
Copyright and the digital economy — the fair use model: what does this mean for Australian banks?

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Background

Australian copyright laws were last reviewed in 2006,¹ to catch up with technologies such as digital music players and video recorders. However, the review left a lot of unanswered questions, particularly with the emergence of social media for both private and commercial use. Australian banks have embraced the idea of using social media to engage customers, as a way to communicate with customers, for customer-focused marketing strategy, and even for banking.² Clearly, banks in Australia want to be innovative and current, but unfortunately copyright laws tend to discourage investment in new technologies. Given the fast and continuous progression of new technology, Australian copyright laws have always struggled to keep up, but this may finally change — and banks should take note.

In June 2012, the Australian Law Reform Commission (ALRC) was asked to consider the adequacy and appropriateness of current exceptions and statutory licences under the Copyright Act 1968 (Cth) in light of internet use. In an issues paper³ and later a discussion paper⁴ released to the public by the ALRC, one exception discussed as a possible new defence to copyright infringement was the more flexible US-style fair use exception.

An overwhelming 860 submissions were received from the public in response to the discussion paper. All were considered in the ALRC's final report, *Copyright and the Digital Economy* (Report), which was delivered to the Attorney-General on 2 December 2013. The Report, which has not yet been released to the public, will help the federal government to form policy in a wide range of intellectual property matters, including the potential introduction of fair use provisions to the Copyright Act.

This article explores the limitations with current copyright laws in light of internet and social media use of copyright material, and whether the introduction of a fair use exception can help banks overcome some of those limitations.

Current copyright laws

Unlike in the US, Australia does not currently have a fair use defence to copyright infringement, but rather has a set of “fair dealing” defences allowing banks a very

limited range of uses of copyright material. The Copyright Act does not define a fair dealing, but provides specific fair dealing exceptions for the purposes of research or study,⁵ criticism or review,⁶ parody or satire⁷ and reporting news,⁸ and for use by a legal practitioner, patent attorney or trade marks attorney.⁹

The Copyright Act then provides that fair dealings for these specified purposes may be made with the following copyright material: literary, dramatic, musical or artistic works;¹⁰ adaptations of literary, dramatic or musical works;¹¹ or audio-visual items.¹² Unfortunately, there are currently very few technology exceptions that may assist banks.

Determining whether a use comes within any of the fair dealing exceptions is a two-step process. First, the use must be one of those specified above and, second, it must be fair. Whether a use is fair will depend on the circumstances of each case.

Limitations with copyright laws — internet and social media use

Unfortunately, the above fair dealing provisions do not adequately address copyright material used through the internet. If use of copyright material does not amount to fair dealing within the meaning of the Copyright Act, then it is not permitted. If read strictly, this could mean that a bank sharing an article from the newspaper on its social media page is in breach of copyright laws. This is common behaviour in the banking sector in Australia, given that most if not all banks in the banking and finance industry have copyright material and use social media marketing (LinkedIn, Twitter and Facebook).¹³ New technology makes it easy to “time-shift, place-shift and format-shift almost any content”,¹⁴ making the current debate about copyright more around what banks may do with content.

It is evident that not only were Australian copyright laws not designed with banks in mind, they were also not designed with the internet and social media in mind. Currently, the reuse of copyright material via the internet

requires explicit advanced permission from the owner, who could be difficult to track or, if found, could charge a high price for the use of their material or, worse, refuse to give a licence.

Given these obstacles, it will not be surprising that banks may simply not seek the consent of the copyright owner and may continue to reuse the materials via the internet regardless. A continuation of this attitude to copyright could encourage contempt for the law, which would not be the intention of any bank. It is evident in today's society that most people believe it is acceptable to disobey copyright laws, given that it is the norm and breach is unlikely to carry serious consequence. There is little point in having a law that is not followed, is rarely enforced and does not fit in with Australian culture in the current digital age.

The sharing of copyright material, such as "user-generated" material, using social media may have been an inevitable, and possibly even desirable, feature of a new digital world. User-generated material generally features on commercial platforms and is unlicensed and non-transformative ("transformative" loosely meaning the creation of new works that draw upon pre-existing works).¹⁵ It is, arguably, less harmful to copyright owners and is now common place. In any case, it is virtually impossible to attribute the rights to all images, text and sound clips that an individual or bankshares, for example, with followers on Facebook or on Twitter.

Fair use model

With internet and social media use of copyright material in mind, essentially the fair use provisions will ask of any particular use of material, "is this fair?" It is proposed that what is "fair" will not be defined by the Copyright Act. It will instead be determined on the circumstances of each case and will focus more on what banks are trying to do with the content than on the specific technologies involved in sharing the content. This will help the new laws stay current, even when new technologies are developed.

The ALRC's Report proposes that any fair use model will incorporate a list of purposes and fairness factors to be considered in an assessment as to whether any use of copyright material is fair. These fairness factors, which would be set out in the Copyright Act, aim to be a more flexible and adaptive method of regulation than previous prescriptive methods.¹⁶

Under the proposed model, some social uses of copyright material would be fair use. However, importantly for banks, sharing content outside the domestic sphere is less likely to be fair. In any case, with this

flexible fair use exception allowing certain social uses of copyright material, it is hoped that copyright laws will be brought more in line with social media and internet use.

The ALRC also considered whether a separate stand-alone "transformative use" exception should be introduced. However, given difficulties in defining what transformative actually means (among other reasons), the Report recommended that the fair use exception should apply when determining whether a transformative use infringes copyright. It is anticipated that the fair use exception would allow individuals to socially use copyright materials more freely in transformative uses. However, one difficulty lies in determining what is social use and what is commercial use.

Social v commercial use

Many submissions in response to the Report emphasised that some "social" uses of copyright material must not be confused with true private and domestic uses. A distinction must be drawn between, for example, burning music onto a disc to play at home, on the one hand, and disseminating it to 300 Facebook friends, on the other hand. The latter may not be social use where it is non-transformative and could harm a market that copyright holders have the right to exploit. For banks, it would be difficult to argue that distribution of copyright material to its customers was social use. Many current non-transformative online uses of copyright material are clearly not fair to copyright owners, including file-sharing networks, digital lockers and other technologies that exchange whole e-books, movies, television shows and music.¹⁷

One example of current social use is uploading and sharing non-commercial user-generated content via the internet, which reflects some creative effort. Changes in technology have increased the opportunity for user-generated content to be created, and any fair use exemption may apply to its non-commercial use.

However, distinguishing between commercial and non-commercial use has become increasingly complex. While technology to splice a video is cheaper and more widely available to consumers, facilitating more productions for private use, the distribution of these productions may involve commercial entities. For example, while Facebook users share copyright material for non-commercial purposes, Facebook is an advertising-funded business, dependent on its members producing user-generated content. Therefore, while some copyright material may be created or reused by banks without an intention to commercialise the work, digital platforms provide an opportunity for creators subsequently to commercialise it.¹⁸

Arguments for and against the fair use model

The potential commercialisation of user-generated content is one of the arguments against social uses of copyright material being exempt under the fair use model. Once user-generated content is released to the public online, it enters the commercial arena and should therefore not be permitted. Social media platforms such as Facebook and YouTube cannot be described as commercial-free zones, particularly now that businesses such as banking and financial institutions use social media as an important marketing and communication tool. Any fair use provisions could prejudice copyright holders by withholding their ability to participate in this new digital economy, while still allowing software companies, online social platforms and commercial users to benefit.¹⁹

Others²⁰ argue that the Australian government had already considered and rejected the fair use model proposed as recently as 2006, after it found in public consultation that “no significant interest supported fully adopting the US approach”.²¹

However, at the very least, the introduction of a fair use model might clarify how copyright laws interact with internet use for banks. It is argued that fair use provisions will enable things to be done with copyright works that are in the public interest, creating a balance by using copyright materials in ways that are valuable to society and not too harmful to the owner.²²

The Australian Digital Alliance believes the current copyright law is broken and wants the fair use provisions introduced to allow others, such as banks, to share, copy or recreate works so long as they don't harm or take revenue from copyright owners.²³ Further, the fair use model may provide flexibility to respond to changing conditions as a principles-based and technology-neutral system and it could increase innovation. The intention is that the fair use will restore balance to the copyright system and will assist with meeting consumer expectations where there is currently a culture of contempt for copyright laws.²⁴

In the ALRC's view, a fair use regime will employ technology-neutral legislative drafting to enable the laws to keep up with ever-changing technology. The ALRC believes that this exemption will assist with predictability in application of the laws, could minimise unnecessary obstacles to an efficient market, and will reduce transaction costs.

Conclusion

One can only hope that this copyright law review and the introduction of the fair use model will see Australia's new copyright laws looking forward and being as technology-agnostic as possible. If not, there is risk that we will need to go through this all again whenever new

technology is developed. The Report's proposal to introduce a fair use model is a highly significant recommendation that could, in the opinion of the ALRC and others, assist innovation for the likes of banks and provide flexibility to respond to changing technological conditions.

In itself, the Report is a critical document that will help shape copyright legislation and policy in the future. Given the large degree of public and corporate response to the Report, and the importance and relevance to the business, banking and technology sectors, there is hope that the Report will be released by the end of February 2014. The government is currently considering the recommendations of the Report and no final decisions will be made until after consideration of the Report and consultation with all stakeholders. Will the fair use provisions be introduced? We will just have to wait and see.



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Leonie Chapman's experience extends to banking and finance, consumer credit and mortgage lending, contract negotiation, trade practices and fair trading legislation, intellectual property and trade marks, and corporate and financial services. After completing her Bachelor of Laws and Bachelor of Commerce in 2002, Leonie went on to work both in private practice and as senior in-house lawyer supporting a specialist lender, and then for six years at Macquarie Bank Ltd. Having achieved a Master of Laws in 2009 specialising in banking and finance law, Leonie's main focus now as Principal of LAWYAL Solicitors is on regulation and compliance for banking and financial institutions.

Footnotes

1. Copyright Amendment Act 2006 (Cth).
2. A Bender “Social media adds spice to financial services, say banks” *Computer World* 19 June 2013.
3. ALRC *Copyright and the Digital Economy* Issues Paper 49 (IP 49), August 2012.
4. ALRC *Copyright and the Digital Economy* Discussion Paper 79 (DP79), May 2013.
5. Copyright Act, ss 40(1), 103C(1).
6. Above, n 5, ss 41, 103A.
7. Above, n 5, ss 41A, 103AA.
8. Above, n 5, ss 42, 103B.

9. Above, n 5, s 43(2).
10. Above, n 5, s 40(1) (research or study), s 41 (criticism or review), s 41A (parody or satire), s 42 (reporting news), s 43(2) (the giving of professional advice by certain individuals).
11. Above, n 5, s 40(1) (research or study), s 41 (criticism or review), s 41A (parody or satire), s 42 (reporting news).
12. Above, n 5, s 103C(1) (research or study), s 103A (criticism or review), s 103AA (parody or satire), s 103B (reporting news).
13. See Canstar Blue “How banks use social media” 26 March 2013, available at www.canstarblue.com.au.
14. A Turner “Can Australia’s old-hat copyright laws work on the web?” *Sydney Morning Herald*, 17 November 2013, available at www.smh.com.au.
15. Above, n 4, Ch 10.
16. Above, n 4, p 61.
17. Above, n 4, p 188.
18. Above, n 4, p 47.
19. Above, n 4, p 206.
20. Australian Film/TV Bodies, Joint Submission in response to Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013, August 2013.
21. Explanatory Memorandum to the Copyright Amendment Act 2006 (Cth), p 10.
22. N Suzor “Australia’s current copyright law stifles innovation” *Business Spectator* 18 November 2013.
23. C Porter “Why creating memes is illegal in Australia” *Daily Telegraph* 13 November 2013, available at www.dailytelegraph.com.au.
24. Above, n 4, p 61.