



**A submission in response to the
Australian Law Reform Commission's
Copyright and the Digital Economy
Discussion Paper**

August 2013

Introduction

eBay is pleased to provide this submission to the Australian Law Reform Commission's (**ALRC**) Discussion Paper on Copyright and the Digital Economy (**Discussion Paper**).

As you know, eBay made a submission in November 2012 in response to the ALRC's Issues paper. As we mentioned in that submission:

- eBay is part of eBay, Inc. which includes the following companies: eBay, PayPal, Gumtree and shopping.com.
- eBay is the world's largest online marketplace with more than 100 million active users globally.
- eBay launched operations in Australia in 1999, and connects a diverse and passionate community of individual buyers and sellers, as well as small businesses. It is a platform through which millions of transactions are effected each day but eBay is not involved in the delivery of purchased items.
- eBay's interest in responding to the Issues Paper arises from its unique position as a leader in, and facilitator of, commerce. eBay's annual Online Business Index survey (Survey) found that in 2011, revenue for the top 2,000 eBay.com.au sellers grew by 45%. The Survey also found that sellers are increasingly drawn to, and wish to use, mobile commerce.

In 2012, consumer's bought \$13 billion worth of goods through eBay's mobile devices, more than double 2011's total. This is expected to top \$20 billion in 2013.

Changing Australian copyright law to support and enhance online commerce is not just an issue of interest to eBay, it is an increasingly important issue for all Australian businesses. An authoritative March 2013 industry report found that industry revenue in online retailing in Australia grew by an annualised 24.9% in the five years through 2012-2013, to a total \$10.9 billion and in 2012-13, the industry increased by 17.9%¹.

As previously mentioned:

- eBay supports the protection of intellectual property. eBay is a member of the Owners' Rights Initiative (ORI), a coalition of businesses, associations and organisations with a common aim to protect ownership rights in the United States.
- The ORI operates under the fundamental principle that the ownership of personal property incorporates inherent rights. This is encapsulated in the ORI's central premise that "if you bought it you own it", and should have the right to sell, lend or give away the property you lawfully own.
- eBay recognises that copyright and trademark owners need the tools to protect themselves online and has created the Verified Rights Owners program (**VeRO program**) to help brand-owners inform eBay merchants about their trade marks and copyright material, monitor eBay merchants for infringements, and to make complaints and have offending material removed.
- eBay is also a member of the Anti Counterfeiting Action Group (ACAG). ACAG is an incorporated association of manufacturers, wholesalers and traders of goods who are concerned with the sale of counterfeit products throughout Australia and New Zealand.

eBay was pleased to see many of the issues raised in its submission referred to in the Discussion Paper and addressed by the recommendations of the ALRC. Accordingly, in this submission we focus on only a select number of matters raised by eBay but not addressed

¹ IBIS World Industry Report x0004, Online Shopping in Australia, March 2013

in the Discussion Paper and those matters mentioned in the Discussion Paper of direct relevance to eBay.

Guiding principles

In the summary to Chapter 2 of the Discussion Paper "Framing Principles for Reform", the ALRC comments that "overall, stakeholders agreed about basic principles, but not about how they are to be interpreted or prioritised".

eBay considers that principle number two "Maintaining incentives for the creation of works and other subject matter" is the key objective of copyright. There is no purpose in maintaining a regime of copyright ownership if this objective is not achieved.

The other principle that eBay would give priority is principle number four "providing rules that are flexible and adaptive to new technologies". Copyright is necessarily a complex area of law dealing with concepts of ownership in intangible subject matter. It also has wide application to activities that take place throughout the community and is increasingly important in areas where it has not had direct relevance, as more and more business goes online. Providing rules that are flexible and adaptive is particularly important in these circumstances.

It is far easier for the community and business to come to terms with generally applicable principles than with a complex list of specific exceptions. Providing flexible and adaptive principle-based law offers stability and certainty and reduces the instances where rules designed for one technology or one set of circumstances cannot easily be applied to new technology or an unusual case.

In eBay's view, there will be significant cost savings in adopting a principle-based approach to copyright exceptions because it will make the law more accessible and less dependent on specialist knowledge and analysis. A principle based approach is also likely to reduce the difficulties applying the law to new technologies and services and lessen the need to make ongoing statutory amendments in order to accommodate changing user expectations.

The challenge is to move from the existing law to a principle based approach by building on the existing understanding of key concepts rather than starting from scratch. eBay considers that generally the approach proposed by the ALRC in the formulation of the suggested fair use provision which sets out "fairness factors" together with many familiar "illustrative purposes" is likely to achieve this result.

Matters not addressed by the Discussion Paper

Exhaustion of rights

The Commission does not appear to have addressed the issues raised in our submission to the Issues Paper in relation to the need for a first sale doctrine in Australia.

Exhaustion of rights in copyright after the first sale is a key economic issue that should be considered closely by the ALRC as part of this review. It is a necessary component of the Digital Economy, and it makes sense that the doctrine which applies to the offline environment is made relevant in the online environment.

As stated in our submission on the issues paper:

"The ability of a copyright owner to restrict the transfer of copyright interests as currently permitted under Australian law is a restriction on the ability of an individual or small business to legitimately trade in items of value. It also introduces an onerous enforcement responsibility on intermediaries such as eBay. Removal of this limitation will support and promote diverse markets, preserve value for individuals and government and improve economic efficiency"

Parallel importation

The Commission does not appear to have addressed our submission to the Issues Paper as it related to free trade in authentic goods.

With the rapid increase in online shopping, Australia finds itself in a position where vendors with close proximity to large markets (i.e. those based in Singapore, Hong Kong, the USA and Europe) have a considerable advantage arising from economies of scale and proximity. These advantages apply in relation to the sourcing packing and delivery of online products. As stated in our earlier submission:

"As a global market facilitator, eBay advocates amending the Act to permit importation of any goods created with the authority of the copyright owner. The existing framework is unnecessarily complex, inconsistent and an inappropriate impediment to free trade in legitimate goods."

We respectfully request that the ALRC give consideration to this issue and recommend the removal of all barriers to the importation and sale in Australia of products manufactured under the authority of the legitimate copyright owner.

Fair Use

eBay supports the replacement of "fair dealing" with "fair use" in the Australian Copyright Act 1968 (Act).

eBay does not regard the existing fair dealing rights appearing in the Act as more certain or as involving lower administrative/management costs than fair use. As stated in the by Hely J in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002), upholding Conti J's articulation of the principles at first instance:[1]

"Fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept"; and

^[1] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417.

"Fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of criticism or review or the purpose of reporting news; in short, it must be fair and genuine for the relevant purpose, because fair dealing truth of purpose".

In our submission the existing law includes many of the identified "uncertainties" of moving to fair use but without the ability to adapt to new technologies and the full range of circumstances where unremunerated use of copyright material is both fair and without economic disadvantage to the copyright owner.

The approach suggested by the ALRC whereby there are four "fairness factors" corresponding to Section 107 of the US *Copyright Act* which is moderated by nine illustrative principles, would have substantial benefits beyond those mentioned in the Discussion Paper. For example, there have been a number of cases in the United States where fair use has played an important role in facilitating fair and competitive commerce:

- In the *Bates vs Arizona*, 433U.S.350 (1977) fair use was found in support of comparative advertising.
- In *Consumers Union of USA, Inc. vs. General Signal Corps* 720 4F.2-D 1044, a vacuum manufacturer was permitted to quote from a consumer report on the basis that the reports assessment was "in the interests of accuracy, not piracy"(p 382).
- the copying of advertisements for a product in order to undertake surveys of consumer practices has been found to be fair use.

In each of these US cases the copying of a copyright work served to inform the public and allow the communication of consumer information in a manner which is valuable to the proper operation of the marketplace. eBay believes, that, in this way, moving away from specific categories of fair dealing to the broad "fairness factors" can have a benefit for commerce that goes further than simply improving flexibility or enhancing the accommodation of new technologies

Third Parties

eBay sees the issue of third party liability in the context of its role as an online service provider. As part of delivery services to users eBay hosts and delivers content that has been provided by third parties but does not have the capacity to review and check each item of content. eBay has in place policies that ensure that it does not authorise infringement of copyright and procedures that ensure that it responds appropriately when it is notified of any infringing content.

The service provided by eBay has been successful on a global scale because of the real value that it provides to users. This is possible because responsibility associated with the design and operation of the eBay service and responsibility associated with actions and activities of the users of the service are separated. eBay does not support the approach to this issue suggested by the ALRC. Third parties should not be regarded as "using" copyright works held or processed on behalf of users. Whether or not holding or processing copyright works on behalf of users should not be subject to a fairness test.

In our view, the law should clearly provide that providers of facilities and services by selling physical devices or offering services online do not infringe copyright if they are:

- (a) carrying out task or actions at the direction of a user;
- (b) provide a service that is capable of being used for non-infringing activities; and

(c) are not on notice of the infringing act that is the subject of a claim.

Any copies made by a service provider in these circumstances should be regarded as non-infringing "non-consumptive use" and the question of whether the action of the user is legal or not should be assessed having regard to the rights of the user of the service.

The importance of this issue to online service providers has been recognised by the Commonwealth in the Consultation Paper "Revising the Scope of the Copyright "Safe Harbour Scheme" released by the federal Attorney-General's department in October 2011. That paper proposed expanding the scope of the existing safe harbour scheme for carriage service providers to cover online service providers. In our view, the key element of that proposed reform was the proposal to provide immunity for "acting as conduit" for a third party. We appreciate that the scope of this reference to the ALRC does not include safe harbour schemes. We mention this consultation because it indicates the importance of this issue and, in our view, acceptance that service providers should be able to operate as independently and at arms length with each customer.

Comment on the ALRC Approach

We note that it seems to be by reference to the argument set out above that the ALRC comments at paragraph 5.35 of the Discussion Paper of being "wary of attempts, using new technologies, to avoid the question of whether rights were being exploited at all". With respect, the argument set out above is not about "new technologies", it is about all technology. Also, it is a highly conventional position to make a clear distinction between the provider of a tool or service and the user of that tool or service.

With respect, the approach to third party services suggested by the ALRC in chapter 5, whereby the providers of third party services are subject to a fairness test, has the same defects as the Full Federal court decision in TV Now: it is not technology neutral, it discourages cloud services and in departs from a conventional cause and effect approach to the making of an infringing copy.

Unless a service causes a copy to be made for consumption by the service provider of the underlying creative or expressive purpose of a work, the copying should automatically be regarded as a form of non-consumptive use that is not infringing.

Non-consumptive use

Although eBay supports the introduction of the concept of non-consumptive use into Australian copyright law. it proposes the term be defined to also include "copies made by service providers as part of a technological process of delivering services to a customer or third party".

eBay considers that division 2AA of Part V of the Act could also be deleted if an exception for non-consumptive use (that encompasses all copying in course of providing online services) is introduced.

Private and domestic use

We submit that the ratio of the ALRC's discussion of private and domestic use in chapter 9 is a strong argument for consolidation within "private and domestic use" of the various and many uses of copyright material undertaken in the private context by members of the public.

There are clear inconsistencies between the treatment of format shifting as it applies from analogue to digital format shifting as it should apply from older digital formats to codecs that accommodate newer devices. There is no sensible reason why it should be possible to time shift program content broadcast using the broadcasting services bands but not the same content delivered over the Internet. There are similar issues with the existing limited exception for making backups. The existing right to make a backup copy of computer programs expressed in section 47C of the Act is complex and unacceptably narrow. It is vital in a digital economy that the owners of digital copyright material have the right to protect digital purchases by making backup copies.

In paragraph 9.27 the ALRC quotes the Explanatory Memorandum of the *Copyright Amendment Bill 2006* noting that it says that the failure to recognise common practices such as time shifting and format shifting in the Act "diminishes respect for the Copyright and undermines the credibility of the act".

In our submission, the growth of the digital economy extends this issue much further than time shifting and format shifting. The respect for copyright and the credibility of the Act depend on its ability to accommodate the ordinary use and enjoyment of legally obtained digital material by ordinary members of the public.

Subject to our next following comment, the approach suggested by the ALRC of including "private and domestic use" within the framework of fair use as an illustrative purpose is in our view a practical solution to the difficult problem created by the existing framework.

We suggest that a more detailed consideration of the definition of "private and domestic" is warranted. In particular, the scope of the concept should be made as clear as possible in any amendment to the Act. eBay agrees with the comments quoted in paragraph 9.87 of the Discussion Paper that some online social media uses of digital material should not be regarded as personal and domestic. For example, re-publication of copyright material beyond a close group of immediate friends and family should not be regarded as "personal or domestic". On the other hand the terms "personal or domestic" should not be understood as limited to activities that take place within the home.

Transformative use

eBay agrees with the general thrust of the ALRC's recommendations in relation to transformative use. However eBay has a concern that leaving accommodation of possible future transformative uses to be dealt with within a new fair use exception may present a challenge for Australian law. In essence the ALRC appears to expect that Australian courts will be prepared to consider transformative uses that do not fit within the specific illustrative purposes as possibly fair on some other grounds.

The framing of the illustrative purposes as non-exclusive does permit transformative use to be regarded as fair use but it does not guarantee it. While it is likely that Australian courts would have regard to US jurisprudence in interpreting a possible fair use provision, eBay would prefer a recommendation that provided more guidance to lawmakers.

It seems clear from the ratio of the discussion in chapter 10 of the Discussion Paper that there are good reasons for accommodating transformative uses that do not fall within

existing categories such as parody and satire or criticism and review. A number of examples of these are given in the paper by Pamela Samuelson² quoted by the ALRC.

Broadcasting copyright

eBay supports the recommendation of the ALRC that the definition of "broadcasting services" in the *Broadcasting Services Act 1992 (BSA)* should not define the extent to which broadcast copyright subsists in a transmission to the public.

In our submission, there is no good reason for copyright in electronic communications to be linked to licensing the use of the broadcasting services bands. eBay submits that each of the exceptions listed in the paragraphs following 16.31 of the Discussion Paper should apply to transmissions over the Internet as well as the broadcast made by licensed broadcasters.

Consideration of these broadcast copyright exceptions raises the question of whether and when broadcast copyright should subsist in transmissions over the Internet. It is an anomaly in copyright law that the broadcast of a live sporting event by a radio or television broadcasting licensee is protected by broadcasting copyright but the live transmission over the internet of the same event is not protected.

In eBay's submission the copyright law should be technologically neutral. The party that arranges, selects and makes available a live transmission or program material should enjoy broadcast copyright even if the only means of transmission is over the Internet.

It is less important for broadcast copyright to subsist in transmissions over the Internet of on-demand material because on demand the transmissions are necessarily made from a cinematograph film or sound recording and a right of communication to the public is enjoyed by the owner or licensee making the transmission. We note, however, that a great deal of content broadcast on television and radio is pre-recorded and the overlapping exercise of the communication right in the sound recording or cinematograph film and ownership of the broadcast copyright is not a cause of difficulty. In fact it provides a single legal right for the party making the transmission that can be used to prevent exploitation of the transmission (whatever it may comprise) by third parties.

Accordingly, eBay considers a simple and workable technology neutral amendment to the existing regime would extend broadcast copyright to transmissions of all kinds, whether live or pre-recorded, whether transmitted by radio waves, over the internet or by other means.

Contracting out

eBay does not support the recommendation made by the ALRC in relation to contracting out.

eBay considers that there is no reason to distinguish between different fair use rights or, at least, different "illustrative purposes" that may constitute fair use when determining whether or not a copyright owner should be able to require a user to contract out of a right of fair use.

The essence of fair use is that it provides a mechanism whereby the interests of the user and the public interest can be balanced against the commercial interest of the copyright owner. This mechanism is equally applicable across the range of illustrative purposes.

It appears that the ALRC considers that a limitation on contracting out should not apply to personal and domestic, non-consumptive, educational or public administrative use. In eBay's

² Unbundling Fair Uses -<http://ssrn.com/abstract=1323834> **

view these purposes are of sufficient public or private benefit that they are truly illustrative of likely fair use and should not be discounted or limited by contractual arrangement.

Allowing parties to contract out of statutory right (especially where that statutory right emerges as an “exception” to a prohibition”) is unfair. Further it produces an unfair distortion to the extent that parties who have actually engaged with the copyright owner will have fewer rights than those have not entered into any contractual arrangement with the rights holder. This can't be what is intended. It also creates a disincentive to the parties using legitimate services and/or licensors to obtain access to digital copyright.

Summary

In summary eBay makes the following submissions:

- In order to better accommodate the digital economy, Australian copyright law should provide for exhaustion of rights after first sale and thereby facilitate trading in second hand digital media.
- In order to optimise the benefits of the global digital economy for Australians, Australian copyright law should allow importation and sale of any and all products made with the authority of the copyright owner.
- eBay supports replacing Australia's fair dealing rights and wide range of specific exceptions to the infringement of copyright with a broad based fair use test as described in the Discussion Paper. Necessary to such a transition would be to broadly define non-consumptive use, clearly define personal and domestic use and include a further illustrative purpose of "transformative use"
- Third party service providers should not be solely or jointly responsible for copyright infringements arising from the use of the service they provide even subject to a fairness test. Such an approach is not technology neutral and could delay discourage the location of cloud services in Australia.
- Broadcast copyright should not be limited solely to broadcasting organisations licensed under the broadcasting law. Broadcast copyright should subsist in all audio visual transmissions including those made over the internet and the various exceptions to copyright infringement currently enjoyed by broadcasters should be extended to all parties making audio visual communications electronically.
- Contracting out of statutory copyright exceptions should not be permitted.

eBay Inc.

Sydney August 2013