



June 30, 2005

COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE IN SUPPORT OF FAIR USE IN AUSTRALIA

The Library Copyright Alliance (LCA) welcomes the opportunity to provide comments on the Fair Use Issues Paper. The LCA consists of five major library associations—the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. These five associations collectively represent over 139,000 libraries in the United States employing 350,000 librarians and other personnel. These five associations cooperate in the LCA to address copyright issues that have a significant effect on the information services libraries provide to their users. The LCA’s mission is to foster global access to information for creative, research, and educational uses.

Based on our own experience with fair use and the benefits it has had within the United States, the LCA encourages the Coalition Government to reform Australian copyright law by adding a fair use exception. Fair use would provide the necessary flexibility for copyright law to adapt itself quickly to new technologies and market conditions.

The United States Supreme Court has described fair use as an “‘equitable rule of reason’ ... which ‘permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’”¹ Although specific statutory exceptions are a critical part of any copyright system, such exceptions are inherently backward looking. Legislators cannot always anticipate the future needs of institutions, businesses, individuals, and other creators to make use of copyrighted materials, particularly at a time of rapid technological change. The fair use doctrine allows courts to permit uses that benefit society without unreasonably harming the copyright owner.

Instead of limiting use to the four specific “fair dealing” areas created by Australian law with specific exceptions for such cases as reverse engineering, U.S. “fair use” law allows use based on the balancing of four factors: (1) The purpose of the use, i.e., whether it is commercial or educational; (2) the nature of the publication, i.e., whether it is highly creative or factual; (3) the amount and substantiality of the whole which is copied; and (4) the effect of the copying on the market for the original work.² No single factor is dispositive for or against fair use, and the factors must be considered together as a whole.

¹*Stewart v. Abend*, 495 U.S. 207, 236 (1990) (citations omitted).

² 17 U.S.C. § 107 (2005).

The fair use doctrine has promoted innovation and creativity in the United States. For example, fair use facilitated the digital revolution. By 1984, millions of Americans owned and used Video Cassette Recorders (“VCRs”) to time shift television programming.³ In *Sony Corporation v. Universal City Studios, Inc.*, the United States Supreme Court declared that noncommercial home time shifting of television programming was fair use,⁴ and thus legitimized the activity of these millions of users. *Sony*’s finding regarding time shifting provided the basis for its holding that manufacture and sale of a VCR did not make the manufacturer liable for contributory infringement.⁵ *Sony* “provided the backdrop for an unprecedented period of technological growth and innovation.”⁶ The *Sony* decision created legal demand for personal copying technologies, which in turn encouraged manufacturers to design and develop products that satisfied this demand.

Thus, *Sony*’s fair use determination was partly the catalyst for hundreds of billions of dollars of market growth in the United States.⁷ By applying the fair use doctrine, the United States Supreme Court created a new legal landscape that provided new opportunities to both content and technology industries. Instead of waiting for a legislative body to slowly debate each individual exception to copyright law, the fair use doctrine allowed the Court to examine noncommercial home copying on its own merits.

Fair use is also the basis for the operation of all major search engines, which are critical to the efficient functioning of the Internet. The search engine companies send out software “spiders” that copy vast quantities of material from websites across the Internet. This material is stored in databases, which the search engines then search in response to user queries. Because much of this material is covered by copyright, the search engines rely on the fair use doctrine to permit the copying and storing of the material.⁸ The legality of this copying and storage has not

³ Brief of Amicus Curiae Hitachi, Ltd. and Hitachi Sales Corp. of America, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (No. 81-1687).

⁴ 464 U.S. at 454-455.

⁵ *Id.* at 456.

⁶ Brief of Amicus Curiae The Nat’l Venture Capital Ass’n at 29, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. ___ (2005) (No. 04-480)(*Grokster*). The Supreme Court’s recent decision in *Grokster* did not in any way alter the impact of *Sony*. In *Grokster*, the Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” The Court made clear that this rule “does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.” The Court also took great pains to distinguish the facts in *Sony* from those in *Grokster*. Accordingly, *Grokster* does not limit the *Sony* Court’s fair use holding, nor its holding that the distributor of a product capable of substantial noninfringing use is not liable for infringing uses of the product simply by virtue of distributing the product.

⁷ See Brief of Amicus Curiae Intel Corp. at 19-20, *Grokster*; Department of Commerce, Bureau of Economic Analysis, Gross-Domestic-Product-(GDP)-by-Industry Data, available at http://www.bea.gov/bea/dn2/gdpbyind_data.htm.

⁸ The information location tool exception of the Digital Millennium Copyright Act, 17 U.S.C. § 512(d), does not cover a search engine’s unauthorized copying of a website. Rather, it limits a search engine’s liability for linking to a site containing infringing material.

yet been tested in court. The U.S. Court of Appeals for the Ninth Circuit, did, however, rule that a search engine's presentation of thumbnail images in response to a query constituted fair use.⁹

Similarly, the broad fair use exception permitted U.S. courts to fashion exceptions for the reverse engineering of software. The Ninth Circuit applied fair use principles in *Sega Enterprises, Ltd. v. Accolade, Inc.*¹⁰ to conclude that "where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law."¹¹ Thus, with a single court decision based on fair use, the Ninth Circuit opened the door to further technological innovation as needed by the rapidly changing software market.

In contrast, "Australia debated the issue of software reverse engineering for over a decade."¹² According to the Attorney-General, the Hon. Daryl Williams QC, the reverse engineering exception to copyright law was vital in order for Australia to maintain its competitive edge in the world economy.¹³ The decision making process to create an exception to copyright for software reverse engineering allowed for extensive input from concerned parties, jurists, and other experts. However, the delay between the start of discussions and the final passing of legislation creating this exception allowed other countries a long head start in technological innovation. The fair dealings provisions were insufficient to adapt themselves to the changing environment of software development without a statutory amendment.

Libraries have relied upon fair use to adapt themselves to their patrons' needs as technology has evolved. While U.S. copyright law does contain explicit exceptions for libraries and archives,¹⁴ these exceptions do not cover every circumstance under which a library or a library user might need to make a copy of a work. For example, libraries for decades have made photocopies of articles and chapters of books which they "reserve" for students of a particular course to provide ready access to materials selected by faculty as required or recommended course readings within a designated area of the library or for short-term loans. More recently, libraries have begun to maintain electronic reserves that enable students enrolled in a course to access assigned materials electronically.

Significantly, "there is no section of the law that directly addresses exemptions for reserve operations."¹⁵ Rather, libraries throughout the United States have based this practice on the fair use doctrine. Many libraries have created their own "best practices" regarding when permission should be requested from the owner prior to placing material on reserve, how much of a book or article may be placed on reserve, how long the material may exist on reserve, who

⁹ *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003).

¹⁰ 977 F.2d 1510, 1527-1528 (9th Cir. 1992).

¹¹ *Id.*

¹² Jonathan Band, *Software Reverse Engineering Amendments in Singapore and Australia*, J. Internet L., Jan. 2000, at 17, 18.

¹³ *Id.*

¹⁴ 17 U.S.C. § 108 (2005).

¹⁵ Carrie Russell, *Complete Copyright: An Everyday Guide for Librarians* 77 (2004).

may access reserve materials, and where the material may be accessed.¹⁶ Because the fair use privilege is technologically neutral, libraries' best practices for reserves have evolved from the analog to the digital environment.

Similarly, courts relied on the fair use privilege to permit libraries to make photocopies of articles at the request of patrons.¹⁷ Congress then codified this ruling in the specific library exceptions contained in Section 108 of the 1976 Copyright Act. This codification provides libraries with certainty and precision. At the same time, Section 108(f)(4) explicitly states that nothing in Section 108 "in any way affects the right of fair use as provided by section 107...."

The ability of courts to apply fair use principles quickly and create exceptions on an "as-needed" basis does not remove the legislature from the process of determining copyright law. Legislatures may restrict the opinions of courts by creating, removing, and modifying exceptions as they see fit. Statutes passed by legislatures are necessarily the final word on copyright law. It is in this area that input from concerned parties, jurists, and experts may affect the broad course of the law and provide balance to the individual rulings of courts.

In fact, Congress has modified the rules resulting from court decisions interpreting fair use. In the early 1990s, several judicial decisions questioned whether the fair use doctrine applied to unpublished works. Responding to concerns from publishers, authors, and historians about these decisions, Congress amended the fair use statute in 1992 to clearly include unpublished works.¹⁸ Thus, Congress is able to respond effectively when the courts appear to take fair use in the wrong direction. At the same time, as noted above, if Congress believes that the courts have taken fair use in the correct direction, it can codify the courts' decision in a specific copyright exception.

Embracing and adapting to new technologies and markets creates issues within copyright law for both libraries and their users, whether they are copyright owners or users, non-profit or for-profit institutions, small businesses or consumers, or educational or non-educational institutions. The adoption of a U.S.-style fair use privilege would aid all of these groups in creating a reasonable and adaptable standard from which all could gain. All types of users of library services would benefit.

Thank you again for this opportunity to comment on this important issue. We would be happy to answer any questions you may have.

¹⁶ *Id.* at 77-82.

¹⁷ *See U.S. v. Williams & Wilkins Co.*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam* by an equally divided Court, 420 U.S. 376 (1975).

¹⁸ Jonathan Band and Laura L.F.H. McDonald, *The Fair Use Bill: A Funny Thing Happened on the Way to Congress*, 10 *The Computer Lawyer* 9, 13 (March 1993); Act of October 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified at 17 U.S.C. § 107 (2005)) ("section 107 of title 17, United States Code, is amended by adding at the end the following: 'The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.'").



The American Association of Law Libraries (AALL) is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

<http://www.aall.org/>

Contact: Mary Alice Baish (202-662-9200)



The American Library Association (ALA) is a nonprofit educational organization of over 65,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society. <http://www.ala.org/>

Contact: Miriam Nisbet (202-628-8410)



The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. Its mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the communities they serve. ARL pursues this mission by advancing the goals of its member research libraries, providing leadership in public and information policy to the scholarly and higher education communities, fostering the exchange of ideas and expertise, and shaping a future environment that leverages its interests with those of allied organizations.

<http://www.arl.org/>

Contact: Prue Adler (202-296-2296)



The Medical Library Association (MLA), a nonprofit, educational organization, is a leading advocate for health sciences information professionals with more than 4,700 members worldwide. Through its programs and services, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public. <http://www.mlanet.org/>

Contact: Carla Funk (312-419-9094 x.14)



The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 12,000 members in 83 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives. <http://www.sla.org/>

Contact: Doug Newcomb (703-647-4923)