

TELSTRA CORPORATION LIMITED

**Submission to the Australian Law Reform
Commission's Discussion Paper -**

'Copyright and the Digital Economy'

31 July 2013

INTRODUCTION

Telstra Corporation Limited (**'Telstra'**) welcomes the opportunity to make a further submission to the Australian Law Reform Commission's (**'ALRC'**) Inquiry into *'Copyright and the Digital Economy'*. We reiterate our previous appreciation of the consultative approach that has been adopted by the ALRC for this Inquiry.

We have reviewed the ALRC's Discussion Paper with interest and are particularly pleased to note the ALRC's proposal to introduce a broad, flexible exception for fair use of copyright material. The flexibility offered by a broad fair use exception is of significant importance to Telstra and our customers.

Traditionally copyright serves the dual purpose of recognising and protecting creativity, while at the same time enabling legal dissemination of, and access to, information and knowledge. Today's digital technologies (and future unknown technologies) are changing the way that these purposes are achieved. Copyright law should not be an impediment to this forward progress. If Australia's copyright laws are to remain relevant to all stakeholders and truly balance their interests, Telstra believes that those laws must focus on the future.

SUBMISSION

Telstra's further submission addresses only those aspects of the ALRC's Discussion Paper that are of particular interest or concern to Telstra and our customers.

Telstra supports copyright laws that promote freedom and flexibility for our customers to store and manage legally acquired content, on different devices, using different technologies, at a time and place convenient to them. We also support the integrity of copyright ownership and licensing regimes, and the rights of intermediaries to legally facilitate access, distribution and storage of copyright materials.

Reform of the copyright exceptions should not be misconstrued as *'free riding'*. Fair use must be concerned with legitimate access to copyright works in contexts which we currently understand (such as recognised fair dealings) and in contexts which we're yet to envisage. Reform should stimulate innovation by growing the (digital) content market and fostering the growth of new markets - so that everyone has access to more.

Framing Principles for Reform

In its Discussion Paper the ALRC has articulated the following five policy settings (the **'Framing Principles'**) for its Inquiry:

1. Acknowledging and respecting authorship and creation;
2. Maintaining incentives for creation of works and other subject matter;
3. Promoting fair access to and wide dissemination of content;
4. Providing rules that are flexible and adaptive to new technologies; and
5. Providing rules consistent with Australia's international obligations.

Telstra supports the above Framing Principles, with one small change - addition of the word '*clear*' to Principle 4, to capture the previously articulated Issues Paper Guiding Principle 7 - '*Reducing the complexity of copyright law*'. If amended in this way Principle 4 would read:

4. *Providing rules that are flexible, clear and adaptive to new technologies*

Telstra also submits that the ALRC should consider a sixth Framing Principle, along the lines of the Issues Paper Guiding Principle 2 - '*Encouraging Innovation and Competition*'. As discussed above, Telstra strongly believes that copyright in the digital economy should stimulate and facilitate creation of new copyright works and innovation in legal access, distribution, storage and consumption of those works:

*'...[T]he communications and media market should be innovative and competitive, while balancing outcomes in the interest of the Australian public....An optimal system of copyright law will support enterprises as they establish new ways of doing business and seek out new commercial opportunities.'*¹

Fair Use

Telstra supports the introduction into the *Copyright Act 1968 (Cth)* of a fair use exception to copyright infringement.

In our view, the significant advantage of a broad fair use exception, particularly when compared with the suite of the current closed, incremental fair dealing exceptions, is its prospective and flexible nature. Fair use, as proposed by the ALRC, is a principles based assessment. As such it provides all stakeholders with a framework for considering specific known, and future unknown, ways of using copyright works.

By supporting fair use, Telstra does not in any way condone '*free riding*' - the essential question which remains to be answered for the use of copyright material under a fair use exception is whether the use will in fact be '*fair*'.²

¹ Paras 32 & 33, pg 19 ALRC 'Copyright & the Digital Economy' Issues Paper (August 2012)

² Para 4.5, pg 60 ALRC 'Copyright & the Digital Economy' Discussion Paper (May 2013)

*'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 allow for the question of fairness to be asked.'*³

In that context, we support the ALRC's preservation of existing fairness jurisprudence (in the form of the proposed '**Illustrative Purposes**'), as well as the introduction of a set of non-exhaustive factors to be taken into account when assessing the fairness of a particular use (the '**Fairness Factors**').

The principal argument advanced by opponents of a fair use exception is that its introduction will lead to uncertainty, characterised by increased litigation to establish precedent and guidance. We acknowledge these concerns, at least in the short term, in the same way that any new legislation takes time to 'bed down'. However, the concept of 'fair' is not new to Australian copyright law and is certainly not new in the US,⁴ from which Australian stakeholders may take some guidance. Further, the current fair dealings have themselves from time to time been the subject of litigation.⁵

Any uncertainty about fair use is less likely to be about interpreting fairness *per se*, as it will be about:

- understanding how the digital economy will facilitate new legal ways of using copyright materials; and
- the impact those uses will have upon the potential market or value of the material.

Telstra submits that while fair dealings have served us reasonably well to date, the digital economy is driving such rapid changes that without a more flexible principled based approach, exceptions to copyright infringement will become redundant, which in turn will significantly disrupt the balance that copyright law seeks to preserve.

Telstra therefore supports a fair use regime which retains its jurisprudential heritage while at the same time, providing a flexible framework for the future.

³ Para 5.46, pg 107 ALRC 'Copyright & the Digital Economy' Discussion Paper (May 2013)

⁴ Fair use has been part of US copyright law since 1976.

⁵ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417; *Thoroughvision Pty Ltd v Sky Channel Pty Ltd* [2005] FCA 1527; *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109; *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012)

Fairness Factors

Proposal 4–3 The non-exhaustive list of fairness factors should be:

- (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; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

Telstra supports inclusion of the above non-exhaustive Fairness Factors as part of an Australian fair use exception. We believe that inclusion of the Fairness Factors will:

- build flexibility and prospectively into the exception regime;
- provide clear guidance to all stakeholders and the courts as to how fairness should be assessed;
- go a long way to addressing perceived uncertainties; and
- counter an argument that fair use somehow equates to '*free riding*'.

The proposed Fairness Factors are essentially based on the four factor test in §107 of the US Copyright Act. While we acknowledge that US copyright law is not the same as Australian copyright law, how US courts have dealt with *fairness* over the past three decades is nevertheless of interest and perhaps guidance to Australian stakeholders and courts, at least in the short term.

The first three Fairness Factors are very similar to the matters which currently need to be considered when applying the fair dealing exceptions. The application of these Factors to future uses of copyright works can therefore be more readily understood, even if those future uses can't be envisaged at this time. We welcome their inclusion as part of a new fair use exception.

We believe that introduction of the fourth Factor is particularly important, as it opens the scope of the inquiry to allow consideration of how a contemporary use will impact the contemporary market for, or value of, copyright material.

Illustrative Purposes

Proposal 4–4 The non-exhaustive list of illustrative purposes should include the following:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) non-consumptive;
- (f) private and domestic;
- (g) quotation;
- (h) education; and
- (i) public administration.

Telstra supports inclusion of a non-exhaustive list of Illustrative Purposes in an Australian fair use exception. Telstra believes that inclusion of such a list is important for continuity and certainty, as it preserves existing fair dealing jurisprudence. At the same time, the non-exhaustive nature of the list leaves room for further purposes which may be created in a digital (or other) economy.

The ALRC's proposed list of Illustrative Purposes includes two purposes which are not referable to an existing exemption or licence, and which are therefore not readily understood – 'non-consumptive' (**'Non-Consumptive Use'**) and 'public administration'. Telstra supports inclusion of both of these purposes (as addressed in the Discussion Paper), and suggests that they should each be defined to provide guidance as to their scope.

See also below our further specific comments in relation to Non-Consumptive Use.

Question 4.1 What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

The ALRC's Illustrative Purposes list (while acknowledged to be non-exhaustive) doesn't include at least two current exceptions which Telstra believes should be expressly referenced, namely the current exceptions in the *Copyright Act 1968* in relation to professional advice (**'Professional Advice'**) and legal proceedings (**'Legal Proceedings'**).

Professional Advice

Telstra submits that Professional Advice should be a blanket exception for 'works' and 'subject matter other than works' in relation to *giving* and *seeking* advice.

In the alternative, Telstra submits that Professional Advice should be expressly included as an Illustrative Purpose, for the following reasons:

- Telstra believes that there are important policy reasons relating to the integrity and freedom of Australia's judicial system, which warrant express inclusion of Professional Advice as an Illustrative Purpose. These policy reasons are perhaps reflected in the fact that professional advice is currently the subject of both a fair dealing exception and blanket exceptions.
- It seems inconsistent not to include Professional Advice as an express Illustrative Purpose; given that the ALRC proposes to introduce it as an express fair dealing exception should fair use not be enacted;
- We agree with the ALRC's concerns that the current Professional Advice provisions are inconsistent and incoherent, particularly as they relate to works and subject matter other than works; for example:
 - s43A provides a fair dealing exception for works for the purpose of *giving* advice – however, there's no fair dealing exception for *seeking* advice.
 - s103(b) provides a blanket exception for subject matter other than works for the purpose of *seeking* advice.
 - s103(c) provides a blanket exception for subject matter other than works for the purpose of, or in the course of, *giving* advice.

Telstra believes that the clearest way to address these inconsistencies is to repeal the current fair dealing provisions and expressly refer to Professional Advice as an Illustrative Purpose.

Legal Proceedings

The current exception for the purpose of a judicial proceeding is a blanket exception, not a fair dealing exception. Telstra believes that this blanket exception should be maintained. In the alternative, Telstra submits that Legal Proceedings should be expressly included as an Illustrative Purpose for the same policy reason articulated above in relation to Professional Advice.

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.

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

- (a) s43A—temporary reproductions made in the course of communication;
- (b) s111A—temporary copying made in the course of communication;
- (c) s43B—temporary reproductions of works as part of a technical process of use;
- (d) s111B—temporary copying of subject-matter as a part of a technical process of use; and
- (e) s200AAA—proxy web caching by educational institutions.

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 ‘non-consumptive’ use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

Telstra supports the ALRC’s proposal to apply the fair use exception to Non-Consumptive Use. Telstra also supports the ALRC’s proposal for Non-Consumptive Use to be an express Illustrative Purpose.

The ALRC has proposed a definition of Non-Consumptive Use in paragraph 8.69 of the Discussion Paper⁶. Telstra generally supports this definition, but suggests that it should be specifically tied to *technical network functions* which ‘do not trade on the underlying creative and expressive purpose of the material’⁷. These types of functions would be directed to improving:

- the performance and speed of communications networks;
- an intermediary’s ability to manage network issues (including congestion); and
- an intermediary’s ability to meet customer expectations for content display and delivery (across different devices).

In addition to *caching* and *indexing* (which are specifically referred to in the Discussion Paper) there are a range of other technical network functions which in

⁶ Pg 169 ALRC ‘Copyright & the Digital Economy’ Discussion Paper (May 2013) - ‘8.69 The *Copyright Act* should define ‘non-consumptive’ use to mean uses of copyright material ‘that do not trade on the underlying or expressive purpose the material’.

⁷ Par 8.1, pg 155 ALRC ‘Copyright and the Digital Economy’ Discussion Paper (May 2013)

Telstra's view, would be useful to reference as guidance as to the types of uses the ALRC considers to be non-consumptive - for example:

- system-level proxy caching;
- data de-duplication;
- interoperability functions between carrier networks; and
- automatic network backup and data recovery.

Telstra would encourage any definition of Non-Consumptive Use to include these types of specific examples, in the same way that examples are given in s200AB of the *Copyright Act 1968*.

Text and data mining

Telstra does not support inclusion of text and data mining within the scope, definition or application of Non-Consumptive Use. In Telstra's view, text and data mining will always have a very different purpose than a technical network function as discussed above.

While there is no agreed definition of text and data mining (or industry standard as to the processes or methods which they may adopt), text and data mining typically cover two types of activities:

- census, statistical or educational analysis; or
- 'scraping' or copying of data for commercial exploitation - the *Nominet* case⁸ is a useful example of this type of text and data mining.

The *purpose* of both of these activities is very different to technical network management. For example, when *fair use* principles are applied to text and data analysis, it may (or may not) be that such use falls within the '*research and study*' Illustrative Purpose; but when *fair use* principles are applied to text and data scraping, the intended use is likely to be anything but fair.

Telstra submits that text and data mining should generally be assessed against the fair use principles, specifically with reference to the Fairness Factors.

⁸ *Nominet UK v Diverse Internet Pty Ltd (No 2)* [2005] FCA 1773. Nominet provided a domain names register in the UK. Two Australian companies used data mining to extract and collate names and other details from the database. They then sent notices to 50,000 of those registrants in the UK offering the registration of domain names. Nominet commenced proceedings for copyright infringement, amongst other actions. Justice French (as he then was) found that Nominet's copyright was infringed, since in the process of data mining, there was a permanent copy of the database made in a material form, and awarded damages. If text and data mining was considered a '*non-consumptive use*', the text and data mining undertaken by the respondents in *Nominet* could potentially have been considered a fair use.

An example of how the Fairness Factors (and in particular Factor (d)) could be relevant to data and text mining may be seen in the context of the subsequent (or secondary) use of mined data. Such secondary use, while not necessarily copyright infringement, could detrimentally affect the market for and value of the original copyright material. In the *Nominet* example⁹, if the original text and data mining could be viewed as fair use (because it fell within the Non-Consumptive Use Illustrative Purpose), then the respondent companies would be able to use that information for their commercial gain. This scenario illustrates a number of serious problems:

- the incentives to create new copyright material such as online databases are significantly reduced;
- there is less incentive to invest time, money and resources into collecting such information; and
- the new information service has a detrimental effect on the market for the original online database.

Telstra therefore does not support inclusion of text and data mining in any definition or application of Non-Consumptive Use.

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.

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.

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.

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

Telstra agrees with implementation of the above in a fair use exception. This issue is of particular interest and concern to Telstra's customers, particularly in the digital economy.

⁹ See footnote 8.

The current exception regime as it relates to private and domestic use of copyright materials is complex, difficult to navigate and out of step with current and likely future customer expectations and practices. Telstra believes that allowing consumers *fair* access to legal content – in a format, on a device, using a technology and at a time that suits them – will stimulate innovation and continue to grow the content market.

Third Parties

- 5.1** Should a company be free to copy and store broadcast television programs for its customers, or copy music the customer has already bought, from one device to another or to the cloud? Should a school be free to copy material for its students, or a library for its patrons, if the students or patrons would have been permitted to copy the material themselves? This chapter considers such ‘third party’ uses of copyright material, where the third party copies or otherwise uses copyright material on behalf of others. These are unlicensed uses to deliver a service, sometimes for profit, in circumstances where the same use by the ‘end-user’ would be permitted under a free use exception.
- 5.2** The ALRC concludes that such uses should be considered under the fair use exception proposed in Chapter 4, in determining whether the use infringes copyright.
- 5.3** A use might sometimes be considered fair when a third party appears merely to be facilitating an otherwise fair use, such as some types of private and domestic use. Other factors, however, such as whether the use is transformative, for a commercial purpose, or harms the rights holder’s market, may be more important.

Telstra supports the ALRC’s proposal for third parties, namely that third party use of copyright material on behalf of others should be considered under a fair use exception. In Telstra’s view, the application of fair use in this context is a balanced way to support and encourage the continued development and adoption of content technologies with respect for content ownership and commercial licensing practices.

In addition, Telstra believes that if a third party (such as a cloud service provider) is doing *nothing more* than providing a digital locker service for a customer, and the customer uses the service to store and share illegally acquired copyright material, then the third party should be exempt from liability, by virtue of appropriate safe harbour provisions. Similar considerations apply to third parties providing a range of other services, including hosting user generated content, publishing advertisements of behalf of others and facilitating transactions by others.

RETRANSMISSION OF FREE TO AIR (FTA) BROADCASTS

The ALRC has proposed the following options for reform of the current retransmission scheme in Chapter 15 of its Discussion Paper:

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.

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.

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.

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?

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.

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?

Telstra does not support either Option 1 or Option 2. Rather, Telstra supports maintaining the current regulatory framework for retransmission of free-to-air broadcasts. That is, Telstra supports retention of the free-use exception for broadcast copyright and retention of the statutory licensing scheme for the underlying rights.

In our view the current framework:

- facilitates choice for consumers;

- ensures rights holders are properly remunerated;
- improves access to free-to-air broadcasts, assisting consumers and broadcasters alike; and
- appears to be working - Telstra is not aware of evidence that the current retransmission system is not working, or does not provide adequate remuneration for broadcasters.

Further, Telstra supports inclusion of Internet retransmission within the statutory licensing scheme (see our further discussion on this point below).

Telstra queries whether there is a need for reform of the current retransmission scheme, particularly in the form of Option 1 or Option 2. In particular, Telstra queries the justification for repealing the current free-use exception in s212 of the *Broadcasting Services Act 1992 (Cth)* relating to broadcast copyright. Telstra considers that this free-use exception may play a role in stimulating the development of new technologies and services and facilitate access to copyright material. In addition, broadcasters receive remuneration through advertising and the retransmission of programming does not reduce the advertising revenue of free-to-air television, and may actually increase advertising revenue through exposure to additional viewers.

While Telstra does not support either Option 1 or Option 2: of those, our preference would be Option 2. Telstra believes that Option 1 is likely to give rise to a number of serious practical problems, for example:

- Retransmitters would have to engage in two sets of separate commercial negotiations - for the underlying content and for the broadcast copyright.
- it is likely to be impracticable for a Retransmitter to obtain licences from the myriad of owners of the underlying rights.

Retransmission over the Internet

Telstra supports the ALRC's proposal that the statutory licensing scheme should apply to retransmission over the Internet. Telstra agrees with the ALRC that in the era of media convergence, retransmission platforms should be treated in a technology-neutral way. Telstra acknowledges that any such extension of the scheme ought to be implemented in a way which addresses the legitimate concerns of rightsholders.