



**A submission in response to  
the Australian Law Reform  
Commission's Copyright and the  
Digital Economy Issues Paper**

November 2012

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## Introduction

eBay is pleased to provide this submission to the Australian Law Reform Commission's (**ALRC**) Issues Paper on Copyright and the Digital Economy (**Issues Paper**).

eBay is part of eBay Inc which includes the following companies: eBay, PayPal, Gumtree and shopping.com.

eBay is the world's largest online marketplace with more than 100 million active users globally<sup>1</sup>. eBay launched operations in Australia in 1999, and connects a diverse and passionate community of individual buyers and sellers, as well as small businesses. It is a platform through which millions of transactions are affected each day. eBay is not involved in the delivery of purchased items.

eBay's interest in responding to the Issues Paper arises from its unique position as a leader in, and facilitator, of commerce. eBay's annual Online Business Index survey (**Survey**) found that in 2011, revenue for the top 2,000 eBay.com.au sellers grew by 45%. The Survey also found that sellers are increasingly drawn to, and wish to use, mobile commerce.

eBay believes that any changes to Australian copyright law should support and enhance commerce.

eBay also supports the protection of intellectual property. eBay is a member of the Owners' Rights Initiative (ORI), a coalition of businesses, associations and organisations with a common aim to protect ownership rights in the United States.<sup>2</sup> The ORI operates under the fundamental principle that the ownership of personal property incorporates inherent rights. This is encapsulated in the ORI's central premise that "if you bought it you own it", and should have the right to sell, lend or give away the property you lawfully own.

eBay recognises that copyright and trademark owners need the tools to protect themselves online and has created the [Verified Rights Owners program](#) (**VeRO program**) to help brand-owners inform eBay merchants about their trade marks and copyright material, monitor eBay merchants for infringements, and to make complaints and have offending material removed.

The VeRO program includes:

- Fast removal of listings reported to eBay by more than 5,000 intellectual property rights owners.
- Proactive monitoring and removal by eBay of listings that violate eBay policies designed to prevent the listing of infringing items on eBay.
- Ability to save searches and have the results emailed to you.
- Suspension of repeat offenders.
- Cooperation with rights owners seeking information regarding alleged infringers.

As part of eBay's VERO program in the past year:

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<sup>1</sup> As at Q4 2011.

<sup>2</sup> [www.ownersrightsinitiative.org](http://www.ownersrightsinitiative.org).

- More than 850,000 listings were removed from the Australian site;
- More than 80,000 listings were removed at the request of the copyright owner; and
- bad buyer experiences associated with the purchase of counterfeit goods have been reduced by around 50% for Australian buyers.

eBay is also a member of the Anti Counterfeiting Action Group (ACAG). ACAG is an incorporated association of manufacturers, wholesalers and traders of goods who are concerned with the sale of counterfeit products throughout Australia and New Zealand.

### **Copyright and the Digital Economy**

eBay supports the development of a more flexible and technology neutral copyright regime in Australia. Australia's copyright laws can on occasion have a negative impact on investment and innovation.

eBay also believes that having a flexible copyright regime will assist in meeting the Australian Government's National Digital Economy Strategy, with the aim of being one of world's leading digital economies by 2020. Delivery of the National Digital Economy Strategy is an important goal that will contribute to Australia's productivity, maintain its global competitiveness and improve its social wellbeing.

eBay is a member of the Australian Digital Alliance (ADA). Recent reports by Lateral Economics commissioned by the ADA found that investors would value the reduced risk and uncertainty from more flexible copyright exceptions at around \$2 billion a year. The report also found that a more flexible and technology neutral copyright regime in Australia will boost annual productivity gains to the economy by \$600 million per annum over the next 10 years.

Together, the reports calculate the current value of these industries to be \$182 billion dollars per annum, or 14% of Australia's GDP. The analysis shows that Australia's net exports of services depending on copyright 'exceptions' reached \$14 billion in 2010. In sharp contrast Australia had a net deficit of nearly \$3 billion from payments for use of intellectual property in 2010, a deficit that has grown by 9% annually since 2006.

As Lateral Economics concludes, the trade figures provide further evidence of the benefits that would flow from the recommended copyright reform by enabling some of Australia's most globally competitive industries to become even more competitive.

### **Digital material**

As part of its day to day delivery of services to members, eBay collects, stores and displays user generated data such as text and images (including photographs). eBay uses this data to publish a user's listing and to record the user's profile and activities. Each of these functions is fundamental to eBay's online business operations.

The use of copyrighted material is especially pertinent to eBay as users may use images when they create a listing an item for sale which incorporates copyright material (e.g., by listing a photograph of an artwork they may be technically reproducing that image without the copyright owner's permission).

To address the misuse of copyright material, eBay has established a number of policies including its Copyrights, Trademarks & your Listing policy which applies to

the listing and sale of items through its portal. Under this policy, items that bear a company's official brand name or logo can be listed for sale as long as the products were lawfully made by, for, or with the consent of that company. eBay does not allow replicas, counterfeit items, or unauthorized copies to be listed for sale on eBay. Unauthorized copies include things that are bootlegged, illegally duplicated, or pirated and which may infringe another party's copyright or trademark rights.

VeRO program participants have the ability to identify and request removal of allegedly infringing items and materials. eBay is committed to removing infringing or unlicensed items once an authorised representative of the rights owner properly reports them to us in accordance with the VeRO Program.

eBay does not propose that Australian copyright law be amended as it applies to the sale of counterfeit goods. However, in our view, copyright as it applies to images created in the course of listing items for sale should be amended. The lawful sale of goods by an online trader should not be constrained by copyright that may subsist in the item for sale.

## 1. Issues of concern

### 1.1 Modern application of copyright law

As identified in the Issues Paper, copyright law is a means of conferring economic rights that reward and remunerate the work of authors and the creators of other subject matter.<sup>3</sup> As the term "copyright" suggests, copying has been the primary means by which works and other subject matter are exploited and, accordingly, the primary monopoly granted by copyright to the author/owner is the right to control reproduction of their works.

However, in an online, digital environment copying can take place as an incidental part of enjoying, storing or sharing the work. Copying can also take place as part of dealing with/selling the work or a related product and/or as part of providing a consumer service. Many digital copies are made for reasons not related to the exploitation of the work itself and the making of these copies is not adverse to the interests of the copyright owner.

In order to address new technologies and issues with obtaining the authority of authors for legal copying, licensing schemes, exceptions, new rights and new restrictions have been added to the Copyright Act (***the Act***) from time to time. The result is a diverse range of specific exceptions for specific uses and circumstances.

The Act could be much improved by a reconsideration of these provisions focused on the principle/s they have in common. In this way there is an opportunity to develop a more concise, technology and service neutral regime which is more accessible, consistent and predictable. Such a revision could have real benefits for Australian having regard to the development of the National Broadband Network, the need to encourage innovation in the Australian digital economy, and the accelerating development of online commerce.

### 1.2 Parallel importation

Currently, sections 44C to 44F of the Act provide a framework for the importation of goods into Australia in the following circumstances:

- a) where the copyright work is, is on, or embodied in a non-fringing accessory to an article (44C);
- b) where the non-infringing copy is of a sound recording (44D);
- c) where the copyright work is a computer program (44E); or
- d) where the copyright work is, or is part of, an electronic literary or music item.

As a global market facilitator, eBay advocates amending the Act to permit importation of any goods created with the authority of the copyright owner. The existing framework is unnecessarily complex, inconsistent and an inappropriate impediment to free trade in legitimate goods.

In a globally connected commercial environment, it is not feasible to adopt restrictions which do not make sense or cannot be enforced. eBay submits that a person should not be prevented from selling into Australia any item that has been lawfully manufactured outside Australia. By selling goods which do not fall into the identified exceptions, eBay's users risk breaching the Act even when there has been no consequential effect on the copyright owner.

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<sup>3</sup> Issues Paper page 12.

A change of the nature proposed above is likely to remove the risk associated with online sales and enable more effective, and legally certain, commercial transactions. eBay notes the Australian Competition and Consumer Commission has indicated its support for parallel importation as a competitive measure which is beneficial to Australian customers, due to reduced pricing and the greater availability of products.<sup>4</sup>

### 1.3 Exhaustion of rights

Unlike Europe and, to a limited extent the USA, Australia does have a 'first sale' doctrine also known as a doctrine of exhaustion of rights. Reproduction of copyright work is permitted under the Act in limited circumstances, and in respect of software, Australian law allows the grant of a perpetual licence exclusive to the first purchaser that cannot be assigned without the permission of the licensor.

In Europe and the USA support for free trade has driven development of a doctrine of exhaustion of rights.

In July 2012 the European Court of Justice examined the issue of exhaustion of rights in *Oracle International Corp v UsedSoft GmbH*<sup>5</sup> 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.<sup>6</sup> 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.

eBay proposes that the ALRC consider introducing 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. It is basic market economics that real and significant public benefit flows from the free exchange of items of value. Value is lost and costs increased when users are prevented from selling or exchanging products that have a value to others.

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. It also introduces an onerous enforcement responsibility on intermediaries such as eBay. Removal of this limitation will support and promote diverse markets, preserve value for individuals and government and improve economic efficiency.

### 1.4 Caching, indexing and other internet functions (Issues Paper Questions 3 and 4)

Currently, Australian law does not allow the making of persistent copies for the purpose of facilitating communication, analysis or search. This makes Australia an unattractive place

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<sup>4</sup><http://www.accc.gov.au/content/item.phtml?itemId=179183&nodeId=5466d384ea376830f3007417eef6cb72&fn=PARALLEL%20IMPORTING.pdf> accessed 19 September 2012.

<sup>5</sup><http://curia.europa.eu/juris/document/document.jsf?text=&docid=124564&doclang=en&mode=req>

to locate the facilities that deliver, in particular, data analysis and search services over the internet.

It is common practice for Australian internet service providers and content delivery networks to make persistent copies of content that is regularly accessed by Australian users in order to avoid the costs of international transit of the content for each user. eBay also understands that persistent copies of digital information are also made to support data analysis such as price comparison services and product finding tools. Persistent copies may also be made as part of delivery of online search services.

As identified in the Issues Paper, since the year 2000 the effectiveness of sections 43A and 111A to protect caching and like functions has been questioned by formal reviews. These provisions fail to recognise the role of persistent reference copies as part of efficient online service delivery and are too limited in scope. These provisions do not adequately recognise that the making of reference copies is critical to the delivery of content over the internet.

As also previously identified by the ADA, eBay recognises that Division 2AA of the Act provides for limitation of remedies, subject to certain conditions, by copyright owners in relation to persistent copies made by carriage service providers. If the safe harbours expressed in Division 2AA were to be extended beyond carriage service providers it could operate to exempt from monetary damages the infringements of copyright that occur in the course of providing many services online.<sup>7</sup> However, this half way approach would not overcome the logical difficulty of providing a "safe harbour" to support copyright infringement. It would be far preferable to substitute a wider but targeted exemption.

eBay agrees that persistent digital copies should be permitted where there is no adverse economic impact on the copyright owner. It is inappropriate for the Act to provide a framework limited to carriage service providers whereby this reasonable and necessary copying remains infringing.

eBay also notes that section 200AAA provides an exception for proxy caching by educational institutions. This provision appears to address part of the issue for educational institutions only.

In 2009 the Canadian legislature undertook a review of copyright law similar to the review being undertaken by the ALRC, including a consultative process through which more than 150 written submissions were presented for consideration. This process resulted in the 2011 *Copyright Modernization Act* which amended principal copyright legislation to provide that copyright is not infringed by a party solely for providing internet or other digital network services, or for caching or hosting copyrighted work.<sup>8</sup>

A clear legislative provision like the Canadian provision, allowing for service providers to make persistent copies for the purpose of caching, indexing and analysing content will resolve uncertainly and ambiguously currently produced by sections 43A and 111A. The development of business in Australia that deliver services essential to the internet would be safeguarded and enhanced.

eBay fundamentally relies on the internet for delivery of its services and on search engines to make its service accessible. eBay supports developments which encourage the efficient operation of internet content and online platforms.

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<sup>7</sup> Kimberlee Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform*, A Policy Paper prepared for discussion by the Australian Digital Alliance April 2011, page 26

<http://www.digital.org.au/sites/default/files/documents/Weatherall-InternetIntermediariesandCopyright.pdf>

<sup>8</sup> Section 31.1 *Copyright Act (R.S.C., 1985, c. C-42)*

eBay proposes that the ALRC recommend the adoption of more specific allowances for the making of persistent copies as part of the delivery of online content and services.

### 1.5 Cloud computing (Issues Paper Questions 5 and 6)

The increasing use of cloud service is an important technological advance that will have significant economic impact. The use of specialist providers able to store and process information with new levels of speed and efficiency saves time and money. eBay is supportive of legal principles that facilitate use of cloud technology and submits that this important development should not be impeded.

Current Australian law directly impedes the development and delivery of cloud computing services. The recent decision of the Full Federal Court in *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147 (**TV Now Decision**) provides the best available guidance regarding the extent to which individuals can exercise fair dealing rights and/or enjoy exceptions to copyright by using cloud services.

Unfortunately the TV Now Decision has muddied rather than clarified the law. The decision creates serious disincentives for the development of cloud services in Australia in at least the following respects:

- a cloud service provider that delivers a complex/ value added service can, by doing so be a sole or joint maker of the copies which a user might make by using the service. This appears to be the case even where the copies are made solely for and at the direction of the user.
- rights that a user might freely exercise by using a device in the home and which they have purchased may not be able to exercise the same rights using a service provided in the cloud where space is licensed or rented from the cloud service provider or the provision of the service is supported by advertising.
- the technical solution provided by the cloud service may make a difference as to whether the service infringes copyright. For example, if the user purchased remotely located hardware and used it "bespoke" for time shifting TV or making back ups, the service might not be infringing. Whereas, if the provider owns the hardware and provides intelligent software to assist the user, the service would appear likely to be infringing.

Existing law seems to have the unfortunate result that for a certain class of offering, the more useful a cloud service, the more likely it will involve copyright infringement by the provider.

This recent case illustrates the difficulties that can arise in applying the Act to cloud based services. Although there has been some commentary that this case is "specific to its facts" the principles espoused regarding the meaning of "make" in the copyright do not appear limited to the facts.

eBay provides all its services online and is itself a form of cloud service. eBay considers it vital for the development of cloud services, and technological change generally, that the law not discriminate between activities on the basis of the technology that is used carry them out.

eBay proposes that the ALRC recommend clarification of the exceptions currently available in Part III of the Act to clearly state that copyright users are able to choose the technology they may use to exercise their rights and that, provided all copies are made at the direction

of the user for the purpose permitted by the statutory exception, it does not matter if the technology used is owned, leased, licensed by the user or a third party and/or whether the acts take place on a one off or automated basis.

Globally there has been rapid growth in cloud computing and a corresponding move away from the use of localised servers. As stated above, the benefits of this development are numerous and well documented, and include cost effectiveness, flexibility and increased storage capacity. Further cloud services can and should be developed and implemented in Australia without the current legal impediments.

#### 1.6 Online use for social, private or domestic purposes (Issues Paper Questions 11 to 13)

Currently, Australian law does not provide a general fair dealing exception that permits the copying, adaptation and reuse of copyright material for individual private or public communication. Copying is permitted for criticism and review and/or for the purpose of satire but not for private communication, per se.

Digital media now comprises a significant element of mainstream culture. The ability of individuals to communicate ideas and experiences using rich media comprising copies, mashups and new digital media represents an important cultural development that should be permitted when it takes place without damaging the economic interests of the copyright owner and is not for commercial purposes.

An additional broad right for an individual to copy when not damaging the economic interests of the copyright owner and not done for commercial purposes would facilitate personal communication and creativity in a digital environment. It would recognise existing practices and would not disadvantage copyright owners.

#### 1.7 Data and text mining (Issues Paper Questions 25 to 27)

As with the functions noted in paragraph 2.4 above, Australian law does not identify or expressly prohibit or permit data mining. However, the Act can operate to restrict data mining when information is stored by proprietary software and/or it is necessary to make a copy of a copyright work in order to access or analyse data held in digital form.

Data mining is used by many providers in the digital economy. eBay's systems process and store large amounts of proprietary information which is analysed to improve services and, optimise a user's experience. eBay uses data that has been provided by its users, with their express permission to do so. eBay believes that copyright should not operate to prevent or restrict data mining and that, accordingly, that it would be appropriate to include an exception in the Act that permits the transient reproduction of copyright works where the reproduction is necessary or incidental to lawful data mining.

The inclusion of a data mining exception would ensure that proprietary copyright is limited to protect original expression and cannot be leveraged to restrict or prevent access to information.

## 1.8 Fair use (Issues Paper Questions 52 and 53)

Currently, Australian law provides specific limited exceptions to the exclusive rights of the copyright owner, including fair dealing exceptions, a back up exception, a labelling exception, format shifting exceptions and the making of incidental copies of artistic works.<sup>9</sup> There is no general exception for the reproduction of copyright work (other than incidental copies of artistic works) in photographs.

From a technical perspective, many goods presented on eBay contain reproductions of copyright works as a consequence of photographing the work for listing product for sale (e.g., a garment bearing an artwork reproduced or the artistic works on the cover of a book). In this way including a photograph when listing a work for sale can infringe copyright.

In 2005 Singapore adopted fair dealing provisions in order to, amongst other things, comply with its obligations under international treaties and its free trade agreement with the United States. These provisions provide that a fair dealing with a literary, dramatic, musical or artistic work (or an adaptation of these) will not be an infringement of copyright in the work. In determining whether a dealing is 'fair' regard is had to the purpose and character of the dealing (including whether it is of a commercial nature), the nature of the work or adaptation, the amount and substantiality of the part copied taken, the effect of the dealing upon the potential market/value of the work or adaptation, and the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.<sup>10</sup>

The United Kingdom has also created a distinct fair use exception in relation to the advertisement of goods for sale<sup>11</sup>. Under law, it is not an infringement of copyright in an artistic work to copy it, or issue copies to the public, for the purpose of advertising the sale of the work.

As noted in the Issues Paper, the United States has a well established fair use exception which is determined by reference to four factors.<sup>12</sup> The courts have considered the application of this fair use exception to the online use of copyright material in various cases. Fair use has been allowed in circumstances where the portion of the work used was small and the purpose of the use was acceptable<sup>13</sup>; where copyright material was indexed and cached in a passive manner<sup>14</sup>; and where the reproduction did not undermine the potential market for the sale or licensing of the copyright material<sup>15</sup>.

eBay proposes that the ALRC introduce an exception which allows the reproduction of a copyright work for the purpose of offering goods for sale. This might take the form of a specific exception or a fair use exception, drafted to permit the right to copy if it is not disadvantageous to the copyright owner. When reproduced in order to sell an accompanying item, there is no loss or damage suffered by a copyright owner.

eBay submits that licensing is not an appropriate solution in the circumstances, given the impracticality of identifying, contacting and securing the permission of copyright owners when the use of the copyrighted material does not interfere with their market. The use of a collecting society is also not appropriate where the use is not related to the commercial interests of the copyright owner.

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<sup>9</sup> Section 67 of the *Copyright Act 1968* (Cth).

<sup>10</sup> Section 35(1) and (2) *Copyright Act (Chapter 63)*.

<sup>11</sup> Section 63(1) of the *Copyright, Designs and Patents Act 1988* (UK).

<sup>12</sup> Copyright Act, 17 U.S.C., 107 (2007).

<sup>13</sup> i.e., for the purpose of news commentary. *Religious Technology Center v. Pagliarina*, 908 F. Supp. 1353 (E.D. Va. 1995)

<sup>14</sup> *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

<sup>15</sup> *Kelly v. Arriba-Soft*, 336 F.3d. 811 (9<sup>th</sup> Cir.2003).

The introduction of an exception of the nature proposed would enhance the environment for e-commerce in Australia, especially when prepared with the requisite level of technological neutrality. Within a wide range of markets, there is an opportunity to prevent the occurrence of repeated technical infringement of copyright, while clarifying when such use is acceptable.

## Recommendations

eBay urges the ALRC to take steps to support a more flexible and technology neutral copyright regime in Australia. The changes advocated in this submission would improve and update the copyright regime and facilitate and support the growth of the digital economy.

In summary, eBay advocates:

- Amending the Act to allow importation of all goods made with the authority of the copyright owner. It is unnecessarily complex and inappropriate that different rules relating to import apply to different categories of goods;
- Introducing a doctrine of exhaustion of rights to facilitate the trade in second hand digital property;
- Adding a right to make persistent digital copies for the purpose of caching, indexing and analysing information;
- Introducing a technological neutrality principle that provides that any right of use or exception expressed in the Act can be enjoyed by a user by any technological means;
- Clarifying the meaning of "make" in the context of a digital system by specifically providing that the "maker" of any digital copy will be the person that presses the button causing software and/or hardware to carry out a function and not the designer, owner or provider of the software and/or hardware even where the software or hardware is made available to the user on a commercial basis;
- Adding a data mining exception providing copies made in the course of extracting information or data do not infringe copyright;
- Adding an exception to allow the photographing of items listed for sale. The listing of an item for sale should not give rise to infringement of copyright; and
- Adding a US style "fair use" exception to accommodate the development of new products and services.

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