

AuIGF 2012

Copyright workshop ALRC copyright review and the Internet

*This document was created by Carolyn Dalton. It is a public document and attendees at workshop 6 are encouraged to scribe discussion. Please do not edit content under the heading 'Introduction and update'. Thanks to Ellen Broad for scribing :-)

Introduction and update

Wikispaces link to this workshop - <http://auigf.wikispaces.com/Workshop+6>

Wikispaces link to Thursday's Openness panel - <http://auigf.wikispaces.com/Openness>

Update from yesterday's openness panel re industry discussions on ISP liability:

John Stanton CEO of Communications Alliance reportedly told a conference in Melbourne this week that Hollywood is reluctant to find a co-regulatory solution to deter copyright infringement, because it doesn't want to set a precedent of being reasonable and that they are unwilling to pay the costs of a scheme

"That's something that is being staunchly resisted. Not because it really doesn't make sense in an Australian context; I think Hollywood doesn't want to create a global precedent by doing something reasonable in Australia that they feel might prejudice its interests elsewhere," he said.

"I think one of the things that is really acting as a barrier is the fact that Hollywood doesn't really have Australian national interest at heart."

Reported by Josh Taylor in ZDNet

<http://www.zdnet.com/hollywood-blamed-for-australian-piracy-negotiation-delays-7000005579/>

This article has now been updated with a response from Neil Gane (AFACT).

Neil has provided me with his full response to ZDNet, which is reproduced with his permission here:

AFACT is fully supportive of a system (to quote your article) "implemented whereby users are notified when they are suspected of copyright infringement, and the cost for implementing such a system would be shared between industry and the content rights holders".

AFACT is being neither reluctant nor unreasonable – in fact the only global precedent of a co-regulatory solution is that agreed between ISPs and the film and music industry in the United States. This co-funded copyright alert system, fully supported by AFACT, is intended not to punish but to educate consumers about copyright and the many sources of legal content available, as well as to help them guard against the risks of illegal file sharing. Mr Stanton is of the opinion that "it is still in the rights holders' best interests to find a co-regulatory solution". This begs the question why some of Mr. Stanton's constituents have

seemingly rejected the only global precedent of a co-regulatory/industry solution (of which Australian right holders are supportive) which was found by their US counterparts, consumer groups and open internet advocacy groups as a fair and equitable approach.

Workshop discussion

Context - Purpose based exceptions v expanded fair dealing (Canada) v fair use

Specific issues raised by ALRC

Caching, indexing, search - copyright and internet function - does the existing framework adequately support necessary internet functions?

Cloud - are Australia's copyright provisions adequate for the cloud?

Data mining - does the existing copyright framework enable data mining?

Format shifting - achieving technological neutrality

Transformative use - non commercial use only, or extended to commercial and how to define?

For context - see principles for reform put forward by ACC Copyright Expert Group October 2011 -

<http://www.copyright.org.au/pdf/Copyright%20Council%20Expert%20Group%20-%20Paper%202011.pdf>

Background:

2005 Fair Use Review - Government decided against adoption of fair use

Issues/comments:

Any legislation should be framed around principles, not anchored in technology - achieving tech neutrality

Example: Stream of packets heading into a router - stored temporarily in its memory (transient copy) - on its face, Copyright Act seems to permit content going into a cache (reproduction right exception) but not exiting (no equivalent communication right exception)

Technical specificity hasn't worked for telcos, won't work for copyright

Social media - posting images to facebook, twitter, social media platforms? Does liability rest with individual user? [note: in Australia no safe harbours protecting internet intermediaries] How would/should exception to facilitate social media usage be drafted?

Relationship between outcomes of Convergence Review and copyright reform - should we reverse the onus in copyright completely? 'Exceptions' being the rights for right holders, and default being the ability to make copies - overturning view that existing 'exceptions' are 'carve outs' of the rights of creators.

Orphan works - licensing issues for libraries and archives (Fraser/Brennan white paper cited by ALRC issues paper

<http://www.law.uts.edu.au/comslaw/Researchreports/MissingOwnersDiscussionPaperAugust11>.

[pdf](#))

Copyright is ubiquitous - “no longer a rare and special thing” - options for reform? Creating a copyright registry. Return to formalities! (Restricting the operation of copyright to a specific set of commercial works)

Technical functions

Search, indexing and caching technologies identified by ALRC - are there any others?

Question: can an ISP or internet intermediary be liable for content communicated by users, transient copies created, automated systems involving copying...there are safe harbours for carriage service providers but definition of CSPs is limited - expanding scope of safe harbours outside ALRC terms of reference. Attorney-General’s Dept review of scope of safe harbours (October 2011):

<http://www.ag.gov.au/Documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Sche+me.pdf>

Cloud

Note on generic use of term “the Cloud” to cover a range of activities

The nature of copying in the cloud

Not necessarily even “the” server - could take Shakespeare text and store individual pieces of text on over hundred servers across multiple jurisdictions

Principle: copyright law should not be hinged on specific technologies

And copyright law must reflect reality of individual technologies - not agreed

And copyright law should be properly adapted to changes in technology - not agreed

Statement: copyright law should not protect outdated business models

Principle? Copyright policy making should be evidence, principles based, rather than individual lobbying

Principle - Technology neutral format shifting

Copyright legislation is currently a piecemeal response to individual lobbying, specific interests - i.e. educational institutions can cache, but them alone!

Issues paper - questions 54 and 55 - contract and copyright

DRM is an important issue - should only be infringing to bypass DRM in circumstances where the underlying use is also infringing - harmonisation between exceptions and DRM provisions [unfortunately, DRM also outside of scope of ALRC terms of reference - specifically excluded, ongoing AG’s TPM review -

<http://www.ag.gov.au/Consultationsreformsandreviews/Pages/ReviewofTechnologicalProtectionMeasureexceptionsmadeundertheCopyrightAct1968.aspx>

More technology neutral fair dealing exceptions vs broader (and arguably more uncertain) fair use. Canada *Copyright Modernisation Act* (Bill...C-11

<http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/home>)

From a consumer point of view, it can be easier to have specific, easily identifiable exceptions - vs the unfamiliar, broader fair use

Issues with current complexity, restrictive nature of copyright regime - lengthy, detailed, describing specific circumstances in which copying of a work will fit within the exception

Contracts and copyright examples - Chaser - Kate and Will's wedding parody blocked by Palace; APH restrictions on use of HOR and Senate footage for parody

Reform proposal - fair use, accompanied by regulatory guidelines describing examples of uses that would be fair

Fair dealing for a variety of purposes, plus an open ended exception

Inefficient business models trying to maintain the status quo, rather than adopting the status quo

Proposal - to bring an action against users for uses of content that are non-commercial, right holders would first have to establish commercial harm - response: could exacerbate uncertainty for users, weighing up risks associated with non-commercial use; already being considered by users in risk management approach