Combined Newspapers and Magazines Copyright Committee submission in response to ALRC Discussion Paper on Copyright and the Digital Economy

The publishers represented by the Combined Newspapers and Magazines Copyright Committee (**Publishers**) welcome the opportunity to provide this submission in response to the ALRC’s *Copyright and the Digital Economy Discussion Paper*.

In particular, The Publishers address the Discussion Paper's proposals regarding:

1. A broad fair use regime;
2. Fair dealing and fair use in the context of 'reporting the news';
3. Transformative use; and
4. The practices of news aggregators.

The Publishers oppose a broad fair use regime

The Publishers are disappointed that the ALRC has proposed that a broad fair use exception be introduced into Australian copyright law. The Publishers, and many other submitters, articulated and substantiated opposition to a broad fair use regime in responses to the ALRC’s Issues Paper. It is not the intention of the Publishers to restate that reasoning here – other than to say that the Publishers continue to oppose the introduction of a broad fair use regime and/or hybrid fair use models, and continue to support the existing fair dealing regime. However, this submission does outline the substantive issues arising from the ALRC’s proclivity for a fair use regime.

As outlined in the Publishers’ submission to the Issues Paper, given the issue of free-riding regarding the exception for news reporting we reiterate our request for a workable amendment to the *Copyright Act* – which, for the ease of reference, we restate in this submission.

***Non-exhaustive lists of fairness factors and illustrative purposes serve to increase uncertainty***

Unlike the ALRC, the Publishers do not agree that ‘fair use’ is coherent and predictable[[1]](#footnote-1). As outlined by many submissions to the Issues Paper, the Publishers are concerned that a broad fair use exception will introduce unacceptable levels of uncertainty into the law.

The inclusion of non-exhaustive lists of fairness factors and illustrative purposes serves to create greater uncertainty at the cost of and is likely to result in a rise in infringing uses which will be claimed to fair and therefore legitimate. It is not clear that a broad fair use defence would do anything other than entrench – or even encourage – the free-riding type of behaviour outlined in our submission to the Issues paper.

***Uncertainty will dramatically increase transaction costs***

This will inevitably lead to increased transaction costs for rights holders – and users – as legal action will be necessary for the purposes of gaining clarity and definition to the law, and decreasing the uncertainty brought about by fair use.

Further, under a fair use regime it is foreseeable that legal proceedings would increase as rights holders need to exercise those rights within a regime that, by promoting 'flexibility' also encourages infringements.

***Uncertainty will dramatically increase business risk***

The Publishers understand that the ALRC believes that the uncertainty created by a broad fair use regime is a reasonable trade-off for achieving flexibility and technology neutrality.

The Publishers however consider that the introduction of a ‘fair use’ defence would be likely to result in users of copyright works claiming fair use to justify practices which would cause a significant increase in business risk to rights holders and affect the legitimate commercial interests of the Publishers.

As stated in the Publishers' submission to the Issues Paper, the nature of news reports, the temptation to copy and the ease with which this can be achieved makes them particularly vulnerable to infringement. It is difficult to see the risk of infringement – a business risk – abating under a fair use regime. Rather, it is more likely that the infringing behaviour, and the correlating business risk, will proliferate as the principal proposition of fair use is that the user considers it ‘fair use’. This will require the business to plan and undertake mitigation measures which will be likely to include resource allocation for detection of infringements and increased litigation.

***Costs of increased uncertainty will be borne by rights holders and users***

It is not unreasonable to consider that the result of increased risk and transaction costs will be borne by rights holders and users alike. The costs could be monetary – in that the increased risks borne by business, and the swelling costs of increased volumes of legal actions could manifest in increased charges for legitimate consumption of content. Such an outcome would be detrimental to legitimate users and consumers of content, as they would bear the burden of a fair use regime.

Monetary costs of increased uncertainty could also be borne by those parties defending legal actions, therefore undermining the position put in the Discussion Paper that a broad fair use defence would decrease transaction costs to users.

The increased uncertainty for rights holders and users created by the uncertainty of a fair use regime makes it very difficult to sustain the position put by the ALRC, that copyright law:

*‘needs to have a degree of predictability so as to ensure sufficient certainty as to the existence of rights and the permissible use of copyright materials, leading to minimal transaction costs for owners and users, and avoiding uncertainty and litigation.[[2]](#footnote-2)’*

***Lawyers’ picnic***

Following from the concerns articulated above, the Publishers oppose the introduction of a broad fair use regime, which will necessitate an increased allocation of scarce resources to legal advisers and litigation.

It seems that the ALRC has taken a theoretical approach to its deliberations, and the resultant fair use proposals (broad and hybrid) do not recognise the realities of creators and rights holders.

A ‘lawyers’ picnic’ is an untenable direct consequence of the ALRC fair use proposals, and it cannot be countenanced.

***Onus must lie with the user to establish the defence***

The Publishers are also concerned that by its very nature the ALRC’s Discussion Paper concentrates on the 'exceptions' to copyright protection which can lead to people overlooking or ignoring the fact that prima facie the copyright owner has the exclusive rights in an original work or other subject matter, and that such works and subject matter should not, for example, be reproduced or adapted by third parties.

The Publishers submit that the final report of the ALRC should make it unequivocally clear that the primary position is that the copyright rights of the owner should not be infringed, and that if a user wishes to exercise any of those rights on the basis that it is a fair dealing (or – opposed by the Publishers – fair use), the onus lies on the user to establish that defence.

Fair Dealing and Fair Use in the Context of 'Reporting the News'

In addition to the general comments made in relation to the ALRC's board and hybrid fair use proposals, the Publishers also provide the following comments on the issue of '*reporting the news*'.

The current provisions contained in sections 42 and 103B of the Act in relation to fair dealing for the purpose of reporting the news are restrictive. These defences are only available in very limited circumstances. The open-ended purpose of '*reporting news*' in Proposal 4‑4 of the Discussion Paper will certainly be used by a wide variety of individuals and organisations to lift news items from the Publishers' publications and recycle them on the basis that they are '*reporting news*'.

The Publishers currently have in place licensing schemes, both directly and through the Copyright Agency Limited. These schemes are important planks to the sustainability of the newspaper and magazine publishing industry. The proposed removal of the requirement that the fair dealing exception for the purpose of reporting news is only available for the reporting of news in a newspaper, magazine or similar periodical, and a failure to limit any exception for reporting the news to activities performed by an organisation which provides a news or information service opens up a very wide field of organisations that are able to avail themselves of the defence, and, on occasion, compete with Publishers using the Publisher's own material.

This is compounded by the proposal to remove the current fair dealing factor of '*the possibility of obtaining the work…within a reasonable time at an ordinary commercial price*'.

***Evidence highlights the risk of fair use to reporting news***

As the ALRC would be aware, the Canadian Supreme Court has now adopted an approach to fair dealing exceptions which is regarded by many commentators as in fact a 'fair use' approach. It is therefore relevant to look at how the courts in Canada are approaching such fair dealing exceptions for the purposes of considering how the court could apply fair use in Australia.

The Publishers note the decision of Mr Justice Rennie of the Federal Court of Canada in June 2012 in *Richard Warman National Post Company v Mark Fournies and Constance Fournies* (2012 FC 803), where his Honour held the one factor to be considered in determining whether a dealing was 'fair' for the purpose of reporting the news was that the 'reproduced portion of the Kay Work (being the work in respect of which infringement was claimed) contained mostly facts and did not contain most of the original commentary by the author'.

If such an approach were adopted in Australia it would be of particular concern to the Publishers as one of the most important, and expensive, parts of producing a newspaper or magazine is the gathering of facts and the presentation of those facts in an ordered and concise fashion. If it is thought that the reproduction of these facts without the need to, at the very least, rewrite them may be permissible, the Publishers would hold very serious concerns. This underlines the real dangers – and the realities not considered by the ALRC in the theoretical approach to the proposals – evidenced by the Publishers as a direct consequence of a fair use regime, broad or hybrid.

We have clearly articulated our opposition to fair use on the basis of evidence and real outcomes. However, if the ALRC is minded to pursue a fair use defence, the Publishers urge the ALRC to provide greater protection for newspaper and magazine publishers whose continued viability is a matter of both public and private interest.

The Publishers note that the ALRC Discussion Paper also proposes changes if a fair use regime is not introduced. However, these proposals do not incorporate the sensible and proportionate changes the Publishers proposed in our submission to the Issues Paper (which are referred to at paragraphs 7.41 to 7.43 of the Discussion Paper). The Publishers again commend our proposal, contained in our submission to the Issues Paper relating to section 42(1)(b) of the Act, to the ALRC for adoption. For ease of reference, this is at Attachment A of this submission.

Transformative Use

The Publishers agree with the ALRC's Proposal in so far as it states that there should be no new transformative use exception. Notwithstanding that the Publishers oppose fair use, we agree that 'transformative use' should not be an Illustrative Purpose for the purposes of the proposed fair use exception.

The 'Free Riding' Issue – evidence of an existing issue that can be addressed in a targeted manner

Our submission to the Issues Paper raised the practice of aggregators who '*free ride*' on the endeavours, expertise and capital of the Publishers. We are concerned that the ALRC has overlooked this real and evidenced issue, which requires a narrow amendment to the current Act to produce a workable outcome.

The Publishers again draw this real issue to the attention of the ALRC, and attach the material at Attachment B of this submission.

We raise this evidenced issue again to the ALRC for the following reasons:

1. The issue of ‘free riding’ evidences the factual and current practices of aggregators that are already causing the Publishers significant harm; and
2. It illustrates and provides a real example of how any liberalisation of the current copyright regime will likely lead to undesirable outcomes for the newspaper publishing industry and the public at large.

We ask that the ALRC examine this matter. We also recommend that the Publishers’ targeted and proportionate amendment be adopted to address the issue of news aggregators because of the apparent and potential serious consequences that flow from the practices of the news aggregators.

It goes without saying, that our proposed amendment fulfils good design principles of policy making; that the issue is well understood and evidenced; and that the intervention is proportionate and directed at the problem.

The Publishers hold that such a targeted approach to addressing evidenced problems is far preferable to the proposal for a broad fair use regime or a hybrid model, promoted by the ALRC.

If the ALRC does not feel that its terms of reference permit it to address this issue in its final report, we urge the ALRC to at least acknowledge that this is a serious issue and make a recommendation that the issue of news aggregators be separately and urgently considered by government.

**Combined Newspapers and Magazines Committee**

**Gail Hambly**

**Chair**

30 July 2013

**Attachment A**

The Publishers support the continuation of the current fair dealing exceptions which apply a purposive test and, in the case of research and study, a quantitative test.  This can be contrasted to a test based on how the material may be used, which is inherent in a fair use regime and which, if adopted, would introduce significant uncertainty leading to, at best, confusion and at worst an encouragement to misappropriate a copyright owner's material and ongoing litigation.

The Publishers submit in particular that:

1. the exception permitting fair dealing for the purpose of reporting the news should not be expanded directly or indirectly;
2. the *Copyright Act, 1968* (Cth) (**Copyright** **Act**) should make it clear that the communication of newspaper or magazine articles is not permitted under the fair dealing exception unless such activity is performed by an organisation which provides a news or information service and, with the exception of communication by way of broadcast, sufficient acknowledgement of the work is made.

Section 42 provides:

'(1)      A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if:

(a)       it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or

(b)       it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.'

Section 103B provides:

'(1)      A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if:

(a)       it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the first-mentioned audio-visual item is made; or

(b)       it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.'

It will be noted that subsections 42(1)(a) and 103B(1)(a) require that:

1. a fair dealing be for the purpose of, or associated with, the reporting of news in a newspaper, magazine or similar periodical publication; and
2. a sufficient acknowledgment be made of the work that is being dealt with.

Sufficient acknowledgment requires identifying the work that is being dealt with by title and author.

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

1. posting articles and photographs, which relate to their products or services, on their websites; and
2. emailing articles and photographs, which relate to their products or services, to other organisations or clients.

By way of example, a photograph had been purchased by a newspaper on an exclusive basis for a considerable sum and later published.  An organisation recently reproduced and communicated the photograph as it showed one of its products taken at a high profile function on its website and in emails to its clients. On being challenged, the organisation claimed that the reproduction and communication of the photograph on its website and in emails to its clients was a fair dealing for the purpose of reporting the news.

Ultimately, the matter was settled and the terms of settlement prevent identification of the organisation.  However, this is one example of what the Publishers are concerned may become an increasingly common occurrence.

The fair dealing defence was introduced to protect the role of the media in informing the public about matters of current concern (see for example Ashdown v Telegraph Group Ltd[***[1]***](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftn1)).  It was not introduced to permit people to use news items taken from newspapers or magazines to publicise their products, under the guise of reporting the news.

The relevant provisions of section 42 of the Copyright Act in its original form were:

'(1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaption of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if –

…

(b) if it is for the purpose of, or is associated with, the reporting of news by means of broadcasting or in a cinematograph film.

…

(3) This section applies where a literary, dramatic, musical or artistic work, or an adaptation of a literary, dramatic or musical work, is caused to be transmitted to subscribers to a diffusion service in like manner as it applies where such a work or adaptation is broadcast.'

A transmission of a work over a diffusion service was defined as the transmission of a work in the course of distributing a broadcast or other matter over wires, or over other paths provided by a material substance, to the premises of subscribers to the service.

The extension of the broadcast fair dealing provision to diffusion services was simply an extension of the broadcasting right and was very narrow in its application.

The Copyright Amendment (Digital Agenda) Act 2000 (Cth) (**Digital Agenda Act**) amended section 42 by omitting 'broadcasting' and substituting it with 'a communication' in subsection 42(1)(b).  Subsection 42(3) was repealed because the concept of 'transmission over diffusion service' was encompassed in the new communication right.

The Explanatory Memorandum to the Digital Agenda Act stated that the reason for the amendments to section 42 was that under the then Copyright Act, owners of copyright only had 'limited technology-specific transmission rights'.[[2]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftn2)  The omission of 'broadcasting' and substitution with 'a communication' in most places in the Copyright Act replaced technology-specific rights with technology-neutral rights to ensure that future amendments to the Copyright Act would not be needed as technology developed.  The effect of amending section 42 of the Copyright Act was to extend the fair dealing defence for the purposes of reporting the news to any form of communication as opposed to an organisation operating under a broadcasting services licence.

The new broad based technology-neutral right of communication to the public was intended to 'provide copyright owners with greater protection for their material in the new digital environment'.[[3]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftn3)  In his second reading speech, Mr Williams said that the right would 'substantially improve protection for many important industries that publish or distribute copyright material on the Internet'.[[4]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftn4)  However, newspaper and magazine publishers are finding that in this respect they in fact receive less protection, as organisations which are not media organisations are purporting to rely on the fair dealing defence to reproduce and communicate newspaper articles on the internet, often to promote their own products and services, under the guise of reporting the news.

The change in the Copyright Act to include all 'communications' in the fair dealing defence had the unintended effect of greatly extending the scope of the defence by potentially making it available to anyone who wished to communicate a news item to the public, as opposed to a small number of organisations which supplied a broadcasting or diffusion service.

Publishers, through the Copyright Agency Limited (**CAL**), do provide licences to allow organisations to place articles on their intranets, send them to clients and make them available on the internet subject to conditions on the quantity of articles that can be used, the length of time on which they can appear on an organisation's website and payment of an appropriate fee.  Photographs also can be purchased, usually directly from the publisher.  If the fair dealing provisions can be used as claimed, a significant part of the business of the Publishers will be undermined, in a market which is already facing severe pressures.

While the Publishers are aware that the fair dealing defence may not always be successful when it is relied upon to reproduce newspaper or magazine articles in the circumstances described above, it would provide far greater certainty if the Copyright Act were amended to make it clear that the fair dealing defence will only apply if the communication is made by an organisation which provides a news or information service, including a publisher of a newspaper, magazine or similar periodical publication.

In addition, although the Publishers acknowledge that it will be difficult for broadcasters and those reporting the news by a cinematograph film to provide an acknowledgement of the work they are dealing with, there appears to be no reason why communications of a work by newspapers, magazines and similar services should not require sufficient acknowledgement under subsection 42(1)(b). This is particularly so given that such acknowledgement is required under subsection 42(1)(a), creating an inconsistency between the two subsections. The Publishers submit that this be resolved by incorporating a requirement for sufficient acknowledgement into subsection 42(1)(b), with an exception for broadcasters and cinematograph film.

These two objectives could be achieved by amending subsection 42(1)(b) to provide:

'(b)      it is for the purpose of, or is associated with, the reporting of news ***by a  news or information service, or by a  broadcaster licensed under the Broadcasting Services Act 1992 (Cth)***:

(i)       by means of a communication and, except in the case of broadcasts, a sufficient acknowledgment of the work is made; or

(ii)         in a cinematograph film.'

"**News or information service**" means a service conducted by an organisation whose principal business is the commercial provision of news or information to the public, including the publisher of a newspaper, magazine or similar periodical publication.

**What is Fair?**

The defence of fair dealing was examined in Fairfax Media Publications v Reed International Books Australia Pty Ltd (**Reed**).  In what was clearly an obiter finding, Justice Bennett expressed the view that, had Reed been infringing copyright in providing its news aggregation business, such activity would have attracted the fair dealing defence.

With respect to her Honour, this aspect of the judgment contained various logical inconsistencies including when she said that because the summaries of news did not infringe Fairfax's copyright the fact that the summaries may act as a substitute for the reading of an article in the AFR was not relevant.  In fact, as she had found that no infringement occurred, this part of the judgment was not relevant.

Be that as it may, her Honour appeared to be basing her primary argument that the dealing was 'fair' on the basis that the use was transformative because Reed had added something new.  This was despite the fact that the whole Reed aggregation business was totally dependent upon the very much greater investment of the newspaper publishers.

The Publishers would be concerned if the ALRC adopted a 'transformative use' concept in conjunction with either a fair use or fair dealing regime and propose that in determining what is 'fair', the Copyright Act should be amended to have regard to the fact of whether the use is a commercial use and the effect that this may have on the commercial activities of the original author or publisher in addition to any other appropriate criteria.

The Publishers also submit that the fair dealing defence should be revised to explicitly state that it would not be available to an organisation whose news service is principally that of a news aggregator until after a specified time, as the Publishers propose below.

[[1]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftnref1) [2002] Ch 149.

[[2]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftnref2) Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999(Cth), 5.

[[3]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftnref3) Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999(Cth), 33.

[[4]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftnref4) Commonwealth, Parliamentary Debates, House of Representatives, 2 September 1999, 9748 (Daryl Williams).

**Attachment B**

**The 'Free Riding' Issue**

An issue of great concern to the Publishers is the practice of aggregators who collect articles from various newspapers and magazines, create summaries (or abstracts) of those articles and monetise those summaries – the practice of which is to provide a substitute.  Those summaries are often published within hours of the publication of the newspaper or magazine in which they were first published.  An example of this practice is the ABIX service provided by Reed.

The news aggregators generally seek to avoid infringement by only copying small parts of articles and only providing summaries/abstracts.

In proceedings taken against Reed by Fairfax Media Publications,[[1]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftn1) Fairfax alleged that by reproducing over half the headlines of the articles in The Australian Financial Review (**AFR**) in its ABIX service on a regular basis, Reed was infringing its copyright in the headlines as well as copyright in the AFR itself.  Fairfax was unsuccessful in this challenge.  However, the Court of Appeal in the United Kingdom came to a contrary conclusion in Newspaper Licensing Agency Ltd v Meltwater Holding BV.[[2]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftn2)

Modern digital technology allows aggregators to obtain early editions of a newspaper or magazine either online or by purchasing a physical copy and produce their own news service by abstracting the news articles.  Each edition of major print newspapers are usually published and obtainable very early each day.  The news aggregators with a very small number of employees can briefly scan the publications for articles they believe to be of greatest interest to clients, prepare abstracts and then circulate them to their clients at the same time as many people are reading their newspaper for the first time.

The ABIX service at its website states:

'ABIX news abstracts provide users with simple one paragraph summaries of today's critical news information.  This means you can easily stay abreast of key issues affecting your business without having to read through the full-text versions of news stories.

LexisNexis' commitment to providing you with a wide variety of daily news summaries means customers can expect high quality abstracts from major Australian publications such as The Australian Financial Review, The Australian, The Sydney Morning Herald and The Age.'[***[3]***](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftn3)

(our emphasis)

It is abundantly clear from the above that ABIX is promoting itself as an alternative to a newspaper and therefore a competitor, and does so by relying upon the extensive resources of the newspapers with which it competes.

News aggregators are able to do this because digital technology allows the abstracts to be obtained (in the case of online material) written and communicated within a very short space of time. The Publishers submit this practice should be curtailed.

**The Purpose of Copyright Law**

The Publishers acknowledge that there is a continuing debate about the purpose of copyright law.  This is a debate which has exercised the minds of many people for many years and it is not the intention of the Publishers to express a view on what should be regarded as the definitive approach.

In the Issues Paper the ALRC has set out various reasons given for the existence of copyright protection, which vary greatly.

The Publishers submit that one acknowledged reason for the existence of copyright is to 'encourage learning and the dissemination of knowledge'.

The newspaper and magazine industry is facing stresses which have nothing to do with copyright.  New media has provided a vast number of ways in which advertisers can reach their market, all at the expense of traditional publishers.  The Publishers are having to meet these challenges.  They submit however that it is entirely consistent with at least one purpose of copyright law that the creative endeavours of journalists in creating news and other information content, including through commenting on current events and culture, should be protected so they are not forced to meet competition from organisations that are competing using the very products which the Publishers publish.

While in Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd[***[4]***](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftn4) it was found that the news aggregator, Reed, was not breaching copyright, news aggregators are in fact severely diminishing the value of the copyright in articles which they abstract.

**International Solutions**

The free-riding issue has been addressed in the United States (**US**) through the hot news misappropriation doctrine developed in 1918 and more latterly in Germany where there is a proposal to grant news publishers ancillary copyright protection.

**The US Hot News Misappropriation Doctrine**

In the US the courts developed what is referred to as the hot news misappropriation doctrine to meet the type of activity about which the Publishers now complain. This doctrine protects a party who has expended resources gathering and disseminating news or other time-sensitive information as a significant part of its business, where another party takes that information and publishes it as its own in competition with the first party.

The doctrine was established in International News Service v Associated Press***[[5]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftn5" \o ")***. The parties in this case were competitors in the gathering and distribution of news to newspapers throughout the US. During the early part of the war, International News Service (**INS**) was prevented from cabling back information on World War I, as it was believed that the owner sympathised with Germany. To continue providing its members with this news, INS obtained Associated Press's news from its bulletin board postings, early edition newspaper on the East Coast and employees (through bribes). INS would rewrite the articles using the facts obtained and distribute it to its member papers, often releasing the papers on the West Coast before, or at the same time as, Associated Press's members.

Copyright law at the time did not apply to this fact situation on the basis that INS was only copying the facts contained in the news articles. However, the Supreme Court found in favour of Associated Press, holding that INS had engaged in a form of unfair competition. The Court stated that:

'the process amounts to an unauthorized interference with the normal operation of the complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to the defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news.'[[6]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftn6" \o ")

The Court ordered that that INS be restrained from using the news until its commercial value had passed away.

While the hot news doctrine has not yet been applied to the practice of online news aggregating, it will soon be tested in this context. On 14 February 2012, the Associated Press filed a lawsuit against news aggregator Meltwater US Holdings Inc in the US District Court for the Southern District of New York.[[7]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftn7" \o ") The Associated Press claims that Meltwater News is guilty of copyright infringement, removal/alteration of copyright information and hot news misappropriation. This case is yet to be heard.

The fact that there have been few cases based on the doctrine can be put down to the fact that the unfair competition law only exists in some states and because it is only comparatively recently that news aggregators have become a more prolific source.

**Proposed New Ancillary Copyright Protection for News Publishers in Germany**

On 29 August 2012, the German cabinet agreed to a new draft law that introduces ancillary copyright protection for news publishers into the German Copyright Act 1965. The new law will require search engines and news aggregators to pay news publishers a fee for snippets of articles reproduced on their sites. This law has not yet been passed by the German Parliament.

The draft law will introduce a new section 87f into the Copyright Act 1965 which will provide that the producer of news materials (news publisher) shall have the exclusive right to make those materials publically available, in whole or in part, for commercial purposes. Only articles provided as part of a collection of journalistic articles periodically published that is deemed typical of a publishing house will be protected. Links to the news stories will not be protected.

The new right only applies to the use of the news publisher’s material by search engines and news aggregators. This is outlined in subsection 87g(4), an unofficial translation of which provides:

'The provision of public access to news publications or parts thereof shall be permissible to the extent that this access is not provided by commercial operators of search engines or commercial providers of services that aggregate this content in a respective fashion.'***[[8]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftn8" \o ")***

Accordingly, bloggers who quote articles they comment on, companies with other commercial purposes and private users will fall outside the scope of the section and will not be required to pay for their use of the news material.

The right expires one year following publication of the news material (subsection 87g(2)).

The explanatory material provided with the draft law provides that the purpose of the ancillary copyright protection:

'is to take due account of news publishers' newly emerging needs for protection ... news publishing houses find themselves increasingly faced with a situation where other users systematically access their published materials for the sake of their own added value, using these materials in a manner that far exceeds the mere insertion of links to the websites on which the materials were originally published.'

**Proposed Solution**

The Publishers submit that the Copyright Act should be amended to introduce a prohibition on re-publication of abstracts of newspaper or magazine articles published in Australia either electronically or in hard copy until the eighth day after such publication first appears.

The elements of the prohibited activity would be:

1. the summaries of newspaper and magazine articles are prepared;
2. for the purpose of sale to the public;
3. without the permission of the publisher; and
4. are sold within seven days of the article being first published.
5. the summaries of newspaper and magazine articles are prepared;
6. for the purpose of sale to the public;
7. without the permission of the publisher; and
8. are sold within seven days of the article being first published.

It would not extend to news summaries prepared, for example, by companies for the information of their staff or ad hoc news commentary provided as a service to a client without expectation of payment.

This proposal will protect the value of the copyright in articles from which free-riding news aggregators abstract as the practice of news aggregators is to provide a substitute.[[9]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftn9" \o ")

The Publishers submit their proposal is consistent with the Government policy of providing limited protection to local book publishers by, in effect, giving book publishers a 30 day window of protection before allowing the parallel importation of books.

Originally, the Copyright Act contained a total prohibition on parallel importation of books. However, in 1991 the exception for books not published in Australia within 30 days was added, in order to strike a balance between consumers' interest in increasing the availability of books at competitive prices and copyright owners' interest in protecting the fruits of their labour.[[10]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftn10" \o ")

Relevantly, in formulating this limited exception, Parliament was careful not to tip the balance too far by removing the prohibition on parallel importation completely. Senator Collins in his second reading speech commented as follows:

'If all restrictions were removed on the importation of books, the influx of cheap overseas books produced for much bigger domestic markets would threaten economic loss to both Australian publishers and Australian authors. While consumers might benefit from such abolition by gaining access to the cheapest priced overseas books, they as well as Australian authors and publishers would suffer from the resultant decline in distinctively Australian literature.

...

The Government concluded that complete repeal of the importation provisions would pose too great a risk to Australian literature in general and to both Australian authors and Australian publishers in particular.'[[11]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftn11" \o ")

Senator Collins also noted that the limited exemption accommodates the legitimate needs of book publishers, who can protect their investment provided they supply it promptly.

The need to protect copyright owners from parallel importation was further recognised when Parliament refused to accept the proposed Schedule 2 of the Copyright Amendment (Parallel Importation) Bill 2002 which would have removed the remaining prohibition against parallel infringement of books and periodicals.

The Publishers submit that the proposal to protect publishers' efforts in compiling their news items for a limited period of seven days serves the same purpose as the copyright owners' protection against parallel importing.

Under the Publishers' proposal, the time limit proposal would only apply to the organisations which commercially exploit articles in newspapers and magazines by providing abstracts. The current provisions of the Copyright Act would still apply in relation to infringement by reproducing a substantial part of an article.

The Publishers submit that the proposal is consistent with the purpose of copyright protection; has been recognised, at least in the United States and Germany as being desirable; and provides no greater protection than is reasonably necessary.

The Publishers also submit that the proposal is consistent with Australia's obligations under Article 10(1) of the Berne Convention which, as we previously noted in our response to question 47, requires that any quotation from a work be compatible with fair practice. News abstracting today does not meet this requirement as it directly competes with the newspapers from which articles are abstracted and does so by relying upon the extensive resources of those newspapers. However, the Publishers acknowledge that the detrimental competitive effect of re-published abstracts diminishes with time and have therefore limited the proposed prohibition on re-publication to the seven days after the publication first appears to ensure that the proposal only covers re-publications that would be incompatible with fair practice in accordance with Article 10(1).

[[1]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftnref1) Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd (2010) 189 FCR 109.

[[2]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftnref2) [2011] EWCA Civ 890.

[[3]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftnref3) LexisNexis, ABIX News Summaries <http://www.lexisnexis.com.au/en-au/products/abix-news-summaries.page>.

[[4]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission#_ftnref4) (2010) 189 FCR 109.

[[5]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftnref5" \o ") 248 US 215 (1918).

[[6]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftnref6" \o ") International News Service v Associated Press 248 US 215 (1918), 240.

[[7]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftnref7" \o ") Case caption Associated Press v. Meltwater US Holdings, Inc., et al., No. 12 Civ. 1087 (S.D.N.Y.),

[[8]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftnref8" \o ") Sourced from Christoph Keese, English translation of ancillary copyright for publishers as passed by German government (3 September 2012) Der Presseschauder, <http://www.presseschauder.de/english-translation-of-ancillary-right-for-publishers-as-passed-by-german-government/> accessed 14 September 2012.

[[9]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftnref9" \o ") Copyright Act 1968 (Cth) ss 37 and 44A.

[[10]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftnref10" \o ") Copyright Amendment Act 1991 (Cth) s 5.

[[11]](http://www.alrc.gov.au/content/copyright-and-digital-economy-online-submission" \l "_ftnref11" \o ") Commonwealth, Parliamentary Debates, Senate, 16 May 1991, 3596 (Senator Collins).

File 1:

[the\_combined\_newspapers\_and\_magazines\_copyright\_committee.docx](http://www.alrc.gov.au/sites/default/files/webform/the_combined_newspapers_and_magazines_copyright_committee.docx)

File 2:

1. ALRC Discussion Paper, [4.92], p79 [↑](#footnote-ref-1)
2. [2.40] ALRC Discussion Paper, p33 [↑](#footnote-ref-2)