

16 November 2012

**The Executive Director
Australian Law Reform Commission**

By email: copyright@alrc.gov.au

Dear Sir / Madam,

Copyright and the Digital Economy
Australian Law Reform Commission Issues Paper 42 (August 2012)

Submission by Tabcorp Holdings Limited

Tabcorp Holdings Limited (**Tabcorp**) is pleased to respond to the Australian Law Reform Commission (**ALRC**)'s Issues Paper on Copyright and the Digital Economy (**Issues Paper**).

Tabcorp is Australia's leading wagering, racing media and Keno operator and manages leading customer brands in Australia including:

- TAB.com.au,
- Luxbet,
- Sky Racing,
- Sky Sports Radio,
- Tabcorp Gaming Solutions, and
- Keno.

Tabcorp's four businesses of Wagering, Media and International, Gaming and Keno employ about 3,000 people across all States of Australia. Tabcorp is within the top 100 Australian companies listed on the Australian Securities Exchange and serves millions of customers in Australia each year.

Tabcorp is both a creator and user of copyright material across its many brands and supports law reform that balances compensating owners of copyright material with recognising fair use of copyright materials.

Copying for private use

Question 7. Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

Question 8. The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

Tabcorp is interested in the issue of copying for private use, in particular, in relation to time shifting, by reason of its media interests in Sky Racing and Sky Sports Radio.



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Sky Racing broadcasts more than 80,000 live horse, harness and greyhound races each year through subscription television. In addition, Sky Racing produces magazine programs which showcase and replay Australian and international racing. Sky Racing is available in approximately 2.4 million homes and 5,400 outlets in Australia. Sky Racing broadcasts Australian racing to 31 countries each year.

Sky Sports Radio broadcasts audio for Australian and international races throughout a radio broadcast network covering all of New South Wales.

Tabcorp supports a legislative regime that reflects society's modern use of broadcast material and allows private individuals to use the exceptions in section 111 of the Copyright Act. These exceptions should be limited to private individuals and should not be extended to companies who can commercially exploit the recordings so as to prevent the diminution of the value of the broadcasters' rights.

Tabcorp goes to great expense to acquire the rights to broadcast many thousands of Australian and international races each year and without the protections in the Copyright Act, as confirmed by the High Court in the Optus TV Now case,¹ Tabcorp's business model (and indeed that of the racing industry as a whole) would be significantly undermined.

Should the ALRC recommend any amendments to the exceptions in s111, Tabcorp supports changes which explicitly adopt the reasoning in the Optus TV Now case.

- Question 9.** The time shifting exception in s 111 of the *Copyright Act 1968* (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:
- (a) should it matter who makes the recording, if the recording is only for private or domestic use; and
 - (b) should the exception apply to content made available using the internet or internet protocol television?

In addition to traditional broadcasting platforms, Sky Racing provides streams of race coverage and its magazine shows to its subscribers over the internet via mobile phone apps and across its websites.

Tabcorp supports extending the time shifting exceptions to ensure platform neutrality and would also provide cautious support for either a broader definition of 'fair' or 'reasonable' use provided that:

- the original broadcast is not an infringing copy,
- amendments would not permit individuals and/or companies to store content on remote servers for their own subscribers to access, and
- some guidance is given regarding the meaning of 'fair' or 'reasonable' use (whether by explanatory memorandum, ministerial determination or in the legislation itself).



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¹ *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012).

Online use for social, private or domestic purposes

- Question 11.** How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?
- Question 12.** Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?
- Question 13.** How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Recently, unauthorised copies of certain races broadcast by Sky Racing have been reproduced and uploaded to social media sites, including You Tube. Due to complaints by the original rights holders, such content has been removed with the co-operation of the social media site.

Given the expense that Tabcorp goes to in order to purchase media rights to commercially exploit race vision both on a live and delayed basis, such conduct diminishes the value of the rights themselves and undermines Sky Racing's business model.

Tabcorp provides limited support to amend the Copyright Act to allow the online use of copyright material for social, private or domestic purposes provided that:

- 'non-commercial' use will not fall under the exceptions, such that commercial enterprises cannot post copyright material on social media and claim it is for 'social' use,
- they do not interfere with the commercial exploitation of the material – in the case of live racing and sports, time shifting exceptions may only be used if the period of delay of the broadcast of live racing is more than an hour, so as not to diminish the commercial value of the rights to the broadcaster,
- concepts such as 'user-generated content' be given clear definitions. One possibility may be to put upper limits on the use of copyright material, for example user-generated content may be defined to include the lesser of up to 5% or 5 seconds of copyright material without the permission of the copyright owner, and
- clear guidance be given around the concepts of 'social' or 'private' use to ensure that only private individuals can avail of the exception.

Fair dealing/fair use exceptions

- Question 52.** Should the Copyright Act 1968 (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?
- Question 53.** Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

Tabcorp does not support a 'fair use' exception that is broader than the current fair dealing exceptions in the Copyright Act.

Tabcorp is satisfied with the current operation of these exceptions (subject to the comments above) and would not support its replacement with a broad and undefined 'fair use' exception.

Tabcorp submits that the uncertainty of application and need for litigation to provide guidance will increase operating costs and add more red tape and



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administrative burden to some of the most innovative and dynamic industries in Australia. Tabcorp submits that the arguments against an open-ended model as set out in paragraph [293] of the Issues Paper outweigh the arguments in favour of such a model.

Comment on copyright protection of databases

Tabcorp, through its TAB.com.au brand, is keenly interested in the issue of copyright protection of databases and is disappointed that this issue is outside the ALRC's Terms of Reference.²

Tabcorp notes the High Court's view in *IceTV Pty Ltd v Nine Network Australia Pty Ltd*³ that copyright protection does not subsist in a database's underlying information but in the form in which it is expressed. This leaves companies who heavily invest in the infrastructure to create and maintain such databases exposed and open to unfair commercial exploitation by competitors. This position puts Australia out of step with countries including the UK, New Zealand, India, Ireland, Hong Kong, and South Africa. Tabcorp cannot see any policy reason to explain why using a computer to create a database of information in an efficient manner should leave a database work unprotected and is disappointed that the ALRC has not been asked to examine this issue.

Tabcorp would be happy to provide more information to the ALRC, should database protection become part of the Terms of Reference at a later date.

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² As noted in [174] of the Issues Paper

³ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458