



Network Ten Pty Ltd

Submission

Fair Use and Other Copyright Exceptions

July 2005

Introduction

The Ten Group Pty Ltd ('Ten') owns and operates Network Ten's five capital city television stations. Ten's television operation focuses on low operating costs and innovative programming which has established it as the number one network in the 16-39 year old demographic.

Ten welcomes the opportunity to make a submission to the Attorney-General's review; Fair Use and Other Copyright Exceptions. This submission outlines Ten's broad preliminary views on a number of the questions raised in the Attorney-General's Department Issues Paper. As this paper is more of a starting point in this debate, Ten would of course seek the opportunity to provide further comment on proposals being actively considered as well as any specific legislative proposals put forward by government as a result of this review.

As a content producer and copyright owner, Network Ten is committed to strong copyright protection and effective enforcement mechanisms. Equally, as a copyright user, Ten supports a legislative balance which promotes creativity and access for copyright users.

Ten also recognises that, ideally, copyright law should be sufficiently flexible to accommodate the challenges posed by technological developments without the need for constant amendment.

Broadcasting in the digital environment

The digital environment presents a number of challenges for broadcasters.

Piracy over the Internet is a matter of great concern to television broadcasters particularly as a result of the wider availability of third generation file sharing programs such as BitTorrent.

Top-rating first-run television programs from overseas markets are increasingly available on the Internet only a matter of hours after being screened in the country of origin (primarily the United States). As the quality of encoding improves, high-speed Internet services proliferate and greater bandwidth access is made available to consumers, the incidence of this illegal copying will only increase. In any reform of Australia's fair dealing provisions, Ten is concerned to ensure that the current difficulties experienced by copyright owners in enforcing their rights against these practices are not exacerbated.

The digital video recorder (or DVR), which facilitates easy recording and storage of hundreds of hours of DVD-quality digital television programming, provides other challenges for broadcasters and underlying rightsholders. Ad-skipping and so-called 'librarying' capabilities have the potential to threaten advertising revenue streams as well as secondary markets for DVD sales of television programs. Typically, DVRs are also capable of recording material to removable

media, a feature which is of great concern to broadcasters and underlying rights holders due to the risk that perfect digital copies will be easily transferred for widespread illegal distribution over the Internet.

Ten is also often contractually obliged to take steps to protect the copyright of underlying rights holders in television programs broadcast by the network. For this reason, Ten is closely monitoring developments in digital rights management and copy protection technologies. Any reforms to the Copyright Act as a result of this current reform process must not revoke the Digital Agenda provisions on technological protection measures. As an aside it is worth noting that in order for copy protection technologies to work effectively, the equipment being used by the consumer to receive the broadcast must conform to the DRM technology. As such, there may be a role for Government in encouraging consumer equipment manufacturers to comply with DRM standards.

As with our commercial broadcast competitors, Ten relies on the current fair dealing provisions of the Copyright Act on a weekly basis, particularly in Ten News and programs including The Panel, Rove Live and the sports program, Before the Game. Ten primarily relies on the fair dealing provisions for reporting the news and criticism and review.

Expansion of the current fair dealing categories

Ten does not support the introduction of an open-ended fair use style provision which would simply bring about further confusion and uncertainty in an already uncertain area.

However, Ten does support the introduction of new fair dealing exceptions for parody and for orphaned works as well as the introduction of a limited time-shifting exception (as outlined below) as a means of addressing the general issue of private copying of television broadcasts.

Parody

Under the current fair dealing provisions, unless a broadcaster can rely on the exceptions for reporting the news or criticism and review, copyright material cannot be used for the purposes of parody. This is the case even where the new 'parody' work is clearly not commercially detrimental to the market for the original work and is not competing in any of the markets of the original work.

In Ten's view this is an overly restrictive regime which creates a real barrier to legitimate social commentary and the creative new use of works.

In the United States, use of copyright material in a new work of parody has been found to be a fair use. Similarly, European Union copyright law recognises an exception for transformative works that are made for the purpose of parody, caricature or pastiche.

Orphaned works

Ten supports an exception to copyright infringement where a use is made after reasonable steps to identify or locate a rights holder have been unsuccessful.

An exception such as this would be particularly relevant for copyright material such as audio-visual footage and publicity photographs; for example from television programs made in the 1960s and 1970s when detailed contractual agreements on copyright ownership and licensing were not as prevalent as they are today. Furthermore, even if they did exist, contracts relating to ownership of copyright in audio-visual footage or publicity photographs from old TV programs can be very difficult to locate.

As a result much of this valuable historical material available to program producers and broadcasters cannot be used in historical documentaries or other programs or products.

Similarly, Ten often has cause to use text, images, or other copyright material from the Internet. However, despite the fact that in many cases the copyright owner cannot be identified even after extensive inquiries have been made, Ten is unable to use that material.

A limited time-shifting exception

Ten does not oppose a limited 'time-shifting' exception that would permit the recording of free-to-air broadcasts for the purpose of *private and domestic use of the maker of the copy* in order to allow a program to be viewed after the scheduled broadcast time *by the person who copied the broadcast*.

Such a provision would strictly be limited to the making of a *temporary* copy in order to exclude copying for so-called 'librarying' purposes. This would also go to ensuring that any further distribution of the material copied would be an infringement.

Such a provision could be an extension of s111, the provision that already allows copying of television broadcasts, and could operate in a way similar to s43B. In other words, a limitation could be incorporated to ensure that any copy made under this provision is only lawful to the extent that there is no subsequent use made of the copy such as distribution to friends or the making of further copies, or even modifying the original copy.

Furthermore, Ten would only support a provision which did not have the effect of limiting relevant contractual restrictions or technological copy protection measures.

While Ten is not opposed to such a provision, subject to the conditions outlined above, Ten would be keen to be consulted on any proposals or draft legislative wording to ensure that the exception does not go beyond what is intended.

Format shifting

While Ten acknowledges that there may be a need to recognise limited incidental format shifting in order to implement a limited time-shifting exception, Ten strongly opposes a general format shifting exception.

There is no legal basis in US law for a general format shifting provision and Ten is concerned that particularly in the digital environment, such an exception would be fraught with risk for copyright owners and may impact on the ability to enforce copyright in the digital environment.

While Ten strongly opposes the introduction of any general consumer right to format shift and sees no justification for such a right, Ten is willing to consider limited proposals to recognise copying for archiving or preservation purposes. Such a provision could prove valuable to broadcasters wishing to preserve or archive historical footage in a rapidly changing technological environment where formats can be rendered obsolete or deteriorate in quality over a relatively short timeframe.

Incidental Use

Ten supports the expansion of the current provisions (s 67) relating to incidental filming or televising of artistic works.

Under current provisions, incidental background material, such as a mural on a wall incidentally televised during an interview with a member of the public, can be broadcast without infringement if the inclusion of the work is only incidental to the matters principally televised.

In Ten's view there is no reason why these provisions should not be expanded to include broadcast of other incidental background material such as music and audio-visual material under the same conditions as are currently set out in s 67.

As such, Ten supports a new provision which would permit incidental and fortuitous reproduction, in a broadcast, of a work or subject matter other than a work.

In the US such a use has been found to be a fair use. Similarly, many other jurisdictions have provisions which are more expansive than the current Australian position.

Attribution and fair dealing for reporting the news

As a general comment on the operation of the fair dealing provisions, Ten submits that the current requirement that newspapers attribute a source when relying on fair dealing provisions for the purposes of reporting the news should be equally applied in the broadcasting environment.

Ten can provide numerous examples where parties have made use of Ten footage in reliance of 103B without attributing the source of the material and, in some cases, by removing or obliterating Ten's logo watermark. While Ten would argue that the latter would impact on whether the use is in fact 'fair', with the advent of the logo watermark as an easy means of attributing the original source, in Ten's view there is no good reason to retain the distinction between reporting of news in a newspaper or periodical, and reporting the news by means of a communication or in a cinematograph film.

Accordingly, S 103B(1)(b) which allows for fair dealing with an audio-visual work for the purpose of, or associated with, the reporting of news by means of a communication or in a cinematograph film, should be amended to provide that (as per s 103B(1)(a)) sufficient acknowledgement of the first mentioned audio-visual item must be made.