

## ALRC Copyright Inquiry

### Response to the ALRC's Issues Paper, Copyright and the Digital Economy

#### iiNet Limited

iiNet is Australia's second largest DSL Internet Service Provider (ISP) and the leading challenger in the telecommunications market. iiNet employs more than 2,000 staff across four countries and supports over 1.3 million broadband, telephone and Internet Protocol TV services. Our vision is to lead the market with products that harness the potential of the Internet and then differentiate with award-winning customer service. iiNet is passionate about the transformative benefits of the Internet and committed to helping Australians connect better.

iiNet has provided a response to those questions set out in the Issues Paper which are of particular relevance to its business.

#### The Inquiry

##### Question 1.

*The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:*

- (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;*
- (b) affects the introduction of new or innovative business models;*
- (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or*
- (d) places Australia at a competitive disadvantage internationally.*

#### Answer

Australia's copyright law is complex. The High Court in the recent iiNet litigation highlighted the voluminous nature of Australia's copyright law:

When enacted in 1968, the Act comprised about 100 pages. Reprint No 12, with amendments up to 2007, shows that the Act has grown to more than five times its original length. The Act has been amended and expanded on some fifty occasions, the most recent substantial changes being made by the [US Free Trade Agreement Implementation Act 2004](#) (Cth).<sup>1</sup>

Given the importance of innovation and creativity in fostering the digital economy, a working understanding of copyright law should be more accessible to the general public.

The ALRC has a formidable challenge in formulating a policy response which will underpin further reform to Australia's copyright law. iiNet draws attention to the guiding principles promoted by Francis Gurry, Director-General of WIPO:

The first of those is neutrality to technology and to the business models developed in response to technology. The purpose of copyright is not to influence technological possibilities for creative expression or the business models built on those technological possibilities. Nor is its purpose to preserve business models established under obsolete or

moribund technologies. **Its purpose is, I believe, to work with any and all technologies for the production and distribution of cultural works, and to extract some value from the cultural exchanges made possible by those technologies to return to creators and performers and the business associates engaged by them to facilitate the cultural exchanges through the use of the technologies.** Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests.<sup>2</sup> (Emphasis added).

The ALRC has also formulated a number of guiding principles for reform of Australia's copyright law. From iiNet's perspective, principles 1, 2 and 5 are particularly relevant:

*Principle 1: Promoting the digital economy*

Reform should promote the development of the digital economy by providing incentives for innovation in technologies and access to content.

*Principle 2: Encouraging innovation and competition*

Reform should encourage innovation and competition and not disadvantage Australian content creators, service providers or users in Australian or international markets.

*Principle 5: Responding to technological change*

Reform should ensure that copyright law responds to new technologies, platforms and services.

We welcome the scope of the ALRC's inquiry and its focus on innovation. ISPs, like iiNet, are critical to innovation and the opportunities that the Internet presents for enabling Australia's digital economy. Relevantly, the Supreme Court of Canada has highlighted "the capacity of the Internet to disseminate 'works of the arts and intellect' is one of the great innovations of the information age. Its use should be facilitated rather than discouraged."<sup>3</sup>

A number of reports, commissioned in Australia and internationally, set out evidence which suggest that Australian copyright law negatively affects the introduction of innovative business models and consequently, places Australia at competitive disadvantage internationally. This situation poses a considerable challenge in meeting the goal of Australia being a leading global digital economy by 2020.<sup>4</sup>

In September 2012 a report prepared by Lateral Economics "*Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions*" was released by the Australian Digital Alliance<sup>5</sup>. The authors assert that "better crafted limitations and more flexible exceptions could make a substantial contribution to Australia's economic growth and innovation."<sup>6</sup> The report concludes that there is substantially more risk flowing from copyright law to internet intermediaries in Australia than in the US and in comparable countries like Singapore. Associate Professor Kimberlee Weatherall has also highlighted that Australian copyright law provides no room for entrepreneurs, start-ups and existing businesses to experiment."<sup>7</sup>

In 2006, Google, in its testimony to the *Gowers Review of Intellectual Property* in the UK, noted that "the existence of a general fair dealing exception that can adapt to new technical environments may explain why the search engines were first developed in the USA, where users were able to rely on flexible copyright exceptions, and not in the UK, where such uses would have been considered copyright infringement."<sup>8</sup> More recently, the government's response to the *Hargreaves Report on Intellectual Property* observed that copyright law currently over-regulates to the detriment of the United Kingdom.<sup>9</sup> As the *Optus TV Now* case showed Australian copyright law has, like in the UK, acted as a regulatory barrier to the creation of certain kinds of new internet-based businesses.<sup>10</sup>

Google has drawn attention to recent economic evidence concerning copyright law. Recent comparative analysis of US and EU investment in cloud computing by Harvard Business

School Professor Josh Lerner showed that simply clarifying copyright exceptions can drive investment and innovation:

“The study shows how giving clarity to this copyright exception led to an additional incremental venture capital investment in US cloud computing firms worth approximately \$1.3 billion over the years after the decision.”<sup>11</sup>

Booz and Co’s findings in their report on the impact of U.S. Internet Copyright Regulations on Early Stage Investment similarly indicates that “the regulatory environment is just as important a driver of early-stage investment decisions as is the state of the economy, the degree of competition in the space, or even the expected return on investments”<sup>12</sup>. In another US report ‘Fair Use in the US Economy’, the authors’ research indicated that the fair use economy in 2008 and 2009 accounted for roughly 17% of US GDP and concluded that:

“the protection afforded by fair use has been a major contributing factor to these economic gains, and will continue to support growth as the US economy becomes even more dependent on information industries.”<sup>13</sup>

The consultation paper released by Ireland’s Copyright Review Committee, highlighted:

“internet intermediaries constitute an important locus of innovation ... the issue then is how best to shape the new contours of copyright law to encourage emerging innovative online business-models without a disproportionate impact on existing rights-holders.”<sup>14</sup>

## **Caching, indexing and other internet functions**

### **Question 3.**

*What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia’s copyright law?*

### **Answer**

“Digital content cannot be handled without copying it”<sup>15</sup>.

Copyright law currently impedes the development of caching in Australia. Proxy caching is particularly important in Australia given the distance international data must travel. Approximately 70 per cent of the traffic iiNet delivers to its customers originates from overseas. Transmission of internet traffic to/from overseas is more time consuming and costly for ISPs than transmission within Australia. Caching also benefits content providers and consumers as more efficient delivery of content provides improved quality of service. Caching reduces iiNet’s costs and this flows through to consumers. In the event every file sought by our customers needs to be downloaded from a source in, say, the US, the cumulative transmission costs would render the provision of such content uneconomic. Additionally, in the event that we are able to cache files locally, we can improve the delivery process, ensure error-free delivery and reduce the time required to download and view content. In our experience, by using caching, transmission overheads can reduce to 1% of what they would otherwise be, without caching.

Caching is a fundamental function of the Internet. Nevertheless, Australian copyright law does not include a specific exception that permits the communication or reproduction of material for the purposes of system-level caching. Section 116AB only allows for the reproduction of copyright material on a system or network controlled by a CSP in response to an action by a user in order to facilitate efficient access to that material by that user or other users.<sup>16</sup>

Another limitation with sections 43A and 111A is that they only expressly apply to the reproduction right. (Compare with section 200AAA which covers both the reproduction and communications rights.) Moreover, as Associate Professor Weatherall has highlighted, another limitation of the temporary reproductions exceptions at section 43A and 111A is that they do not apply where the underlying communication is infringing. The protections offered by these provisions for ISPs who undertake system-level caching are therefore limited.<sup>17</sup>

While consideration of the safe harbour provisions are outside the scope of the Inquiry, iiNet notes that category B of the 'safe harbour' provisions provides insufficient protection for caching activities carried out by ISPs. It is unclear whether some caching platforms would be considered to fall outside the requirements of "automatic process" and "must not manually select the copyright material for caching" as content is cached based on pre-selected traffic classes. In 2010, lawyer and academic, Miguel Peguera noted that there have not been any cases expressly considering the caching safe harbour in the United States. The handful of cases which have discussed this provision in the United States and its equivalent in Europe dealt with the operation of search engines caches, which has a completely different function than that contemplated by the safe harbour.<sup>1</sup>

In the United States, caching, including proxy caching, will often be non-infringing either because the copies are too transient to fall within the reproduction right, or because they are fair use.<sup>18</sup> In contrast, in Australia the uncertainty about the legality of caching is a disincentive for ISPs to efficiently manage their traffic. These uncertainties create a disincentive for Australian ISPs to innovate and provide their own caches which would also allow for the efficient management of their internet traffic. This disparity between the law in Australia and United States potentially places Australian businesses at a competitive disadvantage compared to their US counterparts.

#### Question 4.

*Should the Copyright Act 1968 (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?*

#### Answer

A flexible fair use or specific exception should be crafted to allow for the use of copyright materials for caching.<sup>19</sup> Rights holders' ability to control and exploit their work would not be adversely affected by an exception that permits caching. In the SOCAN decision in Canada, the court noted that caching and hosting by ISPs are reasonably useful and proper functions to achieve the benefits of enhanced economy and efficiency<sup>20</sup>.

Section 31.1 included in Canada's copyright law by the recent *Copyright Modernization Act*<sup>21</sup> sets out an example of a provision that allows for caching. It provides:

**31.1 (1)** A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

Incidental acts (2) Subject to subsection (3), a person referred to in subsection (1) who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient

<sup>1</sup> Miguel Peguera, *Internet Service Providers' Liability in Spain: Recent Case Law and Future Perspectives*, 1 (2010) JIPITEC 151, page 6

Conditions for application	<p>does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.</p> <p>(3) Subsection (2) does not apply unless the person, in respect of the work or other subject-matter;</p> <p>(a) does not modify it, other than for technical reasons;</p> <p>(b) ensures that any directions related to its caching or the doing of any similar act, as the case may be, that are specified in a manner consistent with industry practice by whoever made it available for telecommunication through the Internet or another digital network, and that lend themselves to automated reading and execution, are read and executed; and</p> <p>(c) does not interfere with the use of technology that is lawful and consistent with industry practice in order to obtain data on the use of the work or other subject-matter.</p>
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iiNet also takes this opportunity to express its concern at the expansive and uncertain language of the alleged draft US Intellectual Property chapter of the Trans-Pacific Partnership agreement<sup>22</sup> concerning caching. Article 4.1 of that text grants rights holders the “right to authorize or prohibit all reproductions of their works, performances and phonograms in any manner or form ... including temporary storage in electronic form.”<sup>23</sup>

## Cloud computing

### Question 5.

*Is Australian copyright law impeding the development or delivery of cloud computing services?*

### Answer

The *OECD Internet Economy Report* published in October 2012, defines cloud computing as “a service mode for computing services based on a set of computing resources that can be accessed in a flexible, elastic, on-demand way with low management effort.”<sup>24</sup> The authors of the Report highlight that cloud computing has the potential to become a veritable platform for innovation spurring the development of new products and services.<sup>25</sup> As the nature of cloud computing means that geo-political boundaries have little relevance to markets, iiNet and other Australian service providers find themselves competing with global providers offering cloud-based services to Australian consumers. As a result, any uneven playing field can be seriously detrimental to Australian interests. For example, Apple’s iTunes, one of the first successful legal channels for online music has adopted cloud services, such as its iCloud<sup>26</sup>. However, the ambiguity about the impact of the Optus TV Now case on cloud computing in Australia is very concerning.

The Full Federal Court decision *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (the “Optus TV Now” case) “highlighted the potential for new and emerging cloud computing services to infringe copyright, or to enable their customers to infringe copyright.”<sup>27</sup> Even before the Full Court’s decision in the Optus TV Now case, Associate Professor Weatherall had argued that operating cloud computing resources in Australia creates a higher risk of liability than in other countries.<sup>28</sup>

Following the Full Court’s decision in the Optus TV Now case, Optus closed down its TV Now service. This was the first case in Australia to consider cloud-based technologies in the context of the private use exceptions. In addition, it was reported in late May this year that two similar services based in Australia, Beem and MyTVR were suspended as a result of the Full Court’s decision<sup>29</sup>. Beem<sup>30</sup> had been offering a TV-recording cloud service that allows

playback on phones and tablets. MyTVR<sup>31</sup>, a web-based TV-recording service also suspended its service after the Full Court's decision in the Optus TV Now case. Dr Rebecca Giblin has persuasively argued that the Full Court's decision in the Optus TV Now case in finding that the time-shifting provider (and not just the user) "makes" the relevant recording, effectively makes remote television time-shifting services unlawful.

Further, Dr Giblin argues that the Full Court's decision has significant ramifications for more traditional time-shifting technologies such as TiVo:

TiVo can be seen as playing the same kind of role in making the copies as Optus does. It has designed the TiVo system to respond to the user's commands to make copies. In each case TiVo is inextricably involved in the embodiment of the copyright subject matter. Its software has been designed to automatically capture the broadcast and then embody its images and sounds in the hard disk. Indeed, it is arguably more closely involved in the process than Optus is with regard to TV Now. With TV Now, the subscriber at least had to click "record" for every single show before the automated system commenced the copying process. A TiVo user has much less involvement in the copying process – and in the case of the "TiVo Recommends" feature, no real involvement at all. Just as was the case with TV Now, with regard to each of these features, the customer and operator can be seen as "act[ing] in concert with one another in the infringement pursuant to a common design.

...

In these circumstances, DVR manufacturers like TiVo could not be blamed for struggling to identify any real difference between programming a service like TV Now to provide an automated television copying service, and programming a "traditional" DVR to provide an automated television copying service. TiVo too can be seen as not "merely making available its system to another who uses it to copy a broadcast", but "captur[ing], cop[y]ing, stor[ing] and mak[ing] available for reward, a programme for later viewing by another".<sup>[1]</sup>

The FFC suggested that both the automated service which produced the copies and the causative agency that is responsible for the copies being made at all are relevant in identifying the maker.<sup>[2]</sup> The above description suggests that, under the FFC's reasoning, the provider of a non-remote DVR could easily be held to be the maker of the copies its customers' request.<sup>32</sup>

In addition, iiNet submits that the focus on "domestic" in the private use exceptions in Australian copyright law is no longer relevant given advances in technology. The relevant consideration should be whether the use is fair. In contrast to the position in Australia remote time-shifting devices are allowed in the United States<sup>33</sup> and Singapore<sup>34</sup>. In 1984, in the *Betamax*<sup>35</sup> case, the court held that 'time shifting' television programs fell within the "fair use" doctrine under US copyright law.

More recently in the *Cablevision*<sup>36</sup> case, the Second Circuit Court held that the digital video recorder operated by the company's customers by remote control from their homes but housed at Cablevision's facilities did not infringe the plaintiff's copyright. The Computer & Communications Industry Association has highlighted that this decision had broad positive consequences for cloud services in the US generally:

"our report found that this judgment led to additional incremental investment in US cloud computing firms that ranged from \$728 million to \$1.3 billion over the two-and-a-half after the decision."<sup>37</sup>

In Singapore's *RecordTV* case, the recording was made at RecordTV's premises with registered users operating the DVR system remotely from home or elsewhere via a web browser. The court stated that:

<sup>[1]</sup> See *National Rugby League Investments v Singtel Optus* [2012] FCAFC 59, at [68] (internal citations omitted).

<sup>[2]</sup> *National Rugby League Investments v Singtel Optus* [2012] FCAFC 59, at [76].

“there is also a public interest in not allowing copyright law to hinder creativity and innovation. Rights conferred on copyright owners are statutory rights. ... where, the statute is not clear as to the ambit of an existing copyright owners’ rights and the courts are asked to expand those rights so as to respond to novel technologies impinging on the copyright owner’s interests, the courts must strive to strike the right balance between the copyright owner’s private rights and the public interest in the use of new technology.”<sup>38</sup>

Remote or network personal video recorders are the next step in the evolution of devices that began with the VHS recorders. This technology reduces the equipment consumers need and is a more environmentally friendly and efficient way to enjoy television programs.

It is well worth asking in ten or even five years time, will the apparent focus in Australia’s copyright law on where the hard disk is located have any meaning?

### **Question 6.**

*Should exceptions in the Copyright Act 1968 (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?*

### **Answer**

Many internet intermediaries now offer cloud computing products and services to the public. In doing so, these businesses face the risk that by reproducing or communication of material originally uploaded by their users it may be also be infringing copyright. If an ISP, for example, is found to have authorised copyright infringement by hosting it’s customers infringing material the ‘mere conduit’ exception (sections 39B and 112E) will provide little assistance due to the narrow interpretation given to the provision, most recently, in the *Roadshow v iiNet* litigation.<sup>39</sup>

In line with the ALRC’s guiding principles for reform<sup>40</sup> and the need to encourage innovation in the digital economy Australia could adopt a flexible fair use exception which would permit hosting. Alternatively, if the ALRC recommended the approach of creating new specific exceptions, guidance could be taken from the provision included in Canada’s copyright law by the new *Copyright Modernization Act* which relates to hosting:

“... a person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject-matter does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.”<sup>41</sup>

## **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?*

### **Answer**

Bill Patry, Senior Copyright Counsel at Google, submitted in a recent lecture that where, as in copyright law, most infringement occurs in private it is especially important that laws are created that people will obey.<sup>42</sup> Professor Hargreaves in his report on Intellectual Property in the United Kingdom recommended that copying should be lawful where it is for private purposes or does not damage the underlying aims of copyright.<sup>43</sup>

The Copyright Council Expert Group in its 2011 paper agreed in principle “that an exception permitting private, non-commercial transformative uses would preserve the balance in copyright law between interests of creators and users, and preserve public respect for the relevance and integrity of copyright law.”<sup>44</sup>

It would be in line with recognising current public practices for Australia to either introduce a flexible fair use provision or follow Canada’s lead and introduce a new specific user-generated content exception in its recent *Copyright Modernization Act 2012* (also known as the mash-up exception.) It is not clear, however, that Australia should follow Canada’s lead in restricting such an exception to non-commercial purposes, particularly when our current fair dealing exceptions can be relied on by corporations. This distinction between commercial and non-commercial purposes is also problematic in a context where social networks are also integrating advertising and paid posts, such as Facebook’s “promoted post” feature. The touchstone should be whether the use is fair, and whether the use is commercial will be just one of a number of considerations. One benefit of a flexible fair use exception in this context is that it encourages innovation as the meaning of “domestic”, as illustrated by the Optus TV Now case, is becoming increasingly less useful in a world of cloud based services.

### 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?*

### Answer

Flexible fair use exceptions are more able to accommodate the technological demands of the digital economy. Accordingly, exceptions such as those introduced in 2006 concerning format shifting and time shifting should be framed in technology neutral language or replaced with a flexible fair use style exception. The exceptions should focus on the purpose of the copying not the technology facilitating the copying or the subject matter being copied.

Catherine Bond has highlighted how narrowly framed exceptions can date very quickly. For example section 109A allows limited ‘format shifting’, such as copying music from a CD you already own to an iPod. This section:

“provides a defence to infringing behaviour that, although prevalent 10 years ago, is today become increasingly outdated. ... the provision is decreasing in usefulness for consumers, as content is increasingly made available for download online.”<sup>45</sup>

When this provision was enacted in 2006 a consumer may have had a MP3 player such as an iPod, now consumers may well have an iPod, a laptop, a tablet and use cloud services such as iCloud to manage their content. Section 109 does not encourage innovation in cloud computing in the consumer market as it only permits copying onto a device owned by the individual.<sup>46</sup>

Another example of the current restrictive technology-specific nature of the private use exceptions is section 47J. This section allows making a digital copy of a hard copy photograph or a hardcopy reproduction of a digital photo but does not allow digital-to-digital

copying nor does it permit hardcopy to hardcopy copying (e.g. photocopying). Similarly, section 110AA, which allows for the copying of a cinematograph film simply permits the owner of a videotape embodying a cinematograph film in analogue form to copy the film in electronic form for his or her private and domestic use. For example, allowing the owner of a VHS video cassette to make a digital copy of the film content, e.g. on a DVD or a computer hard drive. This exception does not allow any form of digital-to-digital copying. It is not legally possible to copy a film that is embodied in a DVD. Even where a film is copied from a videotape in an electronic form it is not permitted to make a further digital copy.<sup>47</sup>

### 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?*

### Answer

The High Court decision on 7 September 2012 to dismiss Optus' application for special leave to appeal to the High Court means that the Full Federal Court decision is the applicable law in relation to Optus' TV Now service.

Ericsson in its submission to the Hargreaves Review of Intellectual Property and Growth in the UK cited research that found:

"in a converging environment a regulatory framework that regulated similar services differently (e.g. on the basis of the technical platform), that framework is preventing the market from fully benefiting from the opportunities that technological process offers them. Technology specific approach inevitably leads to inconsistencies and uncertainties."<sup>48</sup>

The users' rights exceptions in the Copyright Act should be replaced with a flexible fair use style exception or amended to provide for innovation and creativity. For example, the time-shifting exception should be expressed in technology neutral terms<sup>49</sup>. It should not matter who makes the recording or if the recording is made jointly, if the recording is made in a "domestic" setting if the underlying purpose of the recording is fair. In this way, competition between technologies will be promoted. .

Australia's copyright law is currently impeding Australian businesses attempting to operate and succeed in a global digital economy. Given that the sale and distribution of digital content is generally oblivious to geo-political boundaries (except, where the distributor may suggest that such boundaries affect their cost of distribution), different regulatory conditions in different jurisdictions are counter-productive to growing Australia's digital economy. Using copyright law to prohibit the use by Australian service providers of innovative technology to distribute content when those prohibitions do not uniformly apply in other jurisdictions is detrimental to the development of Australia's digital economy.

**Question 10.**

*Should the Copyright Act 1968 (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?*

**Answer**

The *Copyright Act* should be amended to clarify that making copies of all types of copyright materials for the purpose of back-up or data recovery does not infringe copyright. Guidance on the nature of the amendment could be taken from the following provisions:

Section 80 of Ireland's *Copyright and Related Rights Act 2000* provides:

**80.**—(1) It is not an infringement of the copyright in a computer program for a lawful user of a copy of the computer program to make a back-up copy of it which it is necessary for him or her to have for the purposes of his or her lawful use.

(2) For the purposes of this section and sections 81 and 82, a person is a “lawful user” of a computer program where, whether under a licence to undertake any act restricted by the copyright in the program or otherwise, he or she has a right to use the program, and “lawful use” shall be construed accordingly.

Section 22 of Canada's *Copyright Modernization Act* inserts a new section 29.24 into the *Copyright Act* in the following terms:

*Backup Copies*

Backup copies	<p><b>29.24</b> (1) It is not an infringement of copyright in a work or other subject-matter for a person who owns — or has a licence to use — a copy of the work or subject-matter (in this section referred to as the “source copy”) to reproduce the source copy if</p> <p>(a) the person does so solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable;</p> <p>(b) the source copy is not an infringing copy;</p> <p>(c) the person, in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented; and</p> <p>(d) the person does not give any of the reproductions away.</p>
Backup copy becomes source copy	<p>(2) If the source copy is lost, damaged or otherwise rendered unusable, one of the reproductions made under subsection (1) becomes the source copy.</p>
Destruction	<p>(3) The person shall immediately destroy all reproductions made under subsection (1) after the person ceases to own, or to have a licence to use, the source copy.</p>

**Question 39.**

*What implications for copyright law reform arise from recommendations of the Convergence Review?*

**Answer**

A relevant recommendation from the Convergence Review is the focus on a technology neutral approach. A principles based approach with technology-neutral language is preferable than legislation which can quickly become obsolete if based on specific technology. Relevantly, the Convergence Review recommended:

**Chapter 1: The need for a new approach**

1. The policy framework for communications in the converged environment should take a technology- neutral approach that can adapt to new services, platforms and technologies.
  - a. Parliament should avoid enacting legislation that either favours or disadvantages any particular communications technology, business model or delivery method for content services.<sup>50</sup>

As noted in the Convergence Review Committee's Final Report, the principle of technology neutrality does not demand that standards be applied in an identical way to all services<sup>51</sup>. iiNet agrees with the sentiments expressed in the Consultation Paper published earlier this year by Ireland's Copyright Review Committee, where it observed:

"It is important that copyright law be technology neutral. It is equally as important that it be capable of either adapting or of being easily adapted to unforeseen technological innovations. These are standards by which to judge both existing and any possible amendments."<sup>52</sup>

**Fair use****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?*

**Answer**

Speaking extra-judicially on the English fair dealing provisions, Laddie J remarked that:

"Rigidity is the rule. It is as if every tiny exception to the grasp of copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls."<sup>53</sup>

The Australia-United States Free Trade Agreement resulted in significant changes to Australia's copyright law. Associate Professor Weatherall has noted that "all of the changes ... were in the direction of strengthening copyright owners' rights, and, as a result questions, were raised about whether those rights had become 'too strong', and 'upset the balance' in Australian copyright law."<sup>54</sup> In May 2004, the Joint Standing Committee on Treaties recommended:

The Committee recommends that the changes being made in respect of the Copyright Act 1968 replace the Australian doctrine of fair dealing for a doctrine that resembles the United

States' open-ended defence of fair use, to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting that is currently absent.<sup>55</sup>

As an active player in Australia's digital environment, iiNet, like many of our customers are now regular creators, and not just passive consumers, of copyright. Any broad exception needs to be flexible enough to encompass developing technologies and at the same time have sufficient certainty. Currently, the exceptions and limitations in Australia's copyright law do not adequately allow for and encourage the development and operation of new technologies. Nor does it allow consumers to fully enjoy the content, when and in what format suits them. A flexible fair use exception can better adapt to new technology and does not require legislation to be continually revised as technology evolves.

As noted in the 2012 Issues Paper "the flexibility of the fair use exception has allowed the courts to play an active role in adapting United States copyright law to major changes in technology." An open-ended fair use defence would also play a role in countering the effects of the 2004 US Free Trade Agreement whereby the ambit of copyright protection was strengthened without adopting an open-ended fair use style exception which provides the balancing element for consumers in the United States.

Australia would not be alone if it developed a more fair use type exception framed to promote flexibility and innovation. The US is not alone in having a fair use doctrine. The Philippines, South Korea and Israel have fair use doctrines and Singapore uses a fair use type multi-factor test within its fair dealing exception<sup>56</sup>. In addition, India is also heading in that direction<sup>57</sup> and Ireland is considering fair use in the context of its current review of copyright law.<sup>58</sup> Israel's list of exceptions and limitations draws upon English copyright law and from the EU Copyright Directive. Section 19 contains a fair use clause:

(a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.

(b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, inter alia, all of the following:

- (1) The purpose and character of the use;
- (2) The character of the work used;
- (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
- (4) The impact of the use on the value of the work and its potential market.

(c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use<sup>59</sup>.

Relevantly, Professor Hargreaves in his report for the UK government noted<sup>60</sup> that:

- fair use provides a legal mechanism that can rule a new technology or application of technology (like shifting music from a CD to a personal computer) as legitimate and not needing to be regulated, so opening the way to a market for products and services which use it.
- this is one of the factors creating a positive environment in the US for innovation and investment in innovation.
- fair use offers a zone for trial and error, for bolder risk taking, with the courts providing a backstop to adjudicate objections from rights holders if innovators have trespassed too far upon their rights.

iiNet agrees with these comments by Professor Hargreaves above, and notes that Google<sup>61</sup> has submitted that fair use was vital to the successful emergence of the indexing and search technology which has turned it into one of the most valuable and dynamic companies in the world. Facebook likewise believes that a global business based upon user generated content required a flexible legal view of copyright to enable it to emerge with its highly successful business model.

In January 2005, Singapore adopted a flexible fair dealing provision based on the four factors in the US 'fair use' provision<sup>62</sup>. This approach is in stark contrast to the current fair dealing approach in Australia's copyright law where exemptions are listed exhaustively:

**Fair dealing in relation to works**

**35.—(1)** Subject to this section, a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for any purpose other than a purpose referred to in section 36 or 37 shall not constitute an infringement of the copyright in the work.

(1A) The purposes for which a dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, may constitute a fair dealing under subsection (1) shall include research and study.

(2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of copying the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for any purpose other than a purpose referred to in section 36 or 37 shall include —

- (a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
- (b) the nature of the work or adaptation;
- (c) the amount and substantiality of the part copied taken in relation to the whole work or adaptation;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

....

In Singapore, the lawfulness of activities permitted by fair use stimulates a market for consumer devices that enables these copies. A study by Roya Ghalfele and Benjamin Gibert, found that flexible fair use policy in Singapore positively influences growth rates in private copying technology industries including "a total increase of €2.27 billion in value-added for private copying technology industries" in period from 2005 to 2010, being 5 years after the fair use amendments were introduced<sup>63</sup>.

Copyright law should better promote creativity and innovation. A flexible open-ended fair use provision would assist in working towards this objective as it is not linked to specific purposes and can be more easily applied to new technologies.

In an interview in September 2012, the Director-General of WIPO, Francis Gurry highlighted:

"Copyright has served society and the economy very well, but the digital environment poses a serious challenge which is not going to disappear. We have to actively find ways to maintain the central mission of copyright - that of ensuring a viable economic existence for creators and creative industries while making creative content broadly available - in the digital environment."<sup>64</sup>

**Question 53.**

*Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?*

**Answer**

The current fair dealing exceptions should be updated for the reasons outlined above and be complemented by a fair use style exception which would provide the necessary flexibility to encourage innovation in the digital economy.

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<sup>1</sup> *Roadshow Films Pty Ltd & Ors v iiNet Ltd* [2012] HCA 16 para 118

<sup>2</sup> F Gurry, Blue Sky Conference: Future Directions in Copyright Law, The Future Of Copyright, 25 February 2011: [http://www.wipo.int/about-wipo/en/dgo/speeches/dg\\_blueskyconf\\_11.html](http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html)

<sup>3</sup> *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45

<sup>4</sup> Opening Remarks to the Digital Economy Forum, Prime Minister of Australia, 5 October 2012

<sup>5</sup> "Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions", Lateral Economics, August 2012, Australian Digital Alliance: <http://www.digital.org.au/content/LateralEconomicsReports>

<sup>6</sup> *Excepting the Future*, 2

<sup>7</sup> K Weatherall, Internet Intermediaries and Copyright: An Australian Agenda for Reform, 2011, Australian Digital Alliance,

<sup>8</sup> *The Gowers Review of Intellectual Property*, 2006, 62

<sup>9</sup> I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 7

<sup>10</sup> I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 3

<sup>11</sup> Google's response to the Government Consultation on proposals to change the UK's copyright system, March 2012, 3 [www.ipo.gov.uk/response-2011-copyright-google.pdf](http://www.ipo.gov.uk/response-2011-copyright-google.pdf)

<sup>12</sup> Impact of U.S. Internet Copyright Regulations on Early-Stage Investment, Booz & Co, November 2011 23

<sup>13</sup> Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use, 2011 prepared by Rogers T, Szamoszegi A for Computer & Communications Industry Association

<sup>14</sup> Copyright and Innovation: A Consultation Paper, Copyright Review Committee Ireland, 49, 50

<sup>15</sup> *Excepting the Future*, 4

<sup>16</sup> underlining added

<sup>17</sup> K Weatherall, Internet Intermediaries and Copyright: An Australian Agenda for Reform, 2011, Australian Digital Alliance, 16

<sup>18</sup> K Weatherall, Internet Intermediaries and Copyright: An Australian Agenda for Reform, 2011, Australian Digital Alliance, 18

<sup>19</sup> iiNet is of the view that an open-ended exception is more preferable than new specific exceptions in being able to adapt to advances in technology. See response to question 52.

<sup>20</sup> *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45, para 115

<sup>21</sup> Assented to 29 June 2012

<sup>22</sup> The complete Feb 10, 2011 text of the US proposal for the TPP IPR chapter, KEI, <http://keionline.org/node/1091>

<sup>23</sup> Position Paper on the Trans Pacific Partnership agreement, Internet NZ, 10 November 2011, 6

<sup>24</sup> OECD Internet Economy Outlook, October 2012, 78

<http://www.oecd.org/sti/interneteconomy/ieoutlook.htm>

<sup>25</sup> OECD Internet Economy Outlook, October 2012, 80

<sup>26</sup> <http://www.apple.com/icloud/>

<sup>27</sup> para 65.

<sup>28</sup> K Weatherall, Internet Intermediaries and Copyright: An Australian Agenda for Reform, 2011, Australian Digital Alliance, 22

<sup>29</sup> J Taylor, Cloud TVRs stop in wake of TV Now ruling, ZDNet, 24 May 2012, <http://www.zdnet.com/cloud-tvrs-stop-in-wake-of-tv-now-ruling-1339338503/>

<sup>30</sup> <http://beem.com.au/>

- <sup>31</sup> <http://www.mytvr.com.au/>
- <sup>32</sup> R Giblin, Stranded in the technological dark ages: implications of the Full Federal Court's decision in *NRL v Optus*, [2012] 34(9) EIPR
- <sup>33</sup> *Cartoon Network, LP v. CSC Holdings*, 536 F.3d 121 (2d Cir. 2008)
- <sup>34</sup> *Record TV Pte Ltd v MediaCorp TV Singapore Ltd* [2010] SGCA 43
- <sup>35</sup> *Sony Corp of America v Universal City Studios Inc*, 464 US 417 (1984)
- <sup>36</sup> *Cartoon Network, LP v. CSC Holdings*, 536 F.3d 121 (2d Cir. 2008)
- <sup>37</sup> Computer & Communications Industry Association submission to Ireland's Consultation on Copyright and Innovation, 31 May 2012, 5
- <sup>38</sup> *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] SGCA 43, 859, 860
- <sup>39</sup> *Roadshow Films Pty Ltd & Ors v iiNet Ltd* [2012] HCA 16 para 26, 113
- <sup>40</sup> ALRC Guiding principles for reform 1, 2 and 5
- <sup>41</sup> Section 31.1(4) *Copyright Modernization Act*
- <sup>42</sup> IBIL Seminar Report, Where are the leaders in copyright law, IPKat, 4 April 2012
- <sup>43</sup> I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 41- 51
- <sup>44</sup> Copyright Council Expert Group, Reform Proposals, 2011
- <sup>45</sup> C Bond, 'There's nothing worse than a muddle in all the world': Copyright complexity and law reform in Australia', UNSW Law Journal, Volume 34(3), 1158
- <sup>46</sup> K Weatherall, Internet Intermediaries and Copyright: An Australian Agenda for Reform, 2011, Australian Digital Alliance, 22
- <sup>47</sup> Department of Attorney-General, Copyright exceptions for private copyright of photographs and films. Review of sections 47J and 110AA, Copyright Act 1968, 2008, 5-6
- <sup>48</sup> (pg 24)
- <sup>49</sup> For example, if modifying the specific exceptions is the favoured approach, the time shifting exception, section 111 should also capture making copies of content made available over the internet as a download or webcast.
- <sup>50</sup> Convergence Review: Final Report, Recommendations 2
- <sup>51</sup> Convergence Review: Final Report, 56
- <sup>52</sup> Copyright and Innovation: A Consultation Paper, Copyright Review Committee Ireland, Dublin 2012, 6, 7
- <sup>53</sup> J Laddie, "Copyright: over-strength, over-regulated, over-rated, European Intellectual Property review, 1996, 18 (5) at 258
- <sup>54</sup> K Weatherall, Fair use, fair dealing: The Copyright Exceptions Review and the Future of Copyright Exceptions in Australia, 20 May 2005
- <sup>55</sup> Recommendation 17, Joint Standing Committee on Treaties, Final Report on the Free Trade Agreement between Australia and the United States of America, May 2004
- <sup>56</sup> Hargreaves Review 45, ALRC Issues Paper para 281
- <sup>57</sup> Copyright and Innovation: A Consultation Paper, 113
- <sup>58</sup> Copyright and Innovation: A Consultation Paper, 35
- <sup>59</sup> Copyright and Innovation: A Consultation Paper, 114
- <sup>60</sup> I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, 44
- <sup>61</sup> Google has relied on the fair use legal doctrine to defend its search engine. For example, *Field v Google* 412 F Supp 2d 1106 (D Nev 2006).
- <sup>62</sup> Section 107.
- <sup>63</sup> R Ghafele & B Gibert *The Economic Value of Fair Use in Copyright Law. Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore*, Oxfirst Limited, October 2012
- <sup>64</sup> Maintaining relevance in a changing world: an interview with WIPO Director General Francis Gurry, WIPO [http://www.wipo.int/wipo\\_magazine/en/2012/05/article\\_0001.html](http://www.wipo.int/wipo_magazine/en/2012/05/article_0001.html)