Amplifying the voice of the Australian open source software industry

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Fair use for everyone!
Including the use of orphan works

Open Source Industry Australia Ltd
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In its recent submission[1] to the Department of Communications & the Arts on copyright modernisation, OSIA have again supported introducing a broad flexible fair use exception to the *Copyright Act 1968*, together with broadening the prohibitions on contracting-out to cover all exceptions in the Act. OSIA also proposed an innovative approach to the problems associated with orphan works.

Free & open source software (FOSS) is the epitome of sharing and so OSIA commended the Department on its timely review, which is taking a close look at three areas dear to OSIA's members' hearts: fair use, orphan works and contracting out. OSIA's only gripe was that TPMs remained out of scope.

As the industry body representing Australian FOSS companies, it is only natural that OSIA have called for modernisation of Australia's copyright regime on multiple occasions over the last 13 years.

Replacing the current fair dealing exceptions with a broad flexible fair use exception would bring Australia in line with the approaches utilised in the United States and Israel. The principal benefit of such a move is that it allows the judiciary to step in and make those decisions in a way that keeps pace with technological changes. Either the High Court or the Federal Court could make those judgements based on the merits of the case.

With orphan works becoming more widespread over time, a consistent mechanism for dealing with uncontactable authors and the reuse of copyright materials needs to addressed. This mechanism must not remove authors' copyright on their own works but should allow a fair mechanism for reuse of such materials. "FOSS has long been a forerunner in developing these types of licenses," said OSIA Chairman Mark Phillips.

OSIA shares the Department's concern about some licensors forcing licensees into contracting out statutory exceptions. This is particular concerning given the ISDS provisions proposed in CPTPP[2].

[1]Burton, J. & Phillips, M., *Submission to the Commonwealth Department of Communications & the Arts re copyright modernisations consultation paper*, OSIA, 4 June 2018. Available at http://osia.com.au/f/osia_sub_201806_dca.pdf

[2]Burton, J. & Phillips, M., *Submission to the Commonwealth Joint Standing Committee on Treaties regarding the "Comprehensive & Progressive agreement for Trans Pacific Partnership"*, OSIA, 20 April 2018. Available at https://www.aph.gov.au/DocumentStore.ashx?id=19af91f2-b876-4dd9-8683-17e0a1b23d47&subId=565185

"Those provisions would give foreign companies a new right (denied to their domestic competitors) to seek compensation for domestic policy changes, including any new copyright exceptions," said Phillips, "However, let's not let the good work carried out by the Department be overshadowed by CPTPP's ISDS provisions, nor by its temporarily suspended onerous provisions on copyright."

"We welcome the current review as the logical next step in implementing the recommendations of the Productivity Commission's 2016 inquiry into IP arrangements," said OSIA Company Secretary Jack Burton, "Now, as then, we see fair use, supplemented by ministerial discretion to add illustrative examples as the best way for all three branches of government to work together so that copyright law can keep up with innovations in technology, so Australia can maximise opportunities for growth in its digital economy."

"We appreciate the work that both the Commission and the Department have done to date on the complex problems associated with orphan works," continued Burton, "and whilst further work in that area is still required, in our submission we offer a FOSS industry take on the beginnings of a model to address those problems."

About Open Source Industry Australia Ltd

Open Source Industry Australia Ltd (OSIA) represents & promotes the Australian open source software industry by:

- Ensuring that the Australian business, government and education sectors derive sustainable financial and competitive advantage through the adoption of open source and open standards;

- Helping Australian Governments to achieve world leadership in providing a policy framework supportive of open standards and of the growth and success of the Australian open source industry; and

- Ensuring Australia's global standing as the preferred location from which to procure open source services & products.

OSIA's members are organisations in Australia who invest in or build their future on the unique advantages of open source software.

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