

**Internet industry Association**

**Response to**

**Australian Law Reform Commission**

**Issues Paper**

**Copyright and the digital economy**

**November 2012**

The Executive Director  
Australian Law Reform Commission  
GPO box 3708  
Sydney New South Wales 2001

E-mail: [info@alrc.gov.au](mailto:info@alrc.gov.au)

Dear Sir or Madam,

## **Copyright and the digital economy**

The Internet Industry Association (IIA) of Australia is delighted to make the following submission in response to the Australian Law Reform Commission (ALRC) Issues Paper "Copyright in the Digital Economy". The IIA has chosen not to submit on every issue raised by the Issues Paper but instead to focus on those issues relevant to its members.

**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;*

One of the most significant impacts of the Internet on the Australian economy is that it creates a global market for the supply of goods and services, introducing trade exposure to markets traditionally regarded as "domestic". Most recently the significant growth in online purchases appears to be impacting the domestic retail industry by exposing local shops to lower prices from online stores based in Singapore, Hong Kong, the US and, for some products, the European Union. Australian businesses have a comparative disadvantage in the supply of many physical products compared to foreign suppliers who are based closer to much larger markets. This is because, in many cases, economies of scale can produce wholesale and retail price discounts higher than the cost of air freighting the goods to Australia.

Australian-based retailers must buy smaller quantities, maintain facilities that supply a smaller domestic market and are not able to discount at a level which would make airfreight to foreign markets from Australia competitive. Ultimately, it is cheaper to buy certain products overseas and to pay the cost of transport instead of paying the higher costs associated with domestic suppliers.

In our view, these circumstances substantially increase the importance of copyright to the Australian economy. Australia has no comparative disadvantage in the creation and supply of digital works and subject matter other than works protected by copyright.

Examples of successful Australian businesses active in the supply of apps to the global market include, but are not limited to:

- Halfbrick Studios, based in Brisbane, has had global success with its app "Fruit Ninja" which generates \$1 million a month in revenue and has been downloaded more than 350 million times; and

- Firemonkeys, based in Melbourne which is responsible for the highly popular apps “Real Racing” (which was the racing game that featured in the very first iPad advert) and “Flight Control”.

*(b) affects the introduction of new or innovative business models;*

The lack of an open ended fair use right in Australia is widely believed to have impacted the creation of new online businesses in Australia.

The fair use right, which exists in US law, has supported the creation of a number of new businesses in the US. Indeed, the concept of the "Fair Use Economy" is widely recognised and encompasses many of the US's leading industries and companies. In 2011, the Computer and Communications Industry Association estimated that between 2002 and 2006, the fair use economy was worth \$4.4 trillion (one sixth of US GDP). Furthermore, despite the widespread negative effect of the economic downturn, the fair use economy remained steady<sup>1</sup>. The biggest examples of companies being able to develop and continue based on fair use are, unsurprisingly, Google and Amazon. As discussed more fully below, the US fair use right is relied upon as the basis for making persistent copies necessary to support search engines and to assist in reducing the cost the transit by copying over the Internet.

The "fair use economy" is also evident in the EU – in 2007, the Computer and Communications Industry Association found that industries relying on exceptions and limitations to copyright amounted to €1.1 trillion or 9.3% of GDP<sup>2</sup>.

*(c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or*

The lack of a licence regime around, for example, the retransmission of free to air television, has prevented the number of international businesses that supply television services over the Internet from acquiring and retransmitting Australian television.

The very limited nature of the rights to copy for the purpose of reverse engineering (s47B and s47D) is also an impediment to those wishing to study code in order to create new and/or interoperable systems. Note in particular that the *relevant provisions do not permit* reproduction for the purpose of testing interoperability.

As discussed further below, the recent case relating to Optus' TV Now service (*National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59) is an example of copyright law preventing the introduction of a new service based entirely on the technology used to deliver the service rather than any material difference in the nature of the copying taking place.

*(d) places Australia at a competitive disadvantage internationally.*

A number of countries around the world have recognised the importance of creating a flexible copyright regime that allows digital works to be stored, communicated and managed

<sup>1</sup> <http://www.cciagnet.org/CCIA/files/cclibraryFiles/Filename/000000000526/CCIA-FairUseintheUSEconomy-2011.pdf>

<sup>2</sup> <http://www.cciagnet.org/CCIA/files/cclibraryFiles/Filename/000000000653/FairUseEUstudy.pdf>

and where the purpose of extraction of information (often by third-party service providers) does not infringe copyright. For example, Canada's 2011 Copyright Modernization Act introduced fair dealing provisions into the Copyright Act of Canada. In January 2005, Singapore adopted a flexible fair dealing provision based on the US fair use provisions.

### **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?*

The IIA endorses the guiding principles mentioned in the ALRC's Issues Paper. It is widely agreed that the Copyright Act 1968 (Cth) (**Act**) contains many provisions designed for specific cases and circumstances that appear to apply similar fundamental principles. This makes the Act difficult to penetrate, even for specialists. Ordinary Australians and Australian businesses have little chance of working with the Act day to day and being confident of the meaning and breadth of the provisions, or even that they have found all of the provisions that might be relevant to a particular issue. Accordingly, the IIA strongly urges the ALRC to emphasise simplification as a guiding principle for reform.

The Act should express clear principles and mechanisms that can be applied to a range of circumstances. The Act should also be technology neutral to the maximum extent. Provisions that allow exceptions and/or rights of use and/or statutory licences should not be granted in relation to only one or a varying range of copyright rights or limited in any way to technologies or formats.

### **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?*

The IIA agrees that caching and indexing are good examples of everyday activities by online businesses that are not properly addressed by existing copyright law. Every major Internet Service Provider (**ISP**) that delivers traffic to Australian customers operates a system designed to anticipate popular content, retrieve copies and maintain that content in anticipation of requests from and delivery to its customer base. The purpose of this kind of persistent caching is to reduce the cost of transmission of international traffic to Australia. The copies maintained by ISPs are not exploited commercially or used in any way except for the purpose of reducing transmission costs and speeding up the time to deliver Internet content to customers.

Persistent copies are also used by search engines to analyse and index information on the Internet, and to make copies of commonly searched information available as quickly as possible. In this case the purpose of copying is a type of data mining. The search provider is not interested in exploiting the copyright work in any way except to make readily accessible the information contained within the work and to make the work accessible to those who can make use of it or the information it contains.

**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?*

The IIA would strongly support the change from the existing safe harbour regime expressed in Part V, Division 2AA of the Copyright Act to a regime closer to section 200AAA of the Act, whereby persistent copies are permitted for non-commercial purposes (in the sense of not being related to exploitation of the copyright in the work itself). It is in the public interest for information on the Internet to be indexed, categorised and made available by search engine technology. It is also in the interests of the Australian economy that access to content stored on the Internet overseas is made available within Australia as cheaply and quickly as is technically feasible. Copyright should not create a barrier to systems by making service providers infringe copyright in order to deliver their service. Even though the safe harbour regime may protect ISPs from monetary damages provided they respond quickly to any complaints they might receive, in practice, very few complaints are ever received and, should they be, selective taking down or removal of content from the systems would be expensive and, in our view, not the kind of activity copyright law was intended to facilitate.

### **Cloud computing**

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

The decision in a *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 is of deep concern to providers of cloud services in Australia. The IIA understands that one of the reasons given by the High Court for not granting leave to appeal the decision was that the court doubted that the case would have broad application due to the specific details of the facts involved. However, the Federal Court decision includes a detailed discussion of what it means to "make" a copy using digital technology. The discussion of findings of the court in that case are directly contrary to the approach taken by Cowdroy J in the iiNet decision (*Roadshow Films Pty Ltd & others v iiNet Ltd (No. 3)* [2012] FCA 24).

In the iiNet case, in the context of copies made using a file sharing network, the court recognised that sophisticated distributed software using a range of computer technology can operate to generate a copy of a copyright work, however the party responsible for the making of a copy is found to be the person who gives the instructions to the software that sets technology in motion to make the copy. In contrast, the Full Federal court in the Optus TV Now decision has determined that the provider of a cloud service can be the maker of an infringing copyright work if its role in the making of the copy is "pervasive" or "innate".

The IIA respectfully submits that the approach of the Federal Court in this regard has at least the following difficulties:

- It is not technology neutral. The IIA doubts whether the court would have found that the copies made in a conventional personal video recorder or the set-top box of a subscription television or IPTV service that facilitates time-shifting (some of which are leased to the customer as part of a wider service) involved the vendor of the product or supplier of the set-top box as a joint maker of the copies made by the technology.
- It is vague regarding the line between supply of service, where copies are made by the user alone, and services where the copies are made jointly or by the service

provider. The alternative paradigm, whereby the user that instructs software, or a device, to make a copy is the maker, is simple straightforward and easy to apply. It permits service providers to develop cloud-based services and offer them to users and users to exercise their statutory rights to make copies by deploying this technology. The "pervasive" test in the Optus TV Now decision creates an unacceptable level of uncertainty regarding the operation of the law in relation to new systems.

- It creates a barrier to the adoption of cloud technology. Cloud technology is having a major impact on information technology services globally. The essence of cloud technology is that a remotely located specialist facility aggregates customer requirements and can provide processing, storage and specific services much more efficiently and cheaply than individual devices and/or facilities maintained by the customer. The most sophisticated and most useful services are those which anticipate the needs of the customer and which can provide analysis and guidance regarding the solution delivered. Consider, for example, the expanding role of online backup services. Many users prefer to back up their valuable information to the cloud rather than trusting a local storage device that might fail, will be lost or may be stolen. The most sophisticated online backup services are capable of identifying content by file type and also by identifying new content without that content being dominated by the user. Applying the logic of the full Federal Court decision in Optus TV Now, a service whereby the user nominates each new item of content and backs it up to the cloud is probably a service where the service provider does not have a "pervasive" role in the copying. On the other hand, a more sophisticated service that assists the user by automatically selecting content to be backed up on a regular basis may involve the service provider as the maker of the copies and thereby take the backup outside the use of statutory right.

**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?*

Yes. The IIA advocates including a provision in the Act to ensure that users can enjoy fair dealing exceptions and other exceptions to copyright infringement expressed in the Act by using cloud services. The provision might include the following elements:

- a statement that the Act is intended to be technology neutral and must be interpreted in a technology neutral manner;
- a provision which provides that the maker of a copy using an online service is the person that instructs the service to make the copy and that the fact that a single instruction may cause a number of copies to be made does not change this outcome; and
- a provision which provides that a user may exercise their fair dealing rights and other exceptions to copyright by deploying an advertiser supported service, a service licensed, leased or rented for a commercial fee, and whether or not they pay a technology provider for other facilities such as storage capacity, processing power or speed.

## **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?*

To the extent that this question goes to whether or not the law, as determined by the TV Now decision, should be revised, the IIA has responded above.

In July 2010, the IIA, in its manifesto on "Principles for a Digital Economy" recognised that the *Copyright Amendment Act 2006* (Cth) expanded fair dealing rights and new exceptions in relation to restricted media, including time-shifting, place-shifting and format-shifting, solely for private and domestic use. However, it also stated that the legislation did not address all of the issues raised in the consultation, in particular on the general right to fair use. The IIA continues to support the views expressed in its Principles for a Digital Economy manifesto.

**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. It's worth considering whether these exceptions should 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?*

Yes. The existing regime of format specific personal copying rights is confusing and unnecessary. The IIA submits that users should be permitted to make copies of digital content in the cloud and on other personal devices for personal use and convenience. There is very limited financial value associated with personal copies made for convenience. In most cases, copyright owners are not in a position to prevent the duplication of digital files supplied to users and, accordingly, users are unlikely to pay for the right merely to conveniently enjoy material that they have already paid for.

**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?

Please see our response to question 5 above. The IIA submits that it should matter who makes the recording and the law should be clear that the party directing the system to make a recording is the "maker" not the person who designs and offers the service as a facility.

However, the IIA believes the limitation to allow time shifting for private or domestic use is appropriate. Although the IIA is in favour of technological neutrality, the question of whether time shifting rights should apply to Internet protocol television is complicated by the fact that Internet protocol television is usually supplied as a proprietary subscription service not as a free to air broadcast like conventional TV.



The IIA considers that the time shifting right should be limited to advertiser supported free to air television and not to be extended to subscription-based services. However it follows that if advertiser supported television would be made available on the Internet (without payment of a subscription) the time shifting right should apply.

**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?*

Yes. The section relating to the making of backup copies should be amended to remove any distinction between forms of digital content. Currently, s47C of the Act permits the back up of computer programs, and 'any work or other subject matter held together with the program on the same computer system'. This exemption means that there is no provision in the Act that allows for the backup of all copyright material generally or any other specific type of copyright material. This is limiting and unpractical in the current digital age as it is an unfortunate feature of modern digital devices that they can be lost or damaged and/or storage can fail. Solid-state memory is known for losing capacity over time. All hard drives will eventually crash. Accordingly, the ability of users to secure purchased content such as music, movies, books and valuable photographs should be facilitated by copyright law. The making of a backup copy is the natural and prudent act of an owner of digital content reasonably necessary to manage risk. Backing up should not require a further permission of the copyright owner and should not be restricted as to the technology used or the place where the stored copy is made or held.

### ***Online use for social, private or domestic purposes***

**Question 11:** *How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?*

Many activities that previously took place face-to-face now take place over the Internet. For example, the sale of an item using an advertisement in a newspaper usually involved the buyer coming to inspect the product before agreeing to make an offer or purchase. Items are now often sold over the Internet without the buyer ever coming to inspect the product. Instead, the buyer relies upon digital photographs of the item, technical specifications and the rating of the seller by other buyers. In this context, literary and artistic works embodied in the advertisement may be infringed by the making and publishing of photographs of the item.

Another example is where photographs are posted on social media sites to share experiences. These photos can also infringe copyright of items, purposefully or incidentally.

As mentioned above, digital property such as software, music, movies, television shows and, less commonly photographs, that would have been stored on a home PC or portable hard drive are now stored in the cloud. Backup copies which once would have been made by the user on the user's own hardware is now often made at the direction of the user on hardware and maintained by a service provider in the cloud, possibly outside Australia.

**Question 12:** *Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?*



The IIA submits that copying for personal use including storage, backup and disaster recovery should be permitted without infringement of copyright. The provision permitting such copying should be technology neutral. Copying should be permitted whether or not the user owns or licences the device on which the copy is stored or merely buys storage as a service from a third party. The number of copies that might be made in exercise of this right should not be limited. However it should be a condition that the copies should not: be exploited for commercial gain, made available to copying by third parties, or be used for any other purpose outside the limits of the personal use statutory licence.

**Question 13:** *How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?*

The exception proposed should be solely for private and domestic non-commercial use. The further conditions that it does not conflict with the normal exploitation of copyright material or unnecessarily prejudice the legitimate interests of the owner of the copyright should be reserved for a further exception in the style of "fair use", where the use that could be made might be a commercial use. A party seeking to make a creative commercial use of copyright material would have an incentive to carefully evaluate whether or not the proposed use might satisfy the tests of "no conflict with normal exploitation" and "not unreasonably prejudice the legitimate interests of the copyright owner". However, making this assessment is too complex, and possibly confusing, for an ordinary domestic user.

### **Transformative use**

**Question 14:** *How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?*

Copyright materials are being used in a wide range of transformative ways in addition to the "sampling", "remixes" and "mashups" examples above.

**Question 15:** *Should the use of copyright materials in transformative uses be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?*

The IIA is in favour of allowing users to make transformative uses of copyright works without infringing copyright. For many centuries ordinary people have enlivened their communications by quoting from famous and popular works of literature. In the world of digital media, there is a wide range of content shared by millions of people, many of whom have the tools to record, edit and manipulate the content being consumed. It is an ordinary natural development to permit non-commercial transformative uses in order to enrich the way we communicate.

**Question 16:** *How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?*

This is a complex question which the IIA has not previously considered in any detail. We would however note a recent example regarding the nature of transformative use. An American, Waxy, used a pixelated re-creation of Miles Davis' album cover "Kind of Blue" in a commercial context without the permission of the author of the original artwork. Whilst Waxy maintained that the pixelated re-creation was permissible under the fair use doctrine as it was transformative, the author of the original, however, disagreed and sued for copyright infringement. The case was settled out of court, so the question as to whether the pixelated re-creation was transformative or not was not settled. The action nevertheless raised the issue as to how transformative use is defined.

**Question 17:** *Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?*

The IIA submits that transformative uses should be permitted for personal and domestic (non-commercial) purposes without there being the additional test of whether or not the transformative use conflicts with the normal exploitation of the copyright material or unreasonably prejudiced the legitimate interests of copyright owner. However, there is a case for allowing commercial transformative use, subject to the suggested two-stage test in subparagraph (b) of this question. It is a curious feature of the existing Copyright Act that a fair dealing exception exists for parody and satire however no similar fair dealing exception exists for other forms of creative transformation.

**Question 18:** *The Copyright Act 1968 (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?*

Moral rights may become more relevant due to the increase in content manipulation and transformation. Digital Rights Management, or similar technology relating to digital data identification, may be able to link content to its author, thereby enabling the author to assert their moral rights. However, the use of small but identifiable elements of content by third parties may be considered to undermine, for example, the integrity of the author.

Establishing who the author is may be impossible in such instances and it would be difficult to be able to say that the author approves of the use, albeit minimal, of their content. Moral rights, where applicable, should be technology neutral. The IIA submits that the ALRC should have consideration as to whether moral rights should be applied according to the use of the copyright content, i.e. non-commercial private use moral rights are inapplicable whereas for any commercial exploitation of content the moral rights of the author continue to apply.

***The IIA does not have any comments on questions 19-24 in relation to Libraries, archives and digitisation***

### ***Data and text mining***

**Question 25:** *Are uses of data and text mining tools being impeded by the Copyright Act 1968 (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?*

This is a complex legal question specific to the tools that are used and the practical matter of whether copying of software or another work is necessary in order to extract data stored by proprietary information systems. The complexity of the analysis and assessment required can operate to prevent data mining and therefore the extraction and use of valuable information. It is trite copyright law to say that copyright is intended to protect the expression not the ideas in any particular work. Similarly, copyright should not prevent the extraction of information and its use. The facts in the case of *Ice TV (IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 239 CLR 458p)* provide an example of an attempt to use copyright to control information.

Examples of services that operate in this category are: account aggregation services which compile information from different accounts, such as bank accounts, credit card accounts, investment accounts, and other consumer or business accounts, into a single place (e.g. ANZ Bank with its MoneyManager application and Yodlee with its Yodelee MoneyCentre application), screen scrapers (which scrape visual information (commonly prices) from third-party sites offering competing or similar and present it to users in a consolidated form) and web scrapers (where an API is used to extract data from a website), most common of which are travel sites (e.g. WebJet and LastMinute) and price comparison sites (such as GetPrice and iSelect)

The IIA supports the introduction of either a fair use right sufficiently wide, or a specific exception to allow systems and services that may be making infringing or temporary copies of copyright subject matter for the purpose of extracting information.

**Question 26:** *Should the Copyright Act 1968 (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?*

Yes. The Act should be framed so that it is permissible to make a temporary copy of a copyright work solely for the purpose of analysing and extracting information embodied in or stored by that copyright work.

**Question 27:** *Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?*

A sufficiently wide fair use exception as a substitute to a specific exception may also assist services wishing to engage in text mining or data mining

**The IIA does not have any comments on questions 28-31 in relation to Educational institutions**

**The IIA does not have any comments on questions 32-34 in relation to use of copyright material**

### ***Retransmission of free-to-air broadcasts***

**Question 35:** *Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?*

The IIA does not have a position on whether or not free to air broadcasters should be remunerated for the retransmission of their broadcasts over the Internet. However, the IIA

notes that in many jurisdictions around the world, regimes exist for the compensation of broadcasters when signals are retransmitted, while there are also reciprocal benefits that can be obtained in doing so.

**Question 36:** *Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geo-blocking?*

The IIA sees this question in terms of technological neutrality. The existing regime favours subscription television service providers as against those who might be able to have a similar service possibly supported by advertising over the Internet. Accordingly, the IIA would support the introduction of a licensing scheme retransmission of free to air television over the Internet and, considering the geographic nature of the licence and possible permissions granted by underlying rights holders to free to air TV, agrees that such an expansion of the existing licensing scheme should take place on the basis that retransmitted signals are subject to geo-blocking.

**Question 37:** *Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?*

A question sometimes arises as to whether services delivered using Internet protocol are services that are "over the Internet" and therefore not within the existing statutory licensing scheme for retransmission of free to air by subscription television. This question also arises in relation to streaming video services delivered over mobile devices limited to the customers of a particular telecommunications provider. The prevailing view is that even where a service uses Internet protocol and content is delivered to subscribers using the Internet, it is nevertheless not "over the Internet". The rationale being that a necessary feature of the Internet is that it is accessible by users throughout the world and therefore services that require a set-top box or are only accessible within a walled garden are not "over the Internet" even if the internet is used for delivery. The IIA believes that there would be some advantage in clarifying the existing regime in line with the common understanding so as to remove any doubt as to which services are within and which are outside the existing framework.

**Question 38:** *Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?*

The IIA observes that any recommendations made by the ALRC will be carefully considered by the government and further investigations (at least by Parliamentary Committees) and reports are likely to be obtained before changes are implemented. Accordingly it is appropriate for the ALRC to look at the questions proposed in the context of growth of the digital economy and the guiding principles of its reference in order to provide input on this aspect of the issues relevant to any change.

**Question 39:** *What implications for copyright law reform arise from recommendations of the Convergence Review?*

The IIA has no comment on this issue.

## ***Statutory licences in the digital environment***

**Question 40:** *What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?*

The IIA urges the ALRC to consider the range of search and transaction services available on the Internet and take into account how the tools made possible by the Internet can be brought to bear to make the owners of rights easier to find, and help make transactions related to those rights faster and more efficient. The range and diversity of rights that can subsist in particular in, for example, a sound recording or a movie are immensely complex and made more difficult by the range of organisations appointed to represent different rights holders. This review represents an important opportunity to consider ways in which digital technology might reduce this complexity.

***The IIA does not have any comments on questions 41-44 in relation to statutory licences in the digital environment.***

## ***Fair dealing exceptions***

**Question 45:** *The Copyright Act 1968 (Cth) provides fair dealing exceptions for the purposes of:*

- (a) research or study;*
- (b) criticism or review;*
- (c) parody or satire;*
- (d) reporting news; and*
- (e) a legal practitioner, registered patent attorney or registered trademarks attorney giving professional advice.*

*What problems, if any, are there with any of these fair dealing exceptions in the digital environment?*

There is inconsistency between the fair dealing exceptions as to whether there must be attribution and in relation to the extent of copying permitted. Changes to improve the consistency and certainty of the operation of these provisions would be welcomed.

**Question 46:** *How could the fair dealing exceptions be usefully simplified?*

The fair dealing exceptions should encompass all the exceptions to copyright infringement in the Act. The exceptions that are only for personal and domestic use should be separated for those where the purpose of the use of the exception is not a factor. As far as reasonably possible each fair dealing right should apply to the same set of rights and be subject to the same conditions.

**Question 47:** *Should the Copyright Act 1968 (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?*

The IIA supports the introduction of an exception for data extraction, persistent copies and personal and domestic transformative use.

### ***Other free-use exceptions***

**Question 48:** *What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?*

The IIA has no comment on this issue.

**Question 49:** *Should any specific exceptions be removed from the Copyright Act 1968 (Cth)?*

No.

**Question 50:** *Should any other specific exceptions be introduced to the Copyright Act 1968 (Cth)?*

See the answer to Q47.

**Question 51:** *How can the free-use exceptions in the Copyright Act 1968 (Cth) be simplified and better structured?*

The IIA has no comment on simplified or better structure free-use exceptions in the Act at this time.

### ***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?*

Yes. However, the test should not be based on a broad concept of reasonableness or fairness. It should be based on whether the use is economically or socially valuable but does not derogate from the economic interests of the copyright owner

**Question 53:** *Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?*

No. The IIA does not support replacing existing fair dealing rights with broader fair use type right. The IIA believes a broad fair use right should be added to the specific exceptions because this would preserve the value of existing precedent and provide maximum clarity.

### ***Contracting out***

**Question 54:** *Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?*

No. The IIA is concerned that users may be forced to give up rights granted by the Act in circumstances where the copyright rights holder has substantial economic power or influence. The benefits of new copyright exceptions would be most limited if contracting out

were to be permitted. However, the Act should be very clear on this point. We advocate including an express provision preventing contracting out.

**Question 55:** *Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?*

Yes. All exceptions.

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