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By email: legcon.sen@aph.gov.au

October 30, 2006

Re: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Provisions of the Copyright Amendment Bill 2006

Dear Ms Morris:

Google Inc. respectfully submits these comments on those aspects of the Government's Copyright Amendment Bill 2006 concerning fair use, fair dealing, and other related exceptions. As an intermediary that respects both (a) the need for adequate incentives to creators and (b) the need of the public to have access to information, Google may be in a good position to offer useful suggestions on how best to achieve an appropriate balance between these sometimes competing interests. Additionally, as an innovator in online technologies, Google embodies the positive value of a flexible, adaptable legal framework that provides those who create and invest in new technologies the freedom to innovate without fear that their efforts will be blocked by an overly-restrictive approach to copyright.

Innovation comes from thinking outside the bounds of convention and habit. Thanks to the Internet's global reach and low barriers to entry, the next exciting new technology could be created in any corner of the planet. But without the assurance that such technological innovations will be permitted by the law, no one -- in Australia, the United States, or any other country --- is likely to take the risk. To advance the crucial public policy objectives of encouraging innovation, fostering new business enterprises, and enabling bold technology entrepreneurship, the Government of Australia must make crucial choices in the aims and substance of its copyright amendments. Creativity does not recognize national boundaries, but national laws can determine whether a country's innovators are embraced in a secure legal framework, or stifled and forced to seek a safe haven elsewhere. It is no exaggeration to say that Australia is now presented with an opportunity to create a technology environment in which the next Google can rise from Australian start-up to global brand.

The challenge facing the Government of Australia is how to reconcile the tension that arises between the desire to provide present guidance to present problems while also providing the flexibility necessary to resolve problems that arise in the future and which can not be fully predicted. Google's daily experience with copyright issues throughout the world has led us conclude that a combination of (i) specific

exemptions with (ii) a more general "safety valve" provision is the best, most balanced way to resolve that tension.

Relying solely on specific copyright exemptions is bad policy: it is difficult to identify all current problems (much less to find just the right statutory language for hundreds of different possible scenarios), and impossible to prophesy future problems. An exclusive list of specific exemptions will inevitably run afoul of technology's rapidly-changing reality, which does not confine itself to the neat categorizations of legislative drafting, no matter how thoughtful or deliberate. Limiting permitted uses to a set number of words can provide a safe harbor for those within those quantitative boundaries, but such boundaries are inherently artificial and are not in accord with the nature of creativity – or with the infinitely vast and diverse forms of human expression and invention. Creativity is *sui generis* and contextual. An arbitrary limit on the number of words that can be copied without the copyright owner's permission runs roughshod over the way innovation arises. It is an effort to fit the square peg of creative innovation into the round hole of statutory definition.

At the same time, relying exclusively on a general "safety valve" provision is also undesirable: there are existing copyright problems that can be identified and addressed. Failure to resolve the problems at hand might well generate unnecessary murkiness, uncertainty, and unreliability in the law, and therefore in the public's and businesses' ability to order their conduct and estimate risks. Google's comments accordingly attempt to address the need both for specific exceptions and for a meaningful general safety valve.[1]

I. The Framework for Discussion

Google believes that the framework in which the debate over the final legislation takes place is important. To date, a constructive resolution of the important issues facing the Government has been hampered by two polemical positions.

The first such position is one in which copyright is effectively regarded as a natural right. This position is echoed in the very name "exceptions" to rights, calling up a philosophy in which copyright owners are regarded as being naturally imbued with full control over every aspect and element of their works, and in which derogations from those rights are granted only in exceptional circumstances. With this approach, the term "balance" is a misnomer since one side is viewed as the natural beneficiary of protection, while the other side is viewed as an interloper if not a free-loader.

Copyright in Australia (and in all common law countries) is a statutory right, a utilitarian tool to achieve socially desirable objectives. Those objectives have always been achieved by a mix of prohibited and permitted activity, but neither can lay claim

[1] This approach is consistent with the July 2005 submission of the Flexible Learning Advisory Board, which argued persuasively that there is a need for "flexibility and certainty," a goal that can be achieved only with amendments to the existing fair dealing provisions along with a fair use provision and new exceptions. Google disagrees with the approach taken in the Attorney-General's explanatory material (Media Release 08/2006) that the proposed amended fair dealing exception "will not apply to uses where an existing exception or statutory license already operates." Such an approach vitiates the flexibility that is required to deal effectively with unforeseen situations, and will likely lead to a race to the bottom: the most restrictive provision possibly applicable will govern. Related confusion is seen in the proposed amendment of Section 200AB(5) concerning parody or satire, wherein it is stated that the provision does not apply "if under another provision the use does not, or might not, infringe copyright." If a use qualifies under Section 200AB(5), that should be enough. Such inter-sectional qualifications weaken both sections.

to an *a priori*, privileged position. Google urges the Government to approach rights and permitted activity on their own merits, on how they further the ultimate goals of copyright, and not by reference to favoritism, express or implied.

The second polemical position that Google believes has hampered a constructive resolution is the description of the fair use doctrine as foreign to Australia, and as foreign inappropriate for adoption in Australia. The support for cultural and technological innovation inherent in the fair use doctrine is fully consistent with Australia's history of robust technological and artistic production: fair use is, after all, a vehicle for later authors and innovators to build upon the works of their predecessors. A biography of a famous Australian writer that quotes from that writer advances Australia's culture. Greater access to works of Australian authors by online researchers in Australia benefits all Australians. The idea that permitting reasonable access to Australians of works of Australian creators is a foreign concept defies common sense. Moreover, as explored below, the heart and soul of the fair use doctrine, as originally developed in England and later adopted in the United States, already exists in Section 40(2) of the 1968 Australian Copyright Act. The fair use criteria are, therefore, eminently compatible with Australian copyright law. Whether those provisions should be amended or whether another approach is desirable should be the focal point of the Government's deliberations.

In relevant part, the focal questions are (1) whether there should be specific exemptions, and if so which ones, and (2) whether there should a general safety valve provision, and if so whether it should operate in conjunction with specific exemptions. The final results of the Government's deliberations can of course be denominated as fair dealing, fair use, or whatever descriptive term the Government chooses, but the final result should not be pre-judged by labels that present the Government with an either/or choice between "Australian" fair dealing and "U.S." fair use.[2] The proper debate, therefore, should be over how to achieve the right mix and not over what label to affix to it.

II. The Attorney-General's May 2005 Paper

In May 2005, the Attorney-General distributed the Issues Paper "Fair use and other copyright exceptions: an examination of fair use, fair dealing and other exceptions in the Digital Age." The Attorney-General invited comments, which were not long in forthcoming: by Google's count, there were 162 formal, written submissions. The Attorney-General's paper is a thoughtful survey of approaches to permitted uses taken by various legislatures and in treaties. The paper lists five possible options for implementing reform: (1) consolidate the fair dealing exceptions in a single open-ended provision; (2) retain the current fair dealing provisions and add an "open-ended" fair use exception; (3) retain the current fair dealing provision and add further specific exceptions; (4) retain current fair dealing exceptions and add a statutory license that permits enumerated copying of copyright material; (5) other combinations and alternatives.

The Attorney-General included a short discussion of the pros and cons of the first four options. While not explicitly endorsing one option, Google believes it is reasonable to presume the Attorney-General favors the fourth option. Google urges a different approach, one which is more flexible, and also provides greater practical certainty: a mix of amendments to the fair dealing provisions, coupled with new

[2] Cf. the 2005 submission of Professor Brian Fitzgerald, asserting that fair use is consistent with the aspirations of Australian copyright law. See also the July 2005 submission of Electronic Frontiers Australia Inc., arguing for adoption of fair use.

exceptions and a general safety value or residual category. This suggestion is consistent with the Copyright Law Review Committee's 1998 Simplification Report, the July 2005 submission of the Australian Consumers' Association (p. 10), and the July 2005 submission of the Flexible Learning Advisory Group.

III. Fair Use versus Fair Dealing: A Red Herring

In his Issues Paper, the Attorney-General refers to fair use in the United States (statutorily recognized in 17 U.S.C. §107) as "open-ended." This description is also found in written submissions on the Issues Paper. The term "open-ended" is intended to imply a dangerous lack of restraint. That implication is deeply misguided, and is at odds both with the U.S. fair use statute and with the long history of carefully reasoned U.S. judicial decisions under that statute, decisions which often reject claims of fair use as courts carefully balance the sometimes competing elements of the statutory fair use test. Tellingly, the Attorney-General makes no reference to actual U.S. court decisions interpreting fair use. Likewise, the Attorney-General identifies no instances in which U.S. courts have extended fair use too broadly, or where actual application of the statutory fair use factors was too "open-ended."

Characterization of fair use as "open-ended" misrepresents the powerful flexibility of fair use as a tool both for protecting copyright owners and for encouraging innovation. Describing fair use as "open-ended" is a polemical, not practical, position, used to divert attention away from the salutary role fair use can play in accommodating *all* interests. In Google's experience, the doctrine of fair use has proved eminently capable of making important distinctions between (1) activity that does not harm the copyright owner's market, as with the Sony Betamax, and (2) file-sharing services like the original Napster which did. In practice, fair use has, as a system, struck an exceptionally resilient balance between flexibility and certainty.

One reason fair use in the U.S. is not open-ended is the applicability of four statutory factors that were set forth to guide courts in their deliberations. These four factors are virtually identical to the four factors in Section 40(2) of the current Australian Copyright Act. Those factors do not represent an artificial construct about how the law should work. To the contrary, the four factors arose out of practical disputes faced by copyright owners and users, with the criteria being developed and refined over centuries. The four factors represent centuries of accumulated wisdom about the lines of analysis that will best guide litigants and judges alike. Fair use is, in other words, a bottom-up, not top-down doctrine. The issues addressed by each of the four factors arise out of actual disputes, disputes that are by no means unique to the United States.

In its July 2005 submission, the NSW Attorney-General's Department observed (p. 5) that the U.S. fair use provision "contains certain determinative criteria not unlike those already in section 40(2) of the Copyright Act. It is unlikely that copyright owners and users – or the courts – would be paralyzed by uncertainty over what constituted fair use." Google agrees, based on our direct, daily, real-world experience in grappling with the competing claims of copyright owners and users.

It is also important to understand that fair use in the United States operates in conjunction with specific exceptions, found in Sections 108-122 of title 17, United States Code. For example, Section 108 of the U.S. Copyright Act covers photocopying by libraries and archives. Section 108(f)(4) states that nothing in that section "in any way affects the right of fair use as provided by section 107…" Section 1201, which concerns violation of technological protection measures, similarly states that the section does not affect fair use. U.S. copyright law, therefore, operates under

the second option referred to in the Attorney-General's options: it is a mixed system including a general safety valve or residual category, coupled with specific exceptions.

This mixed system of a general safety valve and specific exemptions has not in practice resulted in distortions in the law, or in paralyzing uncertainty. While it is certainly true that new issues arise and there may be uncertainty in how they will ultimately be resolved, this uncertainty also characterizes a strict regime of specific exceptions: no list of specific exceptions can be unambiguous, as language is simply too malleable. As pressure mounts to resolve issues judicially without the need for protracted legislative involvement, uncertainties are resolved in determining the scope of specific exceptions in a manner not dissimilar to resolving fair use claims. In its July 2005 submission, Electronic Frontiers Australia Inc. (p. 9) quoted authorities who described the current state of Australian law on fair dealing as "more uncertain than ever," and as involving "substantial areas of uncertainty." EFA concluded, "the existing legislative framework of fair dealing is inherently uncertain and unnecessarily arbitrary."[3] Some level of uncertainty is inherent in the types of dispute at issue.

There is no doubt that specific exceptions, properly constituted and drafted can lead to greater certainty than a general safety valve that operates as the sole exception, but such a choice need not be made; rather a mix of both produces the optimal result. The only argument against such a mixed system is that it may lead to litigation due to the mere presence of the general safety valve: it is presumably alleged that those who fail to qualify for a specific exception will invariably rely on the general safety valve. The U.S. experience does not bear such concerns out. The existence of specific exceptions that constructively address the parties' concerns serves to stave off reflexive resort to fair use. Indeed, fair use litigation is relatively rare in the United States.

Google therefore supports continuation of specific exceptions, but coupled with a general safety valve derived from current Section 40(2). Such a safety valve should apply to all works of authorship and all types of uses in order to ensure that the call for a proper balance so often intoned can be achieved in actual practice.[4]

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[3] Google expresses respectful disagreement with the June 2005 submission by the Australian Copyright Council (ACC) that incorporation of fair use is inadvisable because "the practical application of the fair use exemption in US law has been widely misunderstood in Australia, and partly because of that, the introduction of an open-ended exception would create undesirable uncertainty in Australia," p. 2 (para. 8). Misunderstandings about legal doctrines are best resolved by creating a proper understanding, not by jettisoning the doctrine. In addition, an Australian fair use doctrine would be a creature of Australian law, interpreted by Australian judges under an Australian statute in a way consistent with Australian policies. Were the ACC's approach to be followed, the current fair dealing provisions in Section 40(2) would have to be abandoned since Australian commentators have complained about their great uncertainty. Nor is it the case, as ACC asserts, that the fair use exception in the United States was intended to "codify years of preceding case law." Section 107 of the U.S. Copyright Act does not codify anything; it is, instead, a statutory recognition of a preexisting common law doctrine. Fair use was a response by the courts and then the legislature to the need for a general safety valve that enables innovation and that provides a necessary check on the potential for copyright owners to unduly control uses that, on balance, are socially useful, while not harming copyright owners' legitimate economic interests.

[4] Google does not address the nature of particular amendments to the existing fair dealing sections that have been proposed by a number of groups. Google notes that some commentators have expressed criticism over what are regarded as substantial drafting errors in the Attorney-General's proposals.

IV. Suggestions for Specific Exceptions

A. The Need for Provisions that Take Into Account the Realities of the Internet

The advent of digital means of distribution has led to concern among some copyright owners that unless they are given control over all uses of their works, the market for their works will be irreparably harmed, as endless numbers of perfect digital copies are distributed throughout the world. These concerns are not without foundation: some peer-to-peer networks, for example, have posed meaningful threats to certain markets for copyrighted works. Such extreme cases have, however, tended to both dominate and distort the entire debate about Internet uses of copyrighted works.

As a result, uses such as caching and buffering that are the result of the technical way in which the Internet functions – rather than being the result of a volitional desire to engage in traditional acts of reproduction – have been mis-analyzed as if such acts were occurring in the brick-and-mortar world. Google urges the Government to undertake and embrace a practical analysis not only of what conduct is at issue, but why the conduct is occurring. For example, merely stating that a "copy" occurs when a temporary instance of a work having no independent value is stored in a form never accessible to consumers is to miss entirely the cause and effect of that conduct. The cause of the conduct is an automatic process mandated by the World Wide Web's architecture; the effect on copyright owners is zero.

Similarly, if in order to enable the search of a document and the subsequent viewing by a consumer of a portion that would qualify for exemption under existing fair dealing criteria, a "back-end" digital copy of the entire work is made, and no liability should attach. The cause of the back-end copy is the need to provide "front-end' access to those engaged in fair dealing. Limiting front-end fair dealing to the hard-copy world is to condemn the Australian public to the pre-Internet era and will place them at a serious competitive disadvantage with those in other countries who have such access.

In order to enact a truly modern copyright law that takes into account the realities of how information is processed and provided to consumers, the Government must eschew formalistic incantations rooted in the hard-copy world and instead analyze the cause and effect of the digital use. Until that occurs, statements that the right balance has been struck will be off-the-mark. Respectfully, Google believes that the Bill fails significantly to bring Australia's Copyright Act fully into the digital age. The proposed exceptions are far too limited in scope, are confusing in their relationship with other provisions (principally the manner in which the proposed amendments to Section 40 relate to each other)[5], and are insufficient absent a general safety value or residual category.

B. Specific Recommendations

Google offers the following recommendations for amendments to the Bill in order to facilitate the objectives reviewed above.

1. A General Safety Valve or Residual Category

Google has argued the need for a general safety valve or residual category in order to provide the flexibility necessary to address technological advances and

[5] For example, while the provisions of proposed Section 40(3)-(5) do not contain quantitative limits, such limits may be imposed nevertheless due to quantitative limits in other sections.

unforeseen circumstances, either present or future. The existence of such a safety valve does not by itself cause any harm to copyright owners' legitimate economic expectations. Rather, it provides a flexible tool by which competing claims can be evaluated. Some assertions of a privileged use will succeed and others will not, based on the criteria established and the facts at hand. The criteria in current Section 40(2) are an excellent starting point for such a provision, but more important than particular language is the need for such a general safety valve to be available even when other specific exceptions do not apply. Without such ability to resort to a general safety valve, its existence will be illusory.

2. Part 5: Digitizing of Library and Archive Material

Google proposes that within the exceptions for the copying of material from libraries and archives in Part 5 of the Exposure Draft, an exception should be made for the reproduction and storage of digital copies of entire works when such reproduction is done for the purposes of permitted research, study, or private use.[6] For example, under a component of Google's Book Search project, copies of books are scanned from library collections and made searchable on a very limited basis. Quantitatively insignificant portions of searchable books are displayed to the searcher; the searcher neither has access to the full digital copy nor may he or she download or print it. Google believes that focusing on the technological means by which otherwise lawful activity is accomplished – that is, focusing on the making of a digital copy – misses the point. Google's purpose in making the digital copy is not to displace the sale for digital copies, nor is such displacement possible since the copy is not accessible by the searcher. Rather, Google's objective is to provide searchers with the ability to engage in legally permitted activity that is not otherwise possible. Consider, for example, the rural student seeking to research an obscure chemical reaction, an advanced mathematical proof, or an esoteric novel; Google's Book Search project is designed to enable that student to find relevant books that are not available in the local library, along with some information about booksellers and libraries from which the book might be obtained. Limiting research to those who either live in major metropolitan areas with major libraries or who have the means to travel to them is to place the rest of the population at a serious educational – and therefore economic – disadvantage.

3. Archiving, Caching and Display of Material on Web Sites

A critical element of all search engines is an automated program (often called a "bot") that continuously crawls the Internet to locate and analyze public web pages. Once crawled, public web pages are then indexed, and the HTML code is stored in a temporary form referred to as a *cache*. Once a web page has been indexed and cached, an individual who types a relevant search will be presented with search results in which the title of the relevant web page is displayed. When the searcher clicks on the title, her browser will direct her to the online location of that page. The cache enables the indexing and presentation of search results.

Given the vast size of the Internet, it is impossible for any search engine to contact personally each owner of a web page to determine whether the owner desires its webpage to be searched, indexed, or cached. If such advance permission was required, the Internet would promptly grind to a halt. The Internet industry has,

[6] It is possible that Google's proposal could form a part of proposed Section 200 AAA. On the other hand, proposed subsection 135ZMB(2) sets forth extremely restrictive guidelines for copying of insubstantial parts of works in electronic form. Google's proposed amendment would operate in spite of this proposed subsection.

however, developed formally standardized protocols by which webpage owners who do not want their pages to be crawled may prevent caching or archiving. The principal standardized protocol used is the “robots.txt” file. This device has proved to be a workable, eminently practical way to reconcile the inherently public nature of the Internet with the desire of a very few copyright owners to restrict access to their works. Google proposes that an exception be included that would exempt from infringement all caching, indexing and archiving where the copyright owner has not used a standardized protocol to prohibit such conduct. While such an exemption is likely not essential under Australian copyright law to legitimate Internet search engines, it would supply useful clarity.

Respectfully submitted

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