



Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper

Executive Summary

Innovation is critical to Australia's future productivity

The Internet is transforming all aspects of the Australian and global economies. Deloitte Access Economics (**Deloitte**) estimates that the Australian digital economy could be worth \$139 billion by 2020 (around 7.3% of GDP).

The Internet is also transforming the way content is created, distributed, purchased enjoyed, modified and preserved. Talented filmmakers, bloggers and musicians can make a living out of their creativity in ways that could not have been imagined prior to the rise of social media and video-sharing sites. Screen Australia has recognised that the Internet has become a powerful tool to finance and release niche film projects that would previously not have been conceivable.¹

Copyright is no longer simply an aspect of cultural or creative policy

The innovative technologies that underpin the development of the digital economy depend on making and transmitting multiple copies of content in which copyright subsists, which means they are themselves deeply affected by copyright law. In today's digital world, properly understood, copyright must be a key plank in Australia's innovation policy.

The Productivity Commission has been asked to assess whether Australia's intellectual property (**IP**) system provides appropriate incentives for innovation, investment and the production of creative works, while ensuring it does not unreasonably impede further innovation, competition, investment and access to goods and services. Google submits that Australia's copyright system is negatively impacting innovations, which will impede Australia's capacity to innovate and our goal of becoming a world leading digital economy.

Australia needs dynamic copyright exceptions

¹ Screen Australia, *Issues In Feature Film Distribution* (July 2015) 4.

Innovation is dynamic, not static. In contrast, Australia's copyright exceptions are 'static' - confined to specific purposes and technologies, and not capable of adapting to changes in technologies, consumer uses or business practices. Australia's copyright system arguably prohibits critical technologies and innovative activities from being conducted in Australia, such as:

- basic Internet functions such as system level caching to provide a search engine;
- cloud computing;
- creative and transformative works, such as mashups;
- medical and scientific research, such as text and data mining; and
- various common consumer uses of copyright materials.

Of course, Australia's 'static' exceptions have not stopped Australians from accessing innovative services created by businesses based overseas in countries such as the United States, which have fair use exceptions. Rather, they operate to put Australian businesses at a commercial disadvantage to their overseas counterparts who have greater scope to develop those services.

'Dynamic', flexible exceptions such as fair use are inherently able to adapt to changing technologies and uses without the need for constant legislative intervention.

The Australian Law Reform Commission (**ALRC**) undertook a detailed analysis of Australia's copyright exceptions and found them inadequate and inappropriate for the digital environment. The ALRC recommended that Australia should adopt a flexible fair use copyright exception which adequately reflects the dynamic nature of innovation in the digital economy.

Google believes that the ALRC got it right. There is substantial empirical evidence showing the importance of copyright exceptions to productivity and economic growth.

- A 2015 study by the Lisbon Council found that exceptions "have valuable positive externalities, specifically in the promotion of education, independent research, free-speech, user generated content and text and data mining."² They noted that policy makers often perceived the positive externalities and innovations associated with exceptions to copyright as a trade off with the economic growth driven by strong intellectual property protection, but that the evidence actually suggests that "broad and flexible exceptions to copyright embedded within a strong intellectual property framework may be the best way to achieve both simultaneously".
- A 2012 study examining the introduction of a fair use style exception in Singapore in 2005 found that:

² Ibid 3.

- Flexible fair use policy positively influences growth rates in private copying technology industries.³ Five years after fair use was introduced, this new flexibility was correlated with a 3.33% increase in value-added (as % of GDP) for private copying technology industries.
 - There was no significant change in growth rates for copyright industries⁴ before and after the fair use amendments, when measured in terms of real economic growth (value added as % of GDP). While growth slowed down in absolute terms, the copyright industries continued to grow after fair use was enacted.
 - Fair use amendments in Singapore did not negatively affect the copyright industries significantly because private copying technologies, which experienced high growth as an industry group after the fair use amendments, increased the value of copyrighted works to consumers.
- A 2012 Australian study by Lateral Economics found that industries dependent on copyright exceptions contributed 14% to GDP and employed 21% of the paid workforce. The study found that better crafted exceptions and limitations would assist some of Australia's most globally competitive industries to become even more competitive, without reducing returns to content industries.

Perhaps the best illustration of the difference between static and dynamic exceptions is to compare the situation of a startup based in Australia and a fair use country such as the United States, Israel, South Korea or Singapore:

Fair use v fair dealing

Imagine a startup company has an idea for a new technology, which involves making new uses of copyrighted content.

In the US, a key question the startup needs to ask is: is my use fair?
(assessed against the fair use factors set out in the US Copyright Act, which balance the public interest in encouraging innovative new uses with the rights of creators).

In contrast, in Australia, the startup must ask at least two questions:

1. Does my use fall within any of the static, purpose-based exceptions in the Copyright Act?

³ Private copying technology industries were defined as those industries that manufacture and sell technologies – and related electronic components, infrastructure, and services - that enable consumers to record, store, and transmit copyrighted material for their own personal use. The private copying group includes manufacturers of computers, data processing and peripheral equipment, disk media, storage subsystems, audio and video combination equipment as well as the wholesale and retail sale of computers, peripheral units and recording equipment.

⁴ Copyright industries are defined as those industries whose primary source of revenue are the reproduction, distribution, publication and sale of copyrighted materials, including film, audio and text.

2. If yes, is my use fair?

If the answer to question 1 is 'No', an Australian startup doesn't even get to the question of fairness. The result is that the new use is not permitted, unless they can obtain a licence, regardless of how "fair" it may be, and regardless of how beneficial it may be to creators themselves and society in general.

Critics of fair use sometimes say that fair use is too uncertain. Google submits that in the copyright context, certainty, whilst an important general goal, should not be the sole, or even the most important, goal of the Copyright Act.

Google submits that perfect certainty that a new use cannot proceed can never be the best outcome where the goal of the IP system is to provide appropriate incentives for innovation, investment and the production of creative works while not unreasonably impeding further innovation.

Australia needs adequate safe harbours

Australia has a simple 'safe harbour' system that gives rights holders an efficient way to seek removal of infringing content and rewards online service providers for their assistance by granting legal protections under the scheme. Australia is required by the Australia - United States Free Trade Agreement (**AUSFTA**) to include all online service providers in the scheme. This is the position in the US and other countries where safe harbours have been introduced such as Singapore, South Korea, the UK and other EU countries. However, Australia has only given safe harbour protection to commercial ISPs (namely carriage service providers).

Excluding other online service providers from the safe harbour scheme makes Australia a much more high-risk legal environment for hosting content when compared to countries that have safe harbour schemes with broad application. It also creates an uneven playing field for local innovations, placing them at serious commercial disadvantage when compared to commercial ISPs and global competitors.

A recent UK study by Oxera Consulting on the economic success of startups warned that startups are likely to be held back in regimes where there is no clearly defined and applicable safe harbour.

Accordingly, Google submits that the Productivity Commission should recommend amendments to the Copyright Act to:

1. introduce a dynamic, flexible copyright exception such as fair use; and
2. amend the safe harbour scheme so that it applies to all online service providers, in line with Australia's obligations under the AUSFTA.

Introduction to Google

Google's mission is to organise the world's information and make it universally accessible and useful. Encouraging the creation of information and creative content is essential and complementary to our business. Through products such as Google Search, Google Play, YouTube, Google Books and Blogger we've provided music, video and literary copyright owners and innovators with platforms to reach billions of fans and find new ways to monetise their content.

Our open platforms and services like Android and Google Maps enable other technology developers to create new phones, web services and applications within their own products.

Google has a strong presence in Australia. With over 1,200 people in our Sydney office approximately 50% of whom are software engineers and growing, we're a major engineering centre.

Our YouTube Partner Program enables Australian content producers (large and small) to reach global audiences and directly monetise their content by displaying advertisements and sharing revenue. YouTube has over a billion users globally, almost one-third of all people on the Internet. Everyday people watch hundreds of millions of hours on YouTube and generate billions of views, with 400 hours of video uploaded every minute. There are also millions of partner channels that are making money from YouTube; thousands of channels are earning USD six figures annually. Partner revenue is up 50% year-on-year, for the third year in a row, and the number of channels earning six figures each year on YouTube is up 50% year-on-year.

YouTube is also a significant revenue stream for traditional rights holders. YouTube's Content ID technology allows rights holders to automatically identify user-uploaded videos comprised wholly or partly of their content, and implement a management policy (eg to block, monetise or track usage information about that video). To do this, rights holders upload a reference copy of their copyright material. Content ID then automatically scans user uploads for matches every day (against the equivalent of more than 400 years of video). Content ID represents a thoughtful and eminently practical solution to piracy, as well as a new and growing revenue stream for rights holders. Content ID is good for users as well. By choosing to monetise their content or track user-submitted videos, rights holders allow users to continue to freely remix and upload a wide variety of new creations using existing copyright works.

The majority of Google's 8,000+ Content ID partners select the monetisation option. More than a third of YouTube's monetised views come from Content ID. As of October 2014, YouTube has paid out over USD\$1 billion to rights holders who have chosen to monetise their content using Content ID, including many major network broadcasters, movie studios and record labels — who have claimed over 400 million videos, helping them control their content on YouTube

and make money on videos containing copyrighted material. Google is proud to have developed this technology on its own initiative and at its own expense.

In short, Google, through its own innovative efforts, has created an ecosystem that includes incentives for new Australian creators and existing copyright owners to develop new content, distribute new and existing content and monetise that content, whilst at the same time taking effective steps to combat piracy. And we have done so whilst providing a free service to all Australians.

Part 1 - Innovation is the key to Australia's future productivity

As set out in the Issues Paper, the goal of this review is to ensure that the IP system provides appropriate incentives for innovation, investments and the production of creative works while ensuring it does not unreasonably impede further innovation, competition, investment and access to goods and services.

Figure 2 in the Issues Paper sets out the framework the Productivity Commission proposes to apply to assess the current system against this goal. Google agrees that this is a sensible framework for approaching this large scale review.

In this submission, Google will provide comments against three aspects of the Productivity Commission's framework in relation to the *Copyright Act 1968* (**Copyright Act**). Namely, is the IP system:

- **Effective**
Does it encourage additional IP that would not have occurred otherwise, and provide incentives to ensure that IP is actively disseminated through the economy?
- **Efficient**
Does the system provide incentives for IP to be created at the lowest cost to society?
- **Adaptable**
Is the IP system adaptive to change? (acknowledging that the impact of rigid incentives could have a strong negative impact on society).

In contrast to the goals set out in the Issues Paper and the Terms of Reference, Google submits that Australia's Copyright Act:

- is not efficient or effective - it does not facilitate non commercially harmful consumer and business uses, and prevents innovation from occurring; and
- is not adaptable - Australia's static copyright exceptions are not capable of responding, let alone rapidly responding, to fair and reasonable changes in consumer or business uses or new technological innovations.

This submission will set out in detail the reasons for this view.

1.1 The importance of the Internet to the Australian economy

The transformative power of the Internet and associated technologies (the **Internet**) on the economy cannot be overstated. The Internet has fostered innovation, increased competition and driven productivity and economic growth. It has facilitated unforeseen technological innovations, which have created opportunities that were unimaginable only a short time ago. And it has done so by using an end-to-end approach whereby the lack of a central control allows people to innovate without government approval and in response to consumer and market demands.⁵ Google's approach to innovation is built on the same principle: rather than use closed systems where pre-approval of every new product or use must be consented to, we use open standards, allowing others to build without the requirement for approval and in response to demand.

In Australia, Deloitte estimated that the direct contribution of the Internet to the economy was worth around \$79 billion in 2013/14, equivalent to 5.1% of GDP.⁶ Deloitte also estimated that the digital economy could be worth approximately \$139 billion by 2020 (7.3% of GDP).⁷

The Internet continues to power economic growth around the world. By 2016 there will be 3 billion Internet users globally and the Internet economy will reach \$4.2 trillion in the G20 economies.⁸

When it comes to creative industries, major growth is represented by digital across different sectors:

- from 2014 to 2019, the Australian creative market is expected to register a 1% growth through video (2% GAGR from 14'-19'), music (1% GAGR from 14'-19'), book (2% GAGR from 14'-19') and games (9% GAGR from 14'-19') with the digital side of all creative sectors vividly increasing - from 2010 to 2014 the overall digital creative market increased by 36% and is expected to grow by an additional 12% until 2019;⁹
- In the filmed entertainment market, over-the-top is expected to register the highest growth (22% CAGR from 10' to 19'), while physical home videos are expected to decline (-7% CAGR from 14'-19');¹⁰
- Australia's music industry is witnessing stable growth. The industry stability can be attributed to the 29% increase in digital from 10'-14', that make up for the 14% decrease in physical sales for the same period;¹¹

⁵ See http://coreInternetvalues.org/?page_id=1415

⁶ Deloitte Access Economics, *The Connected Continent II: How digital technology is transforming the Australian economy*, (2015) 11.

⁷ Ibid 45.

⁸ The Boston Consulting Group, *The Internet Economy in the G20*, (2012) 3.

⁹ PWC *Global entertainment and media outlook 2015-2019*, <http://www.pwc.com/gx/en/industries/entertainment-media/outlook.html>

¹⁰ Ibid

¹¹ Ibid

- Australia’s gaming market is expected to grow at 9% annually between 2014 and 2019, fuelled by the 11% CAGR (14’-19’) of Mobile game, 7% CAGR (14’-19’) of Console games, 9% CAGR (14’-19’) of PC games and 12% CAGR (14’-19’) of game advertising. The Games market revenues 2014 to 2019 growth is predicted to come from digital channels with a 13% CAGR(14’-19’);¹² and
- From 2007 to 2013 Australians daily consumption of media (TV, digital, radio and print) increased by 18%. While digital’s 41% growth was the highest, TV, radio and print experienced growth of 13%, 5% and 7% respectively, with Internet contributing to increasing time spent on all media, without reducing time on traditional platforms.¹³

1.2 The importance of the Internet to Australian creators

It is not just the economy that has been transformed by the Internet. Internet infrastructure is a key enabler of the Australian cultural boom. On YouTube, the number of hours of content uploaded in Australia in 2014 grew by 50% year on year. In Australia, YouTube now reaches more 18-54 year olds than any individual TV station.¹⁴

In Australia emerging artists are on the rise thanks to the opportunities brought by the Internet. In fact, 9 out of the top 10 YouTube Australian channels are owned by independent artists including “TroyeSivan18”, “Lauren Curtis” and “MyCupcakeAddiction”, versus only 4 in the US (Smosh, Fine Brothers, Markiplier and CollegeHumor)(as of November 2015).¹⁵

The platforms and monetisation opportunities provided by Internet companies are enabling talented young Australian filmmakers, bloggers and musicians to make a living out of their creative content in ways they could not have imagined prior to the rise of social media and video-sharing sites. Five of them - supported by Screen Australia - had an opportunity earlier this year to showcase their work before global content financiers at the annual MIPTV forum in Cannes:

- Nick Boshier and Connon Van Vuuren (known online as the Bondi Hipsters¹⁶) have (together with fellow Bondi Hipster, Christiaan Van Vuuren) 76,000 subscribers across four YouTube channels and 234 million video views.
- Derek Muller (creator of the educational YouTube science channel, Veritasium¹⁷) has 2.3 million subscribers and 136 million video views.

¹² Ibid

¹³ Statista <http://www.statista.com/statistics/361207/time-spent-media-australia/>

¹⁴ Roy Morgan Research Single Source (Australia): April 2014 – March 2015. Based on TV Networks viewing in the last 7 days, and websites visited in the last 7 days, at the time of the research.

¹⁵ Social blade <http://socialblade.com/youtube/top/country/au/mostsubscribed>

¹⁶ https://www.youtube.com/channel/UCXwQTAwojxNAqalUnm_sDdA

¹⁷ <https://www.youtube.com/user/1veritasium>

- Natalie Tran¹⁸ is the creator of a hugely successful video blog. Her YouTube channel, [communitychannel](https://www.youtube.com/channel/UCKHi7M_11VJmLZSq4WNH5kg),¹⁹ has about 1.7 million subscribers and 536 million video views.
- John Luc (known online as MyChonny²⁰) has 2.25 million YouTube subscribers across five channels.

Screen Australia's chief operating officer, Fiona Cameron, has been reported as holding these five young Australian creators out as role models for emerging filmmakers:

*Australia is a country of just 22 million people ... so if our filmmakers are going to have sustainable careers, it is critical to connect with global audiences. Despite the geographical boundaries, our online content creators are succeeding at this in spades.*²¹

The Internet has also opened up new export and growth opportunities for innovative online businesses wanting to play on a world stage. An average of nearly 80% of a YouTube channel's views come from foreign countries and in terms of Australian created YouTube content, twice as much is watched in the US as in Australia.

Creators of traditional content - for example films and TV dramas - are also benefiting from the opportunities to which the Internet has given rise. A 2014 report into trends in online video use commissioned by Screen Australia²² found that 50 per cent of Australian Internet users watch movies and television content online. The report noted: "For content creators, this means you can find audiences for your content online in addition to the traditional distribution platforms – it's another avenue to reach them". Video-on-demand (**VOD**) platforms are creating opportunities for distributors and producers of Australian content "to connect with existing audiences".²³ They are also creating greater opportunities for creators of niche content. The Screen Australia report noted that:

Movie tastes are more diverse on VOD and on other 'small screens' than at the cinema. VOD, like DVD, has a role in enabling niche content to reach audiences: science fiction and horror both 'over-indexed' on VOD and DVD...

As online shelf space is 'unlimited', there is plenty of room for niche content that may otherwise be in short supply on mainstream platforms. There is potential to tap into

¹⁸ https://www.youtube.com/channel/UCKHi7M_11VJmLZSq4WNH5kg

¹⁹ <http://www.youtube.com/user/communitychannel>

²⁰ <https://www.youtube.com/user/mychonny>

²¹

<http://www.news.com.au/entertainment/the-bondi-hipsters-give-cannes-a-taste-of-their-work-at-the-palais-de-s-festivals-along-with-australias-other-online-stars/news-story/f62cc36c0f4b174d1d570383c7976016>

²² Online and on demand: Trends in Australian online video use

http://www.screenaustralia.gov.au/getmedia/d61a7c4b-3abf-444c-9367-aa8dc8b1b8f6/OnlineOnDemand_2014.pdf

²³ Ibid

*specialised audience demand, target key demographics and use communities of interest to make sure they can find the content they like.*²⁴

In an even more recent report on Issues in Feature Film Distribution,²⁵ Screen Australia reports that new forms of online distribution are “breaking down the barriers between creators and audiences”, creating the capacity to build communities of interest, reducing the power of established gatekeepers, and potentially allowing films to be marketed and distributed to a global marketplace. It says:

*For lower-budget niche films in particular, the Internet has become a powerful tool to finance and release projects that would previously not have been conceivable.*²⁶

1.3 Copyright is a key plank of innovation policy

In any consideration of copyright and innovation it is important to keep in mind that copyright does not just affect the creators of traditional forms of content: it touches every aspect of digital life.

Here are just a few examples:

- every email is the subject of copyright;
- search engines operate by caching (ie copying) copyright works;
- every time a user backs up a mobile phone they are making and transmitting copies of hundreds or thousands of copyright works, both their own and those created by others;
- medical and scientific researchers using text and data mining technologies are engaged in making copies of copyright works.

The innovative digital technologies that facilitate each of these activities depend on making and transmitting copies, which means that they are themselves deeply affected by copyright law. For the first time in history, non-consumptive or everyday activities, occurring billions of times a day throughout the world, give rise to potential copyright liability.

In today’s digital environment, copyright is no longer simply an issue of cultural or creative policy, but rather is a core part of innovation policy. If we want technologies like search engines then we must recognise that they are not possible without making copies of the underlying content. Similarly, if we want our doctors to be able to develop innovative treatments based on the information about how diseases work then we need to recognise that this critical work is made possible by the type of voluminous text and data mining only computers can do.

²⁴ Ibid

²⁵

http://www.screenaustralia.gov.au/getmedia/9598b9f7-321b-45f3-b5e8-7870166487fc/IssuesInFeatureFilmDistribution_2015-07-30.pdf

²⁶ Ibid

The Australian Law Reform Commission (**ALRC**) recognised this in its Copyright and the Digital Economy report:

*Copyright is an essential aspect of innovation in the digital environment. Productivity is lifted by innovation, which includes 'creation of new copyright works and innovation in legal access, distribution, storage and consumption of those works', as well as 'new ways of producing or distributing goods and services' or new ways of managing existing processes to do so.*²⁷

Google submits that law reform must be focussed not just on how copyright law can continue to encourage the creation of additional copyright works, but also on how it can facilitate innovation by creating the regulatory environment that allows for new business models, new ways for consumers to enjoy creative content, new ways to bring content to market, and new ways of advancing knowledge through research.

1.4 Innovation is dynamic

When considering what kind of copyright law will best promote innovation and creativity, it also needs to be kept firmly in mind that innovation and creativity are, by their nature, dynamic rather than static. Digital technology is dramatically transforming the way in which cultural content is created, consumed and distributed. Internet industries are partnering with creative industries to push the boundaries and see what happens when creativity meets technology.

Map My Summer

This was a partnership between YouTube and Screen Australia that saw great innovation in how content is produced in the digital age. We invited users to upload videos (anything from mobile phone footage to a short file) to a web portal that celebrated the collective Australian summer experience. The project involved legendary filmmaker George Miller selecting an upcoming local filmmaker, Amy Gebhardt, to create a short film based on the footage uploaded by users onto the Map My Summer web portal.²⁸

These developments present great opportunities for creators and audiences alike. But if we truly want to encourage creativity and innovation, we need dynamic, flexible copyright laws that reflect their dynamic nature, and which are capable of keeping pace with rapid developments in technology and the expectations of consumers and creators.

²⁷ ALRC, *Copyright and the Digital Economy*, Report 122, November 2013, para 3.10
http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf

²⁸ http://www.screenaustralia.gov.au/news_and_events/2011/mr_110201_mapmysummer.aspx

Part 2 - Reforming Australia's copyright laws to encourage innovation

Australian copyright law is not as effective, efficient or adaptive as it needs to be. Australian copyright law is not effective at promoting innovation - indeed, inflexible copyright laws impede innovation in Australia in two ways: firstly, through the lack of flexible copyright exceptions that provide the breathing space for innovation to occur; and secondly, through the lack of copyright safe harbours that provide legal certainty to innovative digital companies operating online.

2.1 Flexible copyright law provides a breathing space for innovation

In the same way that the Internet drives productivity and economic growth, there is substantial empirical evidence showing the importance of copyright exceptions to productivity and economic growth.

A 2015 study by Brussels-based think tank, the Lisbon Council, examined the relationship between economic growth and intellectual property regimes in some of the world's most innovative economies. Its report - *The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity*²⁹ - found that countries that employ a broadly flexible regime of copyright exceptions had the following features:

- higher rates of growth in value-added output throughout their economy;
- higher growth rates in the publishing, audiovisual and broadcasting industries. (The authors note that this preliminary finding has “deep potential implications given the strong opposition to copyright reform from many incumbent economic interests in these sectors”);
- faster growth in the wider information technology and services sectors; and
- higher levels of compensation in the overall economy, and specifically in information and communication technology goods and services and consumer manufacturing sectors.

The authors also found that broad and flexible copyright exceptions “have valuable positive externalities, specifically in the promotion of education, independent research, free-speech, user generated content and text and data mining.”³⁰ They noted that policy makers often perceived the positive externalities and innovations associated with exceptions to copyright as a **trade off** with the economic growth driven by strong intellectual property protection, but that the evidence actually suggests that “broad and flexible exceptions to copyright embedded within a strong intellectual property framework may be the best way to **achieve both simultaneously**”.

²⁹

<http://www.lisboncouncil.net/publication/publication/122-the-2015-intellectual-property-and-economic-growth-index.html>

³⁰ Ibid p 3

(emphasis added)

A 2012 study by two University of Oxford scholars examined the economic impact on growth and innovation of introducing fair use in Singapore in 2005.³¹ To do this, they sought to measure the impact of that country's new fair use exception on two groups: high tech private copying technology industries, and copyright industries. The authors wanted to know the extent to which implementing fair use or fair use style legislation "stimulates growth in selected high-technology industries and copyright markets".

The results are illuminating. They found that:

- Flexible fair use policy positively influences growth rates in private copying technology industries.³² Five years after fair use was enacted, this new flexibility was correlated with a 3.33% increase in value-added (as % of GDP) for private copying technology industries. Prior to the reform, private copying technology industries were in recession, and were experiencing 1.97% average annual growth. After the changes were introduced, the same industries enjoyed a 10.18% average annual growth rate. This resulted in a total increase of € 2.27 billion in value-added for private copying technology industries in that period.
- There was no significant change in growth rates for copyright industries³³ before and after fair use amendments, when measured in terms of real economic growth (value added as % of GDP). While growth slowed down in absolute terms, the copyright industries continued to grow after fair use was implemented. Moreover, the magnitude of the change was minimal in comparison to the private copying group. The results indicate that the growth rate of copyright industries leveled out after the fair use policy intervention and consequently that the value-added (as % of GDP) of the copyright industry group remained relatively constant over the entire period. While copyright industry growth rates slowed to a limited extent, copyright markets did not experience a significant negative impact.
- Fair use amendments in Singapore did not negatively affect the copyright industries significantly because private copying technologies, which experienced high growth as an

³¹*The Economic Value of Fair Use in Copyright Law. Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore*, Roya Ghafele and Benjamin Gibert https://mpra.ub.uni-muenchen.de/41664/1/MPRA_paper_41664.pdf

³² Private copying technology industries were defined as those industries that manufacture and sell technologies – and related electronic components, infrastructure, and services - that enable consumers to record, store, and transmit copyrighted material for their own personal use. The private copying group includes manufacturers of computers, data processing and peripheral equipment, disk media, storage subsystems, audio and video combination equipment as well as the wholesale and retail sale of computers, peripheral units and recording equipment.

³³ Copyright industries are defined as those industries whose primary source of revenue are the reproduction, distribution, publication and sale of copyrighted materials, including film, audio and text.

industry group after the fair use amendments, increase the value of copyrighted works to consumers.

This study provides strong evidence that flexible copyright exceptions - which provide the breathing space for innovative technologies - attract investment into copying technologies that are highly complementary to copyrighted works.

Consider the VCR

US film studios sued Sony Corp for copyright infringement when the VCR was first released. They argued that consumers using the technology to tape programs off air at home would inevitably infringe copyright.

Fortunately for the film studios, the US Supreme Court found that while some consumers might use the VCR to infringe copying, the innovative new technology could also be used for substantial non-infringing uses, and Sony could therefore rely on fair use.³⁴ While the film studios may have lamented their loss at the time, they benefited enormously from the court's refusal to ban VCRs. As one commentator has noted:

*"...the sale of VCRs in turn facilitated the growth of a vast new and unforeseen market for the movie studios in the rental and sale of videos for home viewing, which, perhaps ironically, became 'the largest source of revenue for the [U.S.] movie industry,' even surpassing box office sales. ...The VCR also facilitated a new market for camcorders and video cameras; sales for these products doubled within a decade. Thus, had Sony been decided the other way, literally billions of dollars in revenue in these three new markets (VCRs, video rentals/sales, and video cameras) might never have materialized— consumer spending on rentals and sales of videotapes and DVDs alone totaled a staggering \$343.2 billion between 1981 and 2006."*³⁵

Further support for the connection between flexible copyright exceptions and innovation comes from a 2011 law and economics analysis of fair use,³⁶ commissioned by the UK Intellectual Property Office for the purposes of the Hargreaves Review of Intellectual Property and Growth. This study, by economics professor Antony Dnes, sought to compare the ability of purpose-based exceptions such as fair dealing, versus flexible exceptions such as fair use, to

³⁴ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)

³⁵ Edward Lee, Technological Fair Use, Southern California Law Review, Vol 83, 797 at 799
http://lawweb.usc.edu/assets/docs/contribute/SCalLRev83_4Lee.pdf

³⁶A Law and Economics Analysis of Fair Use Differences Comparing the US and UK, Antony W. Dnes, 2011
<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/ipreview-doc-j.pdf>

deal with technological innovation. Professor Dnes found that fair use appears to have allowed innovations to emerge rapidly in the US, and also allows innovative practices that may be of high value to consumers without generating significant damage to copyright holders. The example he gave was format shifting, which, at the time he was writing, was not permitted under UK law.

Professor Dnes reported that:

A move to incorporate fair use into UK copyright law could bring in a doctrine of copyright exceptions that would be adjustable by courts as technological developments unfold. An advantage would almost certainly be better response times than those seen recently under a legislative approach in relation to changes such as caching, transformative use, form shifting and reverse engineering.

Flexibility could help in dealing with new technological developments such as the data mining for marketing purposes that is beginning to emerge around the world. Relying on an independent legal system to adjudicate conflicts over IP rights may provide stronger safeguards, for example over privacy or restraint of trade, than relying on the legislative process, which can be seen as more open to political lobbying by special interests. Independence may prove to be extremely important in a world where IP, privacy and competition are increasingly intermingled.

The Australian economy stands to benefit enormously from more flexible copyright law. A 2012 study by Lateral Economics³⁷ found that industries that rely on copyright exceptions and limitations - ie educational and research institutions, Internet search and web hosting providers, and producers of devices allowing individual copying of copyrighted content - were responsible for the following in 2010:

- contributing 14% to Australia's GDP, or \$182 billion;
- employing 21% of our paid workforce, almost 2.4 million people; and
- paying wages and salaries of \$116 billion.

The authors of this study suggest that better crafted limitations and exceptions would assist some of Australia's most globally competitive industries to become even more competitive, without reducing returns to content industries. They note that in 2010:

- Australia made net payments for the use of IP of almost \$3 billion. This deficit has grown by 9% per annum since 2006; and

³⁷ Exceptional Industries: The economic contribution to Australia of industries relying on limitations and exceptions to copyright, John Houghton and Nicholas Gruen, Lateral Economics, 2012
<http://digital.org.au/sites/digital.org.au/files/FINAL%20Exceptional%20Industries%20-%20Lateral%20Economics%20Report%20%28Sept%202012%29.pdf>

- By contrast our exports of services relying on exceptions to copyright, such as education and research, had net exports of almost \$14 billion and growing.

See attachment A for some links to economic studies on the impact of copyright regulations on early stage investment.

2.2 Inflexible copyright law impedes economic growth

The opportunity cost that a high-risk copyright environment has on the level of investment in Internet industries is illustrated starkly in research recently undertaken by Fifth Era on the impact of Internet regulation on local and foreign investment, including in Australia. Fifth Era found that:

- Australian Internet investors view the legal environment as having a negative impact on their funding activities with 90% of the investors surveyed saying it has a modest or strongly negative impact; and
- 80% of Australian Internet investors surveyed said that the risk of secondary liability, where the intermediaries could be held liable for third party content or actions was a significant concern, with 69% saying they were “uncomfortable investing in [such] Internet businesses”.

Further, Fifth Era also found that Australian and overseas investors agree there are many ways in which government can support the local investment environment which would make them willing to invest additional capital in local Internet businesses, including: being open minded about new business models; and promoting open data use.

That research is consistent with previous³⁸ research on US angel investors and venture capitalists and their attitudes toward copyright. Booz & Company found that:

- There would be double the amount of investment interest if there was clearly defined legislation to protect websites acting in good faith;
- Limiting penalties for online service providers acting in good faith expanded the pool of investors by 115%; and
- 81% of investors said that weakened copyright safe harbour rules (which we discuss in section 4 below) would be more likely to slow their investment decisions than would a weakening economy.

These investors require exceptions that are sufficiently flexible to cope with the challenges and opportunities of rapid technological advance, as well as robust and clear safe harbours.

³⁸ La Merle, Matthew, Sarma, Raju, Ahmed, Tashfeen and Pencavel, Christopher, [The Impact of US Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study](#), (Booz & Co, 25 Oct 2011)

2.3 Australia's static copyright exceptions are impeding innovation

As recognised in the Issues Paper, Australia's Copyright Act must ensure the appropriate incentives for innovation, and not unduly impede further innovation, competition, investment and access to goods and services. This is specifically recognised in paragraph 2(c) of the Terms of Reference, which asks the Productivity Commission to recommend changes that would encourage creativity, investment and new innovation without unduly restricting access to technologies and creative works. Australia's static system of copyright exceptions must be updated in order to meet these objectives.

2.3.1 The difference between 'static' and 'dynamic' copyright exceptions

Australia's existing copyright exceptions are "static": they are expressly confined to particular purposes (and in some cases, particular technologies) and are not capable of adapting to changes in technology or business practice. As new technologies and services have emerged over time, it has been necessary for affected groups - including consumers - to advocate for the Copyright Act to be amended to bring the law into line with technology. Inevitably, this takes many years. By way of example, the Australian copyright exception permitting time shifting³⁹ was not enacted in Australia until 22 years after time shifting had been found to be a fair use in the US.⁴⁰ The Australian fair dealing exception for parody and satire⁴¹ was enacted 12 years after these uses were found to amount to fair use in the US.⁴² The Australian exception for reverse engineering of computer programs⁴³ came seven years after this use was found to amount to a fair use in the US.⁴⁴ In a rapidly changing technological environment, static exceptions will always lag behind the current state of innovation. They will only ever be capable of applying to the technologies and uses that were in existence, or anticipated, at the time of their enactment.

Under Australia's static exceptions:

- Consumers can copy a movie they have purchased onto their tablet if it is on videotape, but not if it is on DVD.
- Consumers arguably can't legally backup their computers to the cloud.
- Consumers can copy a song they have purchased to a smartphone or tablet, but arguably not a smartphone and tablet.

³⁹ Copyright Act 1968, s 110AA

⁴⁰ Sony Corp of America v Universal City Studios, Inc (1984) 464 US 417

⁴¹ Copyright Act 1968, ss 41A, 103AA

⁴² Campbell v Acuff-Rose Music Inc (1994) 510 US 569

⁴³ *Copyright Act 1968 s 47D*

⁴⁴ Sega Enterprises v Accolade Inc (1992) 977 F.2d 1510

“Dynamic” exceptions such as fair use, on the other hand, have an inbuilt ability to respond to change. Unlike prescriptive, purpose-based exceptions, they can adapt to changing technologies and uses without the need for legislative intervention. The US fair use exception, for example, has provided the breathing space for technologies that had not even been imagined at the time that the exception was enacted in 1976, including search engines, data mining and text mining, and social media platforms to name just a few. Some countries, for example Singapore, have retained purpose-based fair dealing exceptions (eg fair dealing for the purpose of criticism or review, fair dealing for the purpose of research etc) but have added an open-ended, flexible exception that is capable of adapting to new and unforeseen uses that may not fit within the scope of any of the existing exceptions, and doing so without the need for legislative revision.

No matter how forward thinking or careful legislators are, they cannot predict the future. This has always been true, but the consequences of this truth are more pronounced now because the rapid pace of technological innovation brought about by the Internet and digital tools has radically collapsed the time lines for the development of new and innovative goods and services and business models that support them. Put simply, the most appropriate way for effectively and efficiently regulating in a dynamic environment is through a principles-based approach. Static laws that attempt to establish for all time the rules governing technological and market innovation will inevitably remain permanently out of date and impede innovation.

This is made even more problematic because of the sheer duration of the term of copyright protection in Australia (life of the author plus 70 years), especially when compared to other forms of intellectual property protection such as patents (typically 20 years). And while Australia has been prepared to import additional protections for copyright owners from the US, it has failed to import the flexibility inherent in the US system, leaving our laws one sided and out of date.

This was recognised in 2004 by the Senate Select Committee considering the (then draft) Australia - United States Free Trade Agreement⁴⁵:

3.101 Doctrines exist in both the Australian and United States copyright regimes which allow for exceptions to when copyrighted material may be used without payment of a royalty. In Australia this is known as 'fair dealing', and in the United States it is known as 'fair use'.

3.102 The 'fair use' defence to copyright infringement in the United States operates more broadly than the Australian 'fair dealing' defences to copyright infringement. In Australia, to gain the benefit of the defence, the alleged infringer is required to show that the purpose of their use of copyright material falls within one of those enumerated in the

⁴⁵ Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Final Report, 5 August 2004, pp71-72
http://www.aph.gov.au/binaries/senate/committee/freetrade_ctte/report/final/report.pdf

Copyright Act: criticism and review, research and study, news reporting, or judicial proceedings. However, the defence is not confined to those purposes and there has been much confusion in Australia about the scope of 'fair dealing'.

3.103 In the United States, a non-exhaustive, flexible list of purposes is provided which has allowed United States courts to find 'fair use' for uses such as parody or other transformative use, time-shifting, space-shifting and device-shifting. Simply put, in the United States courts have the power to find new, or unforeseen but economically insignificant uses 'fair'. Australian courts do not have that power.

3.104 The Committee notes that, in 1998, the Copyright Law Review Committee ...recommended 'the expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes ... but is not confined to those purposes'. However, this recommendation has not been adopted in Australian law. As a result, under the AUSFTA, Australian users of information will have more restricted access to copyright material than users in the United States due to the higher standards of copyright protection overall and the lesser usage rights available. [footnotes omitted]

A good example of how dynamic exceptions accommodate innovation in a way that static exceptions cannot is the Google Books service.⁴⁶ Google set out to make the world's books searchable online. That involved digitizing (ie copying) millions of books in order to create a searchable catalogue. If the book that a user is searching for (or that they discover without ever knowing that it actually existed!) is no longer in copyright, then they will be able view the entire book. Otherwise, Google Books only displays a few snippets of the text to show where the user's search term appears in the book, along with a few sentences for context. The service provides a benefit not only to users, but also to copyright owners, by referring users to places where they can purchase books, and libraries where they can borrow them.

Google was only able to create a service of this kind because of the US fair use exception. In October this year, the US Second Circuit Court of Appeals held that the Google Books service was protected by fair use.⁴⁷ This decision upheld an earlier finding by a US District Court judge.

The ALRC handed down its Copyright and the Digital Economy report shortly after the District Court decision. It said:

*There will no doubt be much debate about this landmark decision. But one thing seems clear to the ALRC: **with a fair use exception, the right questions could be asked. Is***

⁴⁶ <https://books.google.com.au/>

⁴⁷

http://www.ca2.uscourts.gov/decisions/isysquery/94107e44-ed50-4b3a-be09-aa73f8e662b5/1/doc/13-4829_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/94107e44-ed50-4b3a-be09-aa73f8e662b5/1/hilite/

this fair? Does this use unfairly harm the interests of rights holders? Is the use for a public benefit, and is it transformative? ⁴⁸

Contrast this with the questions that would now be raised under Australian copyright law. Was Google using this service for its own research or study, criticism or review, parody or satire, or to report the news? Was this private format shifting, and if so, were copies stored on more than one device? (emphasis added)

The ALRC said that the decision highlighted two problems with Australian law:

First, it does not permit, without possibly unobtainable licences, what many would consider a service of great social and economic value. More importantly, Australian law does not even allow the right questions to be asked to determine whether a service such as this infringes copyright.

Of course this has not stopped Australians accessing innovative services created by businesses based overseas in countries that have fair use exceptions such as the United States. Rather, it has just stopped Australian businesses from developing such products, leaving them at a major commercial disadvantage to their overseas counterparts.

2.3.2 What innovation is being blocked in Australia?

It's not just projects like Google Books that are blocked in Australia by existing copyright law. Each and every day, static exceptions are impeding innovation, creativity and research in Australia in at least the following ways:

- ***Static exceptions provide inadequate protection for basic Internet functions***

Search engines work by using automated 'web crawlers' that find and make copies of websites on the Internet. These copies are then stored on the search engine's cache, allowing information within the pages to be found by users. Search engines also provide a snippet of information from relevant websites so that users can decide which sites to access. Many also provide a cached copy of the web page. In many ways, this is quite similar to the function and purpose performed by a library card catalogue. The difference is that a search engine's ability to search across images, video, music, and other content involves making a copy of that content first.

Search engines and other indexing tools are essential to making sense of the vast amount of information available online. If you were to ask most Australians today whether they could get through a day without using web search, the answer would be "no". The ability to search leads to significant economic benefits across the economy. A 2015 report by Deloitte found that the

⁴⁸ ALRC *Copyright and the Digital Economy* report p 23

ability to search for information more efficiently on the Internet was estimated to be worth \$8.4 billion per annum.⁴⁹

Despite this, there is **no** exception in Australia that clearly applies to all activities that would be undertaken by an Australian search engine, such as caching. This is the kind of technology and innovation that copyright should be *fostering*, not blocking. It is quite possible that if Google was invented in Australia, it could have been shut down in its early days due to the lack of a flexible copyright exception. This is a point that Google has made before in other jurisdictions, including in the United Kingdom, where Prime Minister David Cameron noted in a speech:

*"The founders of Google have said they could never have started their company in Britain," Cameron said. "The service they provide depends on taking a snapshot of all the content on the Internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States. Over there, they have what are called 'fair-use' provisions, which some people believe gives companies more breathing space to create new products and services."*⁵⁰

- **Static exceptions are standing in the way of cloud computing in Australia**

Cloud computing is a way for people to use Internet services over any device anywhere they can connect. In its submission to the ALRC's Copyright and the Digital Economy review, the Australian Consumer and Competition Commission said that *"innovation in services, such as cloud services, are important to the emergence and sustainability of competitive digital services industries"*.⁵¹

The Department of Communications also highlighted the importance of cloud services in its recent Cloud Computing Regulatory Stock Take report.⁵² This report noted that cloud technology could be especially transformative for small businesses because they may lack access to capital for ICT investment and may lack ICT expertise.⁵³ And yet, despite these clear benefits, adoption of cloud computing in Australia has been more limited compared to other OECD countries.⁵⁴

Significantly, the Department of Communication's cloud services "stock take" identified copyright as a roadblock to cloud computing in Australia. This is because cloud computing - which

⁴⁹ Deloitte Access Economics, The Connected Continent II: How digital technology is transforming the Australian economy, March 2015, p35
<https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-connected-continent-ii-2015-300315.pdf>

⁵⁰ <http://arstechnica.com/tech-policy/2010/11/prime-minister-uk-needs-us-style-fair-use-to-spur-innovation/>

⁵¹ ACCC, Submission 658

⁵² Cloud Computing Regulatory Stock Take Report, June 2014
<https://www.communications.gov.au/file/420/download?token=r9MuQloV>

⁵³ Ibid p 7

⁵⁴ Ibid

involves access, use and storage of copyright works - inevitably results in copies being made, potentially giving rise to copyright issues for both users and providers of cloud services. The Department noted the current legal uncertainty regarding the copyright status of many cloud-based services:

The extent to which the exceptions under the Copyright Act may apply to cloud services is unclear and will depend on the specific facts of the case, including the manner in which the cloud service is configured and used. ...The ALRC has noted that it is unclear whether the current law enables backups of copyright material to be copied and downloaded from remote cloud servers.⁵⁵

The Department of Communications report noted that recent cases, including *National Rugby League Investments Pty Ltd v SingTel Optus Pty Ltd* (the **Optus TV Now case**)⁵⁶, have given rise to growing concerns regarding the risk that inflexible exceptions pose to innovation in cloud services in Australia:

Submissions to the ALRC inquiry have raised concerns with the existing exceptions, particularly in light of the Optus TV Now case, potentially inhibiting innovation in the growth and delivery of services that allow improved ways of consumers accessing copyright material. Some submissions showed support for a fair use exception to specifically address caching and indexing functions. For example, Optus noted that much of the traffic in data centres involves copying and backing up data, which may currently amount to an infringement of copyright law. ...The Law Council of Australia indicated that the existing treatment of caching under copyright law has resulted in 'several overlapping, but distinct provisions aimed at the same basic phenomenon and offering only partial and uncertain protection'.⁵⁷

The ALRC said that while it was not clear whether the Optus TV Now service would be found to be fair use or not - particularly without properly considering the potential for harm to rights holders' markets - a flexible exception to copyright, such as fair use, would

...allow the right questions to be asked of a third party use, and should make Australia more fit for a digital age in which remote cloud technologies are becoming increasingly common.⁵⁸

Copyright regulatory settings can have significant impact on technology investment. A recent

⁵⁵ Ibid

⁵⁶ [2012] FCAFC 59

⁵⁷ *Cloud Computing Regulatory Stock Take Report*, June 2014, p 18
<https://www.communications.gov.au/file/420/download?token=r9MuQloV>

⁵⁸ ALRC *Copyright and the Digital Economy* report para 7.26

Harvard Business School study⁵⁹ assessed the economic impact of copyright case law involving cloud computing technologies. The study found that there was evidence of additional investment in US cloud computing firms following the Cartoon Network⁶⁰ decision, with estimates ranging from US\$728 million to approximately US\$1.3 billion over the two-and-a-half years following the decision.⁶¹ By contrast, the same study found that venture capital investment in cloud computing firms declined in France and Germany, relative to the rest of the EU, after court decisions in France and Germany which were less favourable to cloud computing firms.⁶²

- ***Static exceptions are blocking creative and transformative uses of copyright works, such as mashups***

The Web 2.0 environment has driven untold individual creativity. User-generated content hosting services - such as YouTube, Daily Motion, Vimeo, and similar sites - have led to an explosive growth of “remix culture”.⁶³ This profusion covers the gamut from videos of infants intended for sharing within family circles to the political expressions that were an important catalyst for the revolutionaries involved in the Arab Spring uprisings.

Much of this content involves “remixing” existing copyrighted materials - whether excerpts from TV news programs, movies, or popular music - woven creatively together with original user generated content. In our increasingly media-saturated age, it is more and more natural for individuals to create “mashups” or “remixes” of the media around them for expressive purposes. Digital tools have made this possible. We must make sure that digital laws do not ban it.

While some of these creative acts would be permitted by existing fair dealing exceptions,⁶⁴ many would not. As a result, transformative creative uses of existing material may be unduly hampered in Australia.

- ***Static exceptions ‘are blocking medical and scientific research, including through data mining and text mining***

Another valuable new technology that is being blocked by copyright law in Australia is text and data mining (**TDM**). This technology is transforming scientific research, as well as research in the humanities, by enabling automated searches of vast quantities of text and data to look for

⁵⁹ Lerner, Josh, and Greg Rafert. *Lost in the Clouds: The Impact of Copyright Scope on Investment in Cloud Computing Ventures*. 2012

⁶⁰ *Cartoon Network, LP v. CSC Holdings*, 536 F.3d 121 [2d Cir. 2008]. In this decision, the US Second Circuit Court of Appeals accepted that a cloud-based digital video recorder did not infringe copyright.

⁶¹ *Lost in the Clouds*, p3

⁶² *Lost in the Clouds*, p4

⁶³ See Catherine Latterell, *Remix: Reading and Composing Culture (2d edition, 2013, Bedford/St. Martin’s Press)*.

⁶⁴ Such as the criticism and review fair dealing exception in ss 41 and 103A of the Act and the parody and satire fair dealing exception in ss 41A and 103AA of the Act

patterns, trends and other useful information. The data such technology can uncover has been described as the 'crude oil' of the digital age. A recent article on this issue from the Lisbon Council has highlighted the impacts from EU law lagging behind in addressing text and data mining, and concluding: "Europe's current weakness in this area could have long-lasting repercussions."⁶⁵

A report by the UK Joint Information System Committee found that the benefits of data mining and text mining include:

*...increased researcher efficiency; unlocking hidden information and developing new knowledge; exploring new horizons; improved research and evidence base; and improving the research process and quality. Broader economic and societal benefits include cost savings and productivity gains, innovative new service development, new business models and new medical treatments.*⁶⁶

Liber, Europe's largest network of research libraries with over 400 members, has observed:

TDM will increase the progress of science exponentially. It has the potential to facilitate the discovery of cures for diseases such as cancer and Parkinson's. It has already been used to discover how existing drugs can be used to treat other conditions. It will also act as a foundation for innovation and new industry.

*For libraries, who provide access to a growing amount of scientific content, it means that the researchers we support will be able to fully realise the value of the content we hold. This will, in turn, ensure a more rigorous approach to research, including more thorough reviews of the literature.*⁶⁷

Those findings apply equally to Australia.

But text and data mining involves making a digital copy of the content that is to be automatically analysed, and thus is impacted by copyright. It is arguable that much potentially valuable data and text mining would infringe copyright if undertaken in Australia. This will often be the case even where the person or entity doing the mining has obtained a general licence to use the content that is being mined: many commercial content licences are either silent on the question of whether text or data mining is a permitted activity or they expressly prohibit such mining.

⁶⁵ See Sergey Fillipov, Mapping Text and Data Mining in Academic and Research Communities in Europe (2014) <http://www.innovationeconomics.net/component/attachments/attachments.html?id=285&task=view>

⁶⁶ Joint Information System Committee, *The Value and Benefits of Text Mining to UK Further and Higher Education*, 2012

⁶⁷ <http://libereurope.eu/wp-content/uploads/Text%20and%20Data%20Mining%20Factsheet.pdf>

The ALRC recognised the potential benefits of ensuring that our copyright exceptions are sufficiently flexible to enable Australian researchers, and industry, to make full use of innovative text and data mining technologies:

*At the commercial level, the ability to extract value from data is an increasingly important feature of the digital economy. For example, the McKinsey Global Institute suggests that data has the potential to generate significant financial value across commercial and other sectors, and become a key basis of competition, underpinning new waves of productivity growth and innovation.*⁶⁸

The ALRC said that non-consumptive uses such as data mining and text mining were best dealt with under a flexible exception such as fair use. Google agrees with this.

Importantly, the ALRC rejected calls from some submitters to expressly limit a text and data mining exception to non-commercial uses. Under a flexible exception such as fair use, the commercial or non-commercial nature of the use would be just one factor to have regard to when determining whether the use was fair. Google submits that there is no policy justification for limiting a text and data mining exception to non-commercial activities.

In its *Boosting the Commercial Returns from Research* discussion paper⁶⁹ in late 2014 the Government acknowledged that better translation of research into commercial outcomes is “a key part of building our capacity for innovation, which will grow successful Australian businesses and boost productivity and exports”. There are clear public benefits to ensuring that Australian innovators can take advantage of cutting edge technologies of this kind, regardless of whether this occurs within the confines of a university or other public research institution, or in the private sector. Copyright should not stand in the way of innovative commercial uses that satisfy a fairness touchstone such as that set out in the US fair use exception.

- ***Static exceptions do not recognise common consumer uses of copyright materials and impose unnecessary technical restrictions***

There is currently a very real disconnect between the law and practices that are both ubiquitous and unlikely to harm copyright owners, and this is bringing copyright law into disrepute. The copyright system is undermined when millions of citizens are daily, often unwittingly, breaching copyright law without consequence.

Former Attorney-General The Hon Philip Ruddock MP acknowledged this ‘law-reality gap’ in the Second Reading Speech on the Copyright Amendment Bill 2006:⁷⁰

⁶⁸ ALRC Copyright and the Digital Economy report, para 11.58

⁶⁹ <http://www.education.gov.au/news/discussion-paper-boosting-commercial-returns-research-released>

⁷⁰ The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, House of Representatives Hansard (19 October 2006),

... the Copyright Amendment Bill ... 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 that they have legitimately purchased.

While the 2006 reforms did go some way towards ensuring that ordinary Australians were not infringing copyright laws through commonplace uses of copyright materials, these reforms also highlight the dangers of technology specific exceptions and how quickly purpose based exceptions can become out of date in a digital environment. Although the Bill did introduce format shifting and time shifting rights for some types of copyright content, the provisions are complex and extremely technology specific. For example:

Section 110AA of the Copyright Act permits a consumer to format shift a cinematograph film in a videotape format only. In contrast, s.109A allows format shifting of sound recordings in all formats.

This means that Australian consumers can format shift music from CDs onto their smartphones and tablets but not films from DVDs. How is an ordinary Australian consumer expected to know that putting music onto a tablet is acceptable but putting films onto the same tablet is not? And on what possible policy basis should these two copyright works be treated differently from one another?

As we have discussed above, Australia's format shifting provisions do not recognise the development of cloud storage services, which enable consumers to store legitimately purchased content in the cloud and then access this content through a range of devices of their choosing. Similarly, Australians are allowed to make backup copies of computer software they have purchased,⁷¹ but arguably not backup copies of digital media such as sound recordings or films.

Compare this situation in Australia to the one in the US, which has a more flexible copyright law. In the US, fair use effectively operates as an innovation policy within the copyright system by creating the breathing space for private copying technologies such as Apple's iPod and TiVo's DVR that help consumers get more from legitimate content that they have already purchased without harming right holders' economic interests.

Part 3 - The case for a dynamic exception in Australia

The Terms of Reference recognise that the global economy and technology are changing. Parts 1 and 2 of this submission have highlighted the transformative effects of the Internet on creativity and innovation, and shown the ways in which Australia's Copyright Act is failing to keep up with this explosive period of dynamic innovation. The terms of reference also

⁷¹ Section 47C of the Copyright Act

acknowledge that there have been corresponding increases in the scope and duration of copyright protection over this time.

Against this background, the ALRC was asked to examine whether Australia's copyright exceptions had kept pace with these changes in technology and expanded scope of copyright protection, and to determine whether Australia's copyright exceptions remained effective and appropriate in the digital environment. The ALRC in its in-depth examination found that the answer to this question was no, and recommended that Australia introduce a flexible fair use exception. Google believes that the ALRC got it right.

Google submits that the only way that Australian copyright law can achieve the Productivity Commission's goal of ensuring appropriate incentives for innovation, investment and the production of creative works while ensuring it does not unreasonably impede further innovation and investment, is by amending the Copyright Act to introduce a flexible exception like fair use.

Google believes that in order to promote innovation and creativity, Australia should adopt copyright exceptions that allow the market, new technologies and new creativity to evolve. Australia needs not only technologically neutral copyright protections, but also dynamic, technology-neutral exceptions that allow new, legitimate uses of copyright and services to evolve as technology evolves.

It would, of course, be possible to enact new purpose based exceptions to solve some of the problems of today, but this would do little to encourage the innovation of tomorrow that is so essential to a thriving digital economy. Google submits that this approach alone would not be consistent with the requirement in the Terms of Reference to ensure that the IP system does not unreasonably impede further innovation.

A fair use exception of the kind recommended by the ALRC is one example of a dynamic, flexible exception. Fair use is an integral part of the US copyright system, and has led to an explosion in Internet based creativity and innovation, and encouraged investment in Internet infrastructure.⁷² However there are other models for flexible copyright exceptions that have been adopted internationally. The name or label is less relevant. What matters is that the exception be dynamic and able to flexibly respond to new technologies and uses. Static laws are appropriate for static situations. Innovation and creativity are by their very nature dynamic.

New online services like Google, YouTube, Facebook, Twitter and Flickr may not have emerged had the copyright law not been sufficiently flexible to accommodate uses that could not have been predicted in advance by even the wisest policy makers. Flexible exceptions allow copyright to "think on its feet". They enable courts to respond to technological advancements - without the need for further legislative law making - by applying a clearly articulated set of factors to allow uses that are fair and comply with those factors. At the same time, the

⁷² See the discussion above regarding the research undertaken by Josh Lerner and Booz & Company

legislature remains free to revisit fair use determinations that it believes need modification.

For example, the following inventive activities have been found to be a 'fair use' in the United States where it is arguable that they would not be permitted, or would otherwise be only permitted on a more constrained basis in Australia:

- Making local cache reproductions (browser copies);⁷³
- Search engine reproduction in search databases of images and text crawled on the world wide web;⁷⁴
- Time and space shifting of video for later viewing on the same or different device;⁷⁵
- Intermediate copying to discover ideas or other unprotectable elements so long as the end result of the intermediate copying is the development of a non-infringing work;⁷⁶
- Text and data mining;⁷⁷
- Remixed works;⁷⁸
- Use of works in litigation or before government agencies;⁷⁹
- Fortuitous or incidental reproduction especially in news reports (a use that could just as easily be regarded as de minimis);⁸⁰ and
- Uses in political contexts.⁸¹

As mentioned above, there are other models for injecting flexibility into copyright law. One model is that adopted in Singapore, where the existing purpose-based fair dealing exceptions were retained, but a new, flexible, open-ended exception was added in 2005.⁸² A similar model to this was recommended by the Australian Copyright Law Review Committee (**CLRC**)⁸³ in 1998; ie, an open-ended flexible exception that refers to the existing fair dealing purposes but is also expressed as being available for "any" purpose that satisfies a list of fairness criteria to be set out in the Copyright Act. The CLRC considered that its model was 'sufficiently flexible to accommodate new uses that may emerge with future technological developments' and that it also contained 'enough detail to provide valuable guidance to both copyright owners and users'.

⁸⁴

⁷³ *Perfect 10 Inc v Amazon.com Inc* 487 F.3d 701 (9th Cir 2007)

⁷⁴ *Perfect 10 v Amazon*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v Arriba Soft* 336 F.3d 811 (9th Cir 2003); *Field v Google* 412 F. Supp 2d 1106 (D. Nev 2006)

⁷⁵ *Sony Corp of Am v Universal City Studios* 464 US 417 (1984); *Recording Indus .Ass'n of Am. v Diamond Multimedia Sys.* 180 F.3d 1072, 1079 (9th Cir 1999)

⁷⁶ *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992)

⁷⁷ *A.V. ex rel Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009)

⁷⁸ *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

⁷⁹ *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982)

⁸⁰ *Italian Book Corp.v. ABC*, 458 F.Supp. 65 (S.D.N.Y. 1978)

⁸¹ *Mastercard International Inc. v. Nader 2000 Primary Committee*, 2004 Westlaw 434404 (S.D.N.Y. March 8, 2004)

⁸² Singapore Copyright Act, Section 35

⁸³ Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998)

⁸⁴ *Ibid* para 6.08

In its Copyright and the Digital Economy report, the ALRC asks whether Australia would have been better placed to participate in the growth of the nascent digital economy had fair use been enacted back in 1998 as was urged by the CLRC.⁸⁵

We'll never know the answer to that question for sure, but it's a fair bet that the answer would be "yes".

Google submits that the precise model for injecting flexibility into the Copyright Act is less important than its function; ie that it is flexible and dynamic. A flexible and dynamic exception that is fit for purpose in a digital environment is one that provides breathing room for innovation and new uses while ensuring that rights holder's legitimate interests are protected.

3.1 Creative industries thrive under dynamic exceptions

Creators have nothing to fear from flexible, dynamic copyright exceptions. On the contrary, a 2014 report on the health of the US content industries⁸⁶ found that there has been an explosion in creative output in the US over the past couple of decades:

While the nature of the various industries may have changed, the simple, undeniable fact is that there is a cornucopia of amazing new content being produced, consumed, shared and monetized in the United States.⁸⁷

The authors of this report note that much of what is happening is directly related to technological progress and innovation: new platforms, tools and services are enabling cheaper, easier and better ways to create, distribute, and promote content, and to make a living from it. They acknowledge that legacy players may be facing some challenges in adapting to the changed landscape, but make the point that those who embrace the benefits that technological innovation has to offer - new platforms and ways to monetise content - are "learning how to thrive as well".⁸⁸

A really important point to emerge from this report is that framing copyright debates as being about the technology industry "against" the content industry is to miss the point that the two industries are intertwined:

...innovation and improvements in technology [are] opening up tremendous new opportunities for creators, for the public and for those who serve both. There is little indication that anything on that front has changed. If anything, the increasing level of

⁸⁵ ALRC *Copyright and the Digital Economy* report para 4.25

⁸⁶The Sky is Rising, Michael Masnick, Michael Ho, Joyce Hung and Leigh Beadon, October 2014 <https://www.cciianet.org/wp-content/uploads/2014/10/Sky-Is-Rising-2014.pdf>

⁸⁷ Ibid p 4

⁸⁸ Ibid p 5

*innovation appears to have been a huge boon for the public and many content creators.*⁸⁹

It's also worth noting that one of the most successful global content players - the US motion picture industry - recently hit back at claims that it was "against fair use".⁹⁰ The Motion Picture Association of America (MPAA) says that its members

"rely on the fair use doctrine every day when producing their movies and television shows – especially those that involve parody and news and documentary programs".

The MPAA says that it is also routine for its members to rely on fair use - successfully - in court.

3.2 Dynamic copyright exceptions are efficient

One of the questions asked by the Productivity Commission in relation to Australia's copyright system is:

Are Australia's copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators? Does the degree of certainty vary for businesses relative to individual users?⁹¹

In addition, paragraph 2(c) of the Terms of Reference for this review asks the Commission to recommend changes to the current IP system that:

provide greater certainty to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others.

As previously noted, Google submits that in the copyright context, certainty whilst an important general goal should not be the sole, or even the most important, goal of the Copyright Act. Google submits that the general blanket prohibition on new uses can never be the best outcome where the goal of the IP system is to provide appropriate incentives for innovation, investment and the production of creative works while not unreasonably impeding further innovation.

Google notes that claims that fair use is 'too uncertain' were assessed - and rejected - by the ALRC. The ALRC stated that "the most significant concern raised by stakeholders opposed to fair use was that a lack of clear and precise rules would result in uncertainty about what uses are fair".⁹² The ALRC also reported that critics of fair use "argued that the uncertainty would create a need for both rights holders and users to obtain legal advice, thus increasing

⁸⁹ Ibid

⁹⁰ <http://blog.mpa.org/BlogOS/post/2013/04/11/MPAA-and-fair-use-a-quick-history.aspx>

⁹¹ Issues Paper p 21

⁹² ALRC Copyright and the Digital Economy report para 4.118

transaction costs ... [with] litigation ... required to determine the scope of permitted uses [in some instances]”.⁹³

These concerns are without foundation for the following reasons:

1. ***Australia’s existing copyright exceptions are anything but certain.***

The most recent detailed judicial consideration of fair dealing was ‘The Panel’ case,⁹⁴ in which the Federal Court was required to consider whether Channel Nine was entitled to rely on fair dealing to use short extracts from Channel Ten programs in a weekly news review program. Academic commentary on that case has highlighted the uncertainty that surround the application of fair dealing exceptions, and lamented the failure of the Court to take this opportunity to develop a clear jurisprudence as to the factors that would be relevant when determining when the exceptions applied:

“...[the judges] did not adequately consider: the proper standard by which the fairness of the dealing ought to be assessed; how crucial terms, such as ‘criticism’, ‘review’ and ‘reporting of news’, should be defined and applied; or how the substantial body of UK case law on fair dealing should be interpreted.”⁹⁵

2. ***To the extent that Australia’s exceptions are certain, it is not ‘good’ certainty***

To the extent that Australia’s fair dealing exceptions may provide greater ‘certainty’, it is only ‘certainty’ at the expense of a range of socially and economically desirable uses (eg caching etc) that are **not** permitted, regardless of how ‘fair’ they might be. This kind of certainty comes at the direct cost of innovation and ultimately economic growth. It means that innovative new digital technologies, and new ways of creating and using content, do not even get to first base in Australia. They are automatically blocked.

3. ***Fair use is not a ‘foreign concept - fair use and fair dealing share a common legal heritage.***

The main difference between a dynamic exception like fair use, and fair dealing is the fact that fair use is ‘open ended’ and fair dealing is not. Otherwise, there is in fact a great deal of similarity between the existing Australian fair dealing exceptions and the model of fair use that has been adopted by the US, Singapore, South Korea, Israel and the Philippines. The factors that courts, and users, in these countries are required to weigh up when determining whether a use is ‘fair’ have for many years been an entrenched part of Australian copyright law. These factors are set out in the research and study fair dealing exception in s 40(2) of the Copyright Act, but also apply, as a

⁹³ Ibid.

⁹⁴ TCN Channel Nine v Network Ten Pty Ltd [2001] FCAFC 146 22 May 2002

⁹⁵ Michael Handler and David Rolph, ‘A Real Pea Souper: The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’, 27 Melbourne University Law Review, 381 at 383

matter of common law, to the other fair dealing exceptions.⁹⁶ In other words, the factors that are relied on in fair use countries to determine whether a use is 'fair' are essentially the same factors that have always been relied on to determine whether a dealing is "fair" in Australia.

4. ***Fair use is not as uncertain as critics suggest***

Recent scholarship in the US has highlighted the extent to which fair use is in fact *much* less unpredictable than many of its critics suggest. Examples include a 2009 "qualitative assessment" of US fair use case law by Professor Pamela Samuelson⁹⁷ (in which she found that it is generally possible to predict whether a use is likely to be fair use by analysing previously decided cases in the same policy cluster), and a 2012 empirical analysis of fair use case law by Matthew Sag,⁹⁸ which found that the fair use doctrine is "more rational and consistent than is commonly assumed". Sag found that there are consistent patterns in the case law, which provide assistance to individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection. In the UK, economics professor Antony Dnes - in his report previously referred to above - reached the same view. His report to the UK Government said "[a]s a matter of observation and from an assessment of US cases, a system of copyright law adhering to a doctrine of fair use does not appear to be characterized by unusual levels of uncertainty".⁹⁹

5. **Industries can - and do - take steps to 'add certainty' to fair use**

As the ALRC noted, it is likely that guidelines and industry protocols developed by peak bodies, as well as internal procedures developed by institutional users, would provide a great deal of assistance and certainty to those relying on any fair use exception that might be introduced into the Australian Copyright Act.

This has already been happening in Australia for some time under fair dealing provisions. For example, in its submission to the ALRC Copyright and the Digital Economy review, News Limited referred to the code of practice for sports news reporting (developed by news and sports organisations, with the assistance of the ACCC) which media companies rely on when deciding how much sporting footage they can use in reliance on the fair dealing exception for reporting news.

This also happens in the US under fair use. A great example of the success of this approach is the *Documentary Filmmakers' Statement of Best Practices in Fair Use*,

⁹⁶ See the Copyright Law Review Committee's 1998 Simplification Report. The CLRC considered the fairness factors set out in s 40(2) of the Act and said that these factors apply - as a matter of common law - to all fair dealings; ie not just to dealings for the purpose of research or study

⁹⁷ Pamela Samuelson, 'Unbundling Fair Uses' (2009) 77 Fordham Law Review 2537

⁹⁸ Matthew Sag, 'Predicting Fair Use' (2012) 73:1 Ohio State Law Journal, 47-91
<http://ssrn.com/abstract=1769130>

⁹⁹ A Law and Economics Analysis of Fair Use Differences Comparing the US and UK, Antony W. Dnes, 2011

<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-doc-j.pdf>

which has been in use since 2005.¹⁰⁰ These best practice guidelines - developed by documentary filmmakers, working with legal advisers - have been considered to provide such certainty that if they are followed, major insurance companies are prepared to cover filmmakers for errors and omissions insurance for fair use claims.¹⁰¹

6. Fair use style assessments are common across other areas of law.

An argument that is sometimes made against fair use is that it is so fact-specific that it is inherently unpredictable. However this approach is equally true of many concepts in law, such as the “reasonable person” test in tort and negligence law, and concepts of what is “misleading” in consumer law. These standards do not exist independently of the facts of the particular case.

All of the foundational issues in copyright are equally fact-specific: Did you contribute enough to be considered an author? Did you imbue the work with enough originality for the work to be protected? Is the material in question an idea or the expression of an idea? Respected US judge Learned Hand made this point in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp*:

“Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be ad hoc.”¹⁰²

Yet, the idea-expression dichotomy is a bedrock of copyright laws around the world, including in Australia, and is not subject to criticism even though, like fair use, it is totally fact specific and therefore allegedly ‘unpredictable’.

Finally, obtaining legal advice and litigation are facts of life when it comes to IP law in general and copyright law in particular. While there will inevitably be some transaction costs in moving from a fair dealing defence to a fair use defence, or something in between, the question that needs to be asked is whether doing so is of greater economic and social benefit to Australia. To rule out changes because of transaction costs would be tantamount to accepting the view that no laws should ever be changed.

4 Australian start ups and online service providers need adequate safe harbours

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<http://www.cmsimpact.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>

¹⁰¹ Ibid

¹⁰² 274 F.2d 487 (2d Cir. 1960)

While flexible exceptions are one piece in the innovation puzzle, the other piece is an appropriate “safe harbour” scheme. Australia’s Copyright Act contains a simple system that gives rights holders an efficient way to seek removal of infringing content, rewards online service providers for collaborating with rights holders by granting legal protections under the scheme, and includes protections for consumers who wish to challenge incorrect claims of copyright infringement. Safe harbours provide legal certainty and minimise compliance costs.

Australia is required - under the Australia-US Free Trade Agreement (AUSFTA)¹⁰³ (similar obligations are in the Trans Pacific Partnership¹⁰⁴) to include all “service providers” (ie, all providers of Internet services, including online platforms like YouTube, Facebook and Twitter, commercial ISPs like Telstra and iiNet, and search engines like Yahoo! and Google) in the safe harbours. This is the position that applies in the US and other jurisdictions where safe harbours have been introduced including Singapore, South Korea, the UK and other EU countries.

However, in implementing AUSFTA, Australia incorrectly limited the scheme to the narrower term “carriage service providers” (ie, only to commercial ISPs). **Successive government reviews since 2005**¹⁰⁵ have identified the need to fix this by amending the safe harbours to include all service providers, including most recently in the 2014 Online Infringement Discussion paper.¹⁰⁶ Despite this, the change has not been made.

Limiting the safe harbours to commercial ISPs has serious implications for the Australian digital economy. It makes Australia a much more high-risk legal environment for hosting content when compared with countries with safe harbours. It also creates an uneven playing field for local innovators. For example:

- ISPs such as Telstra and Optus are covered by the Australian safe harbours because they are carriage service providers.
- Global Internet companies are covered by safe harbour schemes operating outside of Australia, as long as their services are hosted from a jurisdiction such as the US or one of the many other countries that have effective safe harbours. However, they would not be covered if they operated in Australia.
- Local Internet companies hosting content in Australia have no safe harbour protection and are thus at a serious commercial disadvantage as compared with their global

¹⁰³ Chapter 17, Article 29

¹⁰⁴ Article 18.82

¹⁰⁵ *Review of the Scope of Part V Division 2AA of the Copyright Act*, Attorney-General’s Department (2005), *Revising the scope of the safe harbour scheme*, Attorney-General’s Department 2011

¹⁰⁶

<https://www.ag.gov.au/Consultations/Documents/OnlineCopyrightInfringement/FINAL%20-%20Online%20copyright%20infringement%20discussion%20paper%20-%20PDF.PDF><https://www.ag.gov.au/Consultations/Documents/OnlineCopyrightInfringement/FINAL%20-%20Online%20copyright%20infringement%20discussion%20paper%20-%20PDF.PDF>

commercial competitors and commercial ISPs. This operates as a real disincentive for innovation and for the creation of those types of businesses in Australia.

Safe harbours and start ups

A recent study¹⁰⁷ on the economic impact of safe harbours on Internet startups has pointed to a link between effective safe harbours and the success rate of Internet startups.

The study - conducted by UK firm Oxera Consulting - found that implementing a safe harbour with clearly defined requirements for compliance and with low associated compliance costs could not only increase startup success rates, but also increase the expected profits of successful startups.

It found that an effective safe harbour regime is an important policy lever for encouraging more startup activity.

This is not surprising. While all Internet intermediaries are vulnerable in a regulatory environment where legal risk and compliance costs are high, startups by their nature are particularly vulnerable.

The authors of the Oxera report warned that intermediary startups are likely to be held back in regimes where there is no clearly defined safe harbour.

Australian Internet regulation must develop in line with best practice if we are to develop as a hub for online services. Expanding the safe harbours is a central part of that. It would enable Internet platforms, search engines and a myriad of other Internet services to operate fully from Australia without uncertain legal risk. The Government expressly agreed with the need to fix the scheme in its 2014 Online Copyright Infringement Discussion Paper.

This simple reform is long overdue and is critical to Australia's digital future.¹⁰⁸

Conclusion

It is clear that innovation and a flourishing digital economy are critical to Australia's future productivity. It is therefore essential that Australia's copyright system acts as a key part of Australia's innovation system.

¹⁰⁷

<http://www.oxera.com/getmedia/cba1e897-be95-4a04-8ac3-869570df07b1/The-economic-impact-of-safe-harbours-on-Internet-intermediary-startups.pdf.aspx?ext=.pdf>

¹⁰⁸ The Board of Startup Aus recently referred to this proposed reform as "of great benefit to Australia's startup community" in an open letter to the then Minister for Communications, Malcolm Turnbull MP; <https://startupaus.org/wp-content/uploads/2015/08/StartupAUS-letter-re-copyright-safe-harbours.pdf>

The Internet has provided unprecedented opportunities for Australian creators, reaching global audiences through distribution platforms that could not have been imagined a decade ago. However, including a fair use style exception in Australia's copyright laws will promote a wide range of creativity, technology development and business activity essential for innovation.

The global nature of the Internet exacerbates this problem - while Australian consumers may still be able to use and enjoy innovative services developed overseas and provided remotely, Australia's laws are stopping local businesses from developing these services locally and in turn competing in this global marketplace, leaving them at a major commercial disadvantage to their overseas counterparts.

It is essential that Australia's copyright laws recognise the fundamental reality that innovation is dynamic, not static. We need dynamic copyright exceptions to match.

In order to be efficient and effective in the digital economy, two critical changes are required to Australian copyright law:

1. The introduction of a flexible/dynamic copyright exception; and
2. The expansion of the safe harbours to include all online service providers.

This will ensure that Australia's copyright laws are best placed to provide appropriate incentives for innovation, investment and the production of creative works, while ensuring that necessary innovation, investment and future creativity are not unnecessarily impeded.

Attachment A

Studies on the impact of copyright regulations on early stage investment

[“The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment,” Booz&Co, 2012.](#)

This study, based on a survey of almost 200 angel investors and interviews with 20 prominent venture capitalists, analyzes the extent to which this financing might be affected by the copyright regulatory environment.

[“The Impact of E.U. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study,” Booz&Co, 2012.](#)

This study, based on a survey EU investors, analyzes the extent to which financing might be affected by the copyright regulatory environment.

Key take outs

- 81% of investors said they'd be more likely to invest in a digital content platform under a 'weak economy,' than in a strong economy where existing US copyright safe harbors are weakened. In other words, increasing regulations would slow investment in new platforms more than an actual recession would.
- Regulations making it easier to prosecute users for copyright violations would have a negative effect on investment in the EU, reducing the pool of interested angel investors by 49%.

[“The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies,” Josh Lerner, 2012.](#)

This paper shows that negative copyright decisions lead to significantly reduced VC investment in cloud services.

[“The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies,” Josh Lerner, 2012.](#)

A comparative analysis of US and EU investment in cloud computing. The major finding is: technology-neutral, flexible, and clear copyright limitations drive investment and innovation. EU and other countries risk falling behind if it does not update its copyright limitations.

Key take outs

- Negative rulings in France and Germany led to a reduction in VC investment in the cloud of \$4.6m and \$2.8m respectively per quarter.
- The Cablevision ruling led to additional incremental venture capital investment in U.S. cloud computing firms that ranged from \$728 million to approximately \$1.3 billion over the years after the decision.
- Venture capital investment in cloud computing firms increased significantly in the U.S. relative to the EU after the Cablevision decision.