

## 7. Third Parties

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### Summary

7.1 This chapter considers ‘third party’ uses of copyright material—that is, the unlicensed use of copyright material by third parties to deliver a service, sometimes for profit, in circumstances where the same use by the ‘end user’ would be permitted under a licence or unremunerated exception.

7.2 The ALRC concludes that such uses should be considered under fair use or the new fair dealing exception. These fairness exceptions are well suited to judge whether third party copying and other uses should be held to infringe copyright.

7.3 Using copyright material might sometimes be considered more likely to be fair when a third party merely facilitates a permitted use. However, other factors, such as whether the use is transformative or harms the rights holder’s market, will usually be more important.

7.4 Despite objections to commercial organisations ‘free riding’ on the investment and creative effort of others, in the ALRC’s view, if a use is for a different expressive purpose than the original and does not harm a rights holder’s market, then the use should often be fair, even if it is commercial. Such an approach to copyright exceptions better serves an innovative digital economy.

### Examples of third party uses

7.5 Many organisations, businesses and technologies facilitate uses of copyright material. To varying degrees, computers, home recording devices, many software programs and popular apps—the internet itself—all facilitate copying.

7.6 Some businesses sell machines, computers, or software programs that enable their customers to make copies in their homes; other businesses make, store and communicate the copies more directly. Some services help people copy material they

already own; others copy and collect material the consumer may only be free to access, such as so-called ‘free’ web and broadcast content, and books in libraries.

7.7 The spectrum of these activities is wide. At one end may be pure storage services. Many companies offer cloud storage facilities, that allows customers to store and access their own digital files, including copyright material, on remote servers.<sup>1</sup> A number of stakeholders submitted that merely providing a digital storage facility, such as a cloud locker, should not infringe copyright.<sup>2</sup>

7.8 Other services on this spectrum may include:

- educational institutions copying material for students;
- a photocopying company copying material for students;
- remotely scanning a customer’s computer, copying the files and storing them for the customer’s personal use, including for backup;
- taking a customer’s collection of music CDs and making digital copies for the customer to use;
- scanning hardcopies of a customer’s books, and giving the customer electronic versions;
- a web application that allows users to copy and collect web pages and other digital content, perhaps stripping the content of advertisements and images to make the text easier to read; and
- a web application for managing research resources that allows users to store copies of web pages, journal articles and other copyright material in the cloud.

7.9 These are all existing services, some with millions of customers around the world, that arguably involve a third party using copyright material for a customer, in a way that the customer may be permitted to use themselves. Many more examples could be provided.

## **Fair use**

7.10 The ALRC considers that fair use is a suitable exception to apply to determine whether a third party use of copyright material infringes copyright. These third parties should not be precluded from relying on fair use. Many third party uses of copyright material may be transformative—that is, for a different purpose than that for which the material was created—and fair. Others will not be transformative, and will unfairly compete in the markets of rights holders.

7.11 Some stakeholders submitted that third parties should never be able to rely on fair use, while others submitted that third party uses should necessarily be fair if they

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1 Digital lockers can also be used for piracy. This chapter does not concern the question of third party liability for copyright infringement, which is outside the Terms of Reference.

2 For example, Telstra Corporation Limited, *Submission 602*; Law Institute of Victoria, *Submission 198*.

merely facilitate another fair use. However, the ALRC agrees with those who said that unlicensed third party uses will sometimes be fair, and other times not, and that the fair use exception is well equipped to settle the question. For example, Telstra submitted that applying fair use in this context is ‘a balanced way to support and encourage the continued development and adoption of content technologies with respect for content ownership and commercial licensing practices’.<sup>3</sup>

7.12 Is a third party use of copyright material *more likely* to be fair than it otherwise would be, if the use is simply for another person who would be entitled to make the same use? The ALRC considers that it is, but that this factor is not as important as the four fairness factors set out in the fair use exception. As discussed below, it will usually be more instructive to focus on whether the use is transformative, and whether the use harms the rights holder’s market.

7.13 Many stakeholders noted the difficulty of precisely defining the boundaries of what third party uses should be permitted under unremunerated copyright exceptions, and which should not. In the ALRC’s view, this highlights the danger of setting those boundaries in legislation, and the value of enacting a flexible exception.

7.14 Fair use can also be applied to determine whether copyright is infringed by a third party use that facilitates a use permitted under a specific exception. Specific exceptions should not limit the application of fair use.

7.15 The following section highlights why encouraging transformative uses of copyright material is important for stimulating competition and innovation.

### **Innovation and transformative use**

7.16 As noted above, innovative services, such as many cloud-based services, may involve third parties using copyright material on behalf of their patrons or customers. Many stakeholders stressed that if third parties were prohibited from using copyright material in this way, without a licence, then this would inhibit innovation.

7.17 Many of these third party services are ‘cloud’ based. Many stakeholders stressed the social and economic benefits of such services. The ACCC said that ‘innovation in services, such as cloud services, are important to the emergence and sustainability of competitive digital services industries’.<sup>4</sup> The Internet Industry Association submitted that:

Cloud computing offers enormous social and economic advantages by allowing sharing of computing resources and thereby achieving economies of scale and minimising power and hardware requirements. It also reduces the need to transport information and the device required by the user to achieve the same result.<sup>5</sup>

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3 Telstra Corporation Limited, *Submission 602*. See also Choice, *Submission 745*.

4 ACCC, *Submission 658*.

5 Internet Industry Association, *Submission 744*.

7.18 Although it did not support the introduction of fair use, Free TV submitted:

The transition of electronic services from the personal computer and at home devices to online services in ‘the cloud’ is a major shift and should be accommodated by the Act. It seems anomalous that activities that would be legal if conducted in the home on storage devices owned by a consumer might not be permissible if the same consumer purchases cloud storage to do exactly the same activity.<sup>6</sup>

7.19 Ericsson submitted that the ‘success of the digital economy, enabled primarily by the IT and telecommunications sectors, has been based on sustained and continuous innovation’:

This has driven continuous improvement of technologies and services and has provided a competitive incentive for differentiation amongst competing players across different industries. Therefore, using [information and communications technology] to simplify or differentiate services or offerings should not be prohibited by law.<sup>7</sup>

7.20 Some comments were made in response to the 2012 decision of the Full Federal Court in a case about Optus TV Now, a type of cloud-based personal video recorder.<sup>8</sup> In this case, the question of who made the relevant copies of the broadcasts—Optus or its customers—was important.

7.21 The internet service provider, iiNet, submitted that it should not matter who makes a recording from a broadcast, if it is made ‘in a domestic setting’ and ‘if the underlying purpose of the recording is fair’. In this way, iiNet said, ‘competition between technologies will be promoted’.<sup>9</sup>

7.22 eBay said the *Optus TV Now* decision ‘creates serious disincentives for the development of cloud services in Australia’.<sup>10</sup> It added:

Existing law seems to have the unfortunate result that for a certain class of offering, the more useful a cloud service, the more likely it will involve copyright infringement by the provider. ... eBay provides all its services online and is itself a form of cloud service. eBay considers it vital for the development of cloud services, and technological change generally, that the law not discriminate between activities on the basis of the technology that is used carry them out.<sup>11</sup>

7.23 Some stakeholders drew a distinction between ‘pure copying’ and ‘value-added services’. The ACCC said there was potential for growth in products and services that enabled consumers to use copyright material for personal use. If confined ‘purely to copying, as opposed to transforming or value-adding’, the ACCC said, ‘these markets should be opened to parties other than copyright owners’:

Limiting the development of such services risks reducing the incentives for copyright owner to innovate to meet consumer demands.<sup>12</sup>

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6 Free TV Australia, *Submission 865*.

7 Ericsson, *Submission 151*.

8 *National Rugby League v Singtel Optus* [2012] FCAFC 59 (27 April 2012).

9 iiNet Limited, *Submission 186*.

10 eBay, *Submission 93*.

11 Ibid.

12 ACCC, *Submission 165*.

7.24 The ACCC submitted that third party use that merely facilitated legitimate use by others are ‘likely to be key to innovation and the development of emerging markets and services’.<sup>13</sup> They can stimulate innovation in other markets and help meet consumer demands. Caution should therefore be exercised when considering the degree to which copyright limits this potential.<sup>14</sup>

7.25 The ACCC submitted that the Optus TV Now service was ‘an example of a cloud service that was unable to operate due to Australia’s current copyright laws’, but that even its brief existence had an effect on innovation in the market:

Following the *Optus TV Now* case, Telstra, the incumbent owner of the AFL rights, has made available (for a fee) the AFL live app to any user of a mobile device, when this service was previously only available to Telstra customers. The ACCC considers this is an example of how an investment by a third party appears to have stimulated a competitive response from a rights holder.<sup>15</sup>

7.26 It is not clear whether the Optus TV Now service would be found to be fair use or not, particularly without properly considering the potential for harm to rights holders’ markets. The importance of considering market harm is discussed further below, and more generally in Chapter 5. However, introducing a flexible exception to copyright, such as fair use, will allow the right questions to be asked of a third party use, and should make Australia more fit for a digital age in which remote cloud technologies are becoming increasingly common.

7.27 Fair use provides a better environment for innovative third party uses, in part by encouraging transformative uses of copyright material. ‘A transformative or productive use is one where the defendant has created something new, repurposed the original work, or otherwise added value’.<sup>16</sup> Crucially, if it is transformative, the secondary use will be for a different purpose than that for which the material was originally created.

7.28 Transformative uses are more likely to be fair, under the fair use and fair dealing exceptions recommended in this Report.<sup>17</sup> Some third party uses may be transformative, and will therefore be more likely to be fair. Those that are not transformative—those that merely repackage or republish the original, unfairly competing with the original—may be less likely to be fair.<sup>18</sup>

7.29 Flexible exceptions that permit unlicensed transformative uses of copyright material stimulate further creativity and create a better environment for innovation.<sup>19</sup>

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13 ACCC, *Submission 658*.

14 *Ibid.*

15 *Ibid.*

16 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights, 16.

17 See Ch 5.

18 This draws on the language of US Judge Pierre Leval in P Leval, ‘Toward a Fair Use Standard’ (1989–1990) 103 *Harvard Law Review* 1105. See Ch 5.

19 See Chs 4 and 5.

## Whose purpose?

7.30 Unlike fair use, many exceptions to copyright are confined to a particular purpose. For example, the time shifting exception in s 111 of the *Copyright Act* only applies if the person who makes the copy is the same person for whom the copy is made (to watch at a more convenient time). Considering the Optus TV Now service, the Full Federal Court stated:

There is nothing in the language, or the provenance, of s 111 to suggest that it was intended to cover commercial copying on behalf of individuals. Moreover, the natural meaning of the section is that the person who makes the copy is the person whose purpose is to use it as prescribed by s 111(1). Optus may well be said to have copied programmes so that others can use the recorded programme for the purpose envisaged by s 111. Optus, though, makes no use itself of the copies as it frankly concedes. It merely stores them for 30 days. And its purpose in providing its service—and, hence in making copies of programmes for subscribers—is to derive such market advantage in the digital TV industry as its commercial exploitation can provide. Optus cannot invoke the s 111 exception.<sup>20</sup>

7.31 The new fair dealing exception recommended in this Report is confined to a set of prescribed purposes. The current fair dealing exceptions are also confined to prescribed purposes, such as the purpose of research or study. Fair dealing exceptions do not prohibit third party uses. The difficulty for the third parties comes from having to establish that the purpose of their use is one of the purposes listed in the exception. In *De Garis v Neville Jeffress Pidler*, the Federal Court stated the relevant purpose required by the fair dealing for the purpose of research or study exception, in s 40 of the *Copyright Act*, was that of the defendant, a news clipping service, not that of its customers.<sup>21</sup> The news clipping service was not copying for the purpose of research or study, even if the copies were to be used by its customers for that purpose.<sup>22</sup>

7.32 This distinction was criticised in some submissions to this Inquiry. Professor Robert Burrell and others submitted that it is

entirely artificial to privilege acts of reproduction or copying that can be done by a researcher themselves over acts that require the involvement of a third party, such as an intermediary to assist with the copying or a publisher to disseminate the research output.<sup>23</sup>

7.33 Universities Australia submitted that it was ‘absurd’ that a university student can copy for his or her own research purposes, but that a university cannot copy the very same work on behalf of the student, even if this were fair use.<sup>24</sup>

20 *National Rugby League v Singtel Optus* [2012] FCAFC 59 (27 April 2012), [89].

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

22 The ‘strict approach applied in *De Garis* was not adopted in the very different circumstances of the Panel case (*TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at [100]–[101]). As the case law has developed in the USA, however, the courts have been able to rely on the flexibility inherent in the defence and the fairness factors to make a better informed assessment of whether a third party can legitimately rely on the defence’: Intellectual Property Committee, Law Council of Australia, *Submission 765*.

23 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

24 Universities Australia, *Submission 754*.

7.34 Universities Australia said that introducing fair use—which is not confined to prescribed purposes—would remove ‘an artificial distinction between dealings by a person for their own research or study and dealings by a person undertaking the very same copying on their behalf’.<sup>25</sup> The University of Sydney submitted that it may like to rely on fair use to ‘solicit the services of a third party service provider (such as a cloud server or document digitisation service) to make or store copies in a format that is accessible across a range of technological platforms (tablets, intranet, other)’.<sup>26</sup>

7.35 Google submitted that often cloud service providers operate merely to ‘stand in the shoes’ of their consumers, for example, to ‘to back up content on a customer’s behalf, to store a document the consumer has created in a cloud drive so they can access it from multiple devices, or to provide cloud-based hosting of IT systems’:

In these circumstances, even where the provider may receive some commercial benefit from providing the storage, it is the user who is making the copy, and deciding what is copied. The purpose of making the copying should therefore be seen as identical to the customers’ purpose. If the purpose of the consumer in using copyright material is fair, so too should the purpose of the provider in facilitating that use.<sup>27</sup>

7.36 The NSW Government submitted that fair use promotes ‘more principled statutory interpretation, and more predictable law, by focusing attention on whether or not a use is “fair” rather than on whether it can be brought within one or other of a group of rigid, pre-ordained categories’.<sup>28</sup>

To see why this is an improvement, one need look no further than *TCN Channel Nine v Network Ten* (‘The Panel case’), in which the Federal Court, the Full Federal Court and the High Court all grappled with the question whether the use in a humorous and satirical TV program of a number of clips from a rival broadcaster’s programs was, in the case of each clip, a fair dealing for the purpose of reporting news or of criticism or review.<sup>29</sup>

7.37 In 2012, the Supreme Court of Canada considered ‘whether photocopies made by teachers to distribute to students as part of class instruction can qualify as fair dealing’ for research or private study under Canadian copyright legislation, and concluded that they could qualify.<sup>30</sup> The Court stated that photocopies made by a teacher and given to students are ‘an essential element in the research and private study undertaken by those students’.<sup>31</sup> The Court held that teachers

have no ulterior motive when providing copies to students. Nor can teachers be characterised as having the completely separate purpose of ‘instruction’; they are there to facilitate the students’ research and private study.<sup>32</sup>

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25 Ibid.

26 University of Sydney, *Submission 815*.

27 Google, *Submission 600*.

28 NSW Government and Art Gallery of NSW, *Submission 740*. See also R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278* and Copyright Advisory Group—Schools, *Submission 707*.

29 NSW Government and Art Gallery of NSW, *Submission 740*.

30 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada), [1].

31 Ibid, [25].

32 Ibid, [23].

7.38 Not all third parties share such a ‘symbiotic purpose’ with the persons for whom they may use copyright material.

7.39 Some stakeholders suggested that the *Copyright Act* should expressly provide that a third party use that merely facilitates another use that would either be fair use or would be permitted under another unremunerated exception either necessarily does not infringe copyright, or should be an illustrative purpose in a fair use exception.<sup>33</sup> It was also submitted that the Act be amended to make clear that there was ‘no *per se* restriction on a third party relying on fair dealing to undertake uses on behalf of persons who were themselves entitled to rely on the exception’.<sup>34</sup>

7.40 However, in the ALRC’s view, the fair use exception is sufficiently flexible to allow for third party uses to be considered fair in appropriate circumstances. But such uses do not seem to warrant particular emphasis by including them in the list of examples in the fair use provision. It is important that third parties are not precluded from relying on fair use or fair dealing. It is less clear that a third party use is a particularly noteworthy example of fair use.

7.41 The new fair dealing exception limits the types of third party uses that may be considered under a fairness exception. This is one reason why the ALRC favours fair use. It is preferable at least to consider whether any particular use is fair, rather than to automatically exclude uses not for prescribed purposes.

7.42 To say that these additional third party uses should at least be considered under the fair use exception is not to say the uses would be fair. But copyright law that is conducive to new and innovative services and technologies should at least allow for the question of fairness to be asked.

### **Commercial free riding and market harm**

7.43 A common objection to allowing unlicensed third party use of copyright material is that this is commercial free riding that harms the markets of copyright owners. In the ALRC’s view, rather than automatically exclude all commercial uses, these matters—particularly market harm—should be considered as part of an assessment of fairness.

7.44 Many stakeholders objected to unlicensed commercial use of copyright material by third parties. These businesses were ‘free riders’. For example, the Coalition of Major Professional and Participation Sports said that there is a

fundamental distinction between recordings made by consumers but later stored on a remote server and recordings made by companies, for commercial gain, and stored on remote servers for their subscribers to access. The latter can significantly impact on the ability of content owners to exploit their rights and should not be allowed without the consent of the rights holder.<sup>35</sup>

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33 For example, Optus, *Submission 725*.

34 Universities Australia, *Submission 754*. See also ACCC, *Submission 658*.

35 COMPPS, *Submission 266*.

7.45 Commercial Radio Australia said consumers should be able to take full advantage of technology, but commercial gain should be reserved for rights holders.<sup>36</sup> Free TV Australia similarly submitted that broadcasters ‘are entitled to control the exploitation of their signals and should be appropriately compensated by third parties reaping commercial gain from their broadcast signals’.<sup>37</sup>

7.46 Foxtel stated that to allow unlicensed third parties to ‘share in the rewards’ or ‘profit at the expense of those who invest in the creation of content would be entirely inequitable’.<sup>38</sup>

As Foxtel’s subscription service allows our customers to access content for a limited period of time, unlicensed copying by third parties will undermine our business model and will also hurt those from whom we acquire content. Distributors who make their content available on a temporary basis and to a limited audience must have the ability to determine how their content is accessed, used and stored.<sup>39</sup>

7.47 Some stakeholders also submitted that it was important to consider whether the rights holders offer a comparable service. It was said that if a rights holder has already created a scheme through which consumers can view broadcast television programs at a later time, for example, then personal or third-party time shifting should not be allowed. The ABC submitted that:

Where the cloud service is being offered in competition with the true rights holder, then it is important to consider what legal access to the content is already available to the public. If the content is already accessible on demand by way of a catch-up service by a legitimate rights holder, then the competing cloud service should not be able to offer that content.<sup>40</sup>

7.48 Taking this argument further, some might ask whether exceptions for time shifting free to air broadcasts are now fair, when the programs can be watched at a later time through online catch-up services. ARIA noted that Australia’s time shifting exception had its origins in ‘an era of analogue broadcasts where programming and time constraints meant that the opportunities to catch up on a missed broadcast program were limited’.<sup>41</sup>

7.49 Many of these arguments concern two related but distinct questions: the commerciality of a secondary use, and the harm a secondary use may do to a rights holder’s market. Both questions are considered in determining whether a use is fair, under fair use, but it should be stressed that the second question is more important.

7.50 Commercial uses are not presumptively unfair under the fair use and new fair dealing exceptions.<sup>42</sup> A commercial use may be less likely to be fair than a non-

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36 Commercial Radio Australia, *Submission 132*. See also Tabcorp Holdings Ltd, *Submission 164*; ARIA, *Submission 731*.

37 Free TV Australia, *Submission 270*.

38 Foxtel, *Submission 748*; Foxtel, *Submission 245*.

39 Foxtel, *Submission 748*.

40 ABC, *Submission 210*.

41 ARIA, *Submission 241*.

42 See Ch 5.

commercial use, but other factors are also relevant. The ACCC submitted that third party commercial uses may not always undermine the incentives of rights holders:

Services offered by third parties should not be prohibited simply because a third party may profit from offering a new and innovative service to facilitate otherwise legitimate consumer use. By increasing the value of such use, third party commercial activities may in fact increase the returns to, and incentives for, investment in copyright material.<sup>43</sup>

7.51 The ACCC also submitted that in considering fairness, commercial benefit to third parties ‘should not be a central or determinative factor in establishing whether the use is fair’.<sup>44</sup> If commerciality were determinative under existing fair dealing exceptions, then commercial news reporting would not be fair. US Judge Pierre Leval has written, concerning the US fair use provision:

The proposition that commercial uses are unfair is extraordinarily inappropriate and harmful. The heart of fair use lies in commercial activity. Most undertakings in which we expect to find well-justified instances of fair use are commercial. These include, of course, commentary, criticism, parody, and history. Even the publication of scholarly analysis is often commercial. If these are presumptively unfair, then fair use is to be found only in sermons and classroom lecture.<sup>45</sup>

7.52 Although commerciality is relevant to the question of fairness, it is more important to focus on the related questions of whether the use is truly transformative and whether the use harms the market of the rights holder.

7.53 Whether a given use harms a rights holder’s market is an important factor to consider under both fair use and the new fair dealing exception. Some copying by third parties may not harm rights holders’ markets, and may even 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.

### **Who made the copy?**

7.54 The question of whether a use is fair can sometimes be avoided altogether by arguing that the material was not in fact used by the third party at all—that it was not the third party, but only the end user, who used the material. The threshold question will often be: who made the copy? In other cases, the question might be whether the material was communicated to the public.

7.55 These and related questions were considered in the Federal Court cases about the Optus TV Now service,<sup>46</sup> noted above, and in the United States in *Cartoon*

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43 ACCC, *Submission 658*.

44 *Ibid.*

45 P Leval, quoted in W Patry, *Patry on Fair Use* (2012), 101.

46 *Singtel Optus v National Rugby League Investments (No 2)* [2012] 34 FCA (1 February 2012); *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.

*Network LP v CSC Holdings*<sup>47</sup> and *WNET, Thirteen, Fox Television Stations, Inc v Aereo, Inc, USCA*.<sup>48</sup>

7.56 A number of stakeholders expressed concern about the implications of the decision of the Full Federal Court in *Optus TV Now*. For example, the Internet Industry Association said it had ‘serious reservations regarding the finding that the provider of an online service can be the maker or the joint maker of a copy when the process of selecting the content and causing the technology to make the copy is undertaken entirely by the user’.<sup>49</sup>

The traditional approach provided a ‘bright line’ that was easy to determine and, in our view, deliberately supported the creation of new and innovative products provided they did not have the sole purpose or function of facilitating the infringement of copyright.<sup>50</sup>

7.57 However, how this question of who made the copy should be approached is largely outside the Terms of Reference. This Inquiry is about exceptions to copyright, rather than the threshold question of whether copyright has been exploited at all.

## Safe harbours

7.58 The exceptions recommended in this Report are not intended to replace the safe harbour scheme in pt V div 2AA of the *Copyright Act*. The purpose of the safe harbour scheme, as Robert Xavier explained, is to give carriage service providers ‘some protection from the otherwise unavoidable risk of liability for inadvertently hosting or communicating infringing material on behalf of their users’.<sup>51</sup>

7.59 This chapter is not about third parties facilitating or authorising copyright infringement, for example, by hosting user generated content that infringes copyright or by providing a digital locker that some customers might use to illegally share pirated music with strangers. A safe harbour may provide appropriate protection from secondary liability, where such protection is warranted and subject to conditions.<sup>52</sup> The scope of this protection is being reviewed, and is outside the Terms of Reference for this Inquiry.

47 District Court, 2nd Circuit, 2008.

48 District Court, 2nd Circuit, 2013. See also ALRC Discussion Paper, Ch 5.

49 Internet Industry Association, *Submission 744*.

50 Ibid; See also eBay, *Submission 751*.

51 R Xavier, *Submission 531*. See also Australian Government Attorney-General’s Department, *Revising the Scope of the Copyright ‘Safe Harbour Scheme’*, Consultation Paper (2011).

52 See, eg, Telstra Corporation Limited, *Submission 602*; Google, *Submission 600*: ‘online service providers provide a wide range of services, and host a diverse range of content, which may involve copies that would not be covered by a fair use provision. This may include hosted user generated content (for example, videos on YouTube or ‘memes’ shared on a social network like Google Plus) which contains content which would not be covered by a fair use provision. ... Google believes that the expansion of the existing safe harbours to online service providers is an important reform in the interests of the Australian digital economy.’

7.60 Instead, the focus of this chapter is on third parties facilitating uses of copyright material that, if performed by the end user, would be covered by an exception—for example, by providing a digital locker that some customers might use to store legally obtained music for private use.

7.61 Although a safe harbour may protect third parties from both types of potential copyright infringement, in the ALRC's view, the Act should also provide for exceptions to copyright for some types of third party activities, and that fair use is best suited for these purposes.

7.62 Some stakeholders suggested that the safe harbour scheme was either sufficient for, or the preferred method of dealing with, third party facilitators.<sup>53</sup> However, the ALRC agrees with those who suggested that suitable exceptions and a safe harbour scheme were both necessary.<sup>54</sup> The safe harbour scheme does not provide an absolute defence to infringement, and it places certain obligations on service providers, such as an obligation to remove infringing content when given notice.<sup>55</sup>

7.63 In the ALRC's view, third parties should not need to rely on a safe harbour scheme to make fair use of copyright material, although they may need to rely on the safe harbour scheme for unfair uses.<sup>56</sup> The safe harbour scheme may be necessary for other activities, but not for fair use or otherwise non-infringing activity. In fact, some third party fair uses will be highly productive and transformative, and should therefore be encouraged, rather than merely tolerated.

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53 Law Institute of Victoria, *Submission 198*: 'If an operator is purely hosting a cloud based digital locker service—that is, providing a cloud based facility for customers to store digital content—this of itself should not trigger any liability for copyright infringement. In the LIV's opinion, the hosting of such a service should be exempted from liability, and consider that this is most appropriately dealt with under the safe harbour provisions.'

54 For example, Telstra Corporation Limited, *Submission 602*.

55 See *Copyright Act 1968* (Cth) s 116AH.

56 The fact that a particular third party use is not fair use does not imply that that use should not be protected by a safe harbour scheme.