

30 November 2012

Professor Jill McKeough Commissioner Australian Law Reform Commission

Dear Professor McKeough

## ALRC REVIEW - COPYRIGHT AND THE DIGITAL ECONOMY

Google welcomes the ALRC's review into the adequacy of Australia's current copyright exceptions and statutory licences. The review comes at a critical juncture as Australia and other countries transition to an economy heavily reliant on knowledge, innovation and creativity.

We are excited about potential of the Australian digital economy and about the role that properly drafted copyright laws can play assisting in the development of new opportunities for Australian creators. We would like to see an Australia where local rights holders reach global audiences, local business continue to innovate in the digital space, and where international companies make local technology investments. Where others see difficult challenges, we see exciting opportunities.

We believe that amendments to the copyright law are necessary to make these opportunities come to pass and to ensure greater availability of copyrighted material in socially and economically beneficial ways. Google believes that the recommendations in the attached submission would achieve this important goal.

We look forward to engaging further in these important discussions.

Regards

Mother

Matt Dawes Public Policy & Government Affairs Google Australia



## ALRC Review - Copyright and the Digital Economy

## **Google submission**

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## **Executive summary**

Innovation, culture and creativity are inherently dynamic – copyright must be future proofed with an open-ended flexible exception to keep pace with rapid developments in technology and the expectations of consumers and creators.

The transformative power of the internet on the economy is analogous to that of electricity. The direct contribution of the internet to the Australian economy was worth approximately \$50 billion in 2010, equivalent to 3.6% of GDP, and outpacing the broader economy growing at 7% pa.

Copyright will become an increasingly crucial element of economic policy as Australia transitions to a leading digital economy that relies heavily on knowledge, innovation & creativity.

Copyright 'exceptions' have been vital to Australia's cultural, technological and economic activity. Every time a school student photocopies a page of a book or someone shifts music from CD to mp3 so they can listen to it on their mobile, they are using a copyright exception.

Google would like to see a copyright regime that will help local creators reach global audiences, make Australia more attractive to technology investment, attract a digitally skilled workforce, allow Australian technology and content creators to be competitive on the world stage – and permit Australian consumers to enjoy the content they own in innovative ways.

Unfortunately, the digital world has moved forward and made Australia's copyright regime outdated. Our copyright law is too narrow and technology-specific, which is holding back innovation, creativity, investment and the enjoyment of content. Copyright is infringing on consumers' legitimate expectations – for example, it is illegal to shift a DVD you own to watch it on your tablet.

Australia's inflexible system means that new and innovative uses of copyright materials are frequently not permitted, as they are not specifically covered by an existing exception, no matter how strong the public interest in enabling those new uses may be.

Copyright needs to be "future-proofed", making it more flexible and technology-neutral. This will generate an economic benefit of \$600m pa in Australia. To enable Australia to capitalise on the next waves of innovation, unlocking enormous new investments and economic growth, Google recommends the creation of an open-ended flexible exception. Reform options are to:

- Consolidate and replace some or all of the existing purpose based exceptions with an open-ended flexible exception; or
- Keep the existing exceptions, after review to ensure technological neutral operation, and introduce a supplementary open-ended flexible exception.

An open-ended flexible exception can be part of a fair system that rewards content creators and supports this growing and increasingly important sector of our economy and society.



## Snapshot

### The digital economy is critical to Australia's future

The digital economy is essential to Australia's current and future productivity, global competitiveness and improved social wellbeing. It presents Australia with a unique opportunity to open up new markets for engagement and growth, both domestically and internationally, by engaging new and emerging uses of technology.<sup>1</sup>

#### The internet encourages creation

Today, more music, movies, books and other original content are being created than ever before. Australian creators and consumers are embracing online content leading to a revolution in the way Australians make and consume content.

Australia's online sector was responsible for 40 per cent of total growth in media industry revenues from 2007 to 2011 and is expected to contribute more than half of the \$4.3 billion in predicted growth through to 2015.<sup>2</sup>

#### Australians love online content

Australia's are embracing online content at a staggering rate. Australian publishers sold 630,000 e-books in 2011, an increase of 1,260 percent in only three years.<sup>3</sup> In July 2011, ABC's iView iPhone app had been downloaded more than 1.6 million times, its iPad app had been downloaded more than 300,000 times and the iView-only app for Apple's tablet device had also been downloaded over 300,000 times.<sup>4</sup>

## Australian creators can make a living online

Sydney-based blogger Natalie Tran has a huge international following for her video blogs and is able to make an income from monetisation opportunities offered by internet platforms. Perthbased video blogger Rob Nixon, who has a following of almost 236,000 subscribers and 65 million video views, generates a significant income from his YouTube channels and social media presence on Google+, Facebook and Twitter via revenue sharing arrangements.

<sup>&</sup>lt;sup>1</sup> Department of Broadband Communications and the Digital Economy, 'Australia's Digital Economy' (30

<sup>&</sup>lt;sup>2</sup> Belza, Jan, Forth, Patrick, Purnell, James and Zwillenberg, Paul, *Culture Boom: How Digital Media are Invigorating Australia* (The Boston Consulting Group, March 2012)

<sup>&</sup>lt;sup>3</sup> Ibid

<sup>&</sup>lt;sup>4</sup> Currie, Brenton, 'ABC's Mobile App Push Takes Off as iView Growth Surges', *iTechReport.com.au* (3 July 2011) <a href="http://itechreport.com.au/2011/07/03/abcs-mobile-app-push-takes-off-as-iview-growth-surges">http://itechreport.com.au/2011/07/03/abcs-mobile-app-push-takes-off-as-iview-growth-surges</a>



## The volume of online content is staggering

On YouTube, 72 hours of video content are uploaded every minute. 500 years of YouTube video are watched every day on Facebook and over 700 YouTube videos are shared on Twitter each minute.<sup>5</sup> On Blogger, over 250,000 words are written each minute. Instagram, a photo sharing app launched in October 2010, gains one new user each second. Each day over 4 billion photos are uploaded to social media sites.<sup>6</sup>

## The internet allows Aussie creators to reach global audiences

This growth highlights the importance of new content platforms that empower individuals to create and disseminate content to global audiences. This development has enabled a move from an environment where the control of content distribution is in the hands of a few multinational companies who can dictate the types of content produced and the terms of its distribution throughout the world. The internet has resulted in the 'democratisation of content'.

#### Flexible copyright law is a key policy setting for the success of the digital economy

A key component to position Australia as a world leading digital economy is to reform the *Copyright Act 1968* to introduce a more flexible exception, or set of exceptions. Flexible, technologically-neutral copyright exceptions best support the development of a vibrant digital economy, and serve the interests of copyright owners, distributors and consumers alike.

Dynamic digital economies require dynamic laws. Dynamic laws of necessity must contain flexibility. It is essential that the *Copyright Act* be able to adapt for unanticipated new uses of copyright works that have not even been invented yet. The only way to do this is through a flexible catch-all provision or a series of flexible provisions.

#### Australia's copyright laws are holding back innovation

Digital innovation has put the existing inflexible exceptions regime under increasing strain. There are five areas in where they do not strike the correct balance in the digital economy:

- 1 There are no express exceptions for basic internet functions such as crawling and indexing for web search and system level caching.
- 2 Inflexible exceptions are standing in the way of cloud computing in Australia.
- 3 Australia's Copyright Act is blocking creative and transformative uses of copyright works, such as mashups and innovative maps layers.
- 4 Australia's personal use exceptions are technology specific and overly limited. They do not recognise common uses of copyright materials and impose unnecessary technical

<sup>&</sup>lt;sup>5</sup> YouTube Press Room (2012), <http://www.youtube.com/t/press\_statistics>

<sup>&</sup>lt;sup>6</sup> Instagram for Android Press Centre (2012),< http://instagram.com/press>



restrictions. For example, Australian consumers may lawfully format shift music from a CD onto an iPad but not a film from a DVD.

5 Inflexible copyright laws are blocking medical and scientific research, including through data and text mining.

## The way forward - future proofing the Copyright Act

Harnessing the full economic and cultural potential of the internet requires a copyright system that can respond in a flexible way to rapid technological changes. Flexible, open-ended exceptions can accommodate technological developments without undermining the business models of rights holders. An environment that is pro-innovation benefits copyright owners, consumers and innovators alike.

Google submits that the ALRC must not confine its analysis to whether copyright exceptions are adequate and appropriate for the digital environment as it exists today. It is imperative that the ALRC also recognise the importance of 'future proofing' the Australian Copyright Act for the next wave of innovation, and the next.

**Google recommends** the creation of an open-ended flexible exception as the best way to future-proof copyright, ensuring it continues to be appropriate in the digital age. Reform options:

- Consolidate and replace some or all of the existing purpose based exceptions with an open-ended flexible exception; or
- Keep the existing exceptions, after review to ensure technological neutral operation, and introduce a supplementary open-ended flexible exception.

**Google recommends** the following models to implement an open-ended flexible exception:

- Use the existing 'fairness' factors in s.40(2) of the fair dealing exception for research or study as recommended by the CLRC; or
- Adopt similar factors to the US fair use provision (s.107 US Copyright Act).

Other alternatives for reform include:

- Using the language of the three step test in international law. Note: Google would not recommend using language s.200AB of the Copyright Act, which is overly complex and appears to constrain the operation of the three step test; or
- Use another set of factors to be determined by the ALRC, for example, a set of factors based on reasonableness as identified in question 52 of the Issues Paper.

An open-ended flexible exception is essential if Australia is to provide sufficient scope for innovative forms of content and new legitimate uses and services to evolve. It can be part of a fair system that rewards content creators and supports this growing and increasingly important sector of our economy and society.



## 1 About Google

Google's mission is to organise the world's information and make it universally accessible and useful. Encouraging the creation of information is essential and complementary to our business. Through products such as YouTube, Google Books and Blogger we've provided music, video and literary copyright owners and innovators with a platform to reach billions of fans and to monetise their content.

Our open platforms and services like Android and Google Maps enable other technology developers to create new phones, web services and applications within their own products.

Google has a strong presence in Australia. With over 650 people in our Sydney office and growing, we're a major engineering centre. We work on major Google products such as Google Chrome, Blogger and Google Drive. Australia was the birthplace of Google Maps and we've recently launched (globally) Docs for Android and Dymanic Views in Blogger. Our sales teams have helped tens of thousands of small and medium sized businesses in Australia get online, drive traffic to their website and grow revenue.

Our YouTube Partner Program enables Australian content producers (large and small) to directly monetise their content by displaying advertisements and sharing revenue. Many thousands of partners earn revenue in this way. We have more than one million partners around the world from 27 countries, including Australia. Revenue on partner's watch pages has more than doubled for 4 years in a row. During 2011, the number of partners making more than \$1,000 per month nearly doubled and thousands earn over six figures per year.

YouTube is also a significant revenue stream for traditional rights holders. YouTube's state-ofthe-art technology called "Content ID" allows rights holders to automatically identify useruploaded videos comprised entirely or partially of their content and implement a management policy. Rights holders upload a reference copyright of their material, Content ID then automatically scans user content for matches, more than 100 years of video each day. Rights holders can choose between the following options for different lengths of video:

- block all videos;
- monetise all content by placing ads next to them; or
- track usage and acquire statistics about access.

The majority of Google's 3,000 Content ID partners select the monetisation option. Of the 120 million videos claimed through Content ID, over 90% are monetised. More than a third of YouTube's total monetised views come from Content ID.

Similarly, the Google AdSense program allows web publishers to earn revenue by displaying relevant ads. In 2011, Google shared over \$7 billion with our AdSense publisher partners worldwide.



## 2 Historical context

Copyright laws in common law countries were developed in the eighteenth-century as a regulatory system designed to encourage commercial activity, particularly in the London book market. There were a small number of publishers and high barriers to entry, all of which led to what economists call artificial scarcity. Copyright laws functioned as the regulatory enforcer of that scarcity, as well as ensuring that free riding did not deprive publishers of a return on the investment they made in the costs of production. Authors were not a significant part of the scheme, given that they were typically paid a one-time lump sum fee. The following three hundred years has seen a great expansion in the contours of this system, but no real changes in its structure. Our copyright laws are thus, in their bones, based on the very early 18th century London book trade.

We now live in a fundamentally different time, that of digital abundance. Market forces and technology have moved well beyond our copyright laws. Barriers to entry are low, costs of production and distribution are low, and the reach of individual creators is global (e.g., Korean rapper Psy's "Gangnam Style" video<sup>7</sup> with three quarters of a *billion* views on YouTube). Large sums of money may be made off of a multitude of small transactions. Laws based on artificial scarcity and the business models of 18th century London are not only anachronistic, but act as impediments to creation and innovation.

## Copyright needs to evolve in the digital age

The very nature of the Internet involves the making and dissemination of copies of information, whether it be through web search where Internet pages must be copied and stored in order to be indexed, through emails, or even watching an online video of a government press conference.

In the case of all forms of search, you cannot find things if you do not have an index telling you where to locate the object of your inquiry. On the internet, you cannot have an index if you do not copy those objects (including making cache copies). On the internet, you also cannot find things if you can't link to their web location. If we want to have a functioning Internet, our laws have to match how the internet works.

In addition to connecting us to information through indexing and linking, the internet makes it easier to access and process information without being limited to particular devices and locations, principally through cloud computing. Lawyers can access documents they are working on (including in Google's case, this very submission) from wherever they happen to be. Music lovers can access lawfully made copies of their music regardless of whether they are at home, in the car, or waiting at an airport for a delayed flight.

<sup>&</sup>lt;sup>7</sup> http://www.youtube.com/watch?v=9bZkp7q19f0



Copyright laws are based on the ancient concept of a "copy," owning a physical copy of a book. Copyright laws were designed, not surprisingly, to give book publishers control over copies of books. But copyright laws based on the Gutenberg printing press are not effective for accessing information over the internet on a mobile phone, and where our objective may not be to own a physical copy of something but rather merely to access it on the device of our choice. 'Copyright laws without copies' is more than just a non sequitur; it is a powerful sign that our laws are outdated.

The internet has also breathed new life into remix culture, where creativity consists of transforming (remixing) parts of popular culture in new ways into new works. Such remixing has always been a part of creativity: the Renaissance composers frequently built masses on the works of others, Leonard Bernstein from Shakespeare and Shakespeare from many more. Such creative re-use of others' was prized as showing originality, both by the public and by the original creator.

Today, with the advent of digital tools, such creative transformations are ubiquitous. Copyright laws used to respect this creative use of tradition, and they should be amended so that they do once again. Our copyright laws can either facilitate the way culture is now created, or, as is too often the case, impede the creation of new works.

## Australia is not alone in considering these issues

Australia is not alone in examining the relationship between copyright, innovation and economic growth. The ALRC review is taking place in the context of growing international recognition of the need to inject greater flexibility into copyright law to remove barriers to innovation by allowing new legitimate uses and services to evolve as technology evolves. Policy makers around the world are reflecting on the economic and social costs of inflexible copyright laws. Countries with flexible fair use exceptions now include Canada,<sup>8</sup> Singapore,<sup>9</sup> Japan,<sup>10</sup> the Philippines,<sup>11</sup> South Korea<sup>12</sup> and Israel.<sup>13</sup> The Irish Government is considering whether to introduce a fair use exception and the UK Government is considering how to introduce greater flexibility into its copyright law.<sup>14</sup> The Dutch Government is seeking to initiate discussion at the European political level on a fair use regime.<sup>15</sup>

<sup>&</sup>lt;sup>8</sup> Copyright Modernization Act 2012.

<sup>&</sup>lt;sup>9</sup> Singapore Copyright Act, s35.

<sup>&</sup>lt;sup>10</sup> Japanese Copyright Act, Article 30-2.

<sup>&</sup>lt;sup>11</sup> *Philippines Intellectual Property Code*, s185.

<sup>&</sup>lt;sup>12</sup> Korean Copyright Right Act, Article 35-3.

<sup>&</sup>lt;sup>13</sup> Israeli Copyright Act, s19.

<sup>&</sup>lt;sup>14</sup> See Irish Copyright Review Committee Consultation Paper on Copyright and Innovation (2012) <http://www.djei.ie/science/ipr/crc\_consultation\_paper.pdf> and Digital Opportunity: A Review of Intellectual Property and Growth (May 2011) <http://www.ipo.gov.uk/ipreview-finalreport.pdf>.

<sup>&</sup>lt;sup>15</sup> Parliamentary Record 21501-34, no. 155. (The Hague: House of Representatives, 2011).



The Vice-President of the European Commission responsible for the Digital Agenda, Neelie Kroes, recently made the following comments regarding the need to reform copyright law to promote digital innovation and growth in the EU:<sup>16</sup>

...the world has changed, and is changing still. The change is rapid, it is profound, and it is a huge opportunity for the creative sector.

Each day we fail to respond, we are missing out. Consumers miss out on easy, legal access to their favourite products. The creative sector misses out on new markets, new innovations, new opportunities. We all miss out on new ways to share, recognise, and appreciate our cultural heritage. And our economy overall misses out on the chance of new growth...

The world is changing fast. Let's not wait for ever faster technology to be ever more constrained by ever more outdated legislation. Let's not wait for the USA to speed ahead of Europe. Let's act right now: for artists, consumers, for our economy.

Ms Kroes might just have well have been talking about Australia as about Europe. The world **is** changing fast. Potentially high flying ideas **are** getting stuck on the runway. And every day that passes without copyright reform, Australia **does** put itself in a worse position. This review is timely. It provides a critical opportunity to develop policy settings and copyright exceptions that appropriate in an age of rapid technological change, and that will promote innovation, creativity and the development of the digital economy.

<sup>1 &</sup>lt;sup>16</sup> Neelie Kroes Vice-President of the European Commission, 10/09/2012, <a href="http://europa.eu/rapid/press-release\_SPEECH-12-592\_en.htm">http://europa.eu/rapid/press-release\_SPEECH-12-592\_en.htm</a>



## 3 Internet is a boon for creators

The creative, social and business opportunities afforded by the internet have been embraced by Australians. Internet infrastructure is a key enabler of the Australian cultural boom through the programs, platforms and monetisation opportunities provided by internet companies.

In September 2011, a range of companies sponsored Creative Australia Online, an event hosted in Canberra that showcased exciting Australian content made possible as a result of the internet. The showcase highlighted the innovative methods of production, distribution and audience engagement that are finding contemporary success.

Presenters such as the creators of Beached Az, the Sydney Opera House, YouTube, Aussie games developers and the interactive news teams at ninemsn and Yahoo!7 demonstrated how the internet offers Australians unprecedented opportunities to produce and distribute content to local and global audiences. Some examples of the Australian content creators highlighted at Creative Australia Online are provided at Appendix 1.

## Culture Boom - How digital media are invigorating Australia

The main findings of this 2012 report by the Boston Consulting Group include:<sup>17</sup>

1. The Australian media industry is healthy, with the Internet providing a "shot in the arm" across the sector:

- Total annual revenues of the sector are expected to grow from \$24.8b in 2011 to \$29.1bn by 2015.
- Revenue is still predominantly generated offline (93% in 2011, 86% in 2015) but online media are driving growth. Between 2007 and 2011, 40% of the expansion in media revenue came from online, and this is expected to hit 50% to 2015.
- Jobs in the media sector are projected to grow from 105,000 in 2011 to 120,000 by 2015. Online is likely to create half of those extra jobs.

2. Consumers are happy:

- The Internet has stimulated, rather than reduced interest in other media. Online Australians watched more broadcast TV, listened to more radio, and spent more time reading newspapers than they had three years earlier.
- Media consumption behaviour is changing online Aussies are increasingly multiscreening and consuming more niche content (e.g. 20% of Australia's opera viewing takes place online).
- A survey of 1,000+ Internet users shows that people believe online content is getting better, Australian content is as good as international content, and that the Internet

<sup>&</sup>lt;sup>17</sup> Belza, Jan; Forth, Patrick; Purnell, James and Zwillenberg, Paul, *Culture Boom: How Digital Media are Invigorating Australia* (The Boston Consulting Group, March 2012)

makes it easier to promote Australian content overseas.

• Internet media is delivering an annual consumer surplus of \$24bn p.a. - this is the value that consumers put on online content over and above what they already pay for it. Of this total, platforms like YouTube are delivering a value of \$1,400 per year to every connected household, equivalent to a nationwide benefit of \$9bn per year.

Google

## 3. Australian content remains popular and the Internet has helped it reach a global audience:

- Australians still prefer local content. For example, the Top 20 TV programmes since 2007 have all been Australian-made. 35% of newspaper reading is done online and readers overwhelmingly (91% of the time) choose Australian newspaper websites.
- Australia is running a trade surplus in online video, with overseas users watching more Australian content than Australians watch overseas content. There is a huge global audience for Australian content, with 8 times as much Australian content watched overseas as at home.

Internet creation and distribution can also help more traditional content industries. Data from PricewaterhouseCoopers and iDate show that from 1998 to 2010 the value of the worldwide entertainment industry grew from \$449 billion to \$745 million.<sup>18</sup> During the same period of time, BLS data shows that the number of people who were independent artists in the United States grew by 43%:<sup>19</sup>

[N]ew technologies and services have made it much easier for content creators to find success without going through the traditional gatekeepers. [This data] also raises questions for those who claim that the changing marketplace has been most difficult for independent artists. The data simply does not back that up.

Traditional media outlets are experiencing strong growth when embracing online delivery methods. In September 2012 ABC's iView set a new iView ratings record of 75,900 plays in a day when it premiered the first episode of the new *Doctor Who* season on the online viewing platform – at the same time as it was premiered in the UK.<sup>20</sup>

Technological advancements are also impacting more traditional forms of copyrighted expression. The Internet has had a positive impact in terms of growth in creativity. As Joel Waldfogel noted recently in relation to the music industry:<sup>21</sup>

<sup>&</sup>lt;sup>18</sup> Masnick, Michael and Ho, Michael, *The Sky is Rising. A Detailed Look at the State of the Entertainment Industry* (Consumer and Communications Industry Association, January 2012), 2
<sup>19</sup> Ibid, 3

<sup>&</sup>lt;sup>20</sup> Knox, David, 'Doctor Who Sets New iView Record', *TV Tonight* (3 September 2012) <a href="http://www.tvtonight.com.au/2012/09/doctor-who-sets-new-iview-record">http://www.tvtonight.com.au/2012/09/doctor-who-sets-new-iview-record</a>

<sup>&</sup>lt;sup>21</sup> Waldfogel, Joel, *And the Bands Played On: Digital Disintermediation and the Quality of New Recorded Music*, University of Minnesota and NBER (25 June 2012), Preliminary Draft <a href="http://conference.nber.org/confer/2012/SI2012/PRIT/Waldfogel.pdf">http://conference.nber.org/confer/2012/SI2012/PRIT/Waldfogel.pdf</a>.



Despite a substantial drop in major-label album releases, the total quantity of new albums released annually has increased sharply since 2000, driven by independent labels and purely digital products. Second, increased product availability has been accompanied by a reduction in the concentration of sales in the top albums. Third, new information channels – Internet radio and online criticism – change the number and kinds of products about which consumers have information. Fourth, in the past dozen years, increasing numbers of albums find commercial success without substantial traditional airplay. Finally, albums from independent labels – which previously might not have made it to market – account for a growing share of commercially successful albums.

Google will continue to innovate to provide more and more opportunities for creators to innovate and reach new audiences - both technologically and through partnerships with content providers - to develop new and beneficial business models for content distribution. The evidence shows that Australian copyright owners are embracing these business models.

#### Creativity is not just about creating new works

Not all of the activities commonly considered to be innovative concern the creation of new works. Some concern new business models and new ways of bringing works to market. This does not detract from creators, but rather recognises that those who invent new technologies and distribution platforms play an important role in ensuring that creators are compensated.

Innovation and creativity are, by their nature, dynamic rather than static. A defining attribute of the internet is its unplanned, distributed nature, where "distributed" refers to multiple autonomous computers and software, all interacting without a central command. It is precisely the absence of a central command and control that has made the internet's phenomenal growth possible, and what makes digital creativity so exciting. Digital creativity is something we all engage in, without regard to borders or to traditional cultural and market gatekeepers. Thanks to innovative digital technologies, creativity is no longer a central command activity; it is a dynamic and democratic one. But if we truly want to encourage this new creativity and innovation, we need dynamic, flexible laws that reflect their dynamic nature.

Google believes that copyright law should:

- encourage creativity and enable artists and authors to make money from their content in the online environment;
- ensure end-users have appropriate access to knowledge and cultural products, as well as the freedom to create parodies, mashups and otherwise innovate with content; and
- provide legal certainty to technology creators, including online service providers, and an environment which enables them to experiment with new technologies, business models and services, through safe harbors and exceptions for Internet-related functions.

We support copyright policy that protects copyright owners and fosters innovation in ways that help people create, distribute, and access information. We believe that these goals are fully consistent with the objectives of the terms of reference to this review.



## 4 Internet is a driver of productivity and growth

The Government has identified the digital economy as being "essential to Australia's productivity, global competitiveness and improved social well being", and has set itself the goal of becoming one of the world's leading digital economies by 2020. The Government has also committed itself, through the Seoul Declaration for the Future of the Internet Economy,<sup>22</sup> to "promote the internet economy and stimulate sustainable economic growth and prosperity by means of policy and regulatory environments that support innovation, investment and competition in the information, communications and technology sector".

This review will be of central importance in ensuring that these goals are met. Achieving them requires not just the right digital infrastructure, but also a legal environment conducive to investment in the technologies, products, and services that make up the digital economy. In a recent submission to Government, research and development organisation National ICT Australia (NICTA) commented that legislation - including copyright legislation - "should foster innovation while protecting citizens and business".<sup>23</sup>

There is overwhelming evidence that adoption of the internet drives productivity and growth. The *Connected Continent* report estimated that the direct contribution of the internet to the Australian economy was worth approximately \$50 billion, which was equivalent to 3.6 per cent of GDP in 2010.<sup>24</sup> That is expected to increase by at least \$20 billion over the next five years to \$70 billion,<sup>25</sup> although the study authors suggest that this estimate may well turn out to be on the low side in light of the fact that it is currently impossible to predict the myriad of applications that will be made possible by broadband connections.

To put these figures into context, the same report found that the retail industry and education and training sectors each contribute \$53 billion to the economy. Agriculture and fishing contributes \$27 billion. The arts and recreation sector contributes \$10 billion.

The internet also provides wider benefits beyond its direct economic impact. The *Connected Continent* report found that these wider benefits (which are not fully captured in GDP calculations) include approximately \$27 billion in productivity increases to businesses and government and the equivalent of \$53 billion in benefits to households.<sup>26</sup>

 <sup>&</sup>lt;sup>22</sup> Organisation for Economic Cooperation and Development, Seoul Declaration on the Future of the Internet Economy 2008 (18 June 2008) <a href="http://www.oecd.org/internet/consumerpolicy/40839436.pdf">http://www.oecd.org/internet/consumerpolicy/40839436.pdf</a>
 <sup>23</sup> NICTA, National ICT Australia Submission to the Inquiry into the Role and Potential of the National Broadband Network by the House Standing Committee on Infrastructure and Communications (March 2011)<a href="http://www.aph.gov.au/Parliamentary\_Business/Committees/House\_of\_Representatives\_Committees?url=ic/nbn/subs.htm">http://www.aph.gov.au/Parliamentary\_Business/Committees/House\_of\_Representatives\_Committees?url=ic/nbn/subs.htm</a>

<sup>&</sup>lt;sup>24</sup> Deloitte Access Economics, *The Connected Continent: How the Internet is Transforming the Australian Economy* (August 2011), 2

<sup>&</sup>lt;sup>25</sup> Ibid 46

<sup>&</sup>lt;sup>26</sup> Ibid 1



McKinsey Global Institute's *Internet Matters* study demonstrated that the internet has contributed an average of 21% to the GDP growth of mature countries over the past five years and that internet-related consumption is now bigger than both the agriculture and energy sectors.<sup>27</sup> Likewise, in its most recent report *The Internet Economy in the G-20: The \$4.2 Trillion Opportunity*, the Boston Consulting Group revealed that the internet economy is growing at over 10% per annum in G20 nations and is projected to reach a value of \$4.2 trillion in 2016 - nearly double its size in 2010.<sup>28</sup>

A policy framework that supports investment and innovation in the internet economy is essential if Australia is to take full advantage of the social and economic opportunities that the internet provides. As the Government stated in its 2009 Innovation Agenda for the 21st Century:<sup>29</sup>

The function of the intellectual property system is to stimulate innovation. Patents, trade marks, copyright and other protections exist to give creators a reasonable chance of profiting from their investment in whatever it is they have created — typically by granting them an exclusive right to exploit the creation for a specified time. The trick is to get the balance right: too little protection will discourage people from innovating because the returns are uncertain; too much protection may discourage people from innovating because the pathways to discovery are blocked by other intellectual property owners.

<sup>&</sup>lt;sup>27</sup> Pelissie du Rausas, Matthieu, Manyika, James, Hazan, Eric, Bughin, Jacques, Chui, Michael and Said, Renu, *Internet matters: The Net's sweeping impact on growth, jobs and prosperity* (May 2011, McKinsey Global Institute)

<sup>&</sup>lt;sup>28</sup> Dean, David, DiGrande, Sebastian, Field, Dominic, Lundmark, Andreas, O'Day, James, Pineda, John and Zwillenberg, Paul, *The Internet Economy in the G20: The \$4.2 Trillion Growth Opportunity* (March 2012, The Boston Consulting Group)

<sup>&</sup>lt;sup>29</sup> Department of Industry, Innovation, Science, Research and Tertiary Education, *Powering Ideas: An Innovation Agenda for the 21st Century* (2009)

<sup>&</sup>lt;http://www.innovation.gov.au/innovation/policy/pages/PoweringIdeas.aspx>



## 5 Exceptions encourage creativity, productivity and growth

In the same way that the Internet drives productivity and economic growth, there is substantial empirical evidence showing the importance of copyright exceptions to productivity and economic growth. Copyright laws should encourage all creators, not just the works of large multinational corporations, and recognise that transformative copying is a form of creativity which itself can lead to productivity and growth.

Fair use and fair dealing can encourage further creation by traditional content owners as well as permitting the development of new technological uses of copyright materials. Many companies are both copyright owners and users. Viacom, Inc., a very large, litigious media company that has regularly spoken in favor of strong copyright rights, relies heavily on fair use for its popular "Daily Show with Jon Stewart" and "The Colbert Report."<sup>30</sup> The idea that fair use somehow reduces copyright owners' rights is belied by the regular practice of large U.S. media companies applying fair use in their every day commercial decisions.

## The international experience

A study in the United States conducted by the Computer and Communications Industry Association *Fair Use in the US Economy* explored the economic contribution of industries that depend on the limitations to copyright protection, and found:<sup>31</sup>

In an era of highly competitive markets for information goods and services, changes to the boundaries of copyright protection will alter the economic landscape. Broader regulation of economic activity by copyright might encourage additional creativity, but it will deter certain types of technology innovation, and may undermine creativity and free expression.

The key findings from the study are:

- In 2007, fair use industries generated revenue of \$4.7 trillion, a 36 percent increase of 2002 revenue. In percentage terms, the most significant growth over this five year period occurred in internet publishing, broadcasting, web search portals, electronic shopping, electronic auctions and other financial investment activity.
- Fair use industries grew at a faster pace than the broader economy. From 2002 to 2007 fair use industries accounted for 23 percent of US real economic growth.<sup>32</sup>

<sup>31</sup> Rogers, Thomas, Szamosszegi, Andrew and Capital Trade Inc, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (Computer & Communications Industry Association, 2010), 4

<sup>&</sup>lt;sup>30</sup> Cheng, Jacqui, 'Viacom: "Fair Use Works for Us", Unlikely to Sue Blogger' (5 March 2010) Ars Technica <a href="http://arstechnica.com/tech-policy/2010/03/viacom-fair-use-works-for-us-unlikely-to-sue-over-clips">http://arstechnica.com/tech-policy/2010/03/viacom-fair-use-works-for-us-unlikely-to-sue-overclips</a>

<sup>&</sup>lt;sup>32</sup> Ibid 8



The report recognised the balance that must occur in copyright policy between incentives to create and incentives to innovate:<sup>33</sup>

Certainly copyright protection provides an incentive for the production of creative works and these works have a positive impact on the US economy. The positive aspects of copyright protection should not, however, obscure that fair use is also a vital economic driver in the digital age.

Another recent study considered the impact of fair use on the Singapore economy.<sup>34</sup> The study found that the period following the introduction of fair use in 2006 correlated to a period of significant growth for the 'private copying industries' - growth in manufacturers of devices enabling consumers to store, copy, format and time-shift copyrighted material. Prior to the introduction of fair use, private copying industries experienced average annual growth of 1.97%. In the period following the introduction of fair use, these same industries enjoyed a 10.18% average annual growth rate. This resulted in a total increase of  $\in$  2.27 billion in value-added for private copying technology industries in that period.<sup>35</sup>

## An Australian analysis

Recent studies in Australia have also identified the significance of copyright exceptions to the Australian economy. In September 2012, the Australian Digital Alliance released two reports prepared by Lateral Economics which examined the economic contribution to Australia of industries relying on limitations and exceptions to copyright (*Exceptional Industries*<sup>36</sup>) and setting out the economic case for flexible copyright exceptions and extended safe harbour provisions (*Excepting the Future*<sup>37</sup>).

The studies found that industries relying on limitations and exceptions to copyright are a sizable part of Australia's economy. In 2010, these industries:

- Contributed 14% to Australia's GDP, or \$182 billion
- Employed 21% of the Australian paid workforce, almost 2.4 million people
- Paid salary and wages of \$116 billion during 2010.<sup>38</sup>

<sup>&</sup>lt;sup>33</sup> Ibid 14. Note that in the report 'fair use' is also used as short hard for the combination of limitations and exceptions in US copyright law. See page 7.

<sup>&</sup>lt;sup>34</sup> Ghafele, Roya and Gibert, Benjamin, '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', *The Selected Works of Roya Ghafele* (2012) < http://works.bepress.com/roya\_ghafele/1> <sup>35</sup> Ibid

<sup>&</sup>lt;sup>36</sup> Lateral Economics, *Exceptional Industries: The Economic Contribution to Australia of industries relying on limitations and exceptions to copyright (August 2012)* 

<sup>&</sup>lt;sup>37</sup> Lateral Economics, *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012) <http://digital.org.au/our-work/publication/exceptional-industries-and-excepting-future>

<sup>&</sup>lt;sup>38</sup> Australian Digital Alliance, *Potential \$600m Annual Economic Boost From Copyright Reform* (September 2012), 3 <a href="http://digital.org.au/media/165">http://digital.org.au/media/165</a>>



Between 2007 and 2010, the economic contribution of copyright exceptions reliant industries grew significantly faster than the rest of the economy. For example, economic contribution to GDP grew by 2.6% compared to the economy wide figure of 1.6%.<sup>39</sup> According to the report:<sup>40</sup>

Better crafted limitations and exceptions would assist some of Australia's most globally competitive industries to become even more competitive. ... [The introduction of flexible exceptions] which are nevertheless subject to careful tests to ensure that they do not undermine the ability of rights holders to exploit their works ... should have negligible downsides for rights holders.

The report's modeling suggests that the economic benefits to Australia from introducing a more flexible exception into Australian copyright law could create an additional value added or welfare gain to the Australian economy of \$600 million annually after a period of time.<sup>41</sup>

Google submits that the ALRC must undertake its deliberations about the appropriateness of Australia's copyright exceptions for the digital economy against this research about the economic contribution of industries reliant on copyright exceptions to the broader Australian economy as well as the vibrant 'culture boom' occurring due to the new content creation and distribution models afforded by the internet.

<sup>&</sup>lt;sup>39</sup> Ibid

<sup>&</sup>lt;sup>40</sup> Lateral Economics, *Excepting the Future*, 2

<sup>&</sup>lt;sup>41</sup> Ibid 3. Note that this is a conservative estimate based on an assumption of real growth being just onehundredth higher than it was from 2007 to 2010 as a result of the introduction of more flexible copyright exceptions.



## 'Excepting the Future' and 'Exceptional Industries': ADA/ Lateral Economics Reports

A snapshot of key findings:

- The 'use value' of online activities to household internet users in Australia is calculated in the reports to be around \$60 billion a year with \$49 billion of that value contributed by internet services.
- Compared to other countries, Australia's outdated copyright laws stifle the innovation and investment environment for online services such as web hosts, search engines and social media.
- Inadequate and inflexible copyright exceptions and safe harbour exceptions that extend only to carriage service providers means that Australian online services face substantially more risk of copyright violations than in comparable countries.
- As a result, Australia's current copyright regime fosters risk and uncertainty, which can have a substantial negative impact on investment and innovation because of the risks and costs associated with legal challenges, and the impact of these risks on investment and innovation.
- Investors value reduced risk and uncertainty from copyright limitations and exceptions at around \$2 billion a year.
- Australia needs a more flexible and technology neutral copyright regime to meet the digital reality of the 21st century and the evolving needs of society.
- Flexible copyright exceptions and better crafted safe harbours would make a substantial contribution to Australia's economic growth and innovation with negligible downsides for rights holders.
- Australia's net exports of services depending on copyright exceptions reached \$14 billion in 2010.
- Where as, Australia had a net deficit of nearly \$3 billion from payments for use of intellectual property in 2010, a deficit that has grown by 9% annually since 2006.
- The recommended changes to copyright exceptions and safe harbours would improve productivity growth and enable some of Australia's most globally competitive industries to become even more competitive.
- Over time the additional value added to the Australian economy achieved by flexible exceptions and broadened safe harbour provisions is conservatively estimated to grow to around \$600 million annually.
- Any litigation costs arising from the introduction of flexible exceptions to Australia would be dwarfed by the downstream economic benefits of greater innovation and investment.
- Further, such changes would, by definition not undermine the ability of rights holders to exploit their works and should have negligible downsides for rights holders.



## Narrow or insufficient copyright exceptions impede economic growth

The opportunity cost that a high-risk copyright environment has on the level of investment in internet industries is illustrated starkly in recent research undertaken by Professor Josh Lerner at Harvard Business School.<sup>42</sup> Professor Lerner wanted to know whether the decision of the U.S. Second Circuit Court of Appeals in *Cartoon Network, et al. v Cablevision* - a case that was widely seen as clarifying the copyright status of cloud computing - had any impact on venture investment in cloud computing firms. He found that venture capital investment in cloud computing firms increased significantly in the U.S. relative to the EU after the *Cablevision* decision:<sup>43</sup>

Our results suggest that the Cablevision decision led to additional incremental investment in U.S. cloud computing firms that ranged from \$728 million to approximately \$1.3 billion over the twoand-a-half years after the decision. When paired with the findings of the enhanced effects of VC investment relative to corporate investment, this may be the equivalent of \$2 to \$5 billion in traditional R&D investment.

Professor Lerner's study suggests that decisions around the scope of copyrights can have significant impacts on investment and innovation, and in particular on the question of whether investment flows in the online economy to one jurisdiction or another.

It is informative to observe that in contrast to the investment growth observed in the US economy following the Cablevision decision, sadly Australia has recently observed the opposite effect on innovation and investment following the Full Federal Court's decision in Optus TV Now<sup>44</sup> and the High Court's subsequent refusal to grant Special Leave to appeal.<sup>45</sup> As Dr Rebecca Giblin notes in her article *Stranded in the Technological Dark Ages: implications of the Full Federal Court's decision in NRL v Optus*,<sup>46</sup> not just TV Now but all of the remote DVR services operating from Australia shut down<sup>47</sup> following the Court's decision.

<sup>&</sup>lt;sup>42</sup> Lerner, Josh, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (2012)

<sup>&</sup>lt;http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/00000000559/Cablevision%20white%20pap er%20(11.01.11).pdf>

<sup>&</sup>lt;sup>43</sup> Ibid 1

<sup>&</sup>lt;sup>44</sup> National Rugby League Investments v Singtel Optus Pty Ltd [2012] FCAFC 59

<sup>&</sup>lt;sup>45</sup> *Singtel Optus Pty Ltd v National Rugby League Investments* High Court of Australia, 7 September 2012, transcript available at <a href="http://www.austlii.edu.au/au/other/HCATrans/2012/214.html">http://www.austlii.edu.au/au/other/HCATrans/2012/214.html</a>

<sup>&</sup>lt;sup>46</sup> Giblin, Rebecca, 'Stranded in the Technological Dark Ages: Implications of the Full Federal Court's Decision in NRL v. Optus' (2012) 34(9) *European Intellectual Property Review* <a href="http://ssrn.com/abstract=2086396">http://ssrn.com/abstract=2086396</a>>

<sup>&</sup>lt;sup>47</sup> Taylor, Josh, 'Cloud TVRs Stop in the Wake of TV Now Ruling', *ZDNe*t (24 May 2012) <<u>http://www.zdnet.com.au/cloud-tvrs-stop-in-wake-of-tv-now-ruling-339338503.htm</u>>

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Dr Giblin writes:<sup>48</sup>

It is time ... that Australia implemented a regulatory regime that encouraged rather than hindered innovation

Another study, by Booz & Company,<sup>49</sup> on US angel investors and venture capitalists and their attitudes toward copyright, underscored the findings of Professor Lerner's study - reinforced by recent events in Australia - that copyright legal decisions can have significant impacts on investment and innovation. The Booz & Company study found that:

- There would be double the amount of investment interest if there was clearly defined legislation to protect websites acting in good faith.
- Limiting penalties for online service providers acting in good faith expanded the pool of investors by 115%.
- 80% of investors are uncomfortable investing in business models that are open to unpredictable regulations.
- 81% of investors said that weakened copyright safe harbour rules would be more likely to slow their investment decisions than would a weakening economy.

In other words, for these investors, bad copyright law is worse than a recession. While robust and well designed safe harbours are one aspect of the copyright certainty that these investors require, another is exceptions that are sufficiently flexible to cope with the challenges and opportunities of rapid technological advance.

<sup>&</sup>lt;sup>48</sup> Giblin, above n38, 20-21

<sup>&</sup>lt;sup>49</sup> La Merle, Matthew, Sarma, Raju, Ahmed, Tashfeen and Pencavel, Christopher, *The Impact of US Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study*, (Booz & Co, 25 Oct 2011) <*http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf*>



## 6 Guiding principles for the review

Google is broadly in agreement with the guiding principles set out in the Issues Paper. We would, however, make the following further comments:

## Copyright law must be fit for purpose

The overarching purpose of this review and of the copyright reviews currently taking place in the UK and Ireland is to ensure that copyright law is fit for purpose in the digital age. A copyright law that permits copyright owners to control virtually every use of a work is not a law that is fit for purpose in the digital age. As Professor Ian Hargreaves asked and answered:<sup>50</sup>

Could it be true that laws designed more than three centuries ago with the express purpose of creating economic incentives for innovation by protecting creators' rights are today obstructing innovation and economic growth?

The short answer is: yes.

As discussed in Part 2 of this submission, an important reason for this answer is the failure of copyright laws to take into account first the technological realities of the Internet, and second the changed nature of creativity using digital tools.

The very nature of the internet is to make and disseminate copies of information. In determining what kinds of copying that copyright owners should be permitted control, it is more important than ever to keep the purpose of copyright law firmly in mind. This has been recognised in Australian copyright law since the introduction of the *Copyright Amendment (Digital Agenda) Act 2000* where the then Government expressed as a key aim:<sup>51</sup>

ensuring that the technological processes which form the basis of new technologies such as the internet are not jeopardised.

Professor Hargreaves noted recently that the fact that new technical uses (such as caching, search and data/text mining) happen to fall within the scope of copyright under UK law is "essentially a side effect of how copyright has been defined rather than being directly relevant to what copyright is supposed to protect".<sup>52</sup> This observation is in our view of critical importance to this review. Copyright law oversteps its purpose, and harms innovation, when it enforces rigid constraints that stifle productive and reasonable new uses of copyrighted works.

<sup>&</sup>lt;sup>50</sup> Digital Opportunity: A Review of Intellectual Property and Growth (the Hargreaves Review), 1

<sup>&</sup>lt;sup>51</sup> See for example Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Act 2000* paragraph 63

<sup>&</sup>lt;sup>52</sup> The Hargreaves Review, above n49, para 5.24

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The Chair of the ACCC, Rod Sims, recently stated:<sup>53</sup>

The digital economy can provide lower prices, innovative business models and other potential benefits including immediacy, convenience, and a wider range of choice for consumers. Our aim is to make sure those benefits are maximised.

Google believes that the ALRC should have a similar aim in conducting this review - to ensure that copyright laws are designed in such a way to maximise the benefits of the digital economy while providing incentives to create and ensuring the ability of Australians to use content in the advancement of education, research and culture.

#### Device and technology neutrality as a goal

Google believes that the copyright framework should be device and technology agnostic wherever possible. The importance of technology neutrality was recently recognised by the Supreme Court of Canada in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*.<sup>54</sup>

"The Board's conclusion that a separate, "communication" tariff applies to downloads of musical works violates the principle of technological neutrality. This principle requires that the Act apply equally between traditional and more technologically advanced media forms. There is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. ESA has already paid reproduction royalties to the copyright owners for the video games. Absent evidence of Parliamentary intent to the contrary, we interpret the Act in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies. The Internet should be seen as a technological taxi that delivers a durable copy of the same work to the end user. The traditional balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creators of those works should be preserved in the digital environment.<sup>55</sup>"

In a converged media environment, where a multitude of different devices and technologies can be used to create and distribute content, it is imperative that regulation does not have the unintended consequence of restricting or impeding technological innovation and investment via artificial and outdated technological limitations. One example of this is the state of the law following the Optus TV Now case.

<sup>&</sup>lt;sup>53</sup> Australian Competition and Consumer Commission, *Consumer Protection Online* (2012), <<u>http://www.accc.gov.au/content/index.phtml/itemId/1064585?pageDefinitionItemId=86167></u>.

<sup>&</sup>lt;sup>54</sup> Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada 2012 SCC 34.

<sup>&</sup>lt;sup>55</sup> Per McLachlin C.J. and Deschamps, Abella, Moldaver and Karakatsanis JJ.



Consider the following scenarios:

Scenario A. John will arrive home from work at 7:30pm but wants to watch the ABC news. The night before, he sets the recorder on his Digital Video Recorder to record it while he is out. This activity is lawful under s111 of the Copyright Act.

Scenario B. Jane also arrives home from work at 7:30pm and wants to watch the ABC news. She has forgotten to set the timer on her Digital Video Recorder. She has a set top box recorder as part of her subscription television service. She uses her smartphone to use her subscription broadcaster's mobile app to set her MyStar box (located in her home) to record the ABC news. It is assumed this activity is lawful under s111 of the Copyright Act as the copy is made on the device located in her home.

Scenario C. Sofia also wishes to record the ABC news because she won't be home from work in time. She also uses her smartphone to download an app from a remote storage provider to access an electronic program guide and selects the ABC news. A copy of the ABC news is made for her in a data centre owned by the data storage provider and then later communicated to her smartphone. It is assumed that this activity is now not permitted under s111 following the decision of the Full Federal Court in Optus TV Now.

Google believes that the key consideration in these scenarios should be whether making the copy is fair (i.e., for the purposes of personal time shifted viewing), not the device on which the content is viewed nor the method by which the copy is made, or whether the copy was made by a commercial organisation.

## Copyright is an aspect of economic policy

The Hargreaves review recognised the importance of promoting innovation and growth through policies based on evidence, rather than ideological assertions. It suggested that the UK Intellectual Property Office should be given an overarching legal mandate to pursue economic objectives, along with the powers to access data so that it can, for example, make evidence based recommendations to the UK competition authorities.<sup>56</sup> Google believes that the ALRC should take a similar empirical or evidence-based approach to this review.

Google would like to see the guiding principles for this review more clearly reflect the importance of ensuring that reform takes place in accordance with broader economic policy considerations, such as National Competition Policy as outlined in the Competition Principles Agreement. While this is arguably implicit in the guiding principles set out in the Issues Paper, we urge the ALRC to make this explicit. It is in our view imperative that the public's interest in promoting an innovative and competitive digital economy is fully taken into account in any reform proposals. Bringing economic and competition principles into the foreground of copyright

<sup>&</sup>lt;sup>56</sup> Ibid 6.

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reform discussions will help ensure that copyright is not used for purposes that go beyond the intended scope of the grant, in ways that block innovation, creativity and the development of the digital economy.

Google draws the ALRC's attention to recommendation 7.3 of the report by Dr Terry Cutler reviewing Australia's innovation system:<sup>57</sup>

Professional practitioners and beneficiaries of the IP system should be closely involved in IP policy making. However, IP policy is economic policy. It should make the same transition as competition policy did in the 1980s and 1990s to being managed as such.

Lateral Economics describes the economic policy assessment of the impact of copyright systems on investments in digital economies as follows:<sup>58</sup>

Because many digital services can be provided at a distance, the relative cost (including risk) of different national copyright systems for investors and entrepreneurs, including content providers, intermediaries and users, affects the location of investment. From an economic perspective, the key issue is to strike a balance between the incentive to create content and the opportunities for intermediaries and users to innovate, with the economic policy task being to jointly optimise their surplus.

## Future proofing the Copyright Act

The Australian Copyright Act has traditionally relied on specific exceptions addressing individual circumstances or technological developments. As the Copyright Law Review Committee recognised in 1998:<sup>59</sup>

much of the present complexity in the fair dealing provisions and the miscellany of other provisions and schemes that provide for exceptions to copyright owners' exclusive rights is due to the fact that they operate on the basis of a particular technology or in relation to dealings with copyright materials in a particular material form. Technological developments will no doubt continue, and they will probably affect copyright owners and users in ways that are and will remain unpredictable.

Writing in 1998, the CLRC could not possibly have predicted the communications revolution that has been brought about by the unknown technological developments it foreshadowed. To put this in context, 1998 was the same year that the Google search engine was launched.

<sup>&</sup>lt;sup>57</sup> Terry Cutler, Venturous Australia, Cutler & Company Pty Ltd 2008

<sup>&</sup>lt;http://www.business.nsw.gov.au/\_\_data/assets/pdf\_file/0016/5407/NIS\_review\_Web3.pdf>

<sup>&</sup>lt;sup>58</sup> Lateral Economics, *Excepting the Future*, 16

<sup>&</sup>lt;sup>59</sup> Copyright Law Review Committee, *Simplification of the Copyright Act 1968,* 'Part 1 Exceptions to the Exclusive Rights of Copyright Owners', para 6.01



The following table gives just a brief reminder of the massive technological innovations affecting the internet since 1998:

1998	Launch of google.com
1999	Launch of Napster
2000	AOL buys TimeWarner
2001	Launch of wikipedia.org
2002	Launch of paypal.com
2003	Launch of myspace.com, linkedin.com
2004	Launch of flickr.com
2005	Launch of youtube.com, bebo.com
2006	Launch of facebook.com, twitter.com
2007	Apple surpasses 1 billion iTunes downloads 1.14 billion users on the network 1,301,000 internet domains Launch of the iPhone
2009	53 million smartphones sold globally in Q4 2009
2010	YouTube reaches over 2 billion views per day Launch of Pinterest and Instagram Launch of Apple iPad
2011	Number of monthly unique viewers to Google surpasses 1 billion Launch of Google Plus Launch of Kindle Fire
2012	YouTube uploads grow to 72 hours of video content per minute

In the face of this wave of innovation - and the next unpredicted wave that is sure to occur -Google submits that any analysis of whether copyright exceptions are adequate and appropriate for the digital environment, must not constrain its analysis to whether copyright exceptions are appropriate for the digital economy as it exists today. Google believes that it is imperative that the ALRC include as a guiding principle the need to 'future proof' the Australian Copyright Act for the next wave of innovation, by way of an open-ended flexible exception.



## 7 Inflexible copyright laws are impeding innovation

Google is concerned that the current copyright regime does not adequately support the Government's goal, set out in the National Digital Economy Strategy, of Australia becoming one of the world's leading digital economies by 2020.<sup>60</sup> Outdated Copyright laws are preventing local start-ups from developing innovative products and services with confidence. They stand in the way of innovative internet industries engaged in new kinds of search and web 2.0 services engaging in their full range of operations in Australia. They do not position Australia to be at the forefront of the next wave of technological innovation.

Australian copyright law has failed to keep up with technological and social change. Narrow, purpose-based exceptions are standing in the way of technological innovation and new forms of creativity. This is affecting the ability of creators to earn a living. It is also affecting the introduction of new or innovative business models. In an age of exponential digital technological development, the numbers of occasions when innovators might want to use copyrighted material to generate new products in ways that are not permitted by existing copyright exceptions is only likely to increase. Google submits that an inflexible copyright regime is putting Australia's companies and citizens at a disadvantage, relative to countries like the US where a more flexible copyright regime already exists.

It is significant, that as a US headquartered company, Google has been able to innovate in the development of our products and services precisely because of the flexibility offered by the US copyright regime. It is not an overstatement to say that Google could not have started in Australia under the current copyright framework. As discussed below, the legal reality in Australia is that a search engine cannot operate in Australia without a significant business risk created by the current legal uncertainty from a lack of safe harbors and lack of exceptions adequately covering Internet-related functions including caching and indexing.<sup>61</sup>

Australia's current system of a set of closed, prescriptive exceptions means that new and innovative uses of copyright materials are not permitted unless they fall within the confines of an existing exception, no matter how strong the public interest in enabling those new uses may be. The current system means that innovators often receive an 'automatic no' to a question of whether a transformative new use of copyright material may be possible in Australia.

 <sup>&</sup>lt;sup>60</sup> Department of Broadband, Communications and the Digital Economy, National Digital Economy Strategy: Leveraging the National Broadband Network to Drive Australia's Digital Productivity, (Australian Government, 2011), 2 <<u>http://www.nbn.gov.au/files/2011/05/National\_Digital\_Economy\_Strategy.pdf</u>
 <sup>61</sup> Weatherall, Kimberlee, Copyright and Intermediaries: An Australian Agenda for Reform - A Policy Paper Produced for Discussion by the Australian Digital Alliance (ADA, April 2011), 3



For copyright law to stifle innovation rather than encourage it undermines its entire purpose. This is eloquently expressed by US Judge Alex Kozinski:<sup>62</sup>

Over-protecting intellectual property is as harmful as under-protecting it. Culture is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.

The Canadian Supreme Court has recently reaffirmed the importance of preserving a strong public domain, and recognised the important role copyright exceptions play in promoting the public interest in a "robustly cultured and intellectual public domain".<sup>63</sup>

How can Australia move from a situation where entrepreneurs receive 'the automatic no' to a situation where a new use of copyright works can be permitted if it is considered to be in the public interest (after balancing the interests of copyright owners and other relevant factors)? Google submits that a key indicator of success for this review should be the development and implementation of a new copyright system in Australia, which will enable the next big technological innovation to originate in Australia.

Google submits that the best way to ensure the innovation desired by the Terms of Reference can occur is to introduce an open-ended flexible exception into the Copyright Act to enable new uses of copyright materials to be assessed against a set of prescribed criteria to determine whether a new use is 'fair'.

The ALRC has called for evidence of how Australia's copyright law is affecting participation in the digital economy. Google would like to highlight five main aspects of Australia's copyright system, which we submit are significantly holding back the growth of the Australian digital economy for creators, consumers and technological entrepreneurs.

## 7.1 Inadequate cover of basic internet functions

One of the starkest illustrations of how copyright law is blocking innovation and investment in digital industries in Australia is the way in which existing Australian copyright law applies to core internet activities such as caching, search and indexing. The very nature of the internet is to make and disseminate copies of information. Search engines and other indexing tools are essential to making sense of the vast amount of information available online. If you were to ask any Australian student today whether they could get through a day without using web search, the answer would be "no".

<sup>&</sup>lt;sup>62</sup> White v. Samsung Elec. Am., Inc., 989 F.2d 1512 (9th Cir. 1993).

<sup>&</sup>lt;sup>63</sup> Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36 per Abella J at [10].



When someone is looking for new information, search - using a general search engine, vertical search engine or other specialised website – is often the starting place to find information about products they would like to buy, services they require or content they would like to access. The ability to search leads to significant economic benefits across the economy. The Connected Continent research found that the ability to search for information more efficiently on the internet is estimated to be worth the equivalent of \$500 per person per year, or \$7 billion in total nationally. <sup>64</sup> Further, the number of searches undertaken on the internet in Australia has grown rapidly over the period since 2007, increasing at an annual rate of around 30%. This suggests that the importance of the internet for consumers and the Australian digital economy will continue to expand.

#### Web search

A search engine engages in two distinct activities for the purpose of making search results available to users. First, web pages are crawled, allowing the search engine to retrieve the content on the web pages. The crawled content is then indexed, allowing information within the pages to be found by users.

When the crawler visits websites with the intention of retrieving information for indexing, it will follow the instructions contained in the web page code or website ("robots.txt"). This means that a website operator can instruct the crawler not to access the content on the webpage/website. Website operators may include this instruction for any reason they wish, but it commonly occurs where information is of a private or confidential nature. This widely accepted and easy-to-use robots.txt protocol allows website owners to have complete control over whether and how their content is indexed. The constantly changing nature of the World Wide Web means that search engines are constantly crawling the web to ensure their index is current.

Where a crawler has been permitted to access a webpage and is retrieving information from the website, copies of parts of webpages may be made for the purpose of indexing them. Search engines use a proprietary process to analyse and rank webpages in the index to provide objective and relevant results to a user in response to a search query.

Search engines also provide a snippet of information from relevant websites so that users can decide which sites to access and many provide a cached copy of the web page. In many ways, this is quite similar to the function and purpose performed by a library card catalogue. The difference is that a search engines' ability to search across images, video, music, and other content involves making a copy of that content first.

<sup>&</sup>lt;sup>64</sup> Deloitte Access Economics, above n23, 25



The report Fair Use in the US Economy describes the importance of enabling search technologies as follows:<sup>65</sup>

Absent the exceptions to copyright law provided by the fair use doctrine, search engine firms would face uncertain liability for infringement, a significant deterrent to providing this valuable service. Such an outcome would thwart the educational purposes and growing commerce facilitated by internet search engines, thereby reducing the economic contribution of the internet.

### System level caching

System level caching occurs when a web service operator makes a local copy of content that is fetched, for example, from overseas. A later request for the same content from a different user can be satisfied from the cache, rather than having to be fetched again from overseas. Search companies, web 2.0 hosts and other web operators employ caching technology in order to offer their services to the public for two main reasons:

- Reduces latency—when the request is satisfied from the cache (which is closer to the user) instead of the origin server, it takes less time for the user to get the representation and see it displayed. This makes the web seem more responsive.
- Reduces network traffic—because representations are reused, it reduces the amount of bandwidth used by a user. This saves money if the user is paying for traffic, and keeps their bandwidth requirements lower and more manageable.

Caching is done purely for technical purposes, for the benefits of consumers and the Internet as a whole. Essentially, caching speeds up a user's internet experience and relieves network loads. A cache has a finite storage space and as it fills up, older items are replaced. Website operators are able to modify the coding of a website to control what may be cached (if anything) and at what intervals cached content should be refreshed.

Lateral Economics describes the value of caching as follows:<sup>66</sup>

Caching reduces latency and the call on network resources, but by how much and to what benefit is difficult to say. Nevertheless, as an example, we look at scenarios relating to the user time cost of latency and possible additional traffic costs.

User time cost of latency: As noted, the ACMA reported that there were 19.2 billion web pages viewed by Australians from home during June 2011. If caching reduces the waiting time for each page by an average of 1/2 a second, then at the discounted average weekly wage the user time cost of latency would have been around \$360 million a year circa 2011. However this is clearly a substantial underestimate as reduced latency increases use and fosters innovation.

Additional traffic cost: Consultations suggest that total traffic demand out of Australia is currently around 800 Gbps per month. Around 80% of that traffic is to the US. The internet share of that

<sup>&</sup>lt;sup>65</sup> Rogers et al, above n30, 13

<sup>&</sup>lt;sup>66</sup> Lateral Economics, *Excepting the Future*, 21

# Google

traffic is around 80%, and around 60% of that is cachable. If caching had a 35% success rate, the potential capacity saving would be around 108 Gbps per month. Combining domestic and international traffic costs suggests a cost of around \$35 per Mbps per month, implying a traffic cost saving of \$3.8 million per month or \$45million a year.

The estimates above massively underestimate the true value of caching to the internet which, in its various forms, has become ubiquitous and multi-layered. If we compare the internet we have with multilayered and sophisticated caching to its equivalent without caching, the latter would be crippled in its operation and, with all the loads placed on it today, not unlike the internet of the mid-1990s in which there were frequent outages and users sometimes found themselves waiting minutes rather than seconds for the delivery of content.

The full value of caching is thus the value of the internet we have today less the value of a crippled internet working slowly, poorly and being prone to failure. Consequently, at the upper bound, one could attribute much of the entire value of the internet to caching.

## Search and caching in Australia

In Australian homes, workplaces, schools and universities, web search is ubiquitous. So too is caching. And yet, each of these activities involve making copies that may infringe copyright under Australian law.

More than 15 years after search engines first came to be widely used, there is a significant business risk from locally hosting search in Australia due to legal uncertainty. The legal uncertainty is whether the standard search engine activities of crawling, indexing and caching involve the making and communication of works which infringe copyright under the Copyright Act. This is not just problematic for companies that provide search technologies, as more locally hosted content would provide advantages for all Australians in terms of reduced latency and bandwidth costs, and provide more key infrastructure building blocks for the Australian digital economy.

A recent Policy Paper prepared for the Australian Digital Alliance by Associate Professor Kim Weatherall highlighted the legal uncertainties:<sup>67</sup>

Australian exceptions (for temporary reproductions) may not provide satisfactory protections for search engines, as they:

 do not apply where the source is infringing, making the exceptions not very useful in cases where search engines are most likely to be sued;<sup>68</sup>

<sup>&</sup>lt;sup>67</sup> Weatherall, above n59, 3

<sup>&</sup>lt;sup>68</sup> Most US proceedings relating to caches have been brought by copyright owners complaining that infringements could be located using the search engine: Perfect 10 Inc v Amazon Inc 487 F 3d 701 (9th Cir 2007).



- are confined to reproductions made "as part of the technical process of making or receiving a communication". It could be argued this applies to a search engine's internal cache copy, but the situation is unclear;
- apply to copies "incidentally made as a necessary part of a technical process of using a copy of the work".<sup>69</sup> This does not obviously apply to copies in a search engine' externally supplied cache; and
- both apply only to "temporary" copies which may imply a shorter duration than the days (or longer) that search engine cache copies may be retained.

With respect to the legal status of caching, Professor Weatherall noted that there were real doubts as to whether the highly qualified, technical legal language of the temporary copy exceptions in ss 43A and 111A of the Act would effectively enable all common forms of caching.

Similar concerns were raised in 2000 by the Intellectual Property Competition and Review Committee (the Ergas Review).<sup>70</sup> The Ergas Review found that caching was "of considerable significance to the efficiency of the internet", and recommended that the Government amend the Act to "ensure that this efficiency enhancing activity is not prohibited".<sup>71</sup> This recommendation was not taken up. While the Act was amended in 2006 to include a caching safe harbour for Carriage Service Providers, the safe harbour does not currently apply to online intermediaries, such as search engines, that are not Carriage Service Providers.

Google submits that the legal treatment of caching is highly uncertain in Australia due to at least the following factors:

Sections 43A and 111A refer to temporary reproductions and copies that are *temporary* and made *as part of the technical process of making or receiving a communication*. The Explanatory Memorandum (EM) to these provisions states that reproductions and copies made *in the course of certain caching* would be covered by the exceptions.<sup>72</sup> The EM also states that "In general terms, "caching" is the process whereby digital works are copied as part of the process of electronically transmitting those works to an end user".<sup>73</sup>

<sup>&</sup>lt;sup>69</sup> The better view is that s 43B was intended to benefit consumers using legitimate copies of works, for example, on DVD: the Explanatory Memorandum to the US Free Trade Agreement Implementation Act 2004 (Cth), noted that the exception was needed owing to the expanded definition of "material form", which included "electronic copies of a transitory nature made in the random access memory (RAM) of digital devices such as computers, DVD and compact disc players". Thus "[i]n order that users of copyright material are not potentially liable for copyright infringement for the normal use of non-infringing copyright material an exception is required".

<sup>&</sup>lt;sup>70</sup> *Review of Intellectual Property Legislation Under the Competition Principles Agreement* (Ergas Report), September 2000

<sup>&</sup>lt;sup>71</sup> Ibid, 113

<sup>&</sup>lt;sup>72</sup> Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999, 32-33.

<sup>73</sup> Ibid



- 2 Sections 43A and 111A refer to the reproduction right but not to the right of communication to the public.
- 3 Sections 43A and 111A do not apply to reproductions made if the making of a communication is an infringement. While this requirement may make sense for cache copies made when an individual receives a unique work, it is unclear how this would work in the context of system level caching.
- 4 Section 200AAA applies to proxy caching by educational institutions, and applies to both the reproduction and communication rights. Subsection 2000AAA(3) states that this section does not limit (among other sections) ss.43A and 111A.
- 5 Division 2AA contains safe harbours limiting the remedies available against "carriage service providers" (as defined in the *Telecommunications Act 1997*). Many online service providers would not be covered by this definition so do not receive the benefits of the safe harbours.
- 6 Section 116AB defines caching to mean "the reproduction of copyright material on a system or network controlled or operated by or for a carriage service provider in response to an action by a user in order to facilitate efficient access to that material by that user or other users.

The overlapping and complex, yet incomplete nature of the exceptions for caching in the Copyright Act means that the legal treatment for caching in Australia is highly uncertain.



## A word about safe harbours

Safe harbour regimes are an important mechanism for balancing the legal rights of right holders, end users, and intermediaries. They are every bit as important as flexible exceptions in contributing to a legal and regulatory environment that encourages new entrants in markets for intermediary services, while providing the means for copyright owners to protect their interests.

The Attorney-General's Department considered the question of safe harbours in its October 2011 consultation paper *Revising the Scope of the Copyright 'Safe Harbour Scheme'*. The paper addressed the scope of the safe harbour scheme in the Copyright Act and suggested it should be amended to cover a broader range of service providers than those defined as carriage service providers (CSPs) by the *Telecommunications Act 1997* (i.e.: not only providers of network access to the public). It was proposed that the term 'service provider' should replace 'carriage service provider' for the purposes of the safe harbour scheme to cover internet service providers and operators of online services, irrespective of whether they provide a carriage service to the public. This new term would be consistent with the Australia-United States Free Trade Agreement and comparable international approaches to equivalent safe harbour schemes in the United States, the United Kingdom, Singapore, New Zealand, Japan, India and the Republic of Korea.<sup>74</sup>

Google submitted to this review that, in order to reach the Government's key policy goal of Australia being a world leading digital economy by 2020 and encourage local and international investment and innovation, it was critical that Australia's copyright safe harbours scheme be expanded to all service providers as contemplated by the *Australia-United States Free Trade Agreement* (AUSFTA).<sup>75</sup> The lack of a safe harbour for online service providers is a serious impediment to the growth of Australia's digital economy because common activities where service providers do not control, initiate or direct the users' online activities are not covered by the scheme. This includes transmitting data, caching, hosting and referring users to an online location. Providers of these services do not have the benefit of the same safe harbour that applies to their equivalents overseas, and that applies to Australian CSPs, reducing Australia's attractiveness as a venue for technology investment and innovation.<sup>76</sup>

Providing certainty around secondary liability is a crucial element of any successful copyright regime, and these issues are critical to ensuring that Australia's copyright exceptions are adequate and appropriate in the digital economy. The Attorney-General's Department recently released submissions received in response to its own review of the safe harbour regime, and announced that it would be considering these submissions in the light of the High Court's

<sup>&</sup>lt;sup>74</sup> Attorney General's Department, *Revising the Scope of the Copyright 'Safe Harbour Scheme', Australian Government Consultation Paper* (October 2011), 3-5

<sup>&</sup>lt;sup>75</sup> Submission by Google to the *Revising the Scope of the Copyright 'Safe Harbour Scheme' Consultation Paper*, 17 November 2011, 1

<sup>&</sup>lt;sup>76</sup> Ibid, 1-2



decision in *Roadshow Films Pty Ltd & ors v iiNet Ltd* and "other online copyright issues". Google is concerned to note that some submissions to the Government's safe harbours review have submitted that search engines should continue to be excluded from the safe harbour regime. We urge the ALRC to make recommendations to Government regarding the importance of amending the safe harbours to provide certainty for all online intermediaries.

## Encouraging future innovation on the internet

The uncertain legal status of web search and caching - both under copyright exceptions and due to the absence of a safe harbour applicable to web service providers - currently stands in the way of Australia attracting internet industries and increased investment in local infrastructure, thereby delivering improved service quality to all Australians. But beyond that, there are questions of what innovation is not happening because of the chilling effect of the existing Australian copyright exceptions. What would happen if we had more copyright exceptions? What would happen if we had an open-ended flexible copyright exception? Innovation depends on a legal regime that allows for new, unforeseen technologies. The era of digital indexing, search, and retrieval has just begun. A copyright system must be sufficiently flexible and scalable to permit the development and growth of technologies that are not even yet on the drawing board.

## 7.2 Inhibiting cloud computing innovation

Inevitably, when new technologies such as cloud computing offer new opportunities to consumers, traditional business models are challenged. By nature, technology requires markets to adapt. Google submits that it is imperative that copyright law provide breathing space for innovation if Australia is to take full advantage of the opportunities provided by cloud computing.

Australia's narrow private copying exceptions run the risk of approving yesterday's technologies, without affording the flexibility to embrace tomorrow's cloud-based services. Google submits that private copying exceptions aimed at "space-shifting" must consider not only the end-user's liability, but also how a provider of a cloud service should be treated for providing the platform that makes it all possible. Australian innovators should not be forced to move their servers abroad in order to deliver cloud services globally.

This view is consistent with the ALRC's Guiding Principle 5: ensuring that copyright responds to new technologies, platforms and services. It is also consistent with Google's proposed guiding principle that copyright exceptions should be 'future proof' so as accommodate new waves of innovation.

A recent report of the Australian Academy of Technological Sciences and Engineering (**AATSE**) noted that "cloud computing at internet scale is an emerging technology of importance to Australia's information and communications technology capacity and the competitiveness of its



innovation capability".<sup>77</sup> The report referred to recent estimates of the size of the cloud computing market:<sup>78</sup>

Estimates of the size of the cloud computing market have been provided by a number of leading IT consulting firms. One recent report estimates that the cloud market was worth US\$20.3 billion in 2009 is anticipated to reach US\$100.4 billion by 2016 (Wintergreen Research, 2010). A recent survey of 895 technology experts and stakeholders by the Pew Research Centre has found that they expect that they will live mostly in the cloud by 2020 (Pew, 2010).

While the AATSE report identified concerns about security and privacy as barriers to the adoption of cloud computing, another very real barrier is uncertainty regarding the application of Australian copyright law to cloud computing.

A recent KPMG analysis, *Modelling the Economic Impact of Cloud Computing*, also reported that:<sup>79</sup>

should Australian organisations adopt cloud platforms as expected across their ICT requirements - as more mature markets such as the US suggest is likely - then the benefits at both the enterprise and aggregate economy level could be substantial ... Based on the current level of Australian GDP, KPMG estimates that adoption of cloud services across 75 percent of relevant ICT spending, achieving opex and capex savings of 25 percent and 50 percent respectively, after 10 years would result in an increase in long-run GDP of **A\$3.32 billion per annum**. At 50 percept adoption levels, the GDP gain is A\$2.16 billion per annum.

The report noted that many executives KPMG contacted believed that the Australian ICT market does not yet have mature offerings in cloud deployed solutions, at least in part due to the infancy in deployment of the National Broadband Network (NBN) and perceived barriers due to governance, security, disaster recovery and location of data.<sup>80</sup>

In 2011, Professor Kimberlee Weatherall wrote that operating and using cloud computing resources in Australia creates a higher risk of copyright liability than in other jurisdictions.<sup>81</sup> "...Australia's very technology-specific exceptions inhibit the cloud computing model for individuals and create elevated risks for both consumers and Internet Intermediaries."<sup>82</sup>

The recent litigation between Singtel Optus Pty Ltd and the National Rugby League over the Optus TV Now service is a stark illustration of the risk and uncertainty referred to by Professor

<sup>&</sup>lt;sup>77</sup> *Cloud Computing: Opportunities and Challenges for Australia*, Report of a Study by the Australian Adademy of Technological Sciences and Engineering (ATSE) (September 2010) <a href="http://cloudinnovation.com.au/docs/ATSE">http://cloudinnovation.com.au/docs/ATSE</a> cloud-computing.pdf>

<sup>&</sup>lt;sup>78</sup> Ibid, 2

<sup>&</sup>lt;sup>79</sup> KPMG, Modelling the Economic Impact of Cloud Computing (2012), 7

<sup>80</sup> Ibid, 24

 $<sup>^{81}</sup>$  Weatherall, above n59, 22

 $<sup>^{82}</sup>$  lbid



Weatherall. The Full Federal Court found that Optus was itself (either solely, or jointly with the customer) the "maker" of copies that were made when its customers clicked "record" when browsing an Electronic Program Guide online, with the result that the service provided by Optus fell outside of scope of the personal time-shifting exception in s 111 of the Act. The refusal of the High Court to grant Optus special leave to appeal against the decision has rendered the legal status of a wide range of cloud-based (as well as non-cloud-based<sup>83</sup>) applications and services highly uncertain. Such uncertainty imposes barriers to the introduction of innovative remote storage services including cloud computing and network PVRs and denies Australian consumers access to technology that is widely available in jurisdictions such as Singapore and the US that have more flexible copyright law.

The increasing prominence of cloud based services also calls into question the appropriateness of proposals to limit any exceptions to private <u>or domestic</u> uses (see questions 11-13 in the Issues Paper). Great care should be taken to ensure that limiting an exception to domestic uses does not inadvertently preclude the ability of a person to do an act permitted by an exception by using a cloud based service.

# 7.3 Blocking creative and transformative uses

The creation and distribution of content on the internet no longer relies on traditional concepts of 'creator' and 'audience'. The model of a professional media sector delivering content to passive consumers has been replaced by a model where the lines between creation and consumption of content have been blurred.

Content creation is no longer the sole preserve of a "media sector" – professionally produced content from traditional sources competes with user generated content shared via social networking sites, blogs, video and photo-sharing sites, and the comment sections of mainstream news sites. Content consumption and engagement is also no longer a one way street – consumers are interactively engaged, responding to content, and in that process generating new content to be shared with others.

In their 2010 report, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia*, Associate Professor Kate Crawford and Professor Catharine Lumby describe this new media ecology:

...users are driving the public culture of the internet, evidenced in the growth of blogs, social media sites, video and photo sharing services, and within the comments structures of all mainstream news and discussion sites. This kind of everyday participation makes or breaks online communities and internet businesses, and it is an essential part of the contemporary media industry. This represents a significant disruption of previous media models, where the consumer received a finished product, at the end of an economic chain of production, to become an active

<sup>&</sup>lt;sup>83</sup> See Giblin, above n45, for a discussion of the likely impact of the Full Court's decision on non-cloud based services. <a href="http://works.bepress.com/giblin/16">http://works.bepress.com/giblin/16</a>>



player in a dynamic cycle of ever-changing content. Users determine where and whether a community will develop online, and how long it will last...

...Through their participation, [users] create normative language and behaviours, thus determining what will become the acceptable uses of an online space. Everything, from bonding and discussion, to fights, criticising and 'trolling', to creating content, downloading, and simply 'listening' to other users, create a current of activity that eventually shapes online engagement for other participants.

The innovation that has emerged from the new ecology of content creation is really quite astounding.

### Mashups

The Web 2.0 environment has also driven untold individual creativity. User-generated content (UGC) hosting services - such as YouTube, Daily Motion, Vimeo, and similar sites - have led to an explosive growth of "remix culture". This profusion covers the gamut from videos of infants intended for sharing within family circles to the political expressions that were an important catalyst for the revolutionaries involved in the Arab Spring uprisings. Much of this content involves "remixing" existing copyrighted materials - whether excerpts from TV news programs, movies, or popular music - together with original user generated content. In our increasingly media-saturated age, it is more and more natural for individuals to create "mashups" or "remixes" the media around them for expressive purposes. While some of these creative acts would be permitted by existing fair dealing exceptions,<sup>84</sup> many would not. As a result, transformative uses of existing material may be unduly hampered.

A good example of the process involved in creating a music mashup is provided by mashup artist Girl Talk.<sup>85</sup> In the Australian context, Perth's Pogo is an electronic music artist.<sup>86</sup> His work consists of recording small sounds from films or scenes of films, which are then sequenced to make new musical compositions. For example, he worked with Disney/Pixar to produce a track "UPular" based on the movie Up.<sup>87</sup> His work was celebrated at the Guggenheim Museum as part of the YouTube Play project, which celebrated the most unique, innovative, groundbreaking video work being created and distributed online.<sup>88</sup>

<sup>&</sup>lt;sup>84</sup> Such as the criticism and review fair dealing exception in ss 41 and 103A of the Act and the parody and satire fair dealing exception in ss 41A and 103AA of the Act.
<sup>85</sup> <a href="http://www.youtube.com/watch?v=KykbPtRb0K4">http://www.youtube.com/watch?v=KykbPtRb0K4</a>

<sup>86 &</sup>lt;http://pogomix.net/>

<sup>&</sup>lt;sup>87</sup> Wikipedia: Pogo (electronic musician) <http://en.wikipedia.org/wiki/Pogo\_(electronic\_musician)>

<sup>88 &</sup>lt;http://www.guggenheim.org/new-york/interact/participate/youtube-play/top-videos>



### Transformative uses

The health of Australia's digital economy will be influenced by whether Australia develops an environment in which innovative new uses of materials, and transformative uses, are supported and encouraged. Major innovations are often iterative processes whereby developers and startups may create something entirely new, or envisage new uses of existing data to provide new innovative services to others. These types of activities are often highly inventive and creative.

Some examples of transformative uses include the use of thumbnail images to provide image search or a media studies teacher copying short extracts of films to compile a teaching resource for her students.

One of Google's services that has seen an enormous amount of innovation and transformative uses is through the application of maps layers on Google maps, adding extra data on top of the existing Google mapping data. For example, the Wikipedia layer on Google maps enables you to hover your mouse over a location and see a pop-up excerpt of the article about that area. If you want to read more, all you have to do is click on the "Full Article" link. Enabling the Photo Layer on Google maps will show all of the photos that other people have taken and posted to Google Maps while visiting that part of the world.<sup>89</sup>

A powerful example of the public interest in enabling transformative uses is to consider the impact of social media, and Google maps in particular, during the tragic Victorian bushfires of 2009. The Australian Broadcasting Corporation (ABC) created an amazing Google Map to tell the stories of the Victorian bushfires by those that actually experienced it. The ABC collected hundreds of accounts of the day and the fire's aftermath from residents of the fire-affected communities, volunteer fire fighters, journalists, politicians, tourists and others. This Google Map allows users to browse these stories, videos and photographs by location and by time.<sup>90</sup> This material was generated by the ABC itself, but this project illustrates the type of uses that would be possible if a broader exception were introduced which better enabled transformative uses.

Google submits that this is exactly the sort of initiative that a thriving digital economy should encourage. The ability for individuals and business - where appropriate, and when not causing economic harm to the copyright owner - to harness existing information to stimulate new investment and innovation is critical to the future development of the Australian digital economy. This is also completely consistent with the broader goals of copyright policy.

<sup>&</sup>lt;sup>89</sup> Educational Freeware *Create Activities For Children About Maps Using Google Maps* <a href="http://www.educational-freeware.com/news/google-maps-kids.aspx">http://www.educational-freeware.com/news/google-maps-kids.aspx</a>

<sup>90 &</sup>lt;http://www.abc.net.au/innovation/blacksaturday/#/timeline/map/chapter/1>

<sup>&</sup>lt;http://googlemapsmania.blogspot.com.au/2010/07/victorian-bushfires-on-google-maps.html>



These new cultural genres are transforming the global and local cultural landscape, but Australian copyright law has failed to catch up. Google submits that a copyright system must be sufficiently flexible to allow such uses subject to them being fair and not unduly harming copyright owners' interests, particularly if these new amateur creators are to have a legitimate path to becoming tomorrow's commercially successful musicians, critically acclaimed film producers, and politically influential satirists.

### Commercial v non-commercial use

The ALRC asks whether any exception for transformative use should be limited to noncommercial uses (question 17). Google submits that this would be inappropriate.

Australian fair dealing tradition has long recognised that commercial uses of copyright materials can be fair (for example, by a television broadcaster using short extracts of another broadcaster's content for news reporting and criticism and review in 'The Panel' case<sup>91</sup>). There is no public policy justification for limiting an exception for transformative uses by automatically excluding any uses with a commercial purpose. Google acknowledges that a user's commercial purpose would be relevant to whether a particular use should be permitted. However, it is more appropriate that the commerciality of the use be considered as part of a broader assessment of whether that use is fair.

One of the greatest canards in copyright law is that there should be a sharp distinction between commercial and non-commercial uses. From its inception, copyright law was concerned was the province of one group of commercial entities versus other commercial entities. The first of the "copyright wars" among the London booksellers was called the Battle of the Booksellers for a reason. Many creators of transformative materials have commercial objectives too, captured famously by Dr. Samuel Johnson's quip that "No one but a blockhead ever wrote, except for money."

Google submits that Australian creators should not be prevented from using copyright works in new and innovative ways simply because they may have some degree of commercial purpose. Rather, it seems better when assessed against the policy considerations set out in the ALRC's guiding principles that a creator's commercial purpose should be considered as one of many relevant factors in determining whether the intended use should be considered to be fair.

## 7.4 Expected personal uses are not allowed

A further consideration for the ALRC to take into account is that the current disconnect between the law and practices that are both ubiquitous and unlikely to harm copyright owners is bringing copyright law into disrepute. The copyright system is undermined when millions of citizens are daily, often unwittingly, breaching copyright law without consequence.

<sup>&</sup>lt;sup>91</sup> TCN Channel Nine v Network Ten Pty Ltd [2001] FCAFC 146 22 May 2002



The previous Attorney-General The Hon Philip Ruddock MP, acknowledged this in the Second Reading Speech on the *Copyright Amendment Bill 2006*:<sup>92</sup>

... the Copyright Amendment Bill ... demonstrates our ongoing commitment to an effective, worldclass, up-to-date copyright regime. It will ensure our laws take seriously the need to penalise copyright pirates for flouting the law, while ensuring that ordinary consumers are not infringing the law through everyday use of material that they have legitimately purchased.

Google believes that this is an admirable goal. While the 2006 reforms did go some way towards ensuring that ordinary Australians were not infringing copyright laws through common place uses of copyright materials, these reforms also highlight the dangers of technology specific exceptions and how quickly purpose based exceptions can become out of date in a digital environment.

Although the Bill introduced format shifting and time shifting rights for some types of copyright content, the provisions are complex and extremely technology specific. For example, s.110AA permits a consumer to format shift a cinematograph film in a videotape format only. In contrast, s.109A allows format shifting of sound recordings in all formats. This means that Australian consumers can format shift music from CDs onto their smartphones and tablets but not films from DVDs. How is an ordinary Australian consumer expected to understand that putting music onto a tablet is acceptable but putting films onto the same tablet is not?

In addition, Australia's format shifting provisions do not recognise the development of cloud storage services where legitimately purchased content can be copied to a computer, stored in the cloud and then accessed via a range of devices of the consumer's choosing.

Similarly, Australians are allowed to make backup copies of computer software they have purchased (s.47C), but not digital media such as sound recordings or films. Google believes that introducing more flexible and technology neutral exceptions to enable consumers to make personal uses of legitimately purchased content would be consistent with citizens' expectations about copyright and does not harm right holders' economic interests. This would greatly restore people's faith that the law makes sense, as has been seen in the Canadian public's reaction to similar provisions in Canada's recent copyright reforms.

# 7.5 Blocking medical and scientific research

Another valuable new technology that is being blocked by copyright law is data and text mining. Text mining promises huge economic and research benefits, but again, copyright law has not kept up with technology. A recent report by the UK All-Party Parliamentary Group on Medical

<sup>&</sup>lt;sup>92</sup> The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard* (19 October 2006), 1



Research (APPG) highlighted the ways in which copyright law is hampering scientific and medical research:<sup>93</sup>

McKinsey International estimated that 'big data' technologies, including text and data mining, could create E250 billion to Europe's economy each year – if copyright restrictions did not get in the way.

The extraction of facts or individual words is not subject to copyright law – a human being copying a word or a fact from an article with a pencil is perfectly free to do so. But because a computer must make a copy of an entire in-copyright work in order to perform the same activity, the process of data mining becomes subject to copyright law.

When articles are published in open access form, they are fully accessible for re-use and for text mining. But at present only a small proportion of published material is available in this form. A number of UK research funders, including the research councils and the Wellcome Trust, and UK PubMed Central are working towards a more open access model.

The Hargreaves Review of intellectual property and growth recommended an exception to copyright to enable text and mining for non-commercial research. We believe this is essential to enable researchers to maximise the value of published materials, unlocking new opportunities for innovation.

Some of this activity may be permitted by the research and study fair dealing exception in s 40 of the Act, although this is far from certain given that text and data mining will very often involve copying an entire work. It is also possible that text and data mining that is undertaken by a university for the purpose of educational instruction would fall within the flexible dealing exception in s 200AB of the Act. It is likely, however, that much potentially valuable data and text mining would infringe copyright if undertaken in Australia. This will often be the case even where the person or entity doing the mining has obtained a licence to use the content that is being mined: many commercial content licences are either silent on the question of whether text or data mining is a permitted activity or they expressly prohibit such mining.

The ALRC has asked whether any exception applying to text or data mining ought to be restricted to non-commercial uses. Google submits that there is no policy justification for limiting a data mining exception to non-commercial activities.

First, it is increasingly difficult to draw a distinction between commercial and non-commercial research. The Government's own research and innovation agenda promotes collaboration between the university sector and industry. Earlier this year, the Minister for Tertiary Education, Skills, Science and Research, Senator Chris Evans, announced Government plans to build greater links between Australian industry and universities. Announcing research funding of \$1.63 billion, Senator Evans said that the Government needed to ensure that research

<sup>&</sup>lt;sup>93</sup> United Kingdom All-Party Parliamentary Group on Medical Research, *How data saves lives - Unlocking the research potential of information* (July 2012)

<sup>&</sup>lt;http://amrcpolicyblog.files.wordpress.com/2012/07/appg-on-medical-research-2012-summer-reception-booklet-final.pdf>



undertaken in Australian universities "translates into benefits for Australians, by pushing the innovation down into Australian industries". He said that "2012 marks an exciting new stage in building the essential links between Australian industry and universities".<sup>94</sup> The Government's innovation statement, *Powering Ideas: An Innovation Agenda for the 21st Century*, also sets out a goal of supporting "effective collaborations between business and universities and public sector research agencies".<sup>95</sup>

Second, there are clear public benefits to facilitating innovative technologies of this kind, regardless of whether this occurs within the confines of a university or other public research institution, or in the private sector. Google submits that copyright law should not stand in the way of innovative commercial uses that satisfy a fairness touchstone such as that set out in the US fair use exception.

Third, as discussed at part 7.4 above, there is a tradition in Australian copyright law of exceptions that are viewed to be in the public interest being available to commercial and noncommercial bodies. For example, the fact that a news broadcast is made by a commercial television broadcaster does not prevent the use of the fair dealing exceptions for reporting the news or criticism and review. Google submits that similar considerations apply to the public interest in research and data mining.

<sup>&</sup>lt;sup>94</sup> Senator The Hon Chris Evans, Minister for Tertiary Education, Skills, Science and Research,

<sup>&#</sup>x27;University funding boost will create a smarter and stronger Australia' (Media Release, 16 February 2012) <a href="http://minister.innovation.gov.au/chrisevans/MediaReleases/Pages/Universityfundingboostwillcreateasm">http://minister.innovation.gov.au/chrisevans/MediaReleases/Pages/Universityfundingboostwillcreateasm</a> arterandstrongerAustralia.aspx>

<sup>&</sup>lt;sup>95</sup> Department of Industry, Innovation, Science, Research and Tertiary Education, *Powering Ideas: An Innovation Agenda for the 21st Century* 

<sup>&</sup>lt;http://www.innovation.gov.au/innovation/policy/pages/PoweringIdeas.aspx>



# 8 Future proofing with an open-ended flexible exception

The ALRC has sought comment on whether the existing fair dealing exceptions and other exceptions are adequate and appropriate in the digital environment, and on whether the Copyright Act should be amended to include a broad, flexible exception. In Google's submission, the answer to the first question is "no", and the answer to the second question is "yes".

As the Lateral Economics report "Excepting the Future" correctly observed:96

properly crafted, flexible exceptions should have negligible downsides for rights holders. On the other hand they will assist in the distribution of copyrighted works -- which will improve the market for such works. And they will permit new and innovative uses that could not be anticipated by legislators before the event.

Flexible copyright exceptions are critical since innovation and culture are inherently dynamic, not static. No matter how forward thinking or careful legislators are, they cannot predict the future. This has always been true, but the effects of this truth are more pronounced now since the rapid pace of technological innovation brought about by the internet and digital tools has radically collapsed the time lines for creators, businesses and consumers, as well as for laws that seek to regulate business issues arising from the Internet. Put simply, you cannot legislate detailed rules to regulate dynamic situations; you can only set forth guiding principles. Static laws that attempt to establish for all time the rules governing technological and market innovation will impede that innovation.

Flexibility enables innovators to build new products, which has yielded complementary technologies that enhance the value of copyright works and which can lead to new distribution platforms for new forms of content. Here are two examples, both from the Excepting the Future Report:<sup>97</sup>

[W]hen it was first introduced, Apple's iPod relied on the user's ability to format shift copyrighted content that had been legitimately obtained. This right was unclear under Australian exceptions but permitted in the U.S. In addition, in substantial part because of our more constrained limitations and exceptions, it took ten years for TiVo to make it to Australia and then with a more limited feature list than was provided in the U.S.

The importance of incentivising both the creation of new works and the development of innovative new technologies which may develop new ways of engaging with those works is reflected in the terms of reference to this enquiry, which require the ALRC to consider the importance of incentives to create, the general interest of Australians to use and interact with content, and the importance of the digital economy and the opportunities for innovation it creates.

 <sup>&</sup>lt;sup>96</sup> Lateral Economics, *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012), 2
 <sup>97</sup> Ibid, 3

# Google

### Recommendations for reform

**Google recommends** the creation of an open-ended flexible exception as the best way to future-proof copyright, ensuring it continues to be appropriate in the digital age. Reform options:

- Consolidate and replace some or all of the existing purpose based exceptions with an open-ended flexible exception; or
- Keep the existing exceptions, after review to ensure technological neutral operation, and introduce a supplementary open-ended flexible exception.

**Google recommends** the following models to implement an open-ended flexible exception:

- Use the existing 'fairness' factors in s.40(2) of the fair dealing exception for research or study as recommended by the CLRC; or
- Adopt similar factors to the US fair use provision (s.107 US Copyright Act).

Other alternatives for reform include:

- Using the language of the three step test in international law. Note: Google would not recommend using language s.200AB of the Copyright Act, which is overly complex and appears to constrain the operation of the three step test; or
- Use another set of factors to be determined by the ALRC, for example, a set of factors based on reasonableness as identified in question 52 of the Issues Paper.

An open-ended flexible exception is essential if Australia is to provide sufficient scope for innovative forms of content and new legitimate uses and services to evolve. It can be part of a fair system that rewards content creators and supports this growing and increasingly important sector of our economy and culture.

## Specific purpose-based exceptions or generalised flexible exceptions?

The debate about exceptions is too often cast in binary terms: should there be specific, purpose-based exceptions or a general, flexible exception? Google believes this is a false dichotomy. At least some of the issues that we have highlighted above could be addressed through the introduction of specific exceptions. For example, the UK Government is currently considering introducing specific exceptions for text and data mining and for certain kinds of personal copying.<sup>98</sup> The Canadian government has recently introduced specific exceptions for user generated content and certain kinds of personal copying. Canada has also expanded its copyright safe harbours to include information location tools such as search engines.

Although the introduction of new purpose based exceptions would go some way to solving the problems identified above, Google does not believe that this would be the best way to address the many dynamic situations involved with innovative works, products, and services. For dynamic situations, dynamic, flexible exceptions are required. While purpose based exceptions

<sup>&</sup>lt;sup>98</sup> UK Intellectual Property Office Consultation on Copyright (December 2011) <<u>http://www.ipo.gov.uk/pro-policy/consult/consult-live/consult-2011-copyright.htm</u>>



may solve the problems of today, they would do little to encourage the innovation of tomorrow that is so essential to a thriving digital economy.

### Fair use as an example of a general flexible provision

Fair use is an integral part of the US copyright system, and has led to an explosion in internetbased creativity and innovation, and encouraged investment in internet infrastructure.<sup>99</sup> New online services like Google, YouTube, Facebook, Twitter, Flickr could not have emerged had US copyright law not been sufficiently flexible to accommodate uses that could not have been predicted in advance by even the wisest policy makers. Researchers in the United States rely on the fair use exception to invest heavily in data and text mining, particularly in the bio-medical sciences. Flexible exceptions enable courts to respond to technological advancements - without the need for further law making - by applying a clearly articulated set of factors to allow uses that are fair and comply with those factors. At the same time, the legislature remains free to revisit fair use determinations that it believes are in need of modification.

For example, the following inventive activities have been found to be a 'fair use' in the United States where it is likely that they would not be permitted, or would otherwise be only permitted on a more constrained basis in Australia:

- Making local cache reproductions (browser copies).<sup>100</sup>
- Search engine reproduction in search databases of images and text crawled on the world wide web and subsequent display in search results.<sup>101</sup>
- Time and space shifting of video for later viewing on the same or different device.<sup>102</sup>
- Intermediate copying to discover ideas or other unprotectable elements so long as the end result of the intermediate copying is the development of a non-infringing work.
- Copying of students term papers to check for plagiarism.
- Display of thumbnails of photographs as part of web search results.
- Use of works in litigation or before government agencies.
- Fortuitous or incidental reproduction especially in news reports (a use that could just as easily be regarded as de minimis).
- Uses in political contexts.

As a result of this flexibility, the United States has become the central location for the development of the internet. Fred von Lohmann has argued that the flexibility of the fair use exception has operated as innovation policy within the copyright system because it creates

 <sup>&</sup>lt;sup>99</sup> See the discussion above regarding the research undertaken by Josh Lerner and Booz & Company.
 <sup>100</sup> Perfect 10 Inc v Amazon.com Inc 487 F.3d 701 (9th Cir 2007)

<sup>&</sup>lt;sup>101</sup> *Kelly v Arriba Soft* 336 F.3d 811 (9th Cir 2003); *Field v Google* 412 F. Supp 2d 1106 (D. Nev 2006); *Perfect 10 v Amazon* (ibid)

<sup>&</sup>lt;sup>102</sup> Sony Corp of Am v Universal City Studios 464 US 417 (1984); Recording Indus .Ass'n of Am. v Diamond Multimedia Sys. 180 F.3d 1072, 1079 (9ty Cir 1999)



incentives to build innovative products, which has yielded complementary technologies that enhance the value of copyright works.<sup>103</sup>

Critics of fair use sometimes characterise it as being open-ended in the sense of "anything goes". This is inaccurate. The US fair use exception gives statutory recognition to the common law fair use doctrine, which developed over two hundred years. This is the same case law on which the fairness factors set out in s 40(2) of the Act - dealing with fair dealing for the purpose of research or study - are largely based. It is a myth that fair use determinations are significantly different in kind from the type of judgments Australian courts have made in determining whether a user's dealing with a work can be considered fair.

Another criticism made of fair use is that outcomes in any particular case are inherently unpredictable. Again, Google submits that this is inaccurate. Fair use determinations are no more unpredictable than determinations about authorship, infringement, or violation of moral rights. U.S. media corporations make fair use determinations every day, as do in-house counsel for Google.

A flexible exception such as fair use *does* provide breathing space for uses not previously anticipated: that's what makes it appropriate to a rapidly changing technological environment. But flexibility is not the same as unpredictability. Recent studies looking at the way in which fair use cases have been decided in the US suggest that the fair use doctrine is not nearly so unpredictable as some of its critics sometimes suggest.<sup>104</sup>

While it is true that predictability emerges over time as courts decide fair use cases, Australian courts would have a rich body of both U.S. and Canadian jurisprudence to draw from in the event that Australia was to introduce a flexible exception. The Canadian Supreme Court has recently decided two cases that provide significant guidance as to how a superior level court has approached the task of assessing fairness by reference to an open-ended fair dealing provision and a set of judicially determined factors.<sup>105</sup> Increasingly, Australian courts would also be able to draw on the approach to fair use style provisions taken by courts in countries such as Israel, Singapore, India, South Korea and The Philippines.

That is not to say, of course, that US or other foreign jurisprudence would be exported in its entirety to Australia; but rather that Australian judges would not necessarily be starting with a blank slate when deciding fair use cases. Google is confident that Australian courts would be

<sup>&</sup>lt;sup>103</sup> von Lohmann, Fred, 'Fair Use as Innovation Policy' (2008) 23.1 *Berkeley Technology Law Journal* cited in Lateral Economics, *Excepting the Future, 40* 

<sup>&</sup>lt;sup>104</sup> Sag, Matthew, 'Predicting Fair Use' (25 February 2012) 73:1 *Ohio State Law Journa*l TRPC 2011; Loyola University Chicago School of Law Research Paper No. 2012-005.

<sup>&</sup>lt;http://ssrn.com/abstract=1769130 or http://dx.doi.org/10.2139/ssrn.1769130>. See also Beebe, B, 'An Empirical Study of US Copyright Fair Use Opinions, 1978–2005' (2008) 156 University of Pennsylvania Law Review 549 and Samuelson, P, 'Unbundling Fair Uses' (2009) 77 Fordham Law Review 2537 <sup>105</sup> Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37

Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36



similarly able to conduct a fairness analysis based on fair use principles, the existing fairness factors in s.40(2) of the Australian Copyright Act or any other factors determined by the ALRC to be suitable for the Australian context.

### Fair use is not the only model for flexible copyright reform

In 1998 the Copyright Law Review Committee (CLRC) recommended the expansion of Australia's existing fair dealing exceptions to an general flexible approach that:<sup>106</sup>

- Consolidates Australia's existing fair dealing provisions into a single, general flexible provision.
- Specifically refers to the current exclusive set of purposes but is not confined to those purposes.
- Applies the non-exclusive set of factors currently in s.40(2) of the Copyright Act to be applied generally to all assessments of whether a dealing with a work is to be considered fair.

Google submits that this model would bring similar benefits to those described above in relation to fair use.

Professor Ian Hargreaves, the author of the UK Hargreaves Report, said recently that the international response to his review of UK copyright law had been "substantial and sustained", and that he had received requests to travel to every continent to discuss his report.<sup>107</sup> This is significant. The Hargreaves Report urged the UK Government to "firmly resist over regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators". Finding that the EU Copyright Directive may stand in the way of the UK introducing an open-ended fair use exception, Professor Hargreaves recommended that the UK Government lead a push at EU level for more flexible copyright exceptions. He also recommended legislation to ensure that copyright exceptions are protected from override by contract.

The UK Government has indicated strong support for Professor Hargreaves' recommendations. Responding to the Hargreaves Report in August 2011, the Government said:<sup>108</sup>

The potential benefits are considerable: adding between 0.3% and 0.6% to the size of the UK economy by 2020 – between £5 billion and £8 billion – and cutting deadweight costs in the economy by over £750 million. The government believes this is fundamentally the right view. We are prepared to make changes to give the UK the IP system that best equips us to meet current conditions and opportunities and that can develop further to meet future ones.

<sup>&</sup>lt;sup>106</sup> Copyright Law Review Committee, above n63, 7-8 (Recommendations 2.01, 2.03 and 2.04)

<sup>&</sup>lt;sup>107</sup> Intellectual Property and Innovation: A Framework for 21st Century Growth and Jobs, the Lisbon Council, September 2012

<sup>&</sup>lt;sup>108</sup> Cable, Vince, Osborne, George and Hunt, Jeremy*, The Government Response to the Hargreaves Review of Intellectual Property and Growth* (London: HM Government, 2011)



In Ireland, copyright reform to introduce greater flexibility is also on the agenda. The Irish Copyright Review Committee (CRC) has been asked by the Government to identify aspects of copyright law that are creating barriers to innovation, and to consider whether a US fair use style exception would be appropriate in an Irish/EU context. Earlier this year, the Committee released a Consultation Paper. Commenting on the intersection between exceptions and innovation, the CRC said:<sup>109</sup>

...the State affords copyright protection to the rights-holders because it is for the public benefit or the common good; in particular, from the perspective of this Review, one of the reasons the State allows exceptions to copyright is to promote innovation by promoting competition. Hence, copyright law is justified by the overall benefit of a diverse range of work; and the appropriate reward afforded to the rights-holder is not an end in itself, but rather the means to this diversity, competition and innovation.

The CRC disagreed with Professor Hargreaves regarding the scope for greater flexibility within the existing EU copyright framework, and has sought comment on whether a fair use exception would be appropriate in Ireland.

Google strongly believes that an open-ended flexible exception is essential to future proof copyright, allowing it to keep pace with rapid developments in technology and the expectations of consumers and creators. While any one model may not be a universal panacea to solve all of the problems identified in this submission, the data and experience prove that a general flexible exception will always be better than a closed list of permitted purposes. The model recommended by the CLRC or a fair use style provision are clear and well understood models for the adoption of an open-ended flexible exception. Both can be part of a fair system that rewards content creators and supports this growing and increasingly important sector of our economy.

<sup>&</sup>lt;sup>109</sup> Copyright Review Committee, *Copyright and Innovation: A Consultation Paper* (Dublin 2012), 35

# Google

# 9 International law

Any discussion of possible new copyright exceptions inevitably leads to consideration of whether the exceptions would be consistent with Australia's international law obligations, including the so-called 'three-step test' on limitations and exceptions in Article 9(2) of the Berne Convention.

Google submits that there is no requirement or limitations in Article 9 (2) of Berne that would prevent Australia from adopted an open-ended flexible 'fair use style' exception.

Support for this view can be found in the definitive study of the three step test by Martin Senftleben.<sup>110</sup> In his detailed account of the negotiations that led to the three step test, Dr Senftleben has shown that the test - which he describes as a 'high level abstraction' - was in fact intended to reconcile the many different types of exceptions that already existed when it was introduced:<sup>111</sup>

A comparison of the various observations made by the members countries elicits the specific quality of the abstract formula...: due to its openness, it gains the capacity to encompass a wide range of exceptions and forms a proper basis for the reconciliation of contrary opinions.

In other words, far from intending to introduce a test that limited the capacity of member states to introduce flexible exceptions, the three step was intended to be an abstract, open formula that could accommodate a "wide range of exceptions". This is the same as the intention of the US fair use exception.

It is highly significant that in the many hearings leading up to US becoming a signatory to the Berne Treaty, no concerns regarding fair use were raised by any of the WIPO or by the many leading European copyright experts who took part. Then WIPO Director General Arpad Bogsch said that the only aspect of the US copyright law that made it incompatible with the Berne Convention was the notice and registration requirements that existed at that time.<sup>112</sup>

Google is concerned by recent moves on the part of some rights holder groups to press for a narrow interpretation of the three step test that would stand in the way of other countries introducing greater flexibility to their copyright law. We urge the ALRC to recommend that the Australian Government advocate internationally for a balanced interpretation of the three-step test. The preamble to the WIPO Copyright Treaty emphasises "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information". International harmonisation efforts to date have largely focused on one side of that equation: the rights of authors and copyright owners.

<sup>&</sup>lt;sup>110</sup> Senftleben, Martin, *Copyright, Limitations, and the Three-Step Test: Analysis of the Three-Step Test in International and EC Copyright Law,* Kluwer Law International (2004)

<sup>&</sup>lt;sup>111</sup> Ibid

<sup>&</sup>lt;sup>112</sup> Patry, Bill, *Fair Use, the Three-Step Test, and the Counter-Reformation*, The Patry Copyright Blog (April 2 2008) <a href="http://williampatry.blogspot.com.au/2008/04/fair-use-three-step-test-and-european.html">http://williampatry.blogspot.com.au/2008/04/fair-use-three-step-test-and-european.html</a>



Google submits that it is imperative that the wider public interest be placed on an equal footing. A declaration from some of the most renowned European academics in the field of copyright on "A balanced interpretation of the 'three-step test' in copyright law" provides clear basis for developing such guidance.<sup>113</sup> The declaration rightly identifies that:

The Three-Step Test has already established an effective means of preventing the excessive application of limitations and exceptions. However, there is no complementary mechanism prohibiting an unduly narrow or restrictive approach. For this reason, the Three-Step Test should be interpreted so as to ensure a proper and balanced application of limitations and exceptions.

<sup>&</sup>lt;sup>113</sup> Geiger et al, *Declaration: A Balanced Interpretation of the Three Step Test in Copyright Law* (2010) <http://www.jipitec.eu/issues/jipitec-1-2-2010/2621/Declaration-Balanced-Interpretation-Of-The-Three-Step-Test.pdf>

# Google

# 10 Orphan works

The ALRC has asked how the legal treatment of orphan works is affecting the use, access to and dissemination of copyright works in Australia.

Orphan works represent a largely untapped wealth of information and insights. The current state of affairs benefits no one: copyright owners' works are unavailable to users, and companies, libraries, and others cannot get permission to bring those works back to life.

In the internet era of infinite 'shelf space', there is the possibility for change -- to give renewed opportunities for people to access and use old works, as well as give copyright owners new ways to sell their works and make money. Nevertheless, barriers remain. The costs of identifying, finding, and negotiating with the copyright owners is significant, and in some cases the work is truly orphaned; that is, it is not possible to identify and find the rights holder based on a reasonably diligent search. As a result, millions of orphan works remain generally inaccessible, and copyright law stands as an unnecessary barrier.

Google supports sensible, scalable, orphan works reform: legislation that would provide the public with meaningful access to orphan works in a way that respects the rights of copyright holders that have not abandoned their works. There are different ways that can help achieve this goal, and we think key parts to solving this problem include:

- Technological solutions for copyright owners to make themselves "findable." The creation of simple, accurate, and reliable databases of rights holder information would give copyright owners a way to publicize their contact information. These databases would provide users with a way to determine if a work is orphaned. Moreover, such databases would empower copyright owners who can be found but whose works remain out-of-print today. By making it easier to connect copyright owners with potential licensees, this will facilitate negotiation in the market and new ways to make these works available.
- Providing a clear, objective standard for a user's "diligent search". Any definition of what constitutes a reasonable search risks deterring legitimate usage in one of two ways: by setting a bar so high that no small museum, artist, or other actor can hope to meet it, or by setting a standard so vague that conservative re-users such as investment-backed commercial interests can never achieve reasonable certainty that their search is over. With that in mind, orphan works legislation ought to provide a clear stopping point for what constitutes a "diligent search." Once the user completes this search, they can then avail themselves of the legislative safe harbor and use the work with complete legal certainty. In this regard, databases of rights holder information could help potential users determine whether a work is abandoned, and provide the basis for an objective standard. Furthermore, users must only be expected to base their search for a rights holder on the information at their disposal; the potential user of a book, for example, likely knows the title, author and other key information to help find the current owner of the copyright,



unlike a user who merely has a few minutes of video without authorship or other contextual information.

- Allowing flexibility through a reasonableness standard. Legislation should provide flexibility that can apply in unexpected future circumstances, where a fixed, "objective," standard for a diligent search may not be the most appropriate. One way to do this is to provide a flexible test that courts can apply to determine whether a search for the rights holder is diligent. A good faith re-user would have the option of showing that his search was still diligent and appropriate under the circumstances to receive the benefits of the orphan works safe harbor.
- Encouraging an array of productive uses, both commercial and noncommercial. Legislation would facilitate individual artistic output building on orphan works, libraries and museums preserving works, mass digitization projects, and everything in between. Effective legislation should apply to any use of an orphaned work whether by a for-profit or not-for-profit entity or for commercial advantage. Restricting the orphan works use to a small subset of nonprofit entities would not likely result in innovative, scalable projects requiring significant resources.
- Fair compensation to those holding copyright if they later come forward. If a rights holder later comes forward, there should be a way for them to be reasonably compensated, but not in a way that can kill good faith projects. No large scale project will make the necessary investments in time and money if the whole endeavor can be shut down at any time if a rights holder later comes forward and demands punishing monetary damages or an injunction.



# 11 Copyright and contract

In the digital era, where every use of a copyright work may involve an exercise of at least one of the rights of copyright, uses that previously involved no act of copyright (such as reading) are now able to be controlled by the rights holder, not only through copyright but also through the use of contract and digital locks. Both can be used to restrict the public's access to and use of copyrighted works.

Copyright laws contain a complex balance between the rights of copyright owners to protect their works and the public interest in ensuring access to knowledge and the creation of new works. This balance is sensitively and carefully constructed, which should not be able to be altered or replaced by private arrangements. Google would support an amendment to the Copyright Act that prevented the contractual override of copyright exceptions

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# **Appendix - Creative Australia Online**

In September 2011, a range of companies sponsored Creative Australia Online, a showcase of exciting Australian content across digital platforms. The showcase highlighted the innovative methods of production, distribution and audience engagement that are finding contemporary success.

Presenters such as the creators of Beached Az, the Sydney Opera House, YouTube, Aussie games developers, and the interactive news teams at ninemsn and Yahoo!7 demonstrated how the internet offers Australians unprecedented opportunity to produce and distribute content. Presentations and hands on demonstrations showed how advances in technology mean that content production is widely accessible. Australians are creating content that reflects our culture, reaching audiences at home and abroad.

More information about Creative Australia Online is available at http://googleau.blogspot.com/2011/09/creative-australia-is-online.html. A 'highlights reel' of the presentations is also available.<sup>114</sup>

Some examples of Australian content creators enjoying local and international success online highlighted at Creative Australia Online included:

# Users engaging in co-productions with "professional" content makers to tell Australian stories: Map My Summer

A recent collaboration between Screen Australia and YouTube – Map My Summer – invited users to upload videos (anything from mobile phone footage to a short file) to web portal that celebrated the collective Australian summer experience. The project involved legendary filmmaker George Miller selecting an upcoming local filmmaker, Amy Gebhardt, to create a short film based on the footage uploaded by users onto the Map My Summer web portal.<sup>115</sup> This collaboration between "professional" content creators and users resulted in an entirely new cultural genre. The film was a chronicle of an Australian summer, as told by those who lived it.

# Australian creators using the internet in conjunction with traditional cinema release to promote and distribute their content: The Tunnel

In May 2011, a group of Sydney filmmakers partnered with BitTorrent to promote and distribute their film, The Tunnel, through the US software-maker's internet platforms after a more conventional cinema release.<sup>116</sup> The film won the award for Best Use Of Social Media,

<sup>&</sup>lt;sup>114</sup> <http://www.youtube.com/watch?v=9vQXfOdG3mQ&feature=related>

<sup>&</sup>lt;sup>115</sup> <http://www.youtube.com/watch?v=ZBxvJ8AcAiQ>



Viral Or Word of Mouth at the 17th Annual Australian Interactive Media Industry Association awards, and was nominated for the Cross Platform Interactive award at the 2010 Australian Directors' Guild awards.

# Classical musicians from around the world are coming together via the internet: YouTube Symphony Orchestra

The YouTube Symphony Orchestra is a recent example of the internet being used to break down barriers to inclusion - both on the part of musicians and on the part of audiences. In 2010, musicians from around the world were invited to post an audition on YouTube. A panel of international musical experts selected more than 300 finalists from 46 countries based on skill and technique. Nine orchestras around the world participated in the judging, including London Symphony Orchestra, Berliner Philharmoniker and Sydney Symphony. During a week of online voting in December, the YouTube community gave their input on the finalists. The 101 musicians who were finally selected to take part in the YTSO were flown to Sydney for a series of seven sold-out concerts at the Sydney Opera House. The event was also watched by millions of Australians (there were 2.42 million streams in Australia) and many more millions of overseas viewers (there was not only integral to the delivery and consumption of this cultural event, but also to its creation.

### The internet changing the way that news is gathered and told: ninemsn and Yahoo!7

Shaun Davies from ninemsn and Samantha Yorke from Yahoo!7 discussed the way in which the internet is changing both the creation and consumption of news media by blurring the distinction between audience and creator "and transforming the idea of an Australian story". Ninemsn is working on the creation of a tool that will automatically deliver the mass of user content that it receives via email, Facebook etc into a content management system so that it can be fact checked and edited for style, and then "push-published straight up onto the web".<sup>117</sup>

### Innovation in the development of online games

Tony Reed from the Games Developers Association, Shainiel Deo from Halbrick Studios (creators of Fruit Ninja online game); John Passfield from 3 Blokes Studios (creators of Hospital Town); and Robert Connolly (director of Romulus my Father), discussed the innovation that is occurring in the digital game space.<sup>118</sup>

<sup>&</sup>lt;sup>116</sup> Fulton, Adam, 'Filmmakers Bet on Bittorrent for a Hit' (17 May 2011), smh.com.au

<sup>&</sup>lt;http://www.smh.com.au/technology/technology-news/filmmakers-bet-on-bittorrent-for-a-hit-20110517-1eqdb.html#i>

<sup>&</sup>lt;sup>117</sup> <http://www.youtube.com/watch?v=eoTBRgQMFLU>

<sup>&</sup>lt;sup>118</sup> <http://www.youtube.com/watch?v=ZMZ9HE1LQgQ>



#### Viral success leads to commercial success

Young Australian animators Jarod Green, Nick Boshier and Anthony McFarlane, discussed the way in which a YouTube video that went viral led to their highly successful online cartoon series Beached Az.<sup>119</sup>

#### Arts companies and the internet

Traditional arts companies are also looking to use the internet to increase audience reach and/or access new income streams. For example, the Sydney Opera House is expanding its engagement with people around the world. You can hear about their digital strategy in this video of their presentation at Creative Australia Online.<sup>120</sup>

<sup>&</sup>lt;sup>119</sup> <http://www.youtube.com/watch?v=NQTTAVvOFuE>

<sup>&</sup>lt;sup>120</sup> <http://www.youtube.com/watch?v=7CJhbK3DXZg at 3.55>