



Submission to ALRC Issues Paper: Copyright and the Digital Economy

30 November 2012

Introduction

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

We strongly believe that the orderly management of copyright is essential to promote the continued production of original copyright materials, to ensure sustainable business models and on-going investment and employment in Australia's creative industries.

According to PWC's 2012 report, *The Economic Contribution of Australia's Copyright Industries 1996-7 to 2010-11*¹, the economic contribution of the copyright industries to Australia in 2011 was \$93.2 billion which represented 6.6 per cent of GDP. Further almost 906,000 people are employed in copyright related industries. Copyright employment as a percentage of total employment, for the latest available years that World Intellectual Property Organisation (WIPO) framework data is available, shows Australia's employment intensity to be 8.0 percent. In this regard Australia has a higher percentage of its workforce employed in copyright industries than most countries, except Mexico (11 per cent), Netherlands (8.8 per cent) and USA (8.2 per cent).

We believe that the *Copyright Act 1968* (**the Act**) generally strikes a balance between content creation, consumer choice, and incentives for investment in relation to those matters raised in the discussion paper. We also believe that the Act provides an appropriate environment for the evolution of business models within the digital economy. Proposals in the ALRC discussion paper to introduce various exceptions to the Act run the risk of significantly undermining Australia's creative industries.

Notwithstanding the above, we strongly believe that there are important areas of the Copyright Act, which are regrettably not canvassed in the discussion paper, where changes to the Act are required. These in particular relate to the ability of content and IP holders to take action against inveterate theft of their copy right. It is important to address such online copyright infringement and minimise the impact of such illegal activities to preserve incentives to invest, secure revenue streams and to continue to employ Australians.

This response is structured as follows:

- Section 1 outlines News Limited overall concerns with the Paper; and
- Section 2 addresses individual questions raised by the Paper.

¹ PWC, 2012, <http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>

Section 1 – News Limited’s overarching concerns regarding the Paper

Overall problem

In relation to the matters raised in the discussion paper covering things such as exemptions and fair use, the Act currently aims to balance the rights of consumers and producers and in so doing provides a framework that supports business models, investment and employment across a wide range of creative industries in Australia. There is no need to change that Act in relation to exemptions and fair use as it gets the balance broadly right.

However, there is a need to strengthen the Act further to ensure intellectual property, and associated business models, are more effectively protected in the digital age. Regrettably, the approach taken by the Paper appears to favour ‘watering’ down the Act by, for example, extending the scope of exceptions – in some instances broadly – under the Act.

The section outlines News Limited’s specific and in principle concerns with the approach in the Paper.

Condoning infringement

News Limited is concerned that the Paper appears to accept that copyright theft is ‘a reality’ that should be accepted. The Paper seeks to affect this acceptance by suggesting exceptions from the law, rather than finding effective ways to enforce the law and prevent and/or penalise theft.

The structure of the Paper and the Questions implies the following:

- digital technologies have made content much more accessible and available, and
- as a result there is a large amount of copyright infringement occurring; so
- the Act is obviously out of step with the ‘digital’ age; and
- the current laws are inhibiting innovative and exciting new content developments and business models, because copyright is not of the digital age; therefore
- changes/reforms are required; which will
- strip the rights of content owners to decide the terms on which their works will be distributed; to
- make content freely available; thus
- normalising, condoning and legitimising copyright infringement – theft.

The Paper also references the state of copyright infringement explicitly at Principle 6², stating: *‘Reform should take place in the context of the ‘real world’ range of consumer and user behaviour in the digital environment’*. It states:

‘Digital technology has, arguably, been accompanied by changed consumer attitudes to copyright – specifically less willingness to recognise that copyright is a form of property, owned by a creator...Even where copyright is recognised, infringement may be seen as justified’³.

It then includes a quote from Michael Kirby’s foreword to *Copyright Future, Copyright Freedom*⁴:

² ALRC Issues Paper, p21

³ *ibid*, at para 38

⁴ (2011) edited by B Fitzgerald and B Atkinson

‘...worthy individuals and citizens, many of them children (some maybe even judges), are knowingly, ignorantly or indifferently finding themselves in breach of international and national copyright law. And they intend to keep on doing exactly as before⁵’.

The justification for the Principle concludes with:

‘Laws that are irrelevant and do not fit with community practice are undesirable...means of licensing or exempting what is currently widespread infringement should be considered⁶’.

It is troubling that the ALRC appears to hold to reasoning such as:

- technology is assisting people to misappropriate – effectively steal – something that is not theirs;
- some people doing so would be expected to know ‘right from wrong’ – indeed they may even be the arbiters of justice;
- knowingly, people doing so may justify the misdemeanor;
- knowingly or unknowingly, people doing so will re-offend; therefore
- laws are misplaced and we should legitimise behaviour and actions that would otherwise infringe.

Those interested in analogy may well replace copyright with shoplifting? Would it be considered reasonable to normalise shoplifting and its effects?

To illustrate the effect of online copyright piracy, a report by IPSOS and Oxford Economics, *Economic Consequences of Movie Piracy*⁷ for the Australian Federation Against Copyright Theft (AFACT), indicated that in the 12 months to July 2010 over \$1.37 billion in revenue was lost to the Australian economy as a result of movie theft alone. The study also found that 6,100 jobs were forgone across the entire economy; tax losses to movie theft amounted to \$193 million; and direct consumer spending losses to the movie industry, (cinema owners, local distributors, producers and retailers) amounted to \$575 million.

News Limited submits that an approach that normalises, and indeed legitimises, widespread copyright infringement will undermine the social and economic contributions of creativity in Australia.

Lack of evidence to substantiate the ‘problem’

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

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

⁵ ALRC Issues Paper, para 39

⁶ *ibid*, at para 40

⁷ http://www.afact.org.au/index.php/core/content_protection/who_is_it_harming

News Limited is concerned that the Paper, while seeking evidence to substantiate ‘problems’ also proposes solutions to as yet unsubstantiated issues/problems.

For example, the matter of ‘transformative’ use included in the Paper:

- explores what ‘transformative’ use may be;
- contemplates the current exceptions which may apply, for example, fair dealing; and
- contemplates options for reform.

The questions accompanying ‘transformative’ use in the Paper ask:

- Question 14: How are copyright materials being used in transformative and collaborative ways – for example, in ‘sampling’ and ‘mashups’? For what purposes – for example, commercial purposes, in creating cultural works or as individual self-expression?
- Question 15: Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968 (Cth)* be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?
- Question 16: How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?
- Question 17: Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not reasonably prejudice the legitimate interests of the owner of the copyright?
- Question 18: The *Copyright Act 1968 (Cth)* provides authors with three ‘moral rights’: a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

The questions above seek evidence to support contemplation of a ‘transformative’ use exception.

This is a call for evidence. However, from this point the Paper moves to:

- contemplating framing an exception for transformative use to enable transformative use to not constitute an infringement of copyright;
- defining ‘transformative’ use for the purpose of an exception – including incorporating an example which casts that as broadly as possible in ‘any use of publicly available work’; and
- ask how a ‘transformative’ use exception should be applied.

In posing these questions the Paper presupposes that a ‘transformative’ use exception is warranted. It is appropriate to call for evidence. However, until that evidence is presented and analysed, and the problem is identified and substantiated, it is inappropriate to contemplate ‘fixes’.

It is troubling that the Paper considers a fix to ‘transformative’ use without:

- analysis of the evidence and identification of the nature of the ‘problem’
- quantification of the problem
- consideration of a range of responses, with a key element being proportionality.

News Limited is disappointed that this is the approach taken throughout the Paper, as outcomes from processes that do not undertake sequential analysis are predisposed to deliver sub-optimal outcomes.

No consideration of the value of existing copyright and business models

Another significant problem with the Paper is that it presupposes a range of benefits that will flow from its proposed solutions (such as extending exceptions) however it does not consider at all the costs and unintended consequences of such proposals that water down the Act. In our view there is a very significant risk that introducing the sorts of changes contemplated by the Paper would lead to increases in piracy, increases in the loss to the industry and put further at risk investment and employment models.

The value of existing copyright and business models – and the cost of undermining them – must be taken into account in analysing any potential changes to the copyright regime in Australia.

Omission of education and enforcement

The Paper explicitly acknowledges, as cited above, that copyright infringement is a very real issue. Therefore, News Limited holds serious concerns that the Paper appears to presuppose the manner to address this is via exceptions including consideration of a broad ‘fair use’ exception.

The Paper does not raise the possibilities of education and enforcement – to inform the public about copyright and associated user responsibilities, and alter attitudes and change behaviour; and penalise those who are infringing copyright in the most serious of manners.

As detailed above, the issue of widespread online copyright infringement is a serious concern and is well evidenced. However, the Act is inadequate in dealing with this matter. It requires a code of practice to address unauthorised file sharing (including peer-to-peer); and also legislative amendments to protect consumers and the creative industry from illegal sites (including streaming).

With this matter as evidence, there is a role for Government to support the effective implementation of such cooperative approaches within the existing copyright framework.

News Limited’s recommendation

News Limited believes that all parties of the supply chain, including consumers, should take responsibility for minimising copyright infringement.

We are strongly opposed to recommendations which have the effect of legitimising copyright infringement. To do so would act as a disincentive to investment in content creation and therefore damage the benefits available to society and the economy from creative outputs.

We must work together to nurture and grow the creative industries and therefore the ongoing prosperity of the ecosystem – encompassing individuals, communities and businesses.

News Limited recommendation – action required to combat online copyright infringement

News Limited recommends that immediate attention must be given to cooperatively addressing known deficiencies in the copyright ecosystem, including that of online copyright infringement, in a timely manner.

Online copyright infringement

As News Limited outlined in its submission to the draft Terms of Reference, piracy and theft of digital content is seriously undermining the business models of content creators and legitimate distributors of content.

Evidence of the widespread nature of the problem includes:

- The Intellectual Property Awareness Foundation’s research report for 2012⁸, which tells us that more than 37 per cent of Australians admit to having downloaded material illegally; about 60 per cent of persistent downloaders do so illegally at least once per week – usually TV programs and movies;
- A report for AFACT, *An Estimate of Infringing Use of the Internet*⁹, estimated that as much as 65 percent of all material consumed via bittorrent is downloaded illegally; and
- The 2012 Digital Music Report of the International Federation of the Phonographic Industry (IFPI)¹⁰, which informs us that 28 per cent of internet users globally regularly access unlicensed sites that contain copyrighted music.

Also, developments in digital technology mean that today’s law – which takes steps to address the need to control piracy – is unable to deal with the problems of piracy as they present today.

The deficiencies in this aspect of the copyright ecosystem were acknowledged by the High Court, where the Court indicated that the: *‘statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing...’*¹¹

The Attorney-General’s Department is facilitating a round table of content owners and ISPs regarding this issue. As a participant in this work stream, News Limited is concerned this work is progressing very slowly while widespread online copyright infringement continues to flourish.

Notwithstanding that the Terms of Reference for the Paper outline that the ALRC *‘should not duplicate work being undertaken on unauthorised distribution of copyright materials using peer to peer networks’*, News Limited believes that this is an important element for consideration within the context of the Paper, and urges policy makers to introduce reforms to address the two core elements of online copyright infringement:

- i. Peer-to-peer online copyright infringement: A code of practice to address unauthorised file sharing; and
- ii. Content streaming websites: legislative amendments to protect consumers and the creative industry from illegal sites.

This matter is addressed more fully in response to Question 1 of the Paper, including international examples of actions such as the European Union site blocking directive and examples of the actions undertaken by Member States including the UK.

⁸ <http://www.ipawareness.com.au/research/2012>

⁹ AFACT Snapshot Australian Film and TV Industry State of Play – Envisional Technical Report: *An Estimate of Infringing Use of the Internet*, http://www.afact.org.au/assets/research/AFACT_SNAPSHOT_-_FEB_2012_rz.pdf

¹⁰ IFPI Digital Music Report 2012, <http://www.ifpi.org/content/library/DMR2012.pdf>

¹¹ Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 para 79

News Limited's overarching views on three elements of the Paper

Australia's International Obligations

This section has been moved from a specific section under Fair use (Questions 52 and 53) as it is applicable to the entire paper.

As the ALRC is aware, Australia is a party to a number of international treaties which are key factors in considering laws in relation to copyright. These international treaties include, but are not limited to:

- the *Berne Convention for the Protection of Literary and Artistic Works* (Berne);
- the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (Rome);
- the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS);
- the *Universal Copyright Convention* (UCC);
- the *World Intellectual Property Organization Copyright Treaty* (WCT);
- the *World Intellectual Property Organization Performances and Phonograms Treaty* (WPPT); and
- the *International Covenant on Economic, Social and Cultural Rights* which imposes obligations under human rights treaties including.

These treaties require Australia to protect exclusive rights including the right to authorise actions such as reproduction, distribution and adaptation, and some require the protection of moral rights.

Additionally, Australia is also a party to a number of trade agreements that impose obligations regarding intellectual property rights, including the *Free Trade Agreement between Australia and United States of America* (AUSFTA).

The treaties permit the creation of exceptions in certain circumstances; however exceptions are required to conform to the 'Three-Step Test'. The agreements also generally incorporate the 'Three-Step Test' and obligations under treaties.

Again, as the ALRC is aware, 'Three-Step Test' imposes three requirements that must be satisfied before exceptions are introduced into copyright legislation. Specifically, the exception or limitation:

1. must be confined to 'certain special cases';
2. must not 'conflict with a normal exploitation of work'; and
3. must not 'unreasonably prejudice the legitimate interests' of the author or rights holder.

We reference the material incorporated in the Joint Submission to the Paper by the companies represented by AFACT, AHEDA, MPDAA and NACO which articulates the test process and the burden of proof regarding the 'Three-Step Test':

*'The WTO Dispute Settlement panels, which have construed the "Three-Step Test" under TRIPS and leading test writers on the Treaties, treat each step separately and cumulatively. If any one step is not satisfied, the exception will not comply with the treaty obligations.'*¹²

¹² Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford: Oxford University Press, 2nd ed, 2006) 763 ("Ricketson & Ginsburg"); Panel Report on *United States – Section 110(5) of the US Copyright Act*, WTO Doc. WT/DS160/R (15 June 2000) ("WTO Panel Decision")

The party seeking to defend the exception has the burden of proving that each condition is satisfied.^{13 14}

Further News Limited supports the analysis contained in that Joint Submission which articulates the significant threshold requirements of the 'Three-Steps Test'¹⁵. That material, in full, follows:

First Step: "Certain special cases"

The phrase "certain special cases" requires that exceptions or limitations are clearly and specifically articulated, go beyond the individual interests of copyright users, and have a clear public interest character, that is consistent with, for example, the provisions of the *Berne Convention*.¹⁶ The term "certain" imposes a predictability requirement allowing an assessment of whether the exception does or does not apply on particular facts and a limitation on scope¹⁷. The exception or limitation must apply with a sufficient degree of legal certainty.¹⁸ The term "special" requires the exemption to have an individual or limited application or purpose, and to be narrow in a quantitative as well as qualitative sense. The exception or limitation cannot be a normal case.¹⁹

In summary, the first step requires the exception or limitation to be "clearly defined narrow in its scope and reach"²⁰ and have "an individual or limited application or purpose."²¹

DS160"), para. 6.74; Panel Report on *Canada – Patent Protection of Pharmaceutical Products* (7 April 2000) WTO Doc. WT/DS114/R ("WTO Panel Decision DS114"), para. 7.20; Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: commentary and legal analysis* (Butterworths Lexis Nexis, 2002) ("Reinbothe & von Lewinski") 124; Martin R. F. Senftleben, *Copyright, Limitations, and the Three-step Test* (Kluwer Law International, 2004) 125, 127 ("Senftleben").

¹³ *WTO Panel Decision DS160*, above n 24, para. 6.13, *WTO Panel Decision DS114*, above n 24, para. 7.60; Jane C. Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions" (2001) *Revue Internationale du Droit d'Auteur* 10.

¹⁴ AFACT, AHEDA, MPDAA, NACO Joint Submission to the ALRC Paper at paragraph 27

¹⁵ AFACT, AHEDA, MPDAA, NACO Joint Submission to the ALRC Paper at paragraphs 28 to 35

¹⁶ Ricketson & Ginsburg, above n 24, 773.

¹⁷ See *WTO Panel Decision DS160*, above n 24, para 6.145 ("the term "certain special case" connotes 'known and particularised, but not explicitly identified'"); see also Ricketson & Ginsburg, above n 24, 767 ("a more realistic interpretation [...] is that the exceptions in question should be finite and limited in scope"); Senftleben, above n 24, 135 ("an incalculable, shapeless provision exempting a wide variety of uses would not be allowed"); Reinbothe & von Lewinski, above n 24, 124 ("in essence, exceptions have to be well-defined and to be of limited application"); Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Geneva: WIPO 2003), ("Ficsor Guide") at CT-10.2 ("the use to be covered must be specific – precisely and narrowly determined").

¹⁸ Mihály Ficsor, *The Law of Copyright and the Internet* (2002) paras. 5.55, C10.03; *Ficsor Guide*, above n 27, CT-10.2.

¹⁹ *WTO Panel Decision DS160*, above n 24, para. 6.109; Ficsor, above n 28, paras. 5.55, C10.03; *Ficsor Guide*, above n 27, CT-10.2.

²⁰ *WTO Panel Decision DS160*, above n 24, para 6.108. This is consistent with the recommendations of the Stockholm Study Group which recommended that any exception to the right of reproduction be "for clearly specified purposes.": David Gervais, "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations" (2008) 5 *University of Ottawa Law and Technology Journal* 1, 26.

²¹ *WTO Panel Decision DS160*, above n 24, para 6.109. There is a debate amongst the writers whether there is a third requirement that an exception or limitation must serve some specific public policy objective: Compare *Ficsor Guide*, above n 27, at BC-9.15; Ficsor, above n 28, at paras. 5.55, C10.03 with Reinbothe & von Lewinski, above n 24, at 124; Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, (2003) World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO Doc. SCCR/9/7 at 22 ("Ricketson 2003"); Ricketson & Ginsburg, above n 24, 767.

Step two: not conflict with “normal” exploitation

An exception or limitation must not conflict with a normal exploitation of works. Forms of exploiting a work which have, or are likely to acquire considerable economic or practical importance, must therefore be reserved to the owner of the right. The exception or limitation cannot enter into economic competition with the exercise of the exclusive right in the sense that it must not undermine the market for the work in any way whatsoever or undermine the ways that right holders normally extract economic value from that right to the work and thereby deprive them of significant or tangible commercial gains. Normal exploitation covers a particular usage that the copyright owner would “ordinarily expect or seek to exploit”.²² In the online environment, and in respect of the right of communication to the public, it is necessary to take particular care to avoid compromising the rights holder’s market, as the risks of uncontrolled acts of communication to the public in online environments are potentially far greater.²³

The phrase “normal exploitation” covers not only those forms of exploitation that currently generate significant or tangible revenues, it also encompasses forms of exploitation that, with a certain degree of likelihood and plausibility, could acquire economic or practical importance. It is a “dynamic evolving concept”²⁴ not limited to historical forms of exploitation so as to freeze into place a decision not to exploit a particular market at a particular time. The normal exploitation step applies to each exclusive right conferred by copyright, not simply the right of reproduction or communication to the public. A far-reaching exception to one exclusive right cannot be justified by the fact that an author might still be able to exploit a different exclusive right.²⁵ In one particular WTO Panel decision, an exception which negated an estimated 44% of potential licensing revenues for use of music in restaurants was held to conflict with normal exploitation.²⁶

Third Step: no “unreasonable prejudice” to “legitimate interests”

The third step requires that limitations or exceptions cannot unreasonably prejudice the legitimate interests of the author (in *Berne*) or the rights holder (in *TRIPS*). The condition includes actual or potential economic advantage or detriment such as when an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner. However, it is a broader concept that also covers other forms of potential detriment or advantage requiring protection of interests that are “justifiable” in the sense that they are supported by relevant public policies or other social norms in the light of the objectives that underlie the protection of exclusive rights and the moral rights of authors.²⁷ These interests include pecuniary and non-pecuniary interests, among them the moral rights

²² Ricketson & Ginsburg, above n 24, 767-773; *Ficsor Guide*, above n 27, CT-10.2; Ficsor, above n 28, 284-285; *WTO Panel Decision DS160*, above n 24, para. 6.183; *WTO Panel Decision DS114*, above n 24, 7.54.

²³ Reinbothe & von Lewinski, above n 24, 126; Ficsor, above n 28, 5.56; Ricketson & Ginsburg, above n 24, 703-4.

²⁴ Ricketson & Ginsburg, above n 24, 769; Ricketson 2003, above n 31, 23-24; *WTO Panel Decision DS160*, above n 24, para. 6.180; Senftleben, above n 24, 178.

²⁵ Reinbothe & von Lewinski, above n 24, 125; Ficsor, above n 24, paras. C10.33-10.34; Ricketson & Ginsburg, above n 24, 852.

²⁶ *WTO Panel Decision DS160*, n 24 above, para. 6.209.

²⁷ *Ibid*, paras. 6.220-6.229; *WTO Panel Decision DS114* at paras. 7.68-7.73 (7.69 “To make sense of the term ‘legitimate interests’ in this context, that term must be defined in the way that it is often used in legal discourse – as a normative claim calling for protection of interests that are ‘justifiable’ in the sense that they are supported by relevant public policies or other social norms.”); Reinbothe & von Lewinski, above n 24, at 127; Ricketson & Ginsburg, above n 24, at 773-76; Ficsor, above n 28 at paras. 5.57, C10.03; Ricketson 2003, above n 31, at 27.

of the author and the author's legitimate interests in controlling adaptations or other future uses of a work.²⁸

The words "not unreasonably prejudice" do not allow for exceptions that may cause prejudice to the legitimate interests of authors and rights holders. These words require a balancing assessment of what prejudice an author or rights holder could reasonably be required to tolerate and the quantity and quality of the actual or potential prejudice to rightsholders or authors' legitimate interests. The prejudice must be proportionate or within the limits of reason²⁹ and may include the imposition of conditions, such as guidelines, attribution or payment.³⁰

Remuneration paid under a compulsory licensing scheme may be a factor in determining whether an exception causes unreasonable prejudice. But such remuneration will avoid unreasonable prejudice only in justifiable cases.³¹ The exclusive right to authorise the reproduction or communication of a copyrighted work is undermined by a compulsory license and in some circumstances a compulsory license may not be justifiable at all.³² For example, a compulsory license that covered unpublished works might be an unreasonable prejudice to the author's right to authorize publication.³³ The third step therefore requires a careful contextual evaluation of the import of the loss of exclusivity, given that unreasonable prejudice could not be assumed to be remedied through the imposition of a compulsory licence; some prejudices cannot be remedied this way.³⁴

In interpreting the phrase "legitimate interests", the WTO Panel has observed that legitimate interests include economic and non-economic interests and that prejudice to the legitimate interest of the rights-holders "reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright holder."³⁵ There must therefore be proportionality between the prejudice and the public policy objective underlying the exception or limitation, in that the exception or limitation "must not go beyond a certain level of prejudice which may still be justified in consideration of the underlining special and well-founded public policy considerations."³⁶ Consequently an assessment of the validity of a policy justification may also come into play at the third step.³⁷

²⁸ Ricketson & Ginsburg, above n 24, at 774 and 778; Senftleben at 226; *Berne Convention Art. 6bis*. Moral rights are excluded from the *TRIPS Agreement*, above n 24, Art. 9(1).

²⁹ Ricketson & Ginsburg at 776, above n 24; Ficsor, above n 28, at paras. 5.58, C10.33-10.34; *Ficsor Guide*, above n 27, para. BC-9.26; Reinbothe & von Lewinski, above n 24, at 126-127; Senftleben, above n 24, at 127-133.

³⁰ Ricketson 2003, above n 31, at 27.

³¹ Senftleben, above n 24, at 231; Ficsor, above n 28, at para. 5.55; Ricketson 2003, above n 31, at 27; *Ficsor Guide*, above n 27, at CT-10.2.

³² *WTO Panel Decision DS114*, n 24 above, paras. 7.72.

³³ Reinbothe & von Lewinski, above n 24, at 127.

³⁴ Ricketson & Ginsburg, above n 24, at 775.

³⁵ *WTO Panel Decision DS160*, n 24 above, at [6.229].

³⁶ *Ficsor Guide*, above n 27, at CT-10.2; Ficsor, above n 28, at 5.57.

³⁷ *Ficsor Guide*, above n 27, at BC-9.18 (noting that a "clear and sound political justification" must be identified at the first step to deal with the question at the third step of which areas limitations and exceptions may be introduced and of what burdens societies will allow to be placed on specific categories of its citizens for the benefit of other categories.)

Exceptions

As News Limited outlined in response to the Terms of Reference, we do not support the ‘watering down’ of the Act by, for example, extending the scope of exceptions – in some instances broadly – under the Act.

We noted in that submission that it is prudent to exercise caution before creating additional exceptions. If and when exceptions are created they must be based on sound public policy reasoning and supported by evidence. Additionally, exceptions that limit the rights of the owner must have a demonstrated need – and we would expect a robust cost benefit analysis to justify such change.

Creation of exceptions may also lead to the exclusion of digital distribution channels to rights holders. This would be a real cost of misplaced new exceptions, including those incorporating concepts such as (but not limited to) ‘publicly available work’, ‘non-commercial use’ and ‘normal exploitation’. It is imperative rights holders are able to continue to realise the efficiencies offered by digital distribution channels, and that such an important avenue of the digital economy is not effectively shut off from rights holders through the unintended consequences of policy making.

We do not support legitimising behaviours that would otherwise be illegitimate and illegal by devising exceptions in law. This concern is amplified in that those activities that purposefully breach copyright will gravitate to the ‘exceptions’ to make them legitimate. In turn this will impact the investment in the production and distribution of content, which in turn impacts the contribution of creativity to Australian society and the economy.

Fair use

News Limited strongly opposes the introduction of a fair use exception, for the reasons explained at Questions 52 and 53 of this submission.

It is important to highlight that the current Australian copyright regime incorporates sufficient flexibility to maximise the benefits of the digital economy.

It is the case that there is nothing to inhibit or prevent a content owner from exercising absolute discretion regarding the terms on which that content can be distributed and consumed. It is also the case that the majority of professional content creators exercise that right, by applying terms and conditions. It is also the case that this ability to choose supports the position that increasing the exceptions to the Act is not the appropriate policy – nor commercial – approach to copyright in the digital economy.

The significant risk – which this Paper overlooks – is that undermining the balance provided by the existing copyright framework by increasing unwarranted exceptions such as a broad ‘fair use’ regime will dilute the current copyright framework and cut to the core of investing in creativity. This is not an approach that News Limited supports.

News Corporation captured the matter succinctly in its submission to the Hargreaves Review:

‘A relaxation of copyright laws is only going to de-incentivise potential investors from their pursuit of originality, which copyright rewards³⁸.’

³⁸ <http://www.ipso.gov.uk/ipreview-c4e-sub-news.pdf>, p5, accessed 4 November 2012

In brief, News Limited does not support the introduction of a broad 'fair use' defence for the following reasons:

- Lack of evidence that it is required in Australia;
- 'Fair use' is distinct to the US;
- 'Fair use' would not deliver greater certainty – to the contrary;
- 'Fair use' is not a general defence to copyright infringement;
- Concept is highly subjective;
- Incompatible with international obligations;
- Economic benefits are overstated; and
- UK Hargreaves Report – said no to fair use.

These reasons are outlined fully in response to Questions 52 and 53 in this submission.

SECTION 2 – News Limited’s response to topics/questions posed in the Paper

Question 1: The ALRC is interested in evidence of how Australia’s copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;*
- b) affects the introduction of new or innovative business models;*
- c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or*
- d) places Australia at a competitive disadvantage internationally.*

Copyright is central to News Limited’s business, including businesses News Limited has apart ownership in such as Foxtel, as it is to the creative sector more broadly. It is a fact that widespread online copyright piracy and ‘free-riding’ are negatively impacting content owners.

In a keynote address to the Australian International Movie Convention on 21 August 2012, News Limited CEO, Kim Williams, outlined the extent of the problem:

‘..digital piracy is undermining the business case of cultural production to a greater extent than ever before.

The statistics about copyright theft over the Internet are mind-boggling.

The Intellectual Property Awareness Foundation’s research report for 2012 tells us that more than 37 percent of Australians admit to having downloaded material illegally. Some 60 percent of persistent downloaders download illegally at least once per week. Usually TV programs and movies.

Some sources estimate that as much as 65 percent of all material consumed via bit torrent is downloaded illegally³⁹;

and:

‘One estimate, states that piracy of movies cost the Australian economy \$1.37 billion million last year⁴⁰. And that’s just movies. In the music business 28 per cent of internet users globally regularly access unlicensed sites that contain copyrighted music according to the music industry⁴¹.

These illegal activities undermine investment in the production and distribution of content, which impacts employment in the sector and also outputs and benefits to consumers. If this issue is not addressed – and other jurisdictions do address it, which has occurred – Australia will be disadvantaged.

The widespread incidence of online copyright infringement – through ‘free-riding’ and piracy – poses a real risk of making digital distribution a less attractive channel for rights holders. Therefore the

³⁹ AFACT Snapshot Australian Film and TV Industry State of Play – Envisional Technical Report: *An Estimate of Infringing Use of the Internet*, Jan 2011, http://www.afact.org.au/assets/research/AFACT_SNAPSHOT_-_FEB_2012_rz.pdf

⁴⁰ Oxford Economics/IPSOS report, *Economic Consequences of Movie Piracy*

⁴¹ IFPI Digital Music Report 2012, <http://www.ifpi.org/content/library/DMR2012.pdf>

opportunities provided by digital technologies to support and grow the creative sector are undermined.

Online copyright piracy

Online copyright infringement is of substantial magnitude to the businesses and organisations involved in creating and providing content. As referenced above, one report estimates that movie piracy cost the Australian economy \$1.37 billion in 2011⁴².

The serious issue of online piracy is acknowledged by the key stakeholders in the supply chain, being content providers and ISPs. Reform of this area of the copyright regime is overdue.

A lack of strong copyright protections increases business investment risk, which detrimentally impacts investment in new and innovative services, and therefore reduces benefits to consumers.

News Limited believes it is critical that policy makers introduce reforms to address the two core elements of online copyright infringement:

1. Address widespread peer-to-peer (P2P) piracy

News Limited recommends delivery of a mandatory – and competitively neutral – Code and associated ‘Scheme’ involving content providers and ISPs. Elements of a Scheme must include:

- Identification of copyright infringements;
- Notifications sent to ISP subscribers/customers;
- Mitigation measures such as ‘throttling’ and/or other measures, to restrict services as occurs in the US ;
- Each party bears their own costs – to ensure that each party has an incentive to minimise costs and maximise efficiency.

The benefits of a Code and associated scheme will diminish revenue leakage from legitimate content providers, as well as reduce the amount of illegal traffic on IPS networks to the benefit of ISPs. It also provides an opportunity to increase awareness about the role of copyright, and its continued role in the digital economy.

As overviewed above, stakeholders need to work together to address copyright issues in the digital economy. To that end News Limited is participating in a round-table process facilitated by the Attorney-General’s Department which brings together content providers and ISPs. While this is a step in the right direction, it is currently progressing slowly, is only considering a manual process, and to date there has been no agreement regarding cost sharing.

This matter should be addressed as a matter of urgency.

⁴² Oxford Economics/IPSOS report, *Economic Consequences of Movie Piracy*

Outlined below are examples of codes and schemes effectively operating in international jurisdictions which have been effective in addressing online copyright piracy.

2. Address streaming and illegal sites

News Limited recommends that addressing widespread peer-to-peer piracy must be complemented by legislative amendments protect consumers and the creative industry from illegal sites.

This will enable content providers/rights holders to take action in a court to have streaming websites declared as copyright infringing, and therefore requiring ISPs to block access.

Outlined below are examples of site blocking in international jurisdictions which have been effective in addressing online copyright piracy.

International approaches to combating online copyright piracy

Tackling P2P piracy in France

In 2009 France introduced the Hadopi or Creation and Internet Law. The purpose of the law is to promote the distribution and protection of creative works on the internet – specifically regarding the impact of illegally downloading via P2P networks. It provides a graduated response to encourage compliance with copyright laws. It involves content providers, ISPs and the authority, HADOPI, working in concert.

An independent academic study⁴³ published in January 2012 analysed the impact of the Hadopi law and its impact on consumer behaviour over a 26 month period from April 2009.

The independent study found that public awareness of Hadopi law caused iTunes song sales in France to increase by 22.5 per cent above the sales increase of a control group of five European countries; and a 25 per cent increase in iTunes album unit sales above the change in the control group.

The study found that the combination of increased awareness of the law, the illegality of piracy, and the potential penalties are important elements in changing consumer behaviour – and reinstating the legitimate protections that copyright provides to content creation and distribution.

Further, a report from the French Government in March 2012⁴⁴ states:

*'Benchmarking studies covering all of the sources available shows a **clear downward trend in illegal P2P downloads.***

and:

*'At the same time, **the wide range of legal content offers are gaining visibility and some offers have posted excellent progress.***

⁴³ Dahner, Smith, Telang and Chen, The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France, 2012 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240,

⁴⁴ http://www.hadopi.fr/sites/default/files/page/pdf/note17_en.pdf, accessed 5 November 2012

News Limited attaches the report from the French Government to this submission at Appendix A.

European Commission tackles streaming website blocking

Article 8(3) of the Copyright Directive (2001/29/EC)(EUCD) states:

‘Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.’⁴⁵

This places an obligation on European Union Member States to ensure that rights holders can apply for an injunction against intermediaries whose services are used to infringe copyright. In doing so it envisages that ISPs would have access to liability privileges such as safe harbours.

Orders for site-blocking have been issued in Austria, Belgium, Denmark, Greece, Finland, Ireland, the Netherlands and the UK. Separate criminal blocking orders have been issued in Italy and Spain.

For example, on 26 October 2011 the High Court of the UK issued the first website blocking order under section 97A of the *Copyright Act 1988* (UK)⁴⁶ which required ISPs to block access website Newzbin2⁴⁷. Since then the Court has also issued site blocking orders⁴⁸ requiring ISPs to block The Pirate Bay website.

In a presentation to the Intellectual Property Office (UK) Seminar in July 2012, *Remedies for Online Copyright Infringement: Striking the Balance*⁴⁹, the Hon Mr Justice Arnold, Judge of the High Court, Chancery Division poses and answers the following questions regarding the discretion to make a site blocking order regarding *20 Century Fox & Others v British Telecommunications PLC*⁵⁰ (*20C Fox v BT*):

Did it matter that the Studios were not interested in the whole of Newzbin2? The Studios were the biggest single group of rightsholders affected and their rights were being infringed on a massive scale so they had a sufficient interest to seek an order.

Did it matter that BT would be exposed to other claims? A flood of applications was unlikely. The fact that further applications were likely was not a reason to refuse an order.

⁴⁵ EUCD Recital (59): “In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.”

⁴⁶ <http://www.legislation.gov.uk/ukpga/1988/48/section/97A>

⁴⁷ *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch), [2011] RPC 28 (“Newzbin 2”)

⁴⁸ *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) (“Pirate Bay”)

⁴⁹ <http://www.ipo.gov.uk/ipenforce-onlinedisputes.pdf>

⁵⁰ [2011] EWHC 1981 (Ch)

Did it matter that the order would not be wholly effective? An order would be justified even if it only prevented access to Newzbin2 by a minority of users.

Was the order proportionate? The order was proportionate since it was necessary to protect the Studios' rights which outweighed the infringers' rights and since it was narrow, targeted, contained safeguards and would not be costly to implement.

Also, the British Recorded Music Industry (BPI) applied for a site blocking order with respect to The Pirate Bay (TPB) against the six major ISPs in the UK. On 30 May 2012 Sky Broadband blocked TPB and issued the following statement⁵¹:

We have invested billions of pounds in high-quality entertainment for our customers because we know how much our customers value it. It's therefore important that companies like ours do what they can, alongside the Government and the rest of the media and technology industries, to help protect their copyright. Such protection makes sure that consumers continue to benefit from TV programmes, movies and music both now and in the future. This means taking effective action against online piracy and copyright infringement.

Article 8(3) also provides a legal basis for court orders against other Internet intermediaries, including hosting providers to stop/prevent infringements. Orders have been issued in Belgium, Germany, the Netherlands, Luxembourg, and Sweden.

US, UK and New Zealand all have provisions to address P2P

The common element in such approaches taken in the US, UK and New Zealand is content owners and ISPs working together to combat online copyright piracy and advance the legitimate content ecosystem.

The jurisdictions have variations of Codes and Schemes which include identification of copyright infringement, notifications to subscribers and mitigation measures. While each jurisdiction approaches costs differently, as outlined above, News Limited supports an arrangement whereby each party bears their own cost – which ensures each party has an incentive to minimise costs and maximise efficiencies.

Guiding Principles for reform

Principle 1 – promoting the digital economy

News Limited supports the promotion of the digital economy. We believe that the marketplace is well positioned to deliver to consumers in the digital economy.

Over recent years the lengths of exclusivity windows for all movie content have been significantly compressed due to market pressures from acquirers of movie rights – to satisfy consumer demand.

Traditionally, on demand rights for new release movies occurred after the release of the movie to DVD (both to own and to rent). However, in 2009 Foxtel secured on demand rights

⁵¹ <http://www.sky.com/helpcentre/broadband/protecting-copyright/index.html>

to the movie *The Curious Case of Benjamin Button* to begin on the same day as the DVD release.

Since then, Foxtel has secured 'same day as DVD' on demand rights to a number of movies. For example, in November 2010, Foxtel announced that it had secured same day as DVD rights to a number of movies to be released over the summer viewing period including *Get Him to the Greek*, *Inception*, *A Christmas Carol*, *The Sorcerer's Apprentice*, *Knight and Day*, *Marmaduke*, *Killers*, *The Expendables*, *Tangled* and *Harry Potter and the Deathly Hallows Part I*.

Not only are movie windows compressing, the variety of businesses and platforms competing for the acquisition of new release movie content to meet consumer demand has expanded significantly in recent years. The businesses competing for content include IPTV providers; online content providers such as Apple iTunes, BigPond and Playstation; DVD kiosk operators such as Oovie and Red Room DVD; and online DVD rental providers such as Quickflix, Webflix, Bigpond and DVD Direct. These are in addition to subscription television channels, and commercial and national television broadcasters.

The concurrent release of movie rights via many different delivery mechanisms is demonstrated in a recent internet advertisement from NBC Universal for the movie *The American* – which shows that the film is available from multiple sources (Bigpond, FetchTV, Foxtel On Demand, iTunes, Xbox 360 and the Sony Playstation Store).



Figure 1: internet advertisement from NBC Universal for the movie *The American*

We also draw attention to the recent announcements by Foxtel and the ABC regarding programs being viewable within a day – if not hours – after they premier in international locations as evidence of the market responding to consumer demand in the digital economy.

Specifically, Foxtel recently announced a new agreement with HBO which will provide customers with exclusive first run HBO© content the day after the programs air in the US. Foxtel CEO, Richard Freudenstein, said:

*'This deal will ensure our customers will always see these compelling HBO shows exclusively first-run, with many of the key dramas broadcast express from the US as soon as the day after their original air-date.'*⁵²

The ABC also recently announced that the first episode of season seven of *Dr Who* would premiere on iView from 5:10am AEST on Sunday 2 September 2012 'immediately after its UK

⁵² Foxtel media release, 23 October 2012, <http://www.Foxtel.com.au/whats-on/Foxtel-insider/Foxtel-signs-new-hbo-deal-203024.htm>

*launch on September 1.*⁵³ This was a much more responsive release than previously; according to reports, in 2010 the ABC screened the first episode of a season of Dr Who two weeks after it was screened in the UK.

As reported at news.com.au⁵⁴:

'ABC1 controller Brendan Dahill said the decision to air the show online before television was motivated by a desire to reduce piracy.

"Piracy is wrong, as you are denying someone their rights and income for their intellectual property," Mr Dahill said.'

Mr Dahill also said:

'So as broadcasters we need to find convenient ways of making programs available via legal means to discourage the need for piracy.'

While News Limited supports the promotion of the digital economy and believe that the marketplace is adapting to deliver to customer demands, we do not support the implication – which appears to be embodied in the Paper and actively supported by some – that the promotion of the digital economy requires broad 'fair use' and free access to content. We believe the market – and not Government – is the appropriate mechanism to support the evolution and development of business models in the digital economy.

Principle 2 – encouraging innovation and competition

News Limited supports the encouragement of innovation and competition.

The Paper says that encouraging innovation and competition is consistent with the Convergence Review principle that the communications and media market should be innovative and competitive, while balancing outcomes in the interest of the Australian public.

As the ALRC may be aware, News Limited does not agree with a number of the recommendations of the Convergence Review, particularly the introduction of a so-called public interest test. We do not support this for a number of reasons; most pertinent as it relates to the ALRC Paper is that such a test is highly subjective. Further, the existing measures are adequate; and the developments in the market and the digital economy are delivering effective outcomes – outcomes that are innovative and competitive, and in the public interest.

To evidence the matter of the adequacy of existing measures, we offer the following:

- i. The Australian Competition and Consumer Commission (ACCC) has extensive powers to preserve media diversity in its administration of pro-competition laws. In administering these pro-competition laws, namely section 50 of the *Competition and*

⁵³ ABC press release, 20 August 2012, *The Doctor to premier on iview*, <http://about.abc.net.au/press-releases/the-doctor-to-premiere-on-iview/>

⁵⁴ Claire Connelly, ABC warps time to put Dr Who online early at iview, 29 August 2012 <http://www.news.com.au/technology/abc-warps-time-to-put-dr-who-online-early-at-iview/story-e6frfro0-1226460269988>

Consumer Act 2010, the ACCC effectively has strong powers that preserve media diversity. As the ACCC submission to the Convergence Review includes; 'Section 50 prohibits acquisitions which have the effect, or are likely to have the effect, of substantially lessening competition in a market'.⁵⁵

- ii. The Australian Communications and Media Authority (ACMA) has existing and well established powers to ensure diversity through the *Broadcasting Services Act 1992*. These include enforcing the media diversity rules including the minimum number of voices and '2 out of 3 rule' for commercial television, radio and newspapers; 'one to a market' rule for commercial television; 'two-to-a-market' rule for commercial radio; and '75 per cent audience reach' for commercial television.

To draw out the matter of subjectivity further, the Paper includes consideration of introducing new copyright exceptions. While we address these in detail in the paper, it should be highlighted here that we have serious concerns about the breadth and subjectivity of such exceptions. We are also concerned about the lack of recognition and acknowledgement of the effective outcomes delivered through the combination of the existing copyright measures and the marketplace and the opportunities offered by the digital economy – outcomes which are innovative and competitive, and in the public interest.

Therefore, News Limited supports the principle of encouraging innovation and competition, but is cautious of outcomes that do not consider the resilience of existing frameworks and the intersection of these with the realities of the evolving market and digital economy.

To support the detail of this principle, that '*reform should encourage innovation and competition and not disadvantage Australian content creators, service providers or users in Australian or international markets*'⁵⁶, the Paper quotes Kimberlee Weatherall⁵⁷:

*'If copyright law creates a less conducive environment for a digital economy than the law of Australia's competitors, this will put Australia at a disadvantage in attracting and retaining innovative digital companies'*⁵⁸.

The reasons why companies choose to establish a presence in a country – or in a particular state of a nation – is based on a wide range of incentives/disincentives. While companies will most likely 'weight' factors differently, those that are common include business costs such as tax obligations (and also tax incentives); skills and education, including migration policies; research and development; industrial relations; culture including business risk; location of business inputs – which may exclusively be human capital, but many also involve other inputs such as transportation and distribution. Grouping with 'like minded' companies and competitive pressures may also be considerations in where companies choose to locate.

An Independent Report by Professor Ian Hargreaves, *Digital Opportunity, A Review of Intellectual Property and Growth*, to the UK Government in May 2011, said:

⁵⁵ ACCC submission to the Convergence Review
http://www.dbcde.gov.au/_data/assets/pdf_file/0011/146279/Australian_Competition_and_Consumer_Commission.pdf, p4

⁵⁶ ALRC Issues Paper, p19

⁵⁷ K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform (2011)*, Policy Paper prepared for the Australian Digital Alliance, 2

⁵⁸ ALRC Issues Paper, p19

Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law⁵⁹.

Additionally, the decision of a company to establish a presence is a significant and long-term strategy. It involves employing people and participating in the community. These are material concerns, and ones not easily reversed without commercial and reputations ramifications.

News Limited notes the Australian presence of a wide range of digital companies including Google, Facebook, Apple, Microsoft, Yahoo!7 (a joint venture of Yahoo and Network 7) and Mi9 (a joint venture of Microsoft and Nine Entertainment Group). These companies have committed to operating in Australia and participating within the community. These companies are also offering products and services within the Australian jurisdiction, further illustrating that copyright law is not disadvantaging Australia in attracting and retaining companies operating in the digital arena.

Principle 3 – recognising rights holders and international obligations

News Limited supports recognising rights holders and international obligations.

As addressed previously in this submission, News Limited contends that this principle is a key plank in establishing an industry approach to the issue of online copyright infringement, and also in considering the appropriate analysis – including cost-benefit – of further exceptions to the Act.

Principle 4 – promoting fair access to and wide dissemination of content

News Limited supports access to content being on the terms decided by the content owner – based naturally on competition with the market it is operating in, its cost and the need for a reasonable return on capital. It should always be the case that content owners are free to determine the terms on which their content is distributed – which may not be ‘wide’ and to some may not appear ‘fair’ or ‘free’. It should also be noted that content owners have an inherent incentive to monetise their works through broad distribution, and copyright is the foundation of this.

As well as driving change, the evolving digital economy is empowering consumers like never before. This is generating competition in the market place as businesses are driven to provide content to consumers much faster than before. There is competitive pressure to deliver content to consumers how and where they want to consume it, on the devices of their choice, at the times that they choose.

Organisations are therefore evolving, and working through how to best respond to this consumer demand and changing consumption behaviours. Content creators and owners are working through how best to respond to this consumer demand and changing consumption

⁵⁹ <http://www.ipso.gov.uk/ipreview-finalreport.pdf>, p45, para 5.17, accessed 5 November 2012

behaviours too, also how best to harness the medium to ensure sustainability. We believe that the market is best placed to support the evolution and development of business models to support the creative industries – not Government.

The marketplace is responding. As outlined above in response to *Principle 1* of the Paper, recent announcements by Foxtel and the ABC demonstrate the responsiveness of organisations to meet consumer demands.

The Paper says: *New business models should be allowed to develop without copyright hindering these benefits*⁶⁰. However, there is no evidence in the Paper of copyright hindering the development of new business models. Indeed, if anything is inhibiting new industries it is not the current copyright regime and the lack of existence of exceptions such as ‘fair’ and ‘free’, but theft that undermines business cases.

What seems to be overlooked in the Paper is acknowledgement that it is, and should continue to be, the case that content owners are empowered to choose how their content is distributed. It may be that some make it freely available. It may be that some exercise their right to copyright, and choose then to distribute on terms they have decided upon.

On what terms do I make my content available? The outcomes of such decisions are themselves business models. We see material being distributed freely as a marketing tool (for example, music from a new artist); when that artist has enough followers this may evolve into paying for the music; when the artist has become popular perhaps there’s another business model – such as paying in advance to secure a pre-release of content. These business models are forming and evolving within existing copyright frameworks. We reiterate that the market, supported by effective copyright protections, is best placed to support the evolution and development of business models to support the creative industries – not Government.

All distribution models have an underlying business model, including those that appear to be ‘free’. It may be that some participants in the supply chain (such as platforms and intermediaries) are benefiting, including in an economic sense, and others are not. It may also be that some participants would like to enhance that benefit and are less focused on the consequences of pursuing those benefits.

The Government’s 2009 Report, *Powering Ideas: An Innovation Agenda for the 21st Century*⁶¹, includes a list of successful innovations, including Google Maps, to illustrate that Australia’s innovation system works. It also reminds us that achieving economic success through innovation is a long road:

*‘[These examples remind us that] ground breaking innovation requires sustained commitment, sometimes for decades. Translating new ideas into money-making products and services takes staying power. It requires an innovation system that offers an unbroken path from vision to realisation*⁶².

While the reference relates to large scale ‘technical’ innovation, it is as relevant to creative innovation and endeavour; particularly to the application to the task of creating, and the

⁶⁰ ALRC Issues paper, p20

⁶¹ <http://www.innovation.gov.au/Innovation/Policy/Documents/PoweringIdeas.pdf>, accessed 1 November 2012

⁶² Ibid, p3

rewards and benefits – flowing to the content owner and consumers both economic and social – as a result of the investment in creative endeavour.

That report goes on to state that ‘*governments have a responsibility to step in where markets fail*⁶³’. News Limited agrees with this as long as there is very clear evidence of a durable market failure. We do not believe that such evidence exists in the context of copyright to warrant a principle which focuses on the alleged ‘benefits’ of new business models without undertaking a ‘cost’ analysis that such a principle would have on existing business models including creative output and investment in content creation.

Principle 5 – responding to technological change

News Limited supports the principle of responding to technological change. However, we believe that the current copyright framework does enable this to occur. Copyright is, and has proved to be, durable and adaptable. It is as relevant today as it has ever been – and the terms of which have always been a matter of choice.

As we state previously, we do not support the supposition that because digital technologies makes it easier to infringe copyright, copyright law must be amended to legitimise infringing activities.

Attention is required as a matter of priority to address widespread online copyright infringement which is seriously undermining the business models of content creators and legitimate distributors of content. As we clearly articulate in the Introduction to this submission, News Limited strongly believes that changes to the Act are required to ensure it is able to address online copyright infringement.

News Limited reiterates that notwithstanding the Terms of Reference for the Paper state that the ALRC ‘*should not duplicate work being undertaken on unauthorised distribution of copyright materials using peer to peer networks*’, News Limited urges the Government to make a concerted and coordinated effort to address and deliver:

- i. Peer-to-peer online copyright infringement: a mandatory – and competitively neutral – ISP Code and associated ‘Scheme’, including mitigation measures such as ‘throttling’ and restricting services as occurs in the US, with each party bearing its own costs; and
- ii. Content streaming websites: legislative changes to enable site blocking by ISPs – as occurs in the European Union.

All parties benefiting from content delivery supply chains have a responsibility to ensure – as far as possible – that infringing activities are called to order.

This matter is addressed more fully in response to Question 1 of the Paper.

Principle 6 – acknowledging new ways of using copyright material

⁶³ Ibid, p3

News Limited recognises the importance of acknowledging the context of the digital environment. However, this does not mean that copyright infringement and theft should be legitimised or normalised.

Content owners must continue to be free to determine the terms on which their content is distributed. This will encourage and protect creative investment.

The corollary to this principle is acknowledging the new ways of abusing copyright material. As outlined above, this is particularly the case regarding the well-evidenced issue of online copyright infringement. This requires Government to provide timely assistance and support actions to address the widespread issue of online copyright infringement.

Principle 7 – reducing the complexity of copyright law

News Limited supports reducing complexity in laws as required and as appropriate.

We believe that reducing complexity should have a purpose. In this instance it should promote clarity and certainty for creators, rights holders and users alike.

Some use the reducing complexity argument to support the introduction of a broad ‘fair use’ exception. News does not support the introduction of ‘fair use’ nor the justification of decreased complexity. As outlined previously in this submission, the introduction of ‘fair use’ or similar exception/s would actually create the opposite due to the subjectivity of such a concept; and the necessity to test such in court.

We reiterate that reducing complexity should have a purpose. It is not an end in itself.

Principle 8 – promoting an adaptive, efficient and flexible framework

News Limited supports promoting an adaptive, efficient and flexible framework.

In supporting such an approach, we also believe that it must be balanced with the need for certainty for content owners and consumers.

For the purposes of sound policy making and appropriate outcomes, News Limited recommends that there must be clear evidence of an issue in advance of recommendations being made. Further, recommendations of intervention must include a cost benefit analysis.

Caching, indexing and other functions

Question 3: What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia’s copyright law?

As News Limited understands, caching, indexing and other functions are essential to the operation of the internet.

Therefore it is not the case that entities within Australia are not carrying out these functions. Subsequently, there is a lack of evidence to support the claims that internet related functions are being impeded by Australia’s copyright law.

Further, content owners and distributors must be free to prohibit caching and full form indexing where substantial portions of their work is copied.

Question 4: Should the Copyright Act 1968 (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

As outlined above, as there is a lack of evidence of a problem, News Limited does not support the development of exception/s for such activities.

If it was the case that such exception/s were to be considered – while we would not support this in principle – attention must be given to websites, which would infringe copyright, if not for the exception.

The substantial risk of such exception/s is that infringing sites, including those promoting peer-to-peer online copyright infringements, will exploit the exception. This would substantially undermine such an exception for legitimate purposes. It would also further entrench the behaviours – and legitimise – those participating in online copyright infringement.

To reiterate, News Limited does not believe such exception/s should be developed and applied.

Cloud computing

Question 5: Is Australian copyright law impeding the development or delivery of cloud computing services?

News Limited does not believe that Australian copyright law is impeding the development of cloud computing services. There is no evidence to support a positive response to the question. In fact, the evidence is to the contrary.

Cloud computing services are supplied legitimately by a number of providers in Australia – some of which have shareholders to answer to.

Telstra's recent full year 2012 financial results announcement included strong growth in its Network Applications Services (NAS) division, which includes cloud computing. In detail, Telstra reported an increase of NAS revenue of 10.5 per cent in 2012, supported by growth in Cloud Computing of 42.2 per cent⁶⁴.

Further, in an interview for Business Spectator's KGB on 28 September 2012⁶⁵, Telstra CEO, David Thodey said in response to questions about cloud computing and setting up cloud networks in Australia:

⁶⁴ Telstra Full Year Results 2012, CEO/CFO Analyst briefing presentation, slide 12, <http://www.telstra.com.au/abouttelstra/download/document/tls842-full-year-2012-fr-ceo-cfo-analyst-briefing-presentation-cover-slides.pdf>, accessed 1 November 2012

⁶⁵ <http://www.businessspectator.com.au/bs.nsf/Article/KGB-David-Thodey-Telstra-NBN-cloud-pd20120928-YJS8E?OpenDocument&src=srch>, accessed 1 November 2012

'[So] what we've done is build a big cloud infrastructure here in Sydney and Melbourne...It's a global network. So we're investing significantly and we're seeing a lot of demand for this cloud computing'.

In response to questions about 'how big' this will be for the company by 2020, Mr Thodey said:

'Well, I can't tell you exactly that because I actually don't know the number in 2020, but I do know we're investing roughly \$650 million. So, if I'm investing \$650 million over three years, it would have to be a multibillion dollar business for me to get the returns. I think if you said in excess of \$2 billion, that's what I would like to think it would be. Now, obviously that investment profile is based on our success, but that's what we're planning for'.

And in response to a question about the investment being a growth investment Mr Thodey said:

'Absolutely it's a growth investment, yes. But it's not acquiring another company. It's actually investing in technology, which is a natural extension to what I do today'.

IBM Australia is also investing in cloud computing infrastructure and services in Australia. In an interview which appeared in The Australian on 26 October 2012⁶⁶, IBM Australia cloud computing executive Dean Evans said IBM's private cloud solution will be hosted in its data centre in Sydney's suburbs. It is reported that Mr Evans said the investment is *'in the "millions of dollars" and the centre would act as an Asia-Pacific hub for regional customers'.*

Mr Evans is also reported to say that *'hosting the cloud service in-country was a big plus as it "avoids the troublesome questions from management about where the data is located".'*

These are examples of two companies – of many – that are investing in, and supplying, cloud computing services in Australia. As is illustrated very clearly in the Telstra example, it is expected that cloud computing is a driver of growth. This is undeniable evidence that Australian copyright law is not impeding the development of delivery of cloud computing services.

Question 6: Should exceptions in the Copyright Act 1968 (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

The evidence in response to Question 5 above clearly illustrates that cloud computing services are not impeded by the current copyright regime.

Therefore, News Limited does not support the amendment of existing exceptions; and/or the creation of new exceptions for cloud computing services.

⁶⁶ <http://www.theaustralian.com.au/australian-it/cloud-computing/ibm-australia-unveils-cloud-computing-solution/story-fn8lu7wm-1226503691178>, accessed 1 November 2012

Copying for private use

Question 7: Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

News Limited notes that the Act contains time shifting and format shifting exceptions to enable more convenient use of broadcast copyright material by consumers. The balance between rights holders' interests and consumers' interests was carefully considered at the time of introduction of these exceptions and should be maintained.

We add that demand for catch-up television is being met on a legitimate licensed basis – demonstrating that copyright works.

Again we reiterate that the mere availability and use of digital technologies does not warrant legitimising activities that would otherwise be infringing. Rights holders should be able to determine the terms of use of content.

Question 8: The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

News Limited supports Foxtel's submission regarding this question.

Specifically, Foxtel's submission to the Paper states: Foxtel supports the principle of technological neutrality and believes that simplification of the Copyright Act, where possible without upsetting the balance struck under the Act, is in the best interests of industry and consumers.

Subject to the precise terms of the proposed new exception, Foxtel would welcome the replacement of the four separate format shifting exceptions with a single exception. However, it is important that any new exception is precise and not drafted too widely; otherwise it may impact on rights holders' ability to monetise their content.

In particular, Foxtel would be concerned if a broad "digital-to-digital" exception were to be introduced in respect of cinematograph films. Any relaxation of the laws in this respect may ultimately result in the facilitation of further online piracy.

Question 9: The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

- a) should it matter who makes the recording, if the recording is only for private or domestic use; and*
- b) should the exception apply to content made available using the internet or internet protocol television?*

As with many of the suggestions in the Paper, there is a lack of evidence to support amendments. Specifically, there is a lack of evidence to suggest that the time shifting exception in section 111 of the Act is not operating effectively in the digital environment.

News Limited supports Foxtel's submission regarding this question.

Specifically, Foxtel's submission to the Paper states: Who makes the recording is critically important. If the recording is not made by a private individual, rights holders' ability to monetise their content may be seriously prejudiced.

There is no justification for expanding the scope of the current exception. It would be inequitable if commercial entities with no interest in the underlying content were to profit from exploiting any expansion of the current exception.

Question 10: Should the Copyright Act 1968 (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

News Limited supports Foxtel's submission regarding this question.

Specifically, Foxtel's submission to the Paper states: It is important that any amendment to the Act in relation to back-ups applies only to the extent that the person is authorised by the rights holder to retain a copy of the copyright material.

Foxtel makes certain content available to its subscribers to stream or download for a limited period of time. The length of time content is available for such purposes is usually determined by the content owner. If an exception were introduced that allowed Foxtel's subscribers to make back-up copies of such content, this would conflict with Foxtel's and/or the rights holder's ability to exploit that content at a later time.

Online use for social, private or domestic purposes

Question 11: How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

News Limited is aware that content with attached rights is increasingly being made available in the social networking sphere.

More broadly, the evolution of digital technologies has, and is, enabling the sharing of all content – regardless of the existence of rights, and regardless of knowingly and unknowingly infringing – with increasingly greater ease, online.

In the cases where rights holders have set terms for content distribution other than 'free', it is likely that the sharing of such material – for whatever reason it is labelled with (social, private, domestic, other) – is delivering benefits to online platforms and intermediaries at the expense of the rights holder/s.

What is implicit in the labels 'social, private, domestic' is lack of commercial transaction and commercial benefit, because the person sharing or uploading is not receiving a 'benefit'. However, each and every piece of content that is shared and uploaded online does support a business model, and is of commercial benefit to the operator of the site – through the ability

to monetise users and content through advertising. As each piece of content can so easily be shared online, it is the case the content of rights holders is often being abused, for which someone other than the content creator and rights holder benefits.

Further, given the ease of sharing content online, labels and reasons for sharing content, including but not limited to 'social, private and domestic' are increasingly problematic.

Question 12: Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

News Limited strongly opposes the introduction of any exception for online use of copyright material – including for 'social, private or domestic' use.

As addressed on numerous occasions in his submission, we do not hold that the mere ease of availability of, and access to, content warrants condoning and legitimising infringement. We also restate that it is the right of a content owner to decide the terms of use and distribution of that content – including via the internet and social media platforms.

To entertain such an exception undermines this right to choose. It also undermines the opportunities the internet and social platforms provide to promote and distribute legitimately obtained copyright content. This, we believe, is detrimental to the economy and society.

Question 13: How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

For the reasons articulated above, News Limited strongly opposes an exception for 'social, private or domestic purposes'.

Further, and with reference to the response to Question 11, the concept of 'non-commercial use' is a misnomer as parties in the supply chain are in fact benefiting 'commercially' from the use of copyright materials online – regardless of the labelled purpose.

Also, in acknowledging the evolving nature of the digital world, and the continuing evolution of business models, it is quite reasonable to observe that what may be 'non-commercial' today has the ability to be 'commercial' tomorrow.

Lastly, News Limited submits that in all circumstances, any exception for online use of copyright materials would unreasonably prejudice the legitimate interests of copyright owners.

Transformative use

Question 15: Should the use of copyright materials in transformative uses be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

News Limited strongly opposes the introduction of any exception for transformative use of copyright material.

Again, we do not hold that the mere ease of availability of, and access to, content warrants condoning and legitimising infringement. We also restate that it is the right of a content owner to decide the terms of use of that content. As outlined previously in this submission, content creators will decide on what terms content will be available by taking into account the marketplace for the content – this includes considering the changes to consumer demand and changing consumption habits of consumers empowered by the technologies of the digital age. It therefore holds that consumers should respect the terms set by rights holders, and abide by these accordingly.

To entertain such an exception undermines the content owner's right to choose. The producers of a multitude of goods and services set the terms on which these will be available. It is usual practice to seek permission and/or transact for inputs that contribute to the development of a new product or service. It is also usual respect those terms. The decision then is binary, to abide by the terms, or not – whereby 'not' does not justify misappropriation or theft.

Copyright owners have set the terms of their good, including reproduction and adaptation. Those decisions, and ensuing terms, should be respected.

Question 16: How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

For the reasons articulated above, News Limited strongly opposes an exception for transformative use of copyright material.

Further, the concept of '*publicly available*' is problematic. We do not hold that the mere '*public availability*' of, and access to, content warrants condoning and legitimising infringement. We also restate that it is the right of a content owner to decide the terms of use of that content. It therefore holds that users should respect those terms and abide by such accordingly.

Freely available works that are available for unrestricted use – which are explicitly so – may well be that. A decision has been made and it should be respected.

However, to assume that any – or indeed every – work that is available to the public, including those more easily available via digital technologies, could be used in the creation of a new work without permission is absurd – regardless of whether this is 'transformative' or otherwise.

Lastly, a concept such as '*publicly available*' encompasses the very real risk of incorrectly validating the perception that works that are accessible via digital technologies are freely and publicly available, and therefore the content is available to be used in any manner the consumer would like. This is a dangerous step and undermines the rights of content owners and creators, and the incentives to continue to create.

Question 17: Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

News Limited strongly opposes an exception for ‘transformative use’ for the reasons outlined above.

Further, and as addressed in Question 13, the concept of ‘non-commercial use’ is a misnomer as parties in the supply chain are in fact benefiting ‘commercially’ from the use of copyright materials online – regardless of whether the ‘owner’ of the content is benefiting or not.

Also, in acknowledging the evolving nature of the digital world, and the continuing evolution of business models, it is quite reasonable to observe that what may be ‘non-commercial’ today has the ability to be ‘commercial’ tomorrow.

Lastly, News Limited submits that in all circumstances, any exception for transformative use of copyright materials would unreasonably prejudice the legitimate interests of copyright owners.

Educational institutions

Question 28: Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

News Limited supports Foxtel’s submission regarding this question.

Specifically, Foxtel’s submission to the Paper states: Foxtel is supportive of a statutory licensing scheme for schools. However, Foxtel is aware that the current regime set out in part VA of the Act is open to exploitation by third parties and requires reassessment.

Part VA of the Act confers on schools a statutory licence to make a copy of a broadcast without infringing the copyright in that broadcast (or the underlying copyright works), provided certain criteria are met. Third parties may make the copy of the broadcast on behalf of the school, and the copy of the broadcast is not supposed to be made, sold, or otherwise supplied for a financial profit. However, Foxtel has recently encountered an instance whereby a third party is selling software to schools that do not subscribe to Foxtel, to enable those schools to make copies of Foxtel’s subscription broadcasts. The copies themselves are allegedly not sold for a profit, but the software is. Foxtel is of the view that this is inconsistent with the intention of Part VA and there is sufficient nexus to the copying itself that it should be prohibited.

Question 30: Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the Copyright Act 1968 (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

News does not support the introduction of a free-use exception, for the reasons outlined previously in this submission regarding 'fair use', and again outlined at Question 52.

Question 31: Should the exceptions in the Copyright Act 1968 (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

News Limited supports Foxtel's submission regarding this question.

Specifically, Foxtel's submission to the Paper states: For the reasons explained in response to question 28, Foxtel submits that Part VA of the Act requires urgent amendment to clarify that the statutory licence in respect of subscription broadcasting services and subscription narrowcasting services is only available to schools that are legally entitled to access such broadcasts.

Retransmission of FTA broadcasts

Regarding this topic, News Limited holds that this is a broadcast policy matter and not a copyright matter. Therefore we believe that this is not a matter for the ALRC and this Paper.

Question 35: Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

News Limited supports Foxtel's submission regarding this question.

Specifically, Foxtel's submission to the Paper states: Foxtel strongly opposes any proposed amendment to the current retransmission rules, including the introduction of a US-style 'must carry' regime as called for by Free TV Australia in its submission to the Convergence Review.

Foxtel has retransmitted free-to-air broadcasts for many years and is well placed to respond to the ALRC's inquiry in respect of retransmission. Foxtel believes that the current regime works well and there is no justification for legislative reform.

Retransmission is an extremely limited right, which only enables Foxtel to retransmit free-to-air broadcasts simultaneously with their terrestrial broadcast, in the licence area and in an unaltered fashion. Foxtel retransmits certain free-to-air broadcasts for the convenience of its subscribers being able to access those channels through the one service. However, not all Foxtel subscribers have access to all retransmitted channels.

The commercial broadcasters are ultimately remunerated for Foxtel's retransmission of their broadcasts, as viewing of retransmitted broadcasts is taken into account in measuring ratings, which play a large role in determining advertising revenue. The commercial and national broadcasters are also often the underlying rights holders, in which case they are also eligible for disbursements from Screenrights, the collecting society for the equitable remuneration paid by retransmitters.

Whereas the commercial broadcasters' primary source of revenue is advertising, Foxtel's business is a subscription model. Foxtel does not charge its subscribers to access retransmitted free-to-air broadcasts through the Foxtel service.

Foxtel submits that it would be entirely inappropriate and unfounded to introduce a US-style “must carry” regime. The key objective for enactment of the retransmission regime in the US was to ensure that consumers could continue to receive signals in circumstances where cable television penetration was high and consumers did not have access to television signals via aerials. This is different from Australia, where almost 99% of the population has access to free-to-air television and the Government has spent a considerable amount of tax payers’ money on programs to ensure that Australians receive television either via aerial or satellite. Moreover, cable and satellite penetration in the US is now over 90% and significantly higher than STV penetration in Australia.

Free TV’s submission in respect of the European retransmission regime is also based on a seriously erroneous comparative analysis. EU member states may impose must carry obligations “*where a significant number of end-users of such networks use them as the principal means to receive radio and television broadcasts*”. It simply cannot be said that a “significant number” of Australians rely on STV broadcasters to receive free-to-air channels in circumstances where terrestrial penetration remains at almost 99% of Australian households and STV penetration is approximately 35% of the Australian population.

In all the circumstances and particularly where the commercial broadcasters are ultimately remunerated for STV retransmissions, Foxtel submits that there is no justification for any amendment to the current retransmission regime.

Question 36: Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions – for example, in relation to geoblocking?

News Limited supports Foxtel’s submission regarding this question.

Specifically, Foxtel’s submission to the Paper states: In principle Foxtel is not opposed to extension of the current rules to include retransmission over the Internet, but submits that this is an issue of broadcast policy rather than copyright and therefore should be outside the scope of the ALRC’s inquiry.

Question 37: Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?

News Limited supports Foxtel’s submission regarding this question.

Specifically, Foxtel’s submission to the Paper states: This is a complex issue that has implications for the regulatory regime for IPTV and OTT providers. Essentially this issue is one of broadcast regulatory policy and not copyright. As such, Foxtel submits that this issue would be better considered by the Australian Government in a more holistic forum.

Question 38: Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?

News Limited supports Foxtel’s submission regarding this question.

Specifically, Foxtel’s submission to the Paper states: For the reasons explained in response to question 35, Foxtel does not believe that any consideration of retransmission

arrangements is currently warranted, whether by way of the ALRC's inquiry or in another forum.

Question 39: What implications for copyright law reform arise from recommendations of the Convergence Review?

News Limited supports Foxtel's submission regarding this question.

Specifically, Foxtel's submission to the Paper states: The Convergence Review recommended greater regulatory intervention in relation to investment in Australian content. Foxtel and our STV partners already produce a significant amount of Australian content and do not consider this expansion is warranted.

However, to the extent that there are regulatory obligations to invest in Australian content these should be matched by protections from the theft of that content and acquired content which is purchased at significant cost. Failure to address this problem will undermine the confidence and ability of Australian content providers to invest, which will ultimately be to the detriment of consumers.

Statutory licences in the digital environment

Question 44: Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

News Limited strongly opposes the introduction of a 'free-use' exception, for the reasons outlined in addressing 'fair use' at the outset of this submission and again in brief at Question 52.

Fair dealing exceptions

Question 45: The Copyright Act 1968 (Cth) provides fair dealing exceptions for the purposes of:

- (a) research or study;*
- (b) criticism or review;*
- (c) parody or satire;*
- (d) reporting news; and*
- (e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.*

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

News Limited holds that the current fair dealing exceptions are adequate provisions and supports maintaining the current form.

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

The Publishers paper articulates concerns that digital technologies, while providing enormous benefits in allowing Publishers to provide timely and flexible news and other information services, have also created an environment in which it is easy for others to 'free

ride’ on the investment of Publishers and, indeed, compete through those ‘free riding activities’.

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

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

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

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

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

Question 46: How could the fair dealing exceptions be usefully simplified?

News Limited supports the Publishers’ submission regarding this question.

Question 47: Should the Copyright Act provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

News Limited does not support the provision of any other fair dealing exceptions, including for quotation.

As outlined in the Publishers’ submission response to Question 46, the emphasis of the fair dealing provision is on the purpose – not the task or some other aspect.

Regarding a fair dealing exception for quotation, we draw attention to the existing fair dealing exceptions. These are descriptive of the purpose of use – research or study; criticism or review; parody or satire; reporting news; and a legal practitioner, registered patent attorney or registered trademarks attorney giving professional advice. However, considering quotation (for example) without reference to the purpose means that the fairness of the dealing has nothing to be tested against.

The implication of which would be significant copyright appropriation.

Other free-use exceptions

Question 50: Should any other specific exceptions be introduced to the Copyright Act 1968 (Cth)?

News Limited opposes the introduction of specific exceptions on the basis that without substantive evidence of a problem, there is no rationale to introduce such.

Further, the introduction of any free-use exception will only serve to further undermine the rights of content owners, which in turn introduces more risk into the investment equation associated with, and indeed rewarding, creative outputs.

Copyright law strikes a balance between consumers interests and rights holders. To encourage and ensure the sustainability of creative innovation, and ongoing investment, that balance must be maintained.

Fair use

News Limited is strongly opposed the introduction of the 'fair use' concept. This is overviewed at the beginning of this submission, and expanded here in detail.

Question 52: Should the Copyright Act be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

News Limited is part of the News Corporation entity. As outlined in the News Corporation to the UK's Hargreaves Review:

'our businesses operate within both the fair use doctrine and the fair dealing doctrine and consider both to be fit for purpose given the different legal frameworks and traditions⁶⁷.'

News Limited strongly opposes the introduction of a 'fair use' exception in Australia for the following reasons:

Lack of evidence

As outlined previously in this submission, there is a lack of evidence to warrant the consideration of introducing a broad, flexible exception such as 'fair use', 'reasonable' or any other similar terminology.

News Limited opposes the introduction of specific exceptions on the basis that without substantive evidence of a problem, there is no rationale to introduce such.

'Fair use' is distinct to the US

Fair use is a defence to copyright infringement under US law. It provides a defence to copyright infringement for specific actions based on specific facts, on a case-by-case basis.

'Fair use' is a judicial doctrine that has evolved over almost two centuries in the US. It is supported by the case law and judicial precedents. It is also supported by the details and underpinnings that have developed throughout the course of this framework being in place and its application, including the facts of the actual cases

⁶⁷ <http://www.ipso.gov.uk/ipreview-c4e-sub-news.pdf>, p6, accessed 4 November 2012

tested by the courts.

It is therefore unreasonable to contemplate the introduction of such a doctrine without also importing the content and context of such. This would be challenging at best, and almost certainly would not accord with the foundations and framework of Australian legal practice particularly copyright law.

'Fair use' would not deliver greater certainty – to the contrary

Some argue that 'fair use' provides greater certainty. However, as fair use is tested on a case by case basis, this cannot hold.

If a 'fair use' exception was introduced into Australian copyright law without the US case law underpinning it, it would develop through cases being tested by courts of law.

This would prove costly in time and resources – and would not deliver a more certain outcome for some time, if ever, as the laws would continue to be tested.

This is not an acceptable outcome for a sector comprised of many individuals and communities reliant on investment, where certainty of legal underpinning of copyright is a cornerstone which should not be tampered with.

Certainty of copyright, it must be said, is a crucial element of investment and re-investment in the creative process. Therefore it also holds that uncertainty, or the risk of uncertainty, is a cost that must be factored into any cost-benefit analysis associated with the introduction of a 'fair use' exception.

'Fair use' is not a general defence to copyright infringement

Some are under the misapprehension, that 'fair use' is a broad and general defence to copyright infringement.

As outlined above, even within the US context, 'fair use' is not a general defence to copyright infringement.

If 'fair use' were a broad and general defence, it would be the case that there would be massive misappropriation of content – the consequence of which would be that the social and economic benefits derived from originality and creativity would evaporate. This is an untenable situation.

Concept is highly subjective

Terms such as 'fair use' and 'reasonable' are highly subjective. It would require testing via litigation over time which would be costly and extremely time consuming.

Also, News Limited holds that regardless of the ability – or not – to define, frame or base such a concept, 'fair use' merely serves to validate incorrect consumer perceptions that whatever they choose to do with it can be justified as 'fair use'.

This also further entrenches an incorrect attitude regarding content being more

easily accessible and available, and therefore it can be used without regard to copyright.

Economic benefits are overstated

Support for a more flexible copyright regime, including increased exceptions and exceptions such as 'fair use,' is justified by some on the basis of purported economic benefit.

Research undertaken by Lateral Economics for the Australian Digital Alliance claims a more flexible copyright regime will provide 'additional value⁶⁸' to the economy, and productivity growth, with 'negligible downside for rights holders⁶⁹.'

Dr George R Barker of the Centre for Law and Economics has undertaken a critique of the research referenced above. His recent report, *Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*⁷⁰ (Dr Barker's Report) finds three fundamental weaknesses and flaws with the Lateral Economics analysis:

- the theoretical economic analysis of the costs and benefits of broadening copyright exceptions;
- the empirical analysis; and
- the legal analysis.

These fundamental weaknesses, Dr Barker's report states; '*make the analysis unreliable and its recommendations irrelevant.*⁷¹'

Dr Barker's report goes on to say:

'Contrary to the [Lateral Economics] reports economic theory suggests that any weakening in the enforcement of copyright, through introduction of ill defined exceptions and safe harbours of the kind prompted in the [Lateral Economics] reports, would have significant negative economic costs, and little or no benefit⁷².'

UK Hargreaves Report – no to fair use

The recent Hargreaves Review in the UK considered fair use and an exception for such, however it did not recommend its introduction.

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

⁶⁸ Australian Digital Alliance, *Snapshot, Lateral Economics Copyright Research*, September 2012, p2

<http://digital.org.au/sites/digital.org.au/files/ADA%20-%20Snapshot%20-%20Lateral%20Economics%20Copyright%20Research%20%28Sept%202012%29.pdf> accessed 7 November 2012

⁶⁹ Ibid, p2

⁷⁰ Barker, George Robert, *Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*, 26 November 2012, available at SSRN: <http://ssrn.com/abstract=2180769>, accessed 28 November 2012

⁷¹ Ibid, p5

⁷² Ibid, p5

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

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

It is equally true, however, that the economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated. When the Review briefly visited Silicon Valley in February, providing the opportunity to meet companies such as Google, Facebook, Yahoo and Yelp, along with investors, bankers, lawyers and academics, a consistent story emerged, namely that Fair Use is (from the viewpoint of high technology companies and their investors) just one aspect of the distinctiveness of the American legal framework on copyright, albeit in the view of most an important part⁷³.

And:

Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law⁷⁴.

Question 53: Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

News does not support the introduction of a fair use exception, for the reasons explained above at Question 52.

We reiterate that a so-called ‘fair use’ approach, whereby infringing activities would be made legitimate, would undermine the principles and tangible outcomes being pursued by this Paper – and therefore undermine the creative minds and businesses of our nation.

News Limited holds that there is no justification for replacing the existing Australian copyright system with a new – and untested – regime. We warn of the material costs involved in contemplating such, and the resultant detriment which would be occasioned by the adoption of a ‘fair use’ doctrine in Australia.

⁷³ <http://www.ipa.gov.uk/ipreview-finalreport.pdf>, p45, para 5.16, accessed 5 November 2012

⁷⁴ *ibid*, para 5.17

Contracting out

Question 54: Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

News Limited holds that the freedom of contract is fundamental to commercial negotiations.

If it is the case that parties to an agreement agree that the terms of their bargain should override their rights at law – including copyright exceptions – then the parties should be free to do so.

Question 55: Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

News Limited opposes consideration of any amendments to the Act which would prevent contracting out of any copyright exceptions.

Hadopi,

1 ½ YEAR AFTER THE LAUNCH.

17 months have gone by since the 1st graduated response mail was sent out. The effects, whether on illegal P2P download or on the current state and outlook of online cultural supply, are visible.

Benchmarking studies covering all of the sources available shows a **clear downward trend in illegal P2P downloads**. There is no indication that there has been a massive transfer in forms of use to streaming technologies or direct downloads. It is still too early to gauge the impact of the MegaUpload shutdown in January 2012.

At the same time, **the wide range of legal content offers are gaining visibility and some offers have posted excellent progress**. The labelling system for such offers opens up new opportunities and addresses a real need. Uneven and little-known, legal content offers show great potential for development, and it is important that far-reaching action be widely-undertaken and innovation put to use.

Lastly, the forward-looking studies initiated by Hadopi's Board, both directly and through its Labs, lay down the **foundations for the future of online culture** in the face of the on-going changes, by taking existing efforts into greater depth, or opening up new avenues, transparently and in constant interaction with Internet users.

Hadopi

Haute Autorité pour la diffusion des œuvres
et la protection des droits sur internet

METHODOLOGICAL NOTES

To analyse Hadopi's action is a complex endeavour and one to be undertaken cautiously. Conclusion may vary depending on the method used. A number of "marginal effects" remain difficult, if not impossible to quantify, but are nonetheless not be disregarded.

As regards specifically the impact on illegal downloading via P2P networks, the conclusions that can be drawn about the behaviour of Internet users who have actually received a notice within the graduated response procedure, the observation data collected are compared:

- with the results derived from so-called "user-centric*" methods;
- with the results derived from so-called "network-centric*" methods;
- and lastly, with the statements made by Internet users in responding to opinion surveys*.

These observations all reflect a **shared tendency** to move away from this form of illegal downloading, since the graduated response was introduced, substantiating or strengthening a trend first noted several months ago.

* see notes on *Usage Metrics*, p. 7.

ILLEGAL DOWNLOADING CLEARLY ON THE DECLINE IN FRANCE

Analyse of the graduated response procedures over the period from October 2010 to December 2011 shows that:

Analyse of the graduated response procedures over the period from October 2010 to December 2011 shows that:

95%

Source: Hadopi. Data taken from the French Rights Protection Commission's information system, based on 755,015 records of subscribers having received at least one notice, created between 1 October 2010 and 1 December 2011.

of those having received a first-time notice do not give rise to the need for a second notice for illegal behaviour on peer-to-peer networks*.

92%

of those having received a second notice are in the same situation (no further illegal behaviour recorded within the timeframe set out by law).

98%

of those having received a third notice show the same trend.

** within the timeframe set by law before the following notice is to be issued.*

Dialogue with Hadopi consolidates the change in behaviour.

Between October 2010 and December 2011, 65,848 people, having been targeted by the graduated response procedure, contacted Hadopi:

6%

Source: Hadopi. Data taken from the French Rights Protection Commission's information system, based on 755 015 records of subscribers having received at least one recommendation, between 1/10/2010 and 1/12/2011.

of subscribers having received a first-time notice contacted Hadopi.

25%

of subscribers having received a second-time notice contacted Hadopi.

71%

of subscribers having reached stage three contacted Hadopi.

Most of the above state that they commit to taking action to secure their access to the Internet or to putting an end to all illegal consumption via peer-to-peer networks.

These changes are confirmed by observation data on P2P usage.

In 2011, a wide range of metrics – based on varying methodologies – attests to a drop in P2P and its illegal uses in France.

-17%

Source: see following pages.

in audience levels, reports Nielsen.

-29%

in audience levels, reports Médiamétrie // NetRatings.

-43%

in illegal data sharing, reports Peer Media Technologies.

-66%

in illegal data sharing, reports ALPA.

————— Mesures « User centric » —————

————— Mesures « Network centric » —————

ILLEGAL DOWNLOADING CLEARLY ON THE DECLINE IN FRANCE

These changes are confirmed by observation data on P2P usage

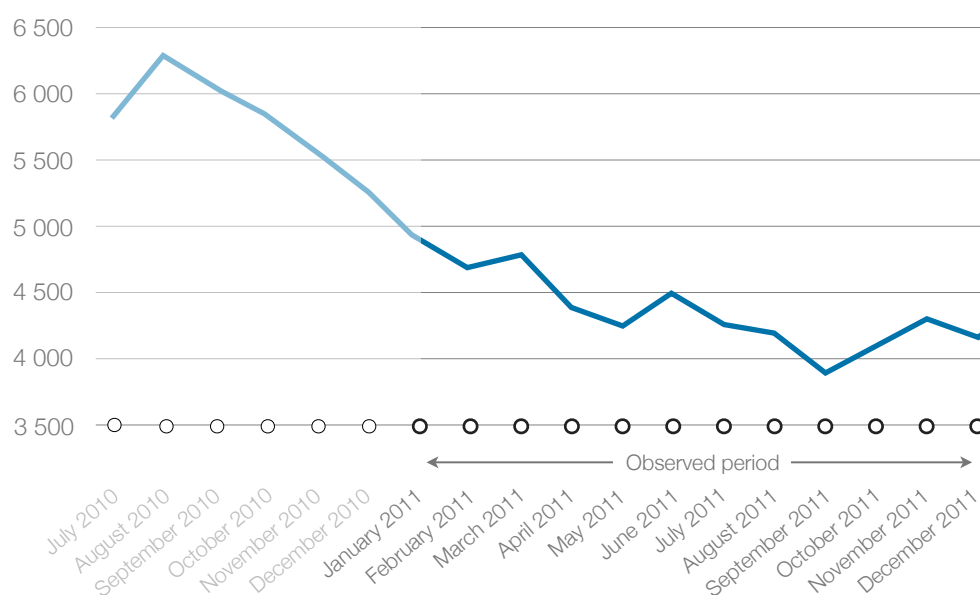
Since the graduated response was first launched in France, many sources concur that P2P use in France steadily declined throughout 2011, percentages varying by source and method used.

Nielsen noted a **drop of approximately 17% in audience levels** en 2011.

Audiences of websites offering links to P2P files and applications

Source: IFPI / Nielsen, "Digital Music Report 2012" January 2012. In thousands of unique visitors.

Total deduplicated audience across approximately 40 P2P services.

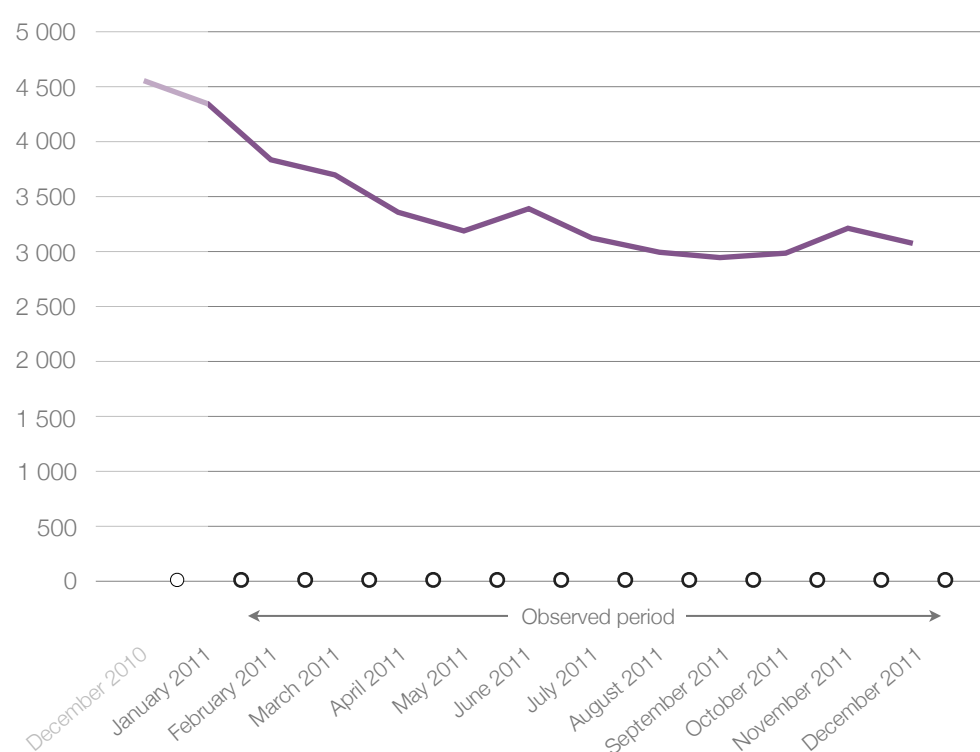


Médiamétrie // NetRatings noted a **29% drop in audience to the ecosystems developed around certain P2P clients** in 2011.

Audience levels in 4 P2P ecosystems

Source : Panel Mediametrie // NetRatings. In thousands of unique visitors, all locations and applications included.

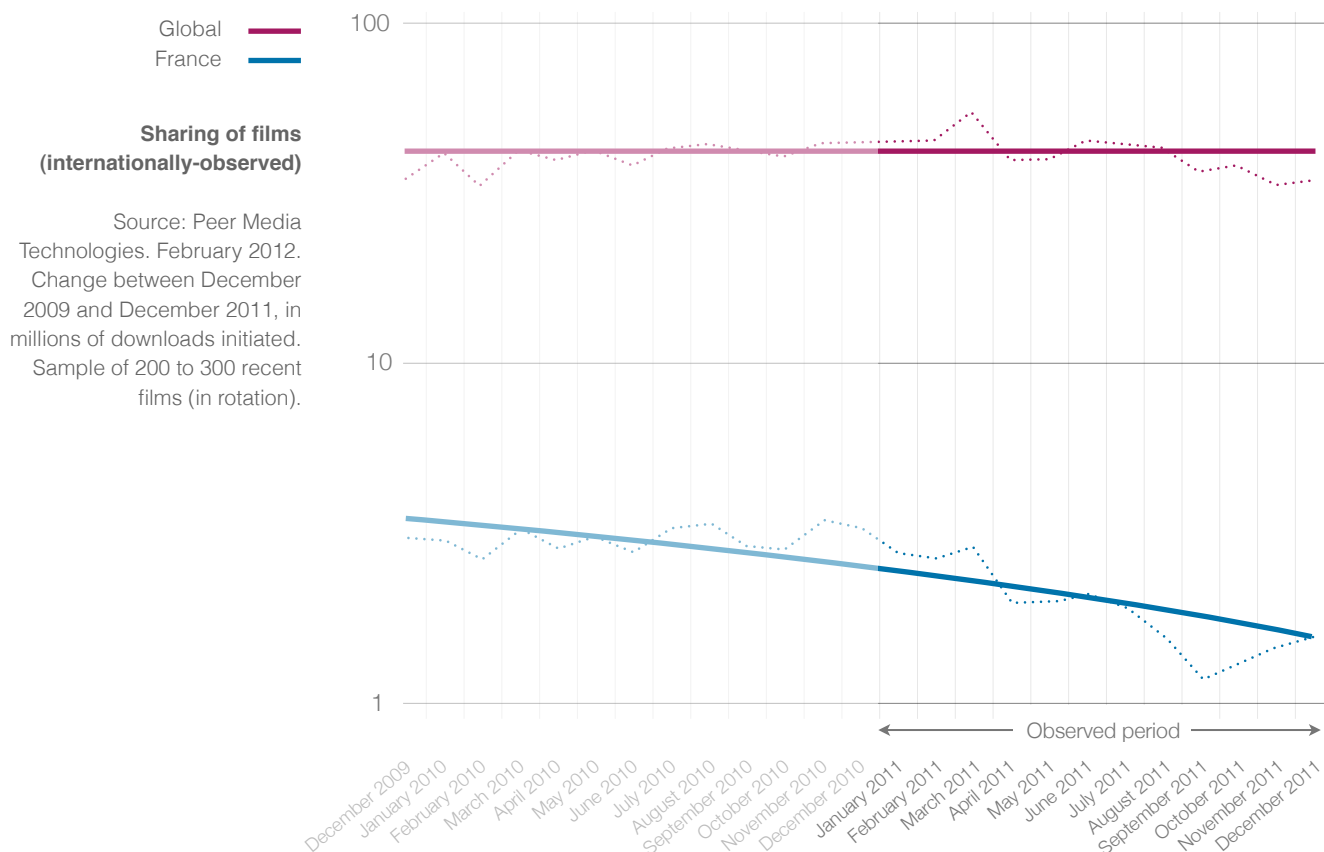
Total deduplicated audience on the 4 P2P ecosystems: µTorrent, BitTorrent, eMule, LimeWire



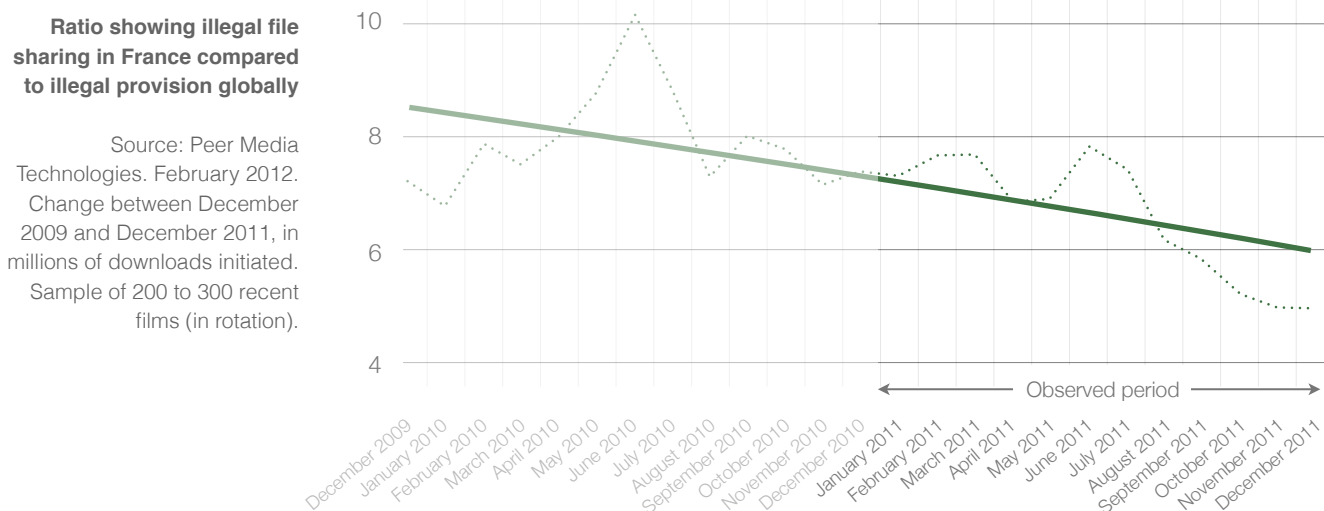
ILLEGAL DOWNLOADING CLEARLY ON THE DECLINE IN FRANCE

These changes are confirmed by observation data on P2P usage.

Peer Media Technologies measured a **drop of approximately 43% in the illegal sharing** of works on P2P networks in France over year 2011.



According to the same source, **in December 2011, France no longer accounted for any more than 4.5% of illegal provision.** In January 2011 France accounted for approximately 6.2% of the total number of files illegally made available on P2P networks at the global level.



ILLEGAL DOWNLOADING CLEARLY ON THE DECLINE IN FRANCE

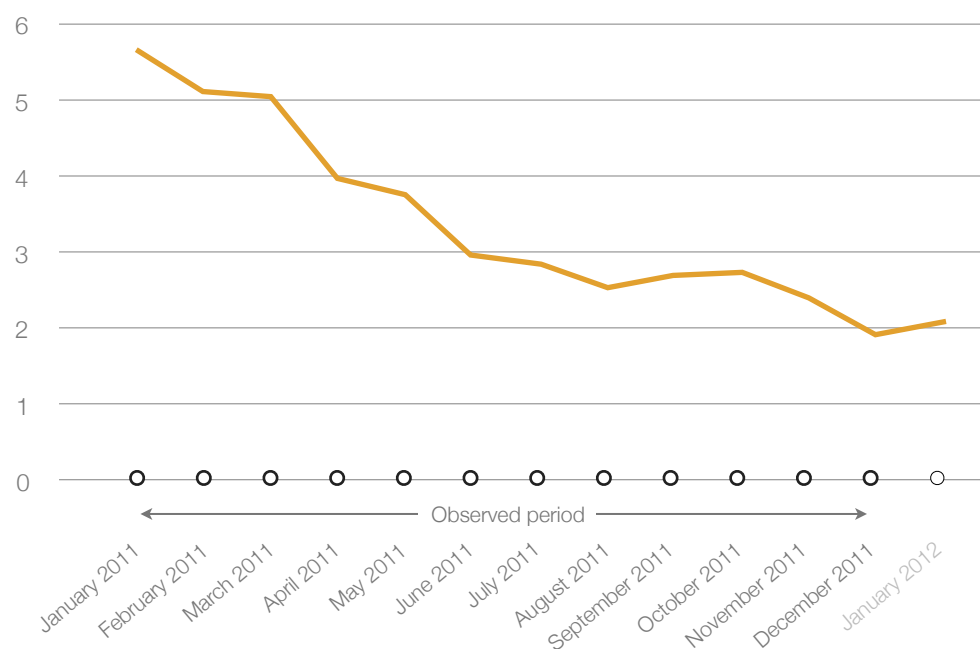
These changes are confirmed by observation data on P2P usage.

Subsequent to the institution of the graduated response system, **ALPA reported a decrease of approximately 66% in the illegal sharing** of films on P2P networks in 2011.

Change in illegal provision of files, based on films most shared on P2P networks

Source : ALPA / TMG.
February 2012.
Change in millions of downloads completed. Out of sample of 10 films* (rotating).

* Top 10 films most detected (changes over time).



These observations are consistent with the statements made by Internet users in response to opinion surveys.

(1) Source: Hadopi – barometer survey carried out online, on 1500 Internet users 15 and above, representative national sample.

(2) Source: IPSOS survey. Study carried out online, in November 2011, with 1,380 Internet users ages 15 to 50.

More than 1 out of 3 surveyed

state that Hadopi gives them reason to more regularly consume cultural works via websites that comply with copyright laws. ⁽¹⁾

71%

of peer-to-peer users state that they would stop downloading illegal content if they received a recommendation from Hadopi. ⁽²⁾

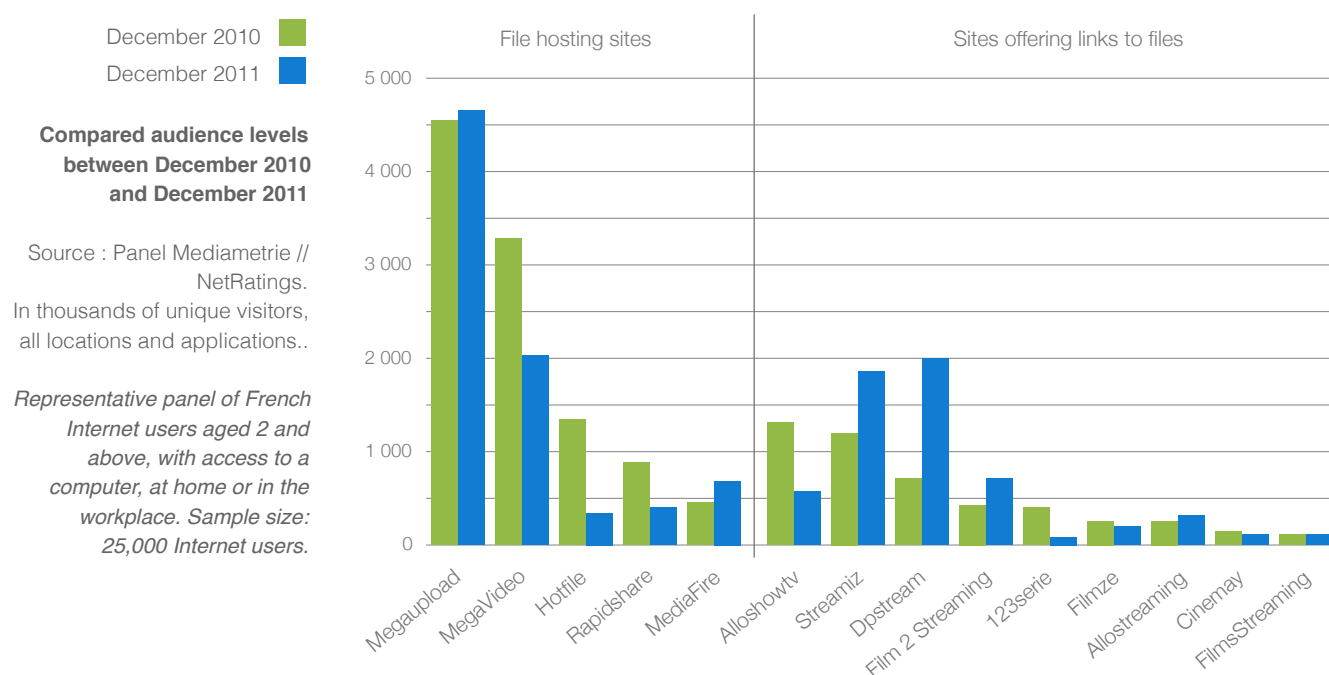
MEGAUPLOAD SHUTDOWN

On 19 January 2012, Megaupload was closed. As yet, there is not enough perspective and data to assert specific changes in Internet users' practices and consumption patterns resulting from this. Nonetheless, it is not to be precluded that some who previously downloaded illegally via P2P will change behaviours following the closure. As the graduated response new information system goes into production, from 1st Quarter 2012, it will become possible to adjust the system to the new environment, should it come to be confirmed.

ILLEGAL DOWNLOADING CLEARLY ON THE DECLINE IN FRANCE

A substantial transfer on streaming and direct download services has not been demonstrated.

Audience measurements on such websites by Médiamétrie// NetRatings in December 2010 and December 2011 seem to show **stability in usage patterns**: while some services enjoy an increase in their audience, others have seen a drop, possibly attesting to a degree of **balance in practices**.



MEASURING USAGE PATTERNS ON THE NETWORKS

Usage measurement on the networks is made complex by a dearth of available data, the variety of methods used and – in certain cases – the impossibility to distinguish between the legal and illegal. Measurements must be taken based on sampling, using either “user-centric” or “network-centric” methods.

User-centric methods

Public surveys, in this method, are used to measure usage, as reported by Internet users in a previously-selected and often representative sample of the population (1,500 people, in general, in studies carried out by Hadopi). It cannot be used to measure actual use with any certainty, as the responses are dependent on participant perceptions of their own practices. Examples include Hadopi, Ipsos, OpinionWay, CSA, etc.

Metering software is a measurement tool voluntarily installed by the members of a given panel, who agree to have their navigation pathways automatically transmitted to the Institute. The software records which sites are viewed, the duration of each visit, etc., most often involving the installation of a toolbar (e.g.: Alexa). Where peer-to-peer is concerned, this method does not make it possible to measure actual downloading, but rather intended use, by tracking the user's movements through sites that make P2P downloads available via links (example: BitTorrent) or connection to a dedicated application. Advantage: the panel is generally large (25,000 people, in Mediametrie // NetRatings). Examples: Nielsen, Mediametrie // NetRatings, etc.

Network-centric methods

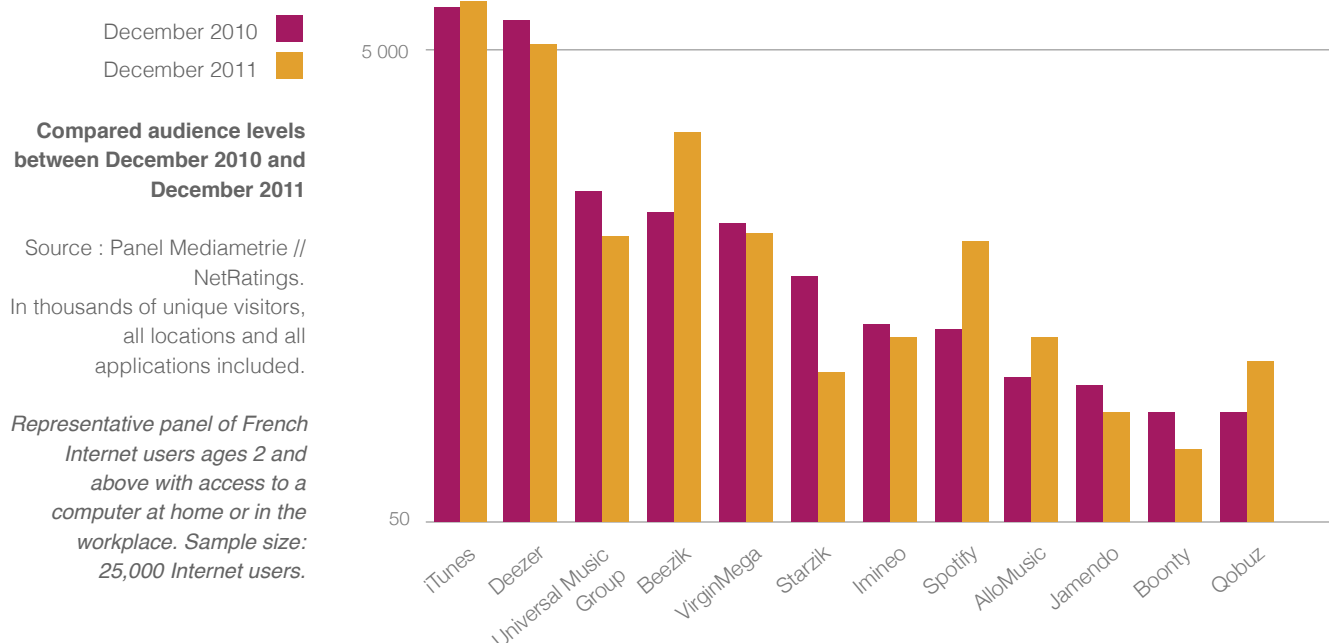
File observation consists of selecting a set of works, and referencing related files available, and observing the number of instances of file sharing on peer-to-peer networks. The sample is generally limited to a few hundred works. This method is not available in non-P2P environments. Examples include TMG, Peer Media Technologies.

Stream volume measurements are used to establish a breakdown on types of use, based on broadband usage. In other words, they make it possible to show the percentage accounted for by one protocol, as compared to others. The method does not, however, make it possible to distinguish the legal from the illegal. Examples include: network operators (ISP's), technical operators (Cisco, Sandvine, IPoque).

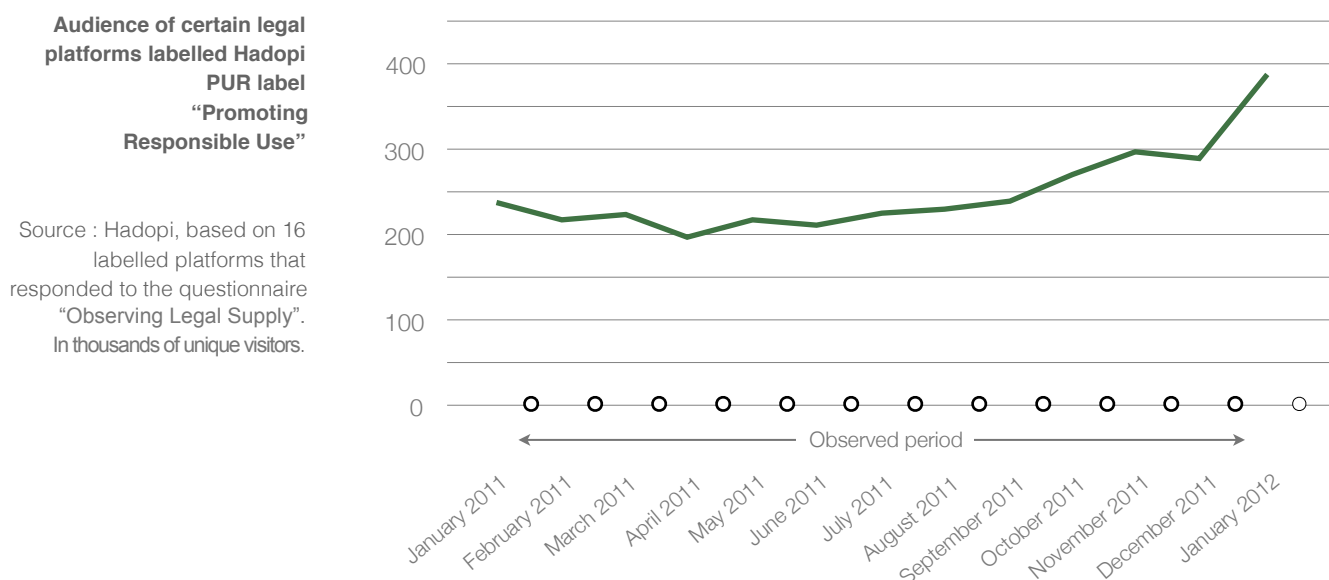
THE ONLINE CULTURAL OFFER IS GAINING IN QUANTITY AND QUALITY

Legal supply platforms are reaching maturity.

Médiametrie // NetRatings audience measurements in December 2010 and December 2011 reflect **general stabilisation in supply**, in which a few **strong surges** can be seen.



In 2011, **PUR-labelled platforms increased by 20%.**



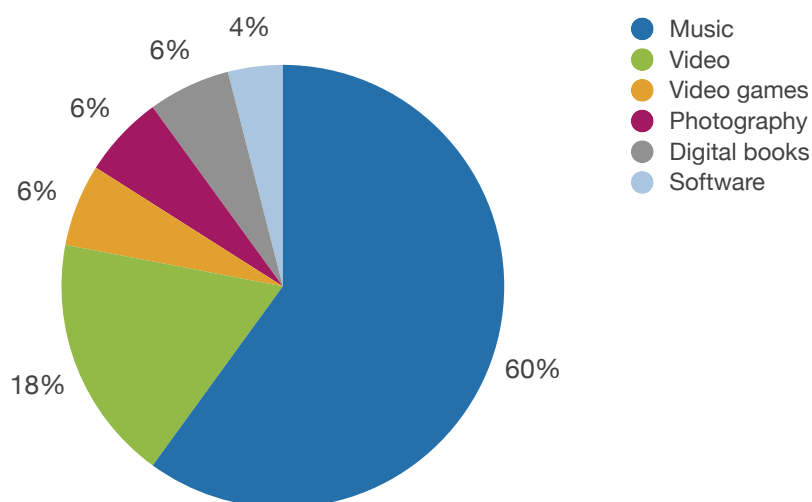
THE ONLINE CULTURAL OFFER IS GAINING IN QUANTITY AND QUALITY

The label has already been granted to some 50 websites covering a wide range of creation and dissemination models.

Over 10 months' time, the label-bearing community has grown to **50 platforms** offering content from **6 cultural sectors** (music, video, video games, software, digital books and images).

Breakdown of labelled platforms by type of cultural good offered

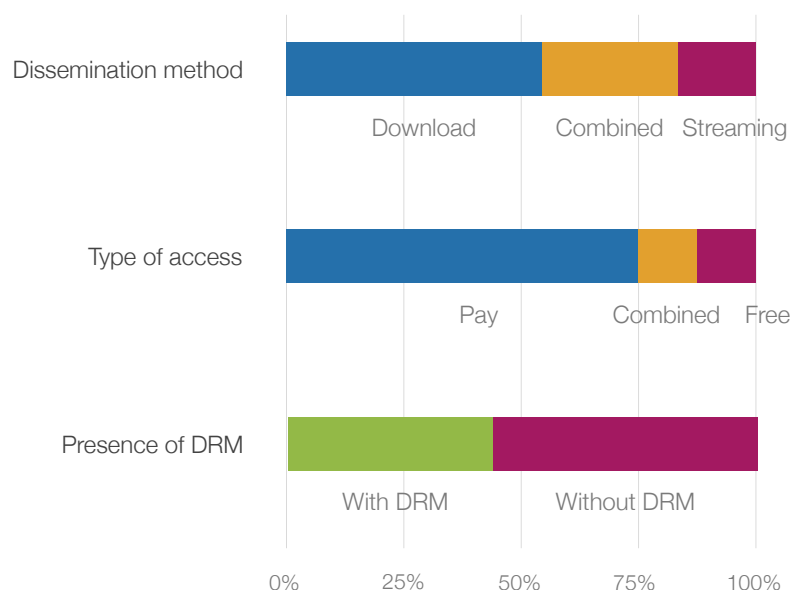
Source : Hadopi.
PUR labelling - "Promoting Responsible Use".



All content dissemination and access methods are included.

Characteristics of PUR-labelled "Promoting Responsible Use" platforms

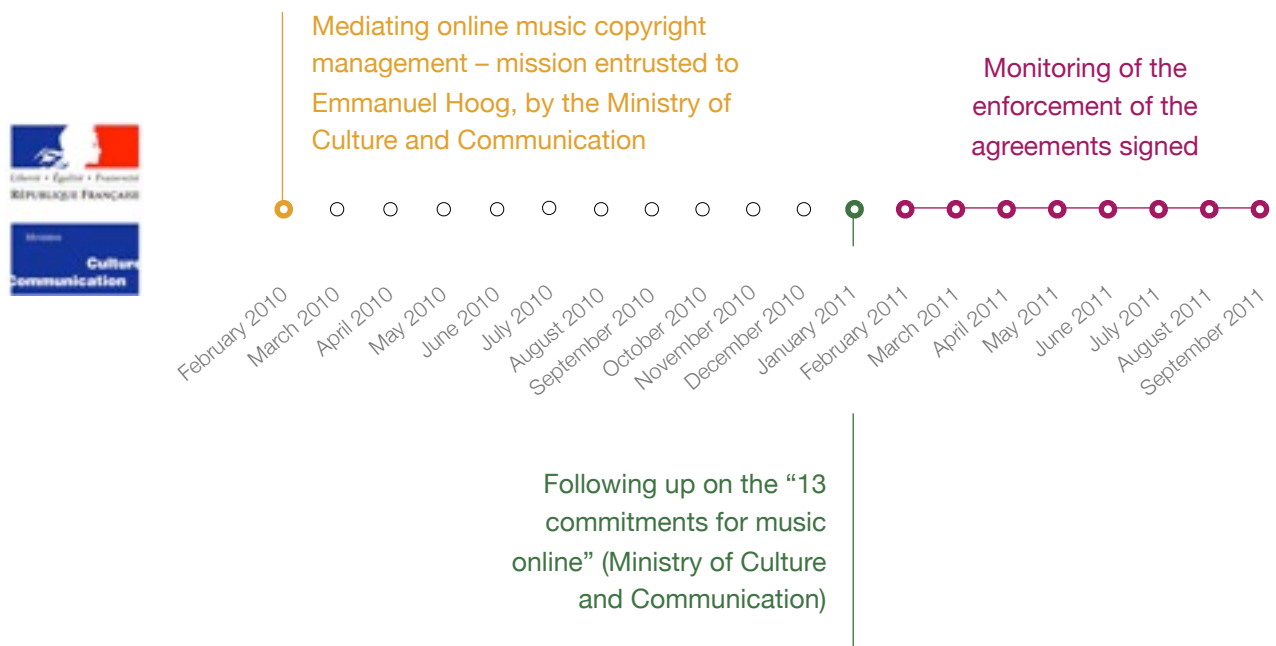
Source : Hadopi.
PUR labelling - "Promoting Responsible Use".



THE ONLINE CULTURAL OFFER IS GAINING IN QUANTITY AND QUALITY

Positive signs for online music.

Responsible for monitoring the 13 commitments set out for online music, Hadopi carried out nearly 30 interviews with 28 professionals and 2 group sessions. Two key facts emerged from this: **the commitments have been kept; the online music market – despite fragile balance in some areas – is gradually becoming an independent ecosystem with some notable sources of development.**



The study on “Sector Economics and Current State of Value-Sharing” was carried out by 3 independent experts, entailing **6 months of work and hearings with 35 professionals.**

The first of its kind, it offers an optimistic outlook: the digital music market grew by a factor of three over the last five years, **reaching EUR 140 million in turnover in 2010.**

These conclusions were discussed and explored in greater depth, at a public session held on 24 January 2012, **where 14 panellists came together before an audience of 130 people.**

13 Commitments for Online Music

<http://www.culturecommunication.gouv.fr/Actualites/A-la-une/13-engagements-pour-la-musique-en-ligne>

Monitoring the enforcement of the 13 Commitments for Music Online

http://www.hadopi.fr/sites/default/files/page/pdf/1818_HADOPI_engagements_BD.pdf

Report “Commitment 8 – Share data on the sector’s economics and current state of value sharing”

http://www.hadopi.fr/sites/default/files/page/pdf/Rapport_Engagement8.pdf

THE ONLINE CULTURAL OFFER IS GAINING IN QUANTITY AND QUALITY

Innovation offers users new freedoms.

Hadopi has published 6 background notes on the state of legal supply and behavioural trends since September 2011. They are based in particular on the **comments or expectations of Internet users, as expressed on the social networks and in Labs.**

- Supply and consumption of fiction on the internet. *Published on 8 September 2011.*
- Supply and consumption of cinema on the networks: current status, hindrances and development prospects. *Published on 19 October 2011.*
- Supply, consumption and video games on the networks: current status and development prospects. *Published on 15 November 2011.*
- Consumer trends for the holidays: The place of dematerialised cultural goods and terminals. *Published on 13 December 2011.*
- Analysing the impact of the MegaUpload shutdown: 25.7% increase in audience for Catch-Up TV and VOD. *Published on 7 March 2012..*
- Offers, terminals and value chain: what are the prospects for digital books? *Published on 12 March 2012.*

An initial study on consumer recognition and satisfaction in relation to online cultural supply was carried out in November 2011, on a selection of 120 platforms. One of its key findings was that **the most innovative forms of supply are also those that post the highest Internet user satisfaction scores.**

Over 3 years' time (2009 to 2012), a growing number of online cultural content comparison tools have been released, joining the aggregators already existing*. Hadopi has embarked on an analysis process with them, in order to better understand how they work and the difficulties they face (referencing, access to catalogues, etc.).

Platforms working with Hadopi (engaged in the labelling process or taking part in analysis efforts).

* Web platforms that aggregate content and/or meta-data from other sites offering cultural content online. As such, they make it possible to combine different disparate offers on a single interface.

Crowdfunding		2	2			
Comparison & aggregators	2	3	1	1	1	
	Catch-up TV	Cinema	Music	Video games	Digital books	

At the same time, since January 2012, in order to give greater visibility to such innovative creation financing methods, Hadopi has offered labelling to community production platforms ("crowdfunding"). **As of 1 March 2012, 2 had been labelled, 2 were under review and others are being prepared.**

THE MILESTONES OF FUTURE ONLINE CULTURE ARE IN PLACE

The Labs – a place for freedom of expression and collaborative knowledge production.

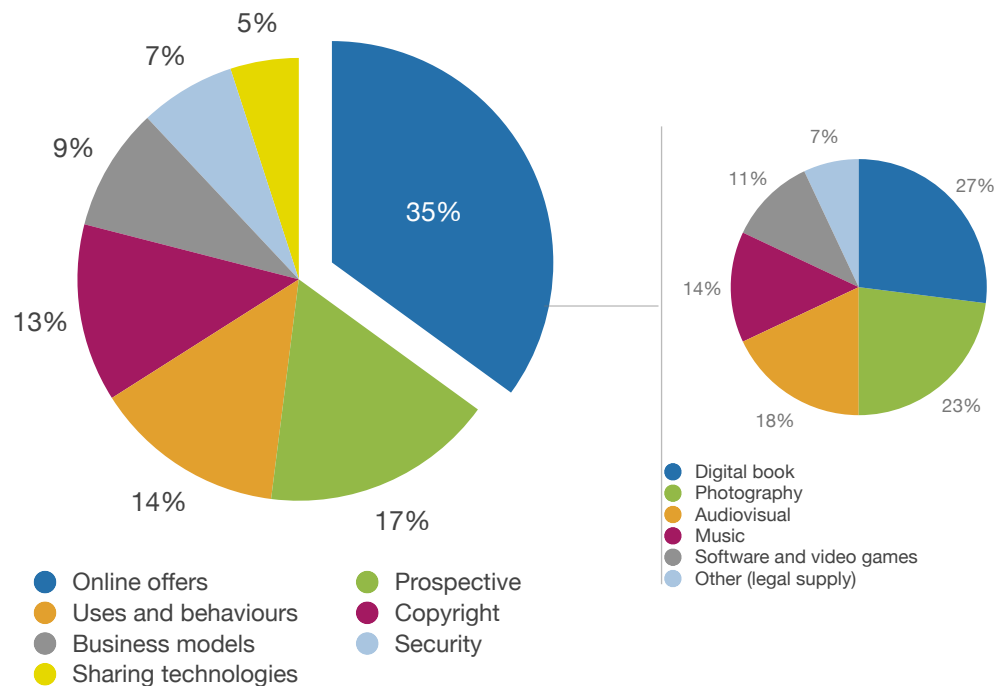
The Labs experiment with new avenues for expertise and knowledge-sharing about culture in the digital era. They are coordinated by independent experts and covering the following areas: philosophy, economics, sociology, law and technologies. They produce analysis, conduct research and suggest position statements, constantly enriched through conversation with Internet users. **Online supply is the subject that stirs the most questions and debate.**

Lab output:

351 content units produced, including 87 discussion topics.

Breakdown of publications, by main focus

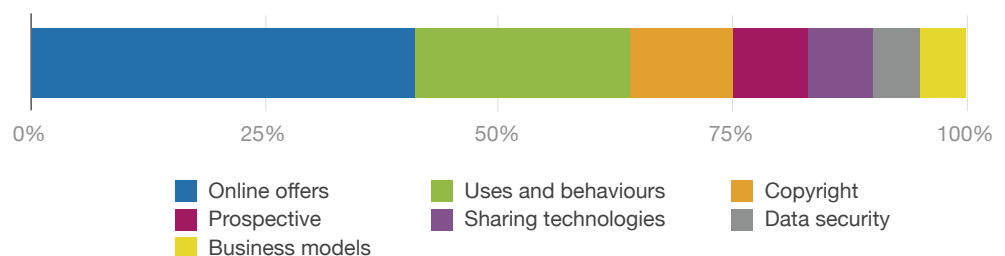
Source: Hadopi. Labs Platform. February 2012..



Conversation dynamics

Breakdown of contributions by main focus

Source : Hadopi. Out of 641 contributions from 254 members between May 2011 and February 2012.



THE MILESTONES OF FUTURE ONLINE CULTURE ARE IN PLACE

Lab Publications

Publications available free of charge,
in digital format, on Hadopi.fr



AU FIL DES LABS #1

Intermediation

Whether technological, legal or economic, intermediaries have become the triggers in our digital lives. To choose intermediation is to accept a fact: traditional digital intermediaries are repeatedly challenged and their role questioned by civil society. For this reason, the experts at the Hadopi Labs tend to foresee traditional intermediation models becoming obsolete, rather than going extinct.

(French publication available only)



AU FIL DES LABS #2

Photography, Put to the Digital Test

Digital technology amplifies the circulation of images and could, as such, be seen as a windfall for photographers, whose work thus becomes easy to disseminate and within everyone's reach. Yet as images are increasingly disseminated and widely-reproduced, they are turning into moving, exchangeable merchandise. Management principles are needed, in order to keep up with the abundance of photography as product – an upheaval in usage patterns and models, in a photographic sector in the throes of change.

(French publication available only)



Authors in the Digital Era

While the ever-changing world of book formats and reading devices are most relevant to readers, the content digitisation and mushrooming usage patterns for digital have a significant impact on how authors work. Fully aware of these issues, the authors show that it is not necessary to pit these two communities against one another – one stringently bent on traditional paper writing and the other eagerly borne by the all-digital dynamic. Digital is more to be understood as the instigator of a wide variety of ways of writing and new opportunities for publishing and publications.

(French publication available only)

Jointly published by Labs Hadopi / Éditions des archives contemporaines
ISBN : 9782813000880

Experimentation

“Gaining Control of One's Digital Life” – a call for experiments, issued in February 2012, by the Networks & Techniques Lab, focused on online security solutions designed today for enable Internet access by “small-scale” users, with the ultimate aim of drawing up functional specifications.

THE MILESTONES OF FUTURE ONLINE CULTURE ARE IN PLACE

The Board explores new avenues independently.

In October and November 2011, Hadopi initiated **6 strategic workstreams**, headed by members of its Board or the Rights Protection Commission.

A report on actual use of copyright exceptions in order to determine, based on the assessed effectiveness of the exceptions considered, whether the development of new digital uses should lead to a change in the definition, type and scope of some of the said exceptions. *Workstream headed by Jacques TOUBON*

Analysis of trends in sharing practices and average monthly spending per household on culture in order to consider the issue of illegal downloading, in light of the changes in usage patterns from 1980 (pre-digital age) to the present day. *Workstream headed by Chantal JANNET*

Initial analysis of the economics of tools to counter illegal downloading in an attempt to identify expenditure incurred – both public and private – in each country, including France, to fight the effects of illegal downloading from the Internet. *Workstream headed by Jacques BILLE*

Exploring the engineering and cooperation between institutions in progress on the issues inherent in the dissemination and protection of works on the Internet, with the three-fold aim of ensuring coherence between them, optimising the public funds engaged and identifying places for cooperation between public operators. *Workstream headed by Jean MUSITELLI*

Preparing the transition to “Open Data” for Hadopi, so as to enable and facilitate the reuse of data regarding the missions entrusted to it, with the three-fold aim of fostering the emergence of innovative services, the appearance of new uses and a greater understanding of the institution's action. *Workstream headed by Jean BERBINAU*

Conducting exploration with a view toward putting forth suggestions for better copyright protection, in the face of infringement via “streaming” sites or direct downloading. *Workstream headed by Mireille IMBERT-QUARETTA*

To learn more about these workstreams, see hadopi.fr



Jacques TOUBON	Chantal JANNET	Jacques BILLE	Jean MUSITELLI	Jean BERBINAU	Mireille IMBERT-QUARETTA
Former Minister	Member of National Council on Consumption	Tribunal of Accounts Member	State Council Member	National Telecommunications Engineering Coordinator	State Council Member
Member of Board	Member of Board	Former Member of the Rights Protection Commission	Member of Board	Member of Board	President of the Rights Protection Commission



LABELLED PLATFORMS

PUR - "PROMOTING RESPONSIBLE USE"

MUSIC

7Digital	fr.7digital.com
Allomusic	allomusic.com
Alter Musique	altermusique.org
Amazon MP3	amazon.fr/mp3
Avcvk	avcvk.com
Beezik	beezik.com
Cd1d	cd1d.com
Deezer	deezer.com
Disquaire Online	disquaire-online.com
Ecompil	ecompil.fr
Fnac	fnac.com
Gkoot Electronic	gkoot-electronic.com
Habett	habett.net
iTunes	apple.com/fr/itunes
Jamendo	jamendo.com
mioozic	mioozic.com
Musicoverly	musicoverly.com
My Clubbing Store	myclubbingstore.com
My Surround	mysurround.com
MyMajorCompany	mymajorcompany.com
Orange Musicstore	musicstore.orange.fr
Qobuz	qobuz.com
Quickpartitions	quickpartitions.com
Sonothèque	sonothèque-hn.com
Spotify	spotify.com
Starzik	starzik.com
Universal Music Mobile	universalmobile.fr
Universal Music Web	universalmusic.fr
Virgin Mega	virginmega.fr
Zaoza	zaoza.fr

VIDEO

Allo clips mobile	allomusic.com
Arte VOD	artevod.com
Imineo	imineo.com
INA	ina.fr
OffTV	off.tv
Touscoprod	touscoprod.com
Videoavolonte	videoavolonte.com
VOD Mania	vodmania.com
Vodeo	vodeo.tv

VIDEO GAMES

Boonty	boonty.com
Dlgamer	dlgamer.com
Everygames	every-games.com

PHOTOGRAPHY

Fotolia	fotolia.com
Monnaie de Paris	monnaiedeparis.com
Wallis	wallis.fr

DIGITAL BOOKS

AveComics	avecomics.com
iKiosque	i-kiosque.fr
Numilog	numilog.com

SOFTWARE

Captain Download	captaindownload.com
Toomaï	toomai.fr

All of the labelled sites can be found on pur.fr

hadopi.fr
pur.fr
labs.hadopi.fr

This document can be found online at:
hadopi.fr/sites/default/files/page/pdf/note17.pdf