



# **Copyright and the Digital Economy Discussion Paper**

Submission to the Australian Law Reform Commission (ALRC)

July 2013

## **About ACCAN**

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will activate its broad and diverse membership base to campaign to get a better deal for all communications consumers.

## **Contact**

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ACCAN welcomes the opportunity to respond to the Australian Law Reform Commission *Copyright and the Digital Economy* Discussion Paper.

**Proposal 4–1** The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.

### Fair Use welcome

ACCAN welcomes the ALRC’s proposal for a broad fair use exception that will be flexible enough to accommodate the increasingly diverse ways in which consumers are using content.

The fair use proposal from the ALRC has the virtue of simplicity and the capacity to accommodate social and technological developments. The non-exhaustive lists of fairness factors and illustrative purposes are easy to understand and would assist non-experts in making a rule of thumb evaluation of particular uses in the context of particular circumstances.

We welcome the technology-neutral approach and an end to the complexity around exceptions confined to particular devices. The Fair Use proposal would resolve existing incongruities such as consumers being able to format shift a CD onto a tablet but not a DVD onto a tablet.

Importantly the introduction of fair use will address the ‘real world’ range of consumer and user behaviour in the digital environment and reduce the gap between the law and norms of community behaviour. This will have the flow-on benefit of creating more respect for the law and increasing its legitimacy in the eyes of the public.

**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.**

**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.

### ‘Private and Domestic’ – fundamental concerns about restrictions on consumer activities

ACCAN emphatically rejects the notion that consumers’ copying or use must take place *in the home* to benefit from a fair use exception. Phrasing the exception as ‘private *and* domestic’ places it at odds with the other illustrative purposes which are wider: ‘research *or* study’, ‘criticism *or* review’ and ‘parody *or* satire’. It is not clear whether the intention is for the existing definition of private and domestic use to remain in the Act. The existing definition is that private and domestic use means private and domestic use on or off domestic premises.

Irrespective of whether the existing definition remains there would appear to be no need for the double limitation. Furthermore, the proliferation of mobile devices has changed the way content is consumed and the expansion of cloud computing means the widespread use of remote storage. It is therefore important that geographical limitations not be placed on this exception.

In the context of fair use, it would be preferable to avoid any suggestion that ‘private’ and ‘domestic’ each have some distinct meaning of their own.

We should not lose sight of the fact that the rationale for introducing fair use is to overcome needlessly restrictive and ambiguous phraseology from the current exceptions, not to replicate it in a new form. ACCAN recommends that in order for everyday consumer uses to be properly recognised as fair use, the illustrative purpose should be either ‘private or domestic’ or simply ‘private’.

In support of this recommendation, we refer to Article 5(2)(b) of the European Directive on Copyright in the Information Society that refers to ‘reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial’ and section 29.22 of the Canadian Copyright Act that refers to reproductions that are ‘used only for the individual’s private purposes’. We would also refer to the 2006 Senate Committee’s deliberations on the introduction of the time-shifting exception and the view expressed at that time that the law should conform to reasonable consumer expectations.

### **Recommendation:**

In the illustrative purposes, it is ACCAN’s view that ‘private and domestic’ is unnecessarily restrictive, and the wording should be either ‘private or domestic’ or ‘private’.

### **Private and Domestic: evaluating the potential market for, or value of, copyright material**

We are concerned that in its analysis the ALRC suggested at 9.59 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.”

However, we disagree. The ALRC correctly noted at 9.48 that ‘[f]ew people will buy the same item twice ... because the law prohibits them from making a copy. Members of the public may also be unlikely to seek licences for other purely domestic non-commercial uses.’

It is not merely ‘unlikely’ that the public would seek out the fine print governing non-commercial use of content already paid for in order to find out what kind of private copying is allowed – it is entirely unrealistic.

Therefore the ‘effect of the use upon the potential market for, or value of, the copyright material’ of a consumer privately copying something they have already paid for in one way or another is in reality negligible unless we adopt a view of human behaviour which is not credible.

In addition, merely because rights holders can use technological measures to encourage consumers who are not technology-savvy to pay for a private use does not mean such private uses should not be considered fair uses.

A commonplace scenario is for a consumer to purchase a movie on iTunes and want to watch it on their Android tablet. They may find the file is locked to Apple products with digital rights management technology. The consumer believes they should be allowed to watch their purchase on whatever device they desire, so they download a small piece of software to enable this.

In considering the ‘effect of the use upon the potential market for, or value of, the copyright material’, we believe that the ALRC’s view on licencing could lead to judicial reasoning that undermines one of the central rationales for fair use – to rectify the ‘significant problem’ of the ‘growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people’.<sup>1</sup>

We have been concerned by the fact that in the digital environment, material is more often licensed than sold despite terminology that leads consumers to expect otherwise. Purchases of e-books, movies or music from iTunes for example are presented to consumers as ‘purchases’ (i.e. it is the iTunes ‘store’, not ‘library’) and yet consumers are not given the rights they would expect to have with a purchase.

With a physical purchase, these rights would include holding books or music forever, or bequeathing such a collection to next of kin. However, often ‘buying’ a song also comes with terms attached which impose a *temporary* right to access. This is all the more true in the context of consumer electronics where e-books or music will last as long as the device or hard drive they reside on.

In contrast, subscription services are understood as providing consumers with access to content only while they continue to pay for such access. There will therefore be varying degrees to which licencing of uses will affect an evaluation of fairness.

### Recommendation:

We believe it is important for the ALRC to recognise that the fairness evaluation should reflect the legitimacy of ordinary consumer behaviour and ordinary consumer expectations. Not all licence terms that rights holders might choose to impose will be legitimate or should automatically be factors counting against fair use.

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

### Concern about Contracting Out

We are concerned that the proposed approach to contractual override of copyright exceptions is unworkable and has the potential to undermine the proposed reforms on fair use.

The ALRC proposes an explicit prohibition on contractual override for some exceptions but not the exception most relevant for consumers – fair use for private purposes. This strengthens the presumption that this and other exceptions not subject to the explicit prohibition are subject to

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<sup>1</sup> ALRC Paper at 4.52 - quoting I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011)

contractual override. Allowing such override is inconsistent with the public policy rationale for introducing fair use.

We are very concerned that if the specific time shifting and format shifting exceptions are abolished in line with the ALRC proposal, and these uses that are everyday consumer activities become a fair use subject to contractual override, consumer rights are substantially weakened. At the same time, the ALRC suggests that these exceptions may be subject to markets that are emerging – thereby weakening them further.

The ALRC view is in contrast to the proposed private copying exception in the UK which contains a no contracting out provision.<sup>2</sup>

There are already terms of use for products which seek to impose contractual limitations on consumers that would prevent a consumer from undertaking private copying.

One example is the terms of use of the Kindle Store, which relevantly states:

*Upon your download of Kindle Content and payment of any applicable fees (including applicable taxes), the Content Provider grants you a non-exclusive right to view, use, and display such Kindle Content an unlimited number of times, **solely on the Kindle or a Reading Application** or as otherwise permitted as part of the Service, solely on the number of Kindles or Supported Devices specified in the Kindle Store, and **solely for your personal, non-commercial use.***<sup>3</sup>

Some of these terms of use would seem to potentially prevent or restrict a series of uses that would be allowed under a copyright exception applying to private use. It for example restricts the reading of an e-book on another device or the sharing of an e-book with a family member.

### Recommendation:

In order to ensure the overall goal of the ALRC's reforms is achieved, all fair use and library exceptions should also be subject to a no contracting out provision. A rule against contracting out would only prohibit contracting out of fair uses – it would not mean a 'free for all' for consumers in relation to purchased content.

However, in the absence of this, it is preferable for the Copyright Act to remain unchanged on the issue of contractual override rather than for the approach proposed in the Discussion Paper to be adopted. The approach proposed in our view risks weakening the exceptions most relevant to consumers.

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<sup>2</sup> [UK private copying exception proposal](#)

<sup>3</sup> [Kindle Store Terms of Use](#)