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Law

To whom it concerns:

I welcome the opportunity to respond to the Australian Law Reform Commission's inquiry into the adequacy of Australia's copyright exceptions. The attached submission addresses Questions 5, 6, 9, 10 and 52.

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

The Australian copyright law is impeding the current and future development and delivery of cloud computing services in at least two ways.¹

The first impediment relates to the recent decision of the Full Federal Court in *National Rugby League Investments v Singtel Optus* [2012] FCAFC 59, which took a much broader view of what it means to ‘make’ a copy than equivalent courts in other jurisdictions (and which the High Court declined to grant special leave to appeal).

At issue in that case was the legality of Optus’ remote television time-shifting service, TV Now. TV Now operated in much the same way as a standard personal video recording device, except that the programs and recording equipment were stored on remote servers instead of in boxes under each user’s television set. Each time a subscriber used the electronic program guide to select a program to be recorded, four personal recordings (in different formats, to allow playback on different devices) would be made just for them. The key question in the case was, who made those copies? If it was the user alone, the time-shifting exception in s 111 of the Copyright Act would apply and there would be no infringement. Since that exception only applies to recordings made ‘solely for private and domestic use’, and doesn’t operate where the recordings are put to commercial use, if the maker was Optus (or if the recording was made jointly by the user and Optus), Optus would be liable for infringement.

Courts in the US and Singapore had previously tested the legality of equivalent technologies, and in both cases found that the user makes the relevant copies.² However, the Full Federal Court held that the service provider was a maker of the copies, since “Optus’ role in the making of a copy – ie in capturing the broadcast and then in embodying its images and sounds in the hard disk – [wa]s so pervasive that, even though entirely automated, it cannot be disregarded when the ‘person’ who does the act of copying is to be identified.”³ In the Court’s view, Optus was not simply making its system available for others to use to copy broadcasts, but capturing, copying, storing and making available (for reward) programs for later viewing by others.⁴ Though acknowledging that no Optus employee actually presses the “record” button, the Court was highly influenced by the degree to which its system was involved in the process:

...once that communication is made, the automated processes described by his Honour come into play – the server enters or creates a schedule ID in respect of the programme selected and the user’s unique identifying number in the user database; the recording controllers poll that database once a minute enquiring whether any users

¹ This response draws upon two peer-reviewed papers previously published by the author. For fuller analysis: see Rebecca Giblin, ‘Stranded in the technological dark ages: implications of the Full Federal Court’s decision in *NRL v Optus*’ (2012) 35 *European Intellectual Property Review* 632-641; Rebecca Giblin, ‘Optus v NRL: A Seismic Shift for Time Shifting in Australia’ (2012) 35 *European Intellectual Property Review* 357-363.

² See *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830, [15]; *Cartoon Network LP, LLLP v CSC Holdings Inc* 536 F 3d 121 (2nd Cir 2008), at 131-133.

³ *National Rugby League Investments v SingTel Optus* [2012] FCAFC 59, at [67].

⁴ *Ibid*, at [68] (internal citations omitted).

have scheduled the recording of any programme due to be broadcast at the time of polling; when the poll so identifies that the user's selection is due to be broadcast, the MACF server informs the recording controllers which then cause four recordings to be made on the NAS hard disk – ie the timing of the recording coincides with Optus' recording controller causing the recording to be made, rather than when the subscriber communicates its selection to Optus.⁵

The Full Court emphasised that its concerns were “limited to the particular service provider-subscriber relationship of Optus and its subscribers to the TV Now Service and to the nature and operation of the particular technology used to provide the service in question”, and acknowledged “that different relationships and differing technologies may well yield different conclusions to the ‘who makes the copy’ question.”⁶ Nevertheless, its broad interpretation of “making” – and its observation that it's not apparent “why a person who designs and operates a wholly automated copying system ought as of course not be treated as a ‘maker’ of an infringing copy where the system itself is configured designedly so as to respond to a third party command to make that copy”⁷ – have significant implications for the future development and delivery of cloud computing services in Australia. Consider, for example, cloud-based data back-up services. Such technologies are socially useful because they allow for secure remote back-ups at minimal cost, and reduce the risk of catastrophic data loss. Since individuals can forget to run backups regularly, best practice involves using software that can be programmed to back up content automatically. An example of one application that does so is Mozy. Mozy is a cloud-based backup service which can be set to automatically scan for and copy all files of a particular type, or in a particular location. Could Mozy's operator be liable for making infringing copies of films or sound recordings stored on a user's computer? Dropbox is another remote storage provider, which allows users to sync content easily across devices. It can monitor subscribers' computers and automatically copy any new or amended files to one or more other locations. Could that render it liable for infringement? In both cases, post-*Optus*, the answer is no longer an automatic “no”. At the very least, the Australian law's broad approach to “making” will introduce uncertainty for providers of cloud-based storage providers and other emerging cloud-based uses that involve any element of automated copying.

Inter-relatedly, the second way in which the Australian copyright law is impeding the development or delivery of cloud computing services is through the absence of a flexible exception such as US-style fair use. If the Full Court's broad interpretation of “making” does in fact result in a situation where the automated copying processes of cloud providers rendered them liable for infringement, a flexible fair use provision could potentially provide some comfort.

(See also this submission's response to Question 7 regarding the related implications of the Full Court's decision for the practice of time-shifting television content).

⁵ Ibid, at [66].

⁶ Ibid, at [100].

⁷ Ibid, at [64].

Recommendation: The copyright law should be amended to ensure that underlying technical processes and automated copying processes do not unreasonably interfere with user rights.

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?

The creation of new piecemeal exceptions is undesirable in the context of a continually changing technological environment like that of cloud computing. Instead, uses arising from cloud computing should be legitimised in appropriate circumstances via a flexible exception which is capable of dynamically responding to the shifting technological and cultural landscape. See further this submission's response to Question 52 for a fuller discussion of the problems caused by continued reliance on narrow purpose-based exceptions, particularly regarding presumptive illegality, difficulties in achieving technological neutrality, and delay in legitimising socially useful activities, as well a proposal regarding what a flexible exception should look like.

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?

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.⁸ This exception was enacted in 2006. An earlier draft had limited the exception to “allowing individuals in their homes to copy a broadcast for personal use to enable it to be viewed or listened to at a more convenient time.”⁹ However, it was subsequently amended to refer more broadly to “private and domestic use”, which could occur “on or off domestic premises”, and to remove the requirement that the recording be made “in domestic premises”.¹⁰ These changes were intended to “provide[] greater flexibility in the conditions that apply to ‘time-shift’

⁸ This response draws upon two peer-reviewed papers previously published by the author. For fuller analysis: see Rebecca Giblin, ‘Stranded in the technological dark ages: implications of the Full Federal Court's decision in *NRL v Optus*’ (2012) 35 *European Intellectual Property Review* 632-641; Rebecca Giblin, ‘*Optus v NRL*: A Seismic Shift for Time Shifting in Australia’ (2012) 35 *European Intellectual Property Review* 357-363.

⁹ *National Rugby League Investments v SingTel Optus* [2012] FCAFC 59, at [21].

¹⁰ *Ibid*, at [23]-[24].

recording.”¹¹ Among other aims, the legislation was intended to “provide legal certainty for industries that ‘provide products and services that assist consumers carry out ... copying activities’”.¹²

The timeshifting right was significantly diluted by the Full Federal Court’s decision in *National Rugby League Investments v Singtel Optus* [2012] FCAFC 59. As discussed at length in this submission’s response to Question 5, the Court found that Optus was a maker of its subscribers’ time-shifted recordings, and that, since it was not protected by s 111, it was liable for infringement. In the days after its decision was handed down, each of the remote PVR services operating within Australia shut down.

The Full Court’s reasoning potentially renders previous-generation time-shifting technologies like TiVo unlawful as well. TiVo launched in Australia in 2008 (a decade after it was developed in the US) with a reduced feature list designed to safely navigate the shoals of the Australian copyright law. In the US, TiVo works on a subscription model. The Australian version involves an upfront payment instead, in exchange for which the purchaser receives the box and ongoing access to the Electronic Program Guide and other services. The main difference between TiVo and TV Now is that recordings are stored on the hard disk in the device itself (instead of on remote servers).

A number of TiVo’s features are relevant to this analysis. For example, it offers something called the “Season Pass Manager”. When a customer enters the name of a desired show, the Season Pass Manager “automatically finds and records every episode of [the] series – for the whole season.” In other words, there is an automated process that continues looking for more episodes after the customer has indicated an interest in a particular show – and then downloads them automatically. Since TiVo’s Australian EPG incorporates a maximum of seven days programming information at a time, without this feature customers would be obliged to manually select each program they wished to watch, each time it was scheduled to air. Another feature is “TiVo Suggestions”. Users are encouraged to rate the programs they watch. Taking those preferences into account, the software then automatically records programs that its algorithm suggests the user might like. Another relevant feature is the “WishList”. Users can enter searches for their favourite “actors, directors, genres or other keywords”, and the software will automatically record all broadcasts that match the search parameters.

Against this backdrop, consider the Full Court’s observation that it is not apparent “why a person who designs and operates a wholly automated copying system ought as of course not be treated as a ‘maker’ of an infringing copy where the system itself is configured designedly so as to respond to a third party command to make that copy”.¹³ Each of the features outlined above require an ongoing link to TiVo’s EPG in order to operate. TiVo can be seen as playing the same kind of role in making the copies as Optus did for TV Now. The TiVo system was designed to respond to the user’s commands to make copies. In each case TiVo is

¹¹ Ibid, at [25] citing Further Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) at [29].

¹² *National Rugby League Investments v SingTel Optus* [2012] FCAFC 59, at [21].

¹³ Ibid, at [64].

inextricably involved in the embodiment of the copyright subject matter. Its software has been designed to automatically capture the broadcast and then embody its images and sounds in the hard disk. Indeed, it is arguably more closely involved in the process than Optus is with regard to TV Now. With TV Now, the subscriber at least had to click “record” for every single show before the automated system commenced the copying process, which led to the Court’s observation that it’s the subscriber who, “by selecting the programme to be copied and by confirming that it is to be copied, can properly be said to be the person who instigates the copying.” A TiVo owner utilising the above-described features has considerably less involvement in the copying process. In the same sense that Optus was the maker of the copies in the case of TV Now, TiVo can be seen to be the maker of copies made by use of its Season Pass, WishList or Suggestions features. In each case, without TiVo’s involvement, “nothing would be copied.” Just as was the case with TV Now, with regard to each of these features, the customer and operator can be seen as “act[ing] in concert with one another in the infringement pursuant to a common design.”

Another service offered by TiVo is something called the “TiVo Genie”. This feature enables customers to remotely schedule recordings onto their TiVos from anywhere in the world. Thus users can view the electronic program guide from a web browser or other mobile device and click “record” to schedule recordings to be made on their TiVo at home (or alternatively they can use the “Season Pass” feature to instruct the system to record all future airings of a particular show). The software then communicates that instruction to the subscriber’s hardware, and the hardware responds by making the recording. If not for the Genie service being “up” and available to implement the subscriber’s request, the requested recording would never be made. The only real difference between this service and TV Now seems to be that one organisation creates and utilises a fully automated system which operates in the customer’s lounge room, and the other creates and utilises one that operates in the cloud. In these circumstances, DVR manufacturers like TiVo could not be blamed for struggling to identify any real difference between providing a service like TV Now to provide an automated television copying service, and providing a “traditional” TiVo-style DVR to provide an automated television copying service. TiVo too can be seen as not “merely making available its system to another who uses it to copy a broadcast”, but “captur[ing], cop[ying], stor[ing] and mak[ing] available for reward, a programme for later viewing by another”.

The Full Court suggested that both the automated service which produced the copies and the causative agency that is responsible for the copies being made at all are relevant in identifying the maker. The above description suggests that, under the Full Federal Court’s reasoning, even the provider of a local DVR could easily be held to be the maker of the copies its customers’ request.

The above analysis demonstrates that many of the most convenient and innovative features offered by providers of traditional “local” DVRs have precisely the same kind of characteristics that led to Optus being found to be the maker of copies in *National Rugby League Investments v Singtel Optus* [2012] FCAFC 59. In the wake of the Full Court’s decision, rightholders may exert pressure on Australian DVR providers to reduce the features

they offer. Australians may be limited to “dumb” technologies that don’t offer the most convenient and useful features. Alternatively, technology providers may be obliged to licence rights to avoid the threat of litigation, forcing consumers to pay higher prices and effectively abrogating their statutory right to time-shift. The judgment also introduces uncertainty for providers of unrelated technologies, particularly cloud or remote storage providers. On this point, see this submission’s response to Question 5.

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?

Please refer to this submission’s response to Questions 5 & 6. As discussed, under the current law making copies for the purpose of back-up or data recovery could well constitute a direct infringement both by the requesting user, as well as by any technology providers that facilitate that copying (insofar as their automated processes render them a maker of those copies). It’s obviously important to permit these socially useful activities. However, a narrow purpose-based exception would be poorly adapted to the changing technological environment and potentially hinder the development and uptake of new back-up and recovery technologies. A flexible exception in the style of fair use would be a far preferable method of achieving the same aims. See further this submission’s response to Question 52.

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?

The Act should certainly be amended to include a broad, flexible exception.¹⁴ Australia’s current system of narrow-purpose based exceptions suffers from a number of shortcomings which have long discouraged innovation and investment by technology providers and content owners alike. These limitations can be usefully illustrated with reference to the history of timeshifting in Australia compared to its treatment under US law.

The treatment of timeshifting in the US

Timeshifting means recording television to watch it at a more convenient time. It has been a common practice around the world since the popularisation of home video recording technologies in the mid to late 1970s. When VTRs first came to market, they were seen as a highly disruptive technology. Indeed, they were of such concern to content owners that in 1981, MPAA President Jack Valenti famously denounced them as being “to the American

¹⁴ This response draws upon two peer-reviewed papers previously published by the author. For fuller analysis: see Rebecca Giblin, ‘Stranded in the technological dark ages: implications of the Full Federal Court’s decision in *NRL v Optus*’ (2012) 35 *European Intellectual Property Review* 632-641; Rebecca Giblin, ‘*Optus v NRL*: A Seismic Shift for Time Shifting in Australia’ (2012) 35 *European Intellectual Property Review* 357-363.

film producer and the American public as the Boston strangler is to the woman home alone.”¹⁵

In the United States, rightholders instituted a test case against Sony regarding its Betamax video tape recording technology in 1976.¹⁶ By 1984, the case had wound its way to the court of ultimate appeal, which recognised timeshifting as a legitimate fair use.¹⁷ Everyone knows the rest of that story: the home video market became a multi-billion dollar industry and a major revenue source for content owners, and the US became a leader in the investment, development and uptake of new timeshifting technologies. US consumers were among the first to enjoy Digital Video Recorders, and TiVo’s 1999 launch made it radically easier for consumers to record and enjoy time-shifted content. A company called Cablevision publicly announced its remote DVR technology in March 2006,¹⁸ was sued by rightholders in May of the same year,¹⁹ and in 2008 the technology was ruled legal by the Second Circuit, which found that it was the users of the system (and not Cablevision) who made the relevant copies.²⁰ Since 1984 sporting interests have known that they have to compete with time-shifting and have tailored their offerings accordingly: organisations such as the NBA, NFL and NHL all offer innovative and attractive direct-to-consumer offerings, and they’re thriving. These innovations and the growth of the enormously profitable home video rental and purchase markets are directly attributable to the Supreme Court’s decision that the consumer right to timeshift was a fair use.

The treatment of timeshifting in Australia

Contrast this situation with the Australian treatment of timeshifting. Australia has no flexible exception which could automatically recognise the legitimacy of timeshifting in the manner of the *Sony* case. Accordingly, the legitimacy of timeshifting depended on the availability of an appropriate purpose-based exception. At the time video recording technologies first came to market the *Copyright Act 1968* (Cth) did contain an exception that permitted the copying of broadcasts. However, it did not permit the copying of any underlying works (eg the films, music, scripts etc contained within the broadcast material). Since virtually all broadcasts incorporated such material, consumers were regularly engaging in wholesale copyright infringement when they recorded programs to watch at a more convenient time.²¹ To render

¹⁵ Jessica Litman, “The Story of Sony v Universal Studios: Mary Poppins Meets the Boston Strangler” in J C Ginsburg and R C Dreyfuss (eds), *Intellectual Property Stories* (Foundation Press, 2005) at 365 citing HR 4783, 97th Cong (1981); HR 4794, 97th Cong (1981); S 1758, 97th Cong (1981); Home Recording of Copyrighted Works: Hearings on HR 4783, HR 4794 HR 4808, HR 5250, HR 5488, and HR 5705 before The Subcom on Courts, Civil Liberties, and The Administration Of Justice of the House Comm on the Judiciary, 97th Cong 1-3 (1982).

¹⁶ *Sony Corporation of America v Universal City Studios*, 464 US 417, at 420 (Supreme Court 1984).

¹⁷ *Ibid*, at 442.

¹⁸ *Cartoon Network v CSC Holdings* 536 F 3d 121, at 124.

¹⁹ Ken Fisher, *TV networks say “No!” to Remote Storage DVRs, file suit in US District Court* (26 May 2006) Ars Technica <<http://arstechnica.com/uncategorized/2006/05/6913-2>>.

²⁰ *Cartoon Network LP, LLLP v CSC Holdings Inc* 536 F 3d 121 (2nd Cir 2008), at 131-133.

²¹ See eg Attorney-General’s Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age*, Issues Paper, May 2005 at 26 (a copy is on file with the author); David Lindsay, “Fair Use and Other Copyright Exceptions: Overview of Issues” (2005) 23 Copyright

that conduct lawful, a new purpose-based exception was necessary. However, the legislature did not get around to enacting a more comprehensive exception until 2006 – 22 years after the right was recognised across the Pacific. By that time VCRs had become museum relics overtaken by new digital recording options.

The new exception in s111 of the Copyright Act applies where a person makes a film or sound recording of a broadcast “solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made”.²² During the drafting process the exception was expanded to extend to copies made both within and outside the home. Many other exceptions in the Australian law are limited to situations where the use is “fair”, but the timeshifting exception was drafted without that limitation.

TiVo finally launched in Australia in August 2008, a decade after its US release²³ and about two years after the Australian parliament finally enacted the s 111 timeshifting exception. It had a reduced feature list designed to safely navigate the shoals of the Australian copyright law,²⁴ and is owned by Australasian content interests.²⁵ However, widespread adoption of other digital video recording technologies continued to be discouraged by some commercial broadcasters, which adopted a strategy of aggressively asserting copyright in the program time and title information necessary to the electronic program guides on which digital copying technologies depend. The High Court finally rejected that argument in April 2009,²⁶ and it was only then that technology providers received a clear signal that it was safe to provide modern timeshifting technologies to Australian consumers. Soon after, a number of providers launched remote storage DVRs of the Cablevision variety, which by then had been available elsewhere for a full half decade. One was Optus, whose TV Now product allowed subscribers to record television programs onto Optus’s servers, and then to play them back by streaming them to various devices with as little as a two minute delay from the start of the broadcast. It sent Australian football codes into a tailspin. The AFL and NRL believed that since Optus had not licensed the rights to broadcast their games over the internet, any such recordings infringed their copyrights. As discussed in detail in this submission’s response to Question 5, the controversy essentially boiled down to one question: who made the recordings? If it was the individual subscribers, the new timeshifting exception would apply and there would be no infringement. But if the recordings were made by Optus (or by Optus and the user together), then the exception would not apply and each recording would be an infringement of copyright. The Federal Court found that the copies were made by the

Reporter 1, at 10; Thomson/Lawbook Legal Online *The law of intellectual property: copyright, designs & confidential information* (at 3 February 2012) [11.344].

²² *Copyright Act 1968* (Cth) s 111(1).

²³ Daniel Long, *The Australian Tivo FAQ – What it does, will it skip ads, when it launches, will it work with Foxtel* (2 September 2008) PC & Tech Authority <<http://www.pcauthority.com.au/Feature/116335,the-australian-tivo-faq--what-it-does-will-it-skip-ads-when-it-launches-will-it-work-with-foxtel.aspx>>.

²⁴ *Ibid.* Some of the differences are that the US version allows taping of cable television as well as free to air, and has much more sophisticated ad-skipping technology.

²⁵ *About Hybrid TV* (2012) TiVo <<http://www.mytivo.com.au/abouttivo/aboutus>>.

²⁶ See *IceTV v Nine Network Australia* (2009) 239 CLR 458.

subscriber, but the Full Court held that Optus was also a maker (and therefore engaging in copyright infringement). The High Court rejected leave to appeal.

Thus the Australian treatment of television timeshifting has meant that:

- Australian consumers were not legally entitled to timeshift television on “dumb” technologies like VCRs until a new purpose-based exception was finally enacted 22 years after the right to do so was recognised in the US;
- Australian consumers are still not entitled to timeshift television on the current-generation (and most user-friendly) “smart” technologies like remote storage DVRs (and the Full Court’s broad reasoning has also thrown into doubt the legality of previous-generation TiVo-style DVRs – see this submission’s response to Questions 5 and 9); and
- The timeshifting technology providers that invested in the Australian market in the belief that their activities were legal were forced to shut down.

Why Australia should have fair use

This history demonstrates some of the most severe problems with Australia’s existing approach to copyright exceptions. Most problematically, new uses are presumptively unlawful – regardless of how innovative or socially beneficial they are. This makes Australia is a hostile regulatory environment for technology innovators and investors: had VCRs been first made available in Australia, right holders may well have succeeded in suing them out of existence (incidentally eliminating the new markets and huge gains to content owners that grew from their creation). Additionally, as the timeshifting example also demonstrates, Australia’s reliance on purpose-based exceptions can delay technological progress, adoption and investment. When new uses develop, it can take a very long time for the legislature to get around to enacting a new exception. And once a new exception is finally enacted it might not achieve its intended aims. The 2006 statutory timeshifting right ended up not even covering one of the first new technologies to appear, even though remote DVRs were well and truly on the international radar at the time the exception was drafted, and despite legislative intent that the exception be technology neutral. As the Hargreaves review pointed out in the context of the UK law, “we have in recent years witnessed a growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people.”²⁷ The same holds true for Australia. Over time, our system of purpose-based exceptions has simply proved incapable of keeping up with the dynamically shifting technological and cultural environment.

Flexible exceptions are much better suited to do so. As the Irish Copyright Review Committee explained in its recent Consultation Paper, “the fair use exception was developed by the US courts as a safety valve upon the exclusive rights granted by copyright, permitting limited and reasonable uses without permission or payment.”²⁸ The Hargreaves review

²⁷ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011) Intellectual Property Office, 43 <<http://www.ipso.gov.uk/ipreview-finalreport.pdf>>.

²⁸ Copyright Review Committee, *Copyright and Innovation: A Consultation Paper* (2012) Department of Jobs, Enterprise & Innovation, 111-112 <http://www.djei.ie/science/ipr/crc_consultation_paper.pdf>.

similarly pointed out that the US fair use doctrine has allowed “sufficient flexibility to realise the benefits of new technologies, without losing the core benefits to creators and to the economy that copyright provides”.²⁹ This is especially so “in a small number of cases which have been extremely important for the development of consumer technologies, notably those relating to reverse engineering, home video recording, and internet search caching and thumbnail images.”³⁰ Flexible exceptions give new technologies, innovations and uses breathing room to get established, to create new markets and to support copyright’s underlying aims, which in Australia have long been utilitarian: to encourage the creation and distribution of certain cultural works.³¹

Possible models

Various flexible exceptions exist around the world, including in the US, the Philippines, Israel, and Singapore.

The US doctrine is a legal standard that involves weighing all the relevant factors, including:

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

The Filipino law incorporates the same factors as the US law verbatim.³² The Israeli law largely replicates the substance of US cousin, although the four factors have been paraphrased. In that jurisdiction the relevant factors in determining whether a use is fair include:

1. The purpose and character of the use;
2. The character of the work used;
3. The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
4. The impact of the use on the value of the work and its potential market.³³

The Singaporean law also incorporates the substance of the four US factors, and adds a fifth. It provides that a fair dealing with a work is not an infringement, and the factors that are to be considered in determining whether a dealing is fair include:

²⁹ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011) Intellectual Property Office, 47 < <http://www.ipo.gov.uk/ipreview-finalreport.pdf>>.

³⁰ *Ibid.*

³¹ See eg Australian Intellectual Property Law, second ed, p 186 (which also cites Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (final Report, 2000), at p 32.)

³² IP Code of the Philippines (Republic Act No 8293) (1997) s 185.1.

³³ *Copyright Act 2007* (Israel) s19.

1. The purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
2. The nature of the work or adaptation;
3. The amount and substantiality of the part copied taken in relation to the whole work or adaptation;
4. The effect of the dealing upon the potential market for, or value of, the work or adaptation; and
5. The possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.³⁴

How should an Australian flexible exception be framed?

This submission is strongly in favour of adopting a flexible exception in the same terms as the US fair use doctrine. The US version has been proven to support innovation and to reach an appropriate balance between the rights of owners and users. Although other jurisdictions have sometimes taken slightly different approaches, they are all modelled closely on the US law. In addition, although fair use has been described as “the most troublesome doctrine in the whole law of copyright”,³⁵ recent scholarship has persuasively argued that fair use outcomes are rather more predictable than has sometimes been argued.³⁶ If Australia was to adopt a flexible exception that took into account the same factors as its US counterpart, it would have the ability to draw upon a rich and growing body of jurisprudence to assist in giving certainty to the new standard.

It has sometimes been suggested that Australia is unable to implement a flexible exception on the grounds that it would conflict with our international treaty obligations. While it is of course vital that Australia complies with those obligations (including the three step test, where applicable), the suggestion that flexible exceptions conflict with those obligations has been overstated.

The World Trade Organisation held a review of copyright legislation in 1996. On fair use, the US was asked by the EU how fair use was consistent with Article 13 of TRIPs (which embodies the Berne Convention’s “three step test”). The US responded by explaining:

The fair use doctrine of US copyright law embodies essentially the same goals as Article 13 of TRIPs, *and is applied and interpreted in a way entirely congruent with the standards set forth in that Article*. Fair use was historically developed as a safety valve to the exclusive rights granted by copyright, permitting limited and reasonable uses without permission or payment - precisely those types of uses which do not interfere with the copyright owner’s normal exploitation of the work or unreasonably prejudice his or her rights.³⁷

³⁴ *Copyright Act 1987* (Singapore) s35.

³⁵ *Dellar v Samuel Goldwyn*, 104 F2d 661, 662 (2d Cir1939) (per curiam).

³⁶ See eg Matthew Sag, ‘Predicting Fair Use’ (2012) 73(1) *Ohio State Law Journal* 47; Pamela Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537.

³⁷ Council for Trade-Related Aspects of Intellectual Property Rights, *Review of Legislation on Copyright and Related Rights* (30 October 1996) World Trade Organisation

This response was apparently accepted. As Professor Bill Patry has chronicled at length, the US has never seriously been challenged about its flexible exception's consistency with international treaty obligations.³⁸ If Australia was to adopt a flexible exception in the same terms as fair use (and make it clear in the Explanatory Memorandum that it should be interpreted with reference to US jurisprudence) there would be no conflict whatsoever with our international obligations.

As Hugenholtz and Okediji have observed, “the unlimited grant or exercise of rights by copyright holders without corresponding and appropriate [limitations and exceptions] has serious adverse long-term implications not only for development priorities, but indeed for the creative and innovation process itself.”³⁹ Australia needs to implement a flexible exception to help it reach a balance that encourages rather than hinders innovation.

Recommendation: Australia should adopt a flexible exception in the same terms as the US fair use doctrine

<http://docsonline.wto.org/GEN_highLightParent.asp?qu=Response+to+Question&doc=D%3A%2FDDFDOCUMENTS%2FT%2FIP%2FQ%2FUSA1.WPF.HTM&curdoc=1&popTitle=IP%2FQ%2FUSA%2F1>.

Emphasis added.

³⁸ William Patry, ‘Fair Use, the Three-Step Test, and the Counter-Reformation’ on The Patry Copyright Blog (2 April 2008) <<http://williampatry.blogspot.com.au/2008/04/fair-use-three-step-test-and-european.html>>.

³⁹ P Bernt Hugenholtz and Ruth L Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (6 March 2008) Institute voor Informatierecht, 10 <http://www.ivir.nl/publications/hugenholtz/limitations_exceptions_copyright.pdf>.