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| Submission to ALRC Discussion Paper*Copyright and the Digital Economy* |
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| JULY 2013 |

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Introduction

In making this submission to the Australian Law Reform Commission’s (ALRC) *Copyright and the Digital Economy* (Discussion Paper), the Australian Communications and Media Authority (ACMA) has focused mainly on how some of the proposals contained in the Discussion Paper will impact on the operation of broadcasting and content regulation and the ACMA’s role in regulating media, communications and the internet. In its earlier submission to the ALRC Issues paper the ACMA noted the strong linkages between copyright and other content regulation, and in responding to this Discussion Paper, the ACMA remains of the view that there are strong benefits in assessing content issues within a single coherent framework.

The major issues of interest for the ACMA are the options provided for changing the retransmission scheme and reconsideration of the term, ’broadcast’. The ACMA notes the proposal to include content transmitted over the internet within the retransmission scheme. This proposal potentially challenges the operation and administration of section 212 of the *Broadcasting Services Act 1992* (BSA) and in the ACMA’s view will lead to a further fragmentation of regulatory arrangements and loss of overall coherence in the governance arrangements for content regulation.

The proposals discussed in this submission highlight the inherent complexity in potentially making small changes in legislation without a broader consideration of how particular policy goals may be achieved whether by regulatory or non-regulatory means. One effect of including content transmitted over the internet within the retransmission scheme may be the imposition of the current geographically-based licensing scheme on the transmission of content using the internet. While the proposal attempts to provide a technology-neutral approach to content transmitted via different delivery platforms, it sets up a potential point of conflict between a geographically-defined licensing scheme under the BSA, and the global delivery models for content transmitted over the internet that are not bounded by such geographic limitations.

The ACMA suggests that such a proposal may prove complex to implement and impractical to enforce. The proposal risks further fragmentation of an already complex regulatory environment for digital content. By seeking to address copyright issues within the BSA by amending specific concepts such as the term ‘broadcast’ and its exceptions, has implications for related regulatory concepts in other communications legislation. The ACMA considers that there would be benefit in bringing the consideration of all digital content-related regulation within a coherent regulatory framework.

The Discussion Paper also proposes a reconsideration of the term ‘broadcast’ in the *Copyright Act 1968* (CA) to incorporate internet transmission of content. The ACMA notes the intent of the proposal is to allow the introduction of technology-neutral legislation. In practice, the ACMA notes that such a change removes the link between ‘broadcast’ in the CA and ‘broadcast service’ in the BSA, and will result in unequal treatment of content and content providers between the two Acts. Another simpler option may be to sever the linkage between the BSA and CA’s use of the term broadcast to treat broadcast content copyright solely within the Copyright Act, rather than seek to align treatment, or any expanded treatment for internet transmission, across the BSA and Copyright Act.

A further issue of interest is the Discussion Paper’s consideration of the fair use of content for transformative or non-consumptive purposes. These fair use issues could potentially be applied to changing consumer behaviour in terms of the production, use and distribution of content, but the ACMA notes that to date, this issue has not been explored in the ALRC’s consideration of fair use conditions.

# Comment on proposals

## Environmental context

The ACMA considers that an understanding of the contemporary context for broadcasting content provides a useful basis for assessing the efficacy of proposals to amend the copyright scheme.

Broadcast content is increasingly available over multiple platforms in a variety of forms. Broadcasters typically offer content on-demand after it has been broadcast through linear channels. Australian commercial free-to-air broadcasters and national broadcasters all have catch-up TV websites. Consumers can often access live-stream content over the internet, such as through radio broadcaster websites, instead of accessing the broadcast channel. At the same time new entrants, such as the IPTV operator Fetch TV, are offering content services exclusively distributed over IP networks and internationally online content providers are producing and distributing original professionally produced content for mainstream audiences.

Explicit exclusions from the definition of broadcasting service contained in the BSA rely on technical distinctions of particular delivery platforms. In the ACMA’s view, some of these definitions no longer reflect the contemporary communications and media environment. For example, all electronic communications (such as text, video, radio, images or voice) are now transmitted to some extent as data with resolution into their native form by the receiving device—digital radios are able to receive images and digital TV channels are being used to provide radio programs.

All of these developments challenge traditional conceptions of content, programs, and broadcasting as they are currently defined in legislation. The ACMA has provided a detailed analysis of these “broken concepts” in communications and media legislation and this analysis is also relevant to assessing how potential changes to copyright law will impact on current foundational definitions in broadcasting and communications regulation[[1]](#footnote-1). In response to this environment, the Discussion Paper proposes the incorporation of broadcast material transmitted over the internet in a number of copyright broadcasting exceptions, such as use by an educational institution.

## Retransmission

As outlined in the Discussion Paper, the CA and the BSA “effectively operate to provide, in relation to the retransmission of free-to-air broadcasts:

* a free-use exception in relation to broadcast copyright;
* a free-use exception in relation to copyright in the underlying works or other subject matter (underlying rights), applying to retransmission by self-help providers; and
* a remunerated exception in relation to underlying rights, which does not apply to retransmission that ‘takes place over the internet’.”[[2]](#footnote-2)

Section 212 of the BSA provides an exception to copyright infringement (in relation to the copyright subsisting in the relevant television or sound broadcasts) to persons who re-transmit programs that are transmitted by a commercial or community broadcasting licensee:

* Within the licence area of the relevant licensee’s licence, or
* Outside the licence area of the relevant licensee’s licence in accordance with permission in writing given by the ACMA.[[3]](#footnote-3)

The Discussion Paper proposes a number of changes to the current arrangements for retransmission of free-to-air broadcasts in the CA. The most important change is the inclusion of broadcast content transmitted over the internet in any retransmission scheme.

### Proposal 15–1

***Option 1:*** *The exception to broadcast copyright provided by the Broadcasting*

*Services Act 1992 (Cth), and applying to the retransmission of free-to-air*

*broadcasts; and the statutory licensing scheme applying to the retransmission of*

*free-to-air broadcasts in pt VC of the Copyright Act, should be repealed. This*

*would effectively leave the extent to which retransmission occurs entirely to*

*negotiation between the parties—broadcasters, retransmitters and underlying*

*copyright holders.*

***Option 2:*** *The exception to broadcast copyright provided by the Broadcasting*

*Services Act, and applying to the retransmission of free-to-air broadcasts, should*

*be repealed and replaced with a statutory licence.*

**ACMA comment**

The ACMA notes the ALRC initially proposed a robust set of principles to guide its considerations of reform options. In particular the ACMA welcomed Principles 7 and 8 that aimed to reduce the current complexity of copyright law and promote an adaptive, efficient and flexible framework. In assessing the options, the ACMA is concerned that that the proposed changes to the exception to broadcast copyright will have the effect of creating a more complex regulatory environment, where content and content providers will be treated differently by the CA and the BSA.

The ACMA does not have a strong view on the superiority of either proposal. Both options are designed to make the treatment of retransmission arrangements technology-neutral for the purposes of the CA. The two options interact with existing communications and media policy, particularly section 212 of the BSA, In its previous submission to the ALRC, the ACMA noted that any revised arrangements need to take account of the linkages between copyright and other content regulatory measures.

The ACMA notes that the ALRC does not propose any change to the operation of free-use exceptions applying to self-help providers.[[4]](#footnote-4) However Options 1 and 2, as described in the Discussion Paper, do not acknowledge the self-help providers exemption. The potential impact of either proposal will depend on whether the self-help provider exemption is retained.

Option 1 may impact the availability of broadcast material for individuals and communities in areas of inadequate terrestrial reception. If Option 1 were to be implemented, retransmission would be dependent upon a self-help retransmission provider securing copyright licences from the broadcaster and from the holders of the underlying copyright works.

Contrary to the public policy goals of the retransmission regime, it is foreseeable that broadcasters may withhold granting (or make it uneconomical to acquire) copyright permission to self-help providers. Even where broadcasters may be prepared to grant licences to re-transmit, negotiating with both the broadcast copyright holders and an array of underlying copyright holders may be impractical. Option 2 would require retransmitters to obtain statutory licences to retransmit content. This option may also result in the cost of retransmission being prohibitive for self-help providers, which is contrary to the public policy goals of the retransmission scheme.

If it is assumed that the self-help provider exemption is retained, the potential impact upon remote/black spot communities of the proposed amendment is substantially lessened. The potential impact remains for those areas where the retransmitter would not qualify as a self-help organisation. In the absence of a broader examination of the content regulatory concepts in the BSA, and in the spirit of fair access and assuming the self-help provisions would be retained, the ACMA sees that Option 2 provides a less complex arrangement than Option 1. However, a simpler option may be to sever the link between the CA and BSA.

### Proposal 15–2

*If Option 2 is enacted, or the existing retransmission scheme*

*is retained, retransmission ‘over the internet’ should no longer be excluded from*

*the statutory licensing scheme applying to the retransmission of free-to-air*

*broadcasts. The internet exclusion contained in s 135ZZJA of the Copyright Act*

*should be repealed and the retransmission scheme amended to apply to*

*retransmission by any technique, subject to geographical limits on reception.*

### Question 15–1

*If the internet exclusion contained in s 135ZZJA of the*

*Copyright Act is repealed, what consequential amendments to pt VC, or other*

*provisions of the Copyright Act, would be required to ensure the proper*

*operation of the retransmission scheme?*

**ACMA comment**

The ACMA does not have any comments on the consequential amendments required to the *Copyright Act* but cautions that a broader consideration of the consequences, if any, on the operation and administration of the BSA should be considered if a particular proposal is recommended. The proposal to remove the internet exclusion in s.135ZZJA of the CA highlights the challenges created by the link between the concept of broadcast service in the NSA and CA.

General comments

The ACMA notes the *Inquiry into the effectiveness of regulatory arrangements to deal with the simultaneous transmission of radio programs*. The ACMA understands that the Inquiry is a response to the recent Full Federal Court decision[[5]](#footnote-5) (‘the CRA case’) in which it was held that the internet simulcast of a radio program that is also broadcast using the broadcasting services bands does not fall within the definition of a “broadcasting service”.

In essence, in the CRA case, Commercial Radio Australia argued (unsuccessfully) that an internet simulcast of a radio program was a service that delivered a radio program using the broadcasting services bands and therefore a “broadcasting service” under the BSA.[[6]](#footnote-6)

The Ministerial Determination, made in 2000, under paragraph (c) of the definition of ‘broadcasting service’ in the BSA[[7]](#footnote-7) serves the important function of providing that the regulatory regime in the BSA for broadcasting services does not apply to the vast range of broadcasting-like services provided via the Internet. In the ACMA’s view, the broadcasting regulatory regime is, in general, ill-equipped to regulate such services.

One potential outcome of the Inquiry may be a recommendation to change the current Ministerial Determination so as to ensure that internet simulcasts are treated as “broadcasting services” under the BSA. While such an approach may be a solution to some issues concerning copyright royalties presented by internet radio simulcasts, there is scope for such a change to result in unintended consequences and create more regulatory complexity than it removes.

For example broadcasting services such as commercial radio broadcasting services, are subject to licence conditions requiring them not to provide their services outside their respective geographical licence areas except in the circumstances enumerated in subclause 8(3) of Schedule 2 of the BSA. These circumstances include that provision of the service occurs ’accidentally’ or ’as a necessary result of provision of the services within the licence area’. It is difficult to see that internet simulcasts (accessible anywhere the internet is available) can properly be thought to provide coverage outside the licence area which is ”accidental” or “necessary”. This particular BSA compliance difficulty was flagged by the Full Federal Court as one potential outcome of adopting the approach preferred by CRA[[8]](#footnote-8).

The notion of geographically-based broadcasting services, with special rights and obligations that are area-specific, is not confined to clause 8(3) of the Schedule 2. It pervades the BSA and the regulatory scheme that the BSA establishes. For example:

* the obligation on commercial broadcasters in clause 8(2)(a) of Schedule 2 requires them to contribute to the provision of an ‘adequate and comprehensive range’ of services within the relevant licence area;
* the regime in Part 3 envisages planning and regulation of broadcasting on an area basis; and
* some of the existing ownership and control limits, including the two station to a market limit for commercial radio broadcasting services, have the effect that commercial broadcasting services in one area need to be independently controlled from like services in other areas.

Since the BSA was originally drafted, the internet has enabled the wide dissemination of audio and audiovisual entertainment and information to new types of commonly available receivers, such as PCs and smart phones, irrespective of geographical location In the ACMA’s research paper *Broken Concepts: The Australian communications legislative landscape[[9]](#footnote-9)* “broadcasting service” was one of the key legislative terms and concepts which the ACMA identified as broken. That work also noted the related legislative concepts of

* program – this concept is central to the definition of a broadcasting service (section 6 of the BSA). As traditional broadcasting services are increasingly integrating with non-traditional services to provide program and non-program content, in the ACMA’s view, this concept may be too narrowly described for contemporary communications and media
* content – this concept is defined in Schedule 7 of the BSA and captures content irrespective of its form and is independent of the carriage service used to deliver content
* content service – is defined differently under the BSA and the Telecommunications Act 1997, with the former definition excluding licensed and national broadcasting services, and the latter including broadcasting services
* internet content – is defined broadly with reference to Schedule 5 of the BSA and reliance on references to content hosted outside of Australia. The effectiveness of this definition is challenged by developments such as cloud computing that host content in the cloud so that its location inside or outside of Australia may be difficult to determine.[[10]](#footnote-10)

The ACMA cautions against proposals that treat internet simulcasting as though it is a broadcasting service, or part of a broadcasting service, without undertaking a broader examination of the BSA and in particular the related concepts and policy goals underlying the current geographically-based regulation of “broadcasting services”.

In the ACMA’s experience of administering content regulation under the BSA, reform approaches that have sought to incrementally adjust arrangements in light of internet-related developments have resulted in increasing complexity for industry and rights holders as well as for regulators in undertaking compliance and enforcement action. Clarity around the underlying policy objectives and consideration of the strategies that may be used to deliver on these objectives, which may be regulatory or non-regulatory solutions, may offer a more flexible and adaptable solution, than incremental changes on legislative concepts that are under increasing strain from technology and social changes in content production and use. Industry self and co-regulatory solutions can offer a degree of flexibility in an environment of rapid innovation, and can be assessed by a regulator to ensure a code or industry standard aligns with relevant policy goals.

Subsection 212(1) of the BSA

One issue generated by this proposal is extending the geographical restriction of transmissions to broadcasting licence areas to retransmissions over the internet. Subsection 212(1) of the BSA provides that the regulatory regime established by the BSA does not apply to services that do no more than re-transmit programs that are transmitted by a commercial broadcasting licensee or community broadcasting licensee within the licence area of that licence, or outside of the licence area of that licence with written permission given by the ACMA.

Licence area is a concept defined under the BSA and its purpose is to restrict the distribution of broadcasting services (and programs) but not content services to a specified geographic area. It is another regulatory concept under increasing strain, with current forms of content delivery where the program and content may be identical but is treated differently under existing regulation.[[11]](#footnote-11)

Licence areas are typically defined by reference to Census Collection District (CD) data compiled by the Australian Bureau of Statistics. CD is the second smallest geographic area defined in the Australian Standard Geographical Classification. For the 2006 Census, there was an average of about 225 dwellings in each CD. In rural areas, the number of dwellings per CD generally declined as population densities decrease. Consequently, in making a decision under Subsection 212(1), the ACMA would potentially be considering the availability of a retransmission service on a street by street basis.

While it is arguably possible to geographically restrict transmissions made over the internet on an intra-national basis, it is unlikely that restrictions could occur on a street-by-street basis. The open internet is not amenable to partitioning and controlling data flows based on specific licence areas. An IP addresses that are assigned to a user (on a temporary basis) does not necessarily correspond to the user’s physical address.

Additionally, the relationship between physical location and digital presence can be masked through the use of Virtual Private Networks or other tools. Any regional restriction on the basis of IP addresses would consequently be difficult to police and protect in practice. This suggests that the inclusion of internet transmission of broadcast material in the retransmission arrangements will potentially allow content to be retransmitted outside a licence area and so require written approval by the ACMA. This proposal raises a range of practical concerns in the design and implementation of compliance and enforcement arrangements.

Again this illustrates that the linkages between concepts in the BSA and CA require a detailed examination to ensure that there are no unintended consequences arising from change proposals. The ALRC may wish to consider is whether the exceptions to copyright infringement provided within ss. 212(2) and (2A) of the BSA should be articulated in the CA rather than the BSA.

### Proposal 15 -3

*If it is retained, the scope and application of the internet exclusion contained in s135ZZJA of the Copyright Act should be clarified.*

### Question 15 -2

*How should the scope and application of the internet exclusion contained in s 135ZZJA of the Copyright Act be clarified and, in particular, its application to internet protocol television?*

**ACMA comment**

Differences between modes of internet transmission, such as IPTV and internet video, would be difficult to translate into legislation as they are essentially differences in service models. The ACMA has published research monitoring the delivery of content over IP networks. This research does identify current and emerging IP content delivery models, including:

* **IPTV**. This service model offers video content in return on a subscription or fee-per-view basis. These services are delivered over a quality-controlled network. One example is Fetch TV, which is offered by a number of Australian Internet Service Providers.
* **Catch-up television**. This service model is offered by free-to-air broadcasters on an over-the-top basis. There is some quality control for the delivery of these services, but not the same degree as IPTV services. Examples include ABC’s iView and Channel Seven’s PLUS7.

Legislative boundaries applied around the different service models employed would be unlikely to remain relevant over the long-term as technologies and service models evolve. Such differential treatment would also ignore that the same content is transmitted over the internet in a variety of ways. It would be possible, for example, for ABC’s iView to be excluded from the retransmission arrangements, on the basis it is not streamed in a controlled and closed network to the same extent as an IPTV service, while the IPTV provider Fetch TV’s ABC streamed channel would be captured in such a scenario.

It is also noted that the BSA does not differentiate between different types of internet transmission, and proposals that would introduce such a distinction are likely to introduce further complexities into the regulatory treatment of broadcast material. This risks a further fragmentation and overall loss of coherence for content regulation, In the ACMA’s view a coherent regulatory framework for content is a preferable solution to further incremental and piecemeal changes to legislative definitions.

## Incorporating internet transmission within the definition of a broadcast

The meaning given to ‘broadcasting service’ (set out in section 6 of the BSA) is incorporated within the definition of ‘broadcast’ set out in section 10 of the CA. The ALRC proposes the incorporation of internet transmission in the CA’s definition of broadcasting by decoupling its definition of broadcasting from the BSA’s definition of broadcasting service stating:

“**16.4** The ALRC concludes that, in a context of media convergence, and given the general desirability of a technology-neutral approach to copyright law reform, the concept of a ‘broadcast’ should generally extend to similar content made using the internet,

 **16.5** The ALRC proposes that the *Copyright Act* be amended to ensure that some broadcast exceptions also apply to transmissions of television programs or radio programs across the internet, removing any unnecessary link between the scope of copyright exceptions and regulation under the *Broadcasting Services Act*.”[[12]](#footnote-12)

This change resolves the specific issue of simultaneous transmission and royalties through alterations to the CA without affecting the BSA.[[13]](#footnote-13) This outcome does raise other issues as discussed below.

***Proposal 16 – 1***

*The Copyright Act should be amended to ensure that the following exceptions (the ‘broadcast exceptions’), to the extent these exceptions are retained, also apply to the transmission of television or radio programs using the internet:*

1. *S 45 – broadcast of extract of works,*
2. *Ss 47, 70, and 107 – reproduction for broadcasting,*
3. *S 47A – sound broadcasting by holders of a print disability radio licence,*
4. *S 67 – incidental broadcast of artistic works,*
5. *S 109 – broadcasting of sound recordings,*
6. *S 135 ZT – broadcasts for persons with an intellectual disability,*
7. *S 199 – reception of broadcasts,*
8. *S 200 – use of broadcasts for educational purposes, and*
9. *Pt VA – copying of broadcasts by education institutions.*

***Question 16 – 1***

*How should such amendments be framed, generally, or in relation to specific broadcast exceptions? For example, should:*

1. *The scope of the broadcast exceptions be extended only to the internet equivalent of television and radio programs?*
2. *‘on demand’ programs continue to be excluded from the scope of the broadcast exceptions, or only in the case of some exceptions?*
3. *The scope of some broadcast exceptions be extended only to content made available by free-to-air broadcasters using the internet?*

**ACMA response to Question 16-1**

Before commenting on each of the three scoping considerations outlined in Question 16-1, the ACMA can provide some general comments on the follow-on consequences of these proposed changes on communications and media regulation.

The ACMA notes that one effect of decoupling the definition of broadcast in the CA from ‘broadcasting service’ in the BSA will be to create a more complicated regulatory environment for content providers who will need to navigate their regulatory treatments through differing regulatory regimes.

It is unclear how the amendment to the definition of broadcast will affect other definitions within the CA that intersect with the BSA or whether there are other consequential implications for foundational legislative definitions such as ‘program’ in the BSA. This is explored further below.

Question 16-1 (a) Internet equivalent of television and radio programs

Defining the ‘internet equivalent’ of radio and television programs is likely to become increasingly problematic over time as both broadcasting and internet content business models continue to evolve. For example, independent online-based content distributors are producing television-like content. Netflix, an online content distributor, commissioned several television-like series, including a further series of cult television show, *Arrested Development,*that had previously been produced by a broadcaster. As an increasing amount of content is made, distributed and consumed online through multiple devices, a ‘television program,’ that is produced by broadcasters and consumed over the television will be one part of an extended mainstream media environment, as outlined in Figure 1.

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| Figure Australia’s OVC supply chains as at September 2012 – major players |
|  |
| Source: ACMA, *Communications report 2011-12 series. Report 1 – Online video content services in Australia. Latest developments in the supply and use of professionally produced online video services*, 2012, page 9. |

The regulatory concept of ‘program’ in legislation across a number of Acts is increasingly challenged by market and technological developments. For example, the BSA definition of ‘program’ is linked to ‘broadcasting service’ and so excludes any content distributed over the internet, such as any programs provided on broadcaster websites. Consequently, this construction of a ‘program’ does not incorporate all the available content in terms of entertainment, information or advertising services.’ [[14]](#footnote-14) The Final Report of the *Classification – Content Regulation and Convergent Media Inquiry* proposed that the definition of television program should be platform neutral and included illustrative examples.[[15]](#footnote-15) This in one way of incorporating a variety of content within a term that is overtly associated with a single distribution platform.

Question 16-1 (b) The ongoing exclusion of on-demand content

Changing supply models and consumer behaviour will challenge the ongoing delineation between live programs and on-demand services. On-demand content forms a large part of the content offered by broadcasters online.[[16]](#footnote-16) There are clear consumer trends towards consuming content on-demand. Thirty-two percent of persons aged 18 years and over with home internet access had a time-shifting device[[17]](#footnote-17), indicating the popularity of on-demand content access. While sixty-four percent of respondents watch live television, twenty percent use a DVR to watch their favourite TV show, and eight percent watch their favourite television programs on-demand.[[18]](#footnote-18) Distinguishing between linear and on-demand will be increasingly problematic, and will result in differential treatment for the same content.

Question 16-1 (c) Scope of broadcast exceptions

The ACMA notes that restricting some of the exceptions to free-to-air broadcasters could effectively exclude online-only new entrants the same opportunities and protections.. The ACMA considers it important that any proposed changes to copyright are considered in the wider content of an overall coherent approach to content regulation, to minimise the potential for proposals to have unintended consequences or introduce potential market distortions.

## Non-consumptive and transformative use

The ACMA’s November 2012 Submission to the ALRC Issues Paper *Copyright and the Digital Economy* (2012 ACMA submission) discussed the utilisation of individual’s personal information, communications or creative content for commercial purposes in both non-consumptive (data-mining) and transformative (mainstream media publication of social network content) contexts. The 2012 ACMA submission discussed consumer concerns about the security of their personal data when using online services, and the use of user-generated material in mainstream media.[[19]](#footnote-19)

The ACMA’s interest in such issues stems from its role as a media and communications regulator, and its experience in navigating the changes brought by an evolving digital economy. This has informed the ACMA’s thinking about changing consumer behaviour in terms of the production, use and distribution of content, and its relationship with content control and access.[[20]](#footnote-20)

The proposals contained in Chapters 8 and 10 of the Discussion Paper could be considered to potentially relate to the issue of personal copyright. Chapters 8 and 10 of the Discussion Paper propose using a fair use measurement rather than specific exceptions for non-consumptive and transformative use. These chapters provide examples of fair use in terms of non-consumptive and transformative use, such as caching, data mining for research purposes and quotations. Neither of these chapters address the issue of using personal information or individual creative content in terms of non-consumptive and transformative fair use.

### *Proposal 8 -1*

*The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. ’Non-consumptive use’ should be an illustrative purpose in the fair use exception.*

### *Proposal 10-1*

*The Copyright Act should not provide for any new ‘transformative use’ exception. The fair use exception should be applied when determining whether a ‘transformative use’ infringes copyright.*

**ACMA comment**

It is not clear to what extent, and how, the fair use exceptions proposed in the Discussion Paper would apply to the use of individual’s user-generated content, such as social network content, or personal information. Much of this would hinge on whether personal information or user-generated content could be considered copyrightable material. It would be useful to have an example of the extent to which the use of user-generated content, whether personal information, communications or content, is considered to be fair use.

1. ACMA [Broken Concepts – The Australian communications legislative landscape](http://www.acma.gov.au/~/media/Office%20of%20the%20Chair/Information/pdf/Broken%20Concepts%202013_Final%20pdf.pdf) [↑](#footnote-ref-1)
2. Discussion Paper, Section 15.2 [↑](#footnote-ref-2)
3. Discussion Paper, Sections 15.8 – 15.14 [↑](#footnote-ref-3)
4. Discussion Paper, Section 15.44 [↑](#footnote-ref-4)
5. *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013] FCAFC 11 [↑](#footnote-ref-5)
6. See paragraphs 19 - 21 of the judgment [↑](#footnote-ref-6)
7. *Commonwealth of Australia Gazette—Determination under Paragraph (c) of the Definition of*

*‘Broadcasting Service’*, (No 1 of 2000), Commonwealth of Australia Gazette No GN 38, 27 September

2000. [↑](#footnote-ref-7)
8. See paragraph 70 of the judgment. [↑](#footnote-ref-8)
9. <http://engage.acma.gov.au/broken-concepts/> [↑](#footnote-ref-9)
10. ACMA, [Broken Concepts – The Australian communications legislative landscape](http://www.acma.gov.au/~/media/Office%20of%20the%20Chair/Information/pdf/Broken%20Concepts%202013_Final%20pdf.pdf), p.81 [↑](#footnote-ref-10)
11. ACMA, [Broken Concepts – The Australian communications legislative landscape](http://www.acma.gov.au/~/media/Office%20of%20the%20Chair/Information/pdf/Broken%20Concepts%202013_Final%20pdf.pdf) p.26 [↑](#footnote-ref-11)
12. ALRC, Discussion Paper, Sections 16.4 and 16.5, page 330 [↑](#footnote-ref-12)
13. Refer discussion of *Inquiry into the effectiveness of regulatory arrangements to deal with the simultaneous transmission of radio programs* on page 4, under the ACMA comment on Proposal 15-1. [↑](#footnote-ref-13)
14. ACMA, *Broken Concepts. The Australian communications legislative landscape*, August 2011, page 45. [↑](#footnote-ref-14)
15. ALRC, The Final Report of the *Classification – Content Regulation and Convergent Media Inquiry*, Recommendation 6.27 [↑](#footnote-ref-15)
16. For example, ABC iView [websites](http://www.abc.net.au/iview/), Channel Seven [website](http://au.tv.yahoo.com/plus7/) [↑](#footnote-ref-16)
17. ACMA, *Communications report 2011-12 series. Report 1 – Online video content services in Australia. Latest developments in the supply and use of professionally produced online video services*, 2012, page 33 [↑](#footnote-ref-17)
18. Deloitte, *State of Media Democracy 2012*, page 9. [↑](#footnote-ref-18)
19. ACMA submission to the ALRC Issues Paper *Copyright and the Digital Economy*, November 2012, pages 7, 10-12. [↑](#footnote-ref-19)
20. Ibid, page 1. [↑](#footnote-ref-20)