



Law Council
OF AUSTRALIA

Business Law Section

The Executive Director
Australian Law Reform Commission
GPO Box 2708
Sydney NSW 2001
Via email: copyright@alrc.gov.au

25 February 2013

Dear Sir or Madam,

Copyright and the Digital Economy: Issues paper August 2012

I have pleasure in enclosing a submission on the ALRC's Issues Paper on Copyright and the Digital Economy released in August 2012.

The submission has been prepared by the Intellectual Property Committee of the Business Law Section of the Law Council of Australia ('IPC').

If you have any questions in relation to the submission, in the first instance please contact the Committee Chair, Richard Hamer on 03-9613 8075 or via email: richard.hamer@allens.com.au

Yours faithfully,

Frank O'Loughlin
Section Chairman

Enc.

**Australian Law Reform Commission: Copyright and the Digital Economy: Issues
Paper August 2012**

**Responses by the Intellectual Property Committee, Business Law Section, Law
Council of Australia**

The responses set out in this submission have been prepared by members of the Copyright Subcommittee of the Intellectual Property Committee of the Business Law Section of the Law Council of Australia (**IPC**).

Question 2 - Guiding Principles for Reform

Question 2: What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

1. The IPC supports, in general terms, the draft principles put forward by the Australian Law Reform Commission (**ALRC**) to guide its inquiry, with the following comments on certain of the principles proposed:

Principle 3: Recognising rights holders and international obligations

2. In this regard, the IPC commends the reference by the ALRC in its accompanying commentary to human rights concerns, but believes that specific reference should be made in the draft principle itself to recognition and protection of the moral rights of 'authors'. This is not just because of the positive international obligation to protect such rights under article 6^{bis} of the *Berne Convention of the Protection of Literary and Artistic Works*, but also because the interests of authors tend to be relegated in a number of the other draft principles, eg numbers 1, 4, 5, 6 and 8, or are otherwise subsumed under the label 'rights holders'.
3. As a matter of terminology, the IPC also believes that it would be preferable to use the term 'authors' in respect of works and 'makers' in respect of other subject matter, rather than the term 'creators'. 'Author' and 'maker' are the expressions used in the *Copyright Act 1968*, while the term 'author' is the only expression used in the relevant international conventions, such as *Berne* and the *WCT*. Furthermore, the High Court in *IceTV* has recently emphasized the centrality of the concept of authorship in understanding the proper scope of protection for works under the 1968 Act.

Principle 7: Reducing the complexity of copyright law

4. The IPC strongly supports the aspiration expressed in this principle, but is aware that, at times, a degree of complexity may be unavoidable and that the drive for simplicity should not prevail over the need for clarity and avoiding uncertainty.

Questions 3 & 4 – Caching, Indexing and other Internet Functions

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

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?

1. A guiding principle of exceptions reform should be that stated in the Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999*:

'ensuring that the technical processes which form the basis of the operation of new technologies such as the Internet are not jeopardised'.¹

The necessity of protecting basic Internet functions has not decreased since 2000. The Full Federal Court's emphasis on the technical nature of the reproduction right in the *Optus TV Now* decision potentially broadens the scope of liability for many entities involved in Internet intermediary activities. The court in that case interpreted the reproduction right so as to focus on the technical making of a copy, and may suggest that an entity in some circumstances directly infringes copyright if it establishes equipment on which others make a copy.² Assuming that no change is contemplated to the scope of copyright's exclusive rights, it is necessary to revisit the scope of exceptions in light of the Court's ruling.

Caching

2. The legal position relating to caching is confused, first by the range of different technical activities that go by the title 'caching', and second, by the existence of three different copyright exceptions that could be applied to, or are designed to cover, caching of one kind or another, but which describe the exempted activity in different terms:
 - (a) Sections 43A/111A, which exempts some 'temporary reproductions' of copyright material '*as part of the technical process of making or receiving a [non-infringing] communication*'.
 - (b) Section 200AAA, which is confined to educational institutions and exempts the operation of a computer system primarily to enable people to gain online access, where that system automatically makes temporary electronic reproductions of copyright material made available online through the system to users of the system, in response to action by the users, merely to facilitate efficient later access to the material by users of the system'

¹ Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 (Cth), [63].

² *Optus TV Now* decision, [58], [67]. The court emphasizes the 'pervasive' involvement of Optus in the making of the copies, however, leaving open the possibility that not all entities establishing equipment used by others to make copies will be direct infringers: see [50]-[52].

- (c) The internet safe harbours in Part V Div 2AA, which defines caching as the reproduction of copyright material on a system or network controlled or operated by or for a carriage service provider in response to an action by a user in order to facilitate efficient access to that material by that user or other users (s116AB).
3. The individual provisions are inconsistent: s 200AAA addresses the communication right; s 43A does not. The provisions also have notable weaknesses as general exceptions for caching. Although ss 43A/111A were envisaged to cover 'certain caching',³ the limitation to non-infringing communications (subss 43A(2), 111A(2)) makes these exceptions unworkable for large scale caching by intermediaries, and in any event the different terminology used casts some doubt over the scope of the provision, for example, whether it covers proxy caching intended to facilitate access to users other than the one involved in 'a communication'. Section 200AAA is drafted so as to be confined to copying '*merely to facilitate efficient later access*' – meaning that if, for example, an educational institution engaged in more 'active' forms of caching, for example in order to select material appropriate to be accessed by students, it is at least open to question whether s 200AAA would apply. It is unclear whether, or how, ss43B/111B (which cover temporary copies '*incidentally made as a necessary part of a technical process of using a copy*' of copyright material) may be relevant; in any event it, like ss 43A/111A, is limited to non-infringing copies/uses and so is unhelpful for large scale caching.
4. It is undesirable to have several overlapping but distinct provisions aimed at the same basic phenomenon and offering only partial and uncertain protection. Australian Copyright law does not '*ensur[e] that the technical processes which form the basis of the operation of ... the Internet are not jeopardised*'.⁴ In addition, entities engaged in caching in Australia are worse off than entities performing similar functions in other cognate jurisdictions. Canada, New Zealand, and the European Union have significantly less qualified protection against infringement (not only reproduction) for caching (not excepting acts in the course of infringing communications), subject to conditions that broadly match how the technology of caching works; in the US caching has been held to constitute fair use.⁵

The activities of search engines

5. Search engines may directly infringe copyright by:
- (a) reproducing copyright material from websites onto servers;

³ Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 (Cth), [63].

⁴ Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999, [63].

⁵ *Copyright Modernization Act 2012* (Canada) new s 31.1; *Copyright Act 1994* (NZ) s 92E; *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* ('Directive on electronic commerce') Official Journal L 178, 17/07/2000 P. 0001 – 0016, Article 13; *Field v Google, Inc.* 412 F Supp 2d 1106 (D Nev 2006); *Parker v Google, Inc.* 422 F Supp 2d 492, 497 (ED Pa 2006)

- (b) storing and further reproducing copyright material in a cache on their servers;
 - (c) communicating cache copies of material where the original source is no longer available or is not working; and
 - (d) communicating text extracts and thumbnail images to end users.
6. Australian copyright law should protect an essential Internet function like search to *'ensur[e] that the technical processes which form the basis of the operation of new technologies such as the Internet are not jeopardised'*.⁶

Hosting material

7. Entities that host Internet content store reproductions of copyright material and make that material available, thus exercising, potentially, both the reproduction and communication rights. Hosts that fail to address widespread infringement risk liability for authorising infringement;⁷ but the ruling in the *Optus TV Now* decision has increased the likelihood that hosts directly exercise copyright owners' exclusive rights by establishing equipment designed to reproduce and communicate copyright material – regardless of knowledge. Sections 39B and 112E offer little or no protection.⁸ Hosting, like search and caching, is an essential Internet function, and is protected from infringement in other jurisdictions subject to obligations (at differing levels of detail) to remove material notified as infringing.⁹

The form of any exception to address the activities of Internet intermediaries

8. The IPC considers that exceptions in this area warrant re-writing. Sections 43A/111A, 39B/112E, 43B/111B, 200AAA, and the safe harbours have been introduced at different times (2000, 2004 and 2006) and are confusing, overlapping, incoherent and in some cases redundant.
9. The IPC notes that the Safe Harbours must be retained under the terms of the Australia-US Free Trade Agreement. One approach therefore to reform would be to reform exceptions applicable to natural persons and leave service providers to the protection of (extended) safe harbours. This approach has weaknesses. It is not clear that all entities engaged in caching in particular would be online service providers. Further, the Safe Harbours were not designed to operate as a general set of regulations requiring compliance from all actors engaged in network-related activities. Relying solely on the Safe Harbours would leave Australian Internet

⁶ Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999, [63].

⁷ *Cooper v Universal Music Australia* (2006) 71 IPR 1

⁸ *Roadshow Films v iiNet* (2012) 95 IPR 29

⁹ *Copyright Modernization Act 2012* (Canada) new s 31.1; *Copyright Act 1994* (NZ) s 92C; *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* ('Directive on electronic commerce') Official Journal L 178, 17/07/2000 P. 0001 – 0016, Article 14.

intermediaries less protected from infringement than equivalent actors overseas. In addition, creating additional exceptions for direct infringement will still leave work for the Safe Harbours, which protect from both direct and authorisation liability.

10. The IPC notes that reform in this area needs to consider (a) who can take advantage of an exception, (b) which rights are involved and (c) the activities to be covered (some of which may be difficult to foresee).
11. One option would be to enact activity-specific exceptions for:
 - (a) **Caching:** covering the reproduction and communication rights and aimed at Internet intermediaries, individuals and legal persons;
 - (b) **Hosting:** covering the reproduction and communication rights and aimed at Internet intermediaries; and
 - (c) **Search:** covering the reproduction and communication rights and aimed at Internet intermediaries;
 - (d) **End users (natural or legal persons):** covering the reproduction right and possibly the communication right as it applies to incidental uses during communication and use of legitimate copies of material.
12. Models exist for such provisions as noted above. The weakness of such an approach is that it risks becoming out of date rapidly – just as ss 39B, 43A, 43B, 111A, 111B and 112E arguably have.
13. Alternatively, a more general flexible exception could be drafted. This could be a fair use exception as recommended at the conclusion of this submission; alternatively it could be a more generally worded, abstract provision aimed at essential technical and Internet functions, perhaps building on the EU *Information Society* Directive Article 5(1) but aimed at all exclusive rights (not just reproduction), perhaps conditioned on fairness factors so as to protect the interests of copyright owners. The IPC would be happy to engage with the ALRC further regarding the possible detailed drafting of such a provision at later stages of the Inquiry if this route is adopted.

Questions 5 & 6 – Cloud Computing

Question 5: *Is Australian copyright law impeding the development or 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?*

1. The IPC is concerned that the expression 'cloud computing' appears to be treated as identifying a single and discrete type of activity. Rather, it is an amorphous term that, depending on context, may be used to refer to activities and services of quite disparate characteristics. This is implicitly acknowledged in the definition set out in

footnote 77 of the Issues Paper which defines cloud computing 'in part as' *In many respects, the expression is just current fashion for activities in the past which may have been classified under other names such as, for example, 'web-based'.*

2. One ramification of this is that the particular issues arising under copyright law will depend very much on the characteristics of the particular service that is under consideration. It may be a mistake, therefore, to treat all activities which may fall under the general rubric 'cloud computing' as giving rise to the same issues or susceptible of the same over-arching solutions.
3. Further, while the Court was at pains in the *Optus TV Now* case¹⁰ to point out that it was only deciding the application of copyright law to the particular service in question and not other relationships and different technologies, the IPC considers that the reasoning does raise significant issues for those providing online services generally (in addition to the time shifting issues addressed below).
4. The conclusion that Optus was *the* maker of the copies in question, or a maker, seems equally applicable to other online storage systems such as Dropbox, Sugarsync, Flickr, Google Drive, YouTube and so on.
5. It may be arguable that the decision of a particular user of such a service to upload the material to the 'cloud' takes the situation outside the scope of Optus TV Now, but it is very hard to draw a meaningful distinction between such a decision and the subscriber's decision 'to record' a particular program in *Optus TV Now*.
6. On one view, it seems unlikely that a person uploading a file to such an online storage system, for example their own photographs or wordprocessing documents, would consider that the service provider 'made' the copy stored on the server.
7. The IPC is concerned that such an application of the Full Court's interpretation may appear to be out of line with common understanding.
8. The conclusion that the service provider makes, or is a maker of, the resulting copy also seems to the IPC inconsistent with the principle informing s 22(6) of the *Copyright Act*: that the maker of a communication is the person responsible for determining the content of the communication. It is also at odds with the traditional view that a mere amanuensis is not the maker of a work.¹¹ In this connection, the IPC notes that the Full Court's partial quotation from Copinger meant also that the Full Court avoided grappling with the need to identify the human person who is the most proximate cause of the act being done.¹²

¹⁰ *National Rugby League Investments Pty Ltd v SingTel Optus Pty Ltd* (2012) 201 FCR 147; 95 IPR 321 at [100].

¹¹ *Donoghue v Allied Newspapers Ltd* [1938] Ch 106.

¹² See 201 FCR 147; 95 IPR 321 at [49] and Rebecca Giblin, 'Stranded in the technological dark ages: implications of the Full Federal Court's decision in *NRL v Optus*,' [2012] 34(9) EIPR 632 at 638.

9. By parity of reasoning with the principle adopted in s 22(6) and the '*mere amanuensis*' cases, the provider of the service could be seen as only a facilitator, at least where the service provider was not involved in the selection of the material to be uploaded.
10. One way of addressing this issue could be to identify the maker of the copy as the causative agency as has been done in the case of communications to the public by s 22(6).
11. As the Full Court in *Optus TV Now* indicated, however, the IPC notes that the US courts have not necessarily reached agreement on that position and disputes about these issues often fall to be resolved under the DMCA safe harbour regime. The corresponding regime under the *Copyright Act*, however, is not available, or may well not be available, given its restriction to 'carriage service providers'.
12. It may be – the IPC does not know – that the servers used by the particular services referred to above are located outside Australia and so do not involve an exercise of the reproduction rights under the *Copyright Act 1968*.¹³ There may also be considerations of scale and cost which may inhibit the development of such services in Australia. Nonetheless, the IPC submits that copyright law should not place additional barriers in the way of the establishment of such services in Australia in the absence of compelling justification.
13. A second issue raised by the *Optus TV Now* case is the Full Court's recognition that individual users could legitimately have relied on the defence provided by s 111 insofar as they were makers of the copies in question, but they could not engage an intermediary to take advantage of that entitlement.
14. The Issues Paper questions the extent to which those providing 'cloud computing services' could rely on the 'temporary exceptions' defences. The IPC notes that these provisions have not been the subject of judicial consideration and are of very uncertain scope. In addition, each is excluded if the communication is an infringing communication.¹⁴ This limitation on the defence appears likely to seriously detract from its usefulness for service providers. If the principle is that the service provider should be liable only where it is actively participating in the infringement, or has been put on notice that its customer is engaging in infringement, these provisions do not implement that principle effectively or in any way the service provider could safely rely on.
15. The Supreme Court of Canada's decision in *Entertainment Software Association v SOCAN* 2012 SCC 34 identifies another potential issue. That case concerned the 'sale' of computer games from an online store. The games included recorded music which had been included in the game by agreement with the relevant copyright owners in return for a fee. SOCAN sought payment of a licence fee in

¹³ For example, *Ladakh Pty Ltd v Quick Fashion Pty Ltd* [2012] FCA 389.

¹⁴ See e.g s 43A(2).

respect of use of the communication right to transmit the game from the online store to the 'purchaser'. The Court by the narrowest of margins, 5:4, held that a royalty was not payable.

16. No further fee in respect of the music would be payable in the case of games bought on disk in a 'bricks and mortar' retail store. The majority, therefore, characterised the transmission as just the 'technological taxi' by which the game was delivered to the purchaser. The minority, however, invoked the exercise of the communication right as justifying the payment of a fee for its exercise. After all, it could be argued that the consumer has the convenience of online purchase instead of having to travel to the store to buy the product or wait for its delivery if ordered by mail delivery.
17. The IPC notes that the copyright legislation in Canada, and the courts' approach to its interpretation, is not necessarily on all fours with the Australian Act or our courts' approach. The decision does throw into stark relief, however, the issues thrown up by a desire for a 'technologically neutral' approach.

Question 8 – Format Shifting

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?

1. The IPC notes that sections 43C, 47J, 110AA and 111 are format specific and do not permit multiple copies similar to the flexibility and freedom accorded to users by section 109A. The ALRC should consider the effect these limitations are having, and will have, on widely accepted private and domestic uses of copyright material facilitated by new technologies.
2. If the ALRC considers it is necessary to broaden the exceptions, the restrictions on copying materials with a TPM should continue to apply.
3. Comments on specific sections are made below.

Section 43C

4. The IPC recognises that this exception currently only allows the owner of a book, newspaper or periodical publication to make a reproduction of that work if the copy is made for that person's private or domestic use, and provided that any such copy embodies the work in a form different from the form in which the copied work was originally embodied.
5. This exception does not allow a user to make a further reproduction of any such copy. As only one format shift is allowed, the practical effect of this is, for example,

that once a person has made a digital copy of any such material, it is an infringement to reproduce that copy even if the copies are made for the same private and domestic purpose.

6. In a digital age in which consumers are increasingly seeking to access their materials from any number of multimedia devices within a single household, the ability to make only one copy is of limited utility.
7. The approach in section 43C is inconsistent with the exception otherwise applying to sound recordings by virtue of section 109A. Subject to some limited exceptions, that section allows for digital-to-digital copying for any number of devices a person might own provided that such use is for a private or domestic use.
8. Given the proliferation of multimedia devices, the ALRC should consider whether consumers should be able to view the materials the subject of this section with the same freedom and flexibility which is afforded to sound recordings.

Section 47J

9. Section 47J allows the owner of a photograph to make a reproduction of that photograph for their own private and domestic use provided that the original photograph is not an infringing copy and provided that either:
 - (a) the original photograph is in hard copy form and the copy which is made is in electronic form; or
 - (b) the original photograph is in electronic form and the copy which is made is in hard copy form.
10. As with section 43C this exception does not allow a user to make a further reproduction of any copy which they may already have made (whether it be in electronic or hard-copy form). Accordingly only one format shift is allowed.
11. The practical effect of this is, for example, that once a person has made a digital copy of a photograph, they are not then able to reproduce that copy. In a digital age in which consumers are increasingly seeking to access their photographs from any number of multimedia devices, the ability to make only one copy is of limited practical use.
12. As with section 43C, the approach in section 47J is also inconsistent with the exception otherwise applying to sound recordings by virtue of section 109A.
13. Given the proliferation of multimedia devices with which consumers are able to view their photographs, the ALRC should consider whether section 47J should be drafted to enable digital-to-digital copies to be made for private or domestic use, as is presently the case in section 109A with respect to sound recordings.

Section 110AA

14. Similarly with Sections 43C and 47J the IPC is of the view that the current operation of Section 110AA does not recognise legitimate consumer interests in the digital age. Currently Section 110AA only allows users to take an analogue video that they own and shift it into a digital format. It does not allow digital-to-digital copying. Again, this can be contrasted with Section 109A. Further, it only allows for one copy to be made.
15. The ALRC should consider whether the section should be amended to allow users to make a copy of a film using an earlier copy provided that the earlier is a non infringing copy and that the purpose of the making of the later copy is for private and domestic use regardless of the format of the earlier copy (i.e digital to digital copying should be allowed).
16. As with the change in consumers listening habits (which the IPC submits are comparatively well served by section 109A), the rapid advancement in consumer electronic devices over the past decade has meant that the way in which consumers view films has changed. The questions that arises is whether consumers should now have the freedom and flexibility to watch films they legitimately acquire in the format most suited to them at any particular time. The IPC believes that there has comparatively recently been a rapid expansion of the multimedia device market which has in turn increased the number of ways in which persons can now view films.
17. The ALRC should consider whether the exceptions in section 110AA should be drafted in a non-format specific way to otherwise enable digital-to-digital copies to be made on a number of devices provided that the copies are for private and domestic use.

Section 111

18. Section 111 allows a person to make a copy of a broadcast for private and domestic use for watching at a more convenient time than when the broadcast was originally made. It does not however enable further copies of that original copy of the broadcast to be made.
19. For example, if a person time shifts a broadcast for the purposes of viewing at a more convenient time, that person is not permitted to make a further copy of that broadcast for the purposes of format-shifting that broadcast to enable them to view it on another device. It may be that a viewer does not finish watching a program recorded on the television and wishes to copy it to their computer to watch in another venue. As another example, a person may own two TiVo devices used in different areas of their home. Under the current exception in section 111, if the person records a television program on one of the TiVo devices they cannot then transfer the program to the other TiVo device if they wish to watch the program in the other part of the home.

20. The ALRC should consider whether section 111 should be amended to enable consumers to view broadcasts on a variety of multimedia devices.

Should the exceptions be replaced with a single format shifting exception with common restrictions?

21. The ALRC should consider whether the most appropriate way for the format shifting exceptions to be amended to reflect accepted uses of copyright material should be to adopt a broad, format-neutral, format-shifting exception which would generally enable consumers to format shift copyright works or other subject matter, the subject of the current legislative exceptions, which they legitimately own provided any such use is for domestic and private purposes.
22. The IPC notes that Canada recently enacted the Copyright Modernization Act 2012, which includes a non-format specific exception enabling reproduction (regardless of medium) for private purposes.

Australia's International Obligations

23. Article 9(2) of the Berne Convention provides as follows:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

24. Article 13 of the TRIPS Agreement provides as follows:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

25. More commonly referred to as the three step test, both generally require that any exceptions or limitations to the rights of copyright owners be:
- (a) confined to special cases;
 - (b) not conflict with a normal exploitation of the work; and
 - (c) not unreasonably prejudice the legitimate interests of the copyright holder.
26. When considering whether to broaden the exceptions discussed above, the ALRC should ensure that the exceptions continue to meet these international obligations.

Question 9 - Time Shifting Exception

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?

1. The IPC submits that reconsideration and redrafting of the time-shifting exception is warranted in light of the decisions in the *Optus TV Now* case, even if the result of the *Optus TV Now* decision is considered desirable from a policy perspective. Regardless whether Optus' activities ought to have been protected under s 111, the provision as interpreted by the Court may not fulfil the aim of protecting ordinary consumer activities as at 2006 when the provision was introduced, noting:
 - (a) commentary that suggests that the business models of some suppliers of devices for copying broadcasts may infringe following the Full Federal Court reasoning;¹⁵ and
 - (b) the possible issue that consumers in the case of a service such as that offered by Optus, may authorise the infringement of the service provider;¹⁶
 - (c) there is a question whether consumers also require protection in relation to the communication right as well as for the making of copies.
2. It will be necessary to reconsider the best way to provide flexibility for '*personal consumer devices and other means which enable individuals to record television and radio broadcasts on or off domestic premises*',¹⁷ and '*legal certainty for industries that provide products and services that assist consumers to carry out these copying activities*'.¹⁸
3. In relation to this, as well as other exceptions, *if* specific exceptions are to be retained, consideration should be given to expanding protection to any and all *infringement* by the person intended to benefit from the exception.

Questions 15 & 16: Transformative Use

Question 15: Should the use of copyright materials in transformative uses be more freely permitted?

The IPC believes that the ALRC should bear in mind the following when considering whether transformative uses should be more freely permitted:

1. The making of an adaptation is the subject of a specific exclusive right under s 31(1)(a)(vii) in the case of original literary, dramatic and musical works. The ALRC should therefore be mindful of delineating the results of a transformative use from

¹⁵ R. Giblin, 'Stranded in the Technological Dark Ages: Implications of the Full Federal Court's decision in *NRL v Optus*' (2012) 34(9) *European Intellectual Property Review* 632.

¹⁶ W. Rothnie, 'The Footy Killed Optus' DVR' (2012) 62(4) *Telecommunications Journal of Australia* 58.1.

¹⁷ Further Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth), [29].

¹⁸ Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth), 9.

the making of an adaptation. It should also be noted that Australia is under an obligation to protect, in the case of foreign literary and artistic works, the making of translations under art 8 of the Berne Convention (treated as 'adaptations' under the 1968 Act) and, more generally, under art 12, the making of adaptations, arrangements and other alterations of such works.

2. The ALRC will need to consider whether, as with adaptations, a precondition for protection of a 'transformative work' should be that this constitutes an original work in its own right. That is, in order to be protected, must a transformative work itself be the result of clear and independent authorial effort? For example, if two works are simply pasted together without any further modification, will this constitute a transformative work?
3. There may be a question about the substantial part requirement and the role it should play. For example, on traditional analysis, where a substantial part of a protected work is taken, the fact that it is incorporated into a new and original work will not prevent the taking of the part from amounting to copyright infringement. The ALRC may need to consider whether the purpose or object of the appropriator (assuming these could be readily identified) should be allowed to pre-empt the rights of the original copyright owner. It is possible that such purpose or objective might be a relevant factor in determining whether or not a substantial part has been taken in the first place. More generally, there might be reference to the broader context and cultural/artistic milieu in which the appropriation occurs.
4. Alternatively, the IPC considers that if a general 'fair use' defence was adopted (as discussed below) there would be no need for a special provision relating to transformative uses.

Question 16: How should transformative use be defined?

1. Most of the relevant issues here have already been addressed under the preceding question. Building on these considerations, the IPC submits that:
 - (a) by definition, a 'transformative' use cannot be an 'adaptation' within the present meaning of that term in *the Copyright Act 1968*; and
 - (b) the IPC would also reject any broader proposition of the kind contained in the second sentence of question 16, namely that any use of a publicly available work in the creation of a new work should be considered transformative.

Questions 32 & 33 - Crown Use of Copyright Material

Question 32: Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

1. The IPC believes that the statutory licensing scheme for crown use of copyright works and other subject matter is generally adequate and appropriate in the digital environment, subject to the inclusion of a statutory defence for material registered or deposited with the Crown as discussed in our response to question 34 and the amendment of two drafting anomalies discussed below.
2. The IPC is of the view that division 2 of part VII should be amended to remedy what appear to be two drafting errors. The first relates to the definition of a 'government copy' which is defined to mean '*a reproduction in a material form of copyright material made under subsection 183(1).*' The IPC believes that the limitation of this definition to reproductions has undesirable results in that the benefits of transacting with a collecting society, as opposed to the copyright owner, are not available if the Crown wishes to communicate the work to the public.
3. The term 'government copy' is used within section 183A of the Act which enables the Crown to enter into arrangements with a collecting society for the distribution of equitable remuneration to copyright owners, rather than having to comply with subsections 183(4) and (5). Subsections 183(4) and (5) require the Crown to notify a copyright owner each time it does an act comprised in the copyright and agree terms for the doing of the act with the copyright owner.
4. The interaction between sections 183 and 183A and the confinement of a 'government copy' to a reproduction have the effect that the Crown is able to transact with an appointed collecting society if it wishes to reproduce copyrighted material, but will have to notify the copyright owner if it wishes to communicate the material and agree terms for this communication with the owner. This is an unusual and cumbersome result which is unnecessary to protect the interests of copyright owners. Therefore, the IPC submits that the Act should be amended so that section 183A applies to the communication of copyright material to the public, in addition to the reproduction of such material.
5. The second drafting anomaly relates to the use of the term 'copyright material' in the headings of division 2 or part VII and section 183 (see Michelle Taylor-Sands and Kathryn Graham, 'Crown use of Copyright Material and Computer Programs', 75 *The Australian Law Journal* 566). The inclusion of this term in these headings creates uncertainty in the scope of section 183 as this term is defined to exclude computer programs or a compilation of computer programs, yet the actual wording of section 183 does not exclude these works from its operation.
6. Therefore, the IPC submits that references to 'copyright material' in the heading of division 2 of part VII and section 183 should be substituted with '*copyright works*

and other subject matter. This will remove doubt that the Crown use provisions in section 183 apply to computer programs or a compilation of computer programs and that the exclusion of these works from the definition of 'copyright material' is only intended to remove the works from collecting society arrangements in section 183A (ensuring that the Crown must negotiate terms for the use of computer programs and compilations of computer programs).

Question 33: How does the Copyright Act 1968 (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

1. The IPC is of the view that where government has an obligation to disclose material under disclosure laws, such as the *Freedom of Information Act 1982* (Cth), this obligation has been imposed because there is a public interest in people having access to the material. As such, the IPC submits that the exercise of these obligations should not carry a penalty of having to remunerate the copyright owner. If such a requirement was made it is likely that the public authority would wish to pass on such costs. The IPC believes the public interest in disclosure outweighs any detriment to the copyright owner.
2. The IPC is not suggesting that once disclosed by government under disclosure laws, the material is placed in the public domain and may be reproduced by the person who requested the material under the disclosure laws or any other person. However, in such circumstances the owner should not be entitled to ask government for remuneration for the reproduction of the material or other use necessary for the disclosure.

Questions 45 – 53 - Fair dealing exceptions and fair use

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?

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

Question 47: Should the Copyright Act 1968 (Cth) 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?

Question 52: Should the Copyright Act 1968 (Cth) 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?

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

1. The IPC has considered the questions relating to the fair dealing exceptions and a possible fair use exception and has decided to submit a broad response to the questions raised.
2. In the IPC's view the time has come to introduce a flexible fair use provision which will enable the Act to adapt to changing technologies and uses without the need for legislative intervention. Currently, each new situation needs to be considered and dealt with in separate amending legislation which usually occurs well after the need is identified.
3. A number of the consequences of a piecemeal approach of the introduction of very specific exceptions to copyright without an underpinning, standards based approach to exceptions have already been noted earlier in this submission. These consequences include:
 - (a) The introduction of more complexity into the Act without necessarily providing either certainty or clarity. An example of this complexity may be attempts to redefine what is a substantial part of a work by reference to the motives and objectives of the user.
 - (b) The creation of inconsistency between provisions of the Act.
 - (c) As explained in earlier parts of this submission, the legislative process necessarily lags well behind:
 - (i) the new ways of using copyright material referred to in Principle 6,
 - (ii) the technological development of internet-related functions such as those referred to in Questions 3 and 4,

- (iii) the technological developments relating to cloud computing services referred to in Questions 5 and 6,
 - (iv) the development of transformative uses referred to in Questions 15 and 16; and
 - (v) technological developments in format and time shifting processes and technologies referred to in Questions 8 and 9.
- (d) The fact that many activities that ought not be considered infringing presently do amount to copyright infringement, unless the licence of the copyright owner is obtained, such as:
- (i) in the case of parallel imports of non-infringing accessories, the use of photographs of products and further packaging in advertising (including online advertising) of the products where logos and packaging design may be copyright works;
 - (ii) use of images in a presentation or seminar to illustrate the point being made.
4. In the view of the IPC, these consequences and others can be overcome by the introduction of a fair use defence. One of the objections to a fair use defence is that it lacks certainty although there is some evidence that the alternative approach of introducing specific, somewhat complex exceptions also lacks certainty in addition to retaining all the other drawbacks of not having a standards based approach to exceptions. In any event, if a more flexible fair use provision is introduced into the Act, the IPC submits that it is appropriate to provide clear criteria and guidance to Australian courts in order to remove or reduce the uncertainty that may arise from a general fair use exception.
5. These criteria and guidance may take the following form:
- (a) An acknowledgement of the need for compliance with international copyright obligations, especially the three step test in Article 13 of TRIPS.
 - (b) An inclusive definition of fair use that would include reference to the existing, specific exceptions to copyright which would then act as examples to courts of the type of activities that constitute fair use. The IPC notes that some amendment of those existing exceptions may be needed for the purposes of clarity and certainty.
 - (c) Introduction of such further specific exceptions as examples of fair use as the ALRC may identify as part of the current review process. Some suggestions in this regard are made earlier in this submission.

- (d) Some means of permitting or encouraging Australian courts to draw upon the considerable jurisprudence of the courts of the United States of America in relation to fair use.
6. In relation to the last of those points, the IPC notes that, as a relatively small country, the amount of litigation in relation to copyright should also be relatively small. Drawing upon the jurisprudence of the United States would permit Australia to take advantage the intellectual and financial investment in the creation of that jurisprudence over many years without the disadvantage of having to expend significant judicial resources in the development of a completely stand alone Australian view of fair use. There may also be considerable commercial advantages in a closer alignment between Australian copyright law and American copyright law in this area.

For further discussions or clarification of the foregoing please contact the Chair of the IPC, Richard Hamer, on 03-9613 8705 or via email: Richard.Hamer@allens.com.au.