

TELSTRA CORPORATION LIMITED

Submission to the Australian Law Reform Commission's Issues Paper - *'Copyright and the Digital Economy'*

November 2012

INTRODUCTION

Telstra Corporation Limited ('Telstra') welcomes the opportunity to provide input to the Australian Law Reform Commission's (ALRC) Inquiry into '*Copyright and the Digital Economy*'. We also appreciate the consultative approach that has been adopted by the ALRC.

As Australia's leading telecommunications and information service company, Telstra provides customers with an integrated experience across fixed line, mobiles, broadband, information, transaction, search and pay TV. Telstra is Australia's leading Internet Service Provider (ISP), offering retail internet access nationally, along with a range of online and mobile content and value added services. Telstra also provides wholesale services to other ISPs.

Telstra has an extensive intellectual property portfolio, including copyright works, trade mark and patent rights in Australia and overseas. At times Telstra is a rights holder, licensor, licensee, user and intermediary of copyright works and our customers are enthusiastic consumers of digital content. Telstra is therefore uniquely placed to understand the challenges and opportunities presented by Australia's copyright laws.

SUBMISSION

This submission addresses only those aspects of the ALRC's Issues Paper that are of particular interest or concern to Telstra and our customers.

Telstra supports a robust and flexible copyright system that:

- stimulates innovation, encourages the creation and consumption of content across technologies and devices, and grows the digital content market;
- maintains the delicate balance between all stakeholders - rights holders, users and intermediaries;
- increases legal and commercial certainty and reduces transaction costs; and
- recognises the Internet as a vital communications, education, social and economic platform.

The rapid proliferation of digital technologies and devices is challenging the relevance and effectiveness of Australia's copyright laws. At the same time, these innovations are driving compelling offers and solutions for customers and creative opportunities for business.

A successful intellectual property (IP) regime should stimulate creativity and innovation, promote collaboration and encourage fair market access. The challenge

is to encourage this growth, while balancing the interests of all stakeholders to ensure a fair and sustainable outcome.

Guiding principles for reform

Question 2 What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

Telstra supports the 8 Guiding Principles for reform, set out in the ALRC's Issues Paper.

In addition, Telstra believes that the following principles should also inform the ALRC's approach to the Inquiry:

- Reform should stimulate innovation. It should encourage the creation and consumption of content across technologies and devices, grow the digital content market and foster the growth of new markets - so that everyone has access to more.
- Reform should not favour the interests of one stakeholder over another, but should maintain the delicate balance between all stakeholders. These include traditional copyright stakeholders - rights holders and users - and new digital stakeholders - intermediaries, who may include ISPs, search engines, web hosts and e-commerce entities.
- Reform should not distinguish between technologies, but should instead focus on the *intention* or *purpose* for which activities are undertaken. For example, the outcome of an action undertaken for commercial exploitation and an action undertaken for private and domestic use should differ.

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?

As the ALRC has noted in paragraph 48 of its Issues Paper, internet intermediaries (and others) rely on essential internet functions (like caching and indexing) for their efficient operation. These functions:

- improve the performance and speed of networks - they're often instantaneous;
- improve an intermediary's ability to manage network issues (such as congestion); and
- improve an intermediary's ability to meet customer expectations for content display and delivery.

Examples of internet (or network) related functions in this context include:

- re-encoding content for a mobile device - which given their small size require small pixelation of visual images and reduced network footprint;
- system-level proxy caching – as noted in paragraph 55 of the Issues Paper, it's not clear to Telstra why only educational institutions¹, and not all legitimate users, are protected in this context;
- data deduplication – to compress data and eliminate the need to make duplicate copies of repeating data; and
- interoperability functions between carrier networks.

These networks functions may cause multiple copies of works to be made and may be the result of a user action (eg; when a user enters a search query and the search engine displays a cached version of the result); or the result of a machine action (eg; an automated process to retrieve and store a webpage in anticipation of a user's access request). They occur nearly everywhere across a network, hardware and software. At a low level, they can take place within microprocessors, memory chips, disk drives, routers, and storage. At a higher level, they may occur in applications on files and other data objects.

These type of functions are not static, they will continue to evolve and change over time as technologies and networks develop and the interactions between networks, programs/applications, devices and user requirements grows.

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?

Telstra believes that network related functions should be an exception to copyright infringement. Telstra supports a *purposive* approach, whereby reproduction and communication of copyright works as part of a pure network function (and not for the purpose of commercial exploitation) are exempted. The exception should be broad and flexible, to recognise the ongoing (and desirable) evolution of network operations.

¹ s200AAA Copyright Act 1968 (Cth)

In Telstra's view, the current law is out of step with industry expectations and practices.

Telstra notes that the Issues Paper refers to three overseas approaches to this issue, in:

- Europe - Article 13 of the European E-Commerce Directive
- New Zealand - s92E *Copyright Act 1994 (NZ)*
- Canada – *Copyright Modernisation Act, C-11 2012 (Canada)*

While these approaches are of interest, in our view they remain device/technology centric and therefore risk becoming obsolete as digital technologies and functions continue to evolve.

Telstra doesn't support amending the existing exceptions, for example s116AB Copyright Act 1968 (Cth), to try to define '*internet related functions*'. We don't believe this is a flexible approach, as redrafting based on today's technical knowledge and standards is likely to render the exemption obsolete in the context of future innovations.

Our preference is for network related functions to be encompassed in a general 'fair use' exception (as discussed below), or as a specific example of a fair use.

Alternatively, if a general 'fair use' exception is not implemented in Australia - network related functions should be recognised as a specific fair dealing exception. The exception should focus on the *purpose* for which the function is undertaken and not the function (or technology) itself.

In either case, the exception should recognise that multiple reproductions and communications are likely to occur – the current exceptions in ss43A, 43B, 111A and 111B of the *Copyright Act 1968 (Cth)* contemplate a single reproduction and copy only.

CLLOUD COMPUTING

Question 5 Is Australian copyright law impeding the development or delivery of cloud computing services?

Telstra welcomes the Full Federal Court's decision in the Optus TV NOW case². We believe the decision is a positive one, both for the protection of intellectual property rights and for cloud computing as a commercial offer. It provides the various stakeholders with guidance and recognises the delicate balance of interests which copyright law seeks to protect.

² *National Rugby League Investments Pty Ltd v Singtel Optus* 2012 201 FCR 147

Telstra strongly believes that cloud computing services are an important (and natural) innovation in a digital context. They are an increasingly important and common means for users to receive, store and access content, including copyright material. Content is stored on remote servers and can be accessed through a variety of devices. These type of services also complement the community's interest in sustainable, secure and environmentally sympathetic data storage solutions.

While we welcome the Court's decision, it is expressly restricted to its facts. In particular, to the nature and operation of Optus' technology, and the relationship between Optus and its customers.

The Full Federal Court acknowledged that different technologies and relationships could lead to a different conclusion; eg, as to 'who makes the copy'. It therefore doesn't follow from the decision that cloud operators will automatically be found to have copied content that is uploaded to their services – liability will depend on what the cloud operator does and how the operator does it. Liability will also depend on whether the content being stored was legally acquired.

We believe that Australian copyright law could be strengthened so that cloud service providers better understand what business models and technologies will infringe copyright, and copyright owners better understand what is permissible. Lack of certainty may impede the development and delivery of Australian cloud computing services.

We therefore support additional reforms that balance support for content technologies and respect for rights holders works and commercial licensing arrangements.

Question 6 Should exceptions to the Act be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

Telstra has commercial interests as both a cloud operator and a licensee of exclusive content. Our customers also are enthusiastic consumers of legal content, which they want to receive, store and access on a wide range of devices. Accordingly, we are uniquely placed to appreciate the need to accommodate and respect the interests of cloud operators, content owners and users.

A balance must be achieved between supporting and encouraging the continuing development and adoption of content technologies, and respecting content ownership and commercial licensing practices.

This balance may be achieved by reforms which:

- Provide certainty for all parties – we believe there’s a clear distinction between *merely* providing a content storage facility (for legal content) and commercial exploitation of copyright works. The law should make it clear that entities that merely offer cloud based storage (or digital locker) services do not infringe copyright. In particular, the necessary technical functions of reproducing or communicating legal content, by storing it in and accessing it from a cloud (either by a customer, or at the customer’s request) must not expose cloud operators to allegations of copyright infringement.
- Promote freedom and flexibility for customers to store and manage legally acquired content on different devices, using different technologies, at a time and place convenient to them - this supports digital innovation and is a neutral approach to copyright policy, alleviating the need to consider when a user is accessing content in a ‘domestic’ context.
- Maintain the integrity of copyright rights and licensing regimes (including exclusive licensing regimes) – the protection and recognition of copyright works is an important way of stimulating innovation, as is the well recognised practice of copyright licensing. Content stored in and accessed from a cloud facility must be legally acquired content.

At this point, we feel it’s important to raise the issue of the copyright safe harbour schemes for Carriage Service Providers. While we understand that safe harbours *per se* are outside the scope of the ALRC’s Terms of Reference, we believe that they are an integral part of any discussion about copyright exceptions in the context of cloud computing.

Telstra feels strongly that if a cloud service provider is doing *nothing more* than providing a digital locker service for a customer, and the customer uses the service to store and share illegally acquired copyright material, then the service provider should be exempt from liability, by virtue of appropriate safe harbour provisions.

For completeness in the context of cloud computing - see also our comments below in response to Questions 9 and 10 (relating to making a copy of legal copyright material by an individual, or by a service provider on behalf of an individual, for the purpose of cloud storage or back-up.)

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?

Telstra believes that the current private and domestic use exceptions should be clarified and simplified, with an emphasis on encouraging the creation and consumption of legally acquired content across technologies and devices.

Telstra supports a copyright regime that stimulates innovation. There is an ever increasing range of digital devices – like smart phones, tablets, webcams, MP3 players, televisions, game consoles and GPS trackers - which enable and encourage customers to access and engage with content when, where and how the customer chooses. Copyright law must foster and stimulate this type of innovation, and must not seek to artificially restrict it. At the same time, it's important that copyright owners' works are legally acquired. The aim is to grow the market for legal digital content, to foster growth of new markets enabled by new technologies - so that everyone has access to more.

The current law relating to copying for private and domestic use (including the exceptions relating to format and time shifting) are difficult to understand. They are also out of step with current and likely future customer expectations and practices. We believe that private and domestic use of legally acquired content, leveraging new technologies to access the content in a form, or at a time that is convenient for the customer, should be permitted on a broader basis.

Question 8 The format shifting exceptions in the Act allow users to make copies of certain copyright material, in a new (e.g. 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?

Where content has been legally acquired, our customers have an expectation that they will be able to listen to, or watch it, on any of the digital devices they own – importantly, when and where it suits their lifestyle. Telstra believes this is a

legitimate expectation and that we should be encouraging innovations to facilitate delivery of more legally acquired content in a flexible, personal use context. We appreciate that some content owners already licence customers to make multiple copies of copyright material, so the customer can access the content on any of his/her devices for the customer's private and domestic use (enjoyment)³. We support this approach, however it's not uniformly adopted.

As the private use exceptions are largely directed to our customers, Telstra is particularly concerned that they should clearly articulate what our customers can and cannot do with their legally acquired content. In our view, the current exceptions are complex and difficult to navigate. We would therefore welcome reforms to provide our customers with greater certainty in this area.

Telstra submits that the current format shifting exceptions should be expanded and simplified. While the Canadian model⁴ is yet to be proclaimed and therefore tested, it appears to be a reasonably simple and technology neutral approach to the issue.

Telstra's preference would be that copying of legally acquired copyright material for private and domestic use should be encompassed in a general 'fair use' exception (as discussed below), or as a specific example of a fair use.

Alternatively, if a general 'fair use' exception is not implemented in Australia - copying of legally acquired copyright material for private and domestic use should be simplified and consolidated into a single fair dealing exception.

Question 9 The time shifting exception in s111 of the Act allows users to record copies of free-to-air broadcast material for their own private or domestic use. Should this exception be amended and, if so, how?

Telstra believes that clarification of the time shifting exception in s111 is required. In particular, there must be a distinction between:

- legal recordings made by a customer using their own technology and later stored on a remote server; and
- recordings made by entities, not licensed by rights holders, and stored on remote servers for subscribers to access.

³ As discussed at paragraph 77 of the Issues Paper

⁴ Discussed in paragraph 79 of the Issues Paper

Telstra submits that only the former category of recordings should be covered by the time shifting defence in s111. The latter category is a commercial exploitation of the content and must require a licence from the content owner.

Question 10 Should the Act be amended to clarify that making copies of a copyright material for the purpose of a back-up or data recovery does not infringe copyright? If so, how?

The ability to make digital copies of material for the purpose of back-up or data recovery is an important activity and safeguard in a digital context and (as discussed in the context of Question 5) complements the community's interest in sustainable, secure and environmentally sympathetic data storage solutions.

Telstra believes that the *Copyright Act 1968 (Cth)*, and in particular section 47C, does require clarification and expansion to ensure that making copies of copyright material for the purpose of back-up or data recovery is exempted from copyright infringement. The exemption should not apply where the activities are undertaken for the purpose of commercial exploitation.

If a general 'fair use' exception is implemented in Australia – we believe it should be expressed to encompass back-up and data recovery copies (as outlined above) without the need for a specific exception.

If a 'fair use' regime is not implemented in Australia - a specific exemption should be introduced to allow copies of legally acquired material to be accessed by an individual, or a service provider on behalf of an individual, for the purpose of back-up or data recovery.

In either case, the exception should allow cloud service operators to 'back-up' material on behalf of an individual. In this way, cloud service operators could store legally acquired content on behalf of their customers. Service providers should not however be permitted to commercially exploit material under the protection of a private use exception.

DATA AND TEXT MINING

In Telstra's view there must be a clear distinction between undertaking these type of activities for commercial exploitation – which should not be allowed – and undertaking the activities for purposes such as census or statistical analysis.

If the ALRC considers it appropriate to explore this type of reform, we strongly urge that careful consideration be given to the *purpose* for which the activities are undertaken. Telstra does not support reforms to the *Copyright Act 1968 (Cth)* to provide a general exemption for the use of copyright material for text, data mining and other analytical software.

While Telstra recognises that there may be instances (such as those highlighted by the ALRC in paragraph 170 of its Issues Paper) in the context of education, research and culture, when data mining activities may be of statistical or educational value, we would be very concerned by any reform to allow the use of data and text mining tools or software for commercial exploitation.

The following is an example of the type of activity which is of concern to Telstra - an offshore data-miner 'scrapes' (or copies) data from an online Australian database, such as a telephone directory. The data-miner then uses the scraped content to establish a competing business, without the need to source, verify, supplement or format the content. The data-miner also avoids the need to employ Australian staff, or to invest in the creation or development of the content.

This type of data mining activity can have broader consequences than copyright infringement, including for example privacy breaches. For example, where an individual elects to remove their personal information from a public database, but the information has been scraped and copied by a data-miner, the individual loses control of the information privacy. While database owner may be able to quickly update its content, an unauthorised data-miner may have no interest or incentive to do so – which could leave, for example, private information available (and searchable) in a public context.

RETRANSMISSION OF FREE TO AIR (FTA) BROADCASTS

Telstra supports the current regulatory framework for retransmission of FTA broadcasts. In our view the current framework facilitates consumer choice and technology neutrality and ensures underlying rights holders are properly

remunerated. For the same reasons Telstra supports the simple extension of the existing regime to internet services.

Telstra doesn't believe that it should be necessary to introduce a specific geo-blocking condition for internet retransmission, because an organisation taking advantage of the scheme to retransmit FTA content over the internet can only obtain a copyright licence for the relevant licence area (ie; within Australia), and so would be bound to make whatever technical arrangements are necessary to restrict its supply to that licence area.

FAIR DEALING & FAIR USE EXCEPTIONS

Telstra supports the introduction into the *Copyright Act 1968 (Cth)* of a flexible *fair use* exception. Telstra also submits that, broadly speaking, many of the existing exceptions in the Act (including the current fair dealing provisions) should be retained within the Act as examples of uses that would be regarded as *fair*, but on the basis that their retention would not limit the application of the proposed fair use exception.

Given the nature of the digital economy, the flexibility offered by a broad fair use exception is of significant importance to Telstra and our customers. In the United States, it has been said by US Courts that the *fair use* defence contained in section 107 of the US Copyright Act "*permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster*".⁵

The significant advantage of a broad fair use exception, particularly when compared with the suite of current 'closed' fair dealing exceptions, is that the current exceptions are generally created in response to existing technologies, economies and circumstances. As a result, they tend to have a narrow 'patchwork' application to circumstances existing at the time the exception is introduced. On the other hand, a more flexible exception regime is better suited to future technologies, economies and circumstances - that don't yet exist, or haven't yet been foreseen.

The flexibility of a fair use exception is illustrated by a number of cases in the US where activities that should not, it is submitted, reasonably amount to an infringement have been found by the US Courts to amount to a fair use. These include, for example:

⁵ See *Campbell v Acuff-Rose Music Inc.*, 510 US 569, 577 (1994); *Stewart v Abend*, 495 US 207, 236 (1990); *Iowa State Univ. Research Found. Inc., v Amercian Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980)

- *Caching* – in 2006 Google was held not to be liable for infringement for the indexing and caching of material uploaded to the internet as caching was a fair use⁶.
- *Time shifting* – since the *Betamax Case*⁷ in 1985 it has been the case that recording a free to air broadcast on a personal video recorder for watching at a later time would be regarded as a fair use.
- *Format or 'space' shifting* – since 1999 it has been held that non-commercial, personal conversion of music files contained on Compact Discs to .mp3 format ("space-shifting") would be a fair use⁸.

It is interesting to note that all the above activities amounted to infringement of copyright in Australia, until more recent amendments to the Act were introduced - and in the case of caching, still does infringe in many cases.

Fair use under the US Copyright Act

Although section 107 of the US Copyright Act does not define *fair use*, it contains illustration in its preamble of the types of activities that are likely to be fair use and, importantly, sets out a four factor test in determining whether a use is fair or not. The four factors include:

- The purpose and character of the use - including whether such use is of a *commercial nature*
- The nature of the copyright protected work
- The amount and substantiality of the portion used in relation to the work as whole
- The effect of the use on the potential market for or value of the copyright protected work

The principal argument advanced by opponents of a fair use exception is that its introduction would lead to a long period of uncertainty, characterised by increased litigation to establish precedent and guidance. At first blush it might appear that a regime of specific exceptions does provide greater certainty. It is also true that as the body of case law in the US illustrates, conflicts may occur as the boundaries of the doctrine are applied to specific fact scenarios. However this has also proved true of Australia's current regime of fair dealing and specific exceptions which have provoked a great deal of conflict and uncertainty.

Telstra believes that the introduction of a fair use exception need not result in unacceptable uncertainty. In this regard, Telstra notes the extract by Matthew Sag

⁶ *Field v Google* 412 F.Supp.2d 1106 (2006) District Court for the District of Nevada.

⁷ *Sony v Universal City Studios* 464 US 417 (1984) US Supreme Court;

⁸ *RIAA v Diamond Multimedia Systems* 180 F.3d 1072, 1079 (1999);

included in the Issues Paper⁹ where he argued that his work '*demonstrated that the uncertainty critique is somewhat overblown: an empirical analysis of the [US] case law shows that, while there are many shades of gray in fair use litigation, there are also consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection*'.

Assuming any new fair use exception took a form similar to the US provision, Telstra believes that there would be significant guidance provided, firstly, within the statutory provision itself and, secondly, within the body of US case law that already exists.

Existing fair dealing exceptions under the Copyright Act 1968 (Cth)

As mentioned above, Telstra submits that the existing fair dealing exceptions should be retained, within a broad fair use exemption, as examples of uses that are *fair*. Retaining the existing fair dealing exceptions would provide continuity in relation to activities that the Australian Courts have previously decided fall within the specific fair dealing exceptions. Similarly, there are a number of other specific exceptions that could be included as examples of uses that are fair, such as internet related functions (as discussed above).

⁹ M Sag, "*Predicting Fair Use*" (2012) 73 Ohio State Law Journal 47.