



Optus Submission

to the ALRC in response to the

Copyright and the Digital Economy Issues Paper

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Section 1. Overview

- 1.1 The past decade has seen major technological advances in sectors such as Information Technology, telecommunications, print and media. This has helped to drive enormous advances in the Digital Economy both in Australia and globally. The health of the Digital Sector is now critical to the well-being of the broader Australian economy. For instance, the global cloud industry¹ is expected to grow to over US\$241 billion in 2020, and expected to create 11.3 million jobs globally in 2014 alone.² It is estimated that cloud computing could increase Australia's long-run GDP by \$3.32 billion per annum.³
- 1.2 There is every likelihood that these trends will continue with significant developments already in place. One of the most significant of these is the Government's roll-out of the National Broadband Network, which aims to drive significant improvements in productivity and economic prosperity by improving access to a broader range of digital services. The deployment of fourth generation mobile technology is likely to drive similar benefits.
- 1.3 These changes have had a profound impact on how people access and use copyright material. They are also likely to have had an impact on end-user perceptions about their rights to access and use such material.
- 1.4 The Australian Law Review Commission's (the Commission) review into Copyright and how this impacts on the Digital Economy is timely and welcome. It is important to review the current copyright law to make sure that it continues to meet its objectives; that it facilitates rather than impedes advances in technology and end-user experiences; and that it remains consistent with international best practice.
- 1.5 A key challenge for copyright law is to enable creators to receive sufficient returns, including the costs of creation and the risk of failure, to continue to produce content; while at the same time minimising the wider economic harm due to restriction that inhibit, or has the potential to inhibit, innovation and economic development.
- 1.6 Optus considers that the current copyright law is too restrictive. Difficulties have arisen as technology has advanced whilst the law remains static. This has produced an outcome where the focus of the law is likely to hinge as much on the interpretation of the means by which customers access copyright material as opposed to the nature of the use of that material.
- 1.7 More significantly, there are examples where the law either has inhibited, or has the potential to inhibit, innovation and economic development. Further, there is evidence that Australia's law puts us at a disadvantage against other jurisdictions. The significance of this is

¹ Cloud computing refers to a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. See para.3.11 for a complete definition.

² Forrester Research, Sizing the Cloud

³ KPMG, Modelling the Economic Impact of Cloud Computing, a report for the AIIA. April 2012.

magnified by the ease with which digital services can be moved offshore. Australia's loss is another country's gain.

- 1.8 Optus considers that there is a strong case for amendment to the current law.
- 1.9 In amending the law it will be important to strike an appropriate balance between the legitimate interests of those who create copyright material and the wider economic and social benefits that arise from the use of that material. Equally it will be important to ensure that third parties that merely provide the essential connectivity between creators and users are not inadvertently caught on the wrong side of the law by virtue of activities that should not be properly considered as infringing upon right holders interests. The postal transport network doesn't attract liability by transporting copyrighted material, and it makes little sense that digital transport networks attract liability.
- 1.10 Optus supports an approach to copyright law that is flexible and focuses on the application of a set of core principles. This approach is preferred to one that is more narrowly focused and based around specifically defined exceptions. This will best ensure that the amended law is sufficiently flexible to keep pace with technological change.
- 1.11 In defining the principles to apply Optus recommends that these focus on achieving fair and reasonable outcomes. What is considered fair and reasonable should be measured in terms of what promotes the public interest.
- 1.12 Equally it is important for such principles to be technology neutral. The *Copyright Act* should not seek to draw distinctions between uses of copyright material merely because it is accessed via one technology over another. The underlying technology should be agnostic in defining whether a right exists to use or not use material. In any event, in a converged environment the differences between technologies are becoming increasingly blurred and technological boundaries are harder to define. As an example a smart TV can simultaneously provide access to the internet and a broadcast service to deliver the same content.
- 1.13 Ultimately Australia's copyright laws should seek to align with best practice approaches in other jurisdictions. This is justified both on the grounds of good policy and in recognition of the fact that we compete in a global economy and the law should assist Australian businesses compete in that global economy.
- 1.14 Optus recommends that the following principles be adopted:
 - (a) **Copyright law should focus on the end-user** and their ability to access copyright material. Copyright law should not be used to unreasonably restrict the ability of end-users to view or use material that they otherwise have a legitimate right to view or use. In addition, liability for copyright infringement should not extend to electronic transmission networks; in the same way that liability was never extended to the physical postal networks.
 - (b) **Copyright law should be technologically neutral** and should not disadvantage new and innovative technologies. A focus on the physical act of copying limits society from utilising efficiencies available from new technologies, such as cloud computing.

- (c) **Copyright law should be consistent with international jurisdictions.** The digital economy is increasingly international, with data being able to travel the cloud instantly. The global digital economy is producing new and innovative services. Australian copyright law would impose significant cost on Australian end-users if it is not developed consistently with other jurisdictions and prevents services from being delivered in Australia.

Section 2. Guiding principles for reform

- 2.1 Optus submits that an assessment of the *Copyright Act 1968 (Cth)* ('*Copyright Act*'), and its continuing relevance during a time of fast-paced technological change must make reference to the broad principles underpinning the need for copyright protection.
- 2.2 Recent developments in Australian copyright law have shifted away from managing the ability of the content purchaser (end-user) to reproduce content to other parties⁴, and towards controlling the way in which the end-user accesses the content that has been legitimately purchased. Many of the legal responses to the impact of digitalisation of content make little sense when one uses non-digital metaphors, e.g., comparing digital delivery networks (e-mail) to physical delivery networks (post).
- 2.3 Optus submits that the *Copyright Act*, and its current judicial interpretation, has moved copyright protection away from its original purpose. The *Copyright Act* appears increasingly to be used to protect vested economic interests at the expense of wider economic and social benefits.
- 2.4 In this section, Optus looks at the underlying rationale for copyright protection and develops several overarching principles that the Commission should apply in its assessment of proposed changes to the *Copyright Act*.

Identifying the underlying rationale for copyright protection

- 2.5 Any critical assessment of the *Copyright Act* needs to consider whether the underlying rationale for copyright protection is being achieved. The purpose of copyright protection is to ensure that creators of works and other subject matter (content creators) are able to recover sufficient revenue from their content so as to cover the costs of creating the content (including risk of failure) and to ensure an efficient level of future creation.
- 2.6 The need for this protection comes from the quasi-public good nature of creating content. That is, once content is created, access is non-excludable and inexhaustible. This results in a classic free-rider problem, so that the content creator cannot easily exclude end-users who have purchased the content, from copying the content. Copiers of the original work have a cost advantage in the market as they do not incur the cost of creation (including the risk of failure), and as such, will be able to re-sell the content at a lower price than the original creator. Content creators will anticipate this impact, absent copyright protection, and the decrease in expected future revenue will reduce the level of content created.⁵
- 2.7 The granting of exclusive rights over the use of content also creates economic costs. These costs reflect the welfare losses as a result of pricing access to content above the marginal

⁴ Or to distribute for free.

⁵ Breyer (1970) "The uneasy case for copyright: A study of copyright in books, photocopies and computer programs", 84 *Harvard Law Review*, pp.281-351, was among the first to analysis the problem of copyright in a public good framework.

cost of copying, and the reduction in the level of future creation. The granting of copyright monopoly over content increases the price that consumers would otherwise pay to purchase the content — economic loss is created by excluding consumers who would purchase the content at a lower price but not at the higher price, and by requiring purchasers to pay a higher price than they would otherwise have to pay.⁶

- 2.8 Copyright may also have a chilling effect on future creativity. Information has a cumulative effect, that is, current creators build on past content to make new creations. While copyright increases the incentive to create by increasing the future potential revenue stream, it also increases the cost of using material from existing works and thus reducing the incentive to create⁷. Copyright exemptions that apply to creative re-use (such as satire) and restricting protection to works and not ideas, in part attempt to balance these competing incentives.
- 2.9 In addition, copyright law imposes contracting and enforcement costs. Copyright law can also ensure efficient contracting between creators and end-users. Requiring content users to seek permission of the content creator reduces contracting costs⁸. In addition, statutory licencing schemes reduce the cost of contracting further by allowing third party agencies to act on behalf of copyright holders; in effect bundling multiple copyright holder rights into a one-stop-shop for potential buyers of content. These schemes also require that copyright owners provide access in return for a reasonable fee: preventing owners from refusing to supply. The high cost of contracting may justify limiting copyright liability to minor breaches that impose insignificant or no cost on the copyright holder.⁹ Enforcement costs depend on the frequency and extent of breaches. Enforcement costs increase where the law is not clear and there is doubt as to its application. Enforcement costs can be particularly high for industries facing innovative technologies that could change the impact of copyright protection.
- 2.10 The challenge for copyright legislation is to balance these two interests. The key question is what level of protection is needed to allow recovery of sufficient revenue to maintain incentives to create content, while minimising the risk of over exploitation of that protection which leads to a general reduction in welfare arising from the granting of monopoly rights.
- 2.11 The ultimate goal of copyright law should be to maximise the net social benefit of content.¹⁰ Where an amendment to the copyright law increases the benefit to copyright holders at the expense of reasonable access by users (by extending their protection to a wider range of activities, or the length of protection) to a lesser amount than it increases the economic costs of copyright, the amendment should not be made.

⁶ Baumol and Ordover (1977) “On the optimality of public-goods pricing with exclusion devices”, 30 *Kylos*, pp.5-21, show that in the seller has imperfect knowledge about consumer preferences, prices will be higher to promote creation, but will also inefficiently exclude some consumer who value the information less than the price but higher than the marginal cost.

⁷ Landes and Posner (1989) “An economic analysis of copyright law”, 18 *Journal of Legal Studies*, pp.325-63.

⁸ It will require fewer costs for all potential users to discover who the one holder of copyright is, rather than the copyright holder to discover all potential users.

⁹ This has been used to justify fair use exemptions, see Posner (1992) “When is parody fair use?”, 21 *Journal of Legal Studies*, pp.67-78.

¹⁰ Landes and Posner (1989), Varian (2005) “Copying and Copyright”, *Journal of Economic Perspectives*, Vol 19(2), pp. 121–138.

- 2.12 To this end, an assessment of the efficiency and efficacy of the existing Australian copyright law can be made using the following framework:
- (a) To what extent does the action damage, or limit, the legitimate income stream for the content creator? Is this income stream sufficient to cover the costs of creation (including the risk of failure) and production of work?
 - (b) How does the action impact on the ability of the end-user to view content they are permitted to view?
 - (c) What are the likely enforcement costs to enforce copyright against all possible users?
 - (d) What are the likely transaction costs involved for direct negotiation between content creator and all possible users?
 - (e) What are the social benefits of greater use of the relevant content?
 - (f) Would enforcement of copyright enable the content holder to damage or limit competition in a related market?

Principles for reform to the *Copyright Act*

- 2.13 The underlying justification for copyright protection is to balance the incentive to create new works and the social costs associated with granting monopoly rights — including the chilling effect on later creations.
- 2.14 This implies that copyright protection should not be extended where the benefits of such extension do not outweigh the wider social detriments. Importantly, the benefits of copyright protection extend only to revenue covering the costs of creating – it does not include revenue above this level (i.e. monopoly rents). Increasing payments to content creators is not always beneficial.

End-user focus

- 2.15 The purpose of copyright is to create and protect the rights of creators to derive income from their works from use by other parties. The primary focus has been on the purchaser of material (be it book, music, video, article) and how they use the material. Copyright law typically allows usage that is for the purchaser's own use and would have no or little impact on the ability of the creator to receive an income stream from other potential purchasers. Copyright law prevents or limits the purchaser from copying or reproducing the experience of using the material and depriving the creator of the opportunity to derive income from licenses to other parties.
- 2.16 Copyright liability has not been extended to delivery networks. For example, the postal network is not liable for copyright infringement if an end-user makes and distributes illegal copies to other parties via mail. These intermediary networks are not held to breach copyright where an end-user copies, or sends, copies of material they own to themselves.

2.17 For example, if an end-user purchases a physical CD, they are free to play that CD on any device he owns for personal purposes. The end-user does not require separate authorisation to play the CD on the device at home, in the car or on a portable device. Similarly, if an end-user purchases a book, copyright does not restrict the location or time at which the end-user can access the book. The end-user has purchased the book and is free to access and use it how he/she sees fit — with the caveat that he cannot copy the book for redistribution to third parties.

2.18 Such an approach seems reasonable when assessed against the underlying rationale for copyright protection. Using the key tests outlined in the previous section, Optus' analysis shows that:

- (a) Allowing end-users to view/read their purchased content at multiple places and on multiple devices does not impact the ability of content creators to sell the product to other end-users.
- (b) This will not place undue restrictions on the ability of the end-user to access/view material they have permission to access/view.
- (c) Requiring potential end-users to negotiate permission to access/view material for each possible device type, location, would significantly increase enforcement costs. It would also significantly increase transaction costs for end-users to negotiate usage rights.
- (d) Restricting usage to particular devices, or locations, could significantly impact on the ability of end-user benefit from the material. For example, if the end-user spends 60% of awake hours outside the home, restricting usage to home would reduce the time end-user has to use the material.

2.19 Using the above analytical framework, the ability of end-users to access/use the copyrighted material in multiple locations and devices (i.e. wherever and whenever the end-user can actually access the content) avoids significant costs while not impacting on the ability of the copyright holder to receive an efficient income stream. It seems appropriate that copyright law has not traditionally placed restrictions on the ability of end-users to access the copyright material (e.g. book). Restrictions have focused on the copying and reproducing the work to third parties (which directly impact on the revenue of the rights holder).

2.20 Optus recommends that where an end-user is permitted to view/use the copyrighted material and the end-user does not purport to grant a third party a right to use the material, the end-user should be able to use the material as they see fit. Copyright allows the end-user to view/use the material: how the end-user receives the material, stores the material, or accesses the material should not be a concern for the *Copyright Act*.

Technological neutrality

2.21 In the past, the mechanism through which users would re-distribute material (and thus deprive copyright holders of revenue) was through the process of physically copying the material. One could safely assume that if a copy was made that it displaced a bought copy.

Over time, exceptions were created for copying that did not impact on copyright holders' ability to receive revenue — such as copying for personal and domestic use.

- 2.22 In a digital environment, it is not the process of making physical copies that affects copyright holders' ability to receive revenue for their material. A focus on the physical act of copying precludes society from utilising efficiencies available from new technologies, such as cloud computing. In a digital environment, it is the ability of the end-user to access and view/use the material that creates the billable activity — i.e., access to material creates value for the copyright holder.
- 2.23 A focus on the consumer (end-user) demonstrates that a technology neutral approach to copyright would provide many benefits. Changes to the *Copyright Act* granting limited rights to end-users to format shift and time shift show that the legislation have, at least partly, recognised that a more neutral regime would be beneficial. But, these changes have in themselves restricted the technology that can be used — format shifting is allowed for content, but only one copy can be made, the owner must make the copy and it does not apply to films in digital format.¹¹
- 2.24 Optus supports the adoption of a truly technology neutral copyright regime which focuses on the rights of copyright holders to derive revenues from access and use by end-users of copyright material. Importantly, such neutrality must be maintained over time. If the end-user has a right to access the material, it should not matter over which technology the material is delivered, or through which technology/device the end-user views it. What matters is that the end-user has a legitimate right to access/view the material and the copyright holder does not consequently suffer legitimate economic harm.¹²
- 2.25 It is clear that copyright law is applied differently for the same content depending on the technology of the end device, and the technology over which content is delivered. For example, the *Copyright Act* provides a mechanism for retransmission of free-to-air (FTA) television broadcasting without infringing copyright, but also contains an exclusion for retransmission of that same content over the internet. Such an approach clearly is not technologically neutral, nor end-user focused.
- 2.26 In addition, defining rights based on a specific technology is going to be increasingly difficult in the future. For example, where rights are defined based on specific end-user devices (television, mobile phone, tablet, computer, etc.) it is becoming increasingly difficult to define what exactly a television is and what makes it different from a mobile device, or from a computer or tablet. Televisions are increasingly able to access the internet, access IPTV, and enable end-users to make phone calls. Mobile devices are also able to access the internet, access IPTV and enable end-users to make phone calls. Tablet devices and computers also provide the same functionality. Indeed, the only difference between these devices is the size of the screen.

¹¹ ALRC Discussion Paper, pp.28-9.

¹² Economic harm does not extend to restricting the ability of the copyright holder from extracting monopoly rents above that needed to efficiently compensate the cost of creation and delivery.

- 2.27 Increasingly end-users are watching 'TV' through their mobiles, tablets and computers – in fact on any device other than a television. It appears to increasingly difficult to justify different treatment of rights (such as re-transmission rights) depending on the technology over which it is delivered or viewed.
- 2.28 The adoption of a technology neutral principle appears reasonable when assessed against the underlying rationale for copyright protection. Using the key tests outlined in the previous section, an analysis shows that:
- (a) Issuing technologically neutral rights will not impact on the ability of rights holder to receive appropriate and efficient level of remuneration for their creation. In a digital environment, it is not the act of copying that deprives rights holders of revenue. The ability to enable or disable access is key.
 - (b) A technology neutral approach will enable end-users to view content they are permitted to view through the medium of their choice, and will remove any undue restrictions.
 - (c) Allocating rights based on delivery technology would impose significant transaction costs and would require the end-user to seek permission for every possible device and technology to which they have access. As technology develops, it will become increasingly difficult to segregate devices into television, tablet, mobile phone. The forensic detail in which the Federal Court dissected the technology used for Optus' TV Now product shows that the decision of whether copyright infringement occurred can depend on the extent of automation contained within the device.
 - (d) Segregating rights based on technology (either transmission or device) has the potential to impose significant contracting costs between rights holders and end-users. It may require the end-user to purchase access for each possible type of device or transmission technology. Such costs would most likely result in end-users not seeking permission, and either forgoing access or breaching copyright.
 - (e) Restricting usage to particular technologies, could significantly affect the ability of end-user benefit from the material. For example, the end-user may be allowed content if received over broadcast spectrum, but not over mobile spectrum, or through fixed line internet.
 - (f) Additional economic welfare losses may arise from the ability of rights holder to utilise technology-specific rights to abuse their protected status and damage competition in a related market. For example, a rights holder may also be vertically integrated in a downstream market, and as such, has an incentive to utilise technology-specific rights to damage competition in the related market. Rights holders' may also seek to charge end-users multiple times for accessing material on different technologies, with the effect of achieving monopoly rents – notwithstanding the fact the end-user has purchased the content.
- 2.29 Using the above analytical framework, the ability of end-users to access the copyrighted material using different technologies (device or transmission) avoids significant costs while

not affecting the ability of the copyright holder to receive legitimate revenue. Technology neutrality may limit the ability of rights holders to achieve monopoly rents or impact competition in related markets, but as these are not beneficial outcomes and should not be promoted.

- 2.30 Optus recommends that where an end-user is permitted to view/use the copyrighted material, the end-user should be able to use any technology to access the allowed material. Copyright allows the end-user to view/use the material: the technology used by the end-user to receive, store, or accesses material should not be a concern for copyright.

International consistency

- 2.31 The need for international consistency arises from the global nature of digital content and the nature of the internet. The value of the global cloud computing industry is predicted to grow to US\$241 billion in 2020, increasing from US\$40.7 billion in 2010.¹³ The European Commission predicts cloud computing will create 11.3 million jobs globally by 2014.¹⁴ The ability of Australian firms and consumers to partake in these benefits depends on the consistency of Australian law with international norms.
- 2.32 Consistency of the Copyright Act with the copyright laws of other countries will enable:
- (a) Australian businesses to participate in global activities and industries; and
 - (b) Australian consumers to benefit from use of those global activities and industries.
- 2.33 The prospects for, and uncertainty around, copyright liability influences the decision to develop or provide a service within a jurisdiction. Industry and consumers benefit from availability of international services. For example, the ability of Australian firms to deliver innovative digital products is limited where a service is permitted under one jurisdiction's legislation and not under Australian law. For example, Australian consumers faced long delays before the introduction of electronic program guides (EPG) for digital television, due to copyrights claims that would not have been available in overseas jurisdictions. Even now, the ability of Australian consumers to access many features of EPG that are available overseas are restricted due to FTA networks claiming copyright.¹⁵
- 2.34 Inconsistencies are compounded where legislation in different jurisdictions is actually consistent but judicial interpretation of that legislation differs. For example, Optus' TV Now product is very similar to a product provided in Singapore. The Singapore *Copyright Act* is

¹³ Forrester Research, Sizing the Cloud.

¹⁴ European Commission, COMMISSION STAFF WORKING DOCUMENT Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, Unleashing the Potential of Cloud Computing in Europe. SWD(2012) 271 final.

¹⁵ The High Court found that Channel 9 has copyright in its EPG in *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 (22 April 2009). Although IceTV was found not to breach Channel 9's copyright because it manually entered the details of programs into its own EPG.

similar to the Australian Act – yet products like TV Now have been ruled in Australia to infringe copyright.

- 2.35 A feature of the digitalisation of information is that cloud services can be located in any jurisdiction and be made available to consumers around the world. Jurisdictions that have inflexible legal regimes (including copyright) increase risks associated with deploying cloud services and will fail to see the benefits of cloud computing.
- 2.36 Such an approach seems reasonable when assessed against the underlying rationale for copyright protection. Using the key tests outlined in the previous section, Optus' analysis shows that:
- (a) International consistency would grant the same revenue opportunities in Australia as allowed in other jurisdictions. This would ensure that legitimate revenue stream of content creators continues to be protected. It is possible that international consistency may reduce the ability of rights holders to extract monopoly rents from Australian consumers, but this should not be considered legitimate revenue stream.
 - (b) International consistency would enable Australian consumers to access/view material in the same manner as end-users in other jurisdictions. Given the restrictiveness of Australian copyright regime, this should provide necessary flexibility.
 - (c) A copyright regime that continues to develop inconsistently with international norms would increase the enforcement cost faced by end-users. The increase in the potential of enforcement costs would likely result in firms being reluctant to bring innovative services and products to the Australian market. Uncertainty as to how Australian rules would be enforced would compound this problem.
 - (d) Inconsistent Australian rules may enable rights holders to abuse their protected status and damage competition in related markets. See, for example, the ability of Australian FTAs to restrict competition for the provision of EPG services through the use of copyright.
- 2.37 Using the above analytical framework, adopting internationally consistent copyright rules avoids significant costs while not impacting on the ability of the copyright holder to receive legitimate income streams. International consistency may limit the ability of rights holders to achieve monopoly rents or impact competition in related markets, but this is not a benefit to society. In addition, a lack of consistency could result in Australian consumers not being able to access new and innovative service available elsewhere. Given the significant economic and environmental benefits flowing from digitalisation of content, and increasing use of cloud service, a delay in new services is likely to impose significant economic harm.
- 2.38 Optus recommends that the Commission ensure that Australian copyright law is, to the extent possible, consistent with other jurisdictions worldwide. The current laws have prevented several new and innovative services from being introduced in Australia to the clear detriment of end-users.

Section 3. Optus' business activities and the *Copyright Act*

- 3.1 In this section, Optus provides information on how its business activities interact with, and are impacted by the *Copyright Act*.
- 3.2 Optus is one of the largest communications providers in Australia, providing access through fixed (copper and HFC) and mobile networks. Optus provides services to consumers, small business and large multi-nationals. Optus has more than 9.5 million mobile subscribers and more than 1 million fixed broadband subscribers.¹⁶ Optus also operates data centres across Australia, enabling customers to outsource infrastructure and software services. Optus' ICT and managed services revenue grew by 28% between FY2011 and FY2012.¹⁷
- 3.3 Optus is therefore well placed to provide the Commission with actual commercial insights into how the current Australian *Copyright Act* impacts on the ability to develop and deploy digital services.
- 3.4 This section looks at:
- (a) Cloud computing and caching;
 - (b) User-generated content;
 - (c) Copying for private use; and
 - (d) Re-transmission of FTA broadcasts.

Cloud computing and caching

- 3.5 Both cloud and data-centre computing is predicted to grow substantially in the future. Cisco forecasts that global cloud traffic will increase six-fold over the next five years, growing at an annual average compound rate of 44% from 2011 to 2016. Global data-centre traffic is predicted to nearly quadruple over the next five years, with an annual average compound growth rate of 31% from 2011 to 2016.¹⁸ Data centre services have become, and will continue to become, virtualised and highly dependent on the cloud. Cisco estimates that by 2016, nearly two-thirds of data-centre workloads will be processed in the cloud.
- 3.6 The destination of this traffic may also be important from a copyright perspective. Cisco estimate that over 85% of total global data centre traffic is within data centre, and between data centre traffic — that is, data that does not go to the end-users.¹⁹ This traffic will involve

¹⁶ Singtel, Group Historical Financial Summaries, Optus Driver (New) worksheet. Quarter 1 (ending June) FY2013.

¹⁷ Singtel, Financial Results Presentation Q4 FY12: Quarter ended 31 March 2012, p.22.

¹⁸ Cisco Global Cloud Index: Forecast and Methodology, 2011–2016.

¹⁹ *Ibid.*, p.4.

automatic copying, including for backup and parallel processing purposes. Under the current Australian copyright regime, this may involve infringement of copyright laws.

- 3.7 The potential for an out-of-date copyright regime could pose significant risk to the development of data centres and cloud services.
- 3.8 There is little doubt that the move towards out-of-premise data and computer storage could provide significant economic, social and environmental benefits. A report by the United Nations Broadband Commission estimates that ICT-related CO2 emissions could be reduced by 90% if cloud computing is adopted.²⁰ In addition to these environmental benefits, businesses could reduce their costs of operations if cloud-based computing were adopted. The Broadband Commission estimated that large US companies could save US\$12.3 billion annually in energy costs.²¹
- 3.9 The European Commission expects similarly large benefits for Europe as a result of cloud developments. The EC estimated that:²²
- (a) Cloud computing could boost GDP by 1% to 2% in Europe's biggest five markets;
 - (b) Cloud could reduce the ICT expenditure of organisation by 20% to 50%;
 - (c) The value of cloud computing is expected to increase from US\$21.5 billion in 2010 to US\$73 billion in 2015.
 - (d) Cloud computing will add 11.3 million jobs to the worldwide economy by 2014.
- 3.10 In the Australian context, KPMG estimated that 75% of ICT capital and operating costs relate to cloud-viable services. The cloud has the potential to reduce this ICT-related operating costs by 25%, and capital costs by 50%. KPMG estimate that after 10 years, this would increase Australia's long-run GDP by \$3.32 billion per annum. If only 50% of firms utilised cloud-based services, Australian GDP would increase by \$2.16 billion per annum.²³
- 3.11 Cloud service providers are 'Internet Intermediaries' — that is, entities which enable the digital economy by building and providing platforms and infrastructure but do not directly participate in the creation or use of content.²⁴ As set out in the Issues Paper, the US National Institute of Standards and Technology (NIST) defines cloud computing as:

... a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and

²⁰ <http://www.broadbandcommission.org/net/broadband/Documents/bbcomm-climate-full-reportembargo.pdf>

²¹ Ibid.

²² European Commission, COMMISSION STAFF WORKING DOCUMENT Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, Unleashing the Potential of Cloud Computing in Europe. SWD(2012) 271 final.

²³ KPMG, Modelling the Economic Impact of Cloud Computing, a report for the AIIA. April 2012.

²⁴ K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 1

services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This cloud model promotes availability and is composed of five essential characteristics (On-demand self-service, Broad network access, Resource pooling, Rapid elasticity, Measured Service); three service models (Cloud Software as a Service (SaaS), Cloud Platform as a Service (PaaS), Cloud Infrastructure as a Service (IaaS)); and, four deployment models (Private cloud, Community cloud, Public cloud, Hybrid cloud)²⁵.

3.12 Optus is a leading provider of out-of-premise ICT products and managed services (cloud services), offering the following types of services:

- (a) IaaS data storage offerings to business customers;
- (b) SaaS offerings to business customers for example providing on demand security software;
- (c) Consumer grade data storage offerings; and
- (d) Various on-demand and cloud-like offerings providing for the on-demand access to applications and services such as restaurant reviews and television services.

Impact of Copyright Act on the service

3.13 The two 'essential characteristics of cloud computing' which are important for copyright issues are 'self service' and 'broad network access'.²⁶ Broad network access allows users to access data, from the cloud, from multiple devices and locations,²⁷ thus raising the issue of whether new ways of accessing data should be considered infringement. Self-service refers to the role of the user (rather than the provider) in performing functions on the cloud, thus raising the issue of who, the user or the internet intermediary, should be liable for such activity.²⁸

3.14 One of the main concerns and legal risks arising from IaaS and SaaS is copyright liability arising from copying that is technically required to provide the service, or copying undertaken by end-users but transited through the IaaS provider's equipment. In Optus' experience, the *Copyright Act* in its current form magnifies this risk for Australian operators, and places Australian providers at a significant disadvantage compared to international operators.

²⁵ <http://www.nist.gov/itl/cloud/index.cfm>, accessed 5 November 2012

²⁶ Marc Melzer, 'Copyright Enforcement in the Cloud' 21 *Fordham Intellectual Property, Media and Entertainment Law Journal* 403 at 407

²⁷ Marc Melzer, 'Copyright Enforcement in the Cloud' 21 *Fordham Intellectual Property, Media and Entertainment Law Journal* 403 at 407

²⁸ As cited in Marc Melzer, 'Copyright Enforcement in the Cloud' 21 *Fordham Intellectual Property, Media and Entertainment Law Journal* 403 at 407 - 408

Risk that the cloud provider or other customers will be liable for the actions of an infringing customer

- 3.15 In an IaaS or PaaS facility, and for many SaaS arrangements copies of data will be made in order for the customer to put the data in the facility. This activity is undertaken by the customer with no intervention by the IaaS provider albeit using the provider's facilities. If the customer uploads infringing copyright material, the provider will not be aware, because it is a self-service arrangement. While the provider can seek contractual protection from the infringing activities of the tenant, and some cloud providers will have a level of protection under section 116E of the *Copyright Act*, the provider has a risk of direct copyright infringement of the reproduction right or for authorising the tenant's infringement. The level of protection provided for internet intermediaries in Australia falls short of the protection in other jurisdictions such as Europe, USA, UK and New Zealand.²⁹
- 3.16 Further, if one cloud tenant is involved in legal proceeding relating to copyright infringement, other tenants may be adversely affected. The much publicised MegaUploads case in New Zealand is cited by customers when expressing concerns that using cloud storage service can put them at risk that if another tenant is involved in a copyright dispute the IaaS servers (holding all tenants' data) will be seized as part of the litigation, stopping all tenants from accessing their data, not just the tenant involved in the dispute.³⁰

Risk that a cloud provider will be liable for copies made to provide cloud services

- 3.17 The provision of cloud services may involve moving data across several servers for a variety of purposes — including back-up, security, caching. It may be possible that each of these copies breach copyright, notwithstanding the fact that the ultimate end-user has authority of use the relevant material.
- 3.18 While there are exemptions for temporary copies as part of technical process of making or receiving a communication.³¹ It is not clear whether this exemption would apply for copies required to facilitate efficient cloud and IaaS operations — especially where the copies are more than incidental.

Risk of copyright infringement through an IaaS or PaaS tenant's inadvertent or deliberate use of unlicensed software.

- 3.19 Approaches to software licensing are evolving and a standard approach has not yet emerged.³² Vendors have different licensing requirements which usually differ from the

²⁹ K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 20 – 24.

³⁰ See J Vincent, 'Cloud Computing in the Wake of MegaUploads' *Communications Law Bulletin* Vol 30.4 (March 2012)

³¹ Sections 43A, 43B and 111A.

³² H. W. Classen & M Fogarty 'Avoiding Turbulence in the Cloud: Licensing and Contractual Issues for Licensors, Cloud Providers and End Users' 29(2) *The Computer & Internet Lawyer* 1 at 4.

approach taken for non-cloud services. Some vendors allow on-premises software to be used in the cloud for no extra fee, others do not, and some have not yet addressed the issue.

- 3.20 A cloud tenant may have licensed software in their on-premises environment and not realise that the scope of the licence does not extend to use in the cloud. In another scenario a customer may, in the belief that they have paid sufficiently for the software already, use the software in the cloud and choose not to purchase an appropriate licence for use in the cloud. This means a cloud provider is at risk of being found to be authorising such infringement, even if it is unaware that the software is being used on the platform

Impact of Copyright Act on caching

- 3.21 The ability to effectively utilise caching is a vital component in ensuring Australian consumers experience a properly functioning internet. Yet under the existing *Copyright Act* in Australia, caching may infringe copyright. Australia's copyright law needs to provide clear exceptions to allow for caching to occur. Caching saves internet transmission capacity and costs for network providers. Caching also can improve the performance of the internet and allow for a better user experience and reduced costs to consumers.
- 3.22 Caching by its very nature involves the exercise of at least two exclusive rights of a copyright owner, being;
- (a) the reproduction of copyright material in response to an identified demand for the material by users; and
 - (b) the communication of that material from a local server, rather than the original site.
- 3.23 Optus considers the *Copyright Act* should be amended to provide clear legal protection exceptions for the use of copyright material for caching.
- 3.24 The necessary legal protection needs to extend beyond the existing sections of the *Copyright Act* that deal with temporary reproduction (in sections 43A and section 111A), and the existing safe harbour provisions, particularly since:
- (a) Sections 43A and 111A only apply to copies made as part of an 'internet transmission' when the copy is made after the user requests download of the material in question. On a practical level, this is not technically consistent with what occurs as part of caching, where a copy is created in a cache in anticipation of download by other users, and
 - (b) The safe harbour provisions do not provide an absolute defence against an action for copyright infringement. Optus acknowledges that the safe harbour scheme is outside of the ALRC's terms of reference.
- 3.25 The exceptions for caching to be included in the *Copyright Act* should be framed in a 'technology neutral' and general manner, so as to remain flexible and able to keep up with technological changes in the digital environment. The exceptions need to make it clear that there are no copyright implications for technical and incidental reproduction or

communication that is made as part of the technical process of the functioning of the internet.

3.26 More specifically, Optus considers that:

- (a) The concept of a 'temporary' copy should be removed from the exception, as material may be stored in a cache for a longer period of time, particularly if it is continually being accessed by users.
- (b) The exception needs to cover both reproduction and communication of cached material.

Assessment of current Australia approach

3.27 Optus submits that a key factor the Commission should consider is whether the current position under the Copyright Act around data-centre, cloud hosted services and caching results in a net benefit or net detriment to Australian society.

3.28 Using the framework outlined in Section 2, it can be seen that there would be considerable benefits from amending the copyright law to clarify that intermediary providers of services are not liable for copyright breaches committed by end-users and are not liable for reproductions of end-users' legitimate material required for the operation of cloud services or caching.

3.29 The first principle is an **end-user focus**. The use of virtual storage (cloud) and faster internet access (caching) would provide significant benefits to end-users. Virtual storage allows quicker access to more material, reduces the need for expensive hardware, increase productivity, and lowers power usage. Due to Australia's limited international connectivity, the increased use of caching will provide a quicker internet experience for end-users.

3.30 The second principle is **technological neutrality**. Copyright law should apply in the same manner whether content is held physically at the end-user premise, or virtually in an account controlled by the end-user. Liability should not arise by the simple fact that the method of content delivery is digital rather than physical: if postal networks do not attract liability, then neither should digital delivery networks.

3.31 The last principle is **international consistency**. It is expected that the growth of cloud computing and increased caching will provide significant economic and social benefits. Technology has been a great enabler for many Australian consumers and business, removing the tyranny of distance that has too often hampered economic growth. Australia risks losing these social, environmental and economic benefits because of an out-of-date copyright regime.

3.32 Optus therefore strongly supports clarification that reproductions required for provision of cloud services does not attract copyright liability. Ultimately, the copyright relationship lies between the end-user of the material and the creator of the material: there should be no copyright liability for intermediary networks that provide connectivity and other intermediary services.

Copying for private use

- 3.33 The *Copyright Act* provides a range of exemptions allowing copying of protected material for personal use. These exemptions include format shifting for some type of material and time shifting solely for private and domestic use to enable end-users to watch or listen to the material at a more convenient time.

Optus' TV Now proposition

- 3.34 Optus offered its consumer customers (and employees of small business customers) a service that enabled them to record free-to-air television programs and play them back on any one or more of four types of devices (a PC, an iPhone or iPad, an Android mobile device and other 3G mobile devices). End-users had to sign up to a plan which required them to read and agree to terms and conditions including a direction that they not use the service for any unlawful or illegal purpose and a warning that it was a breach of copyright to make a copy of a broadcast other than to record it for private and domestic use by watching at a time more convenient. The end-user was only able to record free to air broadcasts if they lived in one of five capital city broadcast regions and they could only record broadcasts available to their home broadcast region.
- 3.35 The end-user selected the program to record from an electronic program guide by pressing "record". The service then made 4 unique copies of the program for that end-user (in the relevant formats required for playback on multiple devices) which was stored on Optus' infrastructure rather than on the end-user's phone or computer. The end-user was unable to download or copy the recorded program. They could press "play" and watch the program on their compatible device but the recording would be deleted after 30 days.
- 3.36 In effect, the system worked in the same manner as a personal video recorder (PVR) located in one's home. The PVR made a recording at the request of the end-user and transmitted it back to the end-user to view when "play" was selected. The only real differences were the physical location of the infrastructure, and the lack of any physical connection between the recording and the viewing device.
- 3.37 As is recognised in the Issues Paper, a dispute over this service has recently tested the time shifting exception in section 111 of the *Copyright Act*.³³ Since the publication of the Issues Paper in August 2012, the High Court of Australia has refused Optus' request for special leave and therefore the Full Federal Court decision stands.
- 3.38 As was recognised at first instance, Optus carefully designed the Optus TV Now service so as to comply with the requirements of the *Copyright Act* and in particular the time shifting

³³ *National Rugby League Investments Pty Limited v Singtel Optus Pty Limited* (2012) 201 FCR 147

exception.³⁴ Notwithstanding this, the Full Federal Court found that the TV Now product did not fit within the relevant exemptions under the *Copyright Act*. The Court found that:

- (a) The maker of the recording was Optus or alternatively, Optus and the end-user. The Court's preferred view was that it was both Optus and the end-user such that they were jointly and severally responsible for the act of copying. In reaching that conclusion the Court described Optus as the "main performer of the act..."³⁵ and considered that Optus' role in the making of a copy was "...so pervasive that, even though entirely automated, it cannot be disregarded when the "person" who does the act of copying is to be identified".³⁶
- (b) Optus could not invoke the "private and domestic use" defence in section 111 in either case. In doing so the Court noted that there was nothing in the language or provenance of section 111 to suggest that it was intended to cover commercial copying on behalf of individuals³⁷ and whilst the desirability of technology neutrality was acknowledged, the Court stated that "no principle of technological neutrality can overcome what is the clear and limited legislative purpose of s111. It is not for this Court to re-draft this provision to secure an assumed legislative desire for such neutrality..."³⁸

3.39 Optus' concern is that the state of the law as it now stands results in an arbitrary distinction between technologies which was not what was intended when amendments were made to the *Copyright Act* in 2006. As the state of the law currently stands:

- (a) Australians do not have access to remote storage PVRs such as Optus TV Now;
- (b) Australia is out of step with copyright laws in other developed countries; and
- (c) The *Copyright Act* does not give full effect to the amendments introduced in 2006 which were stated to be intended to make the Act technology neutral.

Implications for PVR use in Australia

3.40 Following the Federal Court judgement, there must be doubt about the legality of other recording systems such as FOXTEL iQ and TIVO. For example, Giblin argues that by finding that the PVR provider makes a recording by providing an automated system enabling other parties to record, the Court has effectively made both remote and traditional PVR technologies legally doubtful.³⁹

³⁴ *Singtel Optus Pty Limited v National Rugby League Investments Pty Limited (No. 2)* [2012] FCA 34 at paragraph 77, per Rares J.

³⁵ Op cit., n.32, para.60.

³⁶ Op cit., n.32, para.67.

³⁷ See para.89, n.32.

³⁸ See para.95, n.32.

³⁹ See Giblin, Rebecca, Stranded in the Technological Dark Ages: Implications of the Full Federal Court's Decision in *NRL v. Optus* (June 18, 2012). *European Intellectual Property Review*, 34(9), 2012 (Forthcoming). Available at SSRN: <http://ssrn.com/abstract=2086396>.

- 3.41 By characterising Optus as the maker because it designed and supplied the service is akin to describing the manufacturers of PVRs such as the FOXTEL IQ or TIVO as the makers of the copies created using those systems as in those instances the equipment is also pre-configured to record programs in response to a person pressing the “record” button and sometimes records even when that step is not taken by the end-user (for example FOXTEL’s Series Link function and TIVO’s Season Pass Manager).

Australian law is inconsistent with international approach

- 3.42 The consequence of the Full Court decision is that time shifting technologies which have been held to be lawful in other jurisdictions such as the US and Singapore (with its very similar *Copyright Act*) are now unlawful in Australia. As a result not only was the Optus TV Now product withdrawn from the market but similar products offered in Australia such as MyTVR and BeemTV were also withdrawn.
- 3.43 This contrasts starkly with other jurisdictions where these types of services are being introduced at a rapid rate. In Singapore the failure of the legal challenge to RecordTV⁴⁰ means that in Singapore consumers are able to record free to air TV shows to the cloud and watch them back on devices such as mobile phones, PCs or iPads.⁴¹ It has been reported that in Europe there has been a “spate of recent deployments”.⁴²
- 3.44 If Australia does not address the shortcomings in the copying for private use exception we will be left behind the rest of the world.

Assessment of current Australia approach

- 3.45 It is clear that Australians want to watch TV when they want, where they want and on the device of their choice. This is evident in the uptake of the various catch up services such as ABC iView which recently reported record views of an episode of Dr Who when it made it available near-simultaneous with international first release before it broadcast it on its free to air service.
- 3.46 If Australia wants to be at the forefront of the digital world then it needs to either lead or at least stay in step with the rest of the world. Whilst the term “cloud” has become somewhat overused and overhyped, the reality is online storage is here and has been for some considerable time. More and more data is being stored in the cloud and there seems to be no logical reason why there should be any distinction between storing the data on the hard drive of a DVD recorder as opposed to remotely in the cloud. In both instances a third party has more than likely been responsible for providing the storage facility; the only real differences are the location and that the provider of the DVD recorder received its commercial benefit up front rather than on an ongoing basis.

⁴⁰ *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] SGCA 43

⁴¹ see <http://www.recordtv.com/>

⁴² Cloud PVR Spreads Over Europe by Philip Hunter, Broadcast Engineering (9 July 2012). Available at <http://broadcastengineering.com/news/cloud-PVR-europe>.

3.47 The efficiency of the current approach can be assessed using the principles outlined in Section 2:

- (a) **End-user focus:** Current consumer behaviour makes clear that end-users do not see a functional difference between physical and virtual storage of, and access to, content. Restricting end-user use in such a manner is likely to result in significant consumer harm. Furthermore, the ability to use a PVR (whether connected to the viewing device by a physical cable or a remote network) would not impact on the legitimate business interest of rights holders. It may reduce the ability of rights holders to receive monopoly rents but such rents cause harm to end-users. Even then there is no reason why the calculation of ratings cannot be extended to cover viewings using remote PVRs. Increased ratings generally lead to increased revenues for the copyright owners which would make up for any “lost” revenue from no longer being able to carve up the rights into “free-to-air” and “online”.
- (b) **Technology neutrality:** It appears that the legality of PVRs in Australia may depend on the extent of automation in the device, additional service available (like series link or recommendations), and whether devices are connected via cable or spectrum. The technology used, however, does not change the fundamental nature of the service: end-users being able to view material they have a right to view at a more convenient time and place.
- (c) **International consistency:** Australian law is inconsistent with international law with regards to use of PVRs. A similar service is allowed in Singapore which has almost the same legislation as Australia. This outcome is perverse, and imposes significant costs to Australian consumers. There is a very real risk that Australian consumers and businesses will not have access to efficient technology that is available elsewhere.

3.48 Optus supports legislative changes that provide clarification that Australian consumers have access to time-shifting technologies to enable them to view material they have a right to view at a more convenient time and location. Optus cannot see any legitimate reason why Australian consumers should be prevented from services that are available elsewhere in the world.

Re-transmission of Free-to-Air

3.49 The current *Copyright Act* contains specific provisions relating to the re-transmission of FTA television broadcasts, including a statutory licensing regime. The Act excludes re-transmission over the internet from the statutory licensing regime.

3.50 In this section, Optus outlines its experience with re-transmission of FTA television broadcasts over its networks and suites of products. In addition, Optus outlines problems that have arisen due to the specific design of the re-transmission provisions in *Copyright Act*.

3.51 This section concludes by assessing how the current approach to re-transmission is consistent with the over-arching principles outlined in Section 2.

Optus' experience with re-transmission of FTA

- 3.52 Optus provides three main television products over its existing fixed and mobile telecommunications networks. These are:
- (a) Optus TV featuring FOXTEL;
 - (b) Optus TV with Fetch; and
 - (c) Optus Mobile TV.
- 3.53 Optus TV featuring FOXTEL product is delivered over Optus' HFC network across metropolitan Sydney and Melbourne. The service is delivered in the following manner: FOXTEL runs a play out centre which receives, compiles, schedules, encrypts and plays-out the FOXTEL channels; Optus receives the transmissions from FOXTEL at the Optus head-end and re-transmits them to Optus customers via the Optus HFC network. The transmission and channels are not altered by Optus. Optus is contractually prevented from, and technically unable, to do so. The direct nature of the transmission is the fact that it is encrypted by FOXTEL and delivered unaltered to Optus customers' FOXTEL set top box and decoded by the smart card which is integral to the FOXTEL conditional access system.
- 3.54 With respect to copyright payments, Optus utilises the statutory licensing regime contained in the *Copyright Act* in the same manner as FOXTEL. Optus pays Screenrights royalties in accordance with rates set down by the Copyright Tribunal in 2006 in its decision about retransmission of free-to-air channels over subscription television.
- 3.55 Optus TV featuring Fetch TV is a service is built around a set top box offering a free-to-air personal video recorder (PVR) and providing access to a range of on-demand and streamed television services over the internet. The service is deliverable over all fixed broadband networks (copper and cable) and is available to all Optus fixed and Optus Post-Paid mobile subscribers. Optus anticipates that the service will also be made available to Optus subscribers through the NBN.
- 3.56 In addition to the fixed network provision of broadcasts, Optus also provides a television service over its mobile network (3G and 4G LTE). This is known as Optus Mobile TV. Optus customers can subscribe to Optus Mobile TV by downloading Optus' TV and Video App which enables them to watch re-transmissions of ABC1 and SBS1 on their mobile telephones (as well as other packaged channels delivered by other means). With respect to the re-transmissions of ABC1 and SBS1, Optus takes an off-air feed of those channels and streams the content to a customer in an unaltered format (and contemporaneously with the original transmission) when a customer selects that particular content stream within the App.
- 3.57 The exclusion of re-transmissions of FTA television broadcasts over the internet from the FTA re-transmission statutory licensing scheme has created significant legal uncertainty around transmission technologies such as IPTV and mobile devices using WiFi. This impacts the willingness of companies to provide the service.

What problems have arisen for Optus' products due to the current Australian copyright laws?

- 3.58 Uncertainty concerning the application of copyright law to different content delivery platforms complicates negotiations in this area. This causes delays in service roll out and added expense, including the cost of expert legal advice and the potential for liability.
- 3.59 For example, Optus notes that the Screenrights website states that “Australian retransmission royalties are generated when free to air broadcasts are simultaneously retransmitted by another service, such as pay television or IPTV” (emphasis added).⁴³ Optus disagrees and notes the ALRC’s comments on the issue.⁴⁴
- 3.60 Excluding retransmissions over the Internet from the Part VC scheme⁴⁵ presents a particular complication for delivery of retransmissions on technologies other than cable subscription TV — that is, IPTV (including the NBN) and mobile TV.
- 3.61 With regard to mobile TV, it is common behaviour for mobile device users (including Mobile TV customers) to access data on their mobile devices via the internet over a wireless local area network (WiFi) in the home as well as over the mobile network (for example to attain a better connection or incur cheaper download costs). However because retransmission over the Internet is excluded from the operation of Part VC, Optus has to block Mobile TV customers from accessing retransmissions over WiFi — Optus does not have licences in place that allow retransmission of that content over the Internet. The practical difficulties of negotiating the right to retransmit over the Internet with each broadcaster and the near impossibility of ensuring that all of the underlying rights (in works and subject matter other than works forming part of the retransmission) are cleared, means that currently, blocking is the only solution.
- 3.62 Similar problems arise for retransmission over IPTV.
- 3.63 In Optus’ experience, the ability of networks to retransmit FTA broadcasts to end-users is limited in practice to just subscription TV over cable – i.e., FOXTEL. Without the protection afforded to retransmissions under Part VC, it is not commercially feasible to offer FTA broadcasts over the internet including over WiFi – and because Optus is unable to re-transmit over WiFi, it is not commercially feasible to re-transmit the full suite of FTA channels over Mobile TV.
- 3.64 This restriction has significantly limited the ability of providers (including Fetch TV and Optus through mobile TV) to offer compelling service to compete against the FOXTEL service. Optus strongly believes that if it was commercially feasible to provide the full suite of FTA channels over its mobile TV platform, customer take-up and use would significantly increase.

⁴³ <http://www.screenrights.org/content-owners/royalty-collection/retransmission>

⁴⁴ Paras 216-7.

⁴⁵ *Copyright Act*, s. 135ZZJA(1).

Assessment of current Australia approach

- 3.65 Using the principles outlined in Section 2, it is clear that the current Australian approach, essentially restricting FTA retransmission to cable providers (i.e., FOXTEL), is not in the interests of end-users and results in significant economic harm.
- 3.66 The first principle is **end-user focus**. A key issue with FTA retransmission is that end-users are permitted to view the broadcast without payment. FTA networks receive income based on viewership and advertising. FTA networks pay licensing fees based on expected viewership. Optus strongly supports a copyright regime which permits end-users to view material that have a legal right to view on whatever platform end-users see fit. End-users should not have to seek permission for every possible device over which they wish to view freely available material.
- 3.67 Further, extending the Part VC regime to all types of retransmission platforms will not impact upon the legitimate business interests of rights holders. If anything, extending the potential market of viewers would lead to greater advertising revenue.
- 3.68 The second principle is **technological neutrality**. The Part VC regime clearly is not technologically neutral —excluding retransmission over the internet. This has the effect of permitting retransmission of FTA broadcasts over subscription television — in other words, the retransmission of FTA by FOXTEL only. Any competitive platform to FOXTEL will most likely involve some form of internet based delivery, and as such, would not be permitted. The ability to provide mobile TV or IPTV is significantly hampered by the technology specific nature of Part VC. If potential TV providers were able to use the internet to deliver content, consumers would have access to significantly more content at a lower price.
- 3.69 The third principle is **international consistency**. While international consistency is less of an impact here than previous issues, the ability to rebroadcast FTA channels over the internet under cover of a statutory licence scheme would make attractive many television products that are available to overseas end-users. Given the dominance of premium content right ownership in Australia (a factor not seen in other markets), it is difficult to provide new and innovative products. The ability to retransmit FTA (in a similar manner to that allowed in other markets) will assist potential new entrants.
- 3.70 Optus supports the extension of the Part VC scheme to apply to all rebroadcasting, regardless of the delivery platform or viewing device. Fundamental to the success of such a regime will be preventing rights holders from obtaining separate royalties for the same content for each delivery method or means of viewing the content.

User-generated content

- 3.71 Optus acknowledges the increasing volume of user-generated content ('UGC') that is uploaded by end-users on social networks and other internet or mobile sites. Optus itself owns and operates sites such as Eatability and Doorstep, where restaurant and entertainment related reviews and content are posted by registered users.

- 3.72 Optus also operates company branded social media sites on Facebook and Twitter. One of the key uses of these company branded social media sites is to provide a convenient forum to allow end-users to communicate with Optus in an open way.
- 3.73 UGC that may be uploaded on the Optus managed portals described above include copyright materials such as literary works, artistic works, sound recordings, photographs, video or links to such materials. Some practical examples could include:
- (a) a user posting a video or photograph of a particular restaurant as part of their review onto Eatability;
 - (b) a user uploading a photo as part of their post to the Optus managed Twitter account; or
 - (c) a user including a copy of a newspaper article as part of their Facebook post on the Optus managed Facebook page.
- 3.74 Optus is generally supportive of facilitating the creation and use of UGC in the digital environment, and recognises that UGC is as an important way for end-users to communicate their views and stay connected with others. Optus adopts this position on the assumption that the UGC in question is honest and objective and a fair reflection of a end-user's view or experience. Optus does not encourage UGC that is offensive, inappropriate or threatening to others.
- 3.75 Optus is aware that under the current *Copyright Act*, certain exceptions may apply to some forms of UGC that uses copyright materials, including fair dealing for the purposes of criticism or review, and parody or satire.
- 3.76 It is also apparent that certain forms of UGC do not fit within the scope of the existing exceptions.
- 3.77 It is Optus' view that use of copyright material in UGC that is created for social, private and domestic purposes should be more freely permitted under the copyright regime. A new exception should be introduced into the *Copyright Act* to protect users for use of copyright material in this manner. It is clear that certain boundaries will need to be also introduced around the meaning of 'social, private and domestic purposes', but such boundaries should not operate to restrict end-users where there is no direct or indirect commercial gain by the end-user. The key test should be whether the action was undertaken with the purpose of depriving the rights holder of legitimate revenue stream.
- 3.78 Consistent with its position of general support for UGC as a form of expression, Optus also recognises the need for legal clarity and protection for facilitators of the forums where UGC is posted, including companies that operate and/or host portals or social media pages where UGC can be posted ('**Facilitators**'). Under the law in Australia, Facilitators are likely to also be regarded as publishers of the UGC.
- 3.79 Facilitators of portals that allow for end-users to generate and publish content should be provided with a clear protection under the *Copyright Act*, for their publishing activities and

their provision and hosting of such portals. The level of legal protection offered to Facilitators needs to be adequate to ensure there is no barrier to them providing portals that allow for the posting of UGC and the free flow of information. If the risks associated with operating these portals are too high or legally uncertain, Facilitators will not be encouraged to offer them.

- 3.80 Optus submits that clarification of copyright exemptions to UGC for ‘social, private and domestic purposes’, where there is no direct or indirect commercial gain by the end-users, would be consistent with the objectives outlined in Section 2. In addition, Optus submits that companies that provide access to UGC portals should not be liable for copyright infringement carried out by end-users posting content on such portals.