



31 July 2013

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 3708

Dear Executive Director

DISCUSSION PAPER – COPYRIGHT AND THE DIGITAL ECONOMY

This submission sets out Cricket Australia's responses regarding the proposals and questions in the ALRC's discussion paper *Copyright and the Digital Economy (DP 79)* that are of specific concern to Cricket Australia at this time.

Cricket Australia welcomes the opportunity to respond to the proposals and questions in the discussion paper.

Details regarding Cricket Australia, its funding, activities and objectives are set out in the previous submission made by Cricket Australia to the ALRC in response to the ALRC's issues paper *Copyright and the Digital Economy (IP 42)*.

Since making this previous submission, Cricket Australia has concluded media rights arrangements for certain key Australian media rights for the next five years. These arrangements include the granting of media rights for international cricket matches played in Australia and the television rights for the domestic 'Big Bash' T20 cricket tournament.

These arrangements represent a significant increase for Cricket Australia in media rights revenue. This revenue will allow Cricket Australia to significantly expand and develop its investments in a range of cricket programs and initiatives (including grassroots and community programs).

Digital rights are an important part of these media rights arrangements. As part of the arrangements Cricket Australia and its licensee will be making a significant investment in the development and delivery of a range of products and services for online cricket content delivery.

Strong and certain copyright laws are crucial for Cricket Australia to be able to continue to licence its rights, and for Cricket Australia and its licensees to make these significant investments.

1. Framing Principles of Reform

Cricket Australia's previous submission identified concerns with the guiding principles of reform set out in the Issues Paper.

Cricket Australia continues to have concerns that the reform principles expressed by the ALRC do not have sufficient regard to the perspectives and rights of content owners.

Cricket Australia is an organisation that (while perhaps not being traditionally seen as a content owner) has built a significant and successful business reliant on copyright.

The ability to protect and exploit copyright in its cricket content has been crucial to the success of this business and the ability of Cricket Australia to generate revenue. This revenue funds the development of the sport of cricket as well as numerous grass roots and community programs.

Cricket Australia is concerned that the interests and perspectives of content owners such as Cricket Australia are not adequately reflected in either the principles of reform or many of the reform proposals in the Discussion Paper.

Some of Cricket Australia's specific concerns with the framing principles in the Discussion Paper include:

- (a) framing principle 3 regarding the wide distribution and dissemination of copyright material fails to take account of the fundamental rights of copyright owners to determine how and when their content is disseminated;
- (b) the framing principles do not reflect the importance of certainty regarding the operation and interpretation of copyright laws to enable copyright owners to obtain the full benefit of their rights; and
- (c) the framing principles do not reflect the need for there to be compelling evidence based justifications for reforms proposed.

2. Regulatory approach

Paragraph 3.73 of the Discussion Paper (discussing the suggested regulatory model for any reforms to the *Copyright Act*) states that:

One theme that emerged from submissions was the desirability of 'principles-based' drafting of the Act, with details and examples supplied by regulations to the Act, supplemented by industry codes, guides to best practice and the like.

Cricket Australia considers that such an approach is problematic for a number of reasons.

Firstly, caution should be exercised before recommending that the *Copyright Act* be significantly amended to be 'principles based'.

Principles based drafting is inherently uncertain and open to conflicting interpretation (including interpretation well beyond the legislative intent).

Principles based provisions may be appropriate as the basis for consumer protection legislation (such as the misleading and deceptive conduct provisions of the *Australian Consumer Law*). However principles based drafting is not appropriate for regulating property rights such as copyright. In regulating property rights certainty is crucial.

In addition, Cricket Australia does not consider that industry codes or other similar agreements are a practical solution to the uncertainties a principles based approach will create.

In Cricket Australia's experience, binding and meaningful industry codes are extremely difficult, time consuming and costly to negotiate and implement. This is particularly the case where the code relates to highly valuable content such as Cricket Australia's cricket content.

Industry codes or similar agreements are also dependent on all of the relevant stakeholders signing up to and complying with the code or other agreement.

Where content is used by parties who are not located in Australia or are not regulated in Australia, an industry code or other similar agreement will be of little use. This is a particularly significant issue in respect of the online and digital environment.

3. Fair Use

3.1 Cricket Australia's position

Cricket Australia does not support the introduction of a fair use exception.

The introduction of a fair use exception would undermine Cricket Australia's valuable media rights, create significant uncertainty and result in increased transaction costs (in particular litigation).

Cricket Australia does not consider that there is a reasonable basis for recommending such a radical and fundamental change to Australian copyright law.

3.2 Fair use has already been considered

The introduction of a fair use exception has been considered in numerous previous Australian reviews and inquiries.

Cricket Australia considers that the correct conclusion was reached in each of these reviews and inquiries (as well as recent international inquiries¹), being that a fair use exception should not be introduced.

Cricket Australia does not consider that another review of whether to introduce a fair use exception into the *Copyright Act* is necessary. In particular, Cricket Australia does not agree that 'development of the digital economy' justifies revisiting these issues.

The digital economy was already well developed in 2000 when the *Intellectual Property and Competition Review Committee* recommended against introducing a fair use

¹ See for example *Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (2011)* (UK)

exception and in 2006 when the *Australian Government Attorney-General's Department's Fair Use Review* recommended against the introduction of a fair use exception.

3.3 Arguments made in support of fair use

The Discussion Paper made the following arguments in support of the introduction of fair use:

- (a) fair use is suitable for the digital economy and will assist innovation;
- (b) fair use provides a flexible standard;
- (c) fair use is coherent and predictable;
- (d) fair use is suitable for the Australian environment; and
- (e) fair use is consistent with the three-step test.

Cricket Australia responds to each of these arguments below.

Fair use will assist innovation

There is no evidence that the introduction of a fair use exception would assist innovation or that the lack of a fair use exception has impeded innovation or the development of the digital economy.

Arguments that the lack of a fair use exception is impeding innovation or the development of the digital economy appear to be directly contradicted by the rapid and continued growth of the digital economy in Australia. Cricket Australia notes the comments in the final report of the UK Hargreaves Review that the economic benefits of fair use have often been overstated².

Cricket Australia finds the arguments that major search engines or other online businesses would not have been able to start their businesses in Australia difficult to reconcile with the successful establishment and operation of Australian businesses by those same companies.

Cricket Australia considers that a fundamental and radical change to Australian copyright law should be supported by real and compelling evidence that the change is required, rather than unsupported claims and rhetoric.

In addition, proposals to reform the *Copyright Act* must not overlook the importance of innovation undertaken by copyright owners and their licensees and the need for such innovations to be protected by strong and predictable copyright laws. It would be a perverse result if reform proposals favoured 'innovations' based on unlicensed use of copyright content rather than the innovative products and services of the copyright owners and their licensees.

Flexibility

² Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) (UK) at 5.16

The Discussion Paper argued that one of the most significant benefits of fair use is its ‘flexibility’.

However this focus on flexibility fails to take into account the needs of copyright owners for copyright exceptions to be limited, purpose based and certain.

Cricket Australia considers that exceptions to infringement of highly valuable intellectual property rights should be specific and limited. In addition the scope of such exceptions should be determined by the legislature, rather than by the interpretation of vague and uncertain concepts such a ‘fairness’.

Cricket Australia also considers that the inflexibility of the current regime of copyright exceptions has been overstated. For example, the fair dealing exceptions in the *Copyright Act* are already flexible and technologically neutral.

Coherency and Predictability

Introducing a fair use exception will result in a significant amount of uncertainty, including uncertainty regarding the scope, application, interpretation and extent of the fair use exception.

The requirement under a fair use exception to assess open ended notions such as ‘fairness’ and the proposed fairness factors and illustrative purposes (which are non exhaustive) will make it extremely difficult for parties to have any certainty regarding whether particular use of copyright material is permitted under the exception or amounts to an infringement of copyright.

The application of a fair use exception will be open to a range of potential interpretations and will require copyright owners such as Cricket Australia to obtain costly legal advice and potentially take expensive and protracted enforcement action to have any certainty regarding the scope of the exception.

This uncertainty will be exacerbated by the lack of applicable case law or other similar guidance for parties, their legal advisors or the courts.

There will also be an increased risk of arbitrary or incorrect decisions being made under a fair use exception (particularly given the lack of Australian case law guidance or commentary).

It is not sufficient to respond to concerns regarding the lack of certainty resulting from a fair use exception by claiming that the *Copyright Act* already lacks certainty in some areas.

There is a significant difference to Cricket Australia between uncertainty regarding the operation of certain provisions of the *Copyright Act* and uncertainty regarding one of the most fundamental copyright issues (being when does an unlicensed use of copyright material amount to an infringement).

For the reasons outlined in paragraph 2 of this submission, it is not practical to suggest that certainty will be able to be obtained from voluntary industry codes or other similar agreements.

Suitability for the Australian legal environment

Cricket Australia does not agree that a fair use exception is suitable for the Australian legal environment.

There are clearly significant differences between the legal systems of Australia and the United States of America (which would be the country where most case law and commentary regarding the fair use exception would need to be sourced from).

Further, as a fair use exception has been introduced in only a small handful of countries throughout the world, the scope and applicability of the guidance available from case law will be limited.

If a fair use exception was introduced Australian parties and their legal advisors would (for the foreseeable future) need to review and try to interpret the applicability to the provisions of the *Copyright Act* of case law from the United States of America, Israel, the Philippines, South Korea and Singapore.

This would clearly be a costly and undesirable outcome.

Consistency with three step test

It appears to Cricket Australia that there are significant issues regarding whether a fair use exception would comply with the 'three step test' under Article 9(2) of the *Berne Convention for the Protection of Literary and Artistic Works*.

Cricket Australia does not consider it to be sufficient to dismiss these concerns on the basis that other countries have introduced a fair use exception and have not been challenged in international fora.

Exceptions to the *Copyright Act* should only be introduced into Australian law where it is clear that doing so would not contravene Australia's international obligations (including under the *Berne Convention*).

3.4 Arguments against fair use

Cricket Australia considers that the Discussion Paper fails to give sufficient weight to the compelling arguments against the introduction of a fair use exception.

These arguments include that:

- (a) fair use lacks certainty;
- (b) fair use will result in significantly increased costs;
- (c) fair use will cause harm to rights holders;
- (d) there is no need for or evidential basis for introducing fair use; and
- (e) fair use may not comply with Australia's obligations under the *Berne Convention*.

The issues regarding fair use lacking certainty, there being no evidential basis for introducing fair use and fair use not complying with Australia's obligations under the *Berne Convention* have already been discussed in this submission.

Increased Costs

Introducing fair use into Australian law will result in significantly increased costs for parties (including copyright owners such as Cricket Australia and users).

Cricket Australia notes the ALRC's statement at paragraph 4.93 of the Discussion Paper that it considers that introducing fair use will 'reduce transaction costs'.

Cricket Australia does not understand (and the Discussion Paper does not appear to provide) the basis for the making of this statement.

Cricket Australia does not see how it can reasonably be argued that increased transaction costs will not result from introducing a broad, untested copyright exception for which there is no body of applicable Australian case law and which potentially allows for the use of highly valuable content without a licence from the owner of copyright.

The uncertain and open ended nature of the fair use exception will inevitably mean that copyright owners such as Cricket Australia will be forced to engage in expensive and time consuming litigation to determine the scope of the fair use exception.

Cricket Australia considers that it would be highly unfortunate if it was forced to expend funds that could otherwise have been spent developing the game of cricket in Australia on costly litigation regarding the scope of a fair use exception.

Harm to copyright owners

Introducing fair use will cause significant harm to copyright owners such as Cricket Australia.

Income from granting media rights is the most significant element of the funding of Cricket Australia (and, consequently, the funding of the sport of cricket in Australia).

To be able to maximise income from the sale of media rights it is crucial for Cricket Australia to be able to grant exclusive rights to its licensees and control how it packages and permits the exploitation of its media rights.

A fair use exception which allows use of Cricket Australia's content by unlicensed parties has the potential to significantly undermine the ability of Cricket Australia to grant the exclusive rights required by its licensees (and therefore maximise income from the grant of media rights).

A fair use exception would also significantly undermine the ability of Cricket Australia to control how and where its content is used. This control is of fundamental importance to sporting bodies such as Cricket Australia. Cricket Australia needs to be able to control the use of its content for a range of reputation and sporting integrity issues, such as controlling use of footage for anti-corruption purposes or of incidents during a match that may damage the reputation of its players, Cricket Australia and/or the sport of cricket.

3.5 Fairness factors

The Discussion Paper identifies four ‘fairness factors’ which would operate as a non-exhaustive list of factors to be considered in determining whether a particular use amounts to fair use.

The use of a non-exhaustive list of fairness factors and the fact the Discussion Paper expressly contemplates additional open ended factors (such as principles of ‘justice’ or ‘equity’) being considered in addition to these fairness factors is illustrative of the inherent lack of certainty involved in a fair use exception.

In relation to the Second Factor, the Discussion Paper states that this fairness factor involves assessing whether the plaintiff’s work is ‘creative’ and ‘published’. Cricket Australia does not consider that the ‘creativity’ of a work should be relevant to whether a fair use exception should apply. Material which may not be considered ‘creative’ should not be subject to a lower standard of copyright protection or more open to unauthorised use under a fair use exception.

Likewise Cricket Australia does not understand why the question of whether a work is ‘published’ or not would be relevant to whether a fair use exception should apply.

The Fourth Factor involves assessing the effect of the use on the potential market for, or value of, the copyright material.

This factor has the potential to create significant complications. Concepts such as what the relevant ‘market’ is and what the ‘value’ of the copyright material is are likely to be highly complicated and disputed issues.

Further, this factor imposes an unreasonable burden on copyright owners as it is likely to require copyright owners to obtain and lead complicated evidence regarding the markets for copyright material, the value of the material and the impacts of particular uses. Factors such as competitive tension and the impacts of particular uses on competitive tension are, in Cricket Australia’s experience, not readily capable of being valued or quantified which adds a further layer of complexity to the burden of proof imposed on copyright owners under fair use. Copyright owners should not be put to such an unreasonable burden of proof in order to stop the unlicensed exploitation of their copyright content.

The Fourth Factor also fails to take into account relevant non financial factors. For example, Cricket Australia may wish to prevent the distribution of audio visual clips damaging to the reputation and integrity of the sport of cricket.

Cricket Australia notes the statement of the ALRC in paragraph 3.49 of the Discussion Paper that ‘*reform should not add further complications to an already complex statute*’.

However, introducing open ended and uncertain ‘fairness factors’ as the basis for assessing whether particular uses infringe copyright will create significant complications to copyright law.

Notwithstanding Cricket Australia’s comments above regarding the fairness factors and its opposition to a fair use exception being introduced, if fairness factors are introduced

(either as part of fair use or fair dealing), Cricket Australia considers that the fairness factors should provide that:

- (a) use for commercial or profit making purposes cannot be fair use or fair dealing (other than as part of any already existing fair dealing exception);
- (b) the impacts of the use on the commercial interests of the copyright owner and its licensees must be considered, and if there is any adverse impact then the use should not be seen as fair;
- (c) it should be considered whether the relevant content could reasonably have been licensed from the copyright owner or its licensees; and
- (d) the non-financial impact of the use on the copyright owner should be considered (for example damage to the reputation or brand of the copyright owner).

3.6 Illustrative purposes

Cricket Australia provides some comments below regarding the illustrative purposes proposed in the Discussion Paper. However these comments are subject to Cricket Australia's overriding opposition to the introduction of a fair use exception.

The use of a non-exhaustive list of illustrative purposes again illustrates the uncertainty inherent in a fair use exception.

Cricket Australia does not consider that 'private and domestic' purposes should be included in the list of illustrative purposes. Cricket Australia's submissions regarding private and domestic purpose exceptions are set out in paragraph 7 of this submission.

Cricket Australia also does not consider that 'non-consumptive' use should be included in any list of illustrative purposes. As detailed in paragraph 6 of this submission, any issues regarding non-consumptive use can be dealt with by way of a specific fair dealing exception.

Also, as discussed in paragraph 4 of this submission, any exception to copyright infringement should not allow unauthorised use by third parties for commercial purposes.

As a result, the relevant purpose under any exception should be the purpose of the person who uses the relevant material (i.e. the infringer) rather than allowing a third party to rely on a copyright exception on the basis it is facilitating or assisting another person's use for an illustrative or other permitted purpose.

4. Third Parties

4.1 Third party use

Cricket Australia does not support the introduction of a fair use exception and therefore does not agree that the permissibility of third party uses of copyright should be assessed under a fair use exception.

It is extremely important that Cricket Australia be able to protect its highly valuable cricket content from unlicensed copying, communication or reproduction.

If unlicensed third parties are able (under cover of a fair use exception or otherwise) to commercially exploit Cricket Australia's copyright content, this will significantly limit Cricket Australia's ability to maximise the value of its media rights (for the ultimate benefit of the sport of cricket in Australia and the grassroots and community programs Cricket Australia funds).

It would also be a significant disincentive to investment by Cricket Australia and/or its licensees in new products and services (such as new online products and services for communicating cricket matches) if unlicensed third parties were able to 'free ride' on Cricket Australia's content.

It is not sufficient for proponents of fair use to suggest that commercial purposes will count against third party use being 'fair use' or that third party use for commercial purposes is unlikely to be 'fair use'.

In the interests of certainty for the granting of rights, and in order to be able to maximise the benefits from granting and exploiting its media rights, Cricket Australia needs clear limits on unlicensed third parties making commercial use of Cricket Australia's copyright content.

4.2 Facilitation

Cricket Australia rejects attempts to characterise or justify commercial third party use as 'facilitating' permitted uses by others.

Paragraph 5.26 of the Discussion Paper characterises the *NRL & AFL v Optus* case³ as involving a third party facilitating private and domestic use.

Cricket Australia considers this to be an inaccurate characterisation of the unauthorised copying service considered in this case. The relevant issue in these cases was that a third party made copies of the relevant broadcasts for commercial gain without obtaining a licence from the copyright owner.

Cricket Australia considers that the approach taken in cases such as *NRL & AFL v Optus* and *De Garis*⁴ that the relevant purpose in cases of third party use is the purpose of the user (i.e. the infringer) is the correct approach.

4.3 Unlicensed third party use

Cricket Australia takes issue with the statement in paragraph 5.49 of the Discussion Paper that '*Some copying by third parties is unlikely to harm the rights holders' market, and may help develop new markets for rights holders to exploit. Prohibiting such unlicensed copying through overly confined exceptions, even if technology neutral, may inhibit the development of the digital economy*'.

³*National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147

⁴*De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99.

Cricket Australia does not accept that unlicensed copying should be justified on the basis that it *'may help develop new markets for rights holders to exploit'*.

This approach ignores the fundamental right of copyright owners such as Cricket Australia to determine how its content may be used and to whom it will be licensed.

This approach also ignores the importance for rights holders such as Cricket Australia of the ability to protect and grant exclusive rights to exploit their content to licensees. This ability is fundamental for rights holders such as Cricket Australia to maximise the value of their copyright content and can only be facilitated by exceptions to copyright infringement which are limited and certain.

4.4 Exclusion of commercial or profit making purpose and third party use

Cricket Australia does not support the introduction of a fair use exception.

However, if a fair use exception is introduced, Cricket Australia considers that the fair use exception should also contain an express statement that use for a commercial or profit making purpose cannot be fair use (including use by third parties who, for commercial or profit making purposes, facilitate fair use by another).

5. Fair dealing

5.1 Fair dealing exceptions

Cricket Australia does not support the fair dealing exceptions being replaced with a fair use exception (subject to the comments in paragraph 5.4 of this submission).

Cricket Australia is not aware of any evidence that there are significant issues with the operation of the fair dealing exceptions or that the digital environment necessitates wholesale amendments to the fair dealing exceptions (although Cricket Australia does have some specific issues with the operation of the fair dealing exceptions in relation to the reporting of news, which are discussed in paragraph 5.3 of this submission).

5.2 Purpose based exceptions are appropriate

Cricket Australia considers that fair dealing exceptions which are limited, purpose based and certain are the appropriate method for providing exceptions to copyright infringement.

As detailed elsewhere in this submission, the significant impact of copyright exceptions on the rights of copyright owners such as Cricket Australia should not be underestimated. Copyright exceptions allow unlicensed third parties to exploit content and exercise rights that would otherwise be the exclusive preserve of the copyright owner.

A limited and purposes based approach is a more appropriate method of providing exceptions to these exclusive property rights and is more likely to comply with Australia's obligations under the three step test.

The current fair dealing provisions are also already flexible and technology neutral.

5.3 Fair dealing for the reporting of news

Cricket Australia's previous submission detailed Cricket Australia's concerns regarding the application of the fair dealing exception for the reporting of news.

Cricket Australia maintains its position that there are significant issues regarding application of the fair dealing exception for the reporting of news and the reform proposals set out in Cricket Australia's previous submission should be considered.

Cricket Australia has no desire to restrict the reporting of news or the freedom of the press.

Cricket Australia's concerns relate to the exception for the reporting of news being used as a 'cover' for the creation of non news content, such as 'entertainment' video content frequently made available on websites for commercial gain which in some cases have used up to six minutes of audio-visual cricket content without Cricket Australia's permission. Cricket Australia does not believe that seeking reasonable limitations on the use of Cricket Australia's content to create and commercially benefit from audio visual entertainment content can reasonably be characterised as an attack on the freedom of speech or freedom of the press.

Cricket Australia also does not agree that the *Code of Practice for Sports News Reporting* addresses or is likely to be able to address these concerns.

The Code of Practice for Sports News Reporting does not deal with the use of audio visual content and Cricket Australia considers that, given the significantly divergent views and interests of the relevant stakeholders, it will not be possible to negotiate amendments to the *Code of Practice for Sports News Reporting* to address issues relating to the use of audio visual content.

From Cricket Australia's perspective the issues with the scope of the *Code of Practice for Sports News Reporting* are representative of the significant limitations in seeking to use industry agreements or codes to seek to regulate the use of valuable copyright content.

5.4 Repeal of fair dealing provisions

While Cricket Australia opposes the introduction of a fair use exception, if a fair use exception was introduced it is likely that the fair dealing provisions would need to be repealed.

If the fair dealing provisions were not repealed following any fair use exception being introduced, Cricket Australia would have concerns that the overlap between the fair use and fair dealing provisions could result in the fair use provisions being argued to amount to a significant expansion of the exceptions under the fair dealing provisions.

5.5 Fairness factors

In relation to proposal 7.4 of the Discussion Paper, Cricket Australia would not have issues with the 'fairness factors' applying to the existing fair dealing exceptions as a matter to be taken into account when assessing whether copyright has been infringed.

However Cricket Australia considers that the fairness factors should be amended to take into account the additional matters set out in paragraph 3.5 of this submission.

6. Non-consumptive Use

As Cricket Australia does not support the introduction of a fair use exception, it does not support the fair use exception applying in determining whether non-consumptive use infringes copyright.

Cricket Australia also does not support the introduction of a general fair dealing exception for 'non-consumptive' use.

Cricket Australia is not aware of any evidence that the *Copyright Act* is impeding 'non-consumptive' use such as internet caching, indexing or data or text mining.

However if it is considered that exceptions are required, Cricket Australia considers that the appropriate approach is for a purpose based, specific fair dealing exception to cover the relevant activities (for example a fair dealing exception for the purposes of caching and indexing) rather than a general exception for all 'non-consumptive' use.

The definition of 'non-consumptive' use proposed in the Discussion Paper is '*use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material*'. Cricket Australia has concerns that this definition is excessively broad.

There are a number of examples of content where even the wholesale reproduction and/or exploitation of the content could be argued not to be trading on the 'creative and expressive purpose' of the content, for example audio visual footage of cricket matches or cricket statistics.

Cricket Australia is therefore concerned that a general 'non-consumptive use' exception intended to allow activities such as caching, indexing or data and text mining could allow reproduction and exploitation of content for other commercial purposes that would currently be understood to be an infringement of copyright.

If any exception is proposed in respect of data or text mining, Cricket Australia considers that the exception should be a fair dealing exception limited to data or text mining for the purposes of research or study.

7. Private and domestic use

7.1 Private and domestic use-fair use and fair dealing

Cricket Australia does not support the introduction of a fair use exception and therefore does not support 'private and domestic use' being an illustrative purpose in any fair use exception.

Cricket Australia also does not support the introduction of a new, general fair dealing exception for private and domestic purposes.

Cricket Australia has significant concerns regarding the definition, scope and application of any expanded exceptions for private and domestic use (discussed below).

7.2 Fair dealing exceptions

Cricket Australia considers that the time shifting and format shifting provisions of the Copyright Act already provide appropriate exceptions for private and domestic use by individuals and a general fair dealing exception for private and domestic purposes is not required or appropriate.

Cricket Australia is not aware of any evidence that private and domestic use is being unreasonably impeded or prevented by the *Copyright Act*.

There are significant potential scope and interpretation issues with a general fair dealing exception for use for private and domestic purposes.

The meaning of the terms ‘private’ and ‘domestic’ are ambiguous and open to multiple interpretations. For example:

- (a) the distinction between private and non private uses of content are increasingly unclear. The uptake of social media and online sharing mean that use which may start as a private use can quickly become publically available; and
- (b) the distinction between private and domestic uses and commercial uses of content is also increasingly unclear. The use of content on social media (such as Facebook and Twitter) or online sharing sites (such as YouTube) cannot properly be classified as ‘private and domestic’ where the content can be viewed by a large number of people (and in many cases all users of the internet) and monetised either by the uploader or site operator.

As a result, a general exception for private and domestic purposes will be uncertain.

If a general private and domestic purposes exception was introduced (subject to Cricket Australia’s opposition to the introduction of such an exception), the relevant exception should expressly:

- (a) define what ‘private and domestic use’ means;
- (b) delineate between private and domestic use and commercial use;
- (c) exclude commercial use or third party use (such as the third party use described in Chapter 5 of the Discussion Paper) from the exception; and
- (d) exclude social uses or other public uses or communications of copyright material from the exception.

Cricket Australia disagrees with suggestions in the Discussion Paper that extended exceptions for private and domestic use will increase respect for or compliance with copyright law.

It is clear that countries that have fair use or broad private and domestic use exceptions still have significant issues regarding piracy and other non-compliance with copyright law.

8. Transformative Use and Quotation

8.1 Transformative Use

Cricket Australia agrees with the ALRC's position in Proposal 10-1 of the Discussion Paper that the *Copyright Act* should not provide any new transformative use exception.

Cricket Australia's concerns regarding the impact of a new transformative use exception were set out in its Previous Submission and included the lack of certainty, the definitional issues with such an exception and the impact on the rights of copyright owners to control the use of their content in adaptations or derivative works.

However Cricket Australia does not support the introduction the fair use exception and therefore does not agree that the fair use exception should be applied in determining whether transformative use infringes copyright.

8.2 Quotation

Cricket Australia does not support the introduction of the fair use exception and therefore does not agree that the fair use exception should be applied in determining whether quotation infringes copyright.

Cricket Australia also does not support the introduction for a fair dealing exception for the purposes of quotation.

The *Copyright Act* already provides sufficient exceptions for quotation, such as the fair dealing exception for the reporting of news and the fair dealing exception for research or study.

A new fair dealing exception for 'quotation' would be uncertain and open to interpretation, particularly as to when a particular use amounts to quotation.

Cricket Australia is concerned that a new fair dealing exception for quotation could allow commercial operators to make unlicensed use of Cricket Australia's content for commercial purposes under the guise of a 'quotation'.

Such an exception could also interfere with the exclusive rights granted by Cricket Australia in respect of its cricket content, for example exclusive audio visual highlight and clip rights, exclusive photographic rights and exclusive audio rights.

If the ALRC does intend to recommend the introduction of a fair dealing exception, Cricket Australia considers that the exception should not apply to audio visual, audio, or photographic content.

9. Libraries, archives and digitisation

It is important to Cricket Australia that it maintains the exclusive rights to keep, use and license its extensive archives of cricket content.

Cricket Australia understands that the proposals under Chapter 11 of the Discussion Paper are limited to activities by 'cultural institutions' for preservation, research and

study purposes and would not extend to archiving, digitisation or other similar activities undertaken by persons other than cultural institutions (such as commercial operators).

This being the case, Cricket Australia would support appropriate reform proposals to improve the exceptions relating to these activities by cultural institutions.

However Cricket Australia does note that, as it does not support the introduction of a fair use exception, it does not support the fair use exception applying to activities by cultural institutions.

10. Retransmission

10.1 Proposed reforms

Cricket Australia is not aware of any significant issues or widely held concerns with the operation of the regime under the *Copyright Act* and *Broadcasting Services Act* in relation to the retransmission of free-to-air television broadcasts.

Any proposal to amend these retransmission provisions will involve multiple complicated policy issues and considerations, including significant communications, copyright and competition law and policy issues.

As identified by the ALRC in the Discussion Paper⁵, a number of factors which are key to any reform of the retransmission provisions are outside the scope of the ALRC's inquiry.

As a result, Cricket Australia's preference is for no recommendations regarding reforms to the retransmission provisions to be made until a more comprehensive review of all the relevant considerations and more detailed consultation with stakeholders can be undertaken.

Of the two reform options set out in proposal 15.1 of the Discussion Paper, Cricket Australia's view is that Option 1 would be more appropriate, as it represents a market based approach.

This view is subject to Cricket Australia's overriding preference that the retransmission provisions not be amended.

10.2 Internet retransmissions

Cricket Australia is strongly opposed to the statutory licensing scheme for the retransmission of free-to-air television broadcasts applying to retransmission over the internet.

Extending the statutory licensing scheme for the retransmission of free-to-air television broadcasts to internet transmissions:

- (a) fails to take account of the fundamental legal and policy differences between broadcasts and internet transmissions;

⁵ ALRC Paragraph 15.3

- (b) would unfairly prejudice the ability of rights holders such as Cricket Australia to control and sell its online rights;
- (c) allows third parties to ‘free ride’ on Cricket Australia’s valuable copyright content; and
- (d) would unfairly prejudice the ability of rights holders such as Cricket Australia to sell international media rights (both online and broadcast).

Broadcasts and internet transmissions are different

Extending the retransmission scheme to internet retransmissions fails to take account of the fundamental legal and policy differences between broadcasts and internet transmissions.

Broadcasts are fundamentally different from internet transmissions. Broadcasts are subject to a stringent regulatory regime and are generally only able to be undertaken by a limited number of broadcasters licensed under the *Broadcasting Services Act*.

There are very significant policy issues associated with merging the concepts of broadcasts and internet transmissions. Many of these issues are outside the scope of the ALRC’s inquiry and should be subject to appropriate review and consultation before amendments are recommended to the retransmission scheme.

Ability of rights holders to sell online rights and free riding

Cricket Australia (like many other sporting bodies) sells and exploits the exclusive rights to communicate its cricket content on the internet, both in and outside Australia. These rights are frequently granted separately from rights to communicate on other platforms (such as free to air or subscription television).

This segmenting of rights is crucial for Cricket Australia to be able to maximise revenue from the sale of its media rights (for the ultimate benefit of the sport of cricket).

Allowing third parties to retransmit free to air broadcasts over the internet would significantly prejudice the ability of Cricket Australia to exploit and grant these exclusive internet rights.

Cricket Australia fails to see why third parties should be entitled to communicate Cricket Australia’s valuable content over the internet without having to contract with Cricket Australia. To Cricket Australia, this amounts to little more than ‘free riding’ on Cricket Australia’s valuable content at the financial expense of Cricket Australia, state cricket associations, local cricket clubs and the sport of cricket generally, and without taking into consideration Cricket Australia’s qualitative and strategic requirements in granting (or not granting) internet rights.

In this regard, Cricket Australia strongly disagrees with the submissions referred to in Chapter 15 of the Discussion Paper that rights holders should be prevented from obtaining ‘*separate royalties for the same content for each delivery method or means of viewing the content*’⁶.

⁶ ALRC Paragraph 15.101

It is crucial for Cricket Australia that it should be able to control and receive appropriate rights fees from the delivery of its cricket content by different means or platforms, without interference from unlicensed third parties.

International rights and piracy

As detailed in Cricket Australia's previous submission, there are significant risks that retransmissions of free to air broadcasts over the internet will be able to be received overseas. This could have a significant impact on Cricket Australia's international licensing of its cricket content. Geo blocking technologies cannot be relied on to prevent this occurring, as the ability for geo blocking technologies to be circumvented is a significant issue.

Cricket Australia also shares concerns expressed by others⁷ that parties undertaking internet retransmission under a statutory licensing scheme will not have the same motivations to implement effective and best practice geo blocking technologies as Cricket Australia or its licensees would have.

Further, internet retransmission has the potential to create significant piracy and other unauthorised communication issues for rights holders such as Cricket Australia, particularly given the risks presented by digital copying and storage mechanisms, which can allow the propagation of unlicensed content across a multitude of digital platforms with little ability or recourse for the rights holder to mitigate or prevent the content's wide dissemination.

10.3 Exclusion of sports broadcasts

If the ALRC does make recommendations that the retransmission scheme be extended to allow internet retransmissions, then Cricket Australia submits that sports broadcasts should be excluded from the broadcasts that can be retransmitted over the internet. Such an exclusion would be reasonable and justified given:

- (a) the importance to sports bodies such as Cricket Australia of income from granting media rights;
- (b) the need to protect sports bodies against the negative impacts to their online licensing of media rights if internet retransmission is allowed;
- (c) the community benefits that flow from sports bodies maximising income from the exploitation of media rights (such as the local, grassroots and community cricket programs funded by Cricket Australia); and
- (d) the special risks to sports bodies such as Cricket Australia regarding internet retransmissions allowing the sporting broadcasts to be accessed overseas.

10.4 Alteration

If the ALRC is considering recommending the retransmission scheme be extended to internet retransmissions, then, in relation to the issues raised in paragraph 15.124 of the

⁷ Such as the MPAA submissions referred to in *ALRC Paragraph 15.110*

Discussion Paper, Cricket Australia would strongly be of the view that no alterations should be allowed to the relevant broadcasts.

The requirement that retransmitted broadcasts be unaltered is a fundamental and well understood principle of the retransmission scheme.

Cricket Australia does not consider there would be any basis for allowing retransmissions to be altered (either by internet or other retransmitters).

10.5 IPTV

As detailed in Cricket Australia's previous submission, Cricket Australia does not believe that the *Copyright Act* can or should be construed to support an argument that the existing retransmission regime applies to either retransmission over the internet or retransmission by IPTV.

If necessary, the *Copyright Act* should be amended to clarify that the regime does not apply to retransmission over the internet or by IPTV.

11. Broadcasting exceptions

In Proposal 16.1 of the Discussion Paper the ALRC proposes that a number of broadcast exceptions in the *Copyright Act* be amended to extend the exceptions to the transmission of television or radio programs using the internet.

Cricket Australia is not aware of any material issues with current operation of the broadcast exceptions or any evidence that the extension of the broadcast exceptions to internet transmissions is required.

In fact, the growth of both 'catch up' television services offered by traditional broadcasters (such as free to air and subscription television) and online video streaming and other services offered by internet providers suggests to Cricket Australia that there are no significant issues with the scope and operation of the broadcast exceptions.

There are significant communications policy issues associated with the broadcast exceptions and caution should be exercised in making changes which may have unintended communications policy consequences.

In particular, extending the Broadcast Exceptions to internet transmissions would result in these exceptions being extended from applying to a very limited category of organisations (being broadcasters licensed under the *Broadcasting Services Act*) to anyone making an internet transmission (which is a potentially unlimited category).

If the ALRC does intend to recommend amendments to extend the broadcast exceptions to transmissions of television or radio programs using the internet, Cricket Australia considers that the broadcast exceptions should only apply to internet transmissions by broadcasting services licensed under the *Broadcasting Services Act* of the linear feed of programming broadcast by that broadcasting service.

The broadcast exceptions have always been limited to broadcasting services licensed under the *Broadcasting Services Act* and Cricket Australia does not believe there is any justification for expanding the broadcast exceptions to persons other than licensed

broadcasting services (subject to Cricket Australia's view that any expansion of the broadcast exceptions is unnecessary).

12. Contracting Out

Cricket Australia does not consider that there should be restrictions on parties contracting out of either fair dealing or any fair use copyright exceptions.

Parties are currently able to contract out of copyright exceptions and Cricket Australia is not aware of any significant problems or issues with parties doing so.

Cricket Australia enters into broadcast or other media rights agreements where the parties may contract out of certain exceptions to the *Copyright Act*.

These agreements are entered into with sophisticated parties who have access to significant resources (including legal resources and advice). Cricket Australia does not see any reasons why these types of parties should not be able to contract out of the fair dealing/fair use copyright exceptions.

Further there are legitimate reasons why Cricket Australia or its licensees may wish to contract out of fair dealing/fair use exceptions in agreements with consumers. For example, Cricket Australia or its licensees may wish to provide online products which allow consumers to watch highlights of cricket matches for a limited period of time (i.e. 48 hours after the match).

Cricket Australia or its licensees should be able to contract out of the fair dealing/fair use copyright exceptions so that it can provide such a product to consumers. The ability of Cricket Australia or its licensees to provide these types of products to consumers would be adversely impacted if consumers were able to circumvent the time restrictions based on a fair dealing or fair use exception.

Representatives of Cricket Australia are available and would be pleased to discuss Cricket Australia's submissions or any other aspects of the Discussion Paper or enquiry that the ALRC might wish to discuss with Cricket Australia.

Grant Poulter, Government and Community Relations Manager, grant.poulter@cricket.com.au and 03 9653 8880, can be contacted to arrange any such discussions.