



Submission in response to ALRC
Discussion Paper

Copyright and the Digital Economy

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Section 1. Overview

- 1.1 The past decade has seen major technological advances in sectors such as Information Technology, telecommunications, print and media. This has helped to drive enormous advances in the Digital Economy both in Australia and globally. The health of the Digital Sector is now critical to the well-being of the broader Australian economy. For instance, the global cloud industry¹ is expected to grow to over US\$241 billion in 2020, and expected to create 11.3 million jobs globally in 2014 alone.² It is estimated that cloud computing could increase Australia's long-run GDP by \$3.32 billion per annum.³
- 1.2 There is every likelihood that these trends will continue with significant developments already in place. These changes have had a profound impact on how people access and use copyright material. They are also likely to have had an impact on end-user perceptions about their rights to access and use such material. As such, a technology neutral approach to copyright is needed now more than ever if Australia is to see the full benefits of ongoing technological advances.
- 1.3 Optus welcomes the opportunity to comment on the Australian Law Reform Commission's (ALRC) Discussion Paper on Copyright and the Digital Economy. Optus agrees with the recommendation to adopt a broad fair use regime in Australia. Optus supports the use of a fair use exemption that is broad and technology-neutral, combined with a non-exhaustive list of guiding principles. This is the best means of ensuring copyright obligations can develop in step with technology. Optus believes strongly that a broad fair use exemption would answer many of the concerns expressed about current copyright law.
- 1.4 In particular, Optus is of the view that greater recognition of the notion of 'non-consumptive and third party use' to distinguish between distribution, storage and consumption of digital content will contribute greatly to creating a use regime that is more resilient and consistent in the face of ongoing technological change.
- 1.5 Optus wants to offer specific comments about the:
 - (a) Fair use exemption, specifically the fairness factors and illustrative purposes; and
 - (b) Re-transmission of FTA broadcasts.
- 1.6 Optus supports the four non-exhaustive factors and the use of a non-exhaustive list of illustrative purposes. In saying that, however, Optus has the following comments.
 - (a) Optus reiterates that the interpretation of the four factors should be from the perspective of the end-user: that is, the actual user of the copyright material. So for example, where the ALRC asks whether the use was commercial under the 'purpose

¹ Cloud computing refers to a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. See para.3.11 for a complete definition.

² Forrester Research, Sizing the Cloud

³ KPMG, Modelling the Economic Impact of Cloud Computing, a report for the AIIA. April 2012.

and character of the use' test, the focus should be whether use of material by the end-user was for a commercial purpose.

- (b) Optus also submits that an additional example should be added to the non-exhaustive list of illustrative purposes that states third parties facilitating end-users to use material that would be otherwise permissible should be considered a fair use by the third party. This would make clear that the focus should be on the permissibility of end-user use, rather than the method through which the end-user makes copies.
- 1.7 Optus submits that the list of illustrative purposes should include 'third party uses on behalf of an end-user where the third party use is facilitating an otherwise fair use by the end-user.' This would ensure that the Australian fair use rule is consistent with its use in other jurisdictions, notably the United States.
- 1.8 With respect to re-transmission of Free-to-Air (FTA) broadcasts, Optus supports removing the *Broadcasting Services Act* exception for re-transmission of FTA broadcasts and replacing it with a statutory licensing regime (Option 2). Optus recommends that the ALRC adopt a broad definition of what constitutes the internet for the purpose of IPTV. Optus agrees with the ALRC that the current definition of internet provides advantages to some IPTV providers.⁴ Optus strongly advises against focusing on the technology through which end-users access the internet.

⁴ ALRC, Discussion Paper, p.324.

Section 2. Fair use exemption

- 2.1 The ALRC proposes to amend the *Copyright Act* to allow for an express statement that a fair use of copyright material does not infringe copyright. This broad statement would be supported by:
- (a) a non-exhaustive list of the factors to be considered in determining whether a use is fair (fairness factors); and
 - (b) a non-exhaustive list of the illustrative uses that may qualify as fair uses (illustrative purposes).⁵
- 2.2 Optus supports the use of a broad and technology-neutral fair use exemption, combined with a non-exhaustive list of guiding principles. This is the best way to ensure that copyright obligations can develop in step with technology. Optus strongly believes the use of a broad fair use exemption would address many of the concerns raised about the current copyright law.
- 2.3 The ALRC proposes a list of four non-exhaustive factors to be used when determining whether use is fair:
- (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.⁶
- 2.4 Optus supports the four non-exhaustive factors. Optus believes strongly that interpretation of the four factors should be from the perspective of the end-user: that is, the actual user of the copyright material. For example, where the ALRC asks whether the use was commercial under the ‘purpose and character of the use’ test, the focus should be whether use of material by the end-user was for a commercial purpose.
- 2.5 Optus believes that this clarification will assist the proper interpretation that third party, non-consumptive uses would fall within the fair use exemption. This is consistent with the long held view that the end user of the material should have primary responsibility for its proper use. Moreover, whether the delivery/distribution was done for commercial payment should have no bearing on the assessment of liability.
- 2.6 The ALRC proposes a non-exhaustive list of nine illustrative purposes that would fall under the fair use exemption. These are:

⁵ ALRC, 2013, *Copyright and the Digital Economy Discussion Paper*, p.90.

⁶ ALRC, 2013, *Discussion Paper*, p.92.

- (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.⁷

- 2.7 Optus supports the non-exhaustive list of illustrative purposes. In saying that, however, further clarification is warranted with respect to non-consumptive and third party uses. Optus is concerned that the discussion in chapter 5 of the Discussion Paper may result in an interpretation that third party uses do not fall under the non-consumptive purpose.
- 2.8 Optus recommends that the list of illustrative purposes should include third party uses on behalf of an end-user where the third party use is facilitating an otherwise fair use by the end-user.

Third party and non-consumptive use

- 2.9 The full benefits of ongoing technology changes will only be available to Australian consumers if the Australian copyright law is flexible and technology neutral. There are ample examples of where the current law has prevented Australian end-users from accessing new services available in other jurisdictions.
- 2.10 As a result, Optus is concerned that the proposals put forward in the Discussion Paper may not be sufficiently clear as to permissibility of third party uses. Optus submits that an additional example should be added to the non-exhaustive list of illustrative purposes stating third parties allowing end-users to use material that would be otherwise permissible are a fair use by the third party.
- 2.11 The focus should be on the permissibility of end-user use, rather than how an end-user makes copies. For example, it would be an unfortunate outcome if the permissibility of time-shifting continues to be dependent on whether the recording device was operated by the end-user through a cable or through the internet. The method in which the end-user makes the copy should not influence whether the making of the copy is permissible. Such an outcome is counter to the technology neutral intent of the recommendations.
- 2.12 It is useful to describe the nature of remote recording services to help illustrate this point. Remote recording allows subscribers to access dedicated recording devices located outside their premise for the purpose of viewing public broadcasting later. The recordings made by

⁷ ALRC, 2013, Discussion Paper, p.94.

one subscriber were not available to other subscribers. From an end-user perspective this is the same service that is provided by modern PVR located in their homes.

- 2.13 Take the example of a third party that owns the recording device but leases its use to the end-user through monthly payments. Should liability be attached to the device provider because of the form of payment? Equally, should an electronic store that sells a device to an end-user who subsequently uses it to breach copyright be liable? Clearly the answer is no.
- 2.14 The location of the third party recording device is at a remote location outside the end-users' premise. Should liability be attached to the third party because of the location? How would this work with remote storage? Is it reasonable to impose liability dependent on whether the end-user is within his home or outside? Clearly the answer is no.
- 2.15 Optus submits that failure to include third party use within the illustrative purposes may undermine the ALRC's objective of adopting technology neutral legislation. Ultimately, if the end use is considered fair, then services or devices that permit such usage should not attract any liability. Over time, there will be a multiple of methods through which end-users could access/record material that they have the right to use. It would be impossible to amend legislation to keep up with technology change. A technology neutral approach can only be implemented when the focus is only on the end-users' fair use. If the end-users' fair use is not permissible, the end-users should attract liability.
- 2.16 Finally, inclusion of third party use within the list of illustrative purposes would ensure the list is consistent with the intent of the ALRC that Australian fair use is consistent with the jurisprudence of fair use in other jurisdictions. Optus notes the developing body of United States cases that have concluded that fair use includes third party recording on behalf of end-users. For example, the *Aereo*⁸ and *Cablevision*⁹ cases and more recently the *Dish Networks* case.¹⁰ These cases deal with cloud-based DVR services, allowing end-users to remotely record broadcasts on servers owned and located by the third party service provider. The third party provided the service on a commercial basis. Case law appears to be that the end-users pushing the record buttons were the ones making the copies and that the playback of those recordings was not a public performance that infringed on copyright. No liability lies with the third parties that enable the service; and it does not matter whether the third party service is done for commercial gain.
- 2.17 Optus submits that the list of illustrative purposes should include third party uses on behalf of an end-user where the third party use is facilitating an otherwise fair use by the end-user.
- 2.18 The Discussion Paper also notes that a factor in assessing whether third party use constitutes fair use may be whether the action is undertaken for commercial gain. Optus does not agree with the proposal that where a third party provides a good or service to an end-user who subsequently uses it to make a copy, that the issue of payment between end-user and third party should be a determinative factor.
- 2.19 It may be inferred from the ALRC's discussion that where a copy is made for non-consumptive purposes to enable an end-user to make a copy for private and personal use, it

⁸ *WNET, Thirteen v. Aereo, Inc.*, United States Court Of Appeals For The Second Circuit, April 1 2013.

⁹ *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

¹⁰ *Fox Broadcasting v Dish Networks*, United States Court Of Appeals For The Ninth Circuit, July 24 2013.

would not be found to be a fair use due to payments to the third party. Optus submits that such a result would undermine the benefits of adopting a fair use test.

- 2.20 A focus on payments to a third party would not only potentially undermine the intent of fair use exemption but would introduce greater complexity, which ultimately is irrelevant to the fundamental questions about the nature of use of copyright material. For example:
- (a) Whether the third party revenue accrues from selling outright devices or leasing access to a recording device impact on a finding of fair use.
 - (b) What occurs if the remote recording service is provided within a bundle of several services provided to the end-user? Does this change the fundamental fairness of the service?
 - (c) If an end-user asks an agent to “press start” to commence recording a broadcast does it matter whether the agent is paid or not; how does this affect the fair use of the recording?
- 2.21 Optus submits that none of these factors necessarily impact upon a finding of fair use. A preferable position would be that no negative inferences should be drawn from third parties providing goods or services for commercial purposes that ultimately only facilitate end-users being able to use or access material in a manner that would otherwise constitute fair use. If an end-user has a right to copy a piece of material it should not matter how that material is copied so long as the use of the material constitutes fair use.
- 2.22 It is also instructive to note the United States case law that has found third party provisions of cloud-based DVR services a fair use notwithstanding it being done on a commercial basis.
- 2.23 Optus recommends that the ALRC make clear that payments to third parties should not influence a finding of fair use by the end-user. This could be done through the above suggested drafting change to include third party use as an illustrative purpose.

Section 3. Re-transmission

- 3.1 The ALRC put forward two recommendations with respect to the re-transmission of broadcast FTA television:
- (a) Remove *Broadcasting Services Act* exemption and leave re-transmission to commercial negotiation (option 1); and
 - (b) Remove *Broadcasting Services Act* exemption and replace with statutory licence (option 2).

Statutory licence regime is preferred

- 3.2 Optus prefers option 2, the use of statutory licence to facilitate re-broadcasting of FTA television.
- 3.3 Option 2 reduces the potential for FTA broadcasters to exploit any market power held over FTA broadcasts. Relying on commercial negotiations (option 1) would enable FTA broadcasters to withhold permission or demand excessively high access charges. Neither scenario is consistent with the interest of end-users and does not represent fair compensation to rights holders. Option 1 would potentially enable FTA broadcasters to discriminate against delivery mechanisms that posed competition to their protected market. For example, it is foreseeable that FTA broadcasters have an incentive to increase costs to FOXTEL, Fetch TV, or new IPTV providers.
- 3.4 In addition, many FTA broadcasters also have commercial relationships with businesses in related industries (such as telecommunications). As such, incentives may arise over time to discriminate against some re-transmitters in favour of others.
- 3.5 Option 2 would also minimise transaction and contracting costs associated with the requirement for all potential re-broadcasters to sign individual contracts with each individual FTA broadcaster, and for FTA broadcasters to identify all possible re-broadcasters.

Definition of the internet

- 3.6 Optus previously identified that excluding retransmissions over the Internet from the Part VC scheme¹¹ presents a particular complication for delivery of retransmissions on technologies other than cable subscription TV — that is, IPTV, internet TV and mobile TV. Optus agrees with the proposal put forward that the remunerated exception in relation to underlying rights should be amended by removing the internet exclusion.¹²
- 3.7 Optus recommends that the ALRC should adopt a broad definition of what constitutes the internet for the purpose of IPTV and internet TV. Optus agrees with the ALRC that the current definition of internet provides advantages to some IPTV providers.¹³

¹¹ *Copyright Act*, s. 135ZZJA(1).

¹² ALRC, Discussion Paper, p.315.

¹³ ALRC, Discussion Paper, p.324.

3.8 Optus strongly advises against focusing on the technology through which end-users access the internet: the internet is not an access network. For instance, end-users can access the internet through a number of media, including: 3G mobile technology; 4G LTE technology; Wi-Fi technology, over copper lines using ADSL or dial-up technology; HFC cable technology; Fibre optic technology, a satellite connection; and Bluetooth . Latest communications data show that almost half of all connections to internet services in Australia are via mobile connections.¹⁴ Each of these access technologies provides end-users access to the internet.

¹⁴ ACMA, 2012, Communications Report 2011-12.