

## Submission to Copyright Modernisation Consultation 4 June 2018

The Allens Hub for Technology, Law and Innovation is a community of scholars at UNSW aiming to add breadth and depth to research on the interactions among law, legal practice and technological change in order to enrich scholarly and policy debates and enhance understanding and engagement among the legal profession, the judiciary, industry, government, civil society and the broader community. The opinions expressed in this submission are the views of its authors.

This submission aims to contextualize and compare the introduction of a 'fair use' defence to extending the current 'fair dealing' exception by focusing on data and text mining ('DTM').

### 1. Orienting the debate for/against 'fair use'

- 1.1. There have been polarizing views concerning the introduction of 'fair use'. There is expansive academic literature on this debate internationally, and it is helpful to outline some of the main perspectives:<sup>1</sup>

#### Enabling technology and innovation

- 1.1.1. Some technology companies such as Google and Yahoo! have argued for a 'fair use' doctrine to enable the development of new profitable technologies that may possibly otherwise infringe on copyright.<sup>2</sup> 'Fair use' has been argued to allow the development of unpredictable technologies without the need for further and ongoing legislative intervention.<sup>3</sup> It has been argued that, under the current framework of 'fair dealing', future profitable technologies that do not fall within the existing categories will infringe copyright. It is suggested that this hinders innovation and productivity.<sup>4</sup> Google has submitted that 'fair use' would solve this problem of new technologies being "automatically prohibited because there is no exception that applies".<sup>5</sup> The ALRC broadly

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<sup>1</sup> For further discussion, see Sara Beth A. Reyburn, 'Fair Use, Digital Technology, and Music on the Internet' (2000) 61 *University of Pittsburgh Law Review* 991; Dan Hunter, 'American lessons: Implementing fair use in Australia' (2014) 24 *Australian Intellectual Property Journal* 192; Lisa Hasenberg, 'Fair Use of Unfair Abuse: How Copyright Law should Adapt in the Age of Ad-Skipping Technology' (2014) 52 *Houston Law Review* 709; Michael Geist, 'Fairness Found: How Canada quietly shifted from fair dealing to fair use' in *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, 2013) 157.

<sup>2</sup> See eg. Google, *Submission 217* (2012); Yahoo, *Submission 276* (2012);

<sup>3</sup> Intellectual Property Committee, Law Council of Australia, *Submission 284* (2012).

<sup>4</sup> ALRC, *Copyright and the Digital Economy* (2013) p 59-61.

<sup>5</sup> Google, *Submission No. 600* (2012\_).

accepted the arguments of eBay, Yahoo!7 and Telstra that ‘fair use’ is relatively ‘technologically neutral’.<sup>6</sup>

- 1.1.2. The idea of technological neutrality has various meanings.<sup>7</sup> When some suggest that “fair use” is more technologically neutral, what they mean is that new means of dealing with works, provided they are “fair”, will be “covered” by the exception. Although fair dealing exceptions do not explicitly refer to any technological medium – and could therefore be said to be technologically neutral – these exceptions do not capture unanticipated uses of technologies that fall outside the specified categories. Ultimately, whether a “fair dealing” or “fair use” approach is preferred will depend on the preferred default for unanticipated new technologies - if the default should be that uses of new technologies may be restricted under copyright law unless licenses are granted for use of material, or until a specific “fair dealing” amendment is passed to allow for their uncompensated use of copyright material, the “fair dealing” approach (with new specific exceptions as applicable) is effective.
- 1.1.3. It is important to note that, in the current case, technological neutrality has been raised in submissions and by the ALRC in terms of exceptions. However, the concept of technological neutrality is one that is perhaps more commonly discussed in the context of subsistence of copyright and associated rights, rather than providing exceptions to rights.<sup>8</sup> This is the other side of the coin, in particular the idea that new ways of using works ought to be, by default, included within copyright.

#### Protecting copyright owners

- 1.1.4. Another key consideration in the debate of ‘fair use’ is the perspective of copyright holders, represented by the submission of various associations, that a more narrow ‘fair dealing’ approach will better protect their interests in their work.<sup>9</sup> In the US, courts have been challenged with complex cases concerning whether uses of certain technologies that conflict with copyright owners’ rights amount to infringement or ‘fair use’.<sup>10</sup> Thus, the case against ‘fair use’ includes concern that adopting such an approach would lead to increased uncertainty and litigation costs.

- 1.2. Thus, the choice that the Parliament faces with respect to this issue is twofold. First, should the default legal position be that rights granted to copyright owners should be wide and inclusive of future unanticipated technologies? And, second, should the exceptions to those rights be wide and inclusive of future unanticipated technologies?

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<sup>6</sup> ALRC, *Copyright and the Digital Economy* (2013) p. 95-98.

<sup>7</sup> Bert-Jaap Koops, “Should ICT Regulation be Technology-Neutral”, in Bert-Jaap-Joops, Miriam Lips, Corien Prins, Maurice Schelleken (eds), *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-Liners* (TMC Asser Press, 2006) p 77 (explaining that technological neutrality can be conceptualized through the purpose of regulation, the consequences of regulation or legislative technique).

<sup>8</sup> Carys Craig, ‘Technological Neutrality: Recalibrating Copyright in the Information Age’ (2016) 17(2) *Theoretical Inquiries in Law* 601.

<sup>9</sup> See eg. Australian Publishers Association, *Submission 629* (2012); Print Music Publishers Group, *Submission 627* (2013).

<sup>10</sup> See *Sony v Universal, Inc.* 464 U.S. 417 (1984) (‘the Betamax case’); *Author’s Guild v Google, Inc.* No 13-4829 (2d Cir. 2015). For further discussion, see Sara Beth A. Reyburn, ‘Fair Use, Digital Technology, and Music on the Internet’ (2000) 61 *University of Pittsburgh Law Review* 991.

This submission will now examine the benefits and disadvantages of the ‘fair use’ doctrine on different stakeholders through a case study on data and text mining.

## 2. ‘Fair use’ doctrine enabling data and text mining for public benefit

2.1. We support ALRC’s view that the ‘fair use’ approach is relatively more flexible in including new technologies that would otherwise infringe copyright (and thus promote innovation in the development of such technologies). This is certainly true for DTM techniques. As detailed in the ALRC report, data and text mining is a set of ‘automated analytical techniques that work by copying existing electronic information... and analyzing the data they contain for patterns, trends and other useful information’.<sup>11</sup> Whilst it is clear that DTM has an important role in a number of research and education fields such as medicine and marketing, this submission will also consider government use of DTM on open-source information for public policy and national security, before considering private sector use.

2.1.1. Copyright may subsist in information such as written posts or photos on Facebook and Twitter if it is not insubstantial and has sufficient originality.<sup>12</sup> Performing DTM on this data may have a number of uses for government agencies. For example, government agencies may wish to mine information on social media pages in order to devise preventative measures or responsive measures to terrorist threats. Governments may also wish to use social media feeds as research to create new analytic tools or in policy development. If such processes involve copying of data, there will potentially be copyright infringement.

2.1.2. Currently, there are methods and exemptions that governments may rely on to avoid copyright infringement. Firstly, the terms of service of internet-based organizations such as Facebook and Twitter tend to include a license and the right to sub-license.<sup>13</sup> Thus, governments may obtain a sub-license to use this data. Secondly, governments may avoid copyright infringement under a statutory exception which allows acts to be done ‘for the purposes of government’.<sup>14</sup> However, relying on such an exception either requires providing a notice to copyright owners or alternatively, paying royalties to Copyright Agency Limited, which is the declared collecting society in respect of Government copying.<sup>15</sup>

2.1.3. These requirements can be particularly onerous. For example, providing a notice to copyright holders of proposed uses of DTM could be counter-intuitive in predicting and monitoring terrorist attacks. Two options that could overcome this difficulty are:

2.1.3.1. A specific exception for government DTM through reforming the existing fair dealing provisions or through reforming the existing government exception to copyright; **OR**

2.1.3.2. A ‘fair use’ exception, with DTM as an illustrative use.

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<sup>11</sup> ALRC, *Copyright and the Digital Economy* (2013), p 260.

<sup>12</sup> Sam Ricketson, *Law of Intellectual Property; Copyright, Design and Confidential Information* (1999) [8.66].

<sup>13</sup> For example, Facebook’s terms and conditions provides them with a “*non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content.*”

<sup>14</sup> *Copyright Act 1968* (Cth) [s 183](#).

<sup>15</sup> *Copyright Act 1968* (Cth) [s 183A\(1\)](#).

These would be useful if there is no pre-existing licence or sub-licence in relation to the material.

- 2.2. However, the above choice is complicated through the possibility that non-governmental organizations, such as NFP organizations, may also perform DTM for public policy separate to government.
- 2.3. In addition, there are private uses of DTM that businesses may wish to pursue for profit. DTM may be used by businesses to analyze and predict the interests of their customer base, increase the effectiveness of marketing campaigns through targeting and achieve greater business profits.<sup>16</sup> In its report on copyright, the Productivity Commission illustrates how “researchers access[ing] a database for text and data mining” would fall within the US ‘fair use’ exception but not the Australian fair dealing exception.<sup>17</sup> The Productivity Commission also accepted Google’s submission that Australia’s current framework prohibits certain medical and scientific research through text and data mining.<sup>18</sup> The ALRC proposes that DTM can also have wider commercial benefit on the economy, citing a study by the McKinsey Global Institute that data can generate ‘significant financial value... become a key basis of competition, underpinning new waves of productivity growth and innovation.’<sup>19</sup> However, it is important to note that such gains by the private sector may come at the cost of privacy of households and individuals. Copyright holders might also question the justification for allowing commercial users of DTM to be exempt from paying for use of copyright material.

### 3. Incidental enabling of DTM for exploitation

- 3.1. Providing an exception for DTM may incidentally enable activities done for exploitation and purely monetization rather than public policy. An example of exploitative DTM can be seen in the recent data scandal involving Cambridge Analytica, a data firm which collected and mined personally identifiable information from Facebook users and used this to influence voting opinion.<sup>20</sup> The main concern in that case was around data protection, privacy and influencing elections. There is, of course, no clear line between good and bad DTM, at least from the perspective of copyright law (as opposed to data protection, for example).
- 3.2. Nevertheless, it is not clear whether copyright law is the appropriate vehicle to prevent such exploitative DTM from occurring. Whether fair use or fair dealing is the form of the exception, the activity has to meet the standard of ‘fairness’, which would likely involve consideration of the purpose of activity.<sup>21</sup> Whilst this may appear to be a solution to avoiding exploitative purposes being captured into ‘fair use’ exception, this is problematic for two reasons:

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<sup>16</sup> Cyberspace Law and Policy Centre, *Submission 201*.

<sup>17</sup> Productivity Commission, *Intellectual Property Arrangements*, p. 170

<sup>18</sup> *Ibid* p. 173 (citing Google, *submission 102*, p 2).

<sup>19</sup> ALRC, *Copyright and the Digital Economy* (2013), p 261 citing McKinsey Global Institute, *Big Data: The Next Frontier for Innovation, Competition and Productivity* (2011), Executive Summary.

<sup>20</sup> See e.g., Zoe Kleinman, “Cambridge Analytica: The story so far” *BBC News* (online) 21 March 2018 <<http://www.bbc.com/news/technology-43465968>> (last accessed 17 May 2018).

<sup>21</sup> In deciding fairness for the ‘fair dealing’ exception, see e.g. *TCN Channel Nine v Network Ten* (2001) 108 FCR 235 (where it was held that ‘fairness is to be judged objectively in relation to the relevant purpose’). In deciding fairness for a ‘fair

- 3.2.1. The onus will fall on individuals who wish to challenge DTM performed on their work to bring a court claim. This may not necessarily be a viable option for those who do not have adequate access to the legal system (eg. due to a lack of funds, knowledge or time);
- 3.2.2. This exception would impose a burden on courts in deciding which uses are allowed and which uses are not, leading to an increased burden on public resources.

#### 4. The choice available

4.1. In conclusion, it can be observed that the two choices available have different impacts on stakeholders:

##### 4.2. Fair Dealing

- 4.2.1. The main benefit of the fair dealing exception is that the Parliament is able to precisely control when rights are protected and when access to copyright material is prioritized over those rights. Considering the example of DTM, Parliament may choose to modify the government exception to copyright and maintain the fair dealing exception, or it may craft the exception in a manner that only permits DTM by certain parties or for certain purposes. This would ensure protection of copyright owners from evolving technologies that may be used in exploitative ways, and would also lessen litigation costs due to increased predictability. However, the 'fair dealing' exception does not bring complete certainty because there is ambiguity surrounding what amounts to fair dealing in certain circumstances (eg. parody and satire, criticism and review), as well as the overarching question of whether such dealings are fair.<sup>22</sup> Thus, the decision should not be based solely on avoiding litigation.<sup>23</sup>
- 4.2.2. The main detriment of a fair dealing exception is its chilling of uses of technological innovations that may infringe copyright. New technologies that may infringe copyright in an 'fair' manner may not be developed if they do not fall into the specified fair dealing categories, unless the Parliament continues to update the legislation. DTM is only one example of a technology that has developed over time, and it is likely this technology will continually evolve. For example, DTM has been defined in the ALRC report as technologies that 'copy' existing information<sup>24</sup> – however, the technology may develop so that DTM will not always 'copy' works, in which case an exception to copyright infringement for DTM may no longer be required or would need to be crafted differently. One issue with specific exceptions is the demand for constant amendment as practices change over time.

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use' doctrine, one of the fairness factors in the US doctrine of which the ALRC proposes involves considering the 'purpose of the activity'.

<sup>22</sup> Austin Graeme W; 'Four Questions about the Australian Approach to Fair Dealing Defences (2010) 57 *Journal of the Copyright Society of the USA* 611.

<sup>23</sup> *Ibid.*

<sup>24</sup> ALRC, *Copyright and the Digital Economy* (2013) p. 261.

#### 4.3. Fair Use

- 4.3.1. The main advantage of fair use is its flexibility in enabling new technologies that may be ‘fair’ to fall within the exception. This would enable fair uses of technologies such as DTM, which can have various benefits to national security, public policy as well as productivity as outlined above in Section 2.
- 4.3.2. However, if fair use is enacted, there may be negative impacts on copyright owners who may not necessarily have access to the court system. In examining DTM, there may be also be incidental expansion of exploitative DTM, although as above, that is best dealt with through other statutory regimes.

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