

COPYRIGHT AND THE DIGITAL ECONOMY

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION DISCUSSION PAPER

31 JULY 2013



1 Introduction

The Coalition of Major Professional and Participation Sports (**COMPPS**) consists of the following member organisations:

- Australian Football League;
- Australian Rugby Union;
- Cricket Australia;
- Football Federation Australia;
- National Rugby League;
- Netball Australia; and
- Tennis Australia.

One of COMPPS' roles is to facilitate a response to public inquiries on behalf of its member sports.

This document comprises COMPPS' written response to the Australian Law Reform Commission's (**ALRC**) *Copyright and the Digital Economy* discussion paper.

COMPPS has previously made a submission to the ALRC's earlier issues paper in this inquiry. COMPPS' previous submissions summarises the media rights arrangements of COMPPS members¹; the role of COMPPS' members, and content relating to those members, in the digital and wider economy; the importance of media rights revenue to COMPPS members and the importance of sport.

The position of COMPPS on matters raised by the inquiry and detailed in its previous submission has not changed. In addition to the matters set out below, COMPPS refers to and repeats its previous submission.

2 Copyright is fundamental to COMPPS members

Copyright plays a fundamental role in the licensing and exploitation of media rights to major sporting events and other content controlled by COMPPS members.

¹ Since lodging the previous submission, some COMPPS members have entered into new arrangements for the licensing of their media rights. If required, COMPPS can provide ALRC with an updated summary of Cricket Australia and Tennis Australia's media rights arrangements.

The *Copyright Act 1968 (Cth)* (**Copyright Act**) must protect the existing and future rights of copyright owners, including the members of COMPPS.

Broadly speaking, COMPPS believes the *Copyright Act* currently strikes an appropriate balance between the rights of copyright owners and users, and that the *Copyright Act* does not require a radical overhaul to remain fit for use in the digital age.

3 The ALRC's reform proposals

The current ALRC inquiry is considering whether the exceptions and statutory licenses in the *Copyright Act* are adequate and appropriate in the digital age.

The ALRC's discussion paper proposes significant changes to various aspects of Australian copyright law.

For reasons raised in COMPPS' previous submissions and discussed in greater detail below, COMPPS does not believe many of the proposed changes are warranted.

As a general comment, COMPPS believes some of the proposed changes:

- fail to appropriately take into account the interests and rights of copyright owners; and
- will materially and detrimentally impact the rights of COMPPS' members as owners and licensors of copyright.

COMPPS' members are self-funding not-for-profit bodies established to administer their respective sports. Any negative impact on their control of media rights and other copyright material will affect the members' current and future revenue operations and revenue streams. This will impact the investments COMPPS members make in their respective sports and the community as a whole.

In opposing some of the changes identified by the ALRC, COMPPS and its members must not be seen as being unreasonably resistant to change or to the development of the digital economy. To the contrary, COMPPS members have embraced new technologies and the licensed dissemination of their valuable rights in the digital age. However, COMPPS members and their authorised licensees need to be able to exploit copyright within the framework of a legal regime that protects owners and

licensees of copyright, and only allows a limited number of predictable exceptions to the exclusive rights of copyright owners.

Where there is a real need for reform to the exceptions and statutory licenses in the *Copyright Act*, COMPPS maintains the appropriate principles for any proposals for reform must:

- be carefully considered from a legal, economic and socio-economic perspective;
- not undermine or adversely impact the ability of copyright owners (including COMPPS members) to control and derive revenue from the exploitation of their rights;
- respect the way in which rights holders and their licensees exploit, and may exploit in the future, copyright material; and
- comply with international obligations, including the ‘three step test’ under Article 9(2) of the *Berne Convention for the Protection of Literary and Artistic Works* and relevant obligations under the *Australia-US Free Trade Agreement*.

4 Fair Use

4.1 A new fair use exception is opposed

COMPPS opposes the ALRC’s proposal to introduce a new standard based copyright exception for ‘fair use’ into Australian law.

COMPPS does not believe the case has been made out for the introduction of a fair use exception. Further and significantly, COMPPS believes a new fair use exception will undermine and adversely impact the licensing and value of the media rights and other content rights of COMPPS members.

The replacement of the existing fair dealing exceptions with a fair use exception has been considered in past Australian reviews and inquiries. COMPPS members have

consistently argued against the introduction of a new fair use exception.² None of the past Australian reviews supported the introduction of a new fair use exception.

COMPPS is of the view that circumstances have not changed such that a broad fair use exception is now appropriate for Australian copyright law.

Further, recent international copyright reviews in the United Kingdom and Canada have also considered the introduction of a new fair use regime in their respective jurisdictions. Neither of these reviews recommended a new fair use exception be introduced.

4.2 No case for fair use

The ALRC has identified four main reasons in support of the introduction of a new broad fair use exception.³ COMPPS disagrees with each of the ALRC's reasons for recommending the introduction of a new fair use exception in Australia.

In COMPPS' view:

- fair use is not certain or predictable;
- a single, general standard is not required;
- fair use is not required by the digital economy;
- fair use is not required to assist innovation;
- fair use will result in greater transaction costs; and
- fair use does not comply with the three step test.

4.2.1 Fair use is not certain or predictable

Exceptions to copyright impact the rights of copyright owners and licensees. Given these impacts, to the extent that any exceptions to copyright are justified, those exceptions need to be limited, clear in scope and able to be consistently applied.

² Joint AFL, Cricket Australia and NRL submission to the Attorney-General's Review of Fair Use and Other Copyright Exceptions in 2005.

³ Paragraph 4.34 of the ALRC Discussion Paper.

COMPPS is concerned the scope and application of any new fair use exception will be difficult to predict, and this will result in inconsistent and arbitrary decisions. It will be difficult for parties to understand the boundaries of the relevant rights and difficult to predict outcomes when they seek to enforce their rights.

This is not in the interests of content rights holders or other stakeholders. These outcomes need to be avoided in Australian copyright law.

Certainty is the cornerstone for encouraging business investment and innovation, and the protection of valuable rights. The uncertainty and unpredictability arising from a new copyright exception will create serious difficulties for copyright owners (such as COMPPS members) when licensing their rights, determining whether a particular use falls within the exception and in enforcing rights.

An illustration of the problems that can arise with fair use and content rights arose in 2009 in Israel. Following the introduction in 2007 of the broad fair use concept into Israeli law, a court held, in part, an entire soccer match could be streamed online by an unauthorised third party under the new fair use exception.⁴ Although this decision was subsequently overturned on appeal, the case is a useful and timely reminder of the uncertainty, interpretation and application problems that arise when an uncertain new concept is introduced.

The suggestion that fairness factors and illustrative purposes will assist in defining the scope of the new fair use exception is not helpful or determinative, given those concepts are not clear, nor exhaustive. The proposed fairness factors and illustrative purposes are discussed in more detail below.

The lack of case law in relation to any new fair use exception adds to the unpredictability and uncertainty of the exception.

Further, the inherent uncertainty of the fair use exception cannot be overcome by relying on third party protocols, guidelines and industry arrangements. These protocols, guidelines and arrangements will not be binding on all relevant persons. Also, there are inevitably problems associated with seeking

4 (Tel Aviv) 11646/08 *Football Association Premier League Ltd. v John Doe* (unpublished) (July 16, 2008)

industry wide arrangements in the context of an uncertain standard, such as obtaining consensus on the scope of restrictions; the enforceability of the arrangements and difficulties in changing the arrangements. These sort of arrangements are not a solution to the uncertainty problems created by a new, broad fair use exception.

4.2.2 A single, general ‘flexible’ standard is not required

The open ended, fair use exception proposed by the ALRC is based on a standard: ‘fair use’.

The use of a general, ‘one size fits all’ standard is problematic. The concept of ‘fair’ is subjective and open to different interpretations. ‘Fair’ use will invariably mean different things to different persons.

The ALRC suggests the prohibition against ‘misleading or deceptive conduct’ in the Australian Consumer Law as an example of ‘standards’ based legislation which is flexible and can be applied broadly. COMPPS does not accept the parallel the ALRC seeks to draw between a new, broad fair use standard introduced into the *Copyright Act* and the prohibition on misleading and deceptive conduct in the *Competition and Consumer Act*. There is a marked difference between protecting consumers against misleading and deceptive conduct, and setting the boundaries for a property right. While the use of a broad standard is appropriate for a wide reaching concept like misleading and deceptive conduct, where legislation is creating an exception to exclusive property rights, the test for applicability of the exclusion should not be linked to a standard but rather restricted to limited circumstances, for defined purposes.

COMPPS believes the attraction of a single fair use exception to copyright based on a standard is illusory. The exception increases complexity of copyright law and has inherent uncertainty.

4.3.3 No evidence a broad fair use exception required by the digital economy

The proposed new fair use exception is a general exception to copyright. Fair use is not specifically related to the digital economy.

COMPPS does not believe evidence has been put forward to support the view that fair use is required for the digital economy.

Further, there is no evidence the existing fair dealing exceptions are inflexible or otherwise inappropriate in the digital age. The fair dealing exceptions are technology neutral and focus on the use of the copyright material by the user.

4.3.4 Fair use will not assist innovation

ALRC has suggested that fair use will 'assist innovation'.

This assertion is not supported by evidence. Major technology companies have successfully established their presence in Australia within the boundaries of the existing copyright laws. As noted in COMPPS' previous submission to the inquiry, existing copyright laws have not prohibited the development of technology like cloud computing provided that technology is used in a lawful manner

Indeed, the Hargreaves Review in the United Kingdom stated that '*the economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated*'⁵.

The innovations of rights holders, such as COMPPS members, also need to be recognised. These innovations occur within the existing copyright framework. Any reforms that undermine the protections granted by that framework will reduce the incentive for rights holders to continue to invest in these innovations.

4.3.5 Fair use will result in greater transaction costs

The copyright material of COMPPS members is popular and valuable. COMPPS members need to be protected against unauthorized use of this material. COMPPS members have had to take legal action in the past to prevent unauthorized use of copyright material purportedly under exceptions in the *Copyright Act*.

⁵ I Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (2011), 101, paragraph 5.16.

It is implausible that a new fair use exception will result in 'reduced transaction costs'.⁶ To the contrary, the novelty, uncertainty and unpredictability of a new broad fair use exception will inevitably result in increased in transaction costs, such as the expenditure of significant costs by rights owners and users on legal costs and litigation.

The transaction costs associated with defining the parameters of the new exception will fall to rights holders, such as COMPPS members, to incur. It is unfair that COMPPS members be required to pursue advice and litigation to obtain certainty concerning the scope and possible infringement of their exclusive rights.

4.3.6 *Fair use does not comply with the three step test*

COMPPS does not believe the proposed new fair use exception complies with the three step test for the introduction of new copyright exceptions and limitations. In particular, COMPPS is concerned the 'fairness' standard for the new exception is an insufficiently clear criterion to meet the first part of the three step test.⁷

COMPPS opposes the proposed fair use exception. If however any such exception is proposed, COMPPS suggests the exception expressly exclude any use that is "social use" (as that term is used in the discussion paper); commercial use or any use in return for a fee or other consideration.

4.3 The introduction of 'fairness factors'

The ALRC has proposed a non-exhaustive list of 'fairness factors' to be used in determining whether a use constitutes fair use under the new exception.

The proposed fairness factors are uncertain, complex and involve consideration of multiple issues. There can be no certainty and predictability in a law based on a standard if the only guidance given for its application is a non-exhaustive list of fairness factors to be considered as part of any determination as to whether a use of copyright material constitutes fair use.

⁶ Paragraph 4.93 of the Discussion Paper

⁷ See for example, S Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (SCCR/9/7) (2003) page 68-69.

COMPPS raises the following concerns in relation to the fairness factors proposed by the ALRC:

- The commentary in the discussion paper regarding the first fairness factor suggests the creativity and publication of the work should be taken into account as a relevant factor. Although the nature of COMPPS' members audio-visual and audio material is not creative and is not published in the traditional sense, this material is extremely valuable and must not be treated as less important than 'creative' and 'published' works.
- The fourth fairness factor refers to the effect on the 'potential market for, or value of, the copyright material'. Any use that has any adverse impact on current or future copyright owners rights should not be capable of being fair use.
- It appears the fourth fairness factor places the onus on the copyright owner to establish the effect on the 'potential market for, or value of, the copyright material'. It is unreasonable and inappropriate to place the burden of proof onto the owner of copyright to show that an unauthorised use of their copyright content is unlawful. No such onus exists under the current fair dealing exceptions.
- It is also not clear how the market effect of the defendant's conduct is to be determined and demonstrated. Ascertaining the market effect of use of copyright material may entail complex economic considerations, and raise cost and evidentiary issues.
- The effect of the proposed use on the reputation of the copyright owner should to be taken into account. For example, COMPPS' members must maintain the right to control the use of rough conduct footage or other content that may damage the image of the sport. Such footage, if communicated in an unauthorised manner, has the potential to detrimentally affect the reputation of COMPPS' members, their content and their sports.

4.4 The introduction of 'illustrative purposes'

The ALRC has proposed a non-exhaustive list of illustrative purposes be included in a new fair use exception.

Again, COMPPS is concerned that these illustrative purposes are not clear or certain.

COMPPS specifically objects to the inclusion of illustrative purposes relating to 'private and domestic use', 'non-consumptive use' and 'quotation'. These matters are discussed in further detail below.

COMPPS also objects to any suggestion that the illustrative purposes should allow a fair use exception to be relied upon by third parties 'facilitating' fair use for others, for commercial benefit or otherwise.

In response to the question specifically raised by the ALRC's discussion paper, COMPPS does not believe any further illustrative purposes of fair use are required.

COMPPS suggests that a list of illustrative purposes be included of what would not constitute fair use, such as "social use" (as that term is used in the discussion paper), any commercial use or any use in return for a fee or other consideration.

4.5 Third parties

COMPPS strongly opposes any reform or amendment to the *Copyright Act* that would have the effect of extending the rights of unlicensed third parties to use copyright material.

It is a fundamental principle of copyright law that a copyright owner has the right to prevent third parties from copying, reproducing, communicating or otherwise exploiting its copyright material (subject to specific and certain exceptions). Allowing third parties broad, general rights to use copyright material under cover of a new fair use exception (or any other new fair dealing exceptions) will significantly, immediately and adversely impact the ability of copyright holders, such as COMPPS' members, to license and enforce their rights.

COMPPS does not agree that the service involved in the recent *NRL & AFL v Optus* case should be viewed as merely '*facilitating private and domestic use*'. That service involved Optus making copies of the relevant broadcasts for commercial benefit, without obtaining a licence from the copyright owner. The service was held to infringe copyright. COMPPS opposes any reforms or amendments to the law that would allow such conduct, or allow similar activities by a third party on the basis the conduct facilitates a 'fair use', a 'private and domestic use' or a fair dealing.

If a fair use exception is proposed (which is opposed by COMPPS), then third party use should not be governed by the proposed fairness factors for fair use and any unauthorised third party use should be prohibited (other than to the extent of the existing exceptions). Further, any unauthorised use for a commercial benefit – by a third party or otherwise - must not be capable of falling within any new fair use exception.

5 Fair dealing

5.1 COMPPS position

COMPPS opposes the replacement of the existing fair dealing exceptions with a fair use exception.

COMPPS supports amendments to the fair dealing exceptions to clarify the application of the exception for the reporting of news (these are discussed in paragraph 5.5 of this submission).

However COMPPS does not support a fundamental expansion of the fair dealing exceptions or other material changes to the fair dealing exceptions.

5.2 Fair dealing exceptions are appropriate

In the discussion paper the ALRC has stated that the limited, purpose-based nature of the fair dealing exceptions is problematic in the digital environment⁸.

COMPPS does not agree.

COMPPS is unaware of any evidence that the fair dealing exceptions are inappropriate in the digital age or that there are significant issues with the application and operation of the fair dealing exceptions that justify the making of radical amendments to the fair dealing exceptions.

Further, many examples provided in the discussion paper of uses claimed not to be subject to the fair dealing exceptions are completely unrelated to the digital environment.⁹ COMPPS considers that the existing fair dealing exceptions are already technologically neutral and have proven to be adaptable to operating in the digital environment.

⁸ Paragraph 7.80 of the Discussion Paper

⁹ For example paragraph 7.34 of the Discussion Paper

COMPPS also does not agree that the purpose based nature of the fair dealing exceptions amounts to a limitation on the effectiveness of the fair dealing exceptions.

Copyright exceptions are a significant imposition on the exclusive proprietary rights of COMPPS members, as they allow parties other than the COMPPS member (or its licensees) to undertake activities that would otherwise amount to an infringement of copyright.

This can have a material impact on the ability of COMPPS members to exploit their copyright for the benefit of their respective sports.

COMPPS considers that a system of limited and purpose based exceptions to copyright infringement is the appropriate approach to providing exceptions to the extremely valuable, proprietary rights of copyright owners such as COMPPS members.

COMPPS also considers that the current fair dealing purposes of:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news; and
- (e) giving professional advice;

are appropriate and should not be expanded.

COMPPS would also not support any changes to the current approach under Australian copyright law¹⁰ that the relevant 'purpose' in assessing whether a fair dealing exception applies to a particular use is the purposes of the user and that third parties cannot take advantage of a fair dealing exception by claiming they are 'facilitating' a fair dealing by another.

¹⁰ See for example *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, 105–6 and *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147

5.3 Consequences of introducing fair use

COMPPS does not support the replacement of the existing fair dealing exceptions with a fair use exception.

However, if a fair use exception is introduced, COMPPS considers that this would necessitate repealing the existing fair dealing exceptions in the *Copyright Act*.

If the fair dealing exceptions were not repealed following any introduction of fair use, COMPPS is concerned that the overlap between the existing fair dealing exceptions and the fair use exceptions would be interpreted as meaning that fair use amounted to a significant expansion over and above the exceptions currently provided under the fair dealing exceptions.

5.4 Fairness factors

COMPPS has previously raised its concerns regarding the ‘fairness factors’ proposed by the ALRC.

However, subject to COMPPS comments regarding the fairness factors set out in paragraph 4.3 of this submission, COMPPS would not oppose the introduction of the fairness factors as part of an assessment as to whether a particular use constitutes fair dealing.

If the ALRC proposes to recommend that the fair dealing exceptions be amended to expressly include fairness factors, COMPPS submits that the fairness factors must be analysed only if the proposed act falls within one of the fair dealing exceptions, as part of a two-stage process in determining if a use constitutes fair dealing.

This is to ensure that fair dealing exception is not turned into a de facto fair use.

5.5 Clarification of the reporting of the news exception

The previous submission to this inquiry made by COMPPS outlined concerns COMPPS members have regarding the application of the fair dealing exception for the reporting of news.

Some of COMPPS’ members have previously raised these concerns, including as part of the Attorney-General’s *Review of Fair Use and Other Copyright Exceptions* in 2005.

These concerns remain a significant issue for COMPPS members.

In essence, COMPPS members are concerned that the exception for the reporting of news is being exploited and relied on by parties to use an excessive amount of highly valuable content of COMPPS members (such as footage of COMPPS members' sporting events) for a purpose other than the reporting of news without a licence from the COMPPS member.

For example, COMPPS and its members are aware that many unlicensed media organisations are relying on this exception to compile and communicate content such as unlicensed highlight packages of COMPPS members sporting events for commercial gain.

COMPPS maintains that amendments to the fair dealing for reporting of news exception should be introduced to:

- (a) provide guidance to rights holders and news organisations as to the amount of material which may be used under this exception (similar to the exception for the purpose of research and study);
- (b) define the boundaries of what would constitute 'the reporting of the news' and prevents what is in reality an entertainment, rather than a news, offering;
- (c) provide guidance on the currency required between the relevant event being reported on and the footage used (for example to prevent news events being used as a 'cover' for the use of COMPPS members archive content for entertainment purposes); and
- (d) address the misuse of the reporting of news exception by third parties without a licence and the impact that this has on rights holders such as COMPPS members and their licensees.

COMPPS notes that News Limited has suggested in a supplementary submission to the inquiry¹¹ that any attempt to define what constitutes news is '*interventionist and would certainly undermine freedom of expression*' and would '*pose significant threats to freedom of speech and freedom of the press*'.

¹¹ Supplementary submission of News Limited dated 26 March 2013

COMPPS does not consider this to be a reasonable or accurate characterisation of the amendments proposed by COMPPS.

COMPPS members are not seeking to undermine freedom of speech or freedom of the press. Rather, COMPPS members are simply seeking reasonable amendments to the exception for the reporting of news to prevent use of the exception by parties for purposes that do not amount to the genuine reporting of news.

COMPPS does not see how these amendments would undermine freedom of the press or freedom of speech.

6 Non-consumptive use

6.1 Exception for non consumptive use

The ALRC has proposed in the Discussion Paper that the fair use exception should be used to determine whether ‘non-consumptive’ use such as caching and indexing, or data and text mining constitute copyright infringement.

As previously stated in this submission, COMPPS opposes the enactment of a fair use exception or the inclusion of non-consumptive use as one of a number of ‘illustrative purposes’ as part of that new exception.

Further, COMPPS opposes the introduction of a new fair dealing exception for ‘non-consumptive use’.

COMPPS does not believe a new fair dealing exception for non-consumptive use is required. COMPPS is not aware of any compelling evidence that caching, indexing other internet related functions are being unreasonably impeded or prevented by the lack of such an exception.

COMPPS also has concerns regarding the potential scope and uncertainty of a general fair dealing exception for ‘non consumptive use’.

In particular, COMPPS is concerned that the definition of ‘non consumptive use’ proposed in the Discussion Paper is not appropriate. The definition proposed is that ‘non consumptive use’ would be *‘use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material’*.

The focus on the ‘creative’ or ‘expressive’ purpose of the material is not appropriate. Material which may be considered less ‘creative’ or ‘expressive’ should not be subject to a lower standard of copyright protection or more open to unlicensed use under a copyright exception.

Some unlicensed uses of copyright material owned by COMPPS members may not directly trade on the creative or expressive purpose of the material (for example the use of audio visual content or the reproduction of statistics). However this material should still be protected by copyright and should not be able to be exploited by unlicensed third parties under such an exception.

COMPPS also has concerns that the proposed definition of ‘non consumptive use’ would result in the scope of the fair dealing exception for non-consumptive use being uncertain and open to interpretation and ‘scope creep’.

Pursuant to the three step test, any new exceptions should be confined to certain and special circumstances only and should not capture unintended conduct. The broad definition of ‘non-consumptive use’ could result in the exception for non consumptive use extending to conduct well outside the scope of caching and indexing, or data and text mining.

To the extent exceptions are required for the purposes of caching, indexing or other internet related functions, this should be addressed by way of a specific fair dealing exception (or an amendment of existing fair dealing exceptions) rather than applying a broad, open ended and uncertain fair use exception or a general ‘non-consumptive use’ fair dealing exception.

6.2 Data and text mining

As detailed above, COMPPS does not support either a fair use exception or a general ‘non-consumptive use’ fair dealing exception being used to determine whether data or text mining constitutes copyright infringement.

COMPPS members own copyright in valuable content which could be subject to unfair, unlicensed use by commercial organisations for data or text mining purposes (such as sports statistics).

COMPPS agrees with the ALRC's proposal in the Discussion Paper that a market based voluntary licensing model should apply for any commercial use of data and text mining.

If a market based voluntary licensing model is adopted, any fair dealing exception for non-consumptive use (noting that COMPPS opposes the introduction of such an exception) would need to specifically exclude data and text mining.

7 Private and domestic use

7.1 Fair use and fair dealing exceptions

As discussed above, COMPPS opposes the introduction of a fair use exception. Consequently, COMPPS also opposes including 'private and domestic use' as an illustrative purpose in the fair use exception.

COMPPS opposes the introduction of a new fair dealing exception for use for private and domestic purposes.

7.2 Fair dealing

There is no evidence that the existing provisions of the *Copyright Act* are unreasonably preventing individuals from using copyright materials for private and domestic purposes or that broader exceptions in respect of private and domestic use are required.

COMPPS believes there are already sufficient exceptions in the *Copyright Act* providing for use of copyright material for private and domestic use, such as the existing time shifting and format shifting exceptions.

These exceptions were enacted relatively recently and careful consideration was given to the need to balance between the rights of users and rights holders before they were introduced. There is no evidence to suggest that these exceptions are too prescriptive or inflexible to keep up with an evolving digital environment.

COMPPS notes with concern the statement in the Discussion Paper that '*one of the primary justifications for private and domestic use exceptions relate to public expectations and social norms*'¹².

¹² Discussion Paper paragraph 9.20.

COMPPS strongly disagrees that ‘social norms’ should dictate changes to the *Copyright Act*, particularly where the changes relate to allowing activity that would otherwise amount to copyright infringement. Such an approach sets a dangerous precedent.

COMPPS also does not agree that there are social norms or public expectations that the copyright content of COMPPS members should more freely be able to be used on an unlicensed basis. COMPPS considers there is strong public recognition of and support for the need for the copyright content of COMPPS members to be protected and respected.

COMPPS considers the format shifting and time shifting provisions of the *Copyright Act* adopt the appropriate approach to exceptions for private and domestic use, being that any exceptions should apply to the use of copyright material for private and domestic purposes in certain limited and specific circumstances only.

A general fair dealing exception for private and domestic use:

- (a) is not necessary;
- (b) would be excessively broad;
- (c) would lack certainty; and
- (d) would unreasonably prejudice the rights of copyright owners such as COMPPS members to control and licence their copyright content.

A general fair dealing exception for private and domestic use is predicated on being able to distinguish between ‘private and domestic’ use and commercial or other types of ‘non private’ use.

This distinction will, in practice, be complicated and difficult to make. The line between when a use is ‘private and domestic’ and when it is a public or commercial use will be unclear.

Many types of uses of copyright material may have both ‘private and domestic’ and ‘non private’ or commercial aspects.

In addition, in the digital environment, many online services used by individuals are both public and commercial. For example, social media sites such as Facebook and

content sharing services such as YouTube can be assessed by many people (including potentially all users of the internet) and are highly commercial operations. Use of copyright content on these types of sites and services cannot properly be classified as private and domestic use.

As a result, the scope and application of a general fair dealing exception for private and domestic use will lack clarity and be open to interpretation.

7.3 Clarifying private and domestic use

COMPPS does not support the introduction of a general fair dealing exception for private and domestic use.

However, if such an exception is to be considered, the relevant provisions should set out the scope and limits of the exception. COMPPS expects that this would include:

- (a) defining when use will be ‘private and domestic’;
- (b) setting out the difference between private and domestic use and other forms of use (such as commercial use);
- (c) excluding commercial use from the exception; and
- (d) excluding public or social use from the exception (this would include excluding use via online services such as social media),

In addition, ‘third party use’ must be excluded from the scope of any exception. COMPPS would strongly oppose any exception which sought to allow third parties to ‘facilitate’ private and domestic use by others for commercial gain.

COMPPS does not agree with the suggestion in Chapter 9 of the Discussion Paper that this type of third party use should be subject to an assessment of ‘fairness’ before it amounts to an infringement of copyright¹³.

8 Transformative Use and Quotation

8.1 Exception for transformative use is not appropriate

Proposal 10-1 of the Discussion Paper (that a new transformative use exception not be provided in the *Copyright Act*) is supported by COMPPS

¹³ Discussion Paper Paragraphs 9.72-9.73

However, COMPPS rejects any suggestion that the transformative use of copyright material should be considered under a fair use exception or that transformative use of copyright materials should be more freely permitted.

In its previous submission to the Inquiry COMPPS stated its opposition to the introduction of any exception for transformative use and the reasons for this opposition. These reasons remain.

As the ALRC noted in the Discussion Paper¹⁴, even limiting any transformative use exception to non-commercial purposes is problematic due to the boundary between non-commercial and commercial purposes being inherently unclear in the digital environment.

Moreover, there is a significant risk that the creation of transformative works may also impact on the reputation of the rights holders such as COMPPS members, as users may erroneously believe that transformative works were created by or with the endorsement of the rights owners.

8.2 Exceptions for quotation is not appropriate

In Proposals 10-2 and 10-3 of the Discussion Paper, the ALRC has proposed that:

- (a) the fair use exception be applied when determining whether quotation infringes copyright; or
- (b) if a fair use exception is not introduced, a new fair dealing exception for quotation be provided for.

COMPPS opposes the introduction of a fair use exception and therefore also opposes the fair use exception applying in respect of quotation.

COMPPS also does not believe that a new fair dealing exception for quotation is necessary. COMPPS is not aware of any significant issues regarding the *Copyright Act* restricting the use of copyright materials for legitimate quotation.

The fair dealing exceptions and the requirement that a 'substantial part' of any works or subject matter other than works to be taken before copyright infringement may be found already allow sufficient use of copyright materials for quotation purposes.

¹⁴ Discussion Paper Paragraphs 10.76

COMPPS also has concerns regarding the potential scope and application of any fair dealing exception for quotation. The Discussion Paper suggests that quotation, for copyright purposes, is the taking of a part of a work where the taking is done by someone other than the creator of the work¹⁵.

This is an extremely broad interpretation of what amounts to a 'quotation' and would potentially allow any unlicensed use of copyright material which uses 'part' of a work.

For example, COMPPS would be concerned that unlicensed third parties may seek to communicate highlights of the sporting events of COMPPS members under the guise of fair dealing for quotation. This would detrimentally and unreasonably impact upon the exploitation of such rights by COMPPS' members.

A fair dealing exception for quotation should not be introduced. However, if a fair dealing exception for quotation is to be introduced, COMPPS considers that the exception should not apply to audio, audio visual or photographic content.

There is no legitimate reason for unlicensed third parties to be able to use audio, audio visual or photographic content for quotation purposes.

9 Libraries, Archives and Digitisation

The ALRC has proposed that the fair use exception be applied when determining whether uses of copyright material not covered by specific libraries and archives exceptions infringe copyright.

As discussed previously in this submission, COMPPS opposes the introduction of a new fair use exception.

However, COMPPS has no objection in principle to copyright exceptions for non commercial use of copyright material by 'cultural institutions' such as not for profit libraries, museums or galleries, provided that there are safeguards preventing the unauthorised use and dissemination of this material.

In addition, exceptions regarding making copies of copyright material or other uses of copyright material by cultural institutions should be limited to the making of copies or other by cultural institutions for 'preservation' purposes.

¹⁵ Discussion Paper Paragraph 10.87

Many COMPPS members keep and maintain valuable archives of content (for example footage of sporting events) and licence this content to third parties. It will therefore be important for COMPPS members that any libraries and archives exception be limited to non commercial, preservation use of copyright by cultural institutions and not, for example, allow use by third parties of COMPPS members valuable content under the guise of a libraries, archives or digitisation exception.

10 Retransmission of free-to-air broadcasts

10.1 No change to existing regime

COMPPS does not support changes to the regime for the retransmission of free-to-air television broadcasts under the *Copyright Act* and *Broadcasting Services Act*.

The regime for the retransmission of free to air television broadcasts cuts across other significant legal and policy areas. Before making any changes to this regime the communications, convergence, competition and other similar legal and policy considerations and impacts would need to be considered. As these areas are outside the scope of the terms of reference of the inquiry, COMPPS does not consider that it is possible for the ALRC to properly review and make recommendations regarding changes to the retransmission regime.

COMPPS does not believe that amendments to the retransmission regime are required. COMPPS members consider the current retransmission regime to be a well understood regime which generally operates in a satisfactory manner.

Many of COMPPS' members have existing media rights agreements which have been negotiated based on the existing retransmission regime being in place.

However, if the ALRC remains inclined to recommend reforms the existing retransmission regime, COMPPS would be more supportive of Option 1 than Option 2.

COMPPS has no objection in principle to a retransmission regime which is determined by market mechanisms. This is appropriate as the relevant parties are able to negotiate and agree on the extent and terms upon which retransmission were to take place. Such a regime would also accord with the general principles that content owners can determine where and how copyright material is disseminated and have less impact on existing media rights agreements of COMPPS members.

However this view should be read in conjunction with COMPPS position that amendments to the retransmission regime are not necessary or appropriate.

10.2 Retransmission over the internet

COMPPS strongly opposes the statutory licensing scheme for the retransmission of free to air broadcasts applying to transmissions over the internet and opposes the removal of the 'internet exclusion' from this scheme.

Extending the statutory licensing scheme for the retransmission of free to air broadcasts to internet transmissions:

- (a) would cause significant harm to COMPPS members;
- (b) would allow unlicensed third parties to unreasonably benefit from the valuable copyright content of COMPPS members;
- (c) is inconsistent with the long standing and important differentiation under communications law and policy between broadcasts and internet communications; and
- (d) would require amendments to the *Australia-US Free Trade Agreement*.

The extension of the statutory licensing scheme to retransmission over the internet would cause significant potential harm to the ability of COMPPS' members to sell and exploit their media rights.

Many COMPPS' members sell or exploit rights to communicate their sporting content over the internet separately from rights to communicate the content on free to air television or other relevant platforms (such as pay television).

COMPPS strongly rejects the submissions referred to in paragraph 15.101 of the Discussion Paper which sought to characterise this a 'double charging' by rights holders. The ability to control and grant rights for the communication of this content across different platforms is fundamental to the ability of COMPPS members to maximise revenue from the sale of their media rights.

This revenue ultimately flows back to and benefits the community as it allows COMPPS members to fund their respective sports and invest in a range of high performance, grassroots and community programs and initiatives.

Allowing unlicensed third parties to retransmit the highly valuable sporting content of COMPPS members over the internet for the payment of only a (likely modest) statutory licensing fee would allow unlicensed third parties to make a significant commercial windfall at the expense of COMPPS members and their licensees.

Existing licensing agreements entered into by COMPPS members may also be undermined, for example in respect of the exclusivity granted under the agreements or the holdback or delay provisions of the agreements.

Extending the statutory licensing retransmission scheme to internet retransmissions will also prejudice the ability of COMPPS members to sell and exploit the rights to communicate their sporting content outside Australia. There will be a significant risk that internet retransmissions of COMPPS members sporting content will be able to be received overseas. These risks are inherent in internet communications which are, by their nature, a form of global communication.

It is not practical to suggest that these risks can be alleviated by geo blocking. Geo blocking technologies remain susceptible to circumvention. COMPPS understands there are numerous online products and services offered specifically to enable geo blocking technologies to be circumvented.

Extending the statutory licensing retransmission scheme to internet transmissions also overlooks the fundamental differences between broadcasts and internet transmissions and the long standing and important differentiation under Australian law between broadcasts and internet transmissions.

There are significant differences between broadcasts and internet transmissions. Broadcasts are undertaken by a limited number of broadcasters licensed under the *Broadcasting Services Act*. Broadcasts and broadcasters are subject to a comprehensive and complex regulatory regime. In comparison, internet transmissions are not restricted to licensed broadcasters and are not subject to the same strict regulatory regime.

The need to negotiate amendments to the *Australia-US Free Trade Agreement* to extend the statutory licensing retransmission scheme to internet transmissions also means there are likely to be significant practical impediments to any such extension being introduced and implemented.

Further, COMPPS considers that extending the statutory licensing retransmission scheme to internet transmissions will be difficult to implement in practice as it will be difficult to monitor the retransmission of content online and administratively difficult to collect royalties from these parties.

If the statutory licensing retransmission scheme is extended to internet transmissions, then COMPPS submits that sporting events should be excluded from the scheme such that sporting events could not be transmitted over the internet as part of the statutory licensing retransmission scheme.

Such an exclusion is justified given the cultural and economic significance of sporting events, the demonstrable harm to sporting bodies such as COMPPS members if internet transmission is allowed and the significant risks to sporting bodies regarding internet transmissions being able to be received overseas.

10.3 Clarifying the internet exclusion

COMPPS does not support the retransmission regime applying to any forms of IPTV.

COMPPS would be supportive of an amendment to section 135ZZJA of the *Copyright Act* to confirm that IPTV is included in the scope of the internet exclusion in this section.

10.4 Alteration

If the retransmission regime is extended to internet transmissions (which COMPPS strongly opposes) the *Copyright Act* should not allow for alterations to be made to the retransmitted broadcasts.

The requirement that retransmitted broadcasts not be altered is an established and accepted requirement of the retransmission regime.

COMPPS members would have significant concerns with unlicensed third parties undertaking retransmission of their valuable sporting content also being able to make alterations to that content.

11 Broadcasting

11.1 No reform to broadcasting exceptions

The Discussion Paper proposes amendments to the *Copyright Act* to extend the operation of a number ‘broadcast exceptions’ in the *Copyright Act* to also apply to transmission of television or radio programs over the internet.

COMPPS does not believe that the broadcast exception should be amended to extend to internet transmissions.

COMPPS is not aware of any evidence that the communication of television or radio programs over the internet has been unreasonably hindered by the broadcast exceptions not applying to internet transmissions.

COMPPS understands that the broadcast exceptions have always only applied to licensed broadcasters (ie ‘broadcasting services’ licensed under the *Broadcasting Services Act*). Extending the broadcast exceptions to internet transmissions would extend the exceptions from applying only to a limited and identifiable category of persons to potentially anyone in the world.

There are likely to be significant communications law and policy consequences of making such a change. These matters need to be considered before any extension is made, however they fall outside the remit of the Inquiry.

Notwithstanding COMPPS opposition to the broadcast exceptions being extended to internet transmissions, if such an extension is proposed COMPPS considers that it should only apply to transmissions by licensed broadcasters (ie broadcasting services licensed under the *Broadcasting Services Act*).

Further, the internet exceptions should only apply to the internet transmission by licensed broadcasters of a linear feed of the programming broadcast by that broadcaster.

12 Contracting out

In the Discussion Paper the ALRC proposes that limitations on contracting out should apply to:

- (a) the exceptions for libraries and archives; and

- (b) the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

Subject to COMPPS comments in paragraph 9 of this submission regarding the need for any libraries and archives exception needing to be limited use by 'cultural institutions' for preservation purposes and not extending to commercial use or use by third parties, COMPPS members do not oppose limitations on contracting out applying to the exceptions for libraries and archives.

However COMPPS does have some concerns regarding the application of the proposed limitations on contracting out of the fair dealing exceptions and/or fair use exception.

COMPPS members enter into media rights agreements where the parties may agree to contract out of copyright exceptions. These agreements are usually detailed, negotiated agreements entered into by sophisticated parties. COMPPS does not see any reason why parties to these types of agreements should not be able to contract out of the fair dealing or fair use exceptions.

This is particularly the case given that COMPPS members and their licensees may contract out of these exceptions to protect the reputation and/or integrity of their sports (for example to restrict use of sporting event footage in ways which would harm the reputation of a sport).

There are also legitimate reasons why COMPPS' members or their licensees may wish to contract out of fair dealing or fair use exceptions in agreements with consumers.

For example, COMPPS members or their licensees may licence consumers to 'rent' audio visual content of sporting events for a limited duration (similar to the time limited content arrangements available using services such as Apple TV). Such arrangements require the parties to be able to contract out of fair dealing or fair use exceptions, including to prevent users being able to contravene the time limited arrangements under cover of a fair dealing exception or a fair use exception.

Further, COMPPS notes that there are other laws, such as consumer protection laws, which already address any issues pertaining to contracting out in agreements with consumers.

13 A further matter - Enforcement of copyright

The enforcement of copyright is outside the scope of the current Inquiry. COMPPS believes this is unfortunate given the need for urgent reform in this area.

COMPPS and its members continue to call for reform to the *Copyright Act* that will strengthen the ability of copyright owners and their licensees to meaningfully enforce their rights against infringement.

Concluding comments

Copyright is very important to the current and future activities and success of COMPPS members.

COMPPS is concerned that many of the ALRC's reform proposals are not justified and / or may adversely impact its members.

COMPPS urges the ALRC not to make any recommendations for reform that may in any way adversely impact the control, value, licensing and dissemination of the valuable copyright and content of COMPPS' members.

COMPPS and its members are available to discuss the above submission and related matters with the ALRC.

For any queries, please contact:

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