

News Corp Australia

SUBMISSION TO ALRC DISCUSSION PAPER: COPYRIGHT AND THE DIGITAL ECONOMY

5 AUGUST 2013

INTRODUCTION

News Corp Australia welcomes the opportunity to make a submission to the Australian Law Reform Commission's *Copyright and the Digital Economy Discussion Paper* (the Discussion Paper).

As articulated in our submission to the Issues Paper, we strongly believe that the orderly management of copyright is essential to promote the continued production of original copyright materials, to ensure sustainable business models and on-going investment and employment in Australia's creative industries. As the ALRC is aware from data provided by many submitters, the economic contribution of the copyright industries to Australia is significant, and was reported to be \$93.2 billion in 2011 which represented 6.6 per cent of GDP¹. It is the case that we do not support proposals that threaten to undermine the creative industries in Australia.

We are therefore concerned with a number of proposals included in the discussion paper that are unwarranted and unjustified, including the introduction of a fair use defence into Australian law, and changes to the retransmission of free-to-air (FTA) broadcasts.

In brief, News Corp Australia is concerned that the proposals incorporated in the Discussion Paper:

- Invert the current approach of the Act, which broadly balances the interests of creators and consumers, to one which substantially increases risk to existing and future investments in content creation and innovative products and services;
- Appear theoretical and lack recognition of commercial realities;
- Are not based on sound policy making principles;
 - The 'problem' is ill-defined and lacks evidence;
 - The response is disproportionate to identified issues;
 - There are unintended consequences to the proposals with real consequences;
- Create uncertainty;
- Increased transaction costs as businesses allocate resources to risk mitigation measures, including investing in legal advice, lawyers and litigation; which will be borne by rights holders and consumers; and
- Do nothing to discourage misappropriation of content – rather more likely nurture and legitimise such.

This response is structured as follows:

- **Section 1** outlines News Corp Australia's overarching concerns with the proposed introduction of a fair use defence in Australian law;
- **Section 2** addresses proposals contained in the Discussion Paper, including retransmission;
- **Section 3** restates support of recommendation in the Publishers submission.

¹ PWC, 2012, *The Economic Contribution of Australia's Copyright Industries 1996-7 to 2010-11*, <http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>

SECTION 1 – NEWS LIMITED’S OVERARCHING CONCERNS REGARDING FAIR USE

A defence for infringement is not an appropriate basis for law

News Corp Australia does not believe that a broad defence for infringement, fair use, is an appropriate basis for copyright law in Australia.

The context upon which the fair use proposal is based seems to be that digital technologies have made content more accessible which is resulting in otherwise law abiding people, knowingly or unknowing, misappropriating content. Therefore, some say, it is appropriate to consider, and indeed deem, all copyright use to be ‘fair’ unless proven otherwise.

We believe that this reasoning – that the current Act is misplaced and behaviour and actions that would otherwise infringe should be normalised and legitimised – is flawed and it should not be progressed. There are serious implications of a fair use proposal, and we believe the ALRC should reconsider this matter.

We believe that ‘inverting’ the law such that people don’t have to actively engage with or be aware of or understand what they are doing when they consume content – they can be passive as all use of copyright material is ‘fair’ – does not ‘fix’ a problem. In fact it is more likely to normalise and increase infringing behaviour. The same logic would have the ALRC recommend that Australia decriminalise shoplifting. The alternative and appropriate response to the anti-social apathy ALRC observes is to educate people about the importance of not infringing copyright.

We note the Discussion Paper includes material to support the context of what consumers may be doing, and their attitudes to copyright use, however we hold that Australia’s copyright laws should not be amended to normalise infringing conduct.

Material included in the Discussion Paper, such as:

‘Law needs to regulate the reality which is faced by those who are subject to the law’²; and

‘Laws that are almost universally ignored are not likely to engender respect for more serious concerns of copyright owners: [p]eople don’t obey laws they don’t believe in’³,

infers that people understand the copyright framework and consciously/actively choose to disregard it and/or flout it. Again, a fair use defence does not fix the problem, rather it normalises a range of misappropriating behaviours – many of which are indeed infringements of copyright – and does not address evidenced issues.

To illustrate, a fair use defence does not address issues such as online copyright infringement. While we acknowledge that this issue is out of scope of the Terms of Reference for this ALRC review, we must stress that online copyright infringement is an evidenced and well understood issue. In our submission to the Issues Paper we recommended that this issue requires immediate attention via narrow and targeted means.

If a fair use exception was introduced, it is likely that online copyright theft, which is having a real impact on the industry and the economy would increase – resulting in economic losses to

² ALRC Discussion Paper, para 3.83, p46

³ Ibid, para 3.43, p47

the industry and also impacting domestic tax revenues. According to a report by IPSOS and Oxford Economics, *Economic Consequences of Movie Piracy*,⁴ the magnitude of the issue without a fair use defence, in the 12 months to July 2010 was over \$1.37 billion in lost revenue to the Australian economy as a result of movie theft alone. The study also found that 6,100 jobs were forgone across the entire economy; tax losses to movie theft amounted to \$193 million; and direct consumer spending losses to the movie industry, (cinema owners, local distributors, producers and retailers) amounted to \$575 million.

Of interest is the ACCC submission to the Issues Paper which observes:

*'To the extent that unauthorised copying and distribution reduces incentives for further investment in commercial copyright materials, then over the longer term, availability for such material could decline. This would offset some of the short term 'benefits' to the economy of unauthorised copying. Some empirical studies suggest that consumers benefit considerably in the short term from the availability of low cost copies. However, these studies do not consider the longer term dynamic effects of a potential reduction in incentives for investment in creative materials'*⁵.

Lastly, the rationale for fair use seems to follow the views put by some submitters that property rights and rules are no longer appropriate in the digital era and 'open' and 'free' guiding principles are a better fit. Interestingly, support of such flexible guiding principles seems to be limited to copyright law and doesn't appear extend to broader intellectual property law matters such as patents.

Inconsistent with Government policy

News Corp Australia is also concerned that the introduction of a fair use defence may be inconsistent with Government policy.

The Government's National Cultural Policy, *Creative Australia*⁶, was launched on 13 March 2013 by former Minister for the Arts, the Hon Simon Crean MP. In the introduction to *Creative Australia*, the Minister states:

*'There's another benefit to the nation from investing in the arts and artists to build a rich cultural life: the economic dividend. A creative nation is a productive nation,'*⁷ and

*'Throughout the 21st century, national creative capacity will continue to be central in driving Australia's productive capability. We must build on the strength and excellence of our artistic and cultural heritage and recognise that creative talent and design thinking need to be at the heart of our innovation, technological development and national economic growth.'*⁸

The policy contains 17 references to references to copyright – the vast majority of which associated with economic value, contribution to GDP, and providing incentives for investment and innovation in content.

⁴ http://www.afact.org.au/index.php/core/content_protection/who_is_it_harming

⁵ ACCC submission to ALRC Issues Paper, p29

⁶ Creative Australia: National Cultural Policy, 2013, <http://creativeaustralia.arts.gov.au/assets/Creative-Australia-PDF-20130417.pdf>

⁷ Ibid, p3

⁸ Ibid, p3

The Discussion Paper does include a reference to the national cultural policy. However, News Corp Australia holds that it does not fully represent the importance of legal protections for copyright and intellectual property encompassed in Government policy. Specifically, the Discussion Paper misrepresents that the focus of Government policy as it pertains to copyright is reform of copyright law to provide innovation and investment:

[The National Cultural Policy] explicitly recognises the importance of copyright law – and the ALRC inquiry – in reform aimed at providing ‘incentives for investment and innovation and content in a digital environment, while a balancing the need to allow the appropriate use of both Australian and international content’⁹.

The *Creative Australia* policy states:

The Australian Government has...commissioned the Australian Law Reform Commission enquiry to consider whether the exceptions and statutory licences in the Copyright Act 1968 continue to be appropriate in the digital environment. This recognises the role that Australian copyright plays as the primary legal framework supporting the creative economy. This inquiry, led by Professor Jill McKeough, is designed to ensure Australian copyright law continues to provide incentives for investment in innovation and content in a digital environment, while balancing the need to allow the appropriate use of both Australian and international content¹⁰. (emphasis added)

Importantly, the policy also states:

‘Acknowledging the importance of strong partnerships between the arts, culture and private and commercial sectors to a strong, sustainable and competitive arts and cultural sector, the Australian Government continues to encourage private giving to the arts through taxation incentives, programs that harness philanthropic support and legal protections for copyright and intellectual property¹¹. (emphasis added)

Further, a press release, *Creative Australia—capturing our digital culture*, jointly issued by the Attorney General, the Hon Mark Dreyfus QC and the then Minister for the Arts, the Hon Simon Crean in conjunction with the launch of the National Cultural Policy states:

‘Copyright protection is vital for creators and businesses whose income is derived online. Copyright protection will help encourage investment and innovation in digital technologies and content.¹²’ (emphasis added)

We believe that copyright protection will be severely watered down by a proposed fair use exception, and will run the risk of significantly undermining Australia’s creative industries, and its contribution to the cultural fabric of the nation and the national economy – which is contrary to Government policy.

⁹ ALRC Discussion Paper, para 3.59, p50

¹⁰ Creative Australia: National Cultural Policy, p83

¹¹ Ibid, p33

¹² Joint media release, *Creative Australia—capturing our digital culture*, issued by the Attorney General, the Hon Mark Dreyfus QC and the Minister for the Arts, the Hon Simon Crean, 13 March 2013

A theoretical exercise without recognition of commercial realities

News Corp Australia is concerned that the approach taken by the ALRC appears to have been more inclined towards theory, and as a result lacks consideration of existing, evolving and developing products and services that are meeting consumer demand, and the associated commercial models.

It appears that the proposals contained in the Discussion Paper have taken into account a number of papers¹³ that support the introduction of fair use, and in turn include claims of economic benefits that would open up under a fair use regime.

Meanwhile, a paper by Dr George Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A critique of recent research in Australia, US, Europe and Singapore*¹⁴, referenced by a number of submitters, and which critically analyses the research referenced above, was given cursory reference in the Discussion Paper and apparently received no further consideration.

Unfortunately, the result of what appears to be a selective theoretical exercise which proposes a broad fair use exception actually jeopardises the existing significant contribution of Australia's copyright industries.

For completeness we restate data included in our submission to the Issues Paper which illustrates the contribution of the copyright industries in Australia which are at risk under a fair use model:

According to PWC's 2012 report, *The Economic Contribution of Australia's Copyright Industries 1996-7 to 2010-11*¹⁵, the economic contribution of the copyright industries to Australia in 2011 was \$93.2 billion which represented 6.6 per cent of GDP. Further almost 906,000 people are employed in copyright related industries. Copyright employment as a percentage of total employment, for the latest available years that World Intellectual Property Organisation (WIPO) framework data is available, shows Australia's employment intensity to be 8.0 percent. In this regard Australia has a higher percentage of its workforce employed in copyright industries than most countries, except Mexico (11 per cent), Netherlands (8.8 per cent) and USA (8.2 per cent).

This bears further weight to the argument the sustainability of creativity will very likely be undermined by the introduction of a fair use model in Australia.

Fair use is unnecessary and no case has been made for it

In News Corp Australia's view, the case for the introduction of fair use has not been made, including that there is a lack of evidence of a 'problem' requiring such a broad and untargeted response.

¹³ R Ghafele and B Gilbert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore* (2012); Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe harbour Provisions* (2012); and PricewaterhouseCoopers (PWC), *The startup economy: how to support start-ups and accelerate Australian Innovation* (2013)

¹⁴ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180769

¹⁵ PWC, 2012, *The Economic Contribution of Australia's Copyright Industries 1996-7 to 2010-11*, <http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>

i. *ALRC assertions are inadequate*

We hold that assertions in the Discussion Paper do not meet any reasonable assessment of an evidentiary threshold, including:

'The opportunities made possible by the digital economy provide further evidence in favour of fair use,'¹⁶

and the related justification of this claim by making reference to a report¹⁷ that does not include a single mention of copyright (see further analysis at p12);

'Stakeholders to this Inquiry have demonstrated their capacity to respond to change: to develop and adapt in the digital economy,'¹⁸

We note the footnote to this comment is the announcement of News Corp Australia's metered digital subscription model. To state, as para 4.31 does, that creative industries 'protected by copyright law' have been subjected to various microeconomic reform policies of governments which 'enhance competition', and imply that fair use is just another in this series – and incorrectly use the introduction of our new digital subscriptions model as a further example – is objectionable and incorrect. The reasons News Corp Australia has introduced digital subscriptions is to ensure it creates a sustainable business model for journalism. It has nothing to do with considerations around 'fair use'.

'The ALRC considers there is now more of an appetite for a broad, flexible exception to copyright'¹⁹; and

'The ALRC considers that the potential benefits of introducing fair use now outweigh the transaction costs'²⁰.

Given that the ALRC has not undertaken detailed modelling or analysis of costs, we cannot, and do not, support this position (see further detail at p16 of this submission).

ii. *Assessment of views put forward in submissions is misrepresented*

The ALRC notes that reasons for not recommending a fair use exception in Australian law were '*shared by a number of stakeholders*²¹'.

The ALRC goes on to state: '*However, alternative views expressing the desirability of introducing fair use into Australian copyright law have been expressed by a large number of other stakeholders*²²'.

¹⁶ ALRC Discussion Paper, para 4.30, p64

¹⁷ PWC, *The startup economy: how to support start-ups and accelerate Australian Innovation*, 2013, <http://www.digitalpulse.pwc.com.au/wp-content/uploads/2013/04/PwC-Google-The-startup-economy-2013.pdf>

¹⁸ ALRC Discussion Paper, para 4.31, p65

¹⁹ *Ibid*, para 4.32, p65

²⁰ *Ibid*, para 4.33, p65

²¹ *Ibid*, para 3.84, p56

²² *Ibid*, para 3.84, p56

Despite the ALRC Discussion Paper inferring comprehensive support for fair use, an analysis of the submissions finds that 105 submissions referred to fair use or fair dealing;

- 47 of those (45%) expressly opposed a broad fair use exception (17 per cent of total submissions); while
- 32 of those (30%) expressly supported a broad fair use exception (11 per cent of total submissions).

It can be seen therefore, that the relativity implied in the ALRC's assessment of those opposing a broad fair use exception and those supporting a broad fair use exception is not as stark, and more likely actually inverted.

iii. Lack of sound policy making principles

As clearly outlined in our submission to the Issues Paper, News Corp Australia believes in sound policy making processes, including identifying and evidencing the 'problem'; quantifying the size of the market failure; evaluating and ascertaining the best solution based on a proportional response to the identified problem – which may include any, or combinations, of regulatory/legislative amendment or reform; supporting existing regulations and legislation to deliver improved outcomes; co-regulation; self-regulation; and effective education and enforcement.

Additionally, we would expect a robust economic cost-benefit analysis to undertaken to support the recommended approach.

As we have demonstrated in this submission and in our submission to the Issues Paper, a proposal to introduce fair use in Australia fails the vast majority of these principles and processes, including the first hurdle being identifying the problem. We hold that the case has not been made.

Fair use creates is uncertainty and expense – which is not considered by ALRC

News Corp Australia outlines below and further in this submission at p15-16, that the concept of fair use is subjective, vague and imprecise. This is exacerbated by the non-exhaustive lists of fairness factors and illustrative purposes, which will need to be tested in court to exercise the legitimate rights of rights holders and increase certainty within the nebulous framework.

This has a real impact on rights holders existing and evolving business models, and is in turn a disincentive for investment.

It seems that the practical effects and consequences of fair use have not been taken into account, as the ALRC Discussion Paper states:

'While copyright law needs to be able to respond to changes in technology, consumer demand and markets, it also needs to have a degree of predictability so as to ensure sufficient certainty as to the existence of rights and the permissible use of copyright materials, leading to minimal transaction costs for owners and users and avoiding uncertainty and litigation. Uncertainty is created by definitions that become redundant or

*differentiate between subject matter or rights holders based on technology rather than underlying principle.*²³

As we outline at p15-16 of this submission, heightened levels of uncertainty increase the requirement for risk mitigation measures, including increased resource allocation for legal advisers, lawyers and litigation. The result of which is increased transaction costs.

Given that the ALRC *'considers that one aspect of this Inquiry should be to reduce the complexity of the current Copyright Act, and with that, transaction costs for users and rights holders'*²⁴ it seems that the likely outcome of increased transaction costs resulting from a fair use regime is a – significant – unintended consequence of a fair use proposal.

While the ACCC submission to the Issues Paper promotes the opportunity for economic efficiencies from copyright 'reform', it seems that the ALRC has overlooked important additional counsel regarding consideration of costs also offered by the ACCC submission, notably:

*'When intervening in markets to address an identified market failure it is important that the costs of intervention are also considered'*²⁵;

*'The ACCC considers that in determining the merits of introducing a broad, flexible exception the ALRC should seek to balance the need for flexibility in this area with a desire to provide certainty and stability to creators and users of copyright material'*²⁶;

*'The ACCC notes that open-ended, broad, flexible exceptions can create uncertainty regarding how they will be applied. This uncertainty can create costs, such as requiring parties to litigate in order to determine the scope of permitted fair use or conversely given the costs of litigation, fail to use the exception where appropriate. For example, only sufficiently well – resourced users and creators of copyright are likely to be in a position to commence litigation'*²⁷; and

*'The ACCC considers that there is a need to ensure that any proposed reforms do not destabilise the regulatory environment. Business, in order to ensure that they remain viable, must be able to rely on a system of regulation for copyright that is sufficiently stable so as to enable businesses to make investment decisions with some certainty as to how their rights will be impacted by legislation'*²⁸.

Fair use is not free use – distribution of content involves commercial interest even on the internet

Lastly, News Corp Australia observes that some copyright infringers attempt to justify their theft by suggesting that it won't harm the businesses distributing the content. In some instances it may be considered that fair use or free use does not involve commercial entities, and that it's somehow 'pure' and untainted by commercial interests. However we note that this is an incorrect assessment. We support the ACCC's observations regarding this matter in the submission to the Issues Paper:

²³ Ibid, para 2.40, p33

²⁴ Ibid, para 3.49, p48

²⁵ ACCC submission to Issues Paper, p2

²⁶ Ibid, p49

²⁷ Ibid, p49

²⁸ Ibid, p49

'It is worth noting, however, that while the creators and owners of these 'non-commercial' copyright materials may seek to exploit these materials in different ways to those with a commercial focus, the sharing and distribution of such material may involve other commercial entities. For example, many users of Facebook publish photos and written copyright material for non-commercial purposes, however, the business of Facebook (an advertising funded business model) is dependent on its members producing these materials²⁹.

²⁹ Ibid, p23

SECTION 2 – NEWS LIMITED’S RESPONSE TO PROPOSALS/QUESTIONS POSED IN THE PAPER

DISCUSSION PAPER SECTION 4: THE CASE FOR FAIR USE IN AUSTRALIA

Proposal 4-1

The Copyright Act 1968 (Cth) should provide a broad, flexible exception for fair use.

Proposal 4-2

The new fair use exception should contain:

- (a) An express statement that a fair use of copyright material does not infringe copyright;*
- (b) A non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and*
- (c) A non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').*

Proposal 4-3

The non-exhaustive list of fairness factors should be:

- (a) The purpose and character of 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.*

Response to Proposals 4-1 to 4-4

News Corp Australia opposes the introduction of a broad, flexible exception for fair use in Australia as recommended in Proposals 4-1 to 4-4, including the elements of an express statement that a fair use of copyright material does not infringe copyright; a non-exhaustive list of fairness factors; and a non-exhaustive list of illustrative purposes.

We continue to hold the view that the case for the introduction of a fair use exception – broad or hybrid in application – has not been made, and the ALRC’s fair reaching ‘reform’ agenda is unjustified, unwarranted and disproportionate. Therefore, we have serious concerns for the

implications and outcomes for the continued creation and distribution of content should the application of the fair use proposal/s contained in the Discussion Paper be implemented.

In addition to the overarching concerns regarding fair use and the approach taken by the ALRC expressed at Section 1 of this submission, News Corp Australia offers the following comments regarding the key planks underpinning the ALRC's conclusion for proposing a broad fair use exception be introduced into Australian law.

i. Fair use is suitable for the digital economy and will assist innovation

It seems that many of the supporters of a broad fair use regime being introduced in Australia claim that it will assist innovation and facilitate the birth of new businesses and business models.

The ALRC also considers that the adoption of a broad fair use regime would '*foster an entrepreneurial culture which contributes to productivity*³⁰, and would make Australia a '*more attractive market for technology investment and innovation*³¹'.

News Corp notes that there is scant evidence to support the assertions of the fair use supporters, and therefore little evidence for the ALRC to base the proposal on. For example, the PWC Report of April 2013 commissioned by Google, *The startup economy – How to Support tech startups and accelerate Australian innovation*³², is cited by the ALRC and proponents of fair use and exemplifying the benefits of fair use to innovation and the digital economy. Interestingly however, the PWC report does not include a single reference to copyright.

The report does include five areas that can speed up startup ecosystems, being: '*culture, skills, opening markets, funding and regulation*' and noting that '*culture and community and more entrepreneurs are the ones the matter most for Australia*'.³³

Further, and of interest in the context of a fair use assisting innovation, the PWC report ranks Australia (at number 29) just behind the US (at number 24) based on an assessment of data relating to entrepreneurial activity, culture and regulatory environments globally. Given that the US has a fair use regime, and that according to the PWC report the most important matters for focus in Australia are culture and community and more entrepreneurs, it seems incongruous that it is being used by fair use supporters to advance that case – as it lacks the evidence required to support the fair use argument. It may in fact be the case that the PWC report undermines the pro fair use case in Australia.

The Hargreaves Review of Intellectual Property and Growth in the UK³⁴ specifically investigated the claim that more flexible fair use would deliver untold benefits for

³⁰ ALRC Discussion Paper, para 4.97, p79

³¹ Ibid, para 4.97, p80

³² PWC Report, <http://www.digitalpulse.pwc.com.au/wp-content/uploads/2013/04/PwC-Google-The-startup-economy-2013.pdf>

³³ Ibid, p11

³⁴ <http://www.ipo.gov.uk/ipreview.htm>

innovation. In announcing the Hargreaves Review in November 2012, UK Prime Minister David Cameron said:

The founders of Google have said they could never have started their company in Britain. The service they provide depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States. Over there, they have what are called “fair use” provisions, which some people believe gives companies more breathing space to create new products and services.

Given this specific reference to ‘fair use’ in the announcement of the review, the Hargreaves Report addressed the matter specifically and conclusively:

It is equally true, however, that the economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated. When the Review briefly visited Silicon Valley in February, providing the opportunity to meet companies such as Google, Facebook, Yahoo and Yelp, along with investors, bankers, lawyers and academics, a consistent story emerged, namely that Fair Use is (from the viewpoint of high technology companies and their investors) just one aspect of the distinctiveness of the American legal framework on copyright, albeit in the view of most an important part³⁵.

And:

Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law³⁶.

We also include here reference to a report undertaken by Dr George Barker, *The Economic Effects of Fair Use and Other Copyright Exceptions*³⁷. Dr Barker concludes that the introduction of a fair use exception to copyright ‘will impose both direct costs and opportunity costs on the copyright industry,’ which will be ‘an increasing function of the extent and uncertainty surrounding the exceptions granted.’³⁸ Higher costs are likely to have a negative impact by reducing investment in the copyright market and thus reducing future copyright output with the result that:

‘The unintended consequences of broadening exemptions is that by limiting the growth of copyright it will in turn limit the growth of the internet intermediary services market which relies on demand for new copyright content like new music, films, games and books to fuel its growth.’³⁹

³⁵ <http://www.ipo.gov.uk/ipreview-finalreport.pdf>, para 5.16, p45

³⁶ Ibid, para 5.17

³⁷ Dr George Barker, *The Economic Effects of Fair Use and Other Copyright Exceptions*, July 2013 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298618

³⁸ Ibid, para 17

³⁹ Ibid, para 18

Lastly, and importantly, we support Foxtel's detailed approach to its innovative own offerings in its response to the Discussion Paper. In conclusion Foxtel states⁴⁰:

Based on our proven experience in establishing innovative services, we believe that the most important factor that will determine whether Australian companies will continue to innovate and make such investments is the strength of the Australian copyright protection framework, and not the introduction of a fair use defence. Indeed, this view is supported by Dr Barker's recent conclusion that, rather than expanding exceptions:

*'...the development of the digital economy requires the opposite response – namely the strengthening of copyright and the limiting of exceptions.'*⁴¹

In order for Foxtel to grow the contribution we make to the digital economy, both through our investments in Australian content and technology, we must be able to rely on a copyright regime that provides appropriate protections and enables us to receive a fair reward for our investments.

ii. *Fair use provides a flexible standard*

News Corp Australia supports the view put by the Australian Film/TV Bodies in their submission to the Discussion Paper, that the pursuit of a 'flexible standard' is not a goal or virtue in and of itself.

The fair dealing regime, which we continue to support, constitutes narrowly defined rules that are exceptions to the rights under the Act. These are appropriate to support the exceptions to the rights available to content creators and rights holders for specific purposes.

We support the material included in the Australian Film/TV Bodies' submission, particularly the analysis of the ALRC's analogies of flexible standards within other areas of Australian law. We include pertinent material from that submission here:

Some legal tests are more susceptible to a flexible standard than others. Resort to analogies with consumer protection or privacy legislation are flawed and provide further support for maintaining the current regime of rule based exceptions. The prohibition on "misleading or deceptive" conduct in s18 of the ACL is a prescription against conduct which otherwise may be freely undertaken. So too is the prohibition on unconscionable conduct or standards for collection of information without breaching privacy. They are restraints on the right to freely conduct one's own business without interference.

The position of an exception to copyright is quite different. It is based on the presumption that but for a permissible act under the exception, no conduct can be engaged in which interferes with the rights of the copyright owner. That is the essence of the statutory monopoly, particularly one reflected in a right of property. Property rights are not amenable to flexible standards of defensive

⁴⁰ Foxtel submission to ALRC Discussion Paper, at Section 2

⁴¹ Dr George Barker Paper, 2013, p 3 – Dr Barker notes that '...moves to extend copyright exceptions in response to the development of the digital economy are mistaken in that it will only serve to reduce incentives for the development of new creative works, which in turn is likely to reduce overall social welfare'.

entitlement. The proposal for flexible exceptions misconceives the nature of copyright.

Inevitably, the adoption of a flexible fair use standard will cause uncertainty. That is the experience with the misleading or deceptive standard. It is one of the most litigated provisions in the statutes in Australia. It is no model of certainty or efficiency. Courts are not consistent in their interpretation of the standard or their application of the standards. Time and time again parties come before the Court in first instance and appellate decisions, and reversals are common. Regulation by litigation is an inefficient way to settle disputes⁴².

To the extent that there are evidenced problems with the current regime (as the submission of the Combined Newspapers and Magazines Copyright Committee (the Publishers) submission to the Issues Paper outlines, but are not addressed by the ALRC), the appropriate response/s must be proportionate, and directed at the problem. We do not believe that the ALRC has met this design principle with a fair use response, and we cannot see that compelling evidence has been brought forward to warrant a fair use proposal on the basis of flexibility.

iii. *Fair use is coherent and predictable*

News Corp Australia disagrees that fair use is coherent and predictable. A broad, flexible fair use regime is, by its very nature, not coherent or predictable. One may argue that if it is flexible, then it cannot also hold that it is coherent and predictable. This is further illuminated by the non-exhaustive lists of fairness factor and illustrative purposes, which underpin the attitude of a broad fair use exception, where what is 'fair' is required to be proven otherwise. We are also concerned that a broad fair use exception will introduce unacceptable levels of uncertainty into the law. It is not clear that a broad fair use defence would do anything other than entrench – or even encourage – infringing behaviour (as outlined in our submission to the Issues Paper).

Notwithstanding this, the actual experience of fair use can be said to be controversial under US law – although it seems that the supporters of fair use, including the ALRC, have overlooked this. There are Court and scholarly commentaries about the difficulties posed by US fair use over decades, including assessing fair use as:

'the most troublesome in the whole law of copyright'⁴³; and

'too indeterminate,...to provide a reliable touchstone for future conduct'⁴⁴.

More recently, a copyright lawyer opined in the *New York Law Journal*:

'Woe to the copyright lawyer asked to provide an opinion on fair use. The task of predicting whether a use falls on the fair or unfair side of the fair use dividing line can be perilous. In addressing such questions, the copyright attorney is often reduced to offering 'on one hand' and 'on the other hand' circumlocutions followed by a somewhat definite 'maybe'⁴⁵.

⁴² Australian Film/TV Bodies Submission to ALRC Discussion Paper, p16

⁴³ *Dellar v Samuel Goldwyn Inc*, 104 F.2d 661, 662 (2d Cir 1939)

⁴⁴ James Gibson, *Once and Future Copyright*, 81 Notre Dame L. Rev. 167, 192 (2005)

⁴⁵ Joseph Paterson, *When Parodists Wish upon the Fair Use Star*, *New York Law Journal*, 16 August 2012

It should also be noted that in June 2013 the US Intellectual Property Coordinator released the 2013 *Joint Strategic Plan in Intellectual Property Enforcement*⁴⁶. A key action of the Strategic Plan is to educate content creators on the fair use copyright doctrine. According to the Strategic Plan:

'The Administration believes, and the U.S. Copyright Office agrees, that authors (including visual artists, songwriters, filmmakers, and writers) would benefit from more guidance on the fair use doctrine.'

It goes on to state:

'In order to make fair use more accessible to the authors of the 21st century, ease confusion about permissible uses, and thereby encourage the production of a greater variety of creative works, the U.S. Copyright Office, working in consultation with the Administration, will publish and maintain an index of major fair use decisions, including a summary of the holdings and some general questions and observations that may in turn guide those seeking to apply the decisions to their own situations.'

iv. *Fair use is suitable for the Australian legal environment*

As outlined in our submission to the Issues Paper, we do not agree that a fair use doctrine is suitable for the Australian legal environment. Our view is based on the issue that one cannot transplant US fair use into Australian law due to the differing constitutional bases of our laws.

Regardless of the whether or not fair use is suitable for the Australian legal environment, a severe lack of coherence and predictability has serious consequences for content creators, rights holders and consumers alike, as they all bear the burden of burgeoning legal costs.

As detailed in the Publishers submission to the Discussion Paper, and reproduced here⁴⁷:

a. *Uncertainty of law will dramatically increase transaction costs*

The effect that fair use will have, of ballooning uncertainty in the law, will inevitably lead to increased transaction costs for rights holders – and users – as legal action will be necessary for the purposes of gaining clarity and definition to the law, and decreasing the uncertainty brought about by fair use.

Further, under a fair use regime it is foreseeable that legal proceedings would increase as rights holders need to exercise those rights within a regime that, by promoting 'flexibility' also encourages infringements.

⁴⁶ <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf>

⁴⁷ Publishers submission to ALRC Discussion Paper, p2-3

b. Uncertainty will dramatically increase business risk

The Publishers [including News Corp Australia] understand that the ALRC believes that the uncertainty created by a broad fair use regime is a reasonable trade-off for achieving flexibility and technology neutrality.

We however consider that the introduction of a whole new copyright regime with the introduction of a 'fair use' defence would be likely to result in users of copyright works claiming fair use to justify practices which would substantially pose a significant increase in business risk to rights holders and affect the legitimate commercial interests of the Publishers.

As stated in the Publishers submission to the Issues Paper, the nature of news reports, the temptation to copy and the ease with which this can be achieved makes them particularly vulnerable to infringement. It is difficult to see the risk of infringement – a business risk – abating under a fair use regime. Rather, it is more likely that the infringing behaviour, and the correlating business risk, will proliferate, as the principal proposition of fair use is that the user considers it 'fair use'. This will require the business to plan and undertake mitigation measures that will be likely to include resource allocation for detection of infringements and increased litigation.

c. Costs of increased uncertainty will be borne by rights holders and users

It is not unreasonable to consider that the result of increased risk and transaction costs will be borne by rights holders and users alike. The costs could be monetary – in that the increased risks borne by business, and the swelling costs of increased volumes of legal actions could manifest in increased charges for legitimate consumption of content. Such an outcome would be detrimental to legitimate users and consumers of content, as they would bear the burden of a fair use regime.

Monetary costs of increased uncertainty could also be borne by those parties defending legal actions, therefore undermining the position put in the Discussion Paper that a broad fair use defence would decrease transaction costs to users.

The increased uncertainty for rights holders and users created by the uncertainty of a fair use regime makes it very difficult to sustain the position put by the ALRC, that copyright law:

*'needs to have a degree of predictability so as to ensure sufficient certainty as to the existence of rights and the permissible use of copyright materials, leading to minimal transaction costs for owners and users, and avoiding uncertainty and litigation.'*⁴⁸

d. Lawyers' picnic

⁴⁸ [2.40] ALRC Discussion Paper, p33

Following from the concerns articulated above, the Publishers oppose the introduction of a broad fair use regime, which will direct scarce resources to increased legal advisers and increased litigation.

It seems that the ALRC has taken a theoretical approach to its deliberations, and the resultant fair use proposals (broad and hybrid) do not recognise the realities of creators and rights holders.

A ‘lawyers’ picnic’ is an untenable direct consequence of the ALRC fair use proposals, and it cannot be countenanced.

v. *Fair use is consistent with 3 steps test*

We reference the material incorporated in the Australian Film/TV Bodies submission to the Discussion Paper regarding compliance of the ALRC’s fair use proposal with international obligations.

Further News Corp Australia supports the analysis contained in that submission, which concludes that the reasoning incorporated in the Discussion Paper does not meet the compliance obligations under international treaties⁴⁹. That material, in full, follows:

The Discussion Paper states that fair use “has been enacted in a number of countries, but most notably, the United States”.⁵⁰ No-where does the Committee acknowledge that only four countries *out of 166 Berne Convention countries* have a fair use regime and that, because many countries have considered and rejected the introducing a fair use exception, the norm is fair dealing exceptions limited to specified purposes.

Were Australia to adopt the recommendation to replace its existing fair dealing framework with the proposed fair use framework, it would be moving from being aligned with the overwhelming majority of the international community to the minority. The question never posed by the Committee is why would Australia adopt an open-ended standard when the majority of countries have not done so?

The UK, Canada and the New Zealand have all conducted enquiries in which a fair use defence was considered and each has rejected such proposals. Their rejections of equivalent proposals for open-ended exceptions ought to be given greater weight by the Committee when it is considering the costs and benefits of the proposal to adopt an open-ended system.

In its 2006 amendments to the Copyright Act, the Australian Government, concluded that an open ended fair use defence “*is not consistent with treaty obligations to include such general uses in a flexible exception.*”⁵¹ The TORs direct the ALRC to take into account the “*consistency*” of proposed legislative solutions “*with Australia’s international obligations.*”⁵² The ALRC Act requires it to “*aim at ensuring that the laws, proposals and recommendations it reviews, considers or*

⁴⁹ Australian Film/TV Bodies submission to ALRC Discussion Paper, p23-27

⁵⁰ ALRC Discussion Paper, para 4.11, see also para 4.149

⁵¹ Explanatory Memorandum, *Copyright Amendment Act 2006 Cth*, 10

⁵² Australian Law Reform Commission, Terms of Reference

makes: ... (b) are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter."

Before the Committee would recommend the adoption of an open-ended fair use model, the Committee would need to have been confident that it Australia would be compliant with its obligations under international treaties. The reasoning disclosed in the Discussion Paper falls short of this.

Contrary to what is asserted in the Discussion Paper,⁵³ the interpretation of the three-step test is clear and unambiguous.⁵⁴ It has been the subject of two WTO Dispute Settlement Panels; first in a patent case⁵⁵ and then in a copyright case.⁵⁶ The panel reports confirm, amongst other things, that permissible exceptions or limitations in national law must, in the words of the adjudicating panel, be "*clearly defined and should be narrow in its scope and reach*"⁵⁷ and have "*an individual or limited application or purpose.*"⁵⁸ Open standards, in the absence of developed jurisprudence or restrictions, do not meet those requirements. The open model proposed may operate in a manner which conflict with 'normal exploitation' of copyright works in existing or emerging markets or 'unreasonably prejudice' rights' holders interests, in violation of the second and third steps.⁵⁹

Almost every international copyright scholar considers that the open-ended fair use model proposed does not satisfy the first condition. In the absence of sufficiently interpretative jurisprudence, an open-end exception, limited only by fairness, is insufficiently clear or defined to satisfy that test. An open-ended model is insufficiently narrow in scope, potentially covering any dealings in respect of any of the exclusive rights in relation to any work or subject matter by any persons or institutions and for any purpose, including in any and all technological context. As Dr Mihaly Ficsor explains:

⁵³ ALRC Discussion Paper, para 4.139, p87

⁵⁴ See generally Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford: Oxford University Press, 2nd ed, 2006) 763 ("Ricketson & Ginsburg"); Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: commentary and legal analysis* (Butterworths Lexis Nexis, 2002) ("Reinbothe & von Lewinski") Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Geneva: WIPO 2003), ("*Ficsor Guide*") at CT-10.2 ("the use to be covered must be specific – precisely and narrowly determined"); Mihály J. Ficsor, "Short Paper on the Three-Step Test For the Application of Exceptions and Limitations in the Field of Copyright", November 19, 2012 available at

www.copyrightseesaw.net/.../0eb32b716fcaa400dd4cf398256e3fa8.doc

⁵⁵ Panel Report on *Canada – Patent Protection of Pharmaceutical Products* (7 April 2000) WTO Doc. WT/DS114/R ("DS114")

⁵⁶ Panel Report on *United States – Section 110(5) of the US Copyright Act*, WTO Doc. WT/DS160/R (15 June 2000) ("DS160")

⁵⁷ DS160, at [6.108]. This is consistent with the recommendations of the Stockholm Study Group which recommended that any exception to the right of reproduction be "*for clearly specified purposes.*": David Gervais, "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations" (2008) 5 *University of Ottawa Law and Technology Journal* 1, at 26

⁵⁸ *Ibid*, at [6.109]

⁵⁹ Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, (2003) World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO Doc. SCCR/9/7 at 22 ("Ricketson 2003"), 67 (step three); Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations* (15 September 2009) <<http://www.barrysookman.com/2009/11/22/why-canada-should-not-adopt-a-fair-use-regime/>> at 157-59 (steps two and three)

*The first criterion is that an exception or limitation may only be applied in "certain special cases". There has always been agreement that this criterion means that the scope of application of an exception must be duly limited; it must not result in a general open-ended exemption from the obligation to protect the right concerned.*⁶⁰

Scholars, including Dr Senftleben,⁶¹ who defend the compliance of the US fair use doctrine with the three-step test rely on 150 years of accumulated case law; it is not present in Australia. As one scholar explained:

Fair use – contrary to the three-step test – is not an internationally recognised legal concept. It only exists in a small number of countries and not necessarily in the same way. It may mean broadly differing criteria and forms of applications (whether partly codified in statutory law or basically left to case law).

When reference is made to fair use, usually the US system is in mind. ... However, section 107 is derived from, and is inseparably linked to, an extremely rich and complex case law, and it is only along this case law that it is meaningful. On the one hand, it is a statutory codification of the criteria of fair use developed by the US courts for many decades, and on the other hand, the well-established case law is indispensable to guarantee – along with the other provisions in the Copyright Act – that the US copyright law is in accordance with the international copyright provisions and, in particular, with each of the cumulative conditions of the three-step test.

Even with the benefit of over 150 years of fair use precedent, the compliance of the US provision with the three-step test is not uncontroversial. For instance, Professor Okediji's careful analysis of the compatibility of TRIPS with the fair use doctrine led her to conclude that the international instrument cannot accommodate the US doctrine.⁶² Herman Jehoram similarly observed that such is the uncertainty of the US model and its capacity to adversely affect the rights of authors that it is not capable of complying with three-step test requirements.⁶³ Professor Sam Ricketson, writing for the WIPO Standing Committee on Copyright and Related Rights, likewise concluded that the "*open-ended, formulaic provisions contained in s. 107 of the U.S. Copyright Act were vulnerable to the three-step test.*"⁶⁴ As he observed that:

⁶⁰ Mihály J. Ficsor, "Short Paper on the Three-Step Test For the Application of Exceptions and Limitations in the Field of Copyright", November 19, 2012 available at www.copyrightseesaw.net/.../0eb32b716fcaa400dd4cf398256e3fa8.doc, 4-5

⁶¹ Eg Martin Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*, 1 (2010) JIPITEC 67, [52].

⁶² Ruth Okediji, "Towards an International Fair Use Doctrine" (2000) 82 *Columbia Journal of Transnational Law* 75, at 114 -23 outlining three reasons why the fair use doctrine violates Article 9(2) of the Berne Convention including (1) the indeterminacy of the fair use doctrine (2) the breadth of the fair use doctrine and (3) the nullification and impairment of rights-holders' expected rights.

⁶³ Herman C. Jehoram, "Restrictions on Copyright and their Abuse" (2005) 27 *European Intellectual Property Review*. 359, at 360.

⁶⁴ Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, (2003) World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO Doc. SCCR/9/7 at 22 ("Ricketson 2003"), 67.

"the real problem, however, is with a provision that is framed in such a general and *open-ended way*. At the very least, it is suggested that the statutory formulation here raises issues with respect to unspecified purposes (the first step) and with respect to the legitimate interests of the author (third step)."⁶⁵

Whilst Professor Ricketson's misgivings related to the first and third steps, Sookman and others have argued that, despite statutory fairness factors requiring consideration of the effect on copyright markets, the open standard fall short of guaranteeing copyright holder's 'normal exploitation' of their works as required by the second condition.⁶⁶ A study of US case law found that the final 'fairness factor' only correlated with the eventual result in less than fifty percent of reported fair use cases.⁶⁷

The ALRC's preference for "*historical and normative arguments*" over the express language of the WTO Dispute Settlement Panels and international copyright experts is baffling. Professors Ginsburg⁶⁸ and Ricketson,⁶⁹ argue that a 'normative interpretation' of the first condition is not sustainable as it would be contrary to the object and purposes of the Berne Convention.

The preparatory materials accompanying the 1967 Stockholm Revision Conference on Article 9(2) do not recognise or support open-ended defences or the fair use doctrine.⁷⁰ The Agreed Statement accompanying article 10 of the WCT provides no 'normative' basis for the introduction of open-end exceptions. Article 10 provides that it "...neither reduces or extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."⁷¹

The Agreed Statement merely confirms the controlling nature of three-step test requirements in digital environments.⁷² The suggestion⁷³ that it allows for new understandings of exceptions or limitations in digital environments irrespective of three-step test requirements is unsupportable:

[I]t seems to be stretching Article 10(2) too far to suggest that it authorises the creation new limitations and exceptions that lie outside the Berne regime... It is therefore difficult to ascribe any operation to this part of the

⁶⁵ Ibid

⁶⁶ Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Faire Use: A Joint Submission to the Copyright Consultations* (15 September 2009) <<http://www.barrysookman.com/2009/11/22/why-canada-should-not-adopt-a-fair-use-regime/>> at 157-59

⁶⁷ David Nimmer, "Fairest of them All and Other Fairy Tales of Fair Use" (2003) 66 *Law and Contemporary Problems* 263, 280

⁶⁸ Ginsburg, 424

⁶⁹ Ricketson,, 87

⁷⁰ Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, (2003) World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO Doc. SCCR/9/7 at 22 ("Ricketson 2003")

⁷¹ *Trade-Related Aspects of Intellectual Property Rights* ("*TRIPS Agreement*") (in force via Australia's WTO membership) Arts. 10(2).

⁷² Mihály J. Ficsor, "Short Paper on the Three-Step Test For the Application of Exceptions and Limitations in the Field of Copyright", November 19, 2012 available at www.copyrightseesaw.net/.../0eb32b716fcaa400dd4cf398256e3fa8.doc, 4-5

⁷³ Burrell et al, Submissions 278

*agreed statement. If a distinct regime for new limitations and exceptions is envisaged under the WCT, this would need to be the subject of an express provision of the treaty.*⁷⁴

Reliance on the *absence of a WTO challenge* to the United States' fair use exception is the weakest argument in favour of an open-ended exception complying with the three-step test.⁷⁵ The US was not a signatory to the Berne Convention in 1967, when all contracting parties did not have or consider having such an open-ended exception. The US only ratified the Berne Convention in 1981, by which time its fair use case law may have constituted a 'special case' under Berne.

SECTION 5: THIRD PARTIES

Response to 'third parties'

The ALRC concludes that 'third party' uses of copyright material – where the third party copies or otherwise uses copyright material on behalf of others – should be considered under the fair use exception, in determining whether the use infringes copyright.

As we continue to hold, News Corp Australia opposes the introduction of fair use in Australia. Our concerns regarding a fair use defence have been articulated in Section 1 of this submission, and in our submission to the Issues Paper. Central to our concerns about the consequences of a fair use defence – by both broad exception and hybrid application – is the facilitation and 'legalisation' of what might seem to be 'fair use' but could meaningfully be copyright infringement.

As the ALRC is aware, News Corp Australia has provided evidence and recommended amendments to the Act to address two key streams of online copyright infringement.

However, our concerns are significantly elevated by the ALRC approach regarding 'third parties' as we foresee that the dire levels of uncertainty accompanying fair use coupled with the proposed application of fair use to third parties would open the flood gates to third parties distributing unlicensed content and obtaining commercial benefit – at the cost of rights holders.

The application of fair use is troubling per se. However, it is more so as the ALRC describes the application in the circumstances of third parties, whereby it is acknowledged that:

*'Sometimes a third party's use may seem merely to amount to facilitating another person's fair use: they will have no ulterior purpose themselves. But often there will be some other ulterior purpose,'*⁷⁶ and goes on to state:

⁷⁴ Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, (2003) World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO Doc. SCCR/9/7 at 68-69

⁷⁵ It has been suggested that the United States is quoted as acknowledging "that the essence of the first condition [of the three-step test] is that the exceptions be well-defined and of limited application.": see Herman C. Jehoram, "Restrictions on Copyright and their Abuse" (2005) 27 *European Intellectual Property Review*, 359.

⁷⁶ ALRC Discussion Paper, para 5.41, p106

*'Of course the finding of a commercial purpose in a particular use, though by no means determinative, will tend not to favour a finding in fair use.'*⁷⁷ (emphasis added)

This is hollow comfort offered by the ALRC – if it is intended to be such – and an entirely unsatisfactory outcome for content creators, content distributors and rights holders, and consumers. It does nothing to encourage investment in content creation and delivery. It does nothing to minimise the risks that businesses will encounter, and be required to mitigate, should the ALRC's proposal for fair use and third parties be adopted. This is an outcome that will impact consumers as the ramifications will reverberate throughout the supply chains of content creation and distribution, and will likely result in less content – rather than more – being available for distribution.

This is counter to the position put by the ALRC, 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'*⁷⁸.

This comment conveys a disregard or ignorance of the market – including that the development of new markets and the digital economy is not singly reliant on copyright settings.

News Corp supports Foxtel's submission to the Discussion Paper regarding this matter, particularly:

*'...the innovative services that Foxtel is offering as real evidence that the current exceptions have not inhibited the development of the digital economy.'*⁷⁹

SECTION 7: FAIR DEALING

Proposal 7-1

The fair use exception should be applied when determining whether a use for the purpose of research or study, criticism or review, parody or satire, reporting of news, or professional advice infringes copyright. 'Research or study', 'criticism or review', 'parody or satire' and 'reporting news' should be illustrative purposes in the fair use exception.

Response to Proposal 7-1

News Corp Australia opposes the introduction of a fair use defence in Australia. Therefore, we do not support a fair use exception being applied, including in the manner outlined in Proposal 7-1.

Proposal 7-2

*The Copyright Act should be amended to repeal the following exceptions:
(a) ss40(1), 103C(1) – fair dealing for research and study*

⁷⁷ Ibid, para 5.42, p107

⁷⁸ Ibid, para 5.49, p107

⁷⁹ Foxtel submission to ALRC Discussion Paper, at Section 3

- (b) ss 41, 103A – fair dealing for criticism and review;
- (c) ss 41A, 103AA – fair dealing for parody and satire;
- (d) ss 42, 103B – fair dealing for reporting news;
- (e) ss 43(2) – fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and
- (f) ss 104(b) and (c) – professional advice exceptions.

Response to Proposal 7-2

As News Corp Australia opposes the introduction of a fair use defence in Australia we also oppose a proposal to amend the Act to repeal the exceptions at Proposal 7-2.

Proposal 7-4

If fair use is not enacted, the existing fair dealing provisions, and the new fair dealing exceptions proposed in the Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright is infringed.

Response to Proposal 7-4

News Corp Australia opposes the introduction of a fair use defence in Australia. As outlined in this submission, and our submission to the Issues Paper, we support the current fair dealing regime. Further, we do not support that the ‘fairness factors’ must be considered in determining whether copyright is infringed as contained in Proposal 7-4.

SECTION 8: NON-CONSUMPTIVE USE

Proposal 8-1

The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. ‘Non-consumptive use’ should be an illustrative purpose in the fair use exception.

Response to Proposal 8-1

As stated, News Corp Australia opposes the introduction of fair use into Australian law. This includes its application as outlined in Proposal 8-1.

News Corp Australia also opposes ‘non-consumptive use’ as an illustrative purpose in a fair use exception because, firstly, we oppose outright the introduction of fair use defence into Australian law.

Further, the definition of ‘non-consumptive use’ as drawn by the ALRC – ‘uses which do not trade on the underlying creative and expressive purpose of the material’⁸⁰ – is problematic as it is:

- ambiguous and evokes transformative use;
- overreaches and is excessively broad – and not targeted at the purported technological issues – in fact it does not allude at all to the ‘temporary’ nature of the supposed technological application;

⁸⁰ ALRC Discussion Paper, para 8.1, p155

- uncertain – due to its breadth, and further exacerbated by lack of inclusion of the time-based nature of; and
- inconsistent with international proposals (for example, the UK Hargreaves Review) – which even when defined narrowly as ‘*the copying is really only carried out as part of the way technology works*’, was rejected by the UK government.

Proposal 8-2

If fair use is enacted, the following exceptions in the Copyright Act should be repealed:

- (a) s 43A – temporary reproductions made in the course of communication*
- (b) s 111A – temporary copying made in the course of communication*
- (c) s 43B – temporary reproductions of works as part of a technical process of use;*
- (d) s 111B – temporary copying of subject-matter as a part of a technical process of use; and*
- (e) s 200AAA – proxy web caching by educational institutions.*

Response to Proposal 8-2

As News Corp Australia opposes the introduction of a fair use defence in Australia we also oppose a proposal to amend the Act to repeal the exceptions at Proposal 8-2.

Proposal 8-3

If fair use is not enacted, the Copyright Act should be amended to provide a new fair dealing exception for ‘non-consumptive’ use. This should also require the fairness factors to be considered. The Copyright Act should define a ‘non-consumptive’ use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

Response to Proposal 8-3

News Corp Australia opposes the introduction of a fair use defence in Australia. As outlined in this submission, and our submission to the Issues Paper, we support the current fair dealing regime.

Further, and as articulated in our submission to the Issues Paper, we oppose the Act be amended to provide a new fair dealing exception for ‘non-consumptive’ use. We do not support the requirement that fairness factors be considered in relation to a fair dealing exception for ‘non-consumptive’ use.

As outlined in response to Proposal 8-1, we do not support the proposed definition of ‘non-consumptive’ use as put forward by the ALRC, that it be ‘*a use of copyright material that does not directly trade on the underlying and creative and expressive purpose of the material*’ for the reasons stated.

SECTION 9: PRIVATE AND DOMESTIC USE

Proposal 9-1

The fair use exception should be applied when determining whether a private and domestic use infringes copyright. 'Private and domestic use' should be an illustrative purpose in the fair use exception.

Response to Proposal 9-1

As stated, News Corp Australia opposes the introduction of fair use into Australian law, including its application when determining whether a private and domestic use infringes copyright. Therefore we do not believe that 'private and domestic use' should be an illustrative purpose in the fair use exception.

Proposal 9-2

If fair use is not enacted, the Copyright Act should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

Response to 9-2

News Corp Australia opposes the introduction of a fair use defence in Australia. As outlined in this submission, and our submission to the Issues Paper, we support the current fair dealing regime.

Further, and as articulated, we do not support the extension of the fair dealing exceptions – including a new fair dealing exception for private and domestic purposes.

We would also like to note that to the extent that evidenced issues have been identified with the current Act, including regarding format and time shifting, they are specific and limited, and require narrow and targeted amendment/s that are proportionate to the problem. For example, the issues and recommendations for amendment identified in the Publishers submission to the Issues Paper; and the prevalence of online copyright infringement which requires two targeted amendments to the Act. However, rather than address the identified issues in a proportionate and targeted manner, the ALRC is recommending firstly, a broad fair use exception, and if not that, then a sweeping private and domestic use exception. Both of which, we assert, are unwarranted.

Proposal 9-3

The exceptions for format shifting and time shifting in ss 43C, 47J, 109A, 110AA and 111 of the Copyright Act should be repealed.

Response to Proposal 9-3

The ALRC proposes that time shifting and format shifting exceptions should be repealed because they are *'too prescriptive and inflexible to keep up with an evolving digital environment.'*⁸¹

News Corp Australia does not agree with this assessment, and supports Foxtel's position put forward in its submission to the Discussion Paper. Specifically that we urge the ALRC to have

⁸¹ Ibid, para 9.6, p174

regard to the real impact of watering down the current time and format shifting exceptions, including the effect such would have on subscription-based services already in the market. We also implore the ALRC to not blindly subscribe to the attitude of ‘well everyone is infringing by so-called ‘private copying’ so it should be legal’ – as this is not an appropriate approach to policy making, and will lead to sub-optimal outcomes and unintended consequences.

News Limited notes that the Act contains time shifting and format shifting exceptions to enable more convenient use of broadcast copyright material by consumers. The balance between rights holders’ interests and consumers’ interests was carefully considered at the time of introduction of these exceptions, in 2007, and holds today. In fact, the Full Federal Court decision in the Optus TV Now case⁸² is evidence that the balance struck in 2007 and in the current scheme is enduring and relevant today – and does not warrant wholesale amendment in the manner proposed by the ALRC.

The wholesale amendment is of significant concern to News Corp Australia. We again make offer that the recommendation of a fair use proposal, and repealing the existing exceptions, is disproportionate and therefore unwarranted, and not aligned with international developments. Unfortunately this is an overarching issue with the approach taken by the ALRC.

Regarding the international experience, as the ALRC does note, many jurisdictions are consulting on copyright and in some instances intellectual property more broadly. In the UK, the *Independent Review of Intellectual Property and Growth* undertaken by Professor Ian Hargreaves was published in May 2011⁸³. Subsequently, regarding private copying, the UK Government has decided to implement a:

‘narrow private copying exception⁸⁴,’ which will allow ‘an individual to copy content they own, and which they acquired lawfully, to another medium or device for their own personal use⁸⁵,’ and ‘applies only to copies lawfully acquired by the copier, who may not transfer copies to other people.⁸⁶

Further, the Government has acknowledged the importance of balancing rights holders and users in stating that:

‘Constraining the exception in this way allows for appropriate compensation to be paid at the point of sale, and ensures the exception will cause minimal harm to copyright owners.⁸⁷

The approach taken by the UK Government incorporates the importance of recognising the private copying can be commercially damaging⁸⁸. And in considering the introduction of four

⁸² National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd [2012] FCAFC 59. In Summary Judgment (at <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2012/2012fcafc0059/summary/2012fcafc0059-summary>) the question posed at [6] is if the respondent (Optus) can ‘invoke what we would inaccurately, but conveniently, call the “private and domestic use” defence of s 111 of the Act?’ At [7] it is stated that the respondent ‘cannot either as maker alone or as a maker with a subscriber bring itself within the scope of the s 111 exception on its proper construction.’

⁸³ <http://www.ipso.gov.uk/ipreview.htm>

⁸⁴ <http://www.ipso.gov.uk/techreview-private-copying.pdf>, p1

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ The [UK] Government Response to the Hargreaves Review of Intellectual Property and Growth, <http://www.ipso.gov.uk/ipresponse-full.pdf>, p7

exceptions, of which private copying is one, the Government said that it was committed to this extension of the exceptions;

‘in ways that do not prejudice the provision of appropriate incentives for creation of works through the copyright system and will consult widely on the basis of sound evidence.’⁸⁹

While we make no comment on the appropriateness, or otherwise, of the private copying exception being pursued in the UK, we do offer that the approach taken – whereby an issue was identified and a proportionate response pursued – follows best practice policy design. The ALRC’s approach of the untargeted and nebulous ‘fair use’ is a sub-optimal manner to approach this matter – and will impact services already on offer, and evolving, in the market.

As Foxtel outlines in its submission to the Discussion Paper⁹⁰, it is unclear how a new exception for private and domestic use would in fact operate in the context of Foxtel’s own new and innovative services – such as the large library of catch-up content available at no additional subscription charge. As Foxtel describes, this content is refreshed regularly and the period of time that such content is available to stream or download varies, although is not usually longer than 28 days. News Corp Australia shares Foxtel’s serious concern regarding the impact that any broadening of the current exception would have on Foxtel’s commercial ability to offer its customers this content in this manner.

Lastly, and of serious concern, News Corp Australia again reiterates that the mere availability and use of digital technologies does not warrant legitimising activities that would otherwise be infringing. Rights holders should be able to determine the terms of use of content.

Proposal 9-4

The fair use exception should be applied when determining whether a use of copyright material for the purpose of back-up and data recovery infringes copyright.

Response to Proposal 9-4

News Corp Australia does not support the introduction of fair use into Australian law, and therefore does not support Proposal 9-4.

SECTION 10: TRANSFORMATIVE USE AND QUOTATION

Proposal 10-1

The Copyright Act should not provide for a new ‘transformative use’ exception. The fair use exception should be applied when determining whether a ‘transformative use’ infringes copyright.

Response to Proposal 10-1

News Corp Australia supports the first part of Proposal 10-1 – that the Act should not include an exception for transformative use.

⁸⁹ Ibid

⁹⁰ Foxtel submission to ALRC Discussion Paper, at Section 3

However, as we do not support the introduction of fair use and transformative use – as detailed in our submission to the Issues Paper, we oppose the application of a fair use exception when determining whether a ‘transformative use’ infringes copyright at Proposal 10-1.

It seems absurd that the ALRC has concluded that a specific transformative use exception would prove too difficult; including elements such as definition and the complexities offered by the interference with the interests of the copyright holder; but would rather therefore leave it open to the application of a fair use exception – also substantially vague, unclear and imprecise – to determine whether the undefinable ‘transformative use’ infringes copyright.

The ALRC states:

‘Relying on a fair use exception to deal with uses that may be characterised as transformative, rather than introducing a specific exception, is preferable in the view of the difficulties involved in framing such an exception. These difficulties include defining whether a use is transformative, and determining the extent to which commercial uses of copyright materials should be covered.’⁹¹

It does appear that intermediaries could serve to gain a substantial ‘leg-up’, including from diminished risk of liability – if this incongruous proposal was flagged through. The cost of the progress of such a proposal would without doubt be increased legal advisory services and litigation, and diminished innovation and investment in material that rights holders would like to manage the distribution of – which is well within their rights.

Proposal 10-2

The fair use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair use exception.

Proposal 10-3

If fair use is not enacted, the Copyright Act should provide for a new fair dealing exception for quotation. This would also require the fairness factors to be considered.

Response to Proposals 10-2 and 10-3

As stated, News Corp Australia does not support the introduction of fair use in Australia and therefore we do not support that ‘quotation’ should be an illustrative purpose in a fair use exception.

Further, and as outlined in our submission to the Issues Paper, and also the Publishers submission to the Issues Paper, we oppose that the Act should provide for a new fair dealing exception for quotation – with and/or without fairness factors being considered.

News Corp Australia supports the continuation of the fair dealing regime in Australia. However, regarding a fair dealing exception for quotation, we again draw attention to the existing fair dealing exceptions. These are limited to purposes of use which are socially beneficial or which do not detract from the commercial competitiveness of the copyright owners’ work. A fair dealing exception for quotation focuses on the type of use – with no consideration of the purpose of the use – the implication of which would be significant copyright appropriation.

⁹¹ ALRC Discussion Paper, para 10.3, p193

We also reference the Publishers submission to the Issues Paper here, which stated that an exception for quotation would:

‘severely limit a copyright owner’s ability to obtain value from its efforts in producing the material, thus removing an important incentive to the creation of new material.’⁹²

Specifically, we restate material included in the Publishers submission to the Issues Paper regarding the *Berne Convention* and quotation:

‘Article 10(1) [of the Berne Convention] expressly requires that the making of the quotation is compatible with fair practice. The Publishers are of the view that in the digital age, it is highly likely that in many cases quotation that does not fall within the current fair dealing exceptions will not be fair. The current fair dealing exceptions already provide sufficient protection for quotations for purposes which justifiably should not require remuneration to the copyright owner (as they are socially beneficial or do not compete with the copyright owner’s exploitation of the work). Therefore, the Publishers submit that a fair dealing exception for the purposes of quotation would not meet the requirements of Article 10(1) as any general quotation right under the exception is unlikely to be fair.’

SECTION 15: RETRANSMISSION OF FREE-TO-AIR (FTA) BROADCASTS

News Corp Australia welcomes the ALRC’s assessment that the subject matter of this section, the retransmission scheme, *‘raises complex questions at the intersection of copyright and communications and media policy’⁹³* and that proposals for reform included in the Discussion Paper are *‘largely dependent on assumptions about matters not within the ALRC’s remit’⁹⁴*.

Therefore, News Corp Australia recommends to the ALRC that copyright-focused decisions which intersect with complex communications and media policy issues should not be made in isolation – including:

- a US-style ‘must carry’ regime; and
- the retransmission of FTA broadcasts.

US-style ‘must carry’ regime not required

News Corp Australia welcomes the ALRC’s conclusion it should not make any proposal regarding whether a US-style ‘must carry’ regime should be introduced.

We support the basis for this decision being that ‘must carry’ regimes are a matter of communication and media policy and *‘are not issues that can, or should, be driven by the ALRC in the context of reform of copyright laws’⁹⁵*.

It should also be stated that notwithstanding the ALRC’s basis for the decision, a US-style ‘must carry’ regime is unnecessary in Australia. We submit that the commercial and regulatory

⁹² Publishers submission to ALRC Issues Paper

⁹³ ALRC Discussion Paper, para 15.3, p300

⁹⁴ Ibid, para 15.3, p300

⁹⁵ Ibid, para 15.156, p327

environments of the media industry in Australia today are different to other jurisdictions, including the US which is the reference point for those that support a 'must carry' regime.

News Corp Australia supports the overview of the policy rationale for the US regime provided in the Foxtel submission to the Discussion Paper⁹⁶ as illustrative of the differences between Australia and the US, and why a 'must carry' regime is unwarranted in Australia.

Retransmission

As outlined in our submission to the Issues Paper, News Corp Australia reiterates that there is no case for amending the existing rules regarding retransmission of FTA broadcasts.

We respond to the ALRC proposals further in this section. However, we feel that it is important to consider the current commercial context of retransmission arrangements. To that end we support the material put forward at *Section 1, The commercial context of retransmission in Australia*, of Foxtel's submission to the Discussion Paper.

Proposal 15-1

Option 1 – The exception to broadcast copyright provided by Broadcasting Services Act 1992 (Cth), and applying to the retransmission of free-to-air broadcasts; and the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of Copyright Act should be repealed. This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties – broadcasters, transmitters and underlying copyright holders.

Option 2 – The exception to broadcast copyright provided by the Broadcasting Services Act, and applying to the retransmission of free-to-air broadcasts, should be repealed and replaced with a statutory licence.

Response to Proposal 15-1

News Corp Australia supports Foxtel's position on this matter. Specifically, that no case has been made for altering the current rules, and therefore the existing regime should continue. In brief:

- TV retransmission does not conflict with the normal exploitation of works or unreasonably prejudice the interests of rights holders (and is therefore compliant with the 3 step test);
- Where retransmission occurs, FTA broadcasters are already remunerated through
 - advertising revenue, and
 - where applicable, as holder of the underlying copyright in works;
- Where retransmission does not occur, it would be less likely to so if an additional and unjustified revenue stream, such as a statutory licensing scheme for broadcast copyright, were introduced.

Notwithstanding this, News Corp Australia offers the following comments regarding Options 1 and 2 respectively:

⁹⁶ Foxtel submission to ALRC Discussion Paper, at Section 1

i. *Option 1*

The ALRC suggests that allowing retransmission to be determined solely by consent would provide for the value of retransmission to be determined by the parties as part of commercial negotiations – allowing broadcasters control over their signals providing choice to STV providers regarding the signals that they transmit⁹⁷. However, it is the case that these ‘benefits’ are already delivered under the current arrangements. News Corp Australia supports Foxtel’s illustration of the existing arrangements⁹⁸, and inserts those below:

- a. FTA broadcasters control their signals because they determine what is transmitted and Foxtel must retransmit simultaneously with the original broadcast and is prohibited by law from altering the broadcast.⁹⁹ Foxtel has arrangements in place with all broadcasters of retransmitted services. These agreements put numerous obligations on Foxtel in respect of retransmission and therefore from a practical perspective, the FTA broadcasters already exercise control of their signals; and
- b. Foxtel already has a choice as to the signals it retransmits – there is no compulsion under the current regime for Foxtel to retransmit any FTA services (and Foxtel is opposed to the introduction of a must carry regime for the reasons outlined above and in its response to the Issues Paper).

It is also the case that Option 1 poses some not insignificant practical difficulties, which would likely have the effect of eliminating retransmission in Australia. This would result in consumer detriment, as FTA channels would no longer be available via the Foxtel EPG and a single remote control.

Specifically, under Option 1, the onus would be on the FTA broadcaster to clear the underlying rights to permit transmission. The practical difficulties arise as it would take considerable resources – including time – for the volume of content on FTA channels to be cleared for retransmission. It would be the case that if content was not able to be cleared it would not be able to be retransmitted, which would involve additional operational arrangements between the FTA broadcaster and the STV provider.

Given the reasoning above, it is the view of News Corp Australia that Option 1 is not warranted.

ii. *Option 2*

The ALRC suggests retaining Part VC of the Act and also introducing a statutory licencing scheme for broadcasting copyright. It further proposes that this exception will be a remunerated exception and that equitable remuneration will be payable by

⁹⁷ Ibid, para 15.53 – 15.53, p309

⁹⁸ Foxtel submission to ALRC Discussion Paper, at Section 1

⁹⁹ Foxtel does not agree with the view of SBS, cited in the Discussion Paper, that there is a need to ‘strengthen protections against uses of SBS’s broadcast signal by third parties which may affect the integrity of its presentation of viewers’—see Discussion Paper, para 15.52, page 309. We submit that there is no risk to the integrity of the presentation to the FTA broadcast because the broadcast is unaltered.

retransmitters for use of the FTA broadcaster's copyright in their broadcasting signal – to provide *'some recognition for broadcast copyright.'*^{100,}

News Corp Australia – like Foxtel – supports the retention of Part VC of the Act, which is operating effectively; and opposes the introduction of a statutory licencing scheme for broadcast copyright.

a. A remunerated exception is an additional revenue stream for FTAs

The ALRC observes that:

'Free-to-air broadcasters would not necessarily ask to be remunerated in order for subscription television companies to retransmit their programs, because retransmission may increase their market penetration.'^{101,}

News Corp Australia does not support this observation, and wishes to clearly state what is encompassed in Option 2. A remunerated exception is effectively an additional revenue stream to FTAs – from STV – for services that are required to be freely available and usually funded by advertising, and customers can already receive those services without payment.

b. FTAs already receive substantial benefits from Government policies, including the pursuit of universal access

It is also the case that the viability of commercial FTAs has, and continues to be, ensured via a legislative framework. Further, since 2001 the Federal Government has implemented policies and made significant investments in programs to ensure universal access to FTA broadcasts – most recently digital FTA broadcasts – to the Australian population. We note that detailed analysis of the range of these Federal Government policies and investments is contained in the ASTRA submission to the Issues Paper¹⁰². We also include here that FTA broadcasters already receive revenue under Part VC of the Act as owners of copyright in works included in the FTA services.

c. Admin costs of a new statutory scheme would likely outweigh distribution

In reference to the ALRC's observations regarding this matter, it is unclear what practical benefit a new statutory licensing scheme for broadcast copyright would actually be (if it were the case that FTAs did not seek any remuneration for retransmission). As noted in Foxtel's analysis of Option 1, FTAs control the retransmission of their services from a practical perspective. Therefore, if such a scheme were introduced, the benefits (likely amount of distributions/payments, if they were sought) would need to be outweighed by the cost (of the administration).

¹⁰⁰ ALRC Discussion Paper, para 15.70, p312

¹⁰¹ Ibid, para 15.75, p312

¹⁰² ASTRA submission to ALRC Issues Paper, http://www.alrc.gov.au/sites/default/files/subs/227._org_astra.pdf, p6-7

Foxtel, in its submission to the Discussion Paper¹⁰³, has presented detailed analysis, which indicates that the administrative costs of implementing and running the scheme are likely to outweigh the costs of distributions. News Corp Australia supports this analysis.

Given the reasoning above, it is the view of News Corp Australia that Option 2 is not justified.

SECTION 17: CONTRACTING OUT

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.

Response to Proposal 17-1

News Corp Australia opposes the ALRC's proposal at 17-1. As outlined in our submission to the Issues Paper, we hold that freedom of contract is fundamental to commercial negotiations, and therefore oppose any amendment that would undermine this. This includes amendment/s which would exclude or limit copyright exceptions – and particularly any fair use exception – of commercial agreements.

i. Rights holders are free to set terms and conditions – and counterparty is free to agree, or not, or negotiate

Content owners/right holders are free to set, and subsequently negotiate and agree, the terms and conditions under which content will be accessible. This freedom to set terms, or freedom of contract, is essential to commercial negotiations, and not one that is distinct to commercial arrangements regarding copyright works.

Therefore, it should continue to be the case that if parties to an agreement do in fact agree that the terms of their bargain should override their rights at law – including copyright exceptions – then the parties should be free to do so.

ii. Contracting out of fair use will be a necessary commercial tool to abate uncertainty resulting fair use (should it be introduced)

Further, and as stated many times throughout the ALRC's consultations, News Corp Australia opposes the introduction of a fair use defence – be it broad or otherwise – into Australian law. If it is the case – and we hope it is not – that fair use is actually introduced into Australian law, it will be essential that contractual terms excluding or limiting fair use remain binding and enforceable. The reason for this is that the consequence of fair use is unpalatable levels of uncertainty that will serve to further destabilise the market for content creation and distribution. It is reasonable that mitigation measures to offset the escalated uncertainty (created by fair use) could

¹⁰³ Foxtel submission to ALRC Discussion Paper, at Section 1

include contract terms, tailored to business and transaction needs to deliver increased certainty and stability for outcomes.

iii. Existing provisions applicable for perceived 'unfairness'

If a concern were that such terms might be perceived as 'unfair', then it would be the case that unfair contracts provisions of Australian Consumer Law, or other existing processes to consider such, may be applied. This is acknowledged in the Discussion Paper whereby David Lindsay's conclusions are captured:

'The view that such restrictions are needed 'overestimates the ability of the law to establish optimal rules for the protection of copyright material, at the expense of the considerable advantages to be derived from private market-based arrangements' and the extent to which copyright owners, operating in a competitive market, are capable of unilaterally imposing terms. He considered that:

Insofar as private agreements may result in less than optimal outcomes, they should be dealt with under established principles of contract law, competition law or consumer protection law.¹⁰⁴

¹⁰⁴ Ibid, para 17.105, p372

SECTION 3 – CLARIFICATION

At paragraph 7.46, the Paper references the Combined Newspapers and Magazines Copyright Committee (Publishers) Submission to the Issues Paper (Submission 238), and News Corp Australia's initial submissions to the Issues Paper (Submissions 224) and supplementary submission regarding the reporting of news, specifically sport (Submission 286).

For the purpose of clarification, News Corp Australia does support the Combined Newspapers and Magazines Copyright Committee (Publishers) recommendations in respect of the fair dealing exception.

We reiterate our comments included in Submission 238 to the Issues Paper¹⁰⁵:

News Limited is a member of the Combined Newspapers and Magazines Copyright Committee. That Committee represents the majority of publishers in the newspaper and magazine publishing industry (Publishers), including publishers of metropolitan and regional newspapers as well as magazines. The Publishers made a submission to the ALRC Paper.

The Publishers submission to the Issues Paper articulates concerns that digital technologies, while providing enormous benefits in allowing Publishers to provide timely and flexible news and other information services, have also created an environment in which it is easy for others to 'free ride' on the investment of Publishers and, indeed, compete through those 'free riding activities'.

As included in the Publishers submission to the Paper, Subsections 42(1)(a) and 103B(1)(a) require any fair dealing to be:

- (a) for the purpose of; and
- (b) for a sufficient acknowledgment to be made.

However, Subsections 42(1)(b) and 103B(1)(b) have neither of these constraints and a number of organisations have recently sought to rely on the fair dealing defence in relation to their use of articles and photographs originally published in newspapers and magazines when:

- (a) posting articles and photographs, which relate to their products or services, on their websites; and
- (b) emailing articles and photographs, which relate to their products and services, to other organisations or clients.

News Limited supports the position recommended in the Publishers submission¹⁰⁶ that the Act could more clearly articulate that the communication of newspaper or magazine articles is not permitted under the fair dealing exception unless such activity satisfies the purpose of the fair dealing exceptions.

News Corp Australia continues to support this view, and the recommendations contained in the Publishers submissions to the Issues Paper¹⁰⁷ and Discussion Paper.

¹⁰⁵ News Limited submission to ALRC Issues Paper, p 34-35

¹⁰⁶ Publishers submission (238) to ALRC Issues Paper, response to Question 45