



# Google submission to ALRC discussion paper Copyright in the Digital Economy (ALRC DP 79)

## Executive summary

Australia's current set of purpose based copyright exceptions have not kept pace with developments in technology, creation, content distribution or consumer engagement with content.

Outdated copyright exceptions mean that consumers cannot time and format shift lawfully acquired content in a seamless way (for example, it is lawful to copy a CD to use on a tablet, but not a DVD). Cloud providers cannot exercise copyright exceptions on behalf of users. And more than 15 years after search engines were invented, it is still not possible to operate a search engine in Australia without a significant and unacceptable level of business risk as copyright exceptions due to the lack of legal protection for standard search engine activities such as crawling, indexing and caching.

Outdated copyright laws are standing the way of Australia meeting its cloud computing and digital economy goals. Australia needs flexible and future proofed copyright laws to support new forms of creation and innovation, as well as the investment in and adoption of digital technologies.

Google is strongly supportive of the ALRC's proposed introduction of a fair use provision into the Australian Copyright Act.

Introducing a fair use exception would not mean that all new uses of copyright materials would be considered fair. But fair use would solve the current problem with Australia's laws that innovative uses of copyright materials are automatically prohibited because there is no exception that applies to them.

Google completely agrees with the ALRC that:

*To say new uses should be considered under a fair use exception is not to say that the uses would be fair. But copyright law that is conducive to new and innovative services and technologies should at least allow the question of fairness to be asked.*

Fair use would create badly needed breathing room for creation and technical innovation, while protecting copyright owners by requiring all fair use assessments to take into account the impact of new uses on copyright owner markets and the value of copyright content.

Fair use would future proof the Copyright Act - enabling new uses of copyright materials to be considered under the fair use provision instead of requiring incremental reform to copyright laws.



## Submission

### Introduction

Google congratulates the ALRC on a thoughtful and well-reasoned discussion paper. The paper consolidates and assesses the range of policy arguments made in the almost 300 submissions made in response to the questions raised in the ALRC's issues paper. This is no easy task.

The discussion paper is a thoughtful document that builds upon the findings of comparable international policy reviews as well as contemporary copyright scholarship.

### The Australian digital economy

In the months since the ALRC released its issues paper, two important policy documents have been released which reiterate the importance of Australia getting its policy settings right for the digital age:

#### *The National Cloud Computing Strategy*<sup>1</sup>

Australia's cloud computing strategy acknowledges the benefits of Australians creating and using world-class cloud services to boost innovation and productivity across the digital economy. It sets three goals:

1. The Australian Government will be a leader in the use of cloud services to achieve greater efficiency, generate greater value from ICT investment, deliver better services and support a more agile public sector<sup>2</sup>.
2. Australian small businesses, not-for-profit organisations and consumers will have the protection and tools they need to acquire cloud services with confidence<sup>3</sup>.
3. Australians will have a vibrant cloud sector supported by:
  - a skilled and cloud aware ICT workforce, able to create as well as adopt cloud services
  - effective competition in cloud services
  - regulatory settings that support growth, foster innovation and protect users<sup>4</sup>.

---

<sup>1</sup> Department of Broadband, Communications and the Digital Economy, *The National Cloud Computing Strategy*, May 2013 Available at [www.dbcde.gov.au/cloud](http://www.dbcde.gov.au/cloud)

<sup>2</sup> National Cloud Computing Strategy, p4

<sup>3</sup> ibid

<sup>4</sup> National Cloud Computing Strategy, p5



*Advancing Australia as a Digital Economy: An update to the National Digital Economy Strategy*<sup>5</sup>

Australia's digital economy policies recognise the importance of the internet to Australian society and future economic development.

*For decades now, information and communications technology (ICT) has been the key driver of global innovation and productivity, pushing the most substantial and rapid transformation of business models and market structures in history ...*

*... Australia's future prosperity depends on how effectively we take advantage of such advances: how effectively we become a digital economy ...*

*... The Government is ensuring that Australia will have world class infrastructure ... The GOVERNMENT is also working to ensure we have the other enabling capabilities necessary for a thriving digital economy: a safe and secure online environment, a strong ICT sector and skills base, regulations that support online engagement, and a willingness to adopt game changing technologies such as cloud computing<sup>6</sup>.*

The ALRC's review of Copyright and the Digital Economy is a critical part of ensuring that Australia achieves these important goals.

### **Getting the copyright balance right is critical for the digital economy**

If Australia is to achieve its digital economy goals, we need to ensure that policy and regulatory settings support innovation, investment and adoption of digital technology. Nowhere is this more critical than copyright.

Since 2004, Australia has introduced 5 major pieces of copyright legislation primarily designed to provide stronger rights protection and enforcement for rights holders.<sup>7</sup> Against that background, the ALRC was asked to ensure that the balance between the interests of rights holders and the public has been properly maintained in Australian copyright law - and that the copyright exceptions are working effectively in the digital economy.<sup>8</sup>

Australia is not the only country asking these important questions. The importance of getting the copyright balance right in the digital economy is recognised worldwide. Similar reviews to the ALRC are occurring or have occurred in the UK, US, Canada, Ireland, European Union, Singapore, Israel, South Korea, Thailand and The Philippines to name just a few.

---

<sup>5</sup> Department of Broadband, Communications and the Digital Economy, *Advancing Australia as a Digital Economy: An update to the National Digital Economy Strategy*, June 2013 Available at [www.nbn.com](http://www.nbn.com)

<sup>6</sup> Forward to *Advancing Australia as a Digital Economy: An update to the National Digital Economy Strategy*

<sup>7</sup> US Free Trade Agreement Implementation Act 2004, Copyright Amendment Act 2004, Copyright Amendment (Film Directors' Rights) Act 05, Copyright Amendment Act '06, Intellectual Property Laws (Raising the Bar) Act 2012.

<sup>8</sup> <http://www.alrc.gov.au/news-media/2011-2012/copyright-inquiry-e-news-draft-terms-reference>.



For example, in relation to the review being conducted by the European Commission into how best to modernise copyright for the digital economy<sup>9</sup>, Ms Neelie Kroes, Vice President of the European Commission responsible for the Digital Agenda said:

*... [W]e need to modernise copyright for the digital age: many of the rules have been in place since before things like YouTube, Facebook or data-mining techniques even existed. And, no matter what perspective you bring to the debate, it is obvious that the current fragmented rules in Europe and elsewhere have created frustrations.*

*It's right to provide reward and recognition for artists: but the current copyright system sometimes doesn't do that as well as it could. Often, in fact, it makes it harder for you to legally access your favourite content. And in many ways it closes us off from digital opportunity, whether it's the chance to explore innovative new business models, or new ways to conduct lifesaving scientific research.*

*It's right that the EU looks at this.*

## **Overview of submission**

Google argued in its submission to the ALRC's issues paper that Australia's current copyright laws are too narrow and technology-specific, which is holding back innovation, creativity investment and the enjoyment of content<sup>10</sup>. Google submits that the proposals put forward in the ALRC's discussion paper would solve the majority of these problems<sup>11</sup>. Google strongly supports the ALRC's primary proposal for the introduction of a fair use provision into the Australian Copyright Act.

This submission addresses 5 issues raised in the discussion paper:

1. Fair use
2. Contracting out
3. Orphan works and mass digitisation
4. Broadcasting issues
5. Safe harbours.

---

<sup>9</sup> European Commission media release, *Commission agrees way forward for modernising copyright in the digital economy*, Reference: MEMO/12/950, Brussels, 5 December 2012. Available at [http://europa.eu/rapid/press-release\\_MEMO-12-950\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-950_en.htm)

<sup>10</sup> Google Australia submission to ALRC Issues Paper 42 (IP 42) *Copyright and the Digital Economy*, August 2012, submission made in November 2012.

<sup>11</sup> Subject to the small number of technical issues identified in this submission.



## 1. Fair use

The ALRC considered the arguments put in submissions to the review's issues paper in relation to whether the introduction of a flexible copyright exception might be beneficial for Australia and concluded that fair use:

- is suitable for the digital economy and will assist innovation
- provides a flexible standard
- is coherent and predictable
- is suitable for the Australian environment; and
- is consistent with the three-step test.

Google agrees with the ALRC's assessment.

As set out in our issues paper submission<sup>12</sup>, Google believes that the current copyright regime does not support Australia's digital economy goals. The current Copyright Act:

- impedes innovation in new content, products and services
- inadequately covers basic internet functions like caching, search and indexing
- inhibits the development and adoption of cloud computing technologies
- blocks creative and transformative uses
- prevents consumers from making everyday uses of legitimately acquired content
- stands in the way of data and text mining used in scientific and medical research.

This is because Australia's current set of purpose based exceptions have not kept pace with developments in technology, methods of content distribution or consumer expectations. Closed lists are antithetical to how the internet works and the dynamic nature of the creativity enabled by the internet. Australia's system of closed-purpose, prescriptively described exceptions means that new and innovative uses of copyright materials that do not fall within the technical confines of an existing exception are not capable of being permitted by exceptions, no matter how creative the new use, or how strong the public interest in enabling that new use may be. Closed lists of exceptions are simply not designed to adapt to new forms of creation, or new uses of copyright materials.

The impact of Australia's closed list of exceptions can be seen in relation to basic internet functions. For example, despite the ubiquitous nature of the internet and web search technologies, each of these activities still involve making copies that may infringe copyright under Australian law. More than 15 years after search engines first came to be widely used, there is still a significant and unacceptable level of business risk from hosting a search engine in Australia due to the lack of legal protection for standard search engine activities such as crawling, indexing and caching.

---

<sup>12</sup> See for example section 7 *Inflexible copyright laws are impeding innovation*, pp 25 - 41



In contrast, a flexible exception such as that proposed by the ALRC enables new uses of copyright materials to be assessed against a set of clear fairness factors (including the impact on the copyright owner's market) in order to assess whether the new use should be considered to be fair. Not only would this approach save the legislature from constant 'catch up' with developments in technology<sup>13</sup>, it would also incentivise the creation of new works and new technologies to assist consumers to consume those works.

*Prescriptively constraining Australia's copyright exceptions to particular purposes may deny Australia ... transformative and productive new technologies and services<sup>14</sup>.*

## 1.1 The certainty debate

Opposition to the introduction of a flexible exception such as fair use in Australia often focuses on claims that fair use would be more uncertain than Australia's existing fair dealing exceptions. Google believes that these concerns are misplaced for two main reasons:

1. Australia and the United States share a common 'fairness history'
2. Experience in the United States suggests that fair use can be predictable and manageable.

### Fair dealing v fair use in practice

Australia's current Copyright Act contains a requirement for courts to assess whether particular uses of copyright materials are 'fair'. For example:

- fair dealing for the purpose of research or study<sup>15</sup>
- fair dealing for the purpose of criticism or review<sup>16</sup>
- fair dealing for the purpose of parody or satire<sup>17</sup>
- fair dealing for the purpose of reporting news<sup>18</sup>.

Under the current fair dealing exceptions, before relying on an exception, a user of copyright material has to ask two questions:

1. Is my use for a fair dealing purpose?
2. Is my use fair?

If a use is covered by one of the listed fair dealing purposes, the user can then assess whether his or her use would be considered to be fair. If the use is not covered by one of the listed fair

---

<sup>13</sup> See Discussion Paper paragraph [4.118]

<sup>14</sup> Discussion Paper, paragraph [5.51]

<sup>15</sup> ss 40 and 103C

<sup>16</sup> ss 41 and 103A

<sup>17</sup> ss 41A and 103AA

<sup>18</sup> ss 42 and 103B



dealing purposes, the user cannot take advantage of the fair dealing exceptions - even where the use might otherwise be considered to be 'fair'.

It is this outcome (ie, automatically banning some uses without even asking whether they might be fair) that makes Australia's current system so unsuitable for a world class digital economy.

In contrast, the ALRC has proposed a flexible exception which provides an illustrative list of the types of uses which *might* be considered to be fair<sup>19</sup>. These purposes should be seen as examples of the types of uses that could potentially be considered to be fair<sup>20</sup>. The fact that a use is listed does not mean that it will automatically be fair, nor does it create a presumption of fairness<sup>21</sup>. Critically for the creation of new forms of content and technologies though, just because a use does not appear on this list, does not mean that it could not still be considered to be fair, if determined to be so when assessed against the fairness factors<sup>22</sup>.

As such, the main difference between the ALRC's proposal and the status quo is this:

Australia currently closely prescribes the types of uses that are potentially able to be considered to be fair uses of copyright materials. As discussed above, this approach does not recognise the dynamic nature of the internet or the creative process. In contrast, the ALRC has given a list of purposes which are illustrative of the types of uses which might be able to be considered fair uses of copyright materials.

Google endorses the ALRC's approach to this issue:

*To say that these uses should at least be considered under the fair use exception is not to say the uses would be fair. But copyright law that is conducive to new and innovative services and technologies should at least ask for the question of fairness to be asked*<sup>23</sup>.

The ALRC goes to some length to establish that this would not lead to a weakening of copyright protection in Australia. Google shares this assessment.

### **The benefits of flexible exceptions have previously been recognised in Australia**

The merits and appropriateness of the ALRC's approach has been recognised in Australia since 1998. In also recommending a similar flexible exception be introduced into Australian copyright law, the Copyright Law Review Committee stated that a flexible exception would:

---

<sup>19</sup> Proposal 4-4

<sup>20</sup> See Discussion Paper paragraph [4.157]

<sup>21</sup> See Discussion Paper paragraph [4.160]

<sup>22</sup> See Discussion Paper paragraph [4.161]

<sup>23</sup> Discussion Paper paragraph [5.46]



- strike a fair balance between the competing interests of copyright owners and users and describes the limits to copyright owners' rights in a manner that maximises the public interest
- simplify the Act
- offer greater flexibility in allowing courts to determine new circumstances to which the exception can apply in response to changing technology
- provides greater certainty in the determination of 'fairness' through the general application of a non-exclusive set of considerations applicable to all uses<sup>24</sup>.

The introduction of fair use was recommended by the Parliamentary Committees examining the Australia-United States Free Trade Agreement in 2004<sup>25</sup>. Just this week the House of Representatives Standing Committee on Infrastructure and Communications unanimously recommended the clarification of fair use rights for consumers, businesses and educational institutions<sup>26</sup>.

### Assessing fairness

Australia's current copyright laws (with the exception of some copying of literary, dramatic, musical and artistic works), do not provide any legislative guidance about how to answer the important question of whether a use is fair. In contrast, the ALRC has proposed a non-exhaustive list of four fair dealing factors designed to assist in assessing whether a particular use should be considered to be fair. As such, Google submits that the ALRC's proposals may in fact provide more certainty than the status quo.

The fairness factors proposed by the ALRC are:

- a) the purpose and character of the use
- b) the nature of the copyright material used
- c) in a case where part only of the copyright material is used - the amount and substantiality of the part used, considered in relation to the whole of the copyright material
- d) the effect of the use upon the potential market for, or value of, the copyright material.

These are drawn from the factors in the United States Copyright Act, and are similar to factors used in other countries that have introduced a flexible copyright exception. This similarity is not accidental - as fairness factors around the world have emerged from common origins.

---

<sup>24</sup> Copyright Law Review Committee *Simplification of the Copyright Act 1968 Part 1 Exceptions to the Exclusive Rights of Copyright Owners*, paragraph [6.12]

<sup>25</sup> Joint Standing Committee on Treaties *Report 61 - United States Free Trade Agreement*, June 2004; Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America, *Final Report*, August 2004

<sup>26</sup> House of Representatives Standing Committee on Infrastructure and Communications *At what cost? IT pricing and the Australia tax*, July 2013





It is important to note that Australian and United States law in relation to fairness (ie, deciding whether a particular use of copyright material is fair) has the same origins: the common law<sup>27</sup>. Codifications of the common law principles of fairness led to the US fair use factors in s.107 of the United States Copyright Act and the fairness factors for research or study currently in s.40(2) of the Australian Copyright Act. The Law Institute of Victoria commented on the level of similarity between the US fair use factors and Australia's current law on fair dealing<sup>28</sup>.

In other words, the ALRC's proposals do not amount to a radical departure from the way that Australian courts currently approach questions of whether a particular use of copyright material should be considered to be fair. They are entirely consistent with Australian common law and fair dealing traditions.

The ALRC's proposal would ensure that the same set of fairness factors would apply to all assessments of new uses of copyright material. Their interpretation would build on existing common law, as well as law in other common law countries where relevant and persuasive. This would simultaneously ensure predictability and consistency, but also flexibility and 'breathing room' to ensure that new uses and technologies can be taken into account. For example, in the context of the first fairness factor, the 'breathing room' that fair use can provides has been explained as follows:

*Examining the context and purpose of the use is the key to determining whether a use is transformative because it is precisely the context that provides new insights, meaning and message. This is the crucial breathing space fair use provides ...*<sup>29</sup>

### **'Day to day' experience suggests fair use is certain**

Google does not believe that fair use in the United States is inherently uncertain<sup>30</sup>.

The idea that fair use is too uncertain is belied by the day-to-day practices of companies in the United States - including large media companies like Viacom and motion picture companies, as well as internet companies like Google - who collectively make fair use determinations daily, often in relation to very high profile products or content. Flexible copyright provisions are also working well in countries such as Singapore and Canada<sup>31</sup>. Globally, there are more than 1500 opinions available on the operation of flexible fair use style provisions for any anyone who

---

<sup>27</sup> See the discussion in S Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Lawbook Co, paragraph [11.35]

<sup>28</sup> As reported in Discussion Paper paragraph [4.1777]

<sup>29</sup> Motion of Amici Curiae International Documentary Association, Motion Picture Association of America, Inc and Film Independent for leave to file brief in support of Defendants-Appellees, *Bouchat v Baltimore Ravens Limited Partnership* ECF Case No.12-2543; *Bouchat v NFL Enterprises LLC* No. 12-2548 4 August 2013, p

<sup>30</sup> We have read the submission of the Kernochan Center for Law, Media and the Arts *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works*. We think it is critical to note that this report does not reflect our day to day experience of fair use.

<sup>31</sup> See *Global Fair Use and Fair Dealing Decisions Available Online* at <http://infojustice.org/archives/30057>



wishes to consult them. There is no evidence to suggest that the experience in Australia would not be the same. Indeed, there is some evidence to suggest that Australian users already *de facto* operate in a fair use style environment, preferring an overall fairness analysis to the more technical and prescriptive assessments required by Australian copyright law<sup>32</sup>.

As the ALRC acknowledges, fair use adopts a 'standards-based' rather than 'rules-based' approach to making legal determinations<sup>33</sup>. Australia has a long legal tradition of standards-based regulation. Organisations throughout Australia are used to a privacy regime based on a set of guiding principles rather than prescriptive rules. The media and communications industries are used to self-regulatory and co-regulatory codes of practice across a range of broadcasting, telecommunications and online content regulatory issues.

Significant certainty can also be achieved through the use of guidelines and codes providing examples of uses that should and should not be considered to be fair uses of copyright materials. Although never binding, reference to industry customs in relation to fair use can be helpful. In the United States, significant guidance in relation to fair use has been provided by the developments of codes and best practice statements such as:

- The Documentary Filmmakers' Statement of Best Practices in Fair Use<sup>34</sup>
- Code of Best Practices in Fair Use for Online Video<sup>35</sup>
- Code of Best Practices in Fair Use for Media Literacy Education<sup>36</sup>
- Association of Research Libraries' Code of Best Practice for Fair Use<sup>37</sup>.

In the case of the Documentary Filmmakers' Statement of Best Practices in Fair Use, these guidelines have been considered to provide sufficient certainty that they have been accepted by major insurance companies for errors and omissions insurance for fair use claims<sup>38</sup>.

Australian experience suggests that similar guidance would be developed here. For example, fact sheets and guidance on the operation of s.200AB were created after the introduction of the *Copyright Amendment Bill 2006*<sup>39</sup>. The development of industry codes is also specifically

---

<sup>32</sup> Policy Australia, Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use? Report prepared for the Australian Digital Alliance/Australian Libraries Copyright Committee, November 2012, see pages 3 and 11-12

<sup>33</sup> Discussion Paper paragraphs [4.102] - [4.118]

<sup>34</sup> <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>

<sup>35</sup> <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>

<sup>36</sup> <http://www.centerforsocialmedia.org/fair-use/best-practices/code-best-practices-fair-use-media-literacy-education>

<sup>37</sup> <http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices>

<sup>38</sup> P Auderheide *Fair Use Put to Good Use: 'Documentary Filmmakers' Statement' Makes Decisive Impact* August 2007. Available at <http://www.documentary.org/content/fair-use-put-good-use-documentary-filmmakers-statement-makes-decisive-impact>

<sup>39</sup> See [www.smartcopying.edu.au](http://www.smartcopying.edu.au)



provided for in the Copyright Act in relation to the interpretation of authorisation liability<sup>40</sup> and in relation to safe harbours for carriage service providers<sup>41</sup>. Codes of practice are also used to govern the operation of collecting societies under the Copyright Act<sup>42</sup>.

## 1.2 Non-consumptive use

Google strongly supports the ALRC's recommendations in relation to non-consumptive use. The ALRC's policy determinations in this regard will be a critical part of the future success of Australia's digital economy:

*Australian copyright law should recognise that the reproduction of copyright material is a necessary part of the effective functioning of technology in the digital environment*<sup>43</sup>.

The critical importance of ensuring that copyright law cannot be used to prevent the incidental reproductions necessary for the functioning of technologies has also been recognised in the United States:

For example, the United States Second Circuit has pointed out the importance of recognising that some copying is only incidental to the use of technology:

*"... asking whether copying copyrighted material is only "incidental" to a given technology is akin to asking whether that technology has "commercially significant noninfringing uses," another inquiry the Sony Court found relevant to whether imposing contributory liability was just."*<sup>44</sup>

The importance of ensuring that incidental reproductions should not be treated as infringing has also recently been recognised by the United States Register of Copyrights:

*The reproduction right could use a makeover ... [It] has been a valuable tool in enforcement proceedings, helping to ameliorate the confusion or inadequacies of other provisions, particularly in the context of peer-to-peer file sharing or illegal streaming. However, new technologies have made it apparent that not all reproductions are equal in the digital age. Some copies are merely incidental to an intended primary use of a work, including where primary uses are licensed, and these incidental copies should not necessarily be treated as infringing*<sup>45</sup>.

---

<sup>40</sup> See ss. 36(1A)(c) and 101(1A0)(c)

<sup>41</sup> See the conditions applicable to all categories of conduct in s.116AH(1)

<sup>42</sup> Code of Conduct for Copyright Collecting Societies, April 2008. Available at <http://www.copyright.com.au/assets/documents/Corporate/Code%20Reviews/CodeFinal2008.pdf>

<sup>43</sup> Discussion Paper paragraph [8.64]

<sup>44</sup> *Cartoon Network LP v CSC Holdings Inc* 536 F.3d 121 (2d Cir. 2008) p27

<sup>45</sup> Maria Pallante, *The Next Great Copyright Act*, Twenty-Sixth Horace S. Manges Lecture, extended version of a lecture delivered at Columbia University March 4, 2013, 37 COLUM.J.L. & Arts (forthcoming Spring 2013), pp 11-12



The ALRC rightly identifies the dampening effect on investment and innovation of Australia's current copyright laws in relation to incidental copying:

*There are strong arguments lack of protection for [caching and indexing] comparable to other jurisdictions may create an environment of uncertainty which could have an impact on investment decisions about whether to operate in Australia or contribute to increases in the cost of providing services to the Australian public, such as internet streaming of television programs. The development of cloud computing services will also increase the need for temporary copies to be made<sup>46</sup>.*

Resolving the legal status for basic internet functions will ensure that these services can be offered in Australia with legal certainty. This lack of certainty currently stands in the way of Australia attracting internet industries and increased investment in internet infrastructure.

As the ALRC recognises however, non-consumptive use is not only limited to technologies such as search, indexing and caching. It could also include temporary copies already covered by temporary copies exceptions in the Copyright Act, for the temporary copies made as part of browsing the internet or receiving an email, or the copies made as part of using lawful content (such as the buffering that occurs when watching a video streamed from the internet).

Non-consumptive uses are also critical in many other contexts. Some examples of the types of uses which might properly be considered to be fair uses for non-consumptive purposes include anti-plagiarism tools for student assignments (for example iParadigms), music recognition or 'second screen TV' apps that rely on audio fingerprints to identify songs or programs, or data analysis and research tools such as Google's nGram viewer.

Ensuring that these types of incidental, transformative and non-consumptive uses of copyright materials can be considered under a fair use provision - and permitted when they are fair - will ensure that Australia's copyright laws will be able to keep pace with rapid developments in technology and the changing expectations of what is fair from creators, consumers and innovators alike.

Google would also support the ALRC's alternative proposal that is a fair use style provision is not implemented in Australia, that a new exception 'fair dealing for non-consumptive uses' should be introduced.

### **Preserving fair uses**

The discussion paper identifies a range of uses that the ALRC envisages would be covered by a fair use exception. The ALRC states that most uses currently covered by existing exceptions would be covered by the fair use exceptions. Google supports this approach - it is important to ensure that conduct currently protected by an exception should not become unlawful simply via the introduction of fair use.

---

<sup>46</sup> Discussion Paper paragraph [8.72]



The ALRC appears to intend that caching, indexing and other similar functions should “not infringe copyright”<sup>47</sup>. Google endorses this position - in order to promote a world class digital economy, it is essential to avoid *any* uncertainty as to whether the temporary copies that make the internet work are potentially infringing. However, we think there is the potential for uncertainty to arise unless it is made abundantly clear that non-consumptive uses such as temporary copies made as part of the normal use of content, as well as copies made as part of the technical functioning of the internet (such as caching and indexing), are not capable of being rendered “unfair” merely because a licence becomes available at some time in the future<sup>48</sup>.

One way of achieving this may be to include a legislative note providing some examples of what Parliament considers to be fair. An example of such a device is the legislative note that was inserted into the Act in 2006 in order to provide guidance to courts and users as to what Parliament intended by ss 22(6) and 22 (6A) which deal with the question of who is the person who is taken to be responsible for determining this content of a communication. Another example is the legislative guidance given after s.200AB(6) which provides examples in the statute of certain activities that should be permitted by s.200AB. This is an important precedent in the context of the ALRC’s recommended fair use exception. It shows that the Australian Parliament has already considered the benefits of including legislative guidance in the Copyright Act in relation to a flexible exception in the interest of providing additional certainty.

### 1.3 Fair use and third parties

Australia’s current exceptions are limited to particular purposes or technical requirements. As such, they generally require an assessment to be made which centres on answering the question ‘who made the copy?’ (or, in some cases, ‘who communicated the material?’). This approach fails to recognise that in a digital age, many uses of copyright materials for a particular purpose require some or all of the technical steps involved in using the material to be done by someone else.

For example:

- a teacher wanting to play a video in a classroom may require someone in the school library to ‘press play’ on a centralised content streaming system
- a company wishing to back up its systems to the cloud would require a remote storage provider to make copies on its behalf
- a consumer wishing to use an electronic program guide app to ‘set the timer’ to copy a television show to watch it later on a mobile device or tablet may require a remote provider to make a copy on their behalf.
- a consumer wanting to backup copies of lawfully obtained content in the cloud using eg Dropbox or Google Drive would require the cloud service provider to make the backup copies.

---

<sup>47</sup> Discussion Paper paragraph [8.71]

<sup>48</sup> See for example the ALRC’s discussion of the potential impact of the market on private and domestic uses in paragraph [9.59]



In each of these examples, a legal approach that limits the ability to rely on a copyright exception to the person who actually made the copy or communication, would unnecessarily constrain the ability of consumers and businesses to use the most modern and convenient technologies to undertake everyday tasks.

Google agrees with the ALRC that:

*Exceptions should not be confined to copies made or stored on devices owned by the consumer. This is not to say that third parties, such as companies that provide cloud computing services, should necessarily be free to use copyright material for their customers. However, it seems clear to the ALRC that to confine exceptions explicitly to uses of copyright material made on computers and other devices owned by the user, is to insist on a technology distinction that, in view of cloud computing, is already outdated<sup>49</sup>*

Google agrees with the ALRC that a better approach from a policy perspective is not to ask ‘who made the copy?’, but instead to ask “ was it fair that the copy was made?”.

### Cloud computing

The National Cloud Computing Strategy highlights the importance of cloud computing to the Australian digital economy. For example, KPMG has estimated that if 75% of Australian ICT spending was moved to the cloud, over 10 years this would result in an increase in long-run GDP of A\$3.32 billion per annum<sup>50</sup>.

The ALRC acknowledges that there may be a distinction between circumstances where a third party’s use may merely amount to facilitating another person’s fair use, and circumstances where the service provider may have a purpose that is additional or ulterior to simply facilitating another person’s fair use<sup>51</sup>.

Google submits that in many circumstances, cloud service providers operate merely to ‘stand in the shoes’ of the consumer. For example, to back up content on a customer’s behalf, to store a document the consumer has created in a cloud drive so they can access it from multiple devices, or to provide cloud-based hosting of IT systems. In these circumstances, even where the provider may receive some commercial benefit from providing the storage, it is the user who is making the copy, and deciding what is copied. The purpose of making the copying should therefore be seen as identical to the customers’ purpose. If the purpose of the consumer in using copyright material is fair, so too should the purpose of the provider in facilitating that use.

Google acknowledges that there may be some circumstances where a cloud service provider has a purpose that could be considered to be ancillary or additional to the purpose of mere

---

<sup>49</sup> Discussion Paper, paragraph [9.47]

<sup>50</sup> KPMG, *Modelling the Economic Impact of Cloud Computing* (2012) p7.

<sup>51</sup> See Discussion paper, paragraph [5.41] and generally pp 105 - 107.



facilitation of the consumer purpose. That purpose may or may not be considered to be fair, when assessed against the illustrative purposes and factors set out in the ALRC's proposed fair use provision.

Given the importance of cloud computing to the digital economy, and the increasing prevalence of services where providers do little more than copy on a customer's behalf, Google submits that there would be significant benefit for the ALRC to clarify that where a use by an individual consumer would be fair, that it would be also fair for a third party to simply provide the means for them to make that use.

### **Private and domestic uses**

The ALRC acknowledges that consumers are increasingly using cloud services to store content libraries, back up content, or to stream content that they have purchased. Often, the reason for using these services is that consumers want to be able to access content in a range of locations, across a range of devices that they own. For example, a consumer may have purchased content from the iTunes store or Google Play store. This content can be stored in the cloud, and streamed to any device authorised on the account, irrespective of whether the consumer is at home, visiting family or on public transport during their daily commute.

Against this background, Google questions the framing of the proposed illustrative purpose for "private and domestic use". The use of the word "and" is in contrast to other illustrative purposes such as research or study, criticism or review, or parody or satire. The word 'and' in the context of the term "private and domestic" may act as a limiting word, suggesting that fair uses of content by consumers must be both of a private nature and conducted in a domestic context.

For example, the first two definitions given for the word 'domestic' in the Macquarie Dictionary are:

1. of or relating to the home, the household, or household affairs.
2. devoted to home life or affairs.

In a world where consumers and devices are increasingly mobile and internet-connected, and cloud services are becoming the norm, any suggestion that fair uses by consumers should be limited to use in the home should be avoided.

Google submits that the proposed fair use provision should instead use the term "private or domestic", to ensure that the proposed purpose is truly illustrative, rather than operating to constrain the range of consumer uses of copyright materials that could be considered to be fair.

### **1.4 Additional illustrative purposes?**

The ALRC asks at Question 4-1 whether any additional purposes should be included in the list of illustrative purposes for the proposed fair use exception. Google would like to comment on



two sets of uses: uses that involve studying and testing the operation of computer software, and uses that assist persons with a visual impairment.

### **Reverse engineering, decompilation etc**

Google notes that the Copyright Act currently contains a number of exceptions in relation to the use of computer software for various public interest purposes:

- normal use or study (s.47B)
- back-up copying (s.47C)
- making interoperable products (s.47D)
- error correction (s.47E)
- security testing (s.47F).

These exceptions can be used by private individuals or organisations as long as the activities fall within the terms of the exceptions. They are critical exceptions to ensuring the development of innovative technology products and enabling the efficient and secure functioning of computer networks.

The ALRC appears to consider that back up copying (both for computer software and for other forms of content) should be considered under the proposed fair use exception (perhaps under the illustrative purpose of 'private and domestic'<sup>52</sup>).

It is not clear from the discussion paper how these computer software provisions would be treated under a new copyright system. They are not included in the list of exceptions to be repealed on page 95 of the Discussion Paper. However, particularly in the case of s.47C in relation to back up copying done by consumers, the activities covered by the exception may be covered by the fair use exception. Many of the activities covered by these exceptions could also be considered to be non-consumptive uses, however they are not referenced in the ALRC's discussion of non-consumptive uses in Chapter 8 of the Discussion Paper.

Google submits that the ALRC should either:

- clarify that the computer software exceptions in Division 4A of Part III will remain in the Act; or (if the ALRC's intention is that these exceptions should be repealed)
- clarify that these types of critical security and research uses could be covered by a fair use provision (assuming the fairness criteria are met). This could be done by clarifying that the ALRC intends that these types of uses should be considered to be non-consumptive, or by the introduction of an additional illustrative purpose.

Clarification of whether s.47H will remain in the Copyright Act will be critical in relation to the ALRC's recommendations in relation to contracting out (see section 2 below).

### **Assistance for persons with a visual impairment**

---

<sup>52</sup> Proposals 9-1, 9-3, 9-5 and 4-4.





Google supports copyright exceptions that facilitate access to accessible versions of copyright materials for people with a disability. In this regard, Google is supportive of Australia's decision to become a signatory of the recently concluded Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled<sup>53</sup> (VIP Treaty).

Google would support the addition of a new exception or illustrative purpose to ensure that Australia is able to fully implement the VIP Treaty.

## 2. Contracting out

Google supports the ALRC's overall policy intention that contracts cannot operate to exclude or limit the operation of certain public interest exceptions. Proposal 17-1 recommends that the Copyright Act should provide that an agreement, or provision of an agreement, that excludes or limits, or has the effect of excluding or limiting the effect of, certain copyright exceptions has no effect.

Proposal 17-1 in relation to contractual override would apply to a core group of exceptions:

- the proposed library and archives exceptions
- the proposed illustrative purposes of research or study, criticism or review, parody or satire, reporting news and quotation.

Although Google is generally supportive of the ALRC's policy objective in relation to contractual override, we believe that the proposed approach is problematic for reasons that can be loosely grouped as policy concerns and legal concerns.

### 2.1 Policy concerns

Google does not agree with the ALRC's division of illustrative purposes in the proposed fair use exception into those that can be considered 'core' to the public interest, and those that by definition must be considered to be 'non-core' to the public interest.

The internet is the critical infrastructure of the digital economy - ensuring its effective functioning is absolutely core to the public interest. Google submits that in the 21st century, ensuring appropriate protection for private uses (including via the cloud) and non-consumptive uses is as critical to the public interest and the future of Australia's digital economy as more traditional fair dealing purposes were in the 20th century.

Google is also concerned that the ALRC has protected as 'core' the purposes predominantly relied upon by 'old media' companies (reporting the news, criticism or review, parody or satire). The ALRC's recommendation may have the practical consequence of preserving the fair use rights of legacy industries at the expense of consumers and the services offered by new media

---

<sup>53</sup> *Historic New Treaty to Help the Visually Impaired*  
[http://foreignminister.gov.au/releases/2013/bc\\_mr\\_130628.html](http://foreignminister.gov.au/releases/2013/bc_mr_130628.html)



and technology companies. Google does not believe that this is an appropriate policy outcome in a digital economy.

## 2.2 Legal concerns

### The legal effect of the proposal

The ALRC has stated that the illustrative purposes are designed to be examples, or illustrative of the types of uses that may be considered to be fair. The fact that a particular use is covered by one of the illustrative purposes is not intended to create a presumption that that use is fair<sup>54</sup>. However, the proposed division of the illustrative uses into categories that are considered 'core' and 'non-core' to the public interest may suggest that in practice, purposes that are categorised as 'core' may come to be seen as more presumptively fair than those that are not.

The ALRC states that its proposal to limit contractual override to 'core' purposes and exceptions does not indicate that contractual terms excluding other exceptions should necessarily be enforceable. Rather, this is a matter that would be resolved under the general law, or other legislation such as the Competition and Consumer Act<sup>55</sup>.

The Copyright Law Review Committee looked at this issue of whether contracts could or should be allowed to be used to exclude or limit contractual exceptions. After a detailed analysis, the CLRC concluded that the enforceability of such contractual arrangements is unsettled as a matter of domestic law<sup>56</sup>. A large part of the CLRC's analysis concentrated on the potential effect of s.47H of the Copyright Act (a provision preventing the contracting out of the computer software exceptions) - and in particular whether the inclusion of a provision preventing 'contracting out' for one set of exceptions created a presumption that 'contracting out' is possible in relation to other exceptions in the Act.

Google submits that the ALRC's approach could create the same type of uncertainty as the introduction of s.47H. This uncertainty would be exacerbated if (as appears to be the case) the ALRC is not intending to repeal the computer software exceptions and s.47H.

Google is concerned that the practical consequences from the ALRC's recommendation could in fact be the opposite to that intended (ie, that the situation may be created where contracts which purport to exclude or limit 'non-core' fair uses may in fact be presumptively enforceable).

### Interpreting the illustrative purposes

It is not clear how the ALRC's proposals in relation to contractual override could work in practice where a particular use was for a mixture of core and non-core exceptions or fair use purposes.

---

<sup>54</sup> See paragraphs [4.157], [4.160] and [4.161]

<sup>55</sup> Discussion Paper paragraph [17.121]

<sup>56</sup> Copyright Law Review Committee *Copyright and Contract*, 2002, p8



Google submits that it would not be uncommon for a use to be for more than one of the illustrative purposes. For example a particular use could be both non-consumptive and for the purposes of education, research or study. Another use might be both private and domestic and involve a quotation. A future use might be for a purpose not addressed in the list of illustrative purposes, but be also for a 'core' purpose such as reporting the news or criticism or review. As well as being more than one purpose, there may also be more than one person involved in the use (such as a fair use facilitated by a third party). It is feasible that the 'primary' user and the third party may have different purposes - one or more of which may be 'core', and one or more of which may be 'non-core'.

### Computer software provisions

We have discussed above the lack of clarity in relation to how the computer software provisions, and s.47H in particular, might be treated under the reforms proposed by the ALRC. For example, will they be retained as 'stand alone' exceptions in the Copyright Act, or included in the fair use provision?

This question will be of particular relevance to the ALRC's contractual override proposal. The computer software exceptions are currently protected from contractual override by s.47H. However, if they were to be included in the fair use provision, they would likely to be considered under one or more of the 'non-core' purposes, such as non-consumptive use or private and domestic use which are not protected from contractual override.

## 3. Orphan works and mass digitisation

Google supports sensible and scalable orphan works reform.

Google understands that the ALRC's proposals would work as follows:

- some uses of orphan works would be covered by the fair use assessment, when assessed against the fairness factors
- some uses of orphan works would not be covered by the fair use provision. In these circumstances, a person could still use an orphan work, as long as:
  - they conducted a 'reasonably diligent search' to locate the rights holder and the rights holder was not found;
  - as far as reasonably possible, the work was attributed to the author.
- Remedies should be limited for the use of orphan works after a reasonably diligent search was conducted<sup>57</sup>.

The ALRC also asks at Question 11-1 whether voluntary collective licensing should be facilitated to deal with mass digitisation projects by libraries, museums and archives.

---

<sup>57</sup> Discussion Paper Proposals 12-1 and 12-2



Google believes that the ALRC's proposals on orphan works and mass digitisation represent a balanced and workable solution, subject to the following comments.

### Reasonably diligent search

Proposal 12-3 suggests that in determining whether a reasonably diligent search was conducted, regard should be had to:

- a) how and by whom the search was conducted;
- b) the search technologies, registers and databases available at the time; and
- c) any guidelines or industry practices about conducting diligent searches available at the time.

Google submits that this standard allows sufficient flexibility to allow the criteria to take into account both present and future search technologies. There could be merit in including statements to ensure that users must only be expected to base their search for a rights holder on the information at their disposal. For example, the potential user of a book would likely know the name, author and other key information to assist in their search for a copyright holder. In contrast, potential users of some materials on the internet may only have a few minutes or seconds of video without any relevant authorship or other contextual information<sup>58</sup>. In this regard, databases of rightsholder information could help potential users determine whether a work is abandoned, and provide the basis for an objective standard.

It is also important to provide guidance on when a searcher can be seen to have 'searched enough'.

### Limitation of remedies

If a rights holder subsequently comes forward after a work is used after a reasonably diligent search, Google submits that the remedies should be limited to fair compensation for the use of the work. Compensation should be set at what a reasonable seller and buyer would have agreed to *ex ante*. No large scale orphan works project will make the necessary investments in time and money if the whole endeavour can be shut down at any time if a rights holder later comes forward and demands significant monetary damages or an injunction.

### Mass digitisation projects

Google would support a licensing solution that would enable licences to be obtained for projects where it is not possible or practical to rely on a fair use provision. However, it is not clear to Google why the ALRC's proposal would limit the availability of the licence only to libraries, museums and galleries.

Google believes that policies in relation to orphan works should encourage a wide array of productive uses, both commercial and non-commercial. Restricting the use of orphan works to

---

<sup>58</sup> This is also relevant to obligations of attribution. For some online materials there may be no authorship information accompanying a work. In this context, Google submits that a link to the source location of the work should be considered to be sufficient authorisation.



a small subset of non profit entities would not likely maximise the development of innovative, scalable projects requiring significant resource investments. If a licensing scheme is established, Google submits that there are sound policy grounds for extending the licence - and the associated possibilities for remuneration to rights holders - to any organisation who wishes to undertake a licensed mass digitisation project.

#### 4. Broadcasting issues

The internet has enabled the development of a wider range of both professionally produced content and user generated content that has ever been seen before in the Australian media market. 'Catch up TV' services such as the ABC's iView are changing the ways in which Australians access professionally produced 'broadcast' content. Services such as iTunes and Google Play mean that consumers no longer need to rely on a television to access 'TV-like' content. And consumers also have a greater choice - they can choose whether to watch professionally produced content (whether on television, via catch up TV, via purchasing an episode as a digital download etc) or to create, watch, comment on and/or share content on a social networking site.

On a content platform such as YouTube, the distinctions can become even more granular. Live professional content (such as live streams of the Indian Premier League cricket) is hosted alongside home videos. Individual creators can produce and monetise independent content. And professional content producers can create channels as additional distribution mechanisms for content that is traditionally delivered via broadcasting signals.

These issues were recently considered by the Convergence Review, which highlighted the way that distinctions between telecommunications and broadcasting regulation are becoming increasingly blurred, and that outdated regulatory frameworks run the risk of inhibiting the evolution of communications and media services<sup>59</sup>.

The ALRC acknowledges in Chapter 16 of the discussion paper the complexities caused by the overlap of the Copyright Act and the Broadcasting Services Act. These challenges were also recently identified by the Senate Environment and Communications References Committee, which recommended that the technical and policy issues in broadcasting and copyright policy (including those addressed in the ALRC's discussion paper) be fully and urgently addressed in a comprehensive and long-term manner<sup>60</sup>.

Question 16-1 in the discussion paper asks whether any extension of broadcast exceptions to include the internet should:

- be limited to only the internet equivalent of radio and television programs?
- exclude 'on demand' programs?

---

<sup>59</sup> Australian Government, *Convergence Review: Final Report*, March 2012, p vii.

<sup>60</sup> Senate Environment and Communications Reference Committee, *Effectiveness of current regulatory arrangements in dealing with radio simulcasts*, July 2013, Recommendation 2



- apply only to content available by free-to-air broadcasters using the internet?

As the examples above show, attempting to define copyright exceptions by reference to concepts based on traditional broadcasting models is extremely complex.

Rather than the ALRC attempting to solve just part of the legal and regulatory puzzle, Google would support the Senate Committee's recommendation for a full and comprehensive review of all of the broadcasting and copyright issues raised by the Convergence Review, the ALRC's current review and the Senate Committee's reference on simulcasting.

## 5. Safe harbours

Google acknowledges that the issue of safe harbours is outside of the ALRC's terms of reference. We would like to reiterate however the central importance of appropriate safe harbours to the digital economy.

Safe harbour regimes are an important mechanism for balancing the legal rights of copyright owners, end users and intermediaries. They are every bit as important as flexible exceptions in contributing to a legal environment that encourages new entrants in markets for intermediary services, while providing the means for copyright owners to protect their works.

The lack of a safe harbour that extends to all online service providers - not just carriage service providers - is a serious impediment as common activities where service providers do not control, initiate or direct a user's online activities are not currently covered by the scheme.

On the issue of safe harbours, the discussion paper contains the following statement:

*Under the Terms of Reference, the ALRC is not to duplicate work being done in relation to a safe harbour scheme. However, in the ALRC's view, safe harbours need not be used [to] protect 'internet service providers' from liability for caching and indexing activities that are not an infringement because of fair use<sup>61</sup>.*

Google understands that by this statement the ALRC is pointing out that any activities such as caching and indexing that were covered by a fair use exception would not constitute infringements. As such, for this subset of activities (ie, where there is no primary copyright infringement), there would be no need for the legal protection of a safe harbour. Google agrees with this assessment.

However, online service providers provide a wide range of services, and host a diverse range of content, which may involve copies that would not be covered by a fair use provision. This may include hosted user generated content (for example, videos on YouTube or 'memes' shared on a social network like Google Plus) which contains content which would not be covered by a fair

---

<sup>61</sup> Discussion Paper paragraph [8.40] Note: The word in brackets is to correct an apparent typographical error in the text



use provision. For example, the discussion paper notes that many uses of online material are not transformative, and some are clearly not fair<sup>62</sup>.

Google believes that the expansion of the existing safe harbours to online service providers is an important reform in the interests of the Australian digital economy. Google would not like to see the ALRC's statement "... there would be no need for the legal protection of a safe harbour" to be read out of context to suggest that there is no need for this critical reform.

---

<sup>62</sup> Discussion Paper paragraph [9.85] - [9.86]