

Thank you for this opportunity to contribute to the process of law making in Australia. I heartily support public consultation in this manner.

Please forgive me for being terse, and not supplying references to research which supports my statements. I am interested in copyright law in so much as it is a pivotal issue affecting the rights of the general public at the dawn of the digital age. Unfortunately, I am just a private citizen and have little time to devote to this. I hope that you can establish the validity of my assertions using your own staff.

When updating laws it is useful to consider the effect in practice of the current law. By this I mean that although many activities are prohibited by the letter of the existing copyright Law, in practice they are not prohibited in the eyes of the general public. Time-shifting, format-shifting and backing up of both computer programs and other works are commonplace, expected and natural. Machines for performing these actions are readily and inexpensively available, and the general public derives great utility from them. The impact on copyright owners of these practices has been minimal or even positive (especially in the case of television fans who subsequently purchase the DVD boxed sets). In short, this is the existing practice that the Copyright Act should be aligned with.

I will briefly answer your numbered questions here as follows:

Q1: The section of the Copyright Law which allows the ability to back up computer programs even if explicitly prohibited by the EULA is a good start. However, it is flawed in two ways: (your paper implies that) images, video and sound are not included, and copyright holders are allowed to use technical measures to make this difficult for the end user.

Every serious computer user backs up their software, including the images, video and sound. In fact, since they often back up to tape, this probably counts as a format shift. I have worked in the data centre of a large Government department and not only is this standard practice (indeed for all data centres), but it would be unprofessional to do less. Clearly this should be legal under Copyright Law.

It is my view that copyright holders should not be permitted to make this backup process difficult for the end user. Technological protection measures should be restricted so they do not interfere with this right.

Q2 and Q3: In my view it is critical that the resulting Copyright Law fully supports time-shifting, format-shifting and backups. Personally, I would do this by retaining the fair dealing provisions while adding explicit exceptions for time-shifting, format-shifting and full backups. In addition I would add an open-ended fair use provision to cater for other uses that are not yet as clear-cut as the three I have highlighted. In effect, this is much like option 2 in the issues paper, but more concrete.

As an aside, it is my understanding that reverse-engineering of computer programs for the purpose of interoperability is expressly permitted. I believe that this is an essential right, necessary to balance the control that computer program vendors have over file formats and network protocols, and hence the control they have over end users' data, and should be retained whatever final form of exceptions (fair dealing or fair use) prevails.

Q4, Q5 and Q6: In my view, all private time-shifting, format-shifting and backup of copyrighted works should be explicitly permitted. Not only should it be permitted, but copyright owners should be prohibited from introducing technological impediments to this process.

Even though the wording of Q6 excludes computer programs, I'd like to emphasise again that it should be legal to back up all portions of a computer program, not just the non-visual, non-auditory portions.

Q7: I would only support a statutory licence for private copying if I could not get lawful time-shifting, format-shifting and backups in any other way. In my profession, I already buy many blank CDs and DVDs to back up my work (correspondence, reports, computer program source code, test data, etc). In my private life, I use a similar quantity of blank media to back up my substantial (and growing) collection of digital photographs, all my own work, and something I would never want to lose. I would very much dislike having to pay an extra fee to copyright holders in order to make backup copies of my own work. That would be a perverse outcome.

Q8, Q9, Q10: I have views on copyright that extend beyond the fair use/fair dealing provisions. This may be my only opportunity to express them, so I hope you will read on, even though they only indirectly answer your questions.

Justification for the existence of copyright:

Copyright is not a natural right as property rights are a natural right. If I take a copy of your work, you have not been deprived of that work and can use it exactly as before. Copyright is an artificial construct.

Copyright exists to enrich society by encouraging creativity. Copyright does this by granting a monopoly on copying a work, for a limited time. It is intended that a creative person will be motivated to create a new work when there is a reasonable expectation of him or her gaining a return on that investment of time and energy. Also, since the copyright is for a limited time, this should motivate the creative person to continue to produce new creative works.

The fact that a copyright industry has grown up around copyright law is an accidental side-effect, and not a primary aim. The interests of members of the copyright industry should only be considered if they further the primary purpose: to enrich society by promoting creativity.

Duration of copyright:

This is all well and good. But what has happened to the idea of "a limited time"? Has any copyrighted work created in my lifetime passed into the public domain? No. Will any? No, never again. How is society being enriched when nothing I see created is ever freed of the restraints of copyright?

If copyright lasted to an artist's death, how much more motivated to create would that artist be if the term were increased to 20 years after the artist's death? A minimal amount. Probably none. How much more if it were 40 or even 70 years after death? Again, so close to zero as not to matter. The current lengthy copyright term is not encouraging more creativity. In fact, the unnecessarily long term encourages hoarding and suppressing of copyrighted works, directly against the public interest.

Whenever a creative work has not yet reached the public domain, the general public has not yet gained the full value of the work. The objective of copyright law should be to move works to the public domain as soon as possible, while ensuring that creative persons have sufficient time to realise enough gain to make the effort worthwhile.

Copyrighted works achieve almost all their return in a short time. Articles I have read put this time at around 5 years. Why is copyright longer than this? If you were to be generous, you could specify 10 years, which will cover the productive life of the vast majority of creative works. The fact that some works may still be producing income when they fall out of copyright at the end of 10 years is not important if creative persons have prospered on the income so far, and, as a consequence, go on to produce more new work to replace their lost income stream.

If this is too bold a concept and you also wish to cover the few outliers that still generate revenue after this time you could add a mechanism whereby the author could register and, for a fee, renew copyright for another cycle or two in the manner once used in some copyright systems. By making copyright short by default, and longer only with direct intervention, both the normal case and the unusually long-lived works would be covered. By charging a fee for unusually lengthy copyright, the public interest could still be served (by spending the fee on public works, for example) even though the work is still not yet in the public domain.

With the current system, a great many works sink from view within a few years (having run their natural commercial course) and remain unavailable ever after. While theoretically these works are available after the copyright on them expires, in practice the public is deprived of these works forever, since copyright legislation is being amended to increase the duration of copyright faster than time is passing, and because works no longer commercially viable are routinely destroyed.

Take an example from the computer field. Microsoft Windows 3.1 is now

unsupported and commercially worthless after only 13 years. In spite of this, it will still be protected by copyright for, I believe, a further 57 years. In fact, Microsoft acknowledged the end of commercial viability for Windows 3.1 after only 9 years, back in 2001, by removing all support. The 70 year copyright term is at least 7 times too long to be appropriate for this copyrighted work, and Windows 3.1 was one of the fantastically popular outliers described earlier, far out-lasting other contemporary computer programs. A 70 year copyright term is amazingly generous. What public good does this serve? I contend that it is contrary to the public good.

In short, there is no benefit from long copyright terms to either the author or the public. The term should be reduced sharply. This will enrich the public domain, and simultaneously stimulate creativity on the part of authors.

Penalties:

The penalties for copyright infringement now exceed public expectations.

Large scale commercial copyright infringement is one thing; individual copyright infringement, or contributory infringement, without commercial gain is another. You may think this simplistic of me, but if an individual engaged in non-commercial copyright infringement can receive a greater punishment than a mugger who attacks an old lady and steals her purse, then the copyright law is wrong.

There should be no criminal penalties in copyright law as the negative effect of infringing copyright can never be as large as the negative effect of even a single physical assault.

Digital Restrictions:

In addition to the ever increasing term of copyright, other aspects of copyright law have shifted to unfairly favour the copyright owner at the expense of the public interest. In particular, I refer to Digital Rights Management (DRM), which the issues paper calls "technological protection measures".

It is important to note that DRM is not directly related to rights as such. The restrictions imposed by any given DRM scheme may have been modelled on the rights enjoyed by end users at some time in some jurisdiction of some country or other, but the computer enforcing DRM is implementing programmed restrictions and is unaware of the current or future rights of the end user, or indeed of any rights at all. DRM schemes are not enforcing the laws of the land but the intentions of the copyright owners. There is a significant disconnect here between what can be done and what should be done, and the public needs protection from existing and possible future abuses.

The issues paper describes some ways in which copyright owners are already using technological measures to bypass the rights of the public. I expect that this will only get worse until legislation is passed to restrict this practice. I am aware that current Copyright Law explicitly permits the use of unbreakable technological measures to prevent copying. It is my view that this is directly contrary to the public good and those technological mechanisms that bypass fair-dealing or fair-use rights should be prohibited, not encouraged, and that this should be codified in Copyright Law.

Inappropriate technical restrictions:

Technological protection measures are also mixed up with other mechanisms that are claimed to be copyright related but which in fact are not. In particular, I refer to DVD region coding and a little-publicised DVD feature called User Operation Prohibited, which, among other things, can prevent the end user from skipping a portion of the DVD.

DVD region coding is a price fixing scheme which to my eyes appears to be illegal, but which has not yet been officially declared to be so in this country. New Zealand has recognised this and banned DVD region coding. Australia should also explicitly recognise that DVD region coding is not a copyright protection measure and is harmful to the public, and so should be banned.

DVD User Operation Prohibited (UOP) is more subtle. It is used to display an unskippable introductory screen, normally displaying information about copyright as it applies to the DVD. It is also misused by some vendors to prevent skipping of promotional material that may be included on the DVD.

It is my view that there should never be any requirement for a purchaser of a DVD to be forced to view promotional material in order to view the program they have purchased, and that manufacturers of DVD equipment should be required to offer users the ability to disable UOP. Even if users begin skipping the copyright notice as a consequence, the fact that it plays first means they will often see it anyway; at least often enough to recognise that it exists, which is all that it does right now. The public would regain some control with no negative effect on copyrights.

Future DRM schemes:

So far, I have described problems with present day DRM schemes, but more restrictive DRM schemes are being proposed. Copyright owners are pressuring computer manufacturers to embed control devices into computer motherboards, CPUs and even video displays and speakers, so that they may restrict the ways that the legitimate owner of the computer may use their own machine.

Often this is termed "Trusted Computing", but this is another misnomer. Such computers cannot be trusted by the owner since a third party has control over at least part of its operation. A truly trusted computer would operate only as the user directs, and would robustly reject all

attempts by third parties to control any aspect of it.

This brings me to what I believe is the logical end point desired by the copyright industry and a worst case scenario for the public: that the rights of copyright owners so overpower the rights of end users that it is no longer possible to buy a general purpose computer, but only one that is sanctioned by and (at least partially) controlled by copyright industry companies. It is worth expending considerable effort to ensure that such a drastically negative situation never transpires, and it would help the public greatly if laws were enacted to prevent such a possibility.

Summary:

It is true that Copyright Law is an important tool for stimulating creativity.

However, at this point in time, copyright is significantly weighted in favour of copyright holders. It lasts far too long, is too restrictive, is enforced in too draconian a manner, and has the potential to undermine some of the most creative forces in the new digital age: the general purpose computing device and its close companion, the unrestricted Internet.

At a time when many older, no longer commercially viable works should be entering the public domain and fueling a digital age of creative plenty, powerful commercial interests are intent on enforcing artificial scarcity. Modifications to the Copyright Law could reverse this trend, and restore its original purpose: to promote creativity for the public good.

Thank you for reading this far. I hope you have obtained something of value from my words.

Regards,

Stephen McKay.

Appendix: Further reading:

After I formulated these views, I discovered a web site that promotes a similar view to my own: <http://www.digitalconsumer.org>

I quote from <http://www.digitalconsumer.org/bill.html>

1. Users have the right to "time-shift" content that they have legally acquired.

This gives you the right to record video or audio for later viewing or listening. For example, you can use a VCR to record a TV show and play it back later.

2. Users have the right to "space-shift" content that they have legally acquired.

This gives you the right to use your content in different places (as long as each use is personal and non-commercial). For example, you can copy a CD to a portable music player so that you can listen to the songs while you're jogging.

3. Users have the right to make backup copies of their content.

This gives you the right to make archival copies to be used in the event that your original copies are destroyed.

4. Users have the right to use legally acquired content on the platform of their choice.

This gives you the right to listen to music on your Rio, to watch TV on your iMac, and to view DVDs on your Linux computer.

5. Users have the right to translate legally acquired content into comparable formats.

This gives you the right to modify content in order to make it more usable. For example, a blind person can modify an electronic book so that the content can be read out loud.

6. Users have the right to use technology in order to achieve the rights previously mentioned.

This last right guarantees your ability to exercise your other rights. Certain recent copyright laws have paradoxical loopholes that claim to grant certain rights but then criminalize all technologies that could allow you to exercise those rights. In contrast, this Bill of Rights states that no technological barriers can deprive you of your other fair use rights.

These well formulated rules should be incorporated into our Copyright Law.
