



**AUSTRALIAN LAW REFORM COMMISSION
COPYRIGHT AND THE DIGITAL ECONOMY
ISSUES PAPER 42 (IP 42)**

Submission

4 December 2012

Table of Contents

Executive Summary	3
The Contribution of the Internet	6
Here in Australia	7
Consumers	7
Business	9
The importance of being able to exchange ideas	12
Opportunities for content creators	13
Here in Australia	14
How DPG members assist copyright holders	16
The Need for Flexibility	17
Individual's Online Rights with respect to copyright	20
How other countries are addressing the issue of copyright	21
The Way Forward	22
About the AIMIA Digital Policy Group	23

Executive Summary

The Australian Interactive Media Industry Association's Digital Policy Group (DPG), which counts eBay, Facebook, Google and Yahoo!7, among its founding members, welcomes the opportunity to make this submission to the Australian Law Reform Commission in response to its Copyright and the Digital Economy Issues Paper (IP 42). The review of the *Copyright Act 1968* (Cth) (Copyright Act) in light of Australia's Digital Economy goals is both timely and important.

The challenge before the Australian Law Reform Commission is to find a balanced approach to copyright, which respects the rights of copyright owners, creators and Internet users and provides the right policy settings to foster the digital economy and innovation including the use of copyright materials to create and deliver new products and services of public benefit.

The digital economy is growing globally and in Australia. The OECD recently reported that in the face of significant global negative economic growth since 2009, industries associated with the internet have remained resilient and displayed growth in the same period.

The digital economy is becoming increasingly important to Australia's future. The Australian digital economy directly contributed \$50 billion or 3.6 per cent of DPG economy in 2011 and this contribution is expected to increase by at least \$20 billion over the next five years to \$70 billion¹. In Australia the online sector of the media and content industry generated 40 per cent of the total growth of the industry from 2007 to 2011 and it is expected to contribute more than half of the \$4.3 billion in growth through 2015.²

The Australian digital economy is benefiting consumers and businesses and providing significant opportunities for Australian content creators and copyright holders. Consumption of content is also growing. In 2011, the Australian media industry generated revenues of \$24.8 billion. This is projected to rise to \$29.1 billion by 2015³.

Here in Australia, in one category of copyrighted works: content, studies are showing that Australians like Australian content. The top 20 TV programmes since 2007 have all been Australian-made and more than 90 per cent of the newspapers read online are Australian. The digital media surplus is also growing with twice as many Australian online videos being watched in America as in Australia⁴. Australians are now spending 21.7 hours per week on the Internet in addition to spending more time per week watching TV (15 hours), listening to radio (10.3 hours) and reading newspapers (3.4 hours) than they did in 2007⁵. This increase is due to the fact that the digital economy gives Australians access to the content of their choice at a time of their choosing.

¹ The Connected Continent: How the internet is transforming the Australian economy, Deloitte Access Economics, August 2011
https://www.deloitteaccessconomics.com.au/uploads/File/DAE_Google%20Report_FINAL_V3.pdf, pages 1 and 2

² Belza, J., Forth, P., Purnell, J., Zwillenberg, P., *Culture Boom, How Digital Media are Invigorating Australia*, March 2012, page 5

³ Ibid, Page 9

⁴ Ibid, Page 7

⁵ Ibid, page 7

In addition, internet media is driving benefits for niche consumers, remote communities and society as a whole⁶. The variety of content better services our pluralistic society and allows for the ability for niche groups to express themselves through media and consumer media that is consistent with their preferences.

Both the global and Australian digital economies are creating significant opportunities for Australian content creators. New internet platforms, such as YouTube and Facebook, are becoming a new form of content distribution providing significant opportunities for content creators and allowing Australian creators to reach global audiences.

DPG members support Australian content creators by providing platforms by which creators can reach global audiences and assist them by providing mechanisms that allow creators to block the use of or monetise their content. 90% of content creators or rights holders choose to monetise the use of their materials.

Whilst the digital economy is growing both globally and locally and presents significant opportunities for the future here, there is reason believe that Australia will miss out on the full potential of these benefits without a more balanced approach to copyright that supports innovation. Genuine reform that recognises the important role of innovation and upholds copyright holder's rights is needed to ensure the growth of the Australian digital industry. If the Australian law can succeed in achieving this goal we believe that significant and lasting growth in the Australian digital industry will result.

The potentially broader economic impact of a healthy Australian digital industry was recently highlighted by the Reserve Bank when it noted that:

One possible explanation for the surge and subsequent decline in multifactor productivity growth in Australia, and perhaps in other developed economies, over the past two decades is the pattern of adoption of ICT, which are primarily developed and produced offshore.⁷

DPG submits that there is reason to believe, that without certainty under Australia's copyright laws for core internet functions, investment, innovation and organic growth within the Australian digital industry will be hindered and this will actively work against the Australian Government's stated objective of Australia being among the leading digital economy by 2020⁸.

The technology specific limitations of the Copyright Act are also placing unreasonable and impractical limitations on individuals who have legitimately purchased content or generating their own content.

The DPG notes that other countries, such as the UK and Ireland, are in the process of reviewing copyright laws to address the same issues and that Canada, Singapore, Israel, Philippines and Japan have already moved to fair use based copyright regimes.

⁶ Ibid, Page 7

⁷ Reserve Bank of Australia, *Australia's Productivity Performance and Real Incomes*, Bulletin, June Quarter 2012 <http://www.rba.gov.au/publications/bulletin/2012/jun/3.html#f10>

⁸ Australian Government, Department of Broadband, Communications and the Digital Economy, National Digital Economy Strategy, page 2
http://www.nbn.gov.au/files/2011/05/National_Digital_Economy_Strategy.pdf

The DPG submits that the Copyright Act should be changed to make it more flexible and technology neutral. Copyright laws must ensure that copyright holders and content producers receive appropriate reward for the materials they create or to which they own the rights. Copyright laws must also permit reasonable uses of digital materials by consumers, as part of basic internet functions, and in emerging technologies such as cloud computing and data mining. No legislature can anticipate the services of the future, and having flexible copyright exceptions will enable Australia to encourage creative innovation and the growth of its digital economy.

Contribution of the Internet

An examination of copyright in the digital economy cannot occur without an examination of the size, nature and the benefits provided by the digital economy.

The Organisation for Economic Cooperation and Development (OECD) recently acknowledged in its *Internet Economy Outlook 2012*:

“What is clear is that the Internet is becoming a key economic infrastructure, revolutionising businesses and serving as a platform for innovation.”⁹

The OECD also notes

“[a]t the company level, the restructuring of business models in association with Internet use has led to improved efficiency and the rapid growth of new online businesses” and for households “[t]he Internet is reshaping the way individuals live, bringing a larger variety of digital goods and services, lower prices, improved information gathering, more distribution channels and so forth. In addition, individuals benefit from a more efficient labour market and, at a broader level, from positive impacts to the environment (OECD, 2009, 2010; Prasad, 2010) and in education. For example, the Internet has become a vital tool for helping match available workers with jobs requiring a certain set of skills.

At the company level, the restructuring of business models in association with Internet use has led to improved efficiencies.... Its impact is also visible in the rapid growth of new online businesses. The Internet’s enhanced communication capabilities are affecting nearly all sectors of the economy in ways both subtle and profound, from making available online previously hard-to-find data to transforming entire markets, as is occurring with music, video, software, books and news.

For governments, Internet development enables better communications with citizens, industry and other organisations and also promotes more efficient governance through improved information sharing, increased transparency and the automation of various resource-intensive services.”¹⁰

The OECD has also found that ICT has been resilient to the global financial crisis. The OECD explained this as being the result of

“The strength of the ICT services sector, even during the economic crisis, is partially the result of the increasing role ICTs play in supporting business efficiency gains. Firms may look to ICTs as a way to improve efficiency and cut costs during economic downturns. This leads to continued demand for ICT services even as budgets in other areas are cut.”¹¹

In Australia the online sector of the media and content industry generated 40 per cent of the total growth from 2007 to 2011 and it is expected to contribute more than half of the \$4.3 billion in growth through 2015.¹²

⁹ Page 8, Executive Summary (<http://www.oecd.org/sti/Internetconomy/ieoutlook.htm>)

¹⁰ *Id.*, pages 3-4.

¹¹ *Id.*, page 34

¹² Belza, J., Forth, P., Purnell, J., Zwillenberg, P., *Culture Boom, How Digital Media are Invigorating Australia*, March 2012, page 5

Here in Australia

It is clear that Australia has a healthy and promising digital economy which is set to provide further growth and opportunity to Australian consumers and business.

A recent study estimated that the direct contribution of the internet to the Australian economy was worth approximately \$50 billion or 3.6 per cent of GDP in 2010. That is expected to increase by at least \$20 billion over the next five years to \$70 billion¹³.

To put this in context Australia's education / training sector and retail sectors contributes \$53 billion to the Australian economy each.

Consumers

The digital economy also provides significant consumer benefit.

The Australian Communications and Media Authority (ACMA) recently advised that

"The digital economy is important to most Australians with almost three quarters of the adult population believing that the internet has improved their day-to-day lives."¹⁴

The table below quantifies the benefits that the Internet provides to Australian consumers.

How the internet benefits households¹⁵

Benefit	Description	Annual Value
Search	The internet is a far more efficient search tool than anything available prior to its development. Although Australians do not devote a large proportion of their time on the internet to searching the amount of time saved in acquiring information is substantial	\$7bn
Variety	Prior to the availability of the internet, consumer purchases were largely restricted by physical location. The internet opens markets up to consumers that were not previously available. The increased variety available to consumers from the internet holds significant value in itself, while the increased competition also reduces prices in a number of markets.	\$16bn

¹³ The Connected Continent: How the internet is transforming the Australian economy, Deloitte Access Economics, August 2011
https://www.deloitteaccess economics.com.au/uploads/File/DAE_Google%20Report_FINAL_V3.pdf, pages 1 and 2

¹⁴ Australian Communications and Media Authority, Communications report 2011-12 series, *Report 2 – Australia's progress in the digital economy Participation, Trust and Confidence*, page 1

¹⁵ The Connected Continent: How the internet is transforming the Australian economy, Deloitte Access Economics, August 2011
https://www.deloitteaccess economics.com.au/uploads/File/DAE_Google%20Report_FINAL_V3.pdf, page 24

Convenience	This category captures the reduction in time it takes to perform various household chores, for example the added convenience of online banking and using the internet to pay bills, and submit forms and other government communications.	\$8bn
Recreation	Consumers spend a considerable amount of their leisure time on the internet. This category places a value on the time Australians spend on recreational activities on the internet, such as browsing, using social media, and other forms of communication with friends and relatives.	\$22bn.

The internet provides savings and efficiencies for individuals and increases their wealth in real terms. It frees up money that previously would have been spent on conducting such transactions as making payments. For example before the internet individuals bore additional costs in terms of time and or perhaps petrol for the car to travel to the post office to pay a bill, paying \$100 for a jumper that can now be purchased for \$50 etc. What this means is that consumers are able to spend the money that they save on other goods and services (including entertainment and consuming more content) providing employment for more people or choose to save their money or reduce debt.

Essentially these efficiencies improve wealth, make us more prosperous and have the potential to drive further economic growth.

DPG submits that, given the significant advantages the internet provides consumers, it is a natural and rational response by consumers to increase participation in the digital economy.

Evidence of this behavior is the increased use of the internet here in Australia. The Australian Bureau of Statistics reported that there were 12 million internet subscribers in Australia at the end of June 2012 representing a 4% increase since the end of December 2011 and annual growth in internet connections of 10%.¹⁶ This is a sizable amount of growth in comparison to other economic indicators.

¹⁶ Australian Bureau of Statistics, 8153.0 June 2012
<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8153.0>

Business

The digital economy is currently providing significant benefit to business and has the potential to continue to do this.

The Australian Bureau of Statistics recently reported in *Measures of Australia's Progress Aspirations for our nation: A conversation with Australian's about progress* that Australian's views on prosperity are:

“Australians aspire to a prosperous and efficient economy.

- Efficient workforce
- Efficient use of resources
- Access to resources
- Innovation for efficiency
- Competition
- Effective regulation

An aspiration that recurred during the consultation was that the Australian economy continues to thrive and function well. This included having an economy that uses both labour and other resources efficiently, that is able to access the right resources needed for production purposes at the right time without impediment, that can improve the productivity of work processes (for example by harnessing new technology) and can compete in an increasingly globalised marketplace. Many thought that economic efficiency relied on well-constructed regulation that helps rather than hinders this functioning.”¹⁷

Another recent report issued by McKinsey Global Institute in July of this year provides some insight into the value that the internet can provide to business. McKinsey found that:

Improved communication and collaboration through social technologies could raise productivity of interaction workers – high skill knowledge workers, including managers and professionals – by 20 to 25 per cent.¹⁸

Many businesses are exploiting the opportunities that are available online. The ACMA reported that as at June 2012, 2.44 million domain names were registered under .au (excluding .gov.au), an increase of 15 per cent since June 2011.¹⁹

¹⁷ Australian Bureau of Statistics, 1370.0.00.002, *Measure's of Australia's Progress Aspirations of our nation: a conversation with Australians about progress*, November 2012

¹⁸ McKinsey Global Institute, *The social economy: Unlocking value and productivity through social technology*, July 2012

http://www.mckinsey.com/insights/mgi/research/technology_and_innovation/the_social_economy

¹⁹ Australian Communications and Media Authority, *Communications Report 2011 -2012 series, Report 2 – Australia's progress in the digital economy, Participation trust and confidence*, November 2012, page 7

The ACMA has also reported that

“Through using a central out-sourced server, cloud computing can provide businesses with significant benefits – reduced operating costs, resource pooling and specialised IT support and software, as well as increased flexibility, functionality and efficiency. By using cloud computing, smaller businesses can achieve economies of scale in their IT costs only achievable in large scale organisations.”²⁰

The DPG’s members also provide platforms that support Australian innovators and entrepreneurs, who are able to build and improve their own businesses utilizing the services we offer.

Some examples of the Australian innovators and entrepreneurs that have built and expanded their businesses using the services that we provide include:

- i) The online wine retailer Wine Market Australia that is earning around \$20,000 in revenue a month via its Facebook eCommerce shop. It commits a growing amount to banner ads to engage with fans, acquire new customers and creating strong brand credibility. It has now built a program that integrates its Facebook shop with back-end systems, simplifying the order-filling process and uses the Facebook platform to push different types of offers not suitable to email marketing.²¹
- ii) Yahoo!7 identified the growing trend both in Australia and globally for Social TV. In response Yahoo!7 developed and launched Australia’s first Social TV app - FANGO. The audience and commercial insights which drove the innovation process allowed Yahoo!7’s team to align technical and sales requirements to develop a product that best fits the audience and advertisers’ needs. FANGO launched the new product category of Social TV in Australia and is now widely considered to be leading this growing segment.

As a digital publisher Yahoo!7 is a business which manages a massive volume of content. With the growing audience shift to consuming content on mobile devices it became clear that a more efficient way to produce and publish content easily across multiple devices – the web, mobile and tablets – was required. A new technology platform was developed to build on Yahoo!7’s existing Media Platform technology to enable device aware content – i.e. once content is published it then knows what device it’s being viewed on and optimises itself for that platform.

Yahoo!7 Data Sciences, a suite of market leading targeting and data products was launched in July this year. Having offered a range of digital advertising targeting products over the past four years Yahoo!7 was aware of the challenges that advertisers were facing when collecting, analysing and using data in marketing activity. Targeting, while attractive to advertisers, was becoming too complex and confusing for advertisers to manage. Yahoo!7 identified this and launched a new range of targeting products which sought to simplify targeting for

²⁰ ²⁰ Australian Communications and Media Authority, *Communications Report 2011 -2012 series, Report 2 – Australia’s progress in the digital economy, Participation trust and confidence*, November 2012, page x

²¹ <http://www.smartcompany.com.au/internet/051372-is-social-media-advertising-really-worth-the-time-and-money.html>

advertisers and add value by offering new services not previously available in Australia. Yahoo!7 Data Sciences pushed the digital targeting category to a new level.

- iii) The DealsDirect Group started back in 2000, when Paul Greenberg and Mike Rosenbaum launched an online auction business called Auctionbrokers.com.au. Hosted on eBay, Auctionbrokers provided a service to businesses looking to deliver surplus stock through the auction format. A proudly Australian-owned company with a multi-faceted online presence. Today, the DealsDirect Group continues to be one of the leading brands in online retail purchasing.
- iv) OzHut, which had its beginnings on the eBay platform is a multi niche Australian retailer specialising in a wide variety of niche lifestyle products. Ozhut enjoyed a 900% increase in revenue in its first three years to \$2.6 million. OzHut was announced as a *BRW* fast starter and featured on another list of 50 fastest growing start-ups, and company founder was named StartupSmart's best young entrepreneur.
- v) Founded in Sydney, Freelancer.com is the world's largest outsourcing and crowd sourcing marketplace for small business. Freelancer.com connects over 4,188,506 employers and freelancers globally from over 234 countries & regions. Through the website, employers can hire freelancers to do work in areas such as software, writing, data entry and design right through to engineering and the sciences, sales and marketing, and accounting & legal services.

All these businesses rely on search, cloud based solutions and other digital platforms for their success.

The Importance of being able to exchange ideas

The value in the exchange of ideas has underpinned the success of the human race for many thousands of years.

Human progress itself has been driven by the fact that human intelligence became collective and cumulative in a way that happened to no other animal.²² That is humans have prospered because

“at some point in human history, ideas began to meet and mate, to have sex with each other”.²³

For example, the creation of steel rather than iron enabled durable railway tracks and the development of steam engines were all pre-requisite innovations that input to the creation of passenger railway that provided longer, faster, more comfortable trips at lower costs for passengers.

One of the intrinsic benefits of the internet is its ability to allow even the most basic internet user to access and exchange of ideas on a scale that was not possible prior to its invention.

Humanity is experiencing an extraordinary burst of evolutionary change, driven by good old-fashioned Darwinian natural selection. But it is selection among ideas not among genes.²⁴ It is this ability to share ideas that is driving the rate of innovation and development to levels that have not been experienced previously.

More importantly the ability to access ideas and globalisation of tasks allows more specialisation than previously possible which will drive further innovation and improvement in the myriad of the activities that encompasses human endeavour. In essence the ability to focus on specific tasks allows us to do things better and more efficiently than we have ever done before.

The Irish Copyright Review Committee recently commented that copyright protection is provided to rights-holders because it is for the public benefit or common good however one of the main exceptions to copyright is to promote innovation and competition **appropriate reward afforded to the rights-holders is not an end in itself but rather the means to diversity, competition and innovation** (emphasis added).²⁵

²² Matt Ridley, *The Rational Optimist How prosperity evolves*, page 5

²³ Ibid, page 6

²⁴ Ibid, page 6

²⁵ Copyright and Innovation: A Consultation Paper, Copyright Review Committee, Dublin 2012 p 35

Opportunities for Content Creators

The Internet is clearly changing many industries. This change is making some less efficient channels and platforms less competitive, significantly changing value chains and input costs but it is also creating significant opportunities for businesses that are adopting the new technology and investing in new business models.

Given the relatively low barrier to entry to the digital innovation marketplace, software and application developers are in an ideal position to capitalise on the digital economy. This in turn will produce the tangible economic, cultural and educational benefits that will continue to drive the Australian digital economy toward its 2020 goals.

The statement made by Rupert Murdoch in News Corporation's 2012 Annual Report outlines the opportunities that are available in the digital economy

A conventional company tends to sit back on the business models that worked for it in the past. Our corporate culture at News Corp. is very different. We know that business models that work today may be obsolete tomorrow, so we are always investing in the next generation – especially when our established models are doing well. Another way of putting it is this: The growth in earnings that we report today is the result of tough and sometimes unpopular decisions we took in the past....

....The publishing company will consist of our news and publishing groups, as well as our ground breaking digital education group. In sum, we have the minds and we have the assets. While most thinking about newspapers remains stuck on newsprint, we regard our papers as trusted brands that distribute news and views across dozens of different platforms, 24 hours a day. By realigning and re-organizing, we intend to take advantage of the opportunities before us by expanding what we offer and the ways we offer it.

I know it is fashionable these days to dismiss publishing, especially newspapers. Elites in particular look down on the popular press, but within the U.K., *The Sun* has 12 times the circulation of *The Guardian* and 27 times that of the *Financial Times*. In Australia, we are the leading publisher of news and have made great strides to restructure the business as we prepare for the digital future.

For publications that earn the loyalty of their readers, the opportunities are very real – and someone is going to grasp them. We believe it will be News Corporation.

We start with a huge advantage in customer loyalty. And we plan to make full use of digital to reward that loyalty by giving our customers the news, information and entertainment they want, the moment they want it and in the format that best suits their individual lifestyles. As we embrace this future, the failure of imagination we see at so many other publishing companies only gives us a greater competitive advantage.

HarperCollins is a highly profitable publisher that already has 25 percent of its books as eBooks in the U.S., with international moving in the same direction.

The Wall Street Journal Digital Network – which also includes Barrons.com – now boasts 1.3 million paying customers around the world. Meanwhile, our new education division is well-positioned to do what so many school districts are crying out for: Revolutionize classrooms around what works so that every schoolchild, no matter where he or she lives, has the opportunity to learn and achieve.²⁶

In addition, one of the many examples of online international success stories is The Economist, an international magazine that examines global economic trends that is written in English. The Economist has found new audiences online through its iPad edition that would have never read a printed copy of the magazine.²⁷

Lastly, there are a number of examples where traditionally produced content is becoming a global phenomenon via social media platforms. As part of its announcement that it had reached a user base of 1 billion people, Facebook also confirmed that in just one year, 62.5 million songs have been listened to 22 Billion times.²⁸

At a more specific level, one of the first early examples of social media providing global success to performers is Lily Allen. Allen, who after initially being rejected by UK record companies posted her material on MySpace and after achieving a following of tens of thousands, was contracted to a music company. Allen has since gone on to produce two albums and achieve world wide recognition and success²⁹.

More recently, Call Me Maybe³⁰ and Gangnam³¹ Style achieved global success through YouTube, including by inspiring mash-ups, remixes and re-sharing.

Here in Australia

The digital economy and digital content platforms are revolutionising Australian content and how Australians consume content. The increased choice, convenience and variety of internet media is delivering a consumer surplus (the value a consumer derives from a product over the price they pay) of \$24 billion a year³².

It is resulting in the growth of media consumption in Australia, particularly internet media. Australians are now spending 21.7 hours per week on the Internet in addition to spending more time per week watching TV (15 hours), listening to radio (10.3 hours) and reading newspapers (3.4 hours) than they did in 2007³³.

²⁶ News Corp Annual Report 2012, http://www.newscorp.com/investor/annual_reports.html, page 5

²⁷ <http://www.guardian.co.uk/media/2011/nov/27/andrew-rashbass-economist-group-interview>

²⁸ <https://newsroom.fb.com/News/457/One-Billion-People-on-Facebook>

²⁹ http://en.wikipedia.org/wiki/Lilly_allen

³⁰ <http://www.nytimes.com/2012/08/22/business/media/how-call-me-maybe-and-social-media-are-upending-music.html?gwh=FEF6CD59E9B282A0101D58E3AA926574>

³¹ Gangnam Style: http://en.wikipedia.org/wiki/Gangnam_Style#Viral_spread

³² Belza, J., Forth, P., Purnell, J., Zwillenberg, P, *Culture Boom*, How Digital Media are Invigorating Australia, March 2012, page 5

³³ Ibid, page

In addition, the Australian media and content industry is expected to grow over the next four years, driven primarily by Internet media. In 2011, the Australian media industry generated revenues of \$24.8 billion. This is projected to rise to \$29.1 billion by 2015³⁴. The online proportion of this industry is still in its infancy, generating only 7 per cent of these revenues. The online sector is responsible for a significant share of growth, generating 40 per cent of the total growth from 2007 to 2011, and it is expected to contribute more than half of the \$4.3 billion in growth through 2015.

Offline media remains the major revenue generator and will account for 86% of revenues (\$25.1 billion) in 2015.

Despite Australian content having to now compete on a global level, Australians believe that Australian online content is as good as the content from overseas and that there is a lot more content than there was three years ago.

Simply stated, Australians like Australian content. The top 20 TV programmes since 2007 have all been Australian-made and more than 90 per cent of the newspapers read online are Australian. The digital media surplus is growing with twice as many Australian online videos being watched in America as in Australia³⁵. In addition, internet media is driving benefits for niche consumers, remote communities and society as a whole³⁶. The variety of content better services our pluralistic society and allows for the ability for niche groups to express themselves through media and consumer media which is consistent with their preferences.

In 2012, the Australia Broadcasting Corporation reported that its internet only catch up television service, iview, was receiving an average of 3.2 million monthly visits with over 48% of online Australian audiences aged 16 years and over having accessed ABC TV content by iview³⁷. In addition there is significant evidence that consumers are consuming more media as a result of the growing phenomenon of watching two screens at a time.

In this environment a new contingent of Australian creators and content entrepreneurs is emerging and taking on the world. Online platforms play a key enabling role in delivering choice to consumers and providing opportunities for creators and producers to reach a local, national and global audience.

Examples of Australian content creators who have prospered online include:

- i) Perth-based YouTube chef Rob Nixon runs one of the most watched online cooking shows in the world, "Nicko's Kitchen" has attracted 80m+ views, has over two hundred thousand subscribers around the world, and four hundred plus videos. Rob joined YouTube in 2006 and quickly built up enough of a following and revenue stream to quit his day job in Perth airport to concentrate 100% on his passion for cooking.
- ii) Sydney-based blogger Natalie Tran has a huge international following for her video blogs and is able to make an income from monetisation opportunities offered by internet platforms

³⁴ Ibid, Page 9

³⁵ Ibid, Page 7

³⁶ Ibid, Page 7

³⁷ Australian Broadcasting Corporation, Annual Report 2012, page 53

- iii) John McCann and Jude Novak created INKids which develops mobile applications. Mr McCann reported that
 “I think we made more than half a million dollars out of AdSense over three or four years, and this was something we were doing in our spare time while we were working full time”³⁸.
- iv) The global success of the much awarded Australian artist, Gotye, is in some part due to endorsements on Twitter from Ashton Kutcher and Lily Allen and the ability to reach a global audience by posting the video “Someone that I used to know” on YouTube.³⁹
- v) Huey’s Planet developed the Beachtown Facebook app, an online game involving beach culture. The company employs a team of approximately five developers and the game recently reached 100,000 monthly active subscribers. In addition to countless Australian users, the game is very popular in the Philippines, Indonesia and Malaysia.

How DPG Members Assist Copyright Holders

DPG members run a variety of different schemes designed to assist copyright holders.

eBay has created the Verified Rights Owners program (VeRO program) that helps brand-owners by providing information to eBay merchants about trade marks and copyright material, monitors eBay merchants for infringements, and allows copyright holders to make complaints and have offending material removed.

Google has developed a Content ID system that allows video and music copyright owners to manage their material on YouTube including where it has been uploaded by users. The Content ID system can automatically detect matching material and allows the rights holder to choose to:

- Block user-uploaded videos
- Monetize their content by placing ads next to videos wherever they are uploaded; or
- Track (acquire statistics about access and decide later what to do)

The majority of Content ID partners have chosen to monetize the content.

In addition to this mechanism, Google has also recently changed its search algorithm to de-prioritise infringing content⁴⁰.

Finally, Facebook and Yahoo!7 support rights-holders by quickly and fairly addressing allegations of copyright infringement. Both users and developers on these platforms benefit from balanced and predictable copyright enforcement mechanisms.

³⁸ <http://www.smh.com.au/digital-life/smartphone-apps/dads-create-childrens-app-empire-20120828-24xm1.html#ixzz2DDxWGkko>

³⁹ <http://en.wikipedia.org/wiki/Gotye>

⁴⁰ <http://insidesearch.blogspot.com.au/2012/08/an-update-to-our-search-algorithms.html>

The Need for Flexibility

In the face of all the change and opportunity the digital economy is providing the Copyright Act is too technology specific and inflexible and as a result it is unable to support today's and tomorrow's innovations.

Many key digital applications and services rely on the ability to cache, index and perform other internet functions that rely on the making of persistent copies of copyrighted work.

Sections 43A and 111A do not provide sufficient clarity in relation to caching, indexing and other key internet functions that internet intermediaries and application service providers need to perform. This lack of clarity has cast doubt over whether the key global innovations of the last two decades including search marketing, cloud computing and other key online platforms can operate in Australia.

Search, search marketing, cloud computing and other key online platforms are key to Australia's ability to participate in the global digital economy as they have become increasingly available and widely used with the development of Web 2.0 technologies.⁴¹ It is very uncertain whether and how these services may be covered by any exceptions in the Copyright Act.

Presumably Australian law makers take the view that our laws, if enacted worldwide, should be workable and benefit the globe's citizens. Unfortunately in the case of Australian copyright law were it to apply on a global scale we would have to explain to citizens of the world why they were no longer able to use some of the most compelling and useful digital applications and platforms ever invented.

Just as importantly, the Copyright Act as it currently stands provides an environment where it is more difficult for the emerging Australian digital industry to develop fresh and innovative products and services in comparison to some of their overseas counterparts.

The fact that Google's search engine could not be created here by the Australian digital industry is an extremely telling point about the effect that Australia's copyright regime has on Australian digital industry's ability to innovate and compete with overseas competitors.

The lack of certainty that has resulted from the *National Rugby League Investments Pty Ltd v Singtel Optus* (2012), the inflexibility of the current regime, better incentives and the ability to access skilled labour from anywhere in the world means that innovative, leading edge ventures are finding other countries more attractive to build their businesses.

In addition to the difficulties that existing copyright law presents for many online functions, services and applications the legislation in its current form presents difficulties for data and text mining.

⁴¹ Australian Communications and Media Authority, *Communications Report 2011 -2012 series, Report 2 – Australia's progress in the digital economy, Participation trust and confidence*, November 2012

Big data refers to large pools of data that can be captured, communicated, aggregated, stored and analysed. It is now part of every sector and function of the global economy.⁴²

McKinsey Global Institute in a 2011 study found

there is strong evidence that big data can play a significant role to the benefit not only of private commerce but also of national economies and their citizens. Our research finds that data can create significant value for the world economy, enhancing productivity and competitiveness of companies and the public sector and creating substantial economic surplus for consumers.⁴³

Data mining can include the making of copies of large data sets on proprietary software which may be problematic under Australian copyright legislation.

⁴² McKinsey Global Institute, *Big Data: The next frontier for innovation, competition and productivity*, May 2011, Preface, http://www.mckinsey.com/insights/mgi/research/technology_and_innovation/big_data_the_next_frontier_for_innovation

⁴³ Ibid, page 1

Individuals Online Rights with respect to Copyright

The DPG submits that there are three main areas of concern in relation to how copyright legislation is working against the legitimate rights of a digital citizen. These include:

- Unnecessary restrictions on changing the format of content that a consumer has purchased
- User generated content
- Limitation on the ability to resell products

Problems with Changing Formats

Australian copyright law currently limits the ability of Australians in overly technical ways. For example, people can format shift music from CD onto an iPad but not a film from a DVD.

Australian copyright law's specificity, with respect to the technologies individuals can and cannot copy content that they have purchased to and from, diverges from the mainstream expectations about what is a fair and reasonable use of content that an individual has purchased.

The DPG submits that the Australian copyright law be amended such that Australians are permitted to format shift content that they have purchased regardless of the technology that they are using. These rights should be expressed in a technologically neutral way so that they have the best chance of remaining relevant in the face of technology as it develops over the next two, five, ten or twenty years.

User Generated Content

Social networking sites (including Facebook and Twitter) and internet content platforms (including YouTube) have enabled people to access, share, remix and engage with content in new ways.

The amount of content being created and shared is staggering. For example, seventy two hours of video are being uploaded per minute to YouTube and, on average, 300 million photos are uploaded each day to Facebook. Common consumer activities are sharing content on social networks and making transformative uses of copyright materials (eg mash ups) online. In many instances, these transformative uses are driving greater awareness and an audience from the original content on which it is based however unfortunately they are not clearly covered by existing exceptions in the Copyright Act.

This is an example of Australians creating content and expressing themselves in a variety of different ways on a variety of different subjects.

Similar to how individuals view their rights with respect to content that they have purchased the treatment of this type of use of content under Australian law diverges from mainstream community expectations of fairness and reasonableness.

Exhaustion of Rights

Australia currently has a first sale doctrine also known as an exhaustion of rights which allows Australians, in limited circumstances, to reproduce software. This right is limited in that it only allows the granting of a perpetual licence to the first purchaser only.

In July 2012 the European Court of Justice examined the issue of exhaustion of rights in *Oracle International Corp v UsedSoft GmbH* in the context of resale of computer software. The Court found that the user of a computer program who makes authorised copies by downloading the software and paying a one-off fee is permitted to use the software for an unlimited time, exhausting the distribution right of the copyright owner. This contemplated exhaustion will only take effect in certain circumstances, including if the software is available for use for an unlimited time, and supplied for remuneration.

The United States Supreme Court will shortly reconsider application of the 'first-sale doctrine' to textbooks. The proposition under consideration is that an exhaustion of rights only applies to goods manufactured domestically and will not apply to goods manufactured outside the United States, even if manufactured with the permission of the copyright owner.

The DPG proposes that the ALRC introduce an exhaustion of rights doctrine in Australia in order to facilitate secondary markets for software, digital works and subject matter other than works and product that embody software material.

The ability of a copyright owner to restrict the transfer of copyright interests as currently permitted under Australian law is a restriction on the ability of an individual or small business to legitimately trade in items of value.

How other countries are addressing the issue of copyright

Australia is not alone in its review of its copyright regime.

A number of international jurisdictions have responded to or are reviewing their current copyright regimes. These include:

- Canada
- United States
- Ireland
- United Kingdom
- Singapore
- The Netherlands
- Japan
- Philippines
- South Korea
- Israel

Canada reviewed its copyright law in 2009 which included a wide consultation process. The introduction of the *Copyright Modernisation Act* that specifies that copyright is not infringed by a party solely for providing internet or other digital network services, or for caching or hosting copyrighted work.⁴⁴

Ireland has tasked the Irish Copyright Review Committee (CRC) with examining whether Irish copyright law supports innovation and to assess whether a fair use style exception would be appropriate in an Irish context.

Many countries now operate under a fair use exception including Canada⁴⁵, Singapore⁴⁶, Japan⁴⁷, the Philippines⁴⁸, South Korea⁴⁹ and Israel⁵⁰.

Both the United Kingdom and The Netherlands are considering how to introduce additional flexibility into their and the European copyright regimes.

The United States has operated under a fair use regime since 1976 and has built up a considerable amount of case law that elucidates what is and is not fair use of content. More importantly it allows innovation to co-exist within a copyright regime.

⁴⁴ *Copyright Modernization Act 2012*

⁴⁵ *Copyright Modernization Act 2012*

⁴⁶ *Singapore Copyright Act, s35*

⁴⁷ *Japanese Copyright Act, Article 30-2*

⁴⁸ *Philippines Intellectual Property Code, s185*

⁴⁹ *Korean Copyright Right Act, Article 35-3*

⁵⁰ *Israeli Copyright Act, s19*

The Way Forward

The DPG submits that the opportunity provided by this review should be used to remedy the current issues with the Copyright Act. It is important that these changes are made so as to place Australia on an equal footing, with respect to copyright treatment, as many of its competitors.

The DPG submits that the Copyright Act should be changed to make it more flexible and technology neutral. Copyright laws must ensure that copyright holders and content producers receive fair and reasonable reward for the materials they create or to which they own the rights. Copyright laws must also permit reasonable uses of digital materials by consumers, as part of basic internet functions, and in emerging technologies such as cloud computing and data mining. No legislature can anticipate the services of the future, and having flexible copyright exceptions will enable Australia to encourage creative innovation and the growth of its digital economy.

About the AIMIA Digital Policy Group

The Digital Policy Group is the policy voice of the digital industry in Australia.

The Digital Policy Group is a special interest group of AIMIA that represents 460 digital players in the Australian digital industry. We represent large and small, local and global players that provide digital content services, applications and platforms.

The founding members of the AIMIA Digital Policy Group include eBay, Facebook, Google and Yahoo!7.

Our aim is to ensure that the Australian policy and regulatory landscape allows Australians to enjoy the maximum economic, social and cultural benefits from the online world in the years ahead and ensure that they can do this safely, securely and confidently.

Our areas of interest span policy areas that are relevant to the digital industry including cyber-safety, security, content standards, intellectual property and copyright, e-commerce, privacy and governance.

Our industry is proud to provide inspiring and compelling content, platforms and applications that deliver significant economic, social and cultural benefits to Australia.

Our members respect the rights of copyright holders and have developed and implemented systems that enable copyright holders to monetise or block use of their assets.

Our industry provides leading edge consumer safety and protection tools and provides support to leading digital not-for-profit organisations including the [National Association for Prevention of Child Abuse \(NAPCAN\)](#), [Kids Helpline](#), [Bravehearts](#), [The Alannah and Madeline Foundation](#) including their [eSmart Schools Program](#), [Ronald McDonald House](#), [R U OK?](#) , the [Reach Foundation](#) and [Young and Well Co-operative Research Centre](#).

AIMIA is the digital industry association for Australia. It has been in operation since 1992 and its members include mobile and web content, apps development companies, publishers, developers, creators, producers, investors, service providers.