Electronic Frontiers
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11 February 2009

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By email to DEFutureDirections@dbcde.gov.au

Digital Economy Future Directions Consultation

Electronic Frontiers Australia (**EFA**) welcomes the opportunity to submit comments on the Future Directions consultation paper. EFA has a long-standing interest in innovation and communication policy in Australia, and seeks to promote a balanced regulatory approach that respects the rights and interests of consumers, artists, commentators, innovators and developers in order to encourage participation by all Australians in the digital economy.

Electronic Frontiers Australia Inc. (EFA) is a non-profit national organisation representing Internet users concerned with on-line freedoms and rights. EFA was established in January 1994 and incorporated under the Associations Incorporation Act (SA) in May 1994.

EFA is independent of government and commerce and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties.

Our major objectives are to protect and promote the civil liberties of users and operators of computer based communications systems such as the Internet, to advocate the amendment of laws and regulations in Australia and elsewhere (both current and proposed) that restrict free speech and to educate the community at large about the social, political, and civil liberties issues involved in the use of computer based communications systems.

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Open Access to Public Sector Information

EFA supports open access to public sector information to the greatest extent possible. A philosophy of open access to information can help to encourage an ethos of transparency and accountability. Further, it can allow the private sectors and non-government organisations to multiply the value and impact of the information which the government produces.

The importance of access to public sector information has been recognised in many jurisdictions outside Australia. Notably, in January of this year, US President Barack Obama issued a directive encouraging transparency in government and instructing US government agencies to make information public where possible.[1] The presidential website, www.whitehouse.gov, makes all copyright-protected content available under an open licence (a Creative Commons Attribution licence).

Open access to public sector information requires three basic commitments: a presumption that valuable public sector information should be available to the public; a commitment to open standards for publishing information; and the adoption of a liberal set of licensing terms for any intellectual property. Together, these measures are likely to provide the necessary access and security for consumers of public sector information along with a culture of openness and sharing within the public sector.

Presumption of publication

It should be presumed that any valuable information created or assembled by the public sector is to be made available to the public free of charge (or at most, for the cost of dissemination). Exemptions such as those found in Part IV of the *Freedom of Information Act 1982* (Cth) provide some caveats to such a principle. A presumption such as this gives public servants the opportunity to share the fruits of their work with the greatest possible audience, and to see it have the greatest possible impact.

It should also be presumed that *all* information created or assembled by the public sector is of value to the public, unless that information must be restricted for privacy or national security reasons. Regardless of any perceived value or lack thereof at the time of creation or collection, any information collected or created by a public body using public funds should be made available to the public to import their own value into that information. Unanticipated new uses of public sector information can result in immeasurable and unforeseen benefit to the public.

1 Barack Obama, Transparency and Open Government, Memorandum for the Heads of Executive and Agencies, Office of the Press Secretary, The White House, 21 January 2009, http://s3.amazonaws.com/propublica/assets/docs/transparencymemo.pdf.

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Use of open standards

A commitment to open publishing standards was in fact a key recommendation of the Australian Government's Review of the National Innovation System. Recommendation 7.8 provides, "Australian governments should adopt international standards of open publishing as far as possible. Material released for public information by Australian governments should be released under a creative commons licence."[2]

Open document formats based on published standards are to be preferred to proprietary formats supported largely or exclusively by one or a few companies. Open formats ensure equity of access to the information now and in the future. Using proprietary standards restricts potential consumers of the information to those owning the proprietary software in question, and requires that this software be licensed indefinitely in order to access the information in the future. Open standards for data transfer and storage are crucial to innovation.

Liberal standard licensing conditions

The Commonwealth should endorse a default set of licensing conditions for intellectual property that it owns, to foster re-use of information. The standard licences provided by the Creative Commons project[3] provide an example of how this can be done in a manner which is both (relatively) simple and clear. Standardising these licences across government not only makes clear that a liberal attitude towards intellectual property re-use is encouraged, but it also lowers transaction costs incurred by consumers of the information in understanding the licensing conditions.

The Commonwealth is not a business — it should not be producing information which does not have an intrinsic public benefit, and so there is no imperative to recoup the cost of production of the information (although recouping the marginal costs of sharing the information, which will almost always be very low, may be justifiable). Allowing Australian companies and individuals to further develop intellectual property produced in the public sector can help to stimulate innovation in Australia's digital economy.

Accessibility

EFA notes that copyright policy and legislation poses a significant obstacle for individuals with a print disability in the digital economy. While the consultation paper notes that "barriers may presently exist to the full online participation by Australians with vision or hearing impairments", the paper appears to consider only access to electronic media. EFA is increasingly concerned about the difficulty that blind people have in participating in the digital economy because of the inaccessibility of *printed* material in electronic formats. Australians with a print disability are increasingly reliant on plain text electronic versions of

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2 Cutler & Co (2008) Venturous Australia: building strength in innovation, Review of the National Innovation System <http://www.innovation.gov.au/innovationreview/Pages/home.aspx>.

3 See Creative Commons, <http://www.creativecommons.org.au>.

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books and other printed material, which is often much more accessible than the more cumbersome and much slower alternatives of either Braille or books on tape. Unfortunately, plain text digital versions unencumbered by technological protection measures are not easy to come by, and the digitisation and sharing of printed material amongst blind individuals is extremely difficult under our current copyright law. While the recently introduced 'flexible dealing' provision in s 200AB of the *Copyright Act 1968* (Cth) may provide some relief in isolated circumstances, EFA believes that blind people in Australia ought to be able to enjoy significantly higher levels of access to published material, and calls upon the Commonwealth Government to simplify the statutory licence in Part VB of the *Copyright Act 1968* (Cth) and either encourage market solutions or adequately fund the development of a public repository of published material in an accessible format.[4]

ICT Training

In the consultation paper, the Government recognises a need for professional ICT skills training. EFA would like to highlight the ubiquitous nature of information communication technologies and the impact they now have on many areas of the Australian workforce that are not traditionally technology-related. Increasingly, there is no clear distinction to be drawn between "ICT jobs" and jobs that do not utilise ICTs. It is important that the government seek to discover areas where ICTs are increasingly relevant and provide training to workers in these areas. For example, librarians in universities, schools and other educational institutions are more and more frequently being required to manage online resources, repositories and databases. Suddenly, with no formal training, these individuals are expected to be highly proficient in managing and operating these new technologies. In these and other areas of the economy, it is important to recognise the need for special ICT skills training. If Australia is to maintain a competitive work force and an efficient economy, training ought to be provided for Australian workers to deal with new technologies in the course of their employment. EFA believes that in all vocations and areas of life, digital and media literacy is becoming crucially important for continued participation in society.

Copyright policy

EFA believes that Australian copyright law should be consistent with our broader policy objective of encouraging innovation. Our current overly-restrictive copyright policy appears to be hindering innovation in Australia. The threshold for originality is currently set so low as to provide copyright protection for mere tables of facts and figures in the public domain.[5] The test of substantiality is extremely uncertain and so loose as to impugn almost any taking of copyright material.[6] The fair dealing exceptions are so narrowly

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4 See Nic Suzor, Paul Harpur, and Dilan Thampapillai, Digital Copyright and Disability Discrimination: From Braille Books to Bookshare (2008) 13(1) Media and Arts Law Review <http://ssrn.com/abstract=1138809>.

5 Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited [2002] FCAFC 112.

6 See, for example, TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2) (2005) 145 FCR 35.

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interpreted as to provide very little certainty and excuse very few reuses of copyright material.[7] In its present state, Australian copyright law is highly uncertain and not well suited to encouraging innovation. The recent changes to the *Copyright Act 1968* (Cth), introducing a convoluted flexible dealing exception and an exception for parody and satire, are not sufficient to overcome these deficiencies in the law.

Experience overseas has shown that innovation requires room to experiment. The development of the current batch of filesharing technologies, virtual communities, social networking sites, and video and music sharing sites has been largely dependent on the ability of developers to experiment with technologies and models that skirt the edges of copyright infringement (or that could be misused for that purpose). The large scale copyright owners are understandably nervous about the development of these disruptive technologies. Entrenched interests have a strong incentive to maintain the status quo. Maintaining the status quo, however, may not be in Australia's best interests. Again, experience has shown that the copyright industry has largely been successful in adapting to changing technologies and changing consumer demand – from recorded music, to VCRs, to personal video recorders, to on-demand internet distribution of film, television, books, and music. The successful business models of iTunes from Apple and Steam from Valve Software, for example, were greatly facilitated by the technological and social advances made by the various filesharing networks in the late 1990s.

The great danger with our copyright law is that it threatens to stifle innovation. The uncertainty in our law too commonly pushes development off-shore or halts it completely. If we are serious about encouraging innovation, innovators need much more certainty and much more breathing space. Innovators ought to be able to experiment with disruptive technologies and new business models with some degree of certainty as to the legal risks they face.

It has become clear in recent months that Australian innovators do not have this certainty. The IceTV litigation currently before the High Court is an example of an innovative business model facing extreme legal expense and risk because it is not clear whether it is permissible, in Australia, to compile directories of factual information in the public domain.[8] The *AFACT v iiNet* litigation currently before the Federal Court similarly shows the risk that a carriage service provider faces through merely providing internet access to its subscribers.[9] Without speculating on the results of either of these two cases, it is clear that the legal costs and uncertainty that these companies face is sufficient to greatly disincentivise innovation.

Apart from reducing uncertainty, it is also important that we give new technologies a chance to develop. The now ancient example of the VCR goes a long way to show that the most threatening of technologies can be greatly beneficial both to the copyright industry and to everyday citizens. Without room for potentially threatening technologies to develop,

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7 See, for example, TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2002) 118 FCR 417; TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2) (2005) 145 FCR 35.

8 Nine Network Australia Pty Limited v IceTV Pty Limited [2008] FCAFC 71 (on appeal to the High Court of Australia).

9 Roadshow Films Pty Ltd v iiNet Ltd (Federal Court of Australia, NSD1802/2008).

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we risk stagnating and losing out on technologies that could increase efficiency and social participation.

To this end, EFA suggests that we critically examine our copyright laws with a view to determining whether they really do serve the purpose of encouraging innovation. In particular, clarification should be provided as to the extent of copyright protection for data compilations and the full scope of our fair dealing exceptions.

Copyright holders have invested much time and money in lobbying for more punitive and restrictive laws, citing the economic and cultural advantages of a healthy entertainment industry. The figures cited, however, are often exaggerated or of uncertain origin and fail to take into account the costs of economic activity stifled by overly restrictive laws.[10] In general, EFA is of the opinion that copyright laws and their enforcement should target commercial-scale piracy and avoid placing excessive restrictions on end users. In particular, EFA opposes statutory damages for copyright infringement that vastly outweigh any actual damages and disproportionately increase the risks of innovation for individuals or companies.

Encouraging innovation means much more than rewarding investment in the creation of new material; it must fundamentally allow for experimentation with new technologies and transformation and repurposing of existing expression. Copyright policy should reflect not only the interests of existing owners of copyright material, but also the interests of the next round of creators.

Research and study

There is a great uncertainty in the scope of the fair dealing exception for research or study that restricts the ability of students and researchers to disseminate their research. While it is clear that this exception applies to reproduction of copyright material, it is not yet certain that it extends to the communication of that copyright material. Consequently, where students or researchers have reproduced substantial parts of copyright material in their thesis or research paper in reliance on the fair dealing exception for research or study, they may be unable to deposit their work (or at least their entire work) into a digital repository or onto their personal website to be read by others in case this is deemed to be a copyright infringement.[11] This result seems illogical, and yet it is a result determined by our copyright system in its current form. It is important that this issue be clarified, particularly in light of the Government's Digital Education Revolution (DER), which will place ICT equipment directly in the hands of young students. It is imperative to the proper functioning of this DER system that students and teachers are clear about their rights in material accessed or uploaded online during school, and whether they can rely on the fair

10 See, for example, Michael Geist, Piercing the peer–to–peer myths: An examination of the Canadian experience, First Monday, Volume 10, Number 4 - 4 April 2005 <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1217> and 50,000 lost jobs? The dodgy digits behind the war on piracy, Ars Technica <http://arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars>.

11 See, for example, K Pappalardo (2008) Understanding Open Access in the Academic Environment: A Guide for Authors, OAK Law Project, <http://eprints.qut.edu.au/archive/00013935/02/13935.pdf>, and other publications produced by the OAK Law Project, available at <http://www.oaklaw.qut.edu.au/reports>.

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dealing exception for research or study, a statutory licence or whether they must seek permission from the copyright owner. Furthermore, the dissemination of research results is a key component of maintaining Australia's innovative development, and the lack of certainty in this area risks great harm to the digital economy.

A transformative exception

In a major review of Australia's copyright law in 2005, the Attorney-General's Department determined not to introduce an open ended copyright exception like the US fair use defence. This decision resulted in Australia adopting some of the harsher measures from US copyright law without the corresponding flexibility that provides a balance for users and rights holders. This balance directly affects innovation - it is the balance between providing the incentive to create and reducing the barriers to create new works. If this balance is not achieved in either direction, innovation is likely to be greatly restricted in Australia.

EFA believes that one major flaw in Australia's copyright regime, as compared to the United States, is that we lack an exception to infringement for transformative reuse of copyright material. In the US, transformative use is a factor in the four-factor fair use defence, and allows some latitude for innovative repurposing of existing expression. In Australia, our fair dealing exceptions limit unlicensed reuses of copyright material to a small number of allowed purposes. Innovative acts of reuse that are not able to be pushed into one of these categories generally require a negotiated licence, which is often not forthcoming or prohibitively expensive. Because the fair dealing provisions are so narrowly interpreted, a large proportion of new creative expression is inhibited by our copyright law. Take, for example, Google Book Search, which is neither criticism or review nor research or study. Google argues that its Book Search is a fair use in the US,[12] but this type of innovation would not appear to be possible under Australian law.[13]

EFA urges a reconsideration of the exceptions to copyright infringement under Australian law, in line with the policy goal of supporting innovation. EFA suggests that a transformative use exception should be introduced that prohibits mere repackaging but allows unlicensed repurposing of copyright material that is not directly substitutable for the original. EFA believes that such an exception could introduce much needed flexibility in Australian copyright law and provide some additional scope for innovation without compromising the incentives to create original expression.

Safe Harbours

The Australian safe harbours do not provide adequate certainty to either carriage service providers or to online service providers. While it is not appropriate to speculate on the result of the recent suit against iiNet, it is clear that certainty is extremely important to

12 See Google, Legal Analysis, <http://www.google.com/googlebooks/legal.html>.

13 See, for example, Paul Ganley, Google Book Search: Fair Use, Fair Dealing and the Case for Intermediary Copying (January 13, 2006) <http://ssrn.com/abstract=875384> (Considering with UK fair-dealing law).

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carriage service providers. The potential copyright liability that ISPs face in their day to day activities, combined with the high costs of litigation even where the safe harbours apparently apply, suggests that clarity and certainty are of paramount importance in the digital economy. In a highly competitive environment, ISPs face great hardship evaluating legal risk due to uncertain copyright policy. In particular, the conditions that attach to the safe harbours ought to be clear enough to ensure that ISPs can ensure compliance. The recent *AFACT v iiNet* litigation shows that there is great uncertainty as to the meaning of the term 'repeat infringers' at least.[14]

A further concern with the Australian safe harbour provisions is the lack of protection for online service providers. Both the US DMCA and the EU eCommerce Directive provide safe harbour provisions that extend to online service providers (such as content hosts and the operators of websites which accept user created content) as well as carriers. This is not a free pass - the service providers must take action where infringement is brought to their attention - but it provides a degree of protection against errant users. These safe harbours are of immense importance to the development of innovative software, websites and services. Many new technologies have applications that can potentially be used to infringe copyright. To hold the developer of technology liable for the actions of the technology's users, however, poses a great stifling risk to innovation. This was an important lesson three decades ago when the development of photocopiers and VCRs was at stake; it is still an important lesson now.

Websites like YouTube, software like BitTorrent, and interactive worlds like Second Life provide immense value not only in their application, but also in the way they change how we communicate and participate in a global society. In each of these examples, users may use the technology to infringe copyright. Without some measure of certainty and protection from damages awards, development of such technologies is likely to be greatly discouraged by potential risk. The current legislation provides no such certainty to online service providers. These provisions should be amended to ensure that they do. Without such protection, online service providers are at risk of being sued in respect of any infringement that results from the use of their tool. This is likely to result in Australian companies being unable to offer services that their international competitors can, and being unwilling to invest in innovation because of their uncertain legal position. The safe harbour provisions in Australia should be brought into line with those in the US and the EU, which have been effective in requiring a fair degree of responsibility without being unduly restrictive.

Reverse engineering, backups, and security testing

Another potentially stifling area of Australian copyright law is the limited operation of the computer software exceptions in Part III Division 4A. These provisions ensure the legitimate rights of Australians to create interoperable and competing software programs, to make backups of software they have licensed, and to examine, identify, and correct errors or vulnerabilities in the software. They are extremely important in a copyright regime that does not have a broad fair use exception. However, these provisions suffer from a

14 Copyright Act 1968 (Cth) s 116H.

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major difficulty that limits their utility in modern use — they only apply to computer programs.

EFA believes that basic activities like backing up and reverse engineering legitimately licensed copyright material are fundamental user rights in the copyright balance. These are not activities that severely undermine the copyright owner's incentive to create, and they provide important benefits for both consumer welfare and competition. EFA believes that the computer software exceptions should be extended to cover all copyright subject matter. This change would ensure that developers of software do not obtain relative immunity from competition by creating non-interoperable software that includes, for example, artistic works or cinematograph films. It would ensure that developers have some certainty when creating interoperable computer games, or internet servers that allow purchasers of computer games to play on interoperable servers.[15] Such a move would also provide some consumer sovereignty, ensuring that books, music, and film purchased today remain readable in the future through the creation of backups and interoperable readers or players.

The limitations in the computer software exceptions have great flow-on effects for the technical ability to innovate in Australia. The development of interoperable computer games is an excellent example. Because computer games are not only computer programs but also consist of films, musical works, artistic works, and sound recordings, unlicensed backing up and reverse engineering for compatibility is generally not permissible. This means, for example, that when a software publisher stops publishing a particular game, the owner of a copy of a game that is deteriorating (as all electronic media does) will not be able to enjoy the legitimately licensed software in the future. It also means that as technology changes and renders the game unplayable on modern hardware, it becomes very difficult for developers to create interoperable products that allow the owner to continue to enjoy the game.[16] For the sake of competition in the marketplace and the interests of consumers, EFA believes that Australian copyright law ought to be revised to ensure a broad right to backup and reverse engineer copyright material.

Conclusion: Ensuring our legal framework encourages the development of our skills base

While the consultation has separated the issues faced by Australia's digital economy into a number of distinct topics, they are not entirely independent. In particular, Australia's attitude to copyright will have an impact upon the skills which Australians, and young Australians in particular, develop.

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15 See, for example, Davidson and Associates v Internet Gateway (Blizzard v BNetD) 422 F. 3d 680 (8th Cir 2005).

16 A good example of this type of development is the ScummVM project, which provides an updated virtual machine to run games that are no longer commercially available. See ScummVM, Wikipedia <http://en.wikipedia.org/wiki/ScummVM>.

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If Australia adopts a forward-thinking approach to copyright that balances the interests of consumers and innovators against the right to exploit the subject matter for economic gain, it will encourage the next generation of Australians to be engaged with the Internet and digital media. This will lead to improved digital literacy and a deeper and wider knowledge and skills base. However, if intellectual property rights are overly restrictive, and further cement digital media as a realm of passive consumption, Australian children will fail to develop the creative and technical skills necessary to flourish in the digital economy. We should do everything we can to allow our future artists and technicians to dive into experimentation - the best and cheapest form of education - so that they gain a positive impression of and familiarity with computing as an interactive activity.

As Australia transforms into a knowledge based economy, the policies we choose to adopt for the creation and dissemination of information become crucially important. It is becoming increasingly clear that greater access to information and greater technical and legal abilities to remix, build upon and improve that information are fundamental drivers of innovation. EFA believes that the single most important issue in an innovation policy is ensuring that Australians are empowered to innovate, and that the barriers we impose to innovation are justified with reference to our social goals.