

ALRC Copyright and the Digital Economy - Discussion Paper 79 - Ericsson submission





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(note: this submission to be made online)

Re: ALRC – Copyright and the Digital Economy – Discussion Paper (DP79), May 2013

Ericsson welcomes the opportunity to respond to the ALRC. Ericsson is the world's leading provider of technology and services to telecom operators. Ericsson is the leader in 2G, 3G and 4G mobile technologies, and provides support for networks with over 2 billion subscribers and has the leading position in the managed services business domain. The company's portfolio comprises mobile and fixed infrastructure, telecom services, software, broadband and multimedia solutions (including IPTV and Mobile TV) for operators, enterprises and the media and broadcasting industry.

As the world's leading network infrastructure and managed services provider for mobile network operators, Ericsson plays a key role in the development of standards for mobile telephony and mobile broadband technologies, and seeks to ensure a globally harmonised allocation of spectrum to foster a global eco-system of network infrastructure, handsets, and other devices to benefit enterprises and consumers.

Ericsson has one of the industry's strongest telecom technology portfolios, with over 33,000 granted patents worldwide and is the leading patent holder for 3GSM family of mobile network equipment standards: GSM / UMTS / WCDMA / LTE. Ericsson is the leading vendor in supplying LTE equipment to mobile operators around the world, and is a net receiver of licensing royalties with more than 90 patent-licensing agreements in place.

Ericsson is the fifth largest Information Technology Company by software revenues, following Microsoft, IBM, Oracle and SAP. Ericsson employs over 110,000 staff worldwide and over 21% or 24,100 of those are dedicated to R&D. Ericsson invested SEK 32.8 billion (USD 4.9 billion) in R&D in 2012.

Ericsson makes its technology available to others, and is a champion of industry practice on FRAND (Fair, Reasonable and Non-Discriminatory) licensing.

Ericsson has been an active industry participant in Australia since the 1950s, and currently has a strong presence of around 1400 employees, delivering high-value professional services capability across the Asia Pacific region, and establishing the first LTE Global Competence Centre for technical innovation and global support. Locally, Ericsson is also a member of following Australian Industry Associations: AIG, AMTA, and CommsAlliance.

Finally, as a member of Communications Alliance and Australian Industry Group, Ericsson is also a contributor to submissions of these associations.



1 Ericsson's position on key proposals and questions

1.1 4) The Case for Fair Use in Australia

Question 4–1 What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

Ericsson supports a progressive approach to enabling wider, legitimate use of copyright material to further stimulate growth of the digital economy.

As caching is a key requirement for efficient distribution of digital content, it is requested that this be explicitly cited as an example of 'non consumptive' use. A key pre-requisite of a digital economy is an increased efficiency in the creation, distribution and delivery of digital assets, however if digital assets remain burdened with 'physical world' costs, the full potential of a digital economy may not be realised in full.

Ericsson has a keen interest to ensure the most efficient use of underlying delivery technologies, and although this may not be explicitly represented by the non-exhaustive list of fairness factors (Proposal 4-3), it is certainly consistent with them. In other words, this interest is not related to content usage or ownership; rather it is entirely related to efficient distribution to maximise the opportunity for rights holders and consumers alike.

Question 4–2 If fair use is enacted, the ALRC proposes that a range of specific exceptions be repealed. What other exceptions should be repealed if fair use is enacted?

ERICSSON: No comment.

1.2 6) Statutory Licences

Proposal 6–1 The statutory licensing schemes in pts VA, VB and VII div 2 of the Copyright Act should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

ERICSSON: No comment.



Question 6–1 If the statutory licences are repealed, should the Copyright Act be amended to provide for certain free use exceptions for governments and educational institutions that only operate where the use cannot be licensed, and if so, how?

ERICSSON: No comment.

1.3

7) Fair dealing

Proposal 7–1 The fair use exception should be applied when determining whether a use for the purpose of research or study; criticism or review; parody or satire; reporting news; or professional advice infringes copyright. ‘Research or study’, ‘criticism or review’, ‘parody or satire’, and ‘reporting news’ should be illustrative purposes in the fair use exception.

Proposal 7–2 The Copyright Act should be amended to repeal the following exceptions:

(a) ss 40(1), 103C(1)—fair dealing for research or study;

(b) ss 41, 103A—fair dealing for criticism or review;

(c) ss 41A, 103AA—fair dealing for parody or satire;

(d) ss 42, 103B—fair dealing for reporting news;

(e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and

(f) ss 104(b) and (c)—professional advice exceptions.

Proposal 7–3 If fair use is not enacted, the exceptions for the purpose of professional legal advice in ss 43(2), 104(b) and (c) of the Copyright Act should be repealed and the Copyright Act should provide for new fair dealing exceptions ‘for the purpose of professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney’ for both works and subject-matter other than works.

Proposal 7–4 If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright is infringed.

ERICSSON: Not relevant for Ericsson to comment on 7-1 to 7-4, as this deals with referential matters rather than delivery or consumption factors.



1.4 8) Non-consumptive Use

Proposal 8–1 The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. ‘Non-consumptive use’ should be an illustrative purpose in the fair use exception.

The traffic in mobile networks is expected to continue to grow exponentially over the next five years, with an expected increase by a factor of 12 or 50% CAGR (Source: Ericsson Mobility Report, June 2013). This growth is driven by the popularity and adoption of smart-phones, tablets, laptops and other portable connected devices. To cope with this growth, a number of new innovations are being designed and developed such as distributed cloud architectures for efficient routing and delivery of data, as well as active/proxy-caching to more efficiently deal with the explosion of data traffic flows.

Ultimately, the sole purpose of these innovations is to drive down the cost of data and hence increase affordability of the data service. It is absolutely essential, in the context of caching that the meaning of “non-consumptive use” is broad and flexible to such a degree that it can accommodate innovations and deployment of efficiency-enhancing technologies.

Proposal 8–2 If fair use is enacted, the following exceptions in the Copyright Act should be repealed:

- (a) s 43A—temporary reproductions made in the course of communication;
- (b) s 111A—temporary copying made in the course of communication;
- (c) s 43B—temporary reproductions of works as part of a technical process of use;
- (d) s 111B—temporary copying of subject-matter as a part of a technical process of use; and
- (e) s 200AAA—proxy web caching by educational institutions.

Ericsson supports the repeal of these exceptions, so long as they are included and sufficiently and explicitly described within Proposal 4-3 and/or Proposal 4-4 to ensure that efficient delivery of digital content and should be sufficiently flexible to enable technological techniques such as non-consumptive caching or temporary copying to be allowed.



Proposal 8–3 If fair use is not enacted, the Copyright Act should be amended to provide a new fair dealing exception for ‘non-consumptive’ use. This should also require the fairness factors to be considered. The Copyright Act should define a ‘nonconsumptive’ use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

Ericsson supports this approach also, should fair-use not be enacted, however requests that the fairness factors described within Proposal 4-3 should be explicitly described to ensure that efficient delivery of digital content and should be sufficiently flexible to enable technological techniques such as non-consumptive caching or temporary copying to be allowed.

1.5 9) Private and domestic use

Proposal 9–1 The fair use exception should be applied when determining whether a private and domestic use infringes copyright. ‘Private and domestic use’ should be an illustrative purpose in the fair use exception.

Ericsson believes that the definition of a private sphere should include domestic use and furthermore should not be limited to a single individual within a domestic context, but rather consumed by multiple parties within that domestic context (eg a household with multiple inhabitants).

Ericsson believes that an up to date copyright regime that is respected and accepted by the mainstream population of a society must meet *reasonable expectations* of an average/mainstream citizen and in this context the reasonable expectation is that an average mainstream citizen in Australia is a member of domestic circle. Approaching the question from a copyright ‘revenue maximalist’ viewpoint where the potential consumption is the benchmark may not be the most appropriate.

Proposal 9–2 If fair use is not enacted, the Copyright Act should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

Proposal 9–3 The exceptions for format shifting and time shifting in ss 43C, 47J, 109A, 110AA and 111 of the Copyright Act should be repealed.

Ericsson supports the repeal of current exceptions for format shifting and time shifting in the Copyright Act, as these are overly prescriptive and fundamentally not technology neutral and apply to an historical analogue domain. For example, time shifting of content is allowed where this is performed on a physical recording device located in the viewer’s home (PVR or VHS cassette recorder), whereas recording content remotely in ‘the cloud’ via a hosted operator or public service, is not permitted. This creates a barrier to service innovation, such as multi-screen viewing and flexible content access for consumers.



The current exceptions therefore are inadequate to support current and future transition to a digital economy, where copyright assets are already largely available in digital format.



Proposal 9–4 The fair use exception should be applied when determining whether a use of copyright material for the purpose of back-up and data recovery infringes copyright.

Ericsson strongly supports the application of the fair use exception when determining whether a use of copyright material, for the purpose of backup and data recovery, infringes copyright.

In order to ensure that there is adequate guidance provided by an updated copyright regime, Ericsson suggests the creation and inclusion of a non-exhaustive list of illustrative examples of non-consumptive uses, similar to the list shown in Proposal 4-4. This would provide greater clarity to copyright holders and consumers of copyright material on what is considered 'fair' when it comes to backup / data recovery of copyright material.

Proposal 9–5 The exception for backing-up computer programs in s 47J of the Copyright Act should be repealed.

ERICSSON: Refer to comments in response to Proposal 9-4.

1.6

10. Transformative Use and Quotation

Proposal 10–1 The Copyright Act should not provide for any new 'transformative use' exception. The fair use exception should be applied when determining whether a 'transformative use' infringes copyright.

Proposal 10–2 The fair use exception should be applied when determining whether quotation infringes copyright. 'Quotation' should be an illustrative purpose in the fair use exception.

Proposal 10–3 If fair use is not enacted, the Copyright Act should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.

ERICSSON: No comment.



1.7

11. Libraries, Archives and Digitisation

Proposal 11–1 If fair use is enacted, s 200AB of the Copyright Act should be repealed.

Proposal 11–2 The fair use exception should be applied when determining whether uses of copyright material not covered by specific libraries and archives exceptions infringe copyright.

Proposal 11–3 If fair use is not enacted, the Copyright Act should be amended to provide for a new fair dealing exception for libraries and archives. This should also require the fairness factors to be considered.

Ericsson: No comment.

Question 11–1 Should voluntary extended collective licensing be facilitated to deal with mass digitisation projects by libraries, museums and archives? How can the Copyright Act be amended to facilitate voluntary extended collective licensing?

Ericsson: No comment.

Proposal 11–4 The Copyright Act should be amended to provide a new exception that permits libraries and archives to make copies of copyright material, whether published or unpublished, for the purpose of preservation. The exception should not limit the number or format of copies that may be made.

Ericsson strongly supports the permission for libraries and archives to make copies of copyright material, published or unpublished, for the purpose of preservation. In the rapidly emerging context of a digital economy, there is a high risk of non-digitised works becoming effectively inaccessible and therefore 'undiscoverable' without digitising for archival and reference purposes.

Proposal 11–5 If the new preservation copying exception is enacted, the following sections of the Copyright Act should be repealed:

(a) s 51A—reproducing and communicating works for preservation and other purposes;

(b) s 51B—making preservation copies of significant works held in key cultural institutions' collections;

(c) s 110B—copying and communicating sound recordings and cinematograph films for preservation and other purposes;

(d) s 110BA—making preservation copies of significant recordings and films in key cultural institutions' collections; and



(e) s 112AA—making preservation copies of significant published editions in key cultural institutions' collections.

Proposal 11–6 Any new preservation copying exception should contain a requirement that it does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.

Proposal 11–7 Section 49 of the Copyright Act should be amended to provide that, where a library or archive supplies copyright material in an electronic format in response to user requests for the purposes of research or study, the library or archive must take measures to:

- (a) prevent the user from further communicating the work;
- (b) ensure that the work cannot be altered; and
- (c) limit the time during which the copy of the work can be accessed.

Ericsson believes that a balance needs to be struck between libraries making copyright material accessible for reference and research purposes, and the practicalities of individual libraries applying technical protection measures (TPM's) such as Digital Rights Management to digitally archived material.

The cost and complexity of implementing and on-going administration of TPM's by individual libraries may actually create a barrier to digitisation of such copyright works, thereby limiting the accessibility of such works in a digital economy. Therefore, it is recommended that a common framework be adopted for libraries to digitise and make accessible copyright material in order to minimise the financial burden and also maximise potential social benefit by maximising accessibility of such assets.

1.8 12. Orphan Works

Proposal 12–1 The fair use exception should be applied when determining whether a use of an 'orphan work' infringes copyright.

Proposal 12–2 The Copyright Act should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

- (a) a 'reasonably diligent search' for the rights holder had been conducted and the rights holder had not been found; and
- (b) as far as reasonably possible, the work was clearly attributed to the author.

Proposal 12–3 The Copyright Act should provide that, in determining whether a 'reasonably diligent search' was conducted, regard may be had, among other things, to:

- (a) how and by whom the search was conducted;



(b) the search technologies, databases and registers available at the time; and

(c) any guidelines or industry practices about conducting diligent searches available at the time.

Ericsson: No comment.

1.9 13. Educational Use

Proposal 13–1 The fair use exception should be applied when determining whether an educational use infringes copyright. ‘Education’ should be an illustrative purpose in the fair use exception.

Proposal 13–2 If fair use is not enacted, the Copyright Act should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.

Proposal 13–3 The exceptions for education in ss 28, 44, 200, 200AAA and 200AB of the Copyright Act should be repealed.

In order to maximise social benefit and accessibility of government-funded copyright material, Ericsson recommends that any public interest copyright material, fully-funded by state or federal governments, should ensure public interest takes precedence over copyright.

Therefore, ‘public interest’ should be included as an illustrative purpose in the fair use exception.

1.10 14. Government Use

Proposal 14–1 The fair use exception should be applied when determining whether a government use infringes copyright. ‘Public administration’ should be an illustrative purpose in the fair use exception.

Proposal 14–2 If fair use is not enacted, the Copyright Act should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered.

Proposal 14–3 The following exceptions in the Copyright Act should be repealed:

(a) ss 43(1), 104—judicial proceedings; and

(b) ss 48A, 104A—copying for members of Parliament.

Ericsson: No comment.



1.11 15. Retransmission of Free-to-air Broadcasts

Proposal 15–1

Option 1: The exception to broadcast copyright provided by the Broadcasting Services Act 1992 (Cth), and applying to the retransmission of free-to-air broadcasts; and the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of the Copyright Act, should be repealed. This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders. (direct licensing)

Option 2: The exception to broadcast copyright provided by the Broadcasting Services Act, and applying to the retransmission of free-to-air broadcasts, should be repealed and replaced with a statutory licence.

Ericsson supports the use of statutory licensing, as this provides an alternative means for a distributor to acquire rights for retransmission of linear content without the need for a direct licensing agreement with the broadcaster, thereby growing the addressable market which is viewed as a positive outcome.

Proposal 15–2 If Option 2 is enacted, or the existing retransmission scheme is retained, retransmission ‘over the internet’ should no longer be excluded from the statutory licensing scheme applying to the retransmission of free-to-air broadcasts. The internet exclusion contained in s 135ZZJA of the Copyright Act should be repealed and the retransmission scheme amended to apply to retransmission by any technique, subject to geographical limits on reception.

Ericsson supports this proposal, as it is technologically agnostic to the content delivery method.

Question 15–1 If the internet exclusion contained in s 135ZZJA of the Copyright Act is repealed, what consequential amendments to pt VC, or other provisions of the Copyright Act, would be required to ensure the proper operation of the retransmission scheme?

Ericsson strongly believes that copyright law should adhere to a technology neutral principle, where the basis or an exception should be the purpose rather than the technology itself. Copyright law should be technology neutral to avoid discriminating against particular technology choices for digital copyright material.



Proposal 15–3 If it is retained, the scope and application of the internet exclusion contained in s 135ZZJA of the Copyright Act should be clarified.

Ericsson recommends that the current scope and application of the ‘internet’ exclusion should be repealed, on the basis that it provides a potential loophole for future exploitation. The ‘Internet’ as we know it today will continue to evolve, with high-speed broad networks such as the National Broadband Network, likely to attract new forms of content delivery such as ‘broadband broadcasters’ or similar.

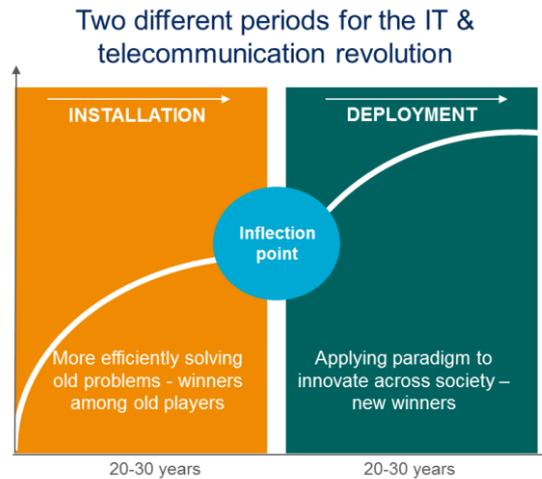
These entities may well decide to deliver content and services NOT over the public internet or ‘over the top’, but rather over dedicated distribution networks, in much the same way today that cable networks deliver both subscription TV as well as internet access, however the two services are independent and not reliant on ‘internet’ access for delivery.

To illustrate, a clear distinction can be made between the network communications protocol TCP/IP, which happens to be used for the internet, as well as for private networks which clearly are separated from the internet.

As ongoing technology and service innovation continues to deliver greater choice to consumers on an equitable and economically attractive basis, it is essential to ensure sufficient future flexibility as opposed to technology-specific legislation, which today is limited by our current understanding of technology and its uses. This significance of previous technological revolutions has been researched and modelled by Carlotta Perez from the Universities of Cambridge, Tallinn and Sussex (see refs), who highlights that in each previous instance (industrial, steam/coal/iron/railways, steel & heavy engineering, automobile/oil/mass productions), the initial installation of a new and typically disruptive innovation led to completely new set of realities in all cases. We are currently in the IT & telecoms revolution, which arguably has already moved from ‘installation’ to ‘deployment phase’, with ongoing decades of IT innovation creating completely new value networks to those of the past.

This topic is further explored in

- 1) Ericsson, <http://www.youtube.com/watch?v=-AAyUN7wj9I>
- 2) Carlota Perez, TECHNOLOGICAL REVOLUTIONS & FINANCIAL CAPITAL: The Dynamics of Bubbles and Golden Ages
- 3) Ericsson, Copyright Enforcement in the Networked Society, 2011



Question 15–2 How should the scope and application of the internet exclusion contained in s 135ZZJA of the Copyright Act be clarified and, in particular, its application to internet protocol television?

Internet Protocol Television can be delivered either via a ‘closed’ or managed IPTV environment, typically managed by a telecoms or cable operator today, or via the public internet which is also commonly known as ‘over the top’. Both are dependent on different and specific technology architectures, however they are often referred to by the same name, thereby creating an ambiguous definition ‘internet protocol television.’

In the case of a managed IPTV environment, management and distribution of content will be limited to a specific geographic area, whereas for IPTV delivered over the public internet, the use of geoblocking or other mechanisms may be required to limit distribution based on territorial licensing agreements.



1.12 16. Broadcasting

Proposal 16–1 The Copyright Act should be amended to ensure that the following exceptions (the ‘broadcast exceptions’), to the extent these exceptions are retained, also apply to the transmission of television or radio programs using the internet:

- (a) s 45—broadcast of extracts of works;
- (b) ss 47, 70 and 107—reproduction for broadcasting;

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- (c) s 47A—sound broadcasting by holders of a print disability radio licence;
- (d) s 67—incidental broadcast of artistic works;
- (e) s 109—broadcasting of sound recordings;
- (f) s 135ZT—broadcasts for persons with an intellectual disability;
- (g) s 199—reception of broadcasts;
- (h) s 200—use of broadcasts for educational purposes; and
- (i) pt VA—copying of broadcasts by educational institutions.

Question 16–1 How should such amendments be framed, generally, or in relation to specific broadcast exceptions? For example, should:

- (a) the scope of the broadcast exceptions be extended only to the internet equivalent of television and radio programs?

Ericsson recommends extending exceptions to any delivery platform, not just via the internet, as per response to question 15-2. Therefore, any amendments should be framed without technology specificity, in order to future-proof and support on-going technological innovation.

- (b) ‘on demand’ programs continue to be excluded from the scope of the broadcast exceptions, or only in the case of some exceptions?

Ericsson recommends that content rights should be issued irrespective of delivery platform (terrestrial broadcast, internet, broadband content delivery network (CDN) or other), in particular because consumers are often not aware (nor do they care) if content they watch is broadcast, multicast to a selected group, or unicast to an individual. Further, with the recent introduction of Hybrid Broadcast Broadband TV (HBBTV) into Europe and planned introduction into the Australian market, any distinctions between delivery platforms will be increasingly obscure to the end consumer.



Consumer confusion or lack of transparency over this issue may actually restrict uptake of on-demand services which might otherwise offer commercially viable benefits to the entire value network (copyright holders, advertisers, broadcasters, operators and ultimately end-consumers).

(c) the scope of some broadcast exceptions be extended only to content made available by free-to-air broadcasters using the internet?

Refer to response to proposal 13.

Proposal 16–2 If fair use is enacted, the broadcast exceptions in ss 45 and 67 of the Copyright Act should be repealed.

Question 16–2 Section 152 of the Copyright Act provides caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings. Should the Copyright Act be amended to repeal the one per cent cap under s 152(8) or the ABC cap under s 152(11), or both?

Question 16–3 Should the compulsory licensing scheme for the broadcasting of published sound recordings in s 109 of the Copyright Act be repealed and licences negotiated voluntarily?

No comment.

1.13

17. Contracting Out

Proposal 17–1 The Copyright Act should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect. These limitations on contracting out should apply to the exceptions for libraries and archives; and the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

No comment.



Ericsson's global and extensive experience with the research and development of technologically efficient and commercial viable solutions for consumers and enterprises strongly supports the case for 'fair use'. While national considerations may make it important to consider compromise outcomes or fallback positions, in the long-term, we do not perceive compromises as commercially sustainable or ultimately in the best interests of a robust, digital economy.

Ericsson looks forward to continued engagement with the ALRC on digital economy related matters in the future, and is pleased to be contacted in relation to any points raised in this submission.

Yours sincerely,

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