



**A submission in response to the  
Australian Law Reform Commission's  
Issues Paper on Copyright and the Digital  
Economy (IP 42)**

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**DECEMBER 2012**

**Introduction:**

Yahoo!7 is one of the most comprehensive and engaging online destinations for Australian consumers and advertisers. Formed as a partnership between the Seven West Media Group and Yahoo! Inc., Yahoo!7 brings together the successful Australian internet business Yahoo! Australia & NZ, and the online assets and television and magazine content of the Seven Network, one of Australia's leading media companies. The company also combines the strengths of Yahoo! search and communications capabilities and its global digital platform network, with Seven's rich media and entertainment content and marketing capabilities. Yahoo!7 has a significant local presence employing over 360 people based across our businesses in Australia and New Zealand.

Yahoo!7 offers a range of content, navigation, ecommerce, information and 'social networking' services through our products Flickr (photo sharing), Yahoo!7 Video (commercial and user generated video sharing), Yahoo!7 Answers (knowledge sharing), Spreets (online group buying) and Yahoo!7 mail and instant messenger.

Yahoo!7 is committed to creating deeply personal digital experiences that keep people connected to what matters most to them, across devices and around the globe. As the Internet pioneer, we have dealt with copyright related issues in different parts of the world and have acquired experiential wisdom and developed valuable expertise in this domain.

In light of that, we welcome the opportunity to provide this submission to the Australian Law Reform Commission's ("**ALRC**") Issues Paper on Copyright and the Digital Economy ("**Issues Paper**"). Yahoo!7 endorses the joint-industry submission to the Issues Paper by the AIMIA Digital Policy Group lodged on behalf of eBay, Facebook, Google and Yahoo!7 and provides the following additional comments focused specifically on consideration of the introduction of a 'fair use' principle in Australia.

## Copyright and the Australian Digital Economy

The Australian Digital Alliance (“**ADA**”) recently released two reports detailing the economic benefit derived from flexible copyright reform in Australia<sup>1</sup>. The reports, prepared for the ADA by Lateral Economics, find that a more flexible and technology neutral copyright regime in Australia will boost annual productivity gains to the economy by \$600 million per annum over the next 10 years.

The ADA reports further calculate the current value of internet intermediary services and industries relying on limitations and exceptions to copyright to be \$182 billion dollars per annum, or 14% of Australia’s GDP. The reports identify that the liability associated with uncertainty created by the specificity of existing exceptions when using new technologies are found to have a chilling effect on investment and innovation, they do note that investors are valuing reduced uncertainty from improved copyright limitations and exceptions at around \$2 billion per year.

Yahoo!7 notes the Government’s National Digital Economy Strategy has set the aim of establishing Australia as one of the world’s leading digital economies by 2020. Achieving this goal and unlocking the value of the digital economy will be greatly assisted by the creation of an Australian copyright regime that carefully marries certainty of rights with a flexible framework of exceptions. This approach will allow domestic innovation to flourish in a positive environment free of overly restrictive enforcement laws which stifle competition without any shared associated benefit.

Yahoo!7 submits that any change to the Australian copyright regime should be predicated on encouraging creation and protection of intellectual property without suppressing utilization of ideas and follow-on innovation. Importantly, this includes finding an appropriate balance between better exceptions in copyright law and better enforcement of copyright law. We believe that certainty and clarity as to rights boundaries is a crucial feature of a copyright regime that will facilitate a vibrant public domain of free flowing ideas, information and commerce.

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<sup>1</sup> “*Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions*”, Lateral Economics, August 2012, Australian Digital Alliance: <http://www.digital.org.au/content/LateralEconomicsReports>

## Questions to be considered:

### Fair Use and Innovation (IP Questions 52 and 53)

The Terms of Reference specifically direct the ALRC to consider whether existing exceptions are appropriate and whether further exceptions should recognize 'fair use' of copyright material. The Issues Paper asks whether such a new exception should replace all or some existing exceptions or should it be in addition to existing exceptions?

*The Copyright Act 1968 (Cth)* ("**the Act**") does currently provide 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 trademarks attorney giving professional advice.

Yahoo!7 submits that the existing exceptions under the Act are no longer sufficient by themselves to protect and support the new services introduced by Internet and technology companies. As described in greater detail below, search engines, to use an elementary example, function by copying millions of pages from the Web periodically into the memory of computer services, where the search firm can rapidly locate information responsive to search queries. In an extension of that notion, Yahoo!'s "image search" tool displays aggregated images sourced from third parties. To do this, Yahoo! relies on the United States' fair use right that we are operating a search index tool that provides users with a means to locate information relevant to their query. This use is significantly different than the original purpose of the photograph.

In Australia, the absence of a robust principle of fair use within the existing fair dealing exceptions means that digital platforms offering search tools are not able to provide real time high quality communication, analysis and search services with protection under law. Accordingly, Yahoo!7 endorses the addition of a broad, flexible fair use principle to the specific exceptions already contained in the Act. This will allow the Act to better accommodate the technological demands of the digital economy and adapt to innovation in a way that does not require legislation to be continually revised as technology and devices evolve.

For example, Yahoo! offers an innovative mobile application that uses proprietary sound print technology to recognize the audio stream of a television program to return to that user a result that identifies the program that they are currently watching. To do that, the application reproduces less than 1-2 seconds of the audio stream from the audiovisual program. From that buffer copy, the system prepares a thumbprint that is matched against its database of thumbprints. This technology is only possible due to the flexibility offered by the US copyright regime.

As more new technologies and consumer devices rely, at least in part, on the limited exceptions in the Act, Australia's copyright regime should be amended in order not to stifle the growth of industries relying on emerging and innovative technologies. Yahoo!7 believes that the introduction of a fair use right to the existing exceptions, while only being a small expansion of the concept under the current regime, would preserve the value of existing precedent, provide maximum clarity and establish a technology neutral exception that will offer greater accessibility and consistency for IP users and creators alike.

This relatively small expansion of the existing exceptions in the Act would help position Australia as a market where new local start-ups can develop innovative products, services and businesses with confidence, and where innovative international companies can engage in their full range of operations with legal certainty. Application development can thrive in Australia if there is a broader approach to how content can be used by others while still ensuring that such use does not deprive the rights holder of a legitimate revenue stream or impact the market value of the underlying work. Given the relatively low barrier of entry to the digital innovation marketplace, it would also provide software and application developers the ideal regulatory environment to capitalize on the roll-out of the National Broadband Network. This in turn will produce the tangible economic, cultural and educational benefits that will continue to drive the Australian digital economy towards the 2020 goals.

#### **Fair Use for caching, indexing and other internet functions (IP Questions 3 and 4)**

Under the current law, a search engine, carrier, ISP or content delivery network who makes an intermediate copy of third party material as part of or as an incidental part of the service being provided may technically infringe copyright. As it stands there is no specific exception in the Act that permits the copying or reproduction of copyright material for the purposes of caching or indexing.

In the United States, providers of search tools and content delivery networks rely on the well-established fair use doctrine to permit this activity. The Issues Paper provides a detailed overview of how the United States' exception is framed as a four-factor formula and the circumstances in which it has been successfully applied. Specifically, case law has established display of text cached in a search database as a fair use. Thus, the billions of dollars of market capital represented by the search engine companies are based primarily on the fair use doctrine. Moreover, the hundreds of billions of dollars of commerce on the Internet facilitated by search engines rely heavily on fair use.

It follows that the world's leading search engines are all based in the United States where fair use provides a far more fertile legal environment for innovation as compared to regimes, such as that in Australia, that rely on a handful of specific exceptions. As United States based technology companies continue to expand their operations globally, Australia will miss the chance to capitalize on investment opportunities if the domestic copyright regime continues to expose those companies to infringement liability.

Yahoo!7 does not believe that rights holders' ability to control and exploit their work would be adversely affected by the expansion of the existing exceptions to permit caching, indexing and related functionality that has the purpose of reducing transmission costs, improving the performance of the Internet and ultimately providing a better user experience.

### **Fair Use for Private Use, Social and Domestic Purposes (IP Questions 7-13)**

Currently, the exceptions and limitations in Australia's copyright law do not adequately allow for and encourage the development and operation of new technologies, nor does it allow consumers to fully enjoy the content, when and in the format that suits them. Conversely, since being incorporated into the United States *Copyright Act* in 1976, the fair use principle has developed significantly to permit a number of different kinds of end-user copies enabled by innovative digital technology.

- First, fair use permits the common practice of time shifting, where a user makes a recording of content, such as a broadcast television program, to view it at a more convenient time<sup>2</sup>. In Australia, Digital Video Recorders ("DVRs") such as the TiVo device have made time shifting easier and more pervasive than ever. With the press of a button, a user can program

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<sup>2</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)

a DVR to record a season's worth of episodes of a favorite television program – a benefit for users and owners alike.

- Second, fair use permits “space shifting” – the ability to move content from one device to another so that the user can access the content in different locations. In *Recording Industry Association of America v. Diamond Multimedia Systems*<sup>3</sup>, the court analogized space shifting to time shifting, stating that copies are made “in order to render portable, or ‘space-shift’ those files that already reside on a user's hard drive”.
- Third, fair use permits the wide range of temporary copies for the purposes of functionality necessary to the digital environment, where even the most basic uses require computers to make copies to allow operability. For example, for a user to view a website, the user's computer must make a temporary copy of the website in its random access memory.

Significantly, these uses have become essential to the conduct of global business. Workers access the Internet to locate important information throughout the work-day, making temporary copies of the websites they visit. If an employee finds an item of interest, the content might be time-shifted by copying it onto a hard-drive so it can be accessed and read at more convenient time. The content might also be space-shifted by printing it out or making a digital copy that can be forwarded to colleagues as an attachment to an email. A fair use principle is flexible enough to permit these end-user copies not only for personal use, but also in the business context.

The lawfulness of these activities stimulates a robust market for the provision of devices and applications that enable these copies and opens new revenue streams for copyright owners. For example in the social sphere, content owners are partnering with application developers to provide an enhanced user experience and open up new distribution and promotional channels for their content. In the United States, The Discovery Channel (a cable network) is encouraging viewers of its programs *Doomsday Preppers* and *Rocket City Rednecks* to use a feature on Yahoo!'s social mobile application to capture still shots of frames of the show, add a meme and distribute to others. The flexible fair use analysis serves to help drive the type of innovation underlying the application's frame capture system.

Unfortunately, the current uncertain legal status of these activities in Australia is having a chilling effect on the market for these products and is undermining the Government's digital economy goals.

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<sup>3</sup> 180 F.3d 1072, 1079 (9th Cir. 1999)

Digital content has become an important item of personal property and means of expressing and use of that content should not be devalued by unenforceable restrictions. Yahoo!7 submits that the complex format shifting and time shifting private use provisions in the Act should be replaced by a flexible fair use style exception that would recognize legitimate consumer practices by focusing on the purpose of the copying not the technology facilitating the copying or the subject matter being copied, and balance that analysis with a requirement that the use does not cause financial harm to copyright owners and markets.

## **Conclusion**

Yahoo!7 looks forward to engaging with the ALRC on the specific detail of a fair use exception for the Act.

It is worth noting that Australia would not be alone if it developed a fair use type exception framed to promote flexibility and innovation. The US is not alone in having a fair use doctrine. The Philippines, South Korea and Israel have fair use doctrines and Singapore uses a fair use type multi-factor test within its fair dealing exception. In addition, India is also heading in that direction and Ireland is considering fair use in the context of its current review of copyright law.

Yahoo!7 believes that copyright law should aim to promote creativity and innovation. Under Australia's existing copyright regime, very many socially useful and economically beneficial technological innovations would simply have no breathing space to emerge. They would be blocked at the first post by a copyright regime that is insufficiently flexible to accommodate technological innovation. No legislature can anticipate the services of the future. Therefore having a flexible fair use provision that is not linked to specific purposes and can be more easily applied to new technologies will encourage creative innovation and power Australia's digital economy into the future.