5. Third Parties

Contents

Summary

5.1 Should a company be free to copy and store broadcast television programs for its customers, or copy music the customer has already bought, from one device to another or to the cloud? Should a school be free to copy material for its students, or a library for its patrons, if the students or patrons would have been permitted to copy the material themselves? This chapter considers such 'third party' uses of copyright material, where the third party copies or otherwise uses copyright material on behalf of others. These are unlicensed uses to deliver a service, sometimes for profit, in circumstances where the same use by the 'end-user' would be permitted under a free-use exception.

5.2 The ALRC concludes that such uses should be considered under the fair use exception proposed in Chapter 4, in determining whether the use infringes copyright.

5.3 A use might sometimes be considered fair when a third party appears merely to be facilitating an otherwise fair use, such as some types of private and domestic use. Other factors, however, such as whether the use is transformative, for a commercial purpose, or harms the rights holder's market, may be more important.

Examples of third party uses

5.4 Many organisations, businesses and technologies may be thought to help 'facilitate' uses of copyright material. To varying degrees, computers, home recording devices, many software programs and popular apps, the internet itself, all facilitate copying—some more directly than others.

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

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

5.6 The spectrum of these activities is wide. At one end may be pure storage services. A third party such as an internet service provider may offer a cloud storage facility that allows customers to store a copy of a music file, for example, on a remote server.[1] Many argue that simply storing customers' files in remote computer servers should not infringe copyright, even if the service provider must make copies of the files and communicate those files to 'the public' (that is, to their customer).

5.7 Other services on this spectrum may include:

- scanning a customer's computer and then copying the files and storing them for back-up, perhaps on a remote computer;
- educational institutions copying material for students;
- a photocopying company copying material for students;
- a video hosting web platform copying and communicating the transformative works of its users;
- taking a customer's collection of music CDs and making digital copies for the customer to use;
- scanning hardcopies of a customer's books (that is, 'format shifting' them), and giving the customer electronic versions;
- a web application that allows users to copy and collect web pages, perhaps stripping them of advertisements and images to make the text easier to read; and
- a web application for managing research resources that allows users to store copies of web pages, journal articles and other copyright material in the cloud.

5.8 These are all existing business models that arguably involve a third party using copyright material for a customer, in a way that the customer may be permitted to use themselves. Many more examples could be provided.

Should third parties benefit?

5.9 One way to consider the question of whether unlicensed third parties should be permitted to facilitate such copying is to ask, as the ALRC asked in the Issues Paper in the context of the time-shifting exception, whether it should matter who makes the copies.[2]

5.10 Some stakeholders told the ALRC that it matters very much who makes the copies. Foxtel submitted that it was critically important because if 'the recording is not made by a private individual, rights holders' ability to monetise their content may be

1 This chapter does not concern the related question of internet service provider liability, or other third party liability, for copyright infringement, which is outside the Terms of Reference.

2 The private copying exceptions are considered more broadly in Ch 9.

seriously prejudiced'.[3] The Coalition of Major Professional and Participation Sports said that there is a

> fundamental distinction between recordings made by consumers but later stored on a remote server and recordings made by companies, for commercial gain, and stored on remote servers for their subscribers to access. The latter can significantly impact on the ability of content owners to exploit their rights and should not be allowed without the consent of the rights holder.[4]

5.11 Free TV Australia similarly submitted that:

> Third parties exploiting free to air signals without the permission or compensation of broadcasters as copyright owners are undermining the economic interests of broadcasters. Broadcasters as copyright owners are entitled to control the exploitation of their signals and should be appropriately compensated by third parties reaping commercial gain from their broadcast signals.[5]

5.12 Many submissions, even some which supported exceptions for private copying, drew the line at unlicensed third parties commercially benefiting from making copies for consumers. This was not confined to time-shifting. Commercial Radio Australia, for example, said consumers should be able to take full advantage of technology, but commercial gain should be reserved for rights holders.[6] Exceptions should be limited

> to prevent an erosion of rightholders' ability to control the commercial exploitation of their content. New uses and technologies should not provide a means by which rightholders might be wrested of such control. .... The time and format shifting exceptions should not cover copying by a company on behalf of an individual, where that company stands to make commercial gain from the copying. Commercial exploitation rights should be reserved for rightholders.[7]

5.13 Tabcorp said that the private copying exceptions 'should be limited to private individuals and should not be extended to companies who can commercially exploit the recordings so as to prevent the diminution of the value of the broadcasters' rights'.[8]

5.14 Foxtel stated that expanding the exceptions 'to allow unlicensed third parties to profit at the expense of those who invest in the creation of content would be entirely inequitable'.[9]

5.15 Telstra also submitted that the time-shifting exception should be clarified, and a distinction made between 'recordings made by a customer using their own technology and later stored on a remote server; and recordings made by entities, not licensed by rights holders, and stored on remote servers for subscribers to access'. The latter category, Telstra said, is a commercial exploitation and must require a licence from the content owner.[10]

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3 Foxtel, *Submission 245*.
4 COMPPS, *Submission 266*.
5 Free TV Australia, *Submission 270*.
6 Commercial Radio Australia, *Submission 132*.
7 Ibid.
8 Tabcorp Holdings Ltd, *Submission 164*.
9 Foxtel, *Submission 245*.
10 Telstra Corporation Limited, *Submission 222*.

5.16 The Music Council of Australia submitted:

> If a service provider is obtaining a commercial benefit from the use of copyright material—that is, capturing the copyright owner's public—it should obtain a licence and pay remuneration to the copyright owner. Such remuneration is a cost of doing business, like any other.[11]

5.17 One common objection is that these businesses are 'free riding'.

Inhibiting innovation

5.18 Others submitted that blanket prohibitions on third parties benefiting from such uses of copyright material may inhibit innovation. For example, iiNet submitted that it should not matter who makes a recording from a broadcast, if it is made 'in a domestic setting' and 'if the underlying purpose of the recording is fair'. In this way, iiNet said, 'competition between technologies will be promoted'.[12]

5.19 Ericsson also submitted that it should not matter who makes the recording.

> The success of the digital economy, enabled primarily by the IT and telecommunications sectors, has been based on sustained and continuous innovation. This has driven continuous improvement of technologies and services and has provided a competitive incentive for differentiation amongst competing players across different industries. Therefore, using [information and communications technology] to simplify or differentiate services or offerings should not be prohibited by law.[13]

5.20 Dr Rebecca Giblin saw the Full Federal Court's *Optus TV Now*[14] decision as a potential threat not only to new digital technologies, but also to established recording devices. Rights holders, Giblin submitted, may now 'exert pressure on Australian [digital video recorder] providers to reduce the features they offer'.

> Australians may be limited to 'dumb' technologies that don't offer the most convenient and useful features. Alternatively, technology providers may be obliged to license rights to avoid the threat of litigation, forcing consumers to pay higher prices and effectively abrogating their statutory right to time-shift. The judgment also introduces uncertainty for providers of unrelated technologies, particularly cloud or remote storage providers.[15]

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

> Limiting the development of such services risks reducing the incentives for copyright owner to innovate to meet consumer demands.[16]

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11 Music Council of Australia, *Submission 269*.
12 iiNet Limited, *Submission 186*.
13 Ericsson, *Submission 151*.
14 *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.
15 R Giblin, *Submission 251*.
16 ACCC, *Submission 165*.

Depends on the market

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

> Where the cloud service is being offered in competition with the true rights holder, then it is important to consider what legal access to the content is already available to the public. If the content is already accessible on demand by way of a catch-up service by a legitimate rights holder, then the competing cloud service should not be able to offer that content.[17]

5.23 Taking this argument further, some might ask whether exceptions for time-shifting free to air broadcasts are now fair at all, when the programs can be watched at a later time through online catch-up services. ARIA noted that Australia's time-shifting exception had its origins in 'an era of analogue broadcasts where programming and time constraints meant that the opportunities to catch up on a missed broadcast program were limited'.[18]

5.24 However few would now say that all unlicensed copying of broadcast material for time-shifting should be prohibited. Consumers very much expect to be able to make these copies. Further, some argue that exceptions to allow the making of private and domestic copies encourage the development of innovative and efficient services and consumer products.[19]

Who made the copy?

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

5.26 The question of third parties facilitating private and domestic uses has most recently been discussed in Australia in the context of the Optus TV Now service, and the Federal Court cases it prompted. The service enabled subscribers:

> to have free to air television programmes recorded as and when broadcast and then played back at the time (or times) of the subscriber's choosing on the subscriber's compatible Optus mobile device or personal computer. The system which permits such 'time-shifting' of programme viewing requires the copying and storing of each

17 Australian Broadcasting Corporation, *Submission 210*.
18 ARIA, *Submission 241*.
19 For example, one recent study found that a fair use policy in Singapore positively influenced growth rates in the private copying technology industries: R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), prepared for Google.

> television broadcast recorded for a subscriber, hence the allegations of copyright infringement in this matter.[20]

5.27 The Optus TV Now technology was described in the judgment. Essentially, copies of broadcasts were made, stored, and later transmitted from an Optus data centre, on instruction from Optus subscribers using electronic program guides.

5.28 Optus argued before the Federal Court that it did not copy these broadcasts, its customers did. Optus emphasised that 'the person who made the copy was the person who did the act of making, eg by selecting the material to be copied and by initiating the other acts to create the copy. Optus merely provided the automated service by which the recording could be made'.[21]

5.29 The Full Federal Court disagreed, and concluded that

> each cinematograph film and sound recording of the broadcasts and copies of the films in the Agreed Facts which was brought into existence after a subscriber had clicked the 'record' button on that subscriber's Optus compatible device, was not made by the subscriber alone. It was made either by Optus alone or by Optus and the subscriber.[22]

5.30 Related questions concerning whether a service communicates works to the public have also been raised recently in the United States, perhaps most importantly in the 2008 Supreme Court case, *Cartoon Network LP v CSC Holdings.* In this case, a cable television company, Cablevision, offered a remote personal video recorder service. It stored copies of television programs in digital lockers dedicated to each of its customers, and would later transmit those copies to its customers, when the customers wanted to view the program. Cablevision successfully argued that this transmission is not 'to the public', because each customer had a dedicated copy, and that copy was only streamed to that particular customer.[23]

5.31 A similar question arose again in response to a new US company, Aereo, which captures live broadcast television on thousands of small aerials—one aerial for each customer—and then delivers the broadcast content to its customers via the internet. Aereo is not licensed to do this; it does not pay the retransmission fees that cable companies pay to broadcasters. In April 2013, the US Court of Appeals for the Second Circuit concluded that 'Aereo's transmissions of unique copies of broadcast television programs created at its users' requests and transmitted while the programs are still airing on broadcast television are not "public performances" of the Plaintiffs' copyrighted works under *Cablevision*'.[24]

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20 *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147, [1].
21 Ibid.
22 Ibid.
23 J Ginsburg and R Gorman, *Copyright Law* (2012), 169.
24 *WNET, Thirteen, Fox Television Stations, Inc. v. Aereo, Inc*, USCA (2nd Circuit, 2013).

5.32 In a strong dissenting opinion, Judge Chin said the Aereo service was 'over-engineered in an attempt to avoid the reach of the *Copyright Act* and to take advantage of a perceived loophole in the law'.[25] Further, Judge Chin wrote:

> Under Aereo's theory, by using these individual antennas and copies, it may retransmit, for example, the Super Bowl 'live' to 50,000 subscribers and yet, because each subscriber has an individual antenna and a 'unique recorded cop[y]' of the broadcast, these are 'private' performances. Of course, the argument makes no sense. These are very much public performances.[26]

5.33 The *Cablevision* decision has also been criticised. US professors Jane Ginsburg and Robert Gordon have written that the 'court's parsing of the text in the *Copyright Act* is very problematic'. Among other things, Ginsburg and Gordon stress that 'it should not matter whether "the performance" originates from a single source copy repeatedly transmitted to individual members of the public "in different places at different times," or from multiple copies each corresponding to a particular place and/or time'.[27]

5.34 Elsewhere, Ginsburg, discussing *Cablevision*, writes:

> Arguably, if the end-user's copying would be fair use, then assisting that copying should not be infringing either, whether the assistance comes in the form of enabling the end-user to do the copying herself, or instead doing the copying for the user. But the caselaw is far from clear that copying on behalf of the user is fair use. For example, the decisions involving photocopy shops generally reject the proposition that the commercial photocopyist is in a sense subrogated to what might be educational fair use copying by the end-user.[28]

5.35 The ALRC is wary of attempts, using new technologies, to avoid the question of whether the rights were exploited at all. In such cases, as a matter of policy, it may be preferable to give a generous interpretation to the scope of the rights, and then to consider the important question of whether the exploitation of the rights was fair.

Whose purpose?

5.36 Unlike fair use, many exceptions are confined to a particular purpose or set of circumstances. The framing of these exceptions often raises the question of whether the person who uses the material, rather than the end-user, must have the requisite purpose for the exception to apply.

5.37 For example, the time-shifting exception in s 111 of the *Copyright Act* only applies if the person who makes the copy is the same person for whom the copy is made (to watch at a more convenient time). Considering the Optus TV Now service, discussed above, the Full Federal Court held:

> There is nothing in the language, or the provenance, of s 111 to suggest that it was intended to cover commercial copying on behalf of individuals. Moreover, the natural

25 Ibid.
26 Ibid.
27 J Ginsburg and R Gorman, *Copyright Law* (2012), 170.
28 J Ginsburg, *Recent Developments in US Copyright Law—Part II, Caselaw: Exclusive Rights on the Ebb?*, Columbia Public Law & Legal Theory Working Paper 08158 (2008), 17.

> meaning of the section is that the person who makes the copy is the person whose purpose is to use it as prescribed by s 111(1). Optus may well be said to have copied programmes so that others can use the recorded programme for the purpose envisaged by s 111. Optus, though, makes no use itself of the copies as it frankly concedes. It merely stores them for 30 days. And its purpose in providing its service—and, hence in making copies of programmes for subscribers—is to derive such market advantage in the digital TV industry as its commercial exploitation can provide. Optus cannot invoke the s 111 exception.[29]

5.38 The fair dealing exceptions are likewise confined to the prescribed purposes, such as the purpose of research or study. In *De Garis*, the Federal Court said the relevant purpose required by the fair dealing for the purpose of research or study exception in s 40 of the *Copyright Act* was that of the defendant, a news clipping service, not that of its customers.[30] The news clipping service was not copying for the purpose of research or study, even if the copies were to be used by its customers for that purpose.

5.39 This distinction was criticised in some submissions to this Inquiry. Some Australian copyright academics submitted that it is

> entirely artificial to privilege acts of reproduction or copying that can be done by a researcher themselves over acts that require the involvement of a third party, such as an intermediary to assist with the copying or a publisher to disseminate the research output.[31]

5.40 A more flexible reading of a fair dealing provision was recently made by the Supreme Court of Canada. In 2012, the Court considered 'whether photocopies made by teachers to distribute to students as part of class instruction can qualify as fair dealing' under Canadian copyright legislation—and concluded that they could qualify.[32] The Court stated that photocopies made by a teacher and given to students are 'an essential element in the research and private study undertaken by those students'.[33] The Court held that teachers

> have no ulterior motive when providing copies to students. Nor can teachers be characterised as having the completely separate purpose of 'instruction'; they are there to facilitate the students' research and private study.[34]

5.41 Sometimes a third party's use may seem merely to amount to facilitating another person's fair use; they will have no ulterior purpose themselves. But often there will be some other ulterior purpose.

5.42 Applying fair use, the question then might be, is a third party use of copyright material more *likely* to be fair than it otherwise would, if the use is simply for another person who would be entitled to make the same use? Is a third party use that facilitates

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29 *Singtel Optus v National Rugby League Investments (No 2)* [2012] 34 FCA (1 February 2012).
30 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99.
31 R Burrell and others, *Submission 278.*
32 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada), [1].
33 Ibid, [25].
34 Ibid, [23].

a use covered by one of the illustrative purposes more likely to be fair than a third party use that facilitates a use not covered by one of the illustrative purposes? In the ALRC's view, the answer is probably yes, it would be more likely to be fair—but only marginally, and this factor is not as important as the four factors set out in the fair use exception. Of course the finding of a commercial purpose in a particular use, though by no means determinative, will tend not to favour a finding of fair use.

Fair dealing and fair use

5.43 The fair dealing exceptions, including those proposed in this Discussion Paper, such as 'fair dealing for private and domestic use', are less flexible and less well-suited to the digital age than a general fair use exception. Importantly, with the fair dealing exceptions, the permitted uses are confined to the prescribed purposes. If a given use is for some other ancillary purpose, the fair dealing exceptions will not apply, and the question of whether the use is fair will not even be asked.

5.44 However, it would seem preferable at least to consider whether any particular use is fair, rather than automatically excluding uses not for prescribed purposes.

5.45 Some extra flexibility might be found in the new fair dealing exceptions proposed in this Discussion Paper (that is, proposed as alternatives to the ALRC's preferred exception, fair use). These alternative exceptions would at least expand the number of prescribed purposes or categories of use that may be considered under a fairness exception. However, many of the uses of copyright material discussed in this chapter are unlikely to be fair dealing for these or any of the other prescribed purposes in the fair dealing provisions.

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

5.47 Some have suggested that the *Copyright Act* should entrench strict technology-neutral exceptions. If an exception now allows users to make copies in their homes, some argue, then it should allow the copies to be made remotely using new technologies, and it should probably allow others to make the copies for them.

5.48 Others might respond that consumers should not be free even to store their copies on remote servers operated by others, and if a third party appears to be profiting from making the copy, then the third party service should pay the rights holder for the use.

5.49 Some copying by third parties is unlikely to harm the rights holders' market, and may help develop new markets for rights holders to exploit. Prohibiting such unlicensed copying through overly confined exceptions, even if technology neutral, may inhibit the development of the digital economy.

5.50 Some of these third party uses are also 'transformative and productive', to draw on the language in US case law discussing the first fairness factor.[35] The first fairness factor to be considered in determining fair use, under the exception proposed by the ALRC and under the US provision, is the purpose and character of the use. In considering this, US courts often ask whether the use is transformative or productive. 'A transformative or productive use is one where the defendant has created something new, repurposed the original work, or otherwise added value'.[36] A court asks

> whether the new work 'merely supersedes the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message ... in other words, whether and to what extent the new work is transformative.[37]

5.51 Prescriptively confining Australian copyright exceptions to particular purposes may deny Australia such transformative and productive new technologies and services. The fair use exception asks the right questions of new business models that use copyright material.

35 The fairness factors are set out in Ch 4.

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

37 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579.