

**COMMUNICATIONS
ALLIANCE LTD**



**Australian Law Reform Commission
Copyright and the Digital Economy – Discussion
Paper**

COMMUNICATIONS ALLIANCE SUBMISSION
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TABLE OF CONTENTS

INTRODUCTION	2
FRAMING PRINCIPLES FOR REFORM	3
INTRODUCTION OF A FAIR USE EXCEPTION	3
THIRD PARTY USES	4
THE INTERACTION OF LICENSING AND FAIR USE	5
NON-CONSUMPTIVE USES	5
PRIVATE AND DOMESTIC USE	6
RETRANSMISSION OF FREE-TO-AIR BROADCASTS	7
CONTRACTING OUT	7

INTRODUCTION

Communications Alliance welcomes the opportunity to provide this submission in response to the Australian Law Reform Commission's (ALRC) Discussion Paper 'Copyright and the Digital Economy' (the Discussion Paper).

Communications Alliance strongly supports the ALRC proposal for the introduction of a fair use provision which will provide clear legal protection for the use of copyright material beyond the current exceptions found within the *Copyright Act 1968*.

The introduction of a fair use provision is critical to the future of Australia's digital economy. Communications Alliance supports the principled-based, technology-neutral approach to a fair use exception which will serve to 'future-proof' changes in the technological environment.

- The introduction of a fair use exception will provide the necessary flexibility to encourage innovation in the digital economy.
- The Fairness Factors represent a reasonable way to examine fair use and it is appropriate that they be based on the U.S. fair use provision.
- The explicit reference to fair use exception for non-consumptive use will permit, for the first time, the communication or reproduction of material for the purposes of system-level caching and internet functions such as search engine indexing. It is important to note, however, that 'non-consumptive' uses are much broader than system level caching and indexing.
- Communications Alliance is supportive of the definition of non-consumptive uses within the Discussion Paper and considers that additional guidance could be provided through the inclusion of a legislative note that provides examples of what Parliament considers fair.
- With regard to Third Party Uses, as well as Personal and Domestic Uses, it is most appropriate to consider whether the use is fair, rather than focus on the technology used.

Communications Alliance commends the principled approach that the ALRC has taken in considering many of these issues. In our view, this will go a long way to alleviating the issues currently experienced by industries affected by fast-paced technology.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

Framing Principles for Reform

Communications Alliance is supportive of the Framing Principles for Reform:

Principle 1: Acknowledging and Respecting Authorship and Creation
Principle 2: Maintaining Incentives for Creation of Works and Other Subject Matter
Principle 3: Promoting Fair Access to and Wide Dissemination of Content
Principle 4: Providing Rules that are Flexible and Adaptive to New Technologies
Principle 5: Providing Rules Consistent with Australia's International Obligations¹

In particular, the principles of 'promoting fair access to and wide dissemination of content' and 'rules that are flexible and adaptive to new technologies' are critical to the effective functioning of the telecommunications industry.

These principles reflect the intention of copyright law; to strike a balance between access and dissemination of content and the acknowledgement and protection of the creator's rights. These also reflect the need for copyright law to provide incentives for creation and innovation.

Introduction of a Fair Use Exception

Communications Alliance strongly supports the ALRC's proposal to introduce a 'broad, flexible exception for fair use'² into the *Copyright Act 1968*.

The introduction of a fair use exception - which includes non-consumptive uses - will remedy the fact that, currently, the law is out of step with industry expectations and practices and that network related functions should be an exception to copyright infringement.

A flexible fair use exception should focus on the purpose of the copying and not the technology platform facilitating the copying or the subject matter being copied. The question should be on whether the purpose of the copying is fair, not the way in which it was copied.

Communications Alliance is also supportive of the 'broad, flexible exception for fair use' which will recognise the ongoing evolution of network operations. It will allow the exception to be 'future-proof' and ensure that such an exception is not made obsolete by future innovations.

Fairness Factors

Communications Alliance contends that a principles-based approach to the fair use exception will ensure it continues to be relevant and responds to changing conditions. This is essential in industries such as telecommunications, where there is rapid technological change and laws often struggle to maintain relevancy.

The Fairness Factors proposed represent a reasonable way in which to consider the circumstance of use of copyright material. In particular, Communications Alliance supports the consideration of '*the purpose and character of the use*', as well as '*the effect of the use upon the potential market for, or value of, the copyright material*'. These factors ensure that consideration is given to why the material was copied, not simply the fact that it was.

¹ ALRC, 'Copyright and the Digital Economy', May 2013, <http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>, p25

² ALRC, 'Copyright and the Digital Economy', May 2013, p80

As noted by the ALRC in its Discussion Paper, the Fairness Factors “are based upon the four factors that are common to both the US fair use provision and existing Australian provisions for fair dealing for the purpose of research and study³”. As such, Communications Alliance submits that any concern that the introduction of a fair use regime will create legal uncertainty is unwarranted. Fair use regimes have been introduced in a number of jurisdictions internationally. As the ALRC states “It is well established that foreign case law may be used by Australia courts...”.

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

Communications Alliance is supportive of the concept of a list of illustrative uses which is understood and accepted as non-exhaustive. It is clear that every circumstance which may fall within the definition of ‘fair use’ cannot be listed, and it is appropriate that circumstances must be considered on a case-by-case basis. This common understanding will allow for issues to be considered on their merit.

However, given the uncertainty about the legality of caching and importance of caching in managing internet traffic, Communications Alliance would support the addition of ‘system-level caching’ to be listed as an illustrative example in the fair use exception.

With regard to ‘non-consumptive’ use, Communications Alliance considers that it is important for the legislation to provide a clear definition of what this means.

Communications Alliance is supportive of the definition in the Discussion Paper, namely “uses of copyright material that do not trade on the underlying or expressive purpose of the material⁴”. Given the importance of these technical functions to Australia’s digital economy, it would be useful for the ALRC to consider providing further guidance on the types of uses it considers to be non-consumptive, perhaps through a legislative note.

Additionally, it is unclear what the purpose of ‘public administration’ includes. Communications Alliance would recommend the specific inclusion of illustrative purposes relating to the use of copying in legal proceedings and the preparation of legal advice.

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?

Communications Alliance supports the repeal of current exceptions that will be addressed by the introduction of a broad, fair use exception. That is, it would be confusing and unnecessary to have two separate parts of the Copyright Act providing exceptions to copyright.

It would seem that the introduction of fair use should correspond with the repeal of the existing exceptions, rather than a need for a transition period.

Third Party Uses

With regard to third party uses, as with other uses of copyright, Communications Alliance contends that it is better to focus on the principle of whether the ‘use’ is fair, rather than a consideration of what technology used. In order to allow for innovation, Communications Alliance asserts a principled, technology-neutral approach to third party uses is appropriate. As is stated by the ALRC:

³ ALRC, ‘Copyright and the Digital Economy’, May 2013, p90

⁴ ALRC, ‘Copyright and the Digital Economy’, May 2013, p93

“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 asked⁵”.

Communications Alliance is very supportive of this approach.

The Interaction of Licensing and Fair Use

With regard to licences, the ALRC considers that where the market offers properly licensed copies then it may be less likely that a person should be free to make their own private and domestic copies. This approach means that some uses may not be considered to be fair when the market offers properly licensed copies.

However, the offer of a licence does not prevent a particular use of copyright material from being able to be considered fair. In this regard, Communications Alliance commends the approach by the ALRC as stated in its Discussion Paper:

In the ALRC's view, the availability of a licence is an important, but not determinative, consideration in ... the application of the fair use exception. Other matters, including questions of the public interest, are also relevant⁶.

For example, it is clear that the ALRC intention is that that caching, indexing and other non-consumptive uses should not be considered as copyright infringement. However, it is possible that uncertainty could continue with regard to these uses unless it is clear that they will not be considered 'unfair' because a licence becomes available.

In order to provide certainty, the ALRC could consider the inclusion of a legislative note that provides examples of what Parliament considers to be fair. By way of example, it should be noted that a legislative note that was inserted into the Act in 2006. This provided 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.

Non-Consumptive Uses

Communications Alliance strongly supports the ALRC proposal to include non-consumptive uses in the fair use exception. The inclusion of non-consumptive uses will provide industry with much-needed certainty in relation to internet functionality.

Current copyright legislation provides no certainty for businesses and stifles innovation. The operation of the internet challenges a copyright holder's traditional right to control reproduction, display, and distribution of protected works. Communications Alliance supports the move to revise copyright law to reflect and embrace the digital economy.

As the Discussion Paper states: *'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'⁷*. This also reflects the basic premise of copyright, which is to protect the expression of ideas and facts, rather than the facts themselves.

In addition, the communications industry is supportive of 'non-consumptive uses' included as an illustrative purpose of the fair use exception. It is necessary that 'non-consumptive uses'

⁵ ALRC, 'Copyright and the Digital Economy', May 2013, p107

⁶ ALRC ' Copyright and the Digital Economy', May 2013, p127

⁷ ALRC, 'Copyright and the Digital Economy', May 2013,

<http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>, p169

are explicitly recognised and included within the fair use exception. Industry needs certainty that, according to the law, the basic operation of the internet does not constitute or facilitate copyright infringement.

Communications Alliance is supportive of the proposal which ensures that there are no copyright implications for technical and incidental reproduction or communication that is made as part of the technical process of the functioning of the internet.

As stated earlier, it is important that business is given certainty with regard to what non-consumptive uses encapsulates. It is critical to recognise that 'non-consumptive uses' is far reaching and not limited to caching, search and indexing. Non-consumptive uses are essential to the functioning of other technologies which should be considered fair use. For example, music recognition software, anti-plagiarism software, and many other incidental, transformative and non-consumptive use of copyright.

The ALRC refers to 'text and data mining' in the context of non-consumptive use. Communications Alliance submits that these uses are very different from technical and incidental communications and should not be regarded as non-consumptive uses. Rather text and data mining should simply be considered with reference to the fairness factors.

Finally, in the event that a fair use exception is not enacted, then industry supports an amendment to the Copyright Act to include an explicit exception for non-consumptive uses (a new fair dealing exception related to non-consumptive use).

Interaction with Safe Harbour

Safe harbour regimes act as an important protection for intermediaries, while balancing the legal rights of copyright owners. Communications Alliance agrees with the ALRC's assessment that:

"safe harbours need not be used to protect 'internet service providers' from liability for caching and indexing activities that are not infringement because of fair use⁸".

However, while it is correct to suggest that these functions would be covered in a fair use exception, such an exception fails to provide immunity for online service providers for hosting a wide range of services – particularly user generated content - not covered by a fair use provision.

It would be concerning if this assessment was used as a rationale to object to the Attorney General's Department proposal to extend the safe harbour scheme from carriage service provider to service provider (and the inclusion of internet service providers). Communications Alliance contends that the proposal is a critical reform.

Private and Domestic Use

As has been previously stated, the reforms proposed in the ALRC's Discussion Paper reflect a critical need to amend current inflexible legislative framework with respect of copyright. As such, it is essential that copyright law is amended to reflect a new way of operating in the digital world, where technological distinction is obsolete. The best way to encourage innovation and creativity - both the creation and distribution of content - is to allow the use of market forces, while ensuring the rights of creators are protected.

As such, fair use is an appropriate consideration with regard to private and domestic use. Communications Alliance asserts that the operation of markets while at the same time

⁸ ALRC, 'Copyright and the Digital Economy', May 2013, p164.

ensuring that copyright law serves to protect the rights of content creators and owners. It is also vital that a balanced legislative framework encourages innovative ways of producing and distributing content. This will, in turn, serve to grow the markets for the consumption of content in legitimate ways.

As is the case with Third Party Uses, Communications Alliance considers that the consideration must be about whether the use is fair. As is stated in the Discussion Paper:

"the ALRC does not favour confining exceptions for private and domestic uses in the Copyright Act. Rather, these matters are best considered when determining whether a particular use is fair. Blanket legislative prohibitions – and endorsements – of specific uses are likely to date quickly".

Retransmission of Free-to-Air Broadcasts

Communications Alliance supports the extension of the retransmission scheme to include the internet. While the regulatory and legislative framework relating to broadcasting is complex, it should not prevent the current imbalance in the retransmission scheme being rectified. As the ALRC states in its Discussion Paper:

*"Technological change, including that brought about by the NBN, may make forms of internet retransmission of broadcasts more feasible. However, at present, cable and satellite subscription television providers have an advantage over internet content providers in being able to access the pt VC statutory licensing scheme for underlying rights. If communications policy makers decide that it is important to facilitate the availability of online television, then it would be logical to consider extending the pt VC statutory licence to internet transmission, so that broadcasters cannot block the provision of new content services."*¹⁰

Communications Alliance believes that this objective could be achieved simply by removing s.135ZZJA(1) from the Copyright Act. This would ensure that the retransmission scheme could apply to all forms of retransmission, irrespective of the technologies used in delivery. However, Communications Alliance would caution the ALRC against attempting to define concepts such as the internet or internet TV protocol in legislation.

Communications Alliance supports this move to a technology-neutral retransmission scheme. The removal of the internet exclusion will provide a greater level of certainty regarding the delivery of content over different transmission technologies and rectify the adverse impact it currently has on the innovative delivery of content services.

Contracting Out

Communications Alliance is supportive of the objective in relation to contractual override, but has concerns with the proposed approach to achieve this objective.

Communications Alliance has concerns with regard to the inclusion of a list of illustrative purposes within the fair use exception – those which are relied upon by 'old' media such as reporting the news, criticism etcetera – and the omission of others, particularly the purpose regarding non-consumptive uses. The digital economy is completely reliant upon the proper functioning of the internet and this is absolutely central to the public interest. However, the current proposal may be seen as creating a hierarchy of fair use exceptions, those considered most important and those, by their omission, considered of lesser importance.

In addition, Communications Alliance has concerns with regard to the way in which cases relating to contracting could be interpreted. It is noted that the inclusion of a use as an illustrative purpose is not supposed to presume it is necessarily fair. However,

⁹ ALRC, 'Copyright and the Digital Economy', May 2013, p183.

¹⁰ ALRC, 'Copyright and the Digital Economy', May 2013, p320.

Communications Alliance asserts that where illustrative uses are listed as being protected from contractual override, the consequence, in practice, could be that that listed uses are more presumptively 'fair' than uses that are not listed.

Communications Alliance objects to a situation where 'old media' uses are, in effect, quarantined while new uses which are just as critical from a public interest perspective will be considered as second tier.



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