

Submission to the Australian Law Reform Commission

### Copyright and the Digital Economy Discussion Paper

August 2013



About CHOICE

CHOICE exists to unlock the power of consumers. Our vision is for Australians to be the most savvy and active consumers in the world.

As a social enterprise we do this by providing clear information, advice and support on consumer goods and services; by taking action with consumers against bad practice wherever it may exist; and by fearlessly speaking out to promote consumers’ interests – ensuring the consumer voice is heard clearly, loudly and cogently in corporations and in governments.

To find out more about CHOICE’s campaign work visit [www.choice.com.au/campaigns](http://www.choice.com.au/campaigns) and subscribe to CHOICE Campaigns Update at [www.choice.com.au/campaignsupporter](http://www.choice.com.au/campaignsupporter).

# Contents

Executive Summary 4

1. Introduction 4

2. Fair Use 5

2.1. Private and domestic use of copyrighted material in Australia 5

CDs and digital audio files 6

DVDs and digital video files 7

Cloud computing 8

2.2. Social Media 8

2.3. Attitudes to private and domestic use 9

2.4. Social Norms 10

2.5. What is legal? 11

Music - what is legal? 12

Video – what is legal? 13

Social Media – what is legal? 14

What is legal? - Implications 14

2.6. Trends 15

2.7. Fair Use is more flexible 15

Copyright Amendment Act 2006 16

Innovation and its implications for consumers 16

2.8. Licensing 17

2.9. Third party providers 18

3. Contracting out 19

3.1. Terms and Conditions 19

Consumer don’t actually read their terms and conditions 20

Consumer #Outrage – Instagram 21

Australian Consumer Law cannot be relied upon to address contracting out 21

3.2. Technological Protection Measures (TPMs) 23

TPM circumvention in Australia 24

4. Conclusion 24

# Executive Summary

CHOICE offers broad support for the recommendations of the Australian Law Reform Commission’s discussion paper. In particular, we believe that a Fair Use system with fairness factors and a non-exhaustive list of illustrative uses will result in the best possible outcome of copyright reform for Australian consumers and the Australian economy

A Fair Use system will better reflect the behaviours and reasonable expectations of Australian consumers, and will help Australia develop and adopt the latest technological innovations. Meanwhile creators will continue to be rewarded for their work.

1. CHOICE would like to make the following recommendations to the ALRC for it to consider ahead of releasing its final report: CHOICE supports a Fair Use system as proposed by the Australian Law Reform Commission in its Discussion Paper. We support the non-exhaustive list of illustrative purposes and fairness factors. However we would advise the illustrative purposes include ‘private **or** domestic’ use instead in ‘private **and** domestic’ use.
2. CHOICE would support the creation of a ‘private or domestic’ Fair Dealing exception in the event that a Fair Use system is not introduced. However, a Fair Use system, as described above, is our clear preference.
3. CHOICE recommends that the Australian Law Reform Commission extend the prohibition of contracting-out to **all** Fair Use exceptions.
4. Introduction

CHOICE welcomes the opportunity to comment on the Australian Law Reform Commission’s (ALRC) discussion paper on copyright reform. We believe that this is an opportunity for Australia to adopt a 21st Century copyright regime that will work in the best interests of creators, innovators and consumers alike.

CHOICE has long advocated for a Fair Use copyright system. In 2005, we submitted to the Attorney General’s Department’s issue paper, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age.* We advocated for Fair Use as the best possible system for consumers and the economy more broadly. However, recognising the limitations of the review at the time, we proposed an expansion of the then-exceptions to include time/space/format/platform shifting, and the backing up of content.

In 2008, we advocated for an expansion of Fair Dealing to allow for more flexible, understandable and digitally friendly exceptions in our submission the Attorney General’s Department’s issue paper, *Copying photographs and Films in a Different Format for Private Use*. We also raised concerns around the restrictive uses of Technological Protection Measures (TPMs).

In addition to being a consumer advocacy organisation CHOICE is itself a creator of content. CHOICE is primarily funded through the sale of our intellectual property (in the form of articles and product tests) to our members.

1. Fair Use

CHOICE believes there is a strong case for reforming Australia’s copyright law framework as it is currently failing to reflect the behaviours and reasonable expectations of Australian consumers. We support proposals 4-1 to 4-4 in the discussion paper, in particular the inclusion of “private and domestic” in a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses.

We would, however, like to echo the concerns raised in the submission to this discussion paper by the Australian Digital Alliance and the Australian Libraries Copyright Committee over the use of ‘and’ instead of ‘or’ in “private **AND** domestic”. Namely, we are also concerned that ‘and’ may be seen as placing limitations by indicating that a use must be both private and domestic in order to be fair. We also note that all other dual uses in the illustrative list state one ‘or’ the other, not one ‘and’ the other (research **OR** study, criticism **OR** review, parody **OR** satire). We therefore recommend that the ALRC consider changing it to “private **OR** domestic”.

It is important to note that under the fairness factors included in the discussion paper’s proposals, the Fair Use exemptions will **not** apply to pirated material or uses that undermine the ability of creators to be rewarded for their works. Therefore we believe it achieves the right balance between encouraging creation of content through financial incentives, and allowing flexibility for consumers to use content for private and/or domestic purposes.

CHOICE believes that Fair Use will:

* Adequately reflect reasonable uses of copyrighted works, including those already being embraced by consumers.
* Meet consumers’ expectations in how copyrighted works can be used for personal consumption.
* Help consumers better understand their obligations under copyright law.
* Adapt to future developments in consumer behaviour, and encourage innovation to the benefit of consumers.

CHOICE believes that a Fair Use system is best possible outcome of copyright reform for Australian consumers and the Australian economy. If a Fair Use system is not adopted, we share the ALRC’s opinion that a ‘private or domestic’ Fair Dealing exemption should be added. Notwithstanding this, it is our very strong preference that Australia moves to a Fair Use copyright regime.

* 1. Private and domestic use of copyrighted material in Australia

Many reasonable activities that consumers currently engage in may be illegal under current copyright laws, which have struggled to keep up with new technologies such as cloud computing and social media. CHOICE believes that many of these potentially illegal activities are entirely reasonable – both in the perceptions of the majority of Australian consumers, and importantly, in that they do not deny the creators and owners of copyright material a market and fair reward for their goods and services. In fact, there is a strong case to suggest that many of these activities promote the interests of copyright holders, as consumers are more likely to pay for copyright material if they can access it in a timely and flexible manner.

CHOICE recently conducted a nationally representative survey asking consumers how they currently use content they have legally acquired[[1]](#footnote-1). The questions focused on private and/or domestic uses, for example asking consumers if they have made a “digital copy of a DVD or a digital video file” to watch on a device that they own, such as an iPad, smartphone etc.

While survey questions focussed on copyright material that consumers had “**legally obtained**”, -consumers were also asked about illegal activities, such as making a “digital copy of a DVD or a digital video file and putting it online so others could download it.”

The survey found that Australian consumers are in breach of Australian copyright law for uses of content that we believe should be considered reasonable. For example, while putting a digital copy of a DVD online for distribution is obviously not a reasonable use, making digital copy of a DVD on your iPad arguably is.

The survey also measured consumer understanding and attitudes towards the laws around the use of copyrighted works.

CDs and digital audio files

Section 109A of the *Copyright Act* covers exceptions for copying “sound recordings” for private and domestic use. It states that consumers are allowed to copy a recording that they own, if:

…

“(b) the sole purpose of making the later copy is the owner's private and domestic use of the later copy with a device that:

 (i) is a device that can be used to cause sound recordings to be heard; and

(ii) he or she owns”

…

However the exemption talks to a singular ‘copy’ on a ‘device’ not ‘copies’ on ‘devices’. This means that the exception could be considered not to apply to multiple copies for multiple devices, even if they are owned personally by the user.

With the massive proliferation of personal electronics over the past several years, many consumers now consume media across several devices. According to Nielsen, market penetration amongst consumers using the internet increased from 51% to 60% for smartphones, from 18% to 31% for tablet computers and from 13% to 19% for eReaders between 2011 and 2012. Meanwhile, 74% of online Australians consume media on both an internet enabled device and the TV simultaneously, up from 60% in the previous year[[2]](#footnote-2).

CHOICE argues that it is perfectly reasonable for consumers to copy works they have legally acquired to personal devices for personal consumption.

The inflexibility of the current exception means that it has failed to adapt to changing consumer behaviours. For example, based on their responses, **8%** of Australian consumers in our national survey are in violation of 109A of the *Copyright Act* as they have copied a CD or audio file to more than one personally owned device in the last year.

Unsurprisingly, rates are higher among regular consumers of digital content. For example, of the people who had copied, transferred, or converted music/audio content in the – last 12 months, **20%** had copied a CD or audio file to more than one personally owned device.

Consumers who own or use handheld mobile devices (a tablet computer or a smartphone) are more likely than other consumers to have copied a CD or audio file to more than one device. (**25%** and **36%** respectively).

This suggests that as devices become more widespread, we can expect this behaviour to increase.

### DVDs and digital video files

Section 10AA of the *Copyright Act* covers exceptions for copying “cinematograph film” for private use. However, the exemption refers to “videotape” and thus does not apply to either DVDs or digital video files.

This is a major oversight and shortfall in current legislation. Based on their responses, **9%** of Australian consumers in our survey are in violation of the *Copyright Act* as they have copied a DVD or video file to at least one personally owned device.

Meanwhile, **4%** made a copy of a DVD or a digital video file and temporarily loaned the copy to someone in their family or household. Such activity is allowable for sound recordings under section 109A, however once again only applies to “videotapes” and not digital film recordings and files.

Of the people who had copied, transferred, or converted DVD/Video content in the previous 12 months, **33%** have copied a DVD or video file to at least one personally owned device, and **14%** made a copy of a DVD or a digital video file and temporarily loaned the copy to someone in their family or household.

Consumers who own or use handheld mobile devices (a tablet computer, a smartphone or an eBook reader) are also more likely than other consumers, unsurprisingly, to have copied a DVD or video file to at least one device, at **14%**, **11%** and **16%** respectively.

Again, this suggests that as devices become more widespread, we can expect this behaviour to increase.

### Cloud computing

The ALRC stated in the discussion paper, that:

…

“Some of these conditions may mean the exceptions do not apply to copies stored on remote servers in the cloud. For example, the exception for format shifting of sound recordings only applies if the copy is to be used with a device owned by the user. Further, the exception for books, newspapers and periodicals only allows users to make one copy in each format, and storing content in the cloud may require multiple copies”.[[3]](#footnote-3)

…

The inadequacy of current laws to address cloud computing and services is a major focus of this review, as well as many stakeholder submissions. Our survey findings show that the inadequacies of current laws also mean that many consumers are already in breach of the law for this relatively new technology.

**22%** of consumers in our survey are currently using cloud storage services to store copyrighted content, such as music and films, in violation of current copyright laws.

Our survey also asked consumers to give their level of agreement with the statement “I believe that consumers should be able to back up and store any of their digital products, in case they are lost or corrupted.”

An overwhelming **71%** agree that they should be able to back-up digital content, while just **3%** disagree. Agreement is higher amongst the consumers who have copied, transferred, or converted music content in the past 12 months (86%).

While cloud computing serves many purposes, and will no doubt give rise to applications which are as-yet unforseen, clearly backing-up is one of its key uses – and something consumers overwhelmingly believe they have they should have the right to do.

* 1. Social Media

Social media uses can come under a variety of the illustrative purposes. They can be criticism or review, parody, satire or quotation. Some would undoubtedly come under a ‘transformative’ exception, especially the use of ‘memes’ which often use well-known images and apply text to create new meaning and commentary. However the ALRC has recommended including such an exception for illustrative purposes.

CHOICE recognises the concerns raised by John Wiley & Sons Inc[[4]](#footnote-4) that social media services should not be viewed as non-commercial zones, as they are indeed monetised through advertisements and other means. However we believe that the fairness factors will be able to determine when particular uses on social media may or may not be covered by Fair Use.

Fair Use is best equipped to address use of works on social media precisely because it is so nuanced. A rigid set of exceptions or limitations would be ill equipped to find the right balance for the various interests at play, and would be likely to age quickly.

In terms of social media use, a high proportion of Australian consumers (35%) have shared a photo they have taken themselves, followed by 21% who have shared a photo they found online, originally taken by someone they didn’t know. A slightly similar proportion (18%) has shared a photo taken by someone they personally know and 5% of consumers have shared a meme they have created using a meme generator.

However, of the people who posted/shared content on social media in the last 12 months, **10%** of consumers in our survey have shared a meme they had created using a meme generator and **42%** have shared a photo they found online, originally taken by someone they do not know.

Again, this was more than those who had shared a photo taken by someone they personally know (**37%**), and considerably less than those who had shared a photo they had taken themselves (**72%)**.

* 1. Attitudes to private and domestic use

It is clear from the survey results that Australians believe that private and/or domestic uses should be more flexibly allowed than under current laws. This indicates that there is a disconnection between the expectations that consumers have towards copyright law, and the reality of the law as it is today.

Our survey asked Australian consumers to give their level of agreement with the following statements relating to private and domestic use:

1. Once I have bought copyrighted content such as music or video or other content, I believe I should be allowed to make as many digital copies for personal use as I like.
2. Once I have bought copyrighted content such as music or video or other content, I believe I should be allowed to transfer it on to as many devices as I own.

**47%** of consumers agree that they should be able to make uncapped digital copies for personal use, while just **11%** disagree.

Not surprisingly, agreement is higher amongst consumers who have copied, transferred, or converted music (**59%**), movies (**54%**) or both (**56%**) in the past 12 months. The same is also true for consumers who own or use a tablet computer (**51%**), a smartphone (**52%**) or an eBook reader (**51%**) for personal use.

Agreement with the second statement is even higher, with **60%** of consumers agreeing that they should able to transfer content to as many devices as they own, while only **5%** disagree.

Again, agreement is higher amongst the consumers who have copied, transferred, or converted music **(74%)** movies (**64%**) or both (**70%**) in the past 12 months. The same is also true for -consumers who own or use a tablet computer (**65%**), a smartphone (**64%**) or an eBook reader (**69%**) for personal use.

Practices which are disallowed under current law, such as making multiple copies of works for personal use, or consuming works on multiple devices, have large levels of support in the general community. The sort of flexibility provided by a Fair Use system will better meet consumer attitudes and expectations around private and domestic use.

Consumers who own personal devices such as smartphones, tablets and eBook readers are more likely to agree with more flexible private and domestic uses. The same is true for consumers who have copied, transferred, or converted content in the past 12 months.

As these devices and practices become more widespread, we could expect consumer opinion on this issue to strengthen.

* 1. Social Norms

Overwhelming social norms are not in themselves reason to advocate changes to law. Widespread infringing behaviour can be addressed through education for example, not changes to the law.

However, this is different when the law is not allowing behaviour that is not only widespread and largely seen as legitimate, but is also perfectly reasonable. If consumers feel like copyright law is out-of-touch or even unjust, then their respect for it will diminish. This may make it easier for consumers to justify other activities, such as piracy, as they already feel that copyright law is nothing to be taken seriously. This ultimately undermines the rights of copyright owners and also the benefits to consumers of ensuring the creators of copyright material are properly rewarded.

Fair Use will not, of course, allow piracy. However it will give consumers more flexibility for uses that are legitimate, widely seen as such, while still allowing for creators to be rewarded for their works.

As CHOICE argued in 2005 when advocating for Fair Use, “[t]he obvious solution is to legitimise the activities that do little commercial harm (in fact probably deliver various benefits) to harmonise consumer behaviour with legal reality.” [[5]](#footnote-5)

The 2006 amendments to the C*opyright Act* tried to do just this. The discussion paper quoted a statement by then-Attorney General Phillip Ruddock from 19 October 2006. Another quote from parliamentary debates at the time summarises the purpose of the Copyright Amendment Bill (emphasis added):

…

“In conclusion, the Copyright Amendment Bill does introduce significant copyright reforms, but it demonstrates our ongoing commitment to an **effective, world-class, up-to-date copyright regime**. It will ensure our laws take seriously the need to **penalise copyright pirates** for flouting the law, while ensuring that **ordinary consumers are not infringing the law through everyday use of material they have legitimately purchased.**”[[6]](#footnote-6)

…

Therefore, introducing Fair Use will not be the first time copyright law in Australian is reformed to better meet prevailing social norms. In fact, CHOICE believes that a Fair Use system is the best way to achieve the goals that the 2006 amendments set out to accomplish, however is currently failing to achieve.

* 1. What is legal?

CHOICE’s survey asked consumers to identify whether or not particular uses of copyrighted works were legal or illegal. The tables below summarise the responses. They separate the uses into activity which is currently legal, which is currently illegal but may become legal under Fair Use[[7]](#footnote-7), and is currently illegal, and would remain illegal (infringing use).

The survey also asked consumers how confident they felt with their knowledge of Australian copyright law. Only **33%** of Australian consumers said that they agree with the statement “I am confident I know what is legal and not legal when it comes to copyright law and digital content in Australia.”

### Music - what is legal?

**Table One – Music**

|  |  |  |  |
| --- | --- | --- | --- |
| **Music** | **Legal**  | **Illegal** | **Don't Know** |
| Legal  |
|  Making a digital copy to listen on one device that you own | **64%** | 17% | 19% |
| Currently Illegal but potentially legal under proposed Fair Use |
|  Making a digital copy to listen on more than one device that you own | **52%** | 23% | 25% |
| Infringing Use |
|  Making a digital copy and putting it online so that others can download it | 4% | **83%** | 13% |
|  Making one or more physical copies to sell to others | 4% | **86%** | 10% |
|  Making a copy and giving it away to someone you know | 14% | **65%** | 21% |

Key findings:

* Almost two thirds (**64%**) of -consumers **correctly** believe that making a copy of music to listen to on one device is legal.
* Just over half (**52%**) of - consumers **incorrectly** believe that making a copy of music to listen to on more than one device is legal.
* Overwhelmingly, consumers **correctly** identified infringing use as illegal.

### Video – what is legal?

**Table Two- Video**

|  |  |  |  |
| --- | --- | --- | --- |
| **Video** | **Legal**  | **Illegal** | **Don't Know** |
| Legal |
| Watching a foreign DVD on a region free DVD player | **45%** | 16% | 39% |
| Currently Illegal but potentially legal under proposed Fair Use |
| Making a digital copy to watch on one device that you own | **57%** | 19% | 24% |
| Making a digital copy to watch on more than one device that you own | **46%** | 25% | 29% |
| Infringing Use |
| Making a digital copy and putting it online so that others can download it | 5% | **81%** | 14% |
| Making one or more physical copies to sell to others | 3% | **88%** | 8% |
| Making a copy and giving it away to someone you know | 12% | **69%** | 19% |

Key findings:

* Almost half of consumers (**45%)** **correctly** identified watching a DVD of a region-free DVD player as legal. However, there was a significant minority, at **39%**, indicating that they did not know. This suggests there is some confusion on this issue.
* A majority (**57%**) of consumers incorrectly believe that making a copy of a video to watch on a personally owned device is legal.
* Nearly half (**46%**) **incorrectly** believe- that making a copy of a video to watch on more than one device is legal- , while three in ten (29%) were unsure.
* Overwhelmingly, consumers **correctly** identified infringing use as illegal.

### Social Media – what is legal?

Table Three – Social Media

|  |  |  |  |
| --- | --- | --- | --- |
| **Social Media** | **Legal**  | **Illegal** | **Don't Know** |
| Legal  |
| Posting or sharing a picture originally created by someone you know personally | 36% | 24% | **39%** |
| Posting or sharing a picture taken by you | **77%** | 6% | 17% |
| Currently Illegal but potentially legal under proposed Fair Use |
| Posting or sharing a 'meme' you have created using a meme generator | 30% | 10% | **60%** |
| Posting or sharing a picture, originally created by someone you don't know | 19% | **43%** | 38% |

Key findings:

* Four in ten consumers (**39%**) **did not know** whether it is legal to share photos of people you personally know on Social Media. While just over a third (36%) believe it is legal.
* A majority (**77%**) of consumers **correctly** believe that posting or sharing a picture taken by you is legal.
* A majority (**60%**) **did not know** if using a meme generator to create a meme to share on social media was legal or not. This high number probably reflects a lack of knowledge of what a ‘meme’ is, however three times as many consumers thought it was legal (**30%**) than those who thought it was illegal (**10%)**.
* Almost half (**43%**) believe that sharing a photo taken by someone you don’t know is illegal. While this was the most common responses, it was only slightly ahead of ‘don’t know’ at **38%**.

### What is legal? - Implications

Infringing activities create the least confusion for Australian consumers. These activities were the most likely to be correctly identified as illegal by consumers, for example **88%** correctly identified that making one or more physical copies of a DVD or video to sell to others was illegal. Consumers overwhelmingly identified other examples of infringing use as being illegal.

The majority of consumers are also able to correctly identify some uses that are currently legal. For example making a digital copy of music to listen to on a device that you own (**64%**) and posting a picture you have taken on social media (**77%**).

The areas of confusion involve activities which are currently illegal, but will potentially become legal under Fair Use. For example **57%** believe that copying a video to a personally owned device is currently legal, while **60%** did not know if using a meme generator is legal or not.

From these results we can see that consumers do not understand their obligations and rights when it comes to certain private and/or domestic uses in Australia. CHOICE believes the large number of consumers that do not know, or incorrectly identify, the legality of uses which are currently illegal in Australia is evidence of our out-dated and restrictive copyright laws. While consumers were able to correctly identify infringing use and legal use, they were confused, specifically, about uses which are currently illegal, but would be considered “fair” under Fair Use.

A Fair Use system will simplify the law and make it better understood by consumers. This will help them interpret new technologies as they emerge, as well as reflect how they currently perceive copyright law.

Consumers will be able to easily evaluate copyright law by posing questions such as “is this fair”, “what am I using it for”, and “is the creator being rewarded”? To a certain extent, it appears from the results that this is already the lens through which consumers perceive private and/or domestic uses, and social uses, of copyright.

* 1. Trends

Research by Nielsen from 2012 suggests that, based on the stated purchasing intentions, tablet computer market penetration will increase from **31%** to **50%**, smartphone penetration will increase **60%** to **70%**, and eBook reader market penetration will increase from **19%** to **29%** by the end of 2013[[8]](#footnote-8).

This is significant because the results from our survey show that consumers who own or use devices such as smart phones, tablet computers and eBook readers are more likely to:

* Be using legally acquired content in ways which are in breach of the law; and
* To agree that such uses should be legal.

This will also have an impact on the perception of legality because, across the board, consumers are more likely to consider use legal if they themselves are engaging in it. This is even the case for infringing activity.

* 1. Fair Use is more flexible

Fair Use exemptions will provide greater flexibility for consumers to use and consume legal content the way they want, while at the same time still enabling content producers to benefit financially from their works. This includes broader allowances for uses such as format shifting, time shifting and storing/backing up.

Fair Use is also technologically neutral, meaning that fewer revisions will need to be made to the law as technology advances. It therefore also encourages more innovative uses of technology in content delivery and consumption, benefitting consumers and the economy more broadly.

Despite being amended less than 10 years ago, the *Copyright Act* has fundamentally failed to anticipate innovations such as cloud computing. It also inadequately caters for the massive proliferation in personal electronic devices used for personal media consumption.

### Copyright Amendment Act 2006

The *Copyright Amendment Act* of 2006 was in part an initiative which attempted to solve the problems identified above; that copyright law was prohibiting use that was legitimate and common.

However, the *Copyright Amendment Act* has failed in the rigidity of the exemptions, which were out-of-date almost immediately after they passed. Fair Use will effectively solve this issue, as it is far more flexible, allowing for non-infringing use both now and into the future.

For example, as has already been mentioned, the 2006 amendments allowed for the copying of “cinematograph film” for private use. However, because the exemption refers to “videotape” it does not apply to either DVDs or digital video files.

This is despite DVD players having a market penetration of **83%** in Australian households in 2006 – the year the amendments passed[[9]](#footnote-9). The amendments also came a full year after Apple began selling movies and TV shows through its iTunes store[[10]](#footnote-10).

Another example is timeshifting. As Dr Giblin notes in her submission, the 2006 amendments allowing timeshifting came 22 years after the American Supreme Court had made its final ruling on the Sony Betamax; and 30 years after the Betamax was first released. However despite the delay, the amendments still disallow ‘smart’ technologies used for timeshifting[[11]](#footnote-11).

### Innovation and its implications for consumers

Now the Australian government is considering what reforms can be made to accommodate new technologies such as cloud computing. Once again this is occurring well after the technology has been developed, and after it has become widely used in the community.

If the 2006 amendments could not account for DVDs, it is hardly surprising they have failed to address newer technological developments.

It should be fairly obvious that an ad-hoc approach to copyright exceptions is preventing both the development of new technologies in Australia, and the importation of new technologies from other jurisdictions. The legal ambiguity and indeed outright illegality of search engine caches, cloud computing, online time-shifting etc. have meant that these technologies have not organically developed in Australia. Once they are developed, usually in America, they are often released in Australia at a later date and with fewer features – as was the case with TiVo[[12]](#footnote-12). Australian consumers are therefore being denied innovations and products which benefit them.

New products have also had a radical impact of consumer behaviour, which copyright laws have failed to address. An exemption which allows one copy of a music file may be adequate in a context where consumers may only own one digital media device. However when consumers own several such devices, some of which serve additional and unique functions, such exemptions are woefully out of sync with reality.

A Fair Use system will eliminate the need for regular revisions to copyright exceptions to address changes in technologies. This is important for consumers as the experience with this approach so far has revealed that it is ill-equipped to address existing and emerging technologies, let alone adequately anticipate new ones.

* 1. Licensing

Some submissions argued that Fair Use is not needed as business models have been developed to address particular uses. This can be achieved through licensing of use, including private and/or domestic use. CHOICE would disagree with this position for several reasons.

First, the content industry, like Australia’s copyright law, is by and large playing catch-up with changes in technologies and consumer behaviour. Consumers should not have to wait for content producers to figure out how to monetise particular activity after a new technology is produced. The development of the mp3 player enabled consumers to transfer songs from their CDs to their devices for more mobile and convenient listening, something they were empowered to do under Fair Dealing. A technology such as an mp3 player would be unusable if consumers were not allowed to make copies for personal use, and instead had to wait until some sort of licencing scheme was developed.

Second, as the discussion paper argued, few consumers will actually buy a product twice or even pay an additional licensing fee for activity they view as reasonable regardless, such as putting a song on both their smartphone and tablet computer. Attempts to monetise this activity would be resisted by consumers, and would only further erode public trust and respect for copyright law. This would likely increase the appeal of comparatively more flexible (and obviously cheaper) pirated copies – which ultimately is worse for creators and, in the long term, consumers and users as well.

Third, the right of creators to be commercially rewarded for their works is not the same as a right to endless commercial exploitation of a work. Just because a creator *can* charge a consumer to copy a CD to a smartphone doesn’t mean that they have the irrevocable right to do so. Restricting a practise such as this would not undermine the market for the work, as a consumer would have to buy it in the first instance.

This point goes to the issue of balance which is at the heart of copyright. It is important when discussing balance to keep in mind that copyright ownership, by definition, is a monopoly that gives particular companies and/or individuals exclusive rights over a work. As CHOICE argued in 2005, when advocating for Fair Use:

…

“Copyright is essentially a legislatively created and approved monopoly. It is our view that claims of copyright holders must be treated with the justifiable scepticism any prudent observer brings to monopoly. Monopoly tends to produce market failure. This means that any problems lamented by the monopoly holder must be tested to see if they do not stem in whole or in part from market failure or abuse of monopoly power”[[13]](#footnote-13)

…

Some commercialisation of works is of course legitimate, and indeed necessary, for copyright holders. However others could be more accurately described as rent-seeking. If the law is allowing rent-seeking behaviour from copyright holders (which are monopolies) then that is not a compelling argument to maintain currents laws as they are.

The recent inquiry into IT pricing by the House Standing Committee on Infrastructure and Communications acknowledged that the disproportionate power of copyright holders in Australia is currently resulting in poor outcomes for consumers:

…

“This inquiry has heard evidence suggesting that the balance between rights holders and consumers in Australian copyright law has shifted in recent years as a consequence of changes in the way content is delivered, changes in the terms under which content is acquired, and changes in the ways in which consumers are permitted to use the content they have purchased... In the view of some observers the balance has swung in favour of rights holders at the expense of consumers, reducing competition in copyright markets and generating higher prices for copyright material, including through international price discrimination.”[[14]](#footnote-14)

…

In light of these findings the inquiry has recommended reforms to Australian law, including copyright law.

* 1. Third party providers

The role of for-profit third party providers in helping consumers exercise their Fair Use rights is complex. It is because of this complexity that CHOICE would advise against either limitations or allowance to be written into law.

The fairness factors developed by the ALRC are adequate to address the issues of third party providers. It is the flexibility of Fair Use, combined with fairness factors that will be best positioned to assure that:

* Technological innovation is encouraged;
* Consumers benefit from this innovation; and
* The interests of rights holders are protected.
1. Contracting out

CHOICE is encouraged that the discussion paper acknowledges the importance of protecting copyright exceptions from contractual override. However, we believe that a contracting out-provision which only includes selected Fair Use exceptions will undermine Fair Use, and fail to protect the public interest.

The Fair Use exception for private and domestic uses (or any other fair uses other than those specifically allowed for libraries and archives) can effectively be made redundant through contractual provisions. This has the potential to undermine what Fair Use is trying to achieve.

Only subjecting certain uses to protection from contractual override will create hierarchies within the illustrative purposes. This will be to the detriment of the less-privileged uses, as it may create the presumption that they are subject to contractual override.

According to the discussion paper, the list of illustrative purposes “may be thought of as examples of the broad types of uses that may be fair”. However, creating a presumption that certain uses are subject to contractual override while others are not makes some uses more ‘fair’ than others.

In 2005 CHOICE argues that there is “little point in conferring a fair use exception of any variety on consumers if it is not protected from technological or contractual confiscation.”[[15]](#footnote-15) We would like to echo those concerns.

Limitations on contracting out also have support from consumers. Our survey asked consumers to give their level of agreement with the statement “I believe that a contract should not prohibit consumers from using a product or service for purposes which are actually allowed by copyright law”. **49%** of consumers agree with this statement, while only **6%** disagree.

* 1. Terms and Conditions

Products available via digital distribution systems or e-commerce sites in most cases require consumers to ‘accept’ a set of non-negotiable terms and conditions. These can limit a consumer’s right below what they are entitled to under the law, and can afford a greater level of control for the retailer or rights holder.

For example Quickflix’s terms and conditions state:

…

“These rules apply to your access to Content on IP connected Approved Streaming Devices or VOD Approved Streaming Devices ("Approved Devices").

(a) You must be an active Service User prior to accessing the Content.

(b) All Content delivered to Approved Devices will be streamed only and must not be downloaded (save for a temporary buffer required to overcomes variations in stream bandwidth) and must not be transferred between devices.”[[16]](#footnote-16)

…

Would this clause apply to a consumer taking a screen shot for their film review blog? Or for a consumer using a short clip in YouTube video, satirising current political events? Under this clause, could a consumer create a temporary copy to watch later when they are offline and unable to stream?

### Consumer don’t actually read their terms and conditions

Consumers today come into contact with countless terms and conditions, many of which are thousands of words long and beyond an average consumer’s ability to understand. Some popular services at the moment have lengthy terms and conditions, for example iTunes’ terms and conditions are over 14,000 words long[[17]](#footnote-17).

The average consumer however is accepting more than just iTunes’ terms and conditions on a regular basis.

Research conducted in 2008 examined how much time would have to be spent reading the privacy policies of all the websites an average American internet user was likely to visit in a year. It concluded that “reading privacy policies carries costs in time of approximately 201 hours a year, worth about $3,534 annually per American Internet user.”[[18]](#footnote-18)

Since 2008, consumer use of the internet for a variety of purposes has only increased, so these figures are likely to be larger today. While this study looked at Privacy Policies, it nevertheless illustrates that the multitude of lengthy, standard form contracts that consumers come across daily is so great that actually reading all of them would be prohibitive to most consumers.

As a result consumers pay little regard to terms and conditions. Clicking ‘accept’ has almost become second nature. Research from 2011 timed how long 2,500 users spent reading the End User License Agreements of several consumer software products. It found:

…

“**The median time users spent on the license page was only 6 seconds!** Generating a confidence interval around this sample tells us that we can be 95% sure at least 70% of users spend less than 12 seconds on the license page.

Assuming it takes a minimum of two minutes to read the License Agreement (which itself is fast) we can be 95% confident **no more than 8% of users read the License Agreement in full**.”[[19]](#footnote-19)

…

In a context where terms and conditions are rarely read, let alone understood, terms and conditions have the ability to strip users of their Fair Use rights.

Based on forecasts, it appears likely that this issue will only grow. The average Australian smartphone user in 2012 had 27 apps[[20]](#footnote-20) – all of which would have their own terms and conditions. Nielsen research asked consumers who had downloaded apps onto a mobile device how many they had downloaded in the past three months. The average was 8 free apps and 4 paid apps[[21]](#footnote-21).

As consumers begin to own more internet connected devices, they will be subject to more and more terms and conditions.

### Consumer #Outrage – Instagram

A good example of the extent to which consumers have little understanding of the terms and conditions they have accepted was displayed after Instagram changed its terms and conditions late last year.

Many users felt that the changes went too far, and in the outrage that followed Instagram lost half of its active daily users[[22]](#footnote-22). However, few people seemed to notice that the new terms and conditions were very similar to the existing Facebook ones[[23]](#footnote-23).

The backlash that met the changes to Instagram’s terms and conditions was in part due to the considerable coverage the changes received in the media. Once consumers became aware of what was in their terms and conditions they revolted, completely unaware that (at least most of them) had already agreed to similar terms on another service they use: Facebook.

### Australian Consumer Law cannot be relied upon to address contracting out

The discussion paper discussed at length the role that Australian Consumer Law can play in addressing contracting out. It argued that overly restrictive terms and conditions could be considered unfair contract terms under ACL. Therefore, competition and consumer law can address contracting out to some degree.

While it is true that terms and conditions could potentially fit the definition of an ‘unfair contract term’ under ACL, CHOICE is unconvinced that this provides adequate protection. The mere presences of the potential for action against unfair contract terms is not acting as a sufficient deterrent for terms and conditions not to include contracting out provisions. Therefore consumers are still subject to them.

Furthermore, taking action in relation to an unfair contract term is not a quick process for consumers. This is due to a number of barriers, expanded on below. This lack of timely redress is compounded by the fact that some copyrighted works can have short lifespans. For example, renting a movie from an IPTV provider has a short window of around 48 hours or so[[24]](#footnote-24).

As Lynden Griggs, of the University of Tasmania has noted:

…

“For the consumer in an electronic transaction within Australia, the likelihood of pursuing an entity for a breach is unlikely. The economic cost of so doing will make it unviable. The regulator will have a critical role in using its remedial and persuasive powers to redress any perceived imbalances between supplier and buyers”[[25]](#footnote-25)

…

This is not to say there have been no successful actions taken by consumers against unfair terms and conditions in Australia[[26]](#footnote-26). However for many, taking actions against companies, particularly large ones, is not viable. In addition to purely economic concerns, consumers also face other barriers. For example, in NSW, consumers require leave of the Supreme Court before seeking action in relation to unfair contract terms under the NSW Fair Trading Act[[27]](#footnote-27).

However, if contracting out of copyright uses was considered void, consumers would be able to use copyrighted works for Fair Use with confidence that their contract does not prohibit them from doing so, and that if it does they are within their rights to ignore it

It is worth noting that the recent *At what cost? IT pricing and the Australia tax* report by the Standing Committee on Infrastructure and Communications, made a recommendation that terms of service which contract-out a consumers’ right to access geo-blocked (market segmented) content online should be considered void:

…

“**Recommendation 10**

That the Australian Government investigate the feasibility of amending the Competition and Consumer Act so that contracts or terms of service which seek to enforce geoblocking are considered void.”[[28]](#footnote-28)

…

The committee received evidence from variety stakeholders and ultimately concluded that the ACL, as it currently stands, may not be providing adequate protection to consumers from terms of service contracting-out their rights.

* 1. Technological Protection Measures (TPMs)

CHOICE acknowledges that TPMs are not within the scope of this review. However, as the discussion paper mentioned, contracting-out can also be achieved through TPMs which restrict a user’s Fair Use of material.

It is the case that TPMs and terms and conditions that restrict use are intimately linked, and it is extraordinarily difficult to address one without the other. This is reflected in the *At what cost? IT pricing and the Australia tax* report, which included recommendations to change the anti-circumvention provisions in the *Copyright Act* relating to TPM (recommendation 5) as well as exploring potential changes the *Competition and Consumer Act* to address terms of service contacts. Both of these measures address the same consumer problem: geo-blocking.

The OECD Directorate for Science, Technology and Industry Committee for Information, Computer and Communications Policy’s working party on the information economy explained the nexus between contractual override and digital locks:

…

“The authors note how the interplay between restrictive contractual provisions (Terms of Service) and DRM systems in tandem with supporting laws can significantly limit users’ access to and use of digital content. Beyond supporting anti-competitive practices, DRM systems… and DMCA-like laws limit in numerous ways what would in many jurisdictions be potential fair uses, including making copies on additional computers and extracting clips for transformative uses. Moreover, the DRM schemes of online music stores typically limit users’ ability to space-shift and format-shift music for players of their choosing. Similarly, online stores eliminate first sale rights - if applicable to the online environment at all by - contractual or technological means.”[[29]](#footnote-29)

…

The capacity of both TPMs and terms and conditions to deny consumers their Fair Use rights cannot be ignored. CHOICE would strongly recommend that Fair Use be secured from contractual override, and that circumvention of TPMs for Fair Use purposes be specifically exempt from criminal and civil liability.

This is consistent with the historical position of the Australian Government on TPMs. In 2006 the Australian Parliament amended the *Copyright Act* to comply with the AUSFTA requirements; however this came after a Parliamentary inquiry which advised that the legislation should define TPMs in a way that draws a direct connection between access control and the protection of copyrighted works[[30]](#footnote-30). Circumventing TPMs for uses of copyrighted works which are allowed under Fair Use exemptions should be allowed, as the TPM is not protecting against copyright infringement, but against particular uses which consumers have the right to engage in.

### TPM circumvention in Australia

The circumvention of TPMs for some non-infringing uses is currently not allowed under Australian law. As a result, consumers are in breach of the law for acts which would otherwise be permitted under Fair Dealing or Fair Use exemptions. This includes circumventing a TPM to back-up content or to watch it on particular devices.

**6%** of consumers in our survey have ‘removed a digital lock’ to copy content to a device that they owned, while the same amount had done so in order to back their content up. This number increases to **11%** for both when just considering consumers who have copied, transferred, or converted content in the previous 12 months.

Consumers who own or use a tablet computer for personal use are also more likely to have removed a digital lock to copy content to another device (**10%**), or to back up (**9%**). Owners or users of eBook readers are, again, more likely to have removed a digital lock to copy content to another device (**12%**), or to back up (**10%**).

1. Conclusion
2. CHOICE supports a Fair Use system as proposed by the Australian Law Reform Commission in its Discussion Paper. We support the non-exhaustive list of illustrative purposes and fairness factors. However we would advise the illustrative purposes include ‘private **or** domestic’ use instead in ‘private **and** domestic’ use.
3. CHOICE would support the creation of a ‘private or domestic’ Fair Dealing exception in the event that a Fair Use system is not introduced. However, a Fair Use system, as described above, is our clear preference.
4. CHOICE recommends that the Australian Law Reform Commission extend the prohibition of contracting-out to **all** Fair Use exceptions.
1. N = 1000 -Australians who currently use or have content consuming devices, such as desktop computers, laptop computers, tablet computers, smartphones, DVD players etc. for personal use. The online survey was conducted from July 2- July 12, 2013. [↑](#footnote-ref-1)
2. Nielsen, *Australian Connected Consumers Report 2012-2013* [↑](#footnote-ref-2)
3. Australian Law Reform Commission, (2013), “Discussion Paper 79 (DP 79)” [↑](#footnote-ref-3)
4. John Wiley & Sons, *Submission* *239*. [↑](#footnote-ref-4)
5. CHOICE, (2005), *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* [↑](#footnote-ref-5)
6. Ruddock , P., (2006), *House of Representatives Hansard, Wednesday 1 November 2006* [↑](#footnote-ref-6)
7. This is broadly defined, and of course is subject to fairness factors and other consideration. The uses provided on the illustrative list are not necessarily guaranteed to be legitimate in all circumstances, as the ALRC explained in its discussion paper. [↑](#footnote-ref-7)
8. Nielsen, *Australian Connected Consumers Report 2012-2013* [↑](#footnote-ref-8)
9. <http://www.screenaustralia.gov.au/research/statistics/archnmcomphome.aspx> [↑](#footnote-ref-9)
10. <http://www.apple.com/pr/library/2005/10/12Apple-Announces-iTunes-6-With-2-000-Music-Videos-Pixar-Short-Films-Hit-TV-Shows.html> [↑](#footnote-ref-10)
11. Giblin, R., (2013), *Submission 251* [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. CHOICE, (2005), *Fair Use and Other Copyright Exceptions: An Examination of fair use, fair dealing and other exceptions in the Digital Age* [↑](#footnote-ref-13)
14. House Standing Committee on Infrastructure and Communications, (2013), *At What Cost? IT pricing and the Australia tax* [↑](#footnote-ref-14)
15. CHOICE, (2005), *Fair Use and Other Copyright Exceptions: An Examination of fair use, fair dealing and other exceptions in the Digital Age*. [↑](#footnote-ref-15)
16. <http://www.quickflix.com.au/termsandconditions> [↑](#footnote-ref-16)
17. <http://www.apple.com/legal/internet-services/itunes/us/terms.html#SERVICE> [↑](#footnote-ref-17)
18. Crano, L.F., McDonald, A.M., (2008), “The Cost of Reading Privacy Policies”, *A Journal of Law and Policy for the Information Society* [↑](#footnote-ref-18)
19. Sauro, J., (2011), *Do Users Read License Agreements?* [↑](#footnote-ref-19)
20. Google, (May 2012), Our Mobile Planet: Australia [↑](#footnote-ref-20)
21. Nielsen, *Australian Connected Consumers Report 2012-2013* [↑](#footnote-ref-21)
22. Warr, P., (2013), “Instagram loses half its daily users after T&Cs debacle”, <http://www.wired.co.uk/news/archive/2013-01/15/instagram-losing-daily-users> [↑](#footnote-ref-22)
23. Lyneley, M., (2012), “Why the Web Is Freaking Out Over Instagram’s New Terms of Service”, <http://blogs.wsj.com/digits/2012/12/18/why-the-web-is-freaking-out-over-instagrams-new-terms-of-service/> [↑](#footnote-ref-23)
24. For example Quickflix’s ‘pay per play’ offering has a 48 hour window. [↑](#footnote-ref-24)
25. Griggs, L., (2013), “E-Commerce”, Malbon, J., Nottage, L., (eds), *Consumer Law and Policy in Australia and New Zealand* [↑](#footnote-ref-25)
26. Ibid. [↑](#footnote-ref-26)
27. Miller, R.V., (2013), *Miller’s Australian Competition and Consumer Law Annotated*  [↑](#footnote-ref-27)
28. House Standing Committee on Infrastructure and Communications, (2013), *At What Cost? IT pricing and the Australia tax* [↑](#footnote-ref-28)
29. OECD Directorate for Science, Technology and Industry Committee for Information, Computer and Communications Policy - Working Party on the Information Economy, (2005), *Digital Broadband Content: Music* [↑](#footnote-ref-29)
30. Rimmer, M., (2012), “IT Pricing: Copyright Law, Consumer Rights, and Competition Policy” [↑](#footnote-ref-30)