

# Internet Intermediaries and Copyright: An Australian Agenda for Reform

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for discussion by the Australian Digital Alliance

## Executive Summary

*Digital Economy: the global network of economic and social activities that are enabled by platforms such as the Internet, mobile and sensor networks.*<sup>1</sup>

Australia aims to be a place where innovation in the Digital Economy happens.<sup>2</sup> Achieving this goal is essential to Australia's future economic growth, productivity, and social well-being.<sup>3</sup> It will require not just great digital infrastructure, and a population with the necessary skills and entrepreneurial spirit, but a legal environment conducive to investment in the technologies, products, and services that make up the Digital Economy.<sup>4</sup>

Copyright law is an important part of this legal framework. The goal of copyright law is to encourage the creation of artistic, intellectual, and scientific content, from books and datasets to movies, music, video games, software, and art, by granting to creators exclusive rights to exploit their creations. The creation of new content is an important part of a successful Digital Economy. But, as has been widely recognised, too much copyright protection (or too much intellectual property generally) 'may discourage people from innovating because the pathways to discovery are blocked by other intellectual property owners'.<sup>5</sup>

A critical set of actors in the Digital Economy who can be affected by over-broad copyright are the Internet Intermediaries. These are the companies that provide the basic infrastructure of the Internet, and that build and create the services and platforms of the Digital Economy. They include Internet Access Providers (IAPs), web hosts, the providers of online platforms for the creation and exchange of content (such as YouTube, WordPress, and Facebook) – and others perhaps not yet conceived. They are all 'intermediaries' in the sense that they stand between customers or end-users, and originators of content or other material. They are not only direct participants in the Digital Economy, but enablers – they build the platforms and infrastructure

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<sup>1</sup> Commonwealth of Australia, Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions (Final Report)* (2009) (hereafter 'Future Directions Final Report'), iv, 2.

<sup>2</sup> Ibid iv.

<sup>3</sup> Ibid iv; see also Organisation for Economic Co-operation and Development, *OECD Innovation Strategy: Getting a Head Start on Tomorrow* (May 2010) (recognising the importance of innovation in underpinning productivity and economic growth); Cutler & Company, *Venturous Australia: Building Strength in Innovation: Review of the National Innovation System* (2008) (similar).

<sup>4</sup> Future Directions Final Report, above n 1, 1.

<sup>5</sup> Government's response to the Final Report of the National Innovation System Review, *Powering Ideas: An Innovation Agenda for the 21<sup>st</sup> Century* (2009), <[http://www.innovation.gov.au/innovationreview/documents/poweringideas\\_fullreport.pdf](http://www.innovation.gov.au/innovationreview/documents/poweringideas_fullreport.pdf)>

that can enable other companies to innovate and to take advantages of the efficiencies of the online environment.

If Australia is to achieve its overall innovation goals, and fully realise the potential economic and social benefits of the National Broadband Network (NBN), it will need to ensure that its copyright law appropriately enables Internet Intermediaries to operate and to invest in creating Australia's Digital Economy. It is difficult to determine in the abstract where the proper accommodation of competing interests in copyright lies. One guide is a comparison with similar countries – Australia's competitors in the global Digital Economy.<sup>6</sup> If Australia's laws create a less conducive environment for a Digital Economy than the law of Australia's competitors, this will put Australia at a disadvantage in attracting and retaining innovative digital companies.

### *Where Australia currently stands*

Measured against other jurisdictions, Australia's copyright law is both less coherent and less amenable to innovation in the Digital Economy. The present legal situation can be understood at a broad level using a basic 'traffic light' metaphor: where RED means an activity involves a high risk of copyright infringement, ORANGE means the legal situation is unclear, and GREEN means a low or non-existent risk of copyright infringement (perhaps subject to the company fulfilling certain conditions, such as taking infringing material down on receiving notice).

**Table 1: Summary Table: Risk of Copyright Infringement**

Activity	Australia: CSP <sup>7</sup>	Australia: Other Internet Intermediary	United States	Canada (after Bill C-32)	European Union	United Kingdom	New Zealand
Providing internet access (activities of an IAP)	GREEN	ORANGE	GREEN	GREEN	GREEN	GREEN	GREEN
System Level/Proxy Caching	GREEN	RED (educational institutions: GREEN)	GREEN	GREEN	GREEN	GREEN	GREEN
Hosting	GREEN	ORANGE	GREEN	GREEN	GREEN	GREEN	GREEN

<sup>6</sup> Several comparable countries have recently adopted a strong focus on promoting the local Digital Economy: see for example Government of Canada, *Improving Canada's Digital Advantage: Strategies for Sustainable Prosperity* (May 2010); Department for Business Innovation and Skills (UK), *Digital Britain: Final Report* (June 2009); United States Government, *A Strategy for American Innovation* (2009). New Zealand released its *Digital Strategy 2.0* in 2008.

<sup>7</sup> 'CSP' stands for 'carriage service provider', a term defined by s 87 of the *Telecommunications Act 1997* (Cth) to mean (in summary) a party who uses infrastructure provided by a 'carrier' (organisation holding a carrier licence) to supply carriage services to the public. Public Internet Access Providers like Telstra BigPond would be carriage service providers. Only CSPs have the benefit of the Safe Harbours under Part V Div 2AA of the *Copyright Act 1968* (Cth).

Content (Traditional Web Host and Cloud Computing)							
Hosting User- Created Content Platform	ORANGE	RED	GREEN	GREEN	ORANGE	ORANGE	ORANGE
Running a Search Engine	GREEN	RED	GREEN	GREEN	ORANGE	RED	RED

The legal reality in Australia is that fifteen years after the Altavista search engine was launched, a search engine can still not operate fully from Australia without facing a risk of copyright infringement. Five or six years after the launch of services like Facebook, YouTube and the WordPress blogging platform, the same applies to these Digital Economy companies and services. Current Australian law also creates an uneven playing field: carriage service providers face less overall legal risk than other Internet Intermediaries, even where they perform the same practical function.

Table 1 does not, however, give a full picture of the impact of copyright on innovation, for two reasons. First, it focuses on online activities *that we already know about*. Innovation is, by definition, doing new things. Doing what is now known – following on from existing, often foreign innovations – is not enough: Australia needs to generate new ideas that can take on the world. Creating the environment in which people can come up with these new ideas, and pursue them through to commercialisation, depends in part on ensuring the law provides some room to experiment.

Australian copyright law provides no such room. By contrast, US law provides two important flexibilities for Internet Intermediaries: the fair use exception, which allows for non-infringement based on a balancing of factors (like the impact of an activity on the market), and the ‘*Sony doctrine*’ – the rule that a person who provides services or technology that has ‘substantial non-infringing uses’ will generally not be held liable for its customers’ infringements.<sup>8</sup> Both legal rules, plus others inherent in US law,<sup>9</sup> provide this ‘room to move’. An innovative company can consider a proposed technology, look at the fair use factors and/or the degree of likely non-infringing use, and make a call on the possible application of those factors to decide whether the risk is worthwhile.

<sup>8</sup> Except in circumstances, such as those in *Grokster*, where the company in question was held to be *inducing* its customers’ infringement: *MGM Studios, Inc. v. Grokster, Ltd* 545 U.S. 913 (2005), or where it is possible to segregate and prevent infringing uses: *A&M Records, Inc v Napster, Inc* 239 F 3d 1004 (9th Cir 2001).

<sup>9</sup> As outlined further below, for example, a number of doctrines relating to the scope of rights and who will be held to exercise them have been used by courts to tailor liability in the online environment.

Australian law, by contrast, has specific exceptions for particular activities (or specific, non-commercial actors like educational institutions), and a law of secondary liability that has no qualification equivalent to the *Sony* doctrine. The difference is critical. In Australia, the default is that unless there is a specific exception, you are liable for copyright infringement – no matter how innovative or exciting the activity, and how small (or even positive) the impact on copyright owners’ commercial interests. With the risk of copyright infringement comes the risk of an injunction and the shutdown of the activity. The only option is to seek a licence – permission to innovate – from copyright owners, or law reform. Such permission or reform is more likely once a concept is proven: personal copying exceptions came well after personal tape recorders and the iPod. Unfortunately for the Australian Digital Economy however, the concept will more likely be proven overseas.

A second issue not captured by Table 1 is the complexity of Australia’s copyright legislation. Australia’s copyright law is difficult to understand and contains complex, overlapping, highly qualified and detailed provisions. This makes legal compliance difficult for everyone.

If Australia wants to achieve the goal of creating a successful Digital Economy, of supporting innovation in Internet infrastructure and services, and becoming ‘enterprising and venturesome’ in the online environment created by the NBN, it needs to start by ensuring that Internet Intermediaries providing the basic Internet infrastructure and common online services have some legal security. It needs to create ‘room to move’ and to experiment in its copyright law, even as it continues to protect copyright owners’ legitimate interests.

### ***Solutions***

To provide an appropriate legal environment to enable greater innovation in the Australian Digital Economy, two critical changes are needed.

#### *Extend the Safe Harbours*

First, Australia should extend its copyright Safe Harbours to benefit all online service providers.<sup>10</sup>

Australia has Safe Harbours removing the threat of copyright damages from companies undertaking certain Internet activities – providing online access, caching, web hosting, and providing ‘information location tools’ such as search engines. The Safe Harbours are subject to conditions designed, in part, to protect copyright owners. Unfortunately, at the moment, only companies that are also ‘carriage service providers’ get the benefit of the Safe Harbours. Thus Telstra and Optus have the benefit of the Safe Harbours, but Google and Yahoo!, WordPress and Facebook (and their new competitors) do not. This makes no sense. Extending the Safe Harbours would bring Australian exceptions into line with law in the US and elsewhere.

Extending the Safe Harbours is a straightforward, obvious first step and would enable common online activities such as hosting, and search engines, to operate fully from Australia without

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<sup>10</sup> *Copyright Act 1968* (Cth) Div V Part 2AA.

indeterminate legal risk. Extending the Safe Harbours would not, however, be sufficient to create a favourable environment for innovation, because entrepreneurs wanting to introduce new, unanticipated services and products would have little room to move.

#### *Introduce a Flexible Exception into Copyright*

Second, Australia should introduce a flexible exception into copyright, in order to promote innovation, create room for experimentation and move from a ‘permission to innovate’ culture to one conducive to taking risks and trying new things, at least where the impact on copyright owners’ economic interests is small. This could be done by:

1. Introducing an exception for fair dealing for the purpose of ‘transformative use’ (or some variation); or
2. Introducing an open-ended fair dealing exception modelled on fair use as found in US copyright law; or
3. Introducing a new s 200AB-style semi-flexible exception (or expanding the operation of the existing s 200AB): for example, specifying Internet Intermediaries as another kind of entity that gets the benefits of being allowed to do activities provided they do not contravene the ‘three step test’ in international law.

Of these, using s 200AB is the least desirable option due to its complexity. Options 1 and 2 are similar. Both would help ensure that Australian law properly enables the key technical processes that underpin the operation of the Internet and common online services, as well as ensuring that Australian law provides room for appropriate innovation to spur a thriving Digital Economy.

If Australia chooses not to introduce a new flexible exception, at the very least, Australia should introduce one or more new specific exceptions to address problems identified in this Policy Paper to allow known activities that do not unjustifiably harm copyright owners. To address the gaps identified in this Policy Paper, specific exceptions would be needed to allow at least:

1. Caching, including proxy and system-level caching;
2. Web Hosting (including Cloud Computing);
3. Hosting a User-Created Content Platform (with an exception to allow individuals to *make* user-generated content); and
4. Operating a Search Engine.

Some reform to address these activities, currently not allowed under Australian law, would be better than nothing, to at least enable local versions of known services online. However this would do little to encourage future innovation in the Australian Digital Economy.

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## 1 Background Material

### 1.1 Terminology: who are the Internet Intermediaries?

The Australian government is committed to the development of the Digital Economy, which it defines as ‘the global network of economic and social activities that are enabled by platforms such as the Internet, mobile and sensor networks’.<sup>11</sup> The National Broadband Network (NBN) is the centrepiece of this commitment.

A core part of the Digital Economy is made up of companies that provide the platforms (or infrastructure) of the networked environment, and companies and individuals that build the services of the online world on top of those platforms. The OECD offers a useful encapsulation of these entities, defining ‘Internet Intermediaries’ as the companies and individuals:

‘who provide the Internet’s basic infrastructure and platforms by enabling communications and transactions between third parties as well as applications and services. ‘Internet Intermediaries’ give access to, host, transmit and index content originated by third parties or provide Internet-based services to third parties.’<sup>12</sup>

The OECD recognises that Internet Intermediaries can play a series of roles:<sup>13</sup>

1. **Internet Access Providers:** which provide access to the Internet to households, businesses, and government. In Australia call these bodies ISPs, but in this document they will be referred to as Internet Access Providers (IAPs), because in other countries, ‘ISP’ may have broader connotations. They include Optus Broadband and iiNet. In Australia, the technical legal term ‘carriage service provider’ includes this group (although the legal term also extends beyond the online environment).<sup>14</sup>
2. **Web Hosts:** Data processing and web hosting providers, which transform data, prepare data for dissemination, or store data or content on the Internet for others. This category would include traditional ‘hosts’ and some ‘software as a service’ or cloud computing operations and email providers.
3. **Search engines and portals:** which aid online navigation by enabling end-users to find the sites, or objects, or news or other content.
4. **Ecommerce intermediaries:** which enable online buying or selling such as eBay or Amazon or, perhaps, App Stores like iTunes.

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<sup>11</sup> Future Directions Final Report, above n 1, iv, 2.

<sup>12</sup> OECD, *The Economic and Social Role of Internet Intermediaries* (April 2010), 6.

<sup>13</sup> OECD, *ibid* at 9. Amazon, for example, is clearly engaged in ecommerce but facilitates the publication of user reviews and commentary, akin to a ‘participative networked platform’.

<sup>14</sup> Carriage service providers are defined under s 87 of the *Telecommunications Act 1997* (Cth) to mean (in summary) parties who use infrastructure, provided by a ‘carrier’ (organisation holding a carrier licence) to supply carriage services to the public. Importantly, unless a company is providing internet access in this way, it will not be a CSP (and will not get the benefit of Australia’s Safe Harbours under the *Copyright Act 1968* (Cth) Part V Div 2AA).

5. **Internet payment systems:** Visa, Paypal etc.
6. Participative networked platforms, or **User-Created Content (UCC) Platforms**, that do not themselves create, or own, content being published or broadcast. These would include sites that host blogs, YouTube and similar sites, and social networking sites.

This document refers to ‘Internet Intermediaries’ as entities playing these roles 1-3 and 6. This is not to say that Internet Intermediaries performing roles falling in categories 4 or 5 are not important, and may not face risks of copyright infringement.<sup>15</sup> It is important to remember, too, that as innovation continues, Internet Intermediaries may in the future play other roles not listed here.

Internet Intermediaries are both participants and innovators in the Digital Economy, *and* assist other actors in that economy by providing enabling technologies and platforms. For this reason, their status, and their ability to operate in the copyright system, is important to achieving Australia’s goals of growing the Digital Economy and encouraging more individuals and businesses develop ‘digital confidence’, and participate in the online opportunities being created.<sup>16</sup>

### ***1.2 Exceptions in context: the scope of exclusive rights and secondary liability***

This Policy Paper mostly refers to copyright exceptions. Considering only the scope of exceptions, however, addresses only half of the innovation story. It is important to appreciate the ways that existing copyright law grants copyright owners ‘rights of veto’ over technologies and services that are offered online.

When assessing whether an Internet Intermediary will be liable for copyright infringement in Australia, and whether it may choose to participate in the Australian digital economy, there are two key questions:

1. Are they at risk of being held liable for direct infringement of the reproduction or communication rights?
2. Are they at risk of being held liable for authorising infringement when their users breach copyright rights?

There is no space here for a long discussion of the reproduction right, the communication right, and authorisation liability under Australian law. It is sufficient here to state three key conclusions which may be drawn from the case law which combine to make Australia a less conducive investment environment for Internet Intermediaries than competitor countries.

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<sup>15</sup> eBay and Amazon have been faced with both trade mark and copyright actions, and companies processing credit card payments have occasionally been sued or threatened with suit for facilitating IP infringement. These kinds of impact are beyond the scope of this Policy Paper: we have not seen, in Australia, the kinds of lawsuits seen elsewhere, particularly in Europe or the US. In addition, disputes concerning eBay and Amazon both concern trade mark law more than copyright law.

<sup>16</sup> See Future Directions Final Report, above n 1, 24

First, due to the nature of digital technology, just about any online or digital activity – such as reading an eBook or listening to a digital music file – involves making ‘copies’ of copyright material into digital memory. Owing to the way reproduction is defined in Australian copyright law,<sup>17</sup> most of these copies ‘count’, meaning they require permission from the copyright owner or an exception. This is true even where equivalent acts offline (reading a book, listening to music) involve no infringement. Thus the reproduction right ‘looms large as the ultimate leverage of right holders to control virtually all aspects of how [Internet Intermediaries] run their businesses’.<sup>18</sup> Internet Intermediaries are therefore likely to undertake many actions that fall within the reproduction right in Australia– and their users will too.

Second, when it comes to the other key right online – the communication right – there is uncertainty about who is liable. Under section 22(6), it is the ‘person responsible for determining the content of the communication’ who communicates the material. Internet Intermediaries hosting User-Created Content (UCC) platforms, for example, risk being considered ‘joint communicators’ of material with users, although the legal position is unclear.<sup>19</sup> Liability may extend to communications made by Internet Intermediaries which operate a proxy server and, in that context, cache material, as well as ordinary companies and public institutions. .

Third, Australian based Internet Intermediaries may face a higher risk of being liable for authorising their users’ infringements. Australian law, even following the *iiNet* appeal, creates the risk of liability for a wider range of activities than comparable countries. The US has its *Sony* doctrine, which limits liability for entities which sell devices or provide services with ‘substantial non-infringing uses’.<sup>20</sup> Both Canada and the UK have case law criticising Australia’s law as imposing secondary liability too readily.<sup>21</sup> In contrast, Australian analysis of

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<sup>17</sup> *Copyright Act 1968* (Cth) s 10 (definition of ‘material form’).

<sup>18</sup> Lucie Guilbault et al, Institute for Information Law (IviR), *Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, February 2007, at 61 (hereafter IVIR Infosoc Implementation Report) (commenting on EU law, but similar reasoning applies to Australia)

<sup>19</sup> In *Cooper*, Tamberlin J allowed that more than one person might be involved in a ‘communication’, which could make the site and the user ‘joint communicators’: *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 at [73]. The better view is that users, having engaged in the ‘volitional conduct’ of uploading material, are responsible for the communication and that host sites are, at worst, liable for authorising infringement: see sources cited below n 139.

<sup>20</sup> *Sony Corp. of America v Universal City Studios, Inc.*, 464 US 417 (1984).

<sup>21</sup> See the discussion in *CBS Songs Ltd v Amstrad Consumer Electronics Plc*, [1988] A.C. 1013; *CCH v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 at [41]. In the latter, the Supreme Court in *CCH* explicitly rejected the *Moorhouse* reasoning as ‘shift[ing] the balance in copyright too far in favour of the owner’s rights’: *ibid* at [43]. In the *Tariff 22* case, the Canadian Supreme Court considered the issue of whether an ISP could be held liable for authorising infringement by its users. The Supreme Court held that ISPs were not liable: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* [2004] 2 SCR 427; 240 DLR (4<sup>th</sup>) 193. In that case, a copyright collecting society sought to impose a tariff on ISPs, so that ISPs would pay for the downloading of music by their customers. Imposition of the tariff depended on finding that the ISPs themselves were infringing copyright or authorising infringement. Canada has, in Bill C-32, proposed a provision specifically to address intermediaries whose services are designed primarily to enable infringement. Canada, Copyright Amendment Bill C-32 (2010), s 27(2.3). This would seem, if anything, to make even clearer the limits on intermediary liability in the general law of authorisation in Canada.

authorisation liability focuses on the ‘reasonable steps’ an Internet Intermediary has taken to prevent infringement:<sup>22</sup> a point emphasised by the Full Federal Court judgment in *Roadshow Films Pty Ltd v iiNet Ltd*.<sup>23</sup> In that case, a majority of the court upheld the decision of the Trial Judge. However, the court did so on very different reasoning. Importantly from an Internet Intermediary perspective, all three judges rejected the Trial Judge’s posited ‘threshold test’, in which his Honour had held that an Internet Access Provider was not providing the ‘means of infringement’ and so could not be liable for authorising infringement. The judgment on appeal reinstates Australia’s historically broad approach to authorisation liability and may strengthen the hand of a copyright owner demanding action by an Intermediary in the face of detected infringements, although it also suggests that right holders will have to meet a high standard of evidence of infringement before action will be required.<sup>24</sup> Assessing the risk of authorisation liability thus involves determining whether the intermediary has done ‘enough’ to prevent infringement – a matter on which the outcome of any litigation must be extraordinarily difficult to predict.<sup>25</sup>

In sum: Australian Internet Intermediaries face higher risks of both direct and indirect liability for copyright infringement in circumstances where liability would not be imposed in comparable countries. This makes the introduction of new exceptions in Australian copyright law critical to ensure the continued competitiveness of Australia’s Digital Economy.

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<sup>22</sup> This is because Australian courts are required by legislation to consider three factors in determining whether there is authorisation: a person’s power to prevent infringement, their relationship with the infringer, and any reasonable steps taken to prevent infringement: *Copyright Act 1968* (Cth) ss 36(1A), 101(1A). In the online environment, where a service is ongoing, an Internet Intermediary may have the power to cease providing a service, and an ongoing relationship with an infringing user.

<sup>23</sup> *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23, upholding the decision of Cowdroy J in *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 83 IPR 430.

<sup>24</sup> Ibid. Justice Emmett, for example, requires ‘unequivocal and cogent evidence of the alleged primary acts of infringement ... mere assertion by an entity such as AFACT, with whatever particulars of the assertion that may be provided, would not, of itself, constitute unequivocal and cogent evidence of the doing of acts of infringement. Information as to the way in which the material supporting the allegations was derived, that was adequate to enable iiNet to verify the accuracy of the allegations, may suffice. Verification on oath as to the precise steps that were adopted in order to obtain or discern the relevant information may suffice but may not be necessary’: per Emmett J at [210].

<sup>25</sup> See generally J. Ginsburg and S. Ricketson, ‘Separating Sony sheep from Grokster (and Kazaa) goats: Reckoning future business plans of copyright-dependent technology entrepreneurs’ (2008) 19 *Australian Intellectual Property Journal* 10; Ginsburg and Ricketson, ‘Inducers and Authorisers’ (2006) 11 *Media & Arts Law Review* 1.

## 2 The impact of the copyright law on common online activities

Internet Intermediaries undertake a number of functions critical to providing the infrastructure underlying the Digital Economy: they provide network access, they host online material and operate information location tools like search engines. In doing so, they often have to both reproduce and communicate copyright material; or their users do so. At almost every point, under present Australian law, they risk infringing copyright.

To date, Australia has introduced two kinds of exceptions written with the goal of protecting these activities in Australia: (a) specific exceptions that apply to reproductions and communications in the digital environment, and (b) ‘Safe Harbours’ that protect certain activities of Internet Intermediaries from damages or other monetary remedies provided certain conditions are met. A more detailed discussion of the text of these exceptions is included in Appendices 1 and 2.

This Policy Paper shows how, despite these reforms, common activities of Internet Intermediaries – hosting, building user-created content sites, creating social networking sites – face greater uncertainty in Australia than in other jurisdictions.

If the point is to make Australia a place for innovation in the Digital Economy, copyright law must protect commonly recognised activities that have become familiar and legitimate features of the digital environment. We need also to think about what is coming, and ensure that copyright law will enable the next ‘killer app’ while still promoting the interests of creators. Some pointers to the future are also discussed below.

This Policy Paper examines the legal treatment in Australia and selected other jurisdictions of four activities critical to the operation of Internet Intermediaries:

1. Providing network access
2. Caching
3. Hosting content
4. Operating a search engine.

### 2.1 Providing network access (*internet access providers*)

*The most basic activity critical to a vibrant Digital Economy is the provision of access to the Internet and all of its opportunities. In Australia, certain telecommunications providers who provide such access (‘carriage service providers’) are safe from copyright liability provided they comply with certain basic conditions. Carriage service providers are, however, not the only ones who provide network access—other parties, like schools, private companies, libraries and other large institutions which provide networks to end-users – are at some legal risk.<sup>26</sup>*

<sup>26</sup> This Policy Paper uses a ‘traffic light’ metaphor to explain comparative legal situations. RED means an activity involves a high risk of copyright infringement, ORANGE means the legal situation is unclear and GREEN means low or non-existent risk of copyright infringement.

	Australia CSPs	Australia Others	US	Canada after C-32)	EU	United Kingdom	New Zealand
Level of legal risk involved in providing internet access (activities of an IAP)	GREEN	ORANGE	GREEN	GREEN	GREEN	GREEN	GREEN

### Australia

An Internet Access Provider (IAP), that provides network access that third parties use to transmit copyright content, does several acts may fall within a copyright owner's exclusive rights of reproduction and communication:

1. It may make temporary copies of copyright material on its servers;
2. It may exercise the communication right by carrying communications to end users (it 'electronically transmits' material); and
3. It could be liable for authorising infringements by users.

Australian copyright law has exceptions that will mostly ensure that an IAP which is also a CSP<sup>27</sup> will not be liable for copyright infringement:

1. The IAP is not likely to be directly liable for fleeting reproductions made on its servers because this is not volitional conduct – end-users have that responsibility.<sup>28</sup>
2. The IAP is, as a result of subsection 22(6), not likely to be directly liable for the communication of material. Under that provision, the person liable for a given communication is the one who determines the content.
3. According to the appeal decision in *Roadshow v iiNet*, an IAP could be liable for authorising the infringements of users where it receives sufficiently compelling and informative notices of infringement from a copyright owner and fails to take reasonable steps to prevent the infringement.<sup>29</sup>
4. To avoid both direct and authorisation liability, such an IAP need only comply with the conditions of the Part V Div 2AA Safe Harbours. These conditions are limited, the key requirement being that the IAP adopt and reasonably implement a policy for the termination of repeat infringers.<sup>30</sup>

<sup>27</sup> The main requirement to be a carriage service provider is that the entity provides service – like internet access – 'to the public': s 87 *Telecommunications Act 1997* (Cth).

<sup>28</sup> For details, see below n 139, page 41 (in Appendix 1)

<sup>29</sup> *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23. Both of the majority judges in the case (Emmett and Nicholas JJ) indicate, in their separate judgments, that a key reason AFACT's suit for authorisation failed was that the notices it provided to iiNet were not sufficiently informative or compelling for iiNet to take action against users: see at [210] (Emmett J) and [764] (Nicholas J). In concluding his decision upholding the Trial Judge's finding of no authorisation, Justice Emmett specifically states that 'it does not necessarily follow from the failure of the present proceeding that circumstances could not exist whereby iiNet might in the future be held to have authorised primary acts of infringement on the part of users of the services provided to its customers under its customer service agreements': at [274].

<sup>30</sup> There are other conditions: for example, non-interference with standard industry technical measures to protect copyright material, but the requirement of a repeat infringer policy is the most significant

Entities that are not carriage service providers but which provide network access – institutions like schools, universities, or large corporations<sup>31</sup> - do not have the protection of a Safe Harbour. Their risk of liability depends on a court's assessment of the factors set out in the legislation: the institution's power to prevent the infringements; their relationship with the infringers, and whether they have taken reasonable steps to prevent infringement. The Full Federal Court judgment in *iiNet* suggests that institutions may be required to respond to sufficiently informative and compelling notices received from copyright owners.<sup>32</sup>

Various exceptions were introduced with the goals of ensuring 'that copyright laws do not jeopardise the underlying technical processes that are integral to the operation of the Internet' and to provide that 'carriers and carriage service providers (including ISPs) with reasonable certainty about liability for infringements that occur on their facilities or infrastructure'.<sup>33</sup> In practice however, reform is required to ensure that these important goals are met for all Internet Intermediaries, including IAPs.<sup>34</sup>

### Other jurisdictions

The conspicuous feature about the law of other jurisdictions when it comes to shielding IAPs from copyright liability is that protection is both universal (every jurisdiction has it) and generous (it comes with few strings attached).

The US, for example, has general principles which exempt most IAPs from direct and indirect liability, as well as a Safe Harbour that operates as a fall-back, covering any entity (including a school etc) that provides for transmission of communications, subject to the same conditions as the Australian Safe Harbour.<sup>35</sup> The European Union recognises exemptions for temporary reproductions occurring in the course of communication, regardless of whether the communication is an infringing one (*Information Society Directive*, Article 5), and establishes, through the *Ecommerce Directive* a safe harbour for 'mere conduits' that has less conditions than the Australian Safe Harbour (Art. 12): IAPs need not, for example, have any kind of repeat

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requirement above and beyond what an IAP would ordinarily do. A fuller discussion of the Safe Harbours may be found in Appendix 2 below page 50.

<sup>31</sup> Most such institutions provide access only to employees or students or some other select group, and may therefore not fulfil the requirements of the *Telecommunications Act 1997* (Cth) s 87. Nor do such institutions necessarily *want* to be defined as carriage service providers, since such designation implies other obligations under other legislation.

<sup>32</sup> *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23.

<sup>33</sup> *Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000* at para 2.1.

<sup>34</sup> These exceptions are ss 43A, 43B, 111A, 111B, 39B and 112E. The temporary copy exceptions do not apply to infringing communications, reducing their usefulness even to an IAP carrying many gigabits of data 24 hours a day. The ss 39B/112E exception to authorisation is of no avail once an IAP has been informed of infringement – that is, once a copyright owner has complained, it seems that an IAP has no defence. For more detail see *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23 and the discussion below, Appendix 1 page 39.

<sup>35</sup> These principles include the general requirement that infringement only arises from 'volitional' conduct, as well as limitations on authorisation liability: see below Appendix 1 nn 180 and 181, page 48.

infringer policy.<sup>36</sup> EU law specifically provides that ISPs cannot be required to monitor their services (Art 15). Canada<sup>37</sup> has exemptions from both direct and secondary infringement covering IAPs. New Zealand is in the process of clarifying the position of IAPs.<sup>38</sup> In some jurisdictions – in the EU, UK, and New Zealand – courts can issue injunctions against IAPs, perhaps to take action against ongoing infringements – but this does not expose the IAP to liability for damages.

## 2.2 Caching

*A second critical activity in the Digital Economy – albeit a frequently invisible one – is caching. Caching increases network efficiency and speed and can be particularly important in a country like Australia with where much material is accessed over very long connections from countries like the US. It can help reduce the chance of Australia’s overseas links becoming bottlenecks limiting the benefits of high-speed networks.*

*Only carriage service providers and educational institutions in Australia enjoy legal clarity as to what caching they may undertake. At least some caching is legal for most online entities in other countries.*

	<b>Australia CSPs</b>	<b>Australia Others</b>	<b>US</b>	<b>Canada after C-32</b>	<b>EU</b>	<b>United Kingdom</b>	<b>New Zealand</b>
Level of legal risk involved in System Level/Proxy Caching	GREEN	RED (educational institutions: GREEN)	GREEN	GREEN	GREEN	GREEN	GREEN

<sup>36</sup> Some jurisdictions are introducing additional regulation to address file-sharing known as ‘graduated response’ or ‘three strikes’ laws. See for example France (Law No. 2009–669 of June 12, 2009, Favouring the Diffusion and Protection of Creation on the Internet [*Loi favorisant la diffusion et la protection de la création sur internet*] (amended Oct. 30, 2009)), and the UK (*Digital Economy Act 2010* (UK)). It is important to note these graduated response laws and proposals are quite distinct from any Safe Harbours. Compliance with graduated response schemes is, for example, not a condition of protection under a Safe Harbour under the *Digital Economy Act 2010* (UK).

<sup>37</sup> *Copyright Act* c.42 (Can) s 2.4(1)(b), interpreted in *Society of Composers, Authors, and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 SCR 427 to provide protection for intermediaries ‘whose participation is content neutral [and] confines itself to providing ‘a conduit’ for information communicated by others’: at para. 92. Bill C-32 proposes to make protection for IAPs more explicit through proposed s 31.1(1) and (2).

<sup>38</sup> *Copyright Act 1994* (NZ) s 92B. Section 92B is worded in a similar way to ss 39B/112E in Australian law: IAPs are only protected where they ‘merely’ provide facilities that others use to infringe. In Australia, this has been interpreted as meaning that once an IAP has knowledge it may potentially be liable. However, if the Copyright (Infringing File Sharing) Bill 2010 (NZ) is passed, it will add subsection (2A) to s 92B which could ensure knowledge does not preclude the exception.

A cache is a high-speed storage mechanism, which generally stores recently-used information in a place, closer to the user, where it can be retrieved by the user or others at a faster speed than if it had to be retrieved from the original site. There are various types of caching including:

- **Browser caching:** Browser programs (eg Firefox) store recently-viewed web pages in a cache on the user's hard disk. The first time an Australian Internet user visits a site on the Web stored in the US it will be via an Internet connection to access the US-based server, leading to some delay for loading. The second time the user visits the site (eg by hitting the 'back' button), the US website will appear more quickly because the page, or elements of it, is retrieved from the browser's cache.
- **Buffering:** also known as disk caching, refers to storing extra data (filling the buffer) before playing audio or video. Having more data in memory than are needed immediately compensates for momentary delays in transmission from the source.
- **Proxy caching:** Large organizations often have proxy servers through which all computers on the local network access the Internet. Among other purposes, a proxy server improves network performance, primarily by caching: saving recently-viewed Web sites, images, and files so that they don't have to be downloaded again. So, for example, if Bob views a news story at cnn.com at 1:00 and Jill views the same page at 1:03, Jill will most likely get the page from the proxy server's cache.<sup>39</sup> Proxy caching may be undertaken, by IAPs and other Internet Intermediaries, and by large corporate entities, government departments, and educational institutions.

From a copyright perspective, a reproduction stored in a cache may be an infringement unless a specific exception applies. In addition, when a user retrieves information from the cache, the transmission from the cache to the user could involve an infringing communication.

### Australia

The first problem with analysing caching under Australian copyright law is that, as Table 2 shows, the legal position is confused by the existence of three different exceptions that could, or are designed to cover caching, but which describe the exempted activity in different terms.

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<sup>39</sup> Proxy caching has the potential to interfere with the collection of usage statistics and statistics on 'page impressions' that are relevant to determining advertising revenue of commercial Web sites. There are technical mechanisms available to reduce this impact.

**Table 2: Australian provisions addressing caching**

Provision	s 43A (introduced 2000)	Part V Div 2AA s 116AB (introduced 2004)	s 200AAA (introduced 2006)
Applies to	Anyone	Carriage Service Providers	Educational Institutions
Covers	Temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication	Defines caching as the reproduction of copyright material on a system or network controlled or operated by or for a carriage service provider in response to an action by a user in order to facilitate efficient access to that material by that user or other users.	Refers to a computer system operated primarily to enable people to gain online access that automatically makes temporary electronic reproductions of copyright material made available online through the system to users of the system in response to action by the users, merely to facilitate efficient later access to the material by users of the system.

Only sections 43A and 111A are available to *all* Internet Intermediaries. At first glance, browser caching and buffering would appear to fall neatly within these provisions.<sup>40</sup> But these exceptions do not apply where the underlying communication is infringing. For example, if a user views a website with an infringing photograph on it and that website is automatically cached by the browser or an IAP in case other users wish to access the site, ss 43A and 111A do not apply. This limitation has the effect of limiting the protections offered by ss 43A and 111A to any Internet Intermediary undertaking caching on a large scale, if its users infringe copyright or retrieve copyright-infringing material.<sup>41</sup> This is in contrast to the stated objective of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (the ‘Digital Agenda Act’) to ‘ensure the copyright laws do not jeopardise the underlying technical processes that are integral to the operation of the Internet *such as certain kinds of caching*’.<sup>42</sup>

There are other reasons in the highly qualified, technical legal language of ss 43A and 111A for doubting their effectiveness to enable all common forms of caching:

1. The exceptions cover only copies made in the ‘technical process of making or receiving a communication’. Caching often facilitates communications to *other* users.<sup>43</sup>

<sup>40</sup> Note that for buffering an exception may not always be required. For larger works (like feature-length films or video games), Australian courts have recognised that a ‘substantial part’ of a work may not be ‘embodied’ in a digital device’s memory at any given point: *Australian Video Retailers Association v Warner Home Video Pty Ltd* (2001) 53 IPR 242; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 65 IPR 513.

<sup>41</sup> There is also an argument that ss 43B/111B could apply to caching. This would hold no advantages for a defendant: s 43B is subject to even more stringent limitations than ss 43A/111A.

<sup>42</sup> There is no explanation in those materials of what counts as ‘certain’ caching: *Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000*, at 6.

<sup>43</sup> Note, in support, that the definition of caching in s 116AB allows for ‘the reproduction of copyright material on a system or network controlled or operated by or for a carriage service provider in response to an action by a user in order to facilitate efficient access to that material by that user or other users’. Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (September 2000), at 108.

2. Proxy caching is a deliberate, non-essential choice by an Internet Intermediary and can involve human discretion, and hence may not always be ‘technical’.
3. Cache copies may not be ‘temporary’: for a large entity, elements of pages frequently accessed might be in a cache effectively for long periods.
4. The presence of specific definitions for caching in both ss 116AB and 200AAA suggest that if the government wanted to create an exception to cover all known forms of caching, it would have.
5. Sections 43A and 111A exempt *reproductions* but not the copyright owner’s communication right. When material is transmitted to a user from a proxy cache, it could be argued that the operator of the cache is ‘responsible for determining the content of the communication’ under s 22(6).

All these arguments can be disputed, but they at least create uncertainty about the legality of caching, which creates a disincentive for the development of the Digital Economy in Australia as well as general efficiency in the management of digital material by any institution. Much will depend on technical details of how the cache operates. In the case of at least some, highly-automated proxy caching, the content of a communication, even mediated through a cache, is in substance determined by the person operating the web site from which material is originally sourced. Other cases, involving greater human judgment or discretion in establishing the cache’s technical parameters could well involve the cache operator in direct infringement – perversely leading to a result where the more efficient and well-tailored the cache is (eg, to call on the network only where necessary), the more likely a finding of copyright infringement.

That the government had doubts about the legality of proxy caching is evident from the introduction of s 200AAA.<sup>44</sup> This section is designed to allow ‘active’ proxy caching by educational institutions.<sup>45</sup> It covers:

- computer systems (operated by educational institutions to provide access to staff and students);
- that automatically make temporary electronic copies of copyright material available online to users, in response to action by the users;
- where the temporary reproductions are made merely to facilitate efficient later access to the copyright material by users of the system.

Section 200AAA provides that an educational institution operating such a system is infringing neither the reproduction nor the communication right – even if the source material is infringing. It is not clear why educational institutions alone receive this special treatment, when similar caching is undertaken by other entities for efficiency-enhancing purposes. Further, the

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<sup>44</sup> That doubt is clearly expressed in the Supplementary Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth), which states that ‘Passive caching is already allowed under s 43A. New s 200AAA makes clear that proxy caching, ie, where a temporary reproduction of the material is automatically made in response to an action by a user in order to facilitate efficient access to that material by that user or other users, is not an infringement of copyright’ (para 128)

<sup>45</sup> According to the Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth), the purpose of s 200AAA was ‘to allow educational institutions to engage in active caching where cached material is not altered and not retained beyond the minimum period for the particular course of study’ (para 8.23).

introduction of s 200AAA in 2006 may suggest that proxy caching by other entities *could* be infringement, at least of the communication right – despite the fact that the presence of s 200AAA is stated not to impact on the application of ss 43A and 111A.<sup>46</sup>

Part V Div 2AA provides a Safe Harbour for automated caching provided certain conditions are met. This does not benefit most Internet Intermediaries – only carriage service providers. Carriage service providers wanting the benefit of the exceptions must comply with the various conditions, including by providing for removal of infringing material from the cache, and having a repeat infringer policy.<sup>47</sup>

In summary, there is much room for confusion about whether proxy caching (and any other forms of active caching involving the exercise of human judgment or retention of material for extended periods of time) is an infringing activity for Internet Intermediaries that are not carriage service providers or educational institutions.

### Other jurisdictions

In the US, caching, including proxy caching, will often be non-infringing: because the copies are too transient to fall within the reproduction right; or because they are fair use.<sup>48</sup> Where this is not true, there is a Safe Harbour for caching available to all online service providers.

In Europe, reproductions made in the process of caching may be temporary copies exempt under Article 5(1) of the *Information Society Directive*. Recital 33 of the Directive mentions caching a situation where Article 5(1) applies.<sup>49</sup> The word ‘may’ is appropriate because European Court of Justice (ECJ) case law suggests that caching involving the exercise of human judgment may not be exempted by Article 5(1).<sup>50</sup> In any event, all Internet Intermediaries have the benefit of Article 13 of the *Ecommerce Directive*, which exempts an Internet Intermediary from any damages award provided that it does not modify the information, complies with any access conditions at the source, complies with updating rules communicated in a standard way, does not interfere with technology used to ensure accurate usage data, and removes infringing material on receiving notice of its removal from the source location. Unlike Australia, there is

<sup>46</sup> *Copyright Act 1968* (Cth) subs 200AAA(3) and (4).

<sup>47</sup> Other conditions apply: the caching entity must not select or modify the communicated material, must update/refresh to industry standards, observe any access conditions at the source, and not interfere with copyright-protective technology: *Copyright Act 1968* (Cth) s 116AH.

<sup>48</sup> *Field v Google, Inc.* 412 F Supp 2d 1106 (D Nev 2006) (communication of material from Google’s cache not an infringement of copyright); *Parker v Google, Inc.* 422 F Supp 2d 492, 497 (ED Pa 2006) (no infringement in initial archive copying by Google or communication of links); compare *Perfect 10 v Google, Inc.* 416 F Supp. 2d 828 (CD Cal Feb. 17, 2006) (finding infringement).

<sup>49</sup> See also IVIR Infosoc Implementation Report above n 18 at 32-33 (citing legislative history making it clear that efficiency-enhancing caching was intended to be covered).

<sup>50</sup> Article 5(1) has been interpreted by the European Court of Justice to apply only to reproductions which do not exceed what is necessary for the proper completion of the relevant technological process and where the storage and deletion of the reproduction are not dependent on discretionary human intervention: *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08, Judgment of the Court (Fourth Chamber) of 16 July 2009 [2009] ECR 00 at [56], [59], [62]-[64]. In that case, image and text files which were automatically deleted might be temporary reproductions covered by Art 5(1) (subject to more detailed factual findings about the level of human discretion).

no need for a repeat infringer policy. The UK has an equivalent provision,<sup>51</sup> and New Zealand's s 92E is very similar.

Canada, like Australia, exempts only temporary reproductions in the course of non-infringing communication in s 30.71. However, assuming the passage of Bill C-32, Internet Intermediaries engaged in caching would rely not on that exception, but on s 31.1 (for network access providers, caching and web hosts) and s 41.27 (information location tools).<sup>52</sup> These provisions define caching in a way similar to that used in other jurisdictions. Canada has no take-down requirement relating to caching.<sup>53</sup>

It is striking how much more straightforward the position is in Europe, New Zealand and Canada. Even the US is more straightforward because often the Safe Harbours would frequently not need to be invoked at all. The complications found in the Australian legislation are ripe for reform.

### 2.3 *Hosting Content*

*For most people and businesses, joining the Digital Economy means they will need to find someone else to 'host' their material. The whole edifice of Web 2.0, user-created content and social networking depends on the creation of hosting platforms for the uploading and communication of third party content. Thus the third critical activity of Internet Intermediaries in the Digital Economy is hosting.*

*Hosting is an activity with low copyright risk only for carriage service providers in Australia: everyone else faces at least a moderate risk of copyright liability. This contrasts with other jurisdictions that have introduced general exceptions or Safe Harbours to protect web hosts.*

	<b>Australia CSPs</b>	<b>Australia Others</b>	<b>US</b>	<b>Canada after C- 32</b>	<b>EU</b>	<b>United Kingdom</b>	<b>New Zealand</b>
Level of legal risk involved in Traditional Web Host and Cloud Computing	GREEN	ORANGE	GREEN	GREEN	GREEN	GREEN	GREEN

Making material available online requires a server with an 'always on' connection to the Internet, which many people do not have at home, or may not have with sufficient capacity to

<sup>51</sup> *Electronic Commerce Regulations 2002* (UK) Regulation 18.

<sup>52</sup> In the meantime, it is possible that s 2.4(1)(b) could be relied on: see above n 156 and accompanying text. The provision has been broadly interpreted to cover at least hosting activities, suggesting that 'providing the means of telecommunication' is a broad concept that might extend to any Internet Intermediary providing essential elements of the Internet infrastructure.

<sup>53</sup> Under the general law of authorisation and the interpretation of s 2.4(1)(b) in *Society of Composers, Authors, and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 SCR 427 there may be an obligation to remove infringing material once notification is received in some circumstances. Bill C-32, if enacted, will have no explicit requirement for take-down.

meet the demands particularly of spikes in traffic. Entities that offer Web hosting store reproductions of content on their server and make that material available to the rest of the world, thus exercising, potentially, both the reproduction and communication rights. Increasingly, hosting of content can take a variety of different forms: it may involve traditional web hosting; cloud computing, or providing a participative forum for user-generated content. No doubt too there are other options, but these three will suffice for present analytical purposes.

### 2.3.1 'Traditional' Web Hosting

'Traditional Web Hosting' involves an entity providing server space and connectivity for a third party (the 'client') to communicate to the world at large via the Internet. The content of the Web site is usually managed by the host's customer.

#### Australia

Carriage service providers undertaking hosting are protected by a Safe Harbour.<sup>54</sup> However for other Internet Intermediaries, the only protection presently available under Australian law is to avoid authorisation, which means (at least) taking 'reasonable steps' to prevent infringement. What that will require is uncertain and highly fact-dependent.

Under Australian law, a traditional web host is most likely to risk liability for authorising infringement, at least once they have knowledge of a customer's infringing activity, although liability would depend on all the circumstances of the case. The Full Federal Court decision in *Cooper* establishes that a host which is aware of ongoing generalised infringement, and which fails to take steps deemed by a court to be reasonable (up to and including termination of the hosting arrangement), could potentially be liable for authorisation;<sup>55</sup> the very recent Full Federal Court decision in *Roadshow v iiNet* reaffirms this position and suggests that sufficiently informative notices of infringement including 'unequivocal and cogent evidence' of infringement may require response.<sup>56</sup>

If a court accepts that a web host *does* authorise infringement, the exceptions under ss 39B/112E are unhelpful according to *Roadshow v iiNet*.<sup>57</sup>

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<sup>54</sup> See s116AE.

<sup>55</sup> In *Cooper*, the host did more than simply know about the infringement (the host was also advertising on the site and providing support): *Cooper v Universal Music Australia* (2006) 71 IPR 1. More recently the Federal Court in *iiNet* held that that having the power to take the disproportionate step of cutting off access does *not* mean a party either has the power to prevent infringements *or* is required to take that step. However, those statements were predicated on a factual scenario where an IAP was unable to ascertain the content of communications as they occurred. A web host with the power to inspect material may be subject to a more stringent standard. Certainly, the 'per se' rule used by Justice Cowdroy to exclude authorisation liability for an ISP (that the ISP was merely providing a 'precondition' to infringement rather than the facilities for infringement) does not obviously apply to a web host. *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 83 IPR 430.

<sup>56</sup> *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23.

<sup>57</sup> *Ibid*; see also *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289; [2005] FCA 1242 at [394] (Wilcox J).

Extension of the Safe Harbours would give Traditional Web Hosts reasonably clear indications of what they must do to avoid liability.

### Other Jurisdictions

In the US, as in Australia, there is a risk a Traditional Web Host will be held liable for infringement by users under equivalents to Australia's law of authorisation. But US law provides better protection for Internet Intermediaries providing hosting services. The US' Safe Harbours are available to all online service providers, not just carriage service providers. Another difference is that the US, the obligation to take down material only arises where a web host receives a notice in the prescribed form.<sup>58</sup> This does not appear to be true in Australia – meaning that, unlike in the US, an Australian host may be obliged to investigate an alleged infringement – even if the regulations have not been followed.<sup>59</sup>

The legal position in Europe is similar to that in the US: there is some risk of secondary liability and a Safe Harbour which applies provided that the host acts expeditiously to remove infringing material on receiving actual or constructive knowledge of an infringement.<sup>60</sup> If the Safe Harbour applies, the possibility remains that a court will order an injunction to prevent infringement. The EU Safe Harbour conditions are reasonably similar to in Australia or the US, although the EU does not require a policy for the termination of the accounts of repeat infringers.

In Canada, entities generally, including Web Hosts, face a lower risk of liability for authorising infringement than in Australia. Bill C-32 could encourage an even narrower approach to authorisation liability, by creating a specific category of secondary liability for people who provide 'by means of the Internet or another digital network, a service that the person knows or should have known is designed primarily to enable acts of copyright infringement',<sup>61</sup> and through exceptions that make it clear that simply providing digital memory is not sufficient for authorisation,<sup>62</sup> and that the obligation of a service provider who receives a notice is to pass that notice on – *not* to take down infringing material<sup>63</sup> (unless a court has found infringement<sup>64</sup>).<sup>65</sup>

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<sup>58</sup> 17 USC §512(c)(3)(B)(i): non-compliant notices are not taken into account in determining whether a host has knowledge of 'circumstances from which infringing activity is apparent'.

<sup>59</sup> Under the conditions in *Copyright Act 1968* (Cth) s 116AH, a host must act to take down material if it becomes aware of 'facts or circumstances that make it apparent that the material is likely to be infringing'. The Copyright Regulations 1969 (Cth), Under Reg 20N, Div 3A.4 applies to determine the procedure for takedown where an entity receives a notice in the prescribed form *or any other notification* from the copyright owner. Div 3A.4 of the Regulations *requires* (Reg 20I) that notices be in the prescribed form. This *might* suggest there is no prescribed take down procedure for non-compliant notices. But this is not clear in the absence of an equivalent to 17 USC §512(c)(3)(B)(i).

<sup>60</sup> The Safe Harbour does not apply if the customer is 'is acting under the provider's authority or control'. This is unlikely in Traditional Web Hosting. It implies only a close relationship will preclude the Safe Harbour. See *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, O.J. L 167 , 22/06/2001 P. 0010 – 0019 (hereafter EU Information Society Directive), Article 8(3); *Ecommerce Directive*, above n 168 Article 14.3; similarly *New Zealand Copyright Act 1994* (NZ) s 92C(5).

<sup>61</sup> Bill C-32, Proposed s 27(2.3).

<sup>62</sup> Bill C-32, Proposed s 31.1(5).

<sup>63</sup> Bill C-32, Proposed ss 41.25-41.26.

### 2.3.2 Cloud Computing

Another kind of hosting of increasing importance is ‘cloud computing’. Cloud computing involves providing customers with access to content and software via Internet access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.<sup>66</sup> A recent report of the Australian Academy of Technological Sciences and Engineering has noted the potential benefits of cloud computing for governments, businesses and researchers.<sup>67</sup> Cloud computing can increase flexibility and reduce the need for individual businesses to invest in their own IT infrastructures. A recent survey found that by 2013, 85 per cent of Australian companies are likely to access their services using cloud computing.<sup>68</sup> Other research indicates that a key reason given by Australian firms for *not* using cloud services is the dearth of data centres in Australia.<sup>69</sup>

Since cloud providers are essentially hosts (at least insofar as they are likely to be impacted by copyright),<sup>70</sup> much of the same analysis that applies to Traditional Web Hosts would apply.<sup>71</sup> Thus operating cloud computing resources in Australia creates a higher risk of copyright liability than in other jurisdictions.

A further relevant point is that individuals who use cloud computing will infringe copyright if they store media – like sound recordings or literary works – where the copyright is owned by other people. While Australia has a private copying exception to allow a person to make a copy of a sound recording they own, that copy must be made onto a device that they own.<sup>72</sup> The private copying exception for texts (like books and newspapers) has a different limitation: the individual can only make one copy – something impracticable in the cloud computing context. Here, Australia’s very technology-specific exceptions inhibit the cloud computing model for individuals and create elevated risks for both consumers and Internet Intermediaries.

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<sup>64</sup> Bill C-32, Proposed s 31.1(6).

<sup>65</sup> It would be possible for Canadian courts to layer general law authorisation over this statutory regime. It seems more likely that the courts will interpret these provisions as establishing outer perimeters of authorisation liability for Internet Intermediaries.

<sup>66</sup> P Mell and T Grance, *The NIST Definition of Cloud Computing*, Version 15, October 2009, National Institute of Standards and Technology, Information Technology Laboratory.

<sup>67</sup> Australian Academy of Technological Sciences and Engineering, *Cloud Computing: Opportunities and Challenges for Australia* (September 2010).

<sup>68</sup> IDC Research report, cited in ‘Pendulum Swings Back Toward Private Cloud: IDC’, *ComputerWorld*, 26 August 2010.

<sup>69</sup> ‘Australian Organisations Still Apprehensive about Public Cloud’, *ComputerWorld*, 5 August 2010.

<sup>70</sup> This is not always true: some Cloud Computing involves off-site processing rather than off-site hosting. Both kinds of Cloud Computing would need to be considered.

<sup>71</sup> Although there is perhaps less risk simply because in many cases, a copyright owner will not find out about infringement. Disgruntled employees or other actions can increase this risk.

<sup>72</sup> *Copyright Act 1968* (Cth) s 109A.

### 2.3.3 Hosting a User-Created Content Site

*Internet Intermediaries also host User-Created (or User-Generated) Content sites (UCC sites). Examples include YouTube, Flickr, or ABC's Pool website (<http://pool.org.au/>).*

*Australia's present copyright law is inhospitable to UCC sites. Europe is similarly inhospitable, as is New Zealand, but Canada (if Bill C-32 passes) and the US are both more conducive to these activities.*

	<b>Australia CSPs</b>	<b>Australia Others</b>	<b>US</b>	<b>Canada after C-32</b>	<b>EU</b>	<b>United Kingdom</b>	<b>New Zealand</b>
Level of legal risk in hosting a User-Created Content Platform	ORANGE	RED	GREEN	GREEN	ORANGE	ORANGE	ORANGE

A UCC site generally accepts user-contributed content without intermediation.<sup>73</sup> But it does more than merely providing server space, managing the website and its structure and layout. A UCC site will have the power to remove particular items (particular photos, or videos), and not just disable access to the site as a whole. It will often derive revenue from advertising and may make judgments – perhaps automated, perhaps not – regarding the highlighting of particular user-generated material, for example, ‘most viewed’ or ‘most recently uploaded’ lists, or recommending similar items to users who view material. This higher level of involvement puts them at greater risk of copyright infringement than Traditional Web Hosts.

#### Australia

A UCC site in Australia may risk directly infringing copyright. A court could decide that such a site is responsible for determining the content of communications from its website, making it directly liable under s 22(6). Whether a court would hold such a site liable is unclear. On the one hand, it is the uploading user who ‘formulates the substance of a communication’;<sup>74</sup> some content may never be seen by any human being at the UCC platform. On the other hand, if a UCC platform actively manages content, for example, through features such as ‘most downloaded’ lists, it might be seen as ‘formulating content’. A UCC site that is aware of (alleged) infringement through notifications by right holders, and fails to take steps to limit this activity may also risk liability for authorising infringement, depending on all the facts.<sup>75</sup>

<sup>73</sup> The OECD defines ‘User-Created Content’ as “content made publicly available over the Internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices”: *Participative Web and User-Created Content*, OECD 2007, page 9.

<sup>74</sup> Justice Tamberlin has warned against ‘too literal and analytical’ an approach to interpreting s 22(6): *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 at [71], finding that the key is who “determines”, “formulates” or “creates” content.’ (ibid at [74]).

<sup>75</sup> There is a distinction between knowledge of *particular* infringements and *generalised* knowledge of infringement. In recent US litigation, Viacom argued that Google was obliged to take action in the presence of allegedly widespread and flagrant infringement on YouTube even without specific notices from Viacom: *Viacom International Inc v YouTube, Inc* (23 June 2010, SDNY). The US Court held that the provider must know of particular infringements – ‘red flags’: the provider need

Notably under Australian law, the fact that a technology or UCC platform has ‘substantial non-infringing uses’ (as many do) would not be sufficient to avoid liability.<sup>76</sup> Australia’s relatively narrow exceptions for individual creativity mean that at least some proportion of user-created content risks infringing copyright.<sup>77</sup>

As for other exceptions under Australian law, there is little joy for UCC Platforms:

1. Sections 39B/112E, which excuse parties who ‘merely’ provide facilities for communication, are not useful. On present interpretations of the law, if a UCC Platform has been held responsible on one of the bases just discussed, it would not succeed in arguing that it was ‘merely’ providing facilities for communication.<sup>78</sup>
2. UCC sites cannot rely on the Safe Harbours as they are not ordinarily carriage service providers.

### Other jurisdictions

In the US, UCC platforms gain considerable protection from a combination of fair use (which protects a wider range of user-created content than equivalent individual protections in Australia) and the US Safe Harbours. As noted, the US Courts have confirmed that Web 2.0 sites such as YouTube are entitled to the benefit of the ‘hosting’ Safe Harbour under US law.

The legal position for UCC sites in the EU is unclear. The EU’s hosting exception is the most important protection offered in EU law. As is the case in Australia, the more directly a UCC platform is involved with UCC content, the less likely it is to qualify as hosting service.<sup>79</sup> The difficulty is in determining the turning point at which UCC platforms are not any longer mere hosts, but ‘publishers’ in the sense of national media laws (with the consequence that they can be fully liable for the content posted by third parties). The UK has no specific provisions applicable in UK law and is thus subject to the same uncertainties as EU law. The UK has announced a review, due to report in April 2011, which will extend to these kinds of issues.<sup>80</sup>

In Canada, present law is similar to Australia. But Canada has proposed a solution: an exception (s 29.21<sup>81</sup>) to allow users to reproduce, and communicate, copyright material for non-commercial purposes, provided it does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of existing or potential markets for the

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not monitor or seek out facts indicating such activity. This discussion arose in a consideration of the US Safe Harbours, but the distinction is a useful one in considering authorisation liability. By contrast, in *Kazaa*, an Australian court held that knowledge of widespread infringement was sufficient for authorisation where there were means available to reduce infringement: *Universal Music Australia v Sharman License Holdings* (2005) 65 IPR 289. In other words, Australian case law suggests there might be a higher risk in Australia than in the US, as generalised knowledge together with the failure to take reasonable steps may be sufficient for authorisation liability.

<sup>76</sup> Cf US law: *Sony Corp. of America v. Universal City Studios, Inc.*, 464 US 417 (1984).

<sup>77</sup> See below Appendix 3 page 56.

<sup>78</sup> See Appendix 1 below page 45.

<sup>79</sup> IVIR, TNO and IDATE, *User- Created -Content: Supporting a Participative Information Society*, Final Report 2008 at 221.

<sup>80</sup> For more, see the website of the Review at <http://www.ipo.gov.uk/ipreview.htm>.

<sup>81</sup> See Appendix 3 page 56.

material. The proposed exception allows the individual to authorise an intermediary to disseminate the content.<sup>82</sup>

#### 2.4 Search Engines: Web Crawling, Indexing and Display of Results

*Search engines are essential to making sense of the vast amount of information available online. Search engines must undertake a range of activities online that involve making, and communicating, copies of works.*

*A search engine cannot operate fully from Australia without significant risk of copyright infringement.*

	Australia: CSPs	Australia: Others	United States	Canada after C-32	European Union	United Kingdom	New Zealand
Level of legal risk involved in running a Search Engine	GREEN	RED	GREEN	GREEN	ORANGE	RED	RED

A search engine must engage in activities that would risk a finding of direct infringement if carried out from Australia. It must use automated web crawlers to visit sites, reproduce copyright material from those sites, and store the material in a cache on the search engine's servers.<sup>83</sup> The material in this cache is used to facilitate indexing and search. This cached material may be retained until refreshed following another visit to the original site – meaning that while the copy is temporary, it is not transient and is retained beyond the initial processing.<sup>84</sup> Although in most cases a Search Engine will provide a link to a relevant site online, sometimes, members of the public using an engine will access the stored cache version if, for example, the original has disappeared, is not working, or has changed.<sup>85</sup> Finally, when a Search Engine displays results, it will often provide some extract (of text) and, in the case of image and video searches, a 'thumbnail' image of the identified material so that users can see if the results are relevant to them. This may, or may not, involve reproducing/communicating a sufficiently substantial portion to constitute infringement.

In many cases, a search engine could argue that such copies and communications are the subject of an implied licence: where a copyright owner puts material on a website, or authorises

<sup>82</sup> The provision is also supplemented by the background Canadian law which interprets liability for authorisation more narrowly: see above nn 21-**Error! Bookmark not defined.** and accompanying text. General principles of authorisation of copyright are not repealed by Bill C-32, meaning a UCC site could still be held to authorise obvious infringement to which it was wilfully blind. But the thrust of the provisions is to place the onus on copyright owners to pursue infringement with users.

<sup>83</sup> Unless the administrator of the website has used meta-data to exclude such caching.

<sup>84</sup> Such caching has been held fair use in the US: *Kelly v Arriba Soft Corp.*, 336 F 3d 811, 817-22 (9th Cir 2003); *Field v Google Inc.*, 412 F Supp 2d 1106, 1124 (D Nev 2006).

<sup>85</sup> Google has provided 'cached' links with its search results since 1998. On the cached copy, search times are highlighted. Such caching can be excluded by the controller of the website.

someone else to do so, without using standard technical methods to exclude search engine copying, one might assume that the copyright owner was consenting to the making of at least the copies necessary to make search engine activities possible.<sup>86</sup> However, there is no implied licence when material is placed online without a copyright owner's consent, and it is that material which tends to generate litigation.<sup>87</sup>

### Australia

Australian exceptions (for temporary reproductions) may not provide satisfactory protections for search engines, as they:<sup>88</sup>

1. do not apply where the source is infringing, making the exceptions not very useful in cases where search engines are most likely to be sued;<sup>89</sup>
2. are confined to reproductions made 'as part of the technical process of making or receiving a communication'. It could be argued this applies to a search engine's internal cache copy, but the situation is unclear;
3. apply to copies 'incidentally made as a necessary part of a technical process of using a copy of the work'.<sup>90</sup> this does not obviously apply to copies in a search engine's externally supplied cache; and
4. both apply only to 'temporary' copies – which may imply a shorter duration than the days (or longer) that search engine cache copies may be retained.

There is no specific exception to address any exercise of the communication right by search engines. It is at least arguable that a search engine communicating cache copies via its website is 'determining the content of the communication' and so responsible under s 22(6).<sup>91</sup> To the extent that a search engine is better analysed as 'authorising' a communication (by the source

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<sup>86</sup> Ben Allgrove and Paul Ganley, 'Search Engines, Data Aggregators and UK Copyright Law: A Proposal' (2007) 29(6) *EIPR* 227, 234.

<sup>87</sup> See, eg, *Perfect 10 Inc v Amazon Inc* 487 F 3d 701 (9<sup>th</sup> Cir 2007).

<sup>88</sup> For drafting details and comparisons with other jurisdictions, see Appendix 1 page 39.

<sup>89</sup> Most US proceedings relating to caches have been brought by copyright owners complaining that infringements could be located using the search engine: *Perfect 10 Inc v Amazon Inc* 487 F 3d 701 (9<sup>th</sup> Cir 2007).

<sup>90</sup> The better view is that s 43B was intended to benefit consumers using legitimate copies of works, for example, on DVD: the Explanatory Memorandum to the US Free Trade Agreement Implementation Act 2004 (Cth), noted that the exception was needed owing to the expanded definition of 'material form', which included 'electronic copies of a transitory nature made in the random access memory (RAM) of digital devices such as computers, DVD and compact disc players'. Thus '[i]n order that *users of copyright material* are not potentially liable for copyright infringement for the normal use of non-infringing copyright material an exception is required'.

<sup>91</sup> A search engine may not determine the content of text extracted and re-communicated to a user. But a search engine *does* determine the overall content of the communication in the form of search results together with other information. In *Cooper*, the court held that a website providing only links (and titles) was not communicating content (although it was authorising communication by the original website to users who clicked on the links on the site, itself a rather odd finding). In short, the point is arguable, but the better view, consistent with *Cooper*, is that material reproduced *on the intermediary's own website* is being communicated *by that intermediary*. Where the intermediary only *links* to material hosted elsewhere, the original host communicates.

site) when it communicates a cache copy there is no relevant exception which will apply to this activity, at least once a search engine has been notified of infringement.

Australia has a Safe Harbour for ‘category D services’ consisting of ‘referring users to an online location using information location tools or technology’<sup>92</sup> – but it is only available to carriage service providers. *If* the Safe Harbours are extended to cover other entities, this Safe Harbour will exempt search engines from liability for ‘infringements of copyright that occur in the course of carrying out’ the activity of ‘referring users to an online location using information location tools or technology’, provided that certain conditions are met (s 116AH; for details see Appendix 2). This provision is likely to be broad enough to cover all the reproductions and communications described above.

### Other jurisdictions

Search engines in the EU and UK also face legal uncertainty. The key exception in the *Information Society Directive* for digital reproductions is unhelpful, because it is confined to temporary and transient (or incidental) copies made for the sole purpose of enabling either (a) a transmission between third parties or (b) a lawful use, and which are ‘an integral and essential part of’ a technological process. Copies made by a search engine are not for the ‘sole purpose’ of enabling transmission between third parties: the search engine also has the ‘purpose’ of itself offering a service to users;<sup>93</sup> and a search engine’s caches are part of ‘transmission’ only on the broadest reading.<sup>94</sup> Caching and communicating infringing material or material that has been removed by a website owner is likely not a ‘lawful use’. Like Australia, the EU and UK have no Safe Harbour for search engines at present;<sup>95</sup> although it was considered early on.<sup>96</sup>

In Canada, there is no current protection for search engines, but Bill C-32 proposes a regime which would offer considerable protection, consisting of:

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<sup>92</sup> *Copyright Act 1968* (Cth) s 116AF.

<sup>93</sup> Ben Allgrove and Paul Ganley, ‘Search Engines, Data Aggregators and UK Copyright Law: A Proposal’ (2007) 29(6) *EIPR* 227, 233.

<sup>94</sup> Such a reading has been suggested, albeit without much confidence, by Susanne Klein, ‘Search Engines and Copyright: An Analysis of the Belgian Copiepress Decision in Consideration of British and German Copyright Law’ [2008] 39(4) *IIC* 451, 472.

<sup>95</sup> Allgrove and Ganley, above n 93. The caching provision might offer some protection, but it is limited to ‘the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service’, and applies only to service providers whose service ‘which consists of the transmission in a communication network of information provided by a recipient of the service’ (see *Ecommerce Directive*, above n 168 Article 13(1); UK *Ecommerce Regulations* above n 169 Article 18).

<sup>96</sup> Article 21 of the *Ecommerce Directive* required the European Commission to ‘analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services. The first report of the Commission in 2003 noted that there did not seem to be any issue: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)*, Brussels, 21.11.2003, COM(2003) 702 final.

1. A free exception in s 41.27 which protects information location tools, defined as ‘any tool that makes it possible to locate information that is available through the Internet or another digital network’,<sup>97</sup> provided they comply with certain technical conditions; which protection only expires 30 days after the provider receives a notice alleging copyright infringement and after material has been removed from the source website;
2. A standalone ‘notice-and-notice’ regime that allows copyright owners to send notices alleging infringement, and requiring the recipient to (a) on receipt of payment, forward the notice ‘to whom the electronic location belongs’, and inform the claimant of its forwarding; and (b) retain records sufficient to allow the identity of the person to whom the location belongs to be determined for 6 months from the date of the notice (or a year if proceedings are commenced and notified to the Intermediary). The penalty for non-compliance is statutory damages of between \$5000 and \$10,000.<sup>98</sup>

## 2.5 *And then there’s the future*

The above sections have dealt with companies and individuals engaged in common activities in the Digital Economy. But the next great Internet company will not be doing something familiar. The Australian government has made clear in the *Digital Economy Future Directions* report and in *Powering Innovation*, that it wants to improve Australia’s environment for innovation in the Digital Economy. Innovation by definition involves doing new things. Thus to focus only on known activities is to miss an important part of the picture.

Peering into the future is fraught with difficulties. But even in the short term certain online activities are likely to become more important. As more data migrates online, we can imagine more services combining that information in unexpected ways. What about a mobile tool that combines restaurant and entertainment reviews with mapping and GPS data to provide a person with a complete ‘picture’ of their social opportunities? A tool that builds a picture of the literary culture of a place based on information about authors, published books, literary festivals and the like? What about a website searching published scientific literature for genetic sequences, or chemical identities, aggregating new knowledge? Or consider a shopping comparison site, which searches for products and pricing online, and then produces a list of the available products, the online stores they are available, the price and other terms (like warranties) – in order to assist consumers find the most competitive deal. These activities – the categorisers, aggregators, and other future unknown entities – could be increasingly important in a world of ‘information overload’,<sup>99</sup> by investing in organising and ranking information and knowledge, in helping individuals find information, and in generating new knowledge. They are exactly the kinds of things that the Australian government has indicated a desire to encourage.<sup>100</sup>

<sup>97</sup> Canada, Bill C-32 s 41.27(5).

<sup>98</sup> Bill C-32, proposed ss 41.25-41.26.

<sup>99</sup> Pasquale describes ‘information ‘categorisers’: parties that provide metadata, rate, categorise, index, organise, and review information and content: Frank Pasquale, ‘Copyright in an Era of Information Overload: Toward the Privileging of Categorizers’ (2007) 60 *Vand. L. Rev.* 135.

<sup>100</sup> Department of Finance, *Engage: Getting on with Government 2.0, Government Response to the Report of the Government 2.0 Taskforce* (May 2010); Commonwealth Government, *Powering Ideas: An Innovation Agenda for the 21<sup>st</sup> Century* (2009) (the government’s innovation agenda and

Copyright law clearly has an impact on these kinds of activities. Any of these sites might reproduce small amounts of text and pictures on its own website and may, for the purposes of performing the analysis, copy large amounts of text from other websites into their own servers for analysis and ranking, and communicate parts of such materials. Australian law recognises no exception to allow for large-scale internal copying of material and storage for the purposes of analysis or aggregation with other information. There are a number of arguments that *could* be made in particular circumstances; some such sites might obtain benefit from the Safe Harbours if expanded – for example, some might be information location tools.<sup>101</sup> Specialised search engines, for example, enable end users to locate relevant information online.<sup>102</sup> Other entities engaged in innovative activities might be able to be characterised as ‘hosts’ or be able to characterise some activity as ‘caching’.<sup>103</sup> These specific exceptions however are unlikely to cover all the incidental activities that might occur online.

Nor are these the only possible innovations in the Digital Economy that may be chilled by overbroad copyright protection. The further development of cloud computing in the consumer market must be in doubt where there are no exceptions to allow consumers to utilise cloud resources to store, for example, legitimately-acquired media.<sup>104</sup>

In the absence of any specifically tailored exception or general flexible exception in the Act, the legal environment facing such entities – and their as yet unidentified successors – is uncertain. This is true regardless of the social value of the activity, and whether or not it competes with any interests of the copyright owner. This may lead to a situation where the only parties who can innovate, in Australia, are companies which are able to gain ‘permission to innovate’ from copyright owners – assuming copyright owners can even be identified and contacted.<sup>105</sup>

Innovative companies in Europe (including the UK) and New Zealand face similar issues: none of these jurisdictions have specific exceptions going beyond presently known activities.<sup>106</sup>

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response to the report of the National Innovation Inquiry, Cutler & Company, *venturousaustralia: Building Strength in Innovation: Review of the National Innovation System* (2008)).

<sup>101</sup> A shopping comparison site could be an information location tool if it links to the original sites: it helps a customer find the most pertinent information for them. But what about a site that does similar analysis of comparative deals *without* the ‘buy it here’ link – for example, a site that copies large amounts of text about mobile phone contracts and presents it in aggregated form?

<sup>102</sup> A benefit of the Safe Harbour is that, as discussed above, the statutory language referring to acts ‘in the course of’ providing an information location tool would exempt all acts of infringement (both archival copies and any subsequent reproductions) are arguably protected.

<sup>103</sup> The category of web host has shown considerable ‘resilience’ in the US at least, being applied to Web 2.0 services not contemplated at the time the original legislation was written.

<sup>104</sup> See above Part 2.3.2 page 21.

<sup>105</sup> The absence of an exception may inhibit investment in new ventures and by new entities beyond the very large players: Neil Netanel, ‘New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age’ (2008) 76 *Geo Wash L Rev* 952, 981.

<sup>106</sup> There is case law in Europe on the question of whether an aggregator is *liable* for infringement. In short, the case law is mixed: Hannibal Travis, ‘Opting out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law’ (2008) 84 *Notre Dame Law Review* 331; also Susanne Klein, ‘Search Engines and Copyright: An Analysis of the Belgian

Canada is slightly better off under Bill C-32 owing to the user-created content exception (proposed s 29.21). In the US, on the other hand, categorisers and content aggregators would have access to the general flexible exception of fair use.<sup>107</sup> This does not provide a general exemption for any such activities, but would enable a court to consider the impact of a given activity on the copyright owner's economic and other interests, and the social value of the activity, in coming to a decision whether the activity should be allowed.

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Copiepress Decision in Consideration of British and German Copyright Law' [2008] 39(4) IIC 451-483

<sup>107</sup> Cache copies made by Google for the purposes of analysis in order to conduct its search activities have already been held to be fair use: *Kelly v Arriba Soft Corp.*, 336 F 3d 811 (9th Cir 2003); *Field v Google* 412 F Supp. 2d 1106 (D Nev. 2006).

### 3 Advancing the Digital Economy: What Australia Should Do

Two critical reforms are needed to adapt Australian law to the Digital Economy: the extension of the Safe Harbours to protect known activities of Internet Intermediaries, and the introduction of a flexible exception to ensure room for innovation. This Policy Paper also recommends complementary reforms which will reduce uncertainty and promote innovation while still protecting the economic rights and other interests of copyright owners.

#### 3.1 *Extend the kinds of entities entitled to Safe Harbours to all online service providers*

Australia's Safe Harbours are out of step with every other jurisdiction discussed here: where Australia restricts its Safe Harbours to carriage service providers only, every other jurisdiction extends protection to a wide range of Internet Intermediaries. Not only does this disadvantage entrepreneurs operating in Australia as compared to other jurisdictions, it also creates, in Australia, an uneven playing field. Under the present legal arrangements, if Telstra and a new entrepreneurial company establish exactly the same web hosting services, Telstra has lower legal risk owing to the Safe Harbours than the new company. There is no good reason for this. To correct this, Australia need only replace the term 'carriage service providers' with a broad definition of online service providers.<sup>108</sup>

Extending the Safe Harbours will go a long way to improving the legal risks facing Internet Intermediaries, but will not on its own be enough to create a legal environment fit for the Digital Economy:

1. Not every activity that may increase social, creative, and technological opportunities online will fall (or clearly fall) within the specified Safe Harbours, particularly as technology changes. Some examples are given in Part 2.5.<sup>109</sup>
2. Other legal systems offer 'breathing room' for unanticipated developments. In these jurisdictions – particularly the US and Canada – the Safe Harbours are a fall-back, not the sole protection for Internet Intermediaries who become aware some infringement is occurring using their service or product.

#### 3.2 *Introduce a flexible exception into Australian copyright law*

Australian copyright law needs flexibility: 'room to innovate' without first seeking government or copyright owner permission in those cases where innovation does not conflict with copyright owners' normal exploitation of their creative efforts, or otherwise unreasonably prejudice their legitimate interests.

There is no way that anyone can foresee how technologies for the communication, enjoyment, and combination of copyright material will develop in the future: the attempt to write legislation for present technology means that future developments are left unprotected. Proof, if it were needed, may be found in the three different attempts to define (and protect) caching that have been enacted in the last decade, or the fact that private copying exceptions written only in 2006

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<sup>108</sup> Examples may be found in both Europe and the US. For legislative details see below Appendix 2.

<sup>109</sup> Above page 28.

now stand in the way of consumer cloud computing services. It is not an accident that many innovative new Digital Economy services have been launched in the US, which has far greater flexibility built into its legislation. Without the legal environment for innovation at home, Australia risks being only an importer of new digital services and products.

In order to fully avail itself of the opportunities created by the Digital Economy, Australia should introduce a flexible exception that does not specify in advance all permitted uses, but establishes criteria to enable innovators to assess whether their intended use of copyright material will be fair to copyright owners.<sup>110</sup>

In the context of Internet Intermediaries, a flexible exception could help play three roles:

1. It could reduce the number of user activities constituting infringement, particularly in the context of User-Created Content, by providing a defence for certain ‘mash-ups’ or incidental use of copyright material in User-Created Content.<sup>111</sup>
2. It could provide an exception that could be relied on by Internet Intermediaries for activities that currently risk direct infringement: such as the copying (for the purpose of indexing) conducted as a necessary intermediate step in providing search services. This would be particularly important in contexts where Safe Harbours do not apply.
3. It could (in the presence of a sufficiently clear legislative intention backed up in the explanatory materials) provide an exception covering incidental, non-harmful temporary and transient copying, enabling the repeal of the overly-complicated, heavily qualified exceptions found in ss 43A, 43B, 111A and 111B.

Such an exception would not be a *carte blanche* for re-use of copyright material. Any exception, to be legitimate under international copyright law, would have to require courts to assess the impact on copyright owners’ economic and other interests. The point is to create an exception that benefits innovation without unduly harming copyright owner interests.

Australia has considered a number of times whether to introduce a flexible exception: most recently in 2005, but also in 1998.<sup>112</sup> Part of the reason this issue has returned to public debate is because reforms in 2000 and 2006 have not succeeded in creating an environment for ongoing digital innovation; technology has already moved far enough to leave even recent changes looking outdated and unduly limited. But also, in neither 1998, nor in 2005, was there such an international momentum towards recognising the need for flexibility in copyright. Now, Canada has proposed new exceptions to enable User-Created Content, and both the UK and Japan are seriously considering how to provide much-needed flexibility into their laws. As time goes on, and as the potential and opportunities in digital technology become clearer, the case for flexibility has become stronger and more urgent.

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<sup>110</sup> See for example the fairness criteria in s40(2) *Copyright Act 1964*

<sup>111</sup> This would be consistent with proposals in Canada and discussions in the United Kingdom (see Appendix 3, page 56).

<sup>112</sup> Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 1: Exceptions* (1998). For a discussion of some of the drawbacks, see Burrell and Coleman, *Copyright Exceptions: The Digital Impact* (2005), Chapter 9.

One thing is clear. The alternative to flexibility is a culture that requires permission to innovate.

There are at least three different ways Australia could seek to legislate for more flexibility:

1. A fair dealing exception that is not entirely open-ended ie which does not provide an illustrative list of purposes but which uses terminology designed to allow for a wide range of activities in the Digital Economy, coupled with an overarching requirement of fairness. For example, an exception for ‘fair dealing for the purposes of transformative use’.
2. An open-ended exception in the style of the US ‘fair use’ exception, which lists certain purposes but in an illustrative way (eg, an exception for ‘fair dealing for purposes such as ...’), coupled with an overarching fairness test; or
3. Revision and expansion of the existing, semi-flexible s 200AB exception to allow for a wider range of users and purposes.

### 3.2.1 Option 1: Fair dealing for the purposes of transformative use

Option 1 is to introduce a new fair dealing defence, identifying a purpose descriptor that is flexible enough to both cover all or many of the gaps identified and provide flexibility for future, innovative uses. One example of a term that is flexible, and that focuses on the goal of encouraging and enabling innovation, is the word ‘transformative’. Thus Australia could introduce an exception for ‘fair dealing for transformative use’.<sup>113</sup>

In the US cases,<sup>114</sup> acts have been considered ‘transformative’ when they do more than merely ‘supersede the objects’ of the original creation, but add ‘something new, with a further purpose or different character, altering the first with *new expression, meaning, or message*.’<sup>115</sup> It is important to note that ‘transformativeness’, is not necessarily concerned with how much the defendant has changed the content of the material being used.<sup>116</sup> Use may be transformative where it involves creative recontextualization.<sup>117</sup> Transformation of content may also suggest

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<sup>113</sup> There may be other terms that also capture the ideas intended here. ‘Transformative’ is useful due to its history and its meaning in copyright jurisprudence, but this discussion is not meant to preclude other possible options.

<sup>114</sup> The transformative nature of a use is a key factor in fair use analysis in the US. Judge Pierre Leval championed the term: Pierre N. Leval, ‘Toward a Fair Use Standard’ (1990) 103 *Harv. L. Rev.* 1105, 1111 (‘the secondary use adds value to the original – if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings’ – because ‘this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society’).

<sup>115</sup> *Folsom v Marsh*, 9 F Cas 342, 348 (No 4,901) (CCD Mass 1841); *Harper & Row Publishers, Inc. v Nation Enterprises* 471 US 539, 562 (1985).

<sup>116</sup> *Campbell v Acuff-Rose* 510 US 569 (1994). While the case clearly involved the transformation of content, the fact that the purpose and meaning was entirely different - parodic criticism rather than romantic musicianship –was important: see R Anthony Reese, ‘Transformativeness and the Derivative Work Right’ (2008) 31 *Colum. J. L. & Arts* 467, 485

<sup>117</sup> Daniel Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 841, 862; *Wall Data Inc v L.A. County Sheriff’s Department* 447 F 3d 769, 778 (9<sup>th</sup> Cir 2006) (‘[a] use is considered transformative

fair use, but only in cases where the purpose being served by the defendant's use is different than the original work.<sup>118</sup> The term 'transformative' could apply to individual creative acts that do not threaten a copyright owner's interests (such as appropriation art or user-created content for a new innovative purpose). It has also been used to describe re-use such as the reproduction of thumbnail images by a search engine.<sup>119</sup>

It is envisaged that the term 'transformative' would describe some or all of the activities of Internet Intermediaries and other actors in the Digital Economy which are not currently allowed in Australia, such as:<sup>120</sup>

1. Search engines or other analytical users, indexing and communicating results (use for an different purpose from that of the copyright owner);<sup>121</sup>
2. Copying of information for the purposes of combining it with other information in order to create innovative new services;<sup>122</sup>
3. Some creative recontextualisation of copyright material in user-created content.

Depending on the Government's policy goals for a new exception, it might be necessary to be quite detailed, either in legislative notes,<sup>123</sup> or in the explanatory memorandum,<sup>124</sup> as to how the government intends the term 'transformative' to be understood. A transformative use exception would not address every issue in Australian law. Simple system or proxy caching may or may not be considered 'transformative' for example, so extension of the Safe Harbours remains important.

### 3.2.2 Option 2: A Fair Use/Open-ended Exception

A second option is a fully open-ended exception, similar to US law. It would be appropriate, in Australia, to term such an exception a fair *dealing* exception, but to adopt the basic feature of fair use, an illustrative, rather than exclusive list of purposes. For example:

- (1) *A fair dealing with a literary, dramatic, musical or artistic work, with an adaptation of a literary, dramatic or musical work, or with an audio-visual work, for purposes such as research or study, criticism or review, parody or satire, the reporting of news, judicial proceedings or legal advice, or*

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only where a defendant changes a plaintiff's copyrighted work or uses the plaintiff's copyrighted work in a different context such that the plaintiff's work is transformed into a new creation'.)

<sup>118</sup> See Reese, above n 116, at 492-493 (citing cases where content was transformed but not the purpose, where the 'transformativeness' factor therefore weighed against a finding of fair use).

<sup>119</sup> *Perfect 10 Inc v Amazon Inc* 487 F 3d 701 (9<sup>th</sup> Cir 2007); *Kelly v Arriba Soft Corporation* 336 F 3d 811(9<sup>th</sup> Cir 2003))

<sup>120</sup> It might also create 'room to move' in other areas that have always been in some doubt: for example, appropriation art.

<sup>121</sup> See to similar effect in the US *Perfect 10 Inc v Amazon Inc* 487 F 3d 701 (9<sup>th</sup> Cir 2007); *Kelly v Arriba Soft Corporation* 336 F 3d 811(9<sup>th</sup> Cir 2003).

<sup>122</sup> See above Part 2.5 page 28.

<sup>123</sup> Like the 'examples' included in the statute in s 200AB of the Act. Such notes do not have binding force: see *Acts Interpretation Act 1901* (Cth) s 13(3); they constitute 'extrinsic material' to which reference may be had in interpreting a provision which is 'ambiguous or obscure': s 15AB(1)(b).

<sup>124</sup> Although if such material were included in the Explanatory Memorandum, rather than the Act itself,

*transformative use, does not constitute an infringement of the copyright in the work.*

- (2) *For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work is fair include:*
- (a) The purpose and character of the dealing;*
  - (b) The nature of the work or adaptation;*
  - (c) The effect of the dealing upon the potential market for, or value of, the work or adaptation;*
  - (d) Where appropriate, whether a sufficient acknowledgment of the original work or other subject matter has been made;*
  - (e) In a case where part only of the work or adaptation is the subject of a dealing – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.<sup>125</sup>*

Such an exception could cover activities necessary to run socially useful Internet Intermediary services like search engines, and extend more broadly to various temporary reproductions and other acts which are not strictly transformative but which are incidental to ordinary legitimate acts, as well as allow for some activities of individual end-users (such as contributing certain user-created content). Again, the exception would not be a *carte blanche* for all possible uses: the requirement of fairness would protect the economic and other legitimate interests of copyright owners.

The difference between this and Option 1 is that the exception is more open-ended than an exception for fair dealing for transformative purposes. This would place a greater onus on courts to determine the bounds of allowable conduct. Concerns about the uncertainty of this could be addressed at least to some extent by explanatory materials, as well as best practice guides as has occurred in the US.

### 3.2.3 Option 3: Extending 200AB

A third model for a ‘flexible exception’ is provided by Australia’s s 200AB. Section 200AB was introduced in 2006 to provide a flexible exception to enable copyright material to be used for certain socially useful purposes, while remaining consistent with Australia’s obligations under international copyright treaties,<sup>126</sup> in particular, the three step test.<sup>127</sup> The s 200AB exception applies if:

- The user is a specified user;

<sup>125</sup> This indicative drafting uses the historical factors for assessing fair dealing from s 40 of the *Copyright Act 1968* (Cth), rather than the factors found in US law (17 USC §107) or the three-step test in s 200AB and Berne/TRIPS Agreements. Australia has case law interpreting the fair dealing factors, but no Australian court and only one international tribunal has interpreted the three step test. Using the fair dealing factors provides more guidance and hence more certainty.

<sup>126</sup> Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth), [6.53].

<sup>127</sup> Berne Convention Article 9(2); TRIPS Article 13.

- The purpose falls within specified (broadly defined) categories of purpose;
- The use is non-commercial; and
- The use complies with the three step test, that is, it:
  - amounts to a special case;
  - does not conflict with a normal exploitation of the work; and
  - does not unreasonably prejudice the legitimate interests of the copyright owner.

In other words, s200AB creates broad parameters for certain kinds of users whose uses *may* be allowed, *if* a court decides the use is a special case that does not unduly harm copyright owners.

Access to s 200AB is confined to certain institutions or people serving public purposes, such as libraries and archives, persons with a disability and educational institutions. There is nothing inherent in the form of s 200AB that requires limiting it to public sector institutions or to non-commercial uses. It would be possible to include additional users and different purposes to cover legitimate activities of Internet Intermediaries and users, such as:

1. Caching, including proxy and system-level caching: for the purpose of improving network efficiency or the provision of online services;
2. Web Hosting;
3. Hosting a User-Created Content Platform;
4. Providing Cloud Computing services to the public;
5. Operating a Search Engine;
6. Future innovations centred on the aggregation, analysis, ordering and ranking of information; and
7. Making or contributing ‘user-created content’ beyond the specific purposes of parody, satire, criticism, review, and the reporting of news.<sup>128</sup>

Some of these (particularly 2, 3, and 4) could be addressed together.

It might be objected that these additional purposes overlap with existing exceptions and in particular the existing Safe Harbours in Part V Div 2AA. This is true, however, of the existing purposes of s 200AB, all of which have some overlap with existing exceptions, and is true of other exceptions found in the Act. The goal in expanding s 200AB would be to promote innovation by providing flexibility for acts not clearly covered by existing exceptions – subject always to a ‘fairness’ requirement. Such overlap is also common in other jurisdictions, for example the US, the Safe Harbours operate as a fall back, or second tier protection for Internet Intermediaries, rather than the only relevant exception excusing certain conduct.<sup>129</sup>

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<sup>128</sup> See Canada’s Bill C-32, s 29.21, for UCC. For an extended discussion see below Appendix 3, page 56.

<sup>129</sup> Similarly, it might also be objected that by leaving little work for the Safe Harbours to do, an expanded s 200AB would reduce the effectiveness of the Safe Harbours in providing incentives for intermediaries to cooperate with right holders. This is not a real concern: the fairness requirement allows a court to consider, and if necessary condemn, an Internet Intermediary’s behaviour.

### 3.2.4 Assessing the options

Of the three options described here, the last (extending s 200AB) is the least desirable. First, it requires the legislature to identify both users, and uses in advance – which reduces some of the flexibility that may be useful in a rapidly changing environment. The discussion above identified seven additional purposes that might need to be added to s 200AB to cover the areas identified as gaps in this Policy Paper: but even this long list cannot entirely future-proof the provision when we cannot predict what will come next. Second, it would increase the complexity of the Australian copyright legislation, particularly in relation to the application of the three step test.<sup>130</sup>

Research suggests that much innovation comes from small, start-up companies and individuals. Legal complexity is particularly challenging for these actors and may discourage them from entering the Australian market. The UK Government<sup>131</sup> is surely right to say that a key problem at the moment for users is complexity; and that what is needed when it comes to individuals is commonsense rules that will give consumers more freedom to undertake commonly accepted acts (such as creating mash-ups) and make clear what would represent an unreasonable interference with copyright owners' rights.

Options 1 and 2 are perhaps better adapted than option 3 to both capture the common activities of Internet Intermediaries necessary to facilitate the growth of the Australian Digital Economy, and to provide flexibility to facilitate, where appropriate, new uses of copyright material. Option 2 perhaps provides the best option for 'future proofing' the Act, however it is recognised that any new flexible exception would need to be implemented in a way that is appropriate for Australian circumstances. Implementing any of the 3 identified options for achieving legal certainty and flexibility for actors in the Digital Economy would be a significant positive advancement on the status quo.

Irrespective of which option was implemented, it would be necessary to address some matters of detail, such as the interaction with existing exceptions and statutory licenses.

Past criticism of the introduction of a flexible exception has focused on two sets of issues:

- Australia's existing system provides greater certainty; and
- A flexible exception is inconsistent with the broader Australian legal system.

In reality, Australia's present exceptions regime is not certain, given the overlaps, inconsistencies, and incoherence of the heavily qualified provisions that require legal advice to understand. The government could address any concerns about how a new flexible exception should be interpreted by indicating its intentions through strong explanatory materials.

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<sup>130</sup> The three step test, was never designed to be implemented into domestic legislation. See Jonathan Griffiths, 'The Three Step Test in European Copyright Law: Problems and Solutions', available at <http://papers.ssrn.com/abstract=1476968>.

<sup>131</sup> UK Intellectual Property Office, © *the way ahead: A Strategy for Copyright in the Digital Age* (2009) 4, 48-49.

Some have objected that the archetypal flexible exception, the US' fair use, is 'closely bound up with constitutional guarantees of free speech, deep respect for a private sphere of home and family life kept relatively free from regulation and vigorous notions of free competition underpinned by antipathy towards monopolies': which may lead to more expansive interpretations than would be seen in Australia.<sup>132</sup> This is true, but on the other hand, Australia shares with the US an instrumental and utilitarian justification for copyright: copyright is aimed at providing needed incentives for creativity: a rationale that supports the existence of limits on copyright to allow second-generation and follow-on creativity. Australia also has a whole range of public sector institutions – like libraries, galleries, and archives – keen to do more to open up Australia's cultural heritage to individuals online, who might be expected to take advantage of the flexibility provided.

The options considered are not the only ways to create flexibility in the Act, but they are the most practicable. Other options would introduce significant complexity and uncertainty. A statutory license, for example, to allow use in return for the payment of equitable remuneration, would create a large and unwieldy bureaucracy and unpredictable costs for minimal gain.<sup>133</sup> The introduction of further Safe Harbours faces legal barriers.<sup>134</sup> These options are therefore not considered in detail here.

### 3.3 *Specific amendments*

Only the introduction of flexibility into the *Copyright Act* will create an environment in which new products and new services in the Digital Economy can thrive.

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<sup>132</sup> Burrell and Coleman, above n 112 at 269, quoting Brian Fitzgerald, 'Underlying Rationales of Fair Use: Simplifying the Copyright Act' (1998) 2 *Southern Cross University Law Review* 153; Robert Burrell and James Stellios, 'Copyright and Freedom of Political Communication in Australia' in Jonathan Griffiths, Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press 2005) 257-286

<sup>133</sup> The Canadian private copying levy is instructive. That levy is proposed by the relevant Collecting Society and then determined by the Copyright Board. It is no light task, and dwarfs anything that has ever been done by the Australian Copyright Tribunal. The first hearing by the Canadian Copyright Board received some 3,000 written comments – reducing somewhat to 1,500 in the third round; the system has also generated at least two sets of legal proceedings to date. Disputes over the scope of the digital copying statutory licence in education in Australia – *particularly* over when, and how much, schools should pay for copying material from the Internet – have been on foot for at least 2 years and are still ongoing. A further issue is whether any statutory licence can provide incentives for innovation and new uses. They may, in fact, end up remunerating owners for existing uses without fixing the problems at the heart of the Australian system at present: its inflexibility and inhospitability to innovation.

<sup>134</sup> See Article 17.11.29(b)(i): the limitations on liability apply to 'the following functions, and shall be confined to those functions'; Footnote 17-37: 'Paragraph 29(b) [the Safe Harbours provision] is without prejudice to the availability of defences to copyright infringement that are of general applicability'; and Footnote 17-38: 'Either Party may request consultations with the other Party to consider how to address under this paragraph functions of a similar nature to the functions identified in paragraphs (A) through (D) above that a Party identifies after the entry into force of this Agreement.'

If the government decides not to introduce a flexible exception, certain amendments should be made as a minimum to enable known activities in the Digital Economy to be conducted in Australia without undue legal risk. However, it is important to realise that this is the ‘least best’ approach, likely to lead to long battles over minor aspects of wording in the Act leading to minimal extensions to cover immediate problems, with no real long term gain in facilitating innovation and stimulating Australia’s Digital Economy.

In addition to the expansion of the Safe Harbours, exceptions would need to be introduced for:

1. Caching, including proxy and system-level caching: for the purpose of improving network efficiency or the provision of online services;
2. Web Hosting;
3. Hosting a User-Created Content Platform;
4. Providing Cloud Computing services to the public; and
5. Operating a Search Engine.

Further reforms would also be necessary to Australia’s *existing* exceptions to address the various ways (outlined in Appendix 1) that they are more restrictive than in comparable jurisdictions.

#### **4 Conclusion**

The NBN will create enormous potential for Australia’s Digital Economy, and Australians can be an innovative group of people. Innovation is much more likely to happen if the economic and legal environments are favourable. It lies in the government’s hands to make Australian law a boon, rather than a barrier, to creators, artists, producers – and the Internet Intermediaries who make the Digital Economy happen.

This Policy Paper shows that at present, Australian law is probably the least conducive to innovation of any of those surveyed. But there *are* changes that could be made that would turn that situation around: extending the Safe Harbours, and introducing a flexible exception. Other complementary amendments would help reduce the complexity and incoherence of parts of Australia’s digital copyright laws.

Changes of these kinds could help ensure that Australia’s investments in its broadband and digital infrastructure and its creative young people through the digital education revolution will pay off: and that Australia takes its place among the leading digital economies.

## Appendix 1: Australia's Digital Exceptions Compared

The body of this Policy Paper discusses the impact of Australia's present digital copyright laws on the activities that make up the Digital Economy. For the purposes of considering amendment of Australia's laws, however, it is also important to appreciate how Australia's digital exceptions compare, in their drafting and coverage, to equivalent exceptions and laws in other jurisdictions.

This Appendix provides essential background to the Policy Paper by providing those comparisons. The next Appendix compares the Safe Harbours in the various jurisdictions.

### *Introduction and Summary*

The Australian government introduced three specific exceptions with the goal of ensuring 'that copyright laws do not jeopardise the underlying technical processes that are integral to the operation of the Internet' and to provide that 'carriers and carriage service providers (including ISPs) with reasonable certainty about liability for infringements that occur on their facilities or infrastructure'.<sup>135</sup> These exceptions map to the copyright rights implicated whenever online material is used. There are:

1. Two exemptions for temporary reproductions:
  - a) One for copies made in the course of communications (ss 43A/111A);
  - b) One for copies in the course of use of digital copyright material (ss 43B/111B);
2. An exemption for communications, protecting entities that provide facilities for transmission (ss 39B/112E); and

Table 3 compares these Australian exceptions with the law overseas. 'Broader' means an exception gives greater protection for the activities of Internet Intermediaries; 'narrower' means that more activities are copyright infringement – meaning less protection for Internet Intermediaries. This Table does not take the Safe Harbours (considered in the next section) into account.

**Table 3: Summary Table Comparing exceptions**

Act	Australia	EU/UK Provisions	Canada (with Bill C-32)	United States	New Zealand
Temporary copies in the course of communication	Exemptions for temporary copies made as part of the technical process of making or receiving a communication. Not applicable	Broader: no limitation to non-infringing communication.	Broader for Internet Intermediaries, similar to Australia for individuals and non-intermediary companies.	Broader. Many such reproductions not covered by copyright or exempt as fair use.	Narrower: copies must be transient, incidental, have no independent economic significance, be 'integral and

<sup>135</sup> *Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000* at para 2.1.

	where communication is infringing.				essential' to the technological process, <i>and</i> communication must not infringe.
Temporary copies in the course of use of a copy	Exempts temporary copies incidentally made as a necessary part of a technical process of using a copy. Does not apply if: <ul style="list-style-type: none"> <li>• source copy infringes;</li> <li>• source copy is parallel imported; or</li> <li>• use infringes.</li> </ul>	Marginally broader. Allows 'lawful use' which would include parallel-imported material.	Marginally broader: allows 'lawful use' which would include parallel-imported material.	Broader. Not copies or fair use.	Marginally broader: allows 'lawful use' which would include parallel-imported material.
Provision of facilities for communication and communication right	s 22(6): person who determines content is communicating. ss 39B/112E: No authorisation merely because person provides facilities for making a communication and another infringes.	Less specific protection. Mere provision of physical facilities does not in itself amount to communication. Key protection comes from ECD's 'Safe Harbours'. Injunctions still available.	Broader for Internet Intermediaries (s 2.4(1) (b); 'safe harbour' equivalents). Proposed s 31.1 has similar conditions to ss 39B/112E but covers all kinds of infringement.	Broader protection mostly through general principle. Direct liability requires volition; secondary liability is more narrowly drawn.	Narrower. s 92B Similar legislation to Australia but narrower protection (monetary remedies only; injunctions still available, like in Europe). <sup>136</sup>

### *Exceptions to liability for (temporary) reproductions*

Temporary copies are made whenever digital material is used. Copies are made in servers controlled by IAPs and sending and receiving organisations/individuals when communications are transmitted across a network; and copies are made in digital memory of devices like computers when digital content (eg DVDs) are used. Most jurisdictions have taken steps to limit a copyright owner's rights to ensure that these reproductions do not give rise to copyright liability. The Australian exceptions are, however, quite limited.

<sup>136</sup> The language of s 92B(3) states that 'nothing in this section limits the right of the copyright owner to injunctive relief in relation to A's infringement or any infringement by the Internet service provider'. An injunction under this provision might be directed to the infringing user or to the Internet Intermediary.

## Australia

Australia has two exceptions for temporary reproductions. The first, introduced in 2000,<sup>137</sup> is s 43A (with an equivalent for Part IV subject matter in s 111A), as follows:

- (1) *The copyright in a work, or an adaptation of a work, is not infringed by making a temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication.*
- (2) *Subsection (1) does not apply in relation to the making of a temporary reproduction of a work, or an adaptation of a work, as part of the technical process of making a communication if the making of the communication is an infringement of copyright.*

Sections 43A and 111A have two main limitations. First, there is the fact that they do not apply where the source is infringing. This means:

1. Consumers who (even unknowingly) view infringing material online may infringe as a result of s 43A(2) – although equivalent acts offline (eg reading a photocopied book) would not give rise to liability.<sup>138</sup>
2. The exception is not useful for Internet Intermediaries, who may provide services to users who deal with both infringing and non-infringing material.

Second, it is not clear that the language is sufficient to cover all temporary reproductions made by IAPs.<sup>139</sup> For example, many Internet Intermediaries will make the decision to ‘cache’: store material on an intermediate server, closer to the user, for faster access. Caching is discussed in detail in the body of the Policy Paper.<sup>140</sup>

The second pair of exceptions covers temporary copies made in the process of using a digital copy of a work in ss 43B and 111B:

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<sup>137</sup> *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

<sup>138</sup> In addition, the limit could renders unlawful the viewing of material made available online with the permission of the copyright owner overseas, but without the permission of the Australian copyright owner, who has an exclusive right to communicate a work to the public in Australia.

<sup>139</sup> IAPs may not be responsible for many copies made on the servers because to be directly liable ordinarily requires volition – in at least some cases, it will be the person sending the communication who ‘makes copies’. *Copinger and Skone James on Copyright*, from Sweet and Maxwell (as included in Westlaw as at December 2009) at [7.21]. See also *Sony Music Entertainment (UK) Ltd v Easyinternetcafe Ltd* [2003] FSR 48 (Ch, Peter Smith J) (drawing a distinction between involuntary copying (where a copy is made on B’s machine without B having any involvement) and voluntary copying (where a human B or human employee of B plays some role in the copying. But compare *The Newspaper Licensing Agency Limited v Meltwater Holding BV* [2010] EWHC 3099 (Ch) (holding that a user who receives an email ‘makes the copies’ in their computer arising from the email: [101]-[102]. This holding is inconsistent with statements in other cases, not acknowledged in the judgment, and may be incorrect. For equivalent case law in the US, see *Cartoon Network LP, LLLP v CSC Holdings, Inc* 536 F 3d 121, 127 (2d Cir 2008); *Religious Technology Center v. Netcom On-Line Communication Services*, 907 F Supp 1361, 1370 (ND Cal 1995); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir 2004); *Parker v Google, Inc.*, 242 F App’x 833, 836 (3d Cir 2007); *Ellison v Robertson*, 189 F Supp 2d 1051, 1056-57 (CD Cal 2002)

<sup>140</sup> Above Part 2.2 Page 14.

- (1) *Subject to subsection (2), the copyright in a work is not infringed by the making of a temporary reproduction of the work if the reproduction is incidentally made as a necessary part of a technical process of using a copy of the work.*
- (2) *Subsection (1) does not apply to:*
- (a) *the making of a temporary reproduction of a work if the reproduction is made from:*
- (i) *an infringing copy of the work; or*
- (ii) *a copy of the work where the copy is made in another country and would be an infringing copy of the work if the person who made the copy had done so in Australia; or*
- (b) *the making of a temporary reproduction of a work as a necessary part of a technical process of using a copy of the work if that use constitutes an infringement of the copyright in the work.*
- (3) *Subsection (1) does not apply to any subsequent use of a temporary reproduction of a work other than as a part of the technical process in which the temporary reproduction was made.*

This over-complicated provision was introduced in 2004, purportedly to ensure that ordinary use of a legitimate digital copy of a work (which inevitably involves some temporary reproductions) is not infringement.<sup>141</sup> Like ss 43A/111A, it is limited to legitimate (non-infringing) sources;<sup>142</sup> plus:

1. Temporary copies from parallel-imported products are not exempt (s 43B(2)(a)(ii)) (making listening to legitimate, parallel-imported music potentially infringing).<sup>143</sup>
2. Under s 43B(2)(b) the *use* as well as the source must be non-infringing.

### The law elsewhere

The Australian provisions on temporary reproductions are more limited than provisions in other countries: particularly when it comes to copies in the course of communication.

In the US, temporary copies arising from digital uses may be non-infringing for at least three reasons. First, a US Appeals Court has held that copies held in a buffer memory for around 1-2 seconds were not ‘copies’, because they were not embodied in memory ‘for a period of more than transitory duration’ as required by 17 U.S.C. §101.<sup>144</sup> Second, temporary copies may be

<sup>141</sup> The stated goal was stated goal to ensure that ‘users of copyright material are not potentially liable for copyright infringement for the normal use of non-infringing copyright material’: Explanatory Memorandum to the US Free Trade Agreement Implementation Bill 2004 [671].

<sup>142</sup> This of course means having a different rule for digital and non-digital activities (there is no prohibition on reading an infringing physical book after all) and is regulating by the backdoor.

<sup>143</sup> Australia’s laws allow parallel importation of some digital material: for example sound recordings, ebooks, and interactive multi-media (such as video games): *Copyright Act 1968* (Cth) ss 10(1) definition of ‘non-infringing copy’, 10AA, 10AC, 44C, 44D, 44F, 112DA, 130A, 130C. The Act also allows for parallel importation of computer programs, however, there is a further exception allowing for copies made in the course of normal use of a computer program, and hence the user of a parallel-imported computer program does not need to rely on s 43B: see s 47B.

<sup>144</sup> 536 F 3d 121, 127 (2d Cir 2008). ‘Copies’ are defined in 17 USC §101 as ‘material objects in which a work is fixed by any method and from which the work can be reproduced’. The Act also provides

considered fair use. For example, in *Field v. Google Inc.*, copies in Google's cache were held to be fair use<sup>145</sup> (and fair use has been held to apply even where the source copies are infringing<sup>146</sup>). Third, the US has a Safe Harbour covering any provider of online services which undertakes caching, provided that certain conditions are met.<sup>147</sup>

In Europe, Article 5(1) of the *Information Society Directive*<sup>148</sup> requires Member States to exempt certain temporary copies from copyright liability (matching provisions apply in the UK).<sup>149</sup> These exceptions apply to reproductions which:

1. are temporary;
2. are transient or incidental;
3. are an integral and essential part of a technological process;
4. have no independent economic significance;<sup>150</sup>
5. have, as their only purpose, to enable either:
  - a) a transmission in a network between third parties by an intermediary, or
  - b) a lawful use.<sup>151</sup>

Like the Australian provision, the EU exception requires that the copy be incidental (or transient); but 'integral and essential' is a less stringent condition than Australia's requirement that the copy be 'necessary'.<sup>152</sup>

On its face the European exception is more complex than ss 43B and 111A, but it is more practically beneficial to Internet Intermediaries engaged in transmitting copyright material, because is no requirement (under 5(a)) that the a communication be non-infringing.<sup>153</sup> This exception is clearly intended to cover copies made on computers of an IAP or an end-user in the course of transmission.<sup>154</sup> The reference to 'lawful use' certainly requires that the user's act be

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that a work is 'fixed in a tangible medium of expression when its embodiment is sufficiently permanent or stable to permit it to be reproduced *for a period of more than transitory duration.*' The Court distinguished *MAI Systems Corp v Peak Computer Inc* 991 F 2d 511 (9<sup>th</sup> Cir 1993) which had held that temporary copies could 'count' for the purposes of copyright law.

<sup>145</sup> 412 F Supp 2d 1106, 1124 (D Nev 2006). See also *Kelly v Arriba Soft Corp.*, 336 F 3d 811, 817-22 (9<sup>th</sup> Cir 2003).

<sup>146</sup> *Perfect 10, Inc v Amazon.com, Inc.*, 508 F 3d 1146 (9<sup>th</sup> Cir 2007) at 1164 footnote 8.

<sup>147</sup> See further below, Table 4, page 52.

<sup>148</sup> EU Information Society Directive, above n 60.

<sup>149</sup> Section 28A, *Copyright, Designs and Patents Act 1988* (UK).

<sup>150</sup> The meaning of 'no economic significance' is also currently the subject of a reference to the European Court of Justice: Case C-403/08: Reference for a preliminary ruling from High Court of Justice (Chancery Division) (United Kingdom) made on 17 September 2008 - Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Phillip George Charles Houghton, Derek Owen; O.J.2008 C301/19.

<sup>151</sup> New Zealand has an exception, s 43A (introduced 2008), similar to Europe's Article 5(1).

<sup>152</sup> IVIR Infosoc Implementation Report above n18 at 32-33.

<sup>153</sup> Discussed in IVIR InfoSoc Report above n18 at 32-33.

<sup>154</sup> This is confirmed by the European Commission, in its *Report to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society*

non-infringing (like Australia); a ‘non-infringing source’ is not explicitly required but is implicit in the requirement of lawful use.<sup>155</sup>

In Canada, there is presently no general exception for temporary reproductions. Temporary copies made by IAPs are allowed under a ‘common carrier’ exception, found in s 2.4(1)(b):

*a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public...*<sup>156</sup>

This provision has been interpreted to protect IAPs from liability under both the communication and the reproduction right.<sup>157</sup> Canada’s Bill C-32, currently before the Canadian Parliament, proposes a general exception for temporary reproductions even more limited than in Australia, as the underlined parts show:

**30.71** *It is not an infringement of copyright to make a reproduction of a work or other subject-matter if:*

*(a) the reproduction forms an essential part of a technological process;*

*(b) the reproduction’s only purpose is to facilitate a use that is not an infringement of copyright; and*

*(c) the reproduction exists only for the duration of the technological process.*

Section 30.71 is an exception applying to everyone (ie it includes individuals viewing or using material as well as Internet Intermediaries). Like the Australian provision, it is not particularly useful to Internet Intermediaries whose users may deal with both infringing and non-infringing materials. But Internet Intermediaries have the benefit of the common carrier exception quoted above, and under C-32, will under have a further conditional exception for caching (see further below).<sup>158</sup>

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(Brussels, 30.11.2007, SEC(2007) 1556 at 3. Compare *The Newspaper Licensing Agency Limited v Meltwater Holding BV* [2010] EWHC 3099 (Ch) (holding that copies made on a user’s computer in the course of reading material online are not covered by the equivalent UK provision: [109]-[112]. This holding is difficult to justify and may well be wrong.

<sup>155</sup> It might be argued that a consumer’s private playing of an infringing DVD or private use of an infringing ebook or piece of software is a ‘lawful use’ (there being no prohibition on use or private viewing). There is little discussion of this issue in the literature.

<sup>156</sup> *Copyright Act 1985* (C-42) s 2.4(1)(b).

<sup>157</sup> *Copyright Act 1985* (C-42) s 2.4(1)(b). *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* [2004] 2 SCR 427 at [115].

<sup>158</sup> The proposed additional exception in Canada covers caching, provided only that the person does not modify the material, complies with directions at the material’s source, and does not interfere with lawful technology to obtain usage data: proposed s 31.1(4). See below in the discussion of Safe Harbours: Appendix 2, page 50.

*Liability for transmission (communication) and exceptions*

An important concern expressed by ISPs during the negotiation of the WIPO Internet Treaties was that the new right of communication to the public ‘might have been interpreted to mean that network providers would violate the communication to the public right by providing a conduit for infringing materials’.<sup>159</sup> This concern was met by the unanimous adoption of an Agreed Statement to the relevant article:

*It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.*

Different jurisdictions have addressed this concern in their legislation in different ways.

Australia

In Australia, the concern is addressed in three stages: first, by ensuring that the person ‘determining the content of a communication’ is *directly* liable (s 22(6)); and second, by shielding conduits from *secondary* liability through ss 39B (works) and 112E (other subject matter) (the third is via Safe Harbours, considered below). Sections 39B and 112E provide that:

*A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.*

The exception is not confined to the providers of physical facilities, such as backbone network provision, but could include software, or hosting services.<sup>160</sup>

Sections 39B and 112E have been considered by courts in *Cooper*, *Kazaa*, and *iiNet*. *Cooper* and *Kazaa*, both involved ‘bad actors’ who were clearly doing more than providing network access,<sup>161</sup> and so the defence was not applied (they did more than ‘merely’ provide facilities for the infringements which occurred). The limits of the exception were most severely tested in

<sup>159</sup> Thomas Vinje, ‘The New WIPO Copyright Treaty: A Happy Result in Geneva’ [1997] 19(5) *EIPR* 230 at 232.

<sup>160</sup> The original draft of ss 39B/112E was confined to ‘carriers and carriage service providers’. A Parliamentary Committee recommended the broadening of the provision to cover ‘digital storage services’: House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999*. Recommendation 34.

<sup>161</sup> In *Cooper*, both Mr Cooper, the person who designed and managed the website, and the IAP E-Talk/Comcen which hosted it, had done more than ‘merely’ provide facilities: *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 (Tamberlin J at first instance). Concerning Mr Cooper see especially at [99]; *Cooper v Universal Music Australia* (2006) 71 IPR 1 (Full Federal Court) [169] (Kenny J). Concern the IAP E-Talk see especially Tamberlin J at [126] and [131]; Full Federal Court at [58]-[60] (Branson J); [170] (Kenny J). In *Kazaa*, p2p software provider Sharman encouraged users to ‘join the revolution’ by sharing infringing files, and thus ‘was more than a “messenger”’: *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289 at [418].

*iiNet*, which involved a general-purpose, commercial ISP conducting a legitimate business.<sup>162</sup> At trial, the court held that it was bound to find that ‘as soon as any factual element is present that bears upon the question of authorisation, the provisions of s 112E are of no consequence’.<sup>163</sup> In the recent appeal court decision, all three judges held that at least in circumstances where an IAP has knowledge of infringements, and takes no action to prevent them, s 112E will not avail them.<sup>164</sup>

It is fair to say that as it stands, the exception is largely redundant. If an entity has no knowledge of infringement, it is unlikely to authorise that infringement; if it does know, s 112E will not apply: with one qualification. In *iiNet*, *iiNet*’s had knowledge of infringement by specific, identified users. One issue therefore remains open: whether generalised knowledge of infringement, without specific information (eg from a copyright owner’s notice) about particular end-users, is sufficient, on its own, to negate the defence.<sup>165</sup>

### The position elsewhere

In the European Union, Recital 27 of the EU *Information Society Directive*, like Australia’s s 22(6), states that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication.<sup>166</sup> Although s 22(6) in Australia is more specific, this probably leads to a similar interpretation of the communication right as being exercised by the party responsible for determining the content of a communication.<sup>167</sup> The

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<sup>162</sup> *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 83 IPR 430

<sup>163</sup> *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 83 IPR 430 at [570] (argument), [574]-[578] (court ruling). Note that very similar arguments were made – and accepted – in the Digital Agenda Review: Phillips Fox, *Digital Agenda Review, Report and Recommendations* (January 2004), [1.23]; [16.1]ff.

<sup>164</sup> The judges in *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23 are less unanimous in what s 112E is meant to do (as opposed to what it does not do). Justice Emmett suggests that s 112E might apply where a service provider has given a general permission or invitation to use certain facilities, such that they could be liable for authorisation even without having knowledge of specific infringements: at [217]. Justice Nicholas appears to view s 112E as simply ‘making clear what [is] the true position under s 101(1) in any event, namely, it cannot be inferred that a person authorises copyright infringement merely because he or she provides another person with communication facilities used by the other person to infringe copyright’: at [795]. Justice Jagot appears to consider that s 112E was enacted merely out of an ‘abundance of caution’: at [464].

<sup>165</sup> Consider, for example, recent US litigation, where Viacom argued, unsuccessfully, that Google was obliged to take action in the presence of allegedly widespread and flagrant infringement even without specific notices from Viacom: *Viacom International Inc v YouTube, Inc* (23 June 2010, SDNY). In these circumstances the differences between the judges’ views could matter: it would seem that Justice Emmett might apply s 112E in these circumstances; it is less clear that Justice Jagot would do so.

<sup>166</sup> Above n 148, Recital 27. One imagines that ‘physical’ here was directed at, for example, the providers of the physical aspects of a network (such as cabling). However, the server space supplied by a web host is also ‘physical’.

<sup>167</sup> Although further examination of the European case law would be required: interpretation of the communication right in all its detail is a matter for national courts, subject to review by the European Court of Justice.

second stage is to apply the horizontal protections in the *Ecommerce Directive*.<sup>168</sup> The first – the ‘mere conduit’ exception (Article 12<sup>169</sup>) – can be compared to ss 39B and 112E. The remaining protections, Articles 13 (caching) and 14 (hosting), are more akin to Australia’s Safe Harbours and so are discussed below.

In both the EU and UK, the mere conduit exception ensures an entity is not liable ‘for the information transmitted’ or for any criminal sanction as a result of a transmission where:

- their service consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;
- the service provider does not:
  - initiate the transmission;
  - select the receiver; or
  - select or modify the information contained in the transmission.<sup>170</sup>

Unlike ss 39B and 112E in Australia, the service provider’s knowledge is irrelevant and a conduit with knowledge of infringement has a defence.<sup>171</sup> The exemption does not, however, prevent a court issuing an injunction,<sup>172</sup> although the circumstances in which a court will do so depend on the particular jurisdiction. In the United Kingdom, for example, the High Court can issue an injunction against a service provider (like an IAP), if the service provider has actual knowledge of another person using its service to infringe.<sup>173</sup> This makes a difference to the extent of the legal risk: in Australia, once knowledge is acquired, there may be (subject to the result of the appeal in *iiNet*) some risk of authorisation liability and hence damages in the event of a later court action. In the UK, a right holder could apply for an injunction, but not damages for events prior to the court granting the injunction.

In Canada, s 2.4(1)(b) affords a shield for providers of communication facilities:

*a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of*

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<sup>168</sup> *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* OJ L 178, 17.7.2000, p. 1–16 (hereafter ‘Ecommerce Directive’). ‘Horizontal’ means simply that the protection applies across areas of law, such as defamation, trade mark, copyright, misleading communications, negligent misstatements etc.

<sup>169</sup> See also in the UK Regulation 17 of *Electronic Commerce (EC Directive) Regulations 2002*.

<sup>170</sup> EU: *Ecommerce Directive*, above n 168, Article 12; UK: *Electronic Commerce (EC Directive) Regulations 2002* (SI 2002 No.2013), Regulation 17.

<sup>171</sup> While the provision is titled a ‘mere conduit’ exception, the word ‘mere’ (or ‘solely’) is not found in the provision itself.

<sup>172</sup> See *Ecommerce Directive*, above n 168, Recital 45; Article 12.3. This is subject to a rule that a general monitoring obligation cannot be imposed under Article 15 of the *ECommerce Directive*. Presumably Article 12.3 enables France to enact its ‘HADOPI’ (three strikes) law, whereby an administrative authority may impose the ‘sanction’ of termination of an infringer’s account. The impact of Article 15 is currently before the European Court of Justice in the case of *SABAM v Scarlet*.

<sup>173</sup> *Copyright Patents and Designs Act 1988* (UK) s 97A.

*telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public...*<sup>174</sup>

This provision has been interpreted to exclude liability under the reproduction and communication rights for a broad range of providers: including any entity providing ‘software connection equipment, connectivity services, hosting and other facilities and services without which such communications would not occur’: ‘[s]o long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, *i.e.* whose participation is content neutral, but confines itself to providing "a conduit" for information communicated by others, then it will fall within s. 2.4(1)(b).’<sup>175</sup>

Bill C-32 would add another exception, s 31.1(1), similar to ss 39B/112E:

*A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject matter.*

Like ss 39B and 112E, proposed s 31.1(1) refers to ‘any means’ (and is thus not confined to providing physical facilities), and is quite restricted (‘solely’ corresponds to ‘merely’ in the Australian legislation). *Unlike* ss 39B and 112E, the Canadian provision covers both reproductions and communications, and both direct and secondary infringement.<sup>176</sup>

The US position is different in form. There are no specific limitations equivalent to ss 39B/112E. Some cases that would be infringement in Australia, however, are not infringement in the US.<sup>177</sup> General principle limits direct infringement of the various communication rights<sup>178</sup> to parties engaged in volitional conduct,<sup>179</sup> which has been used to

<sup>174</sup> *Copyright Act 1985* (C-42) s 2.4(1)(b).

<sup>175</sup> *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 SCR 427 at paragraphs [92] – [101].

<sup>176</sup> A Canadian Court could take a view similar to that in *iiNet*: that once an IAP or other service provider has knowledge of infringement, they are not ‘solely’ providing means – thus, perhaps, creating a risk of authorisation liability but not direct liability.

<sup>177</sup> This is discussed in the body of the Report, in Part 1.2, page 8.

<sup>178</sup> In US law there is no specified right of communication to the public: copyright owners have various rights that may cover Internet communications: the performance right, the right to distribute copies to the public and the public display right: Samuelson et al, ‘The Copyright Principles Project: Directions for Reform’ (2010) *forthcoming* Berkeley Technology Law Journal volume 25, at manuscript page 38-39 (available at [http://www.law.berkeley.edu/files/bclt\\_CPP.pdf](http://www.law.berkeley.edu/files/bclt_CPP.pdf)).

<sup>179</sup> *Cartoon Network LP, LLLP v CSC Holdings, Inc* 536 F 3d 121, 127 (2d Cir 2008); *Religious Technology Center v. Netcom On-Line Communication Services*, 907 F Supp 1361, 1370 (ND Cal 1995); *CoStar Group, Inc. v LoopNet, Inc.*, 373 F 3d 544, 550 (4th Cir 2004); *Parker v Google, Inc.*, 242 F App'x 833, 836 (3d Cir 2007); *Ellison v Robertson*, 189 F Supp 2d 1051, 1056-57 (CD Cal 2002)

exclude many activities of Internet Intermediaries.<sup>180</sup> Secondary liability is understood to be limited in a number of ways that make it unlikely that an Internet Intermediary would ever be secondarily liable ‘merely because’ users used its facilities to infringe copyright.<sup>181</sup> Finally, in some cases, fair use could apply.

### *Summary and commentary on the exceptions covering basic digital and network technology*

As this discussion shows, when compared with other jurisdictions, Australia’s digital copyright exceptions are narrower in some respects, and broader in others. Exceptions that limit liability for temporary copies are heavily qualified in Australia for activities *both* in the course of communication *and* for using digital copies. Elsewhere, copies in the course of communication are less heavily regulated; exceptions covering use are similar to Australia’s. The outlier here is the US, where exceptions are not set out in legislation, but US courts have both interpreted copyright owners’ exclusive rights more narrowly than has occurred in Australia, meaning Internet Intermediaries are less at risk of infringing copyright in the first place, and applied fair use, to reach results that are more intermediary-friendly than the specific provisions seen elsewhere.

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<sup>180</sup> See generally Anthony R. Reese, ‘The Relationship between the ISP Safe Harbours and the Ordinary Rules of Copyright Infringement’ (2009) 32 *Colum. J.L. & Arts* 427. The literature recognises that, perhaps like s 22(6) in Australia, the concept of ‘volitional conduct’ is a nuanced concept that may see some highly involved intermediaries held to directly infringe copyright: *ibid*; see also Matthew Lawless, ‘Against Search Engine Volition’ (2008) 18 *Alb. L.J. Sci. & Tech.* 205

<sup>181</sup> There are two kinds of secondary liability in the US. Vicarious liability requires that an entity have a direct financial interest in the infringing activity, and the right and ability to control that activity. By definition this would not arise where a user merely used the entity’s facilities to infringe. Contributory liability arises where an entity, with knowledge of infringing activity of another person, causes, or materially contributes to that infringement. Contributory liability, under the *Sony* doctrine, will not arise where a person provide services that have, or technology that has, ‘substantial non-infringing uses’ (*Sony Corp. of America v Universal City Studios, Inc.*, 464 US 417 (1984)) – unless the person ‘induces’ infringement (*MGM Studios, Inc v Grokster, Ltd* 545 US 913 (2005)), or where it is possible to segregate and prevent infringing uses: *A&M Records, Inc v Napster, Inc* 239 F 3d 1004 (9th Cir 2001).

## Appendix 2: Australia's Safe Harbours Compared

Internet Intermediaries have, in many countries, exemptions or protections that cover activities necessary to make the Internet work. In Australia, these take the form of 'Safe Harbours' - qualified exceptions that protect Internet Intermediaries from both direct and secondary liability for the acts of their users, subject to conditions mostly aimed at requiring cooperation with right holders.<sup>182</sup> Even with the Safe Harbours in place, courts can still issue injunctions to require specific action against infringing users.

This Appendix compares the detail of Australia's Safe Harbours with equivalent provisions overseas.

The most important problem with Australia's Safe Harbours at present is that they are only available to 'carriage service providers' - more or less, licensed telecommunications providers - thus excluding the majority of Internet Intermediaries, including those the Safe Harbours are apparently designed for, like search engines.<sup>183</sup> This creates an uneven playing field for innovation and commerce: where Telstra and Optus can create, for example, search engines or Web hosting services with the benefit of Safe Harbour protection in Australia, no one else can. The Australian government has indicated in the past an intention to consider expansion.<sup>184</sup>

Table 4 (below page 53) compares Australia's Safe Harbours to other jurisdictions. The US, EU and UK,<sup>185</sup> and New Zealand<sup>186</sup> all have Safe Harbours of varying similarity to those in Australia. Canada presently has no 'Safe Harbours'. Bill C-32 proposes an alternative: exceptions for Internet Intermediaries similar in scope to other countries' Safe Harbours, and separate obligations for Internet Intermediaries to cooperate with right holders.<sup>187</sup>

Apart from the question of who can benefit from the Safe Harbours, Table 4 highlights some obvious differences between the jurisdictions:

1. Australia's (and the US') Safe Harbours are subject to more conditions. The longer the list of conditions to gain the benefit of a Safe Harbour, the greater the risk that a service provider will fail to meet them and hence be found liable for infringement. This higher risk will be relevant to an entity deciding whether to invest in operating in Australia.
2. Australian law requires that any Internet Intermediary seeking a Safe Harbour must have and reasonably implement a policy for the termination of repeat infringers.<sup>188</sup> a requirement absent from most other jurisdictions considered here except the US.<sup>189</sup>

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<sup>182</sup> *Copyright Act 1968* (Cth) Part V Div 2AA.

<sup>183</sup> *Copyright Act 1968* (Cth) s 116AA.

<sup>184</sup> Commonwealth of Australia, Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions (Final Report)* (2009), 22.

<sup>185</sup> The EU 'Safe Harbours' are found in Articles 12-14 of the *Ecommerce Directive*, above n168. In the UK, see *Electronic Commerce (EC Directive) Regulations 2002* (SI 2002 No.2013).

<sup>186</sup> The key New Zealand provisions are found in ss 92B - 92E of the *Copyright Act 1994* (NZ).

<sup>187</sup> Copyright Amendment Bill C-32, Sections 41.25 and 41.26 (Canada).

<sup>188</sup> *Copyright Act 1968* (Cth) s 116AH.

<sup>189</sup> This requirement may be more stringent, following *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23, than previously. Exactly what the requirements are for a policy are not clear following

3. Not all jurisdictions require service providers to remove infringing material. Canada has only limited takedown (for Web hosts, following a court judgment of infringement; for search engines, once material is removed at the source). Canada however has a general obligation on all Internet Intermediaries except search engines to pass on notices of infringement sent by copyright owners and retain records.
4. European courts can grant the widest set of orders, including a full range of injunctions against Internet Intermediaries – possibly even where the Intermediary itself is not infringing.<sup>190</sup> In Canada, no orders are available beyond the specific obligations found in legislation.<sup>191</sup> Australia (like the US) limits the orders that may be available against a party that has the benefit of a Safe Harbour.<sup>192</sup>
5. The Australian and US Safe Harbours are not identical. One potentially important difference is that in the US, copyright owner notices that fail to comply with the required procedure cannot be considered in determining whether a service provider is aware of infringement.<sup>193</sup> There is no equivalent limitation in Australia – potentially making it easier to lose the protection of the Safe Harbours.

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the decision. It is clear that a policy that does not address repeat infringers specifically, is unlikely to be considered sufficient. What is not clear is whether an entity is entitled to apply a penalty of termination only in the most serious and flagrant cases of repeated, detected, warned infringement. In any event, it is also worth noting that the requirements may differ for different entities. A Web host who can see the material for herself and where ‘termination’ may have less serious consequences might be treated differently, although the legislation does not suggest that the court is to judge the reasonableness of the policy itself. Note that in some jurisdictions, there are separate obligations to take action against subscribers who infringe copyright via peer-to-peer mechanisms. The UK and France have legislated a ‘graduated response’ system for IAPs but not other online service providers. These provisions apply to IAPs only. Graduated response legislation does not provide a Safe Harbour for IAPs and is, in these jurisdictions, unrelated to any Safe Harbours.

<sup>190</sup> Subject to Article 15 of the *Ecommerce Directive* under which a Member State may not ‘impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity’: *Ecommerce Directive*, above n 168.

<sup>191</sup> If a service were designed primarily to enable infringement there would be liability under proposed s 27(2.3) which could give rise to remedies such as damages or injunctions.

<sup>192</sup> IAPs can be ordered to take reasonable steps to disable access to an online location outside Australia or terminate a specified account. Service providers that are hosts, information location tools and caching entities can be required to remove or disable access to infringing copyright material, or to a reference to infringing material, to terminate a specific account or some other less burdensome but comparably effective non-monetary order: *Copyright Act 1968* (Cth) s 116AG. In the US, a court may order, in addition, ‘such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose’ (17 USC §512(j)(1)(A)(iii)). It seems that in Australia, any alternative order cannot be more onerous than the first two specified ones; in the US it need only be ‘least burdensome ... among the forms of relief comparably effective’.

<sup>193</sup> 17 USC §512(c)(3)(B)(i); see, e.g., *Perfect 10, Inc. v CCBill LLC*, 488 F 3d 1102, 1113-14 (9th Cir 2007); *Corbis Corp. v Amazon.com, Inc.*, 351 F Supp 2d 1090, 1108 (WD Wash 2004) *Hendrickson v Amazon.com, Inc.*, 298 F Supp 2d 914, 917-18 (CD Cal 2003); *Hendrickson v eBay Inc.*, 165 F Supp 2d 1082, 1092-93 (CD Cal 2001). See also Reese, above n 180, 437-438.

**Table 4: Summary Table of Safe Harbours and Similar Provisions**

<b>Provisions</b>	<b>Australia's Safe Harbours (Part V Div 2AA) (<i>only carriage service providers</i>). (US has Safe Harbours in similar terms)</b>	<b>EU/UK Provisions (ECommerce Directives/ ECommerce Regulations)</b>	<b>Canada's Bill C-32</b>	<b>New Zealand</b>
<b>Available to:</b>	Australia: Carriage service providers only (IAPs) US: all 'online service providers' <sup>194</sup>	Information Society Service Providers <sup>195</sup>	Persons who provide services related to the operation of the Internet or another digital network. <sup>196</sup>	Internet service providers providing network access or hosting material online.
<b>Provides for:</b>	No damages if conditions are fulfilled; limited injunctions available.	No damages but wide range of injunctions.	No damages; no injunctions. Statutory damages for failure to pass on notices of infringement.	No damages but wide range of injunctions.
<b>Activity:</b>				
<b>Transmission and providing network access</b>	ss 116AC, 116AH. Carriage service provider must: 1. adopt & reasonably implement a policy for termination of repeat infringers' accounts; 2. comply with any relevant Industry code relating to standard technical measures; 3. not initiate /direct transmission; and 4. not make substantive modifications to material transmitted.	ECD Art 12. Similar conditions except no requirement to comply with technical measures or terminate repeat infringers.  NB: UK new obligations for IAPs in the <i>Digital Economy Act</i> to pass on to users notices of infringement, and retain records.	IAPs: s 2.4(1)(b) Everyone: proposed s 31.1(1)/(2). No requirement to comply with technical measures or terminate repeat infringers. Separate obligation (ss 41.25-41.26) to pass on notices of infringement to users and retain	No Safe Harbour. Under s 92B merely providing facilities is not infringement or authorisation (wording similar to s 39B). Separate obligation proposed in Copyright (Infringing File Sharing Bill) to send notices to infringing subscribers, retain records and terminate service if ordered by District Court.

<sup>194</sup> 'a provider of online services or network access, or the operator of facilities therefor,' including 'an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received': 17 USC §512(k)

<sup>195</sup> Any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service, including selling goods online; the transmission of information via a communication network; providing access to a communication network; hosting information provided by a recipient of the service; services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail: *Ecommerce Directive*, above n 168, Recitals 17 and 18.

<sup>196</sup> Not including any entity that provides 'means' designed primarily to enable infringement: proposed s 27(2.3).

Provisions	Australia's Safe Harbours (Part V Div 2AA) ( <i>only carriage service providers</i> ). (US has Safe Harbours in similar terms)	EU/UK Provisions (ECommerce Directives/ ECommerce Regulations)	Canada's Bill C-32	New Zealand
			records.	
<b>Caching</b>	ss 116AD, 116AH. Carriage service provider: 1. Must not manually select cached material; 2. must adopt & reasonably implement a policy for termination of repeat infringers' accounts; 3. must comply with any relevant Industry code re standard technical measures used to protect and identify copyright material; 4. must limit access to cached material to same user conditions as at source; 5. must comply with industry code re updating, not interfering with technology at source used to obtain usage information; 6. must expeditiously remove or disable access to cached material upon notice that source removed/disabled; 7. must not make substantive modifications to material transmitted other than as part of a technical process.	ECD Art 13. <sup>197</sup> Similar conditions except no requirement to comply with technical measures used to protect and identify copyright material, or terminate repeat infringers.	Proposed s 31.1(3). No requirement to comply with technical measures used to protect and identify copyright material, or terminate repeat infringers.  No 'takedown' requirement (at all).	s 92E Similar conditions to Europe: service provider 1. Must not modify material 2. Comply with conditions on access; 3. Not interfere with lawful technology to obtain data on usage; 4. Update in accordance with reasonable industry practice; 5. Remove access if notified that the material is removed from the source; access prevented at the source; or a court has ordered that access be prevented.
<b>Hosting (storing, at the direction of a user, copyright)</b>	ss 116AE and 116AH CSP must: 1. adopt & reasonably implement a policy for termination of repeat infringers' accounts; 2. comply with any relevant Industry code relating	ECD Art 14 <sup>198</sup> Similar conditions except no requirement to comply with technical measures used to	C-32 s 31.1(5), (6).  No requirement to comply with technical measures used to protect and identify copyright	s 92C Similar to EU. Service provider must not have knowledge (actual or constructive) of infringement, and on acquiring knowledge

<sup>197</sup> In the UK, see *Electronic Commerce (EC Directive) Regulations 2002* (SI 2002 No 2013), Clause 18, which uses more or less the same language.

<sup>198</sup> In the UK, see *Electronic Commerce (EC Directive) Regulations 2002*, *ibid*, Regulation 19

Provisions	Australia's Safe Harbours (Part V Div 2AA) ( <i>only carriage service providers</i> ). (US has Safe Harbours in similar terms)	EU/UK Provisions (ECommerce Directives/ ECommerce Regulations)	Canada's Bill C-32	New Zealand
<b>material on a system or network)</b>	<p>to standard technical measures;</p> <p>3. not receive a financial benefit directly attributable to infringing activity that the entity has the right and ability to control;</p> <p>4. expeditiously remove or disable access to copyright material residing on its system or network</p> <p>(a) upon receiving notice in prescribed form that the material has been found to be infringing by a court; or</p> <p>(b) on becoming aware that material is infringing or of facts or circumstances that make it apparent that the material is likely to be infringing.</p> <p>5. comply with prescribed procedure in relation to removing or disabling access to material.</p>	<p>protect and identify copyright material, or terminate repeat infringers.</p> <p>Also: excluded only when recipient of service is acting under provider's authority or control (cf Australia: financial benefit<sup>199</sup>).</p> <p>No prescribed notice-and-takedown system although expeditious removal required.</p>	<p>material, or terminate repeat infringers.</p> <p>Not excluded by notice of infringement: only excluded if provider is told of <i>court</i> decision that material infringes copyright.</p> <p>Subject to obligation to pass on notices and retain information about infringers.</p>	<p>must delete or prevent access to material as soon as possible.</p> <p>Receiving notice in prescribed form is relevant to, but not determinative of, knowledge.</p> <p>User must not be acting on behalf of or at direction of service provider.</p>
<b>Information location tools (search engines and others).</b>	<p>ss 116AF and 116AH.</p> <p>CSP must:</p> <p>1. adopt &amp; reasonably implement a policy for termination of repeat infringers' accounts;</p> <p>2. comply with any relevant Industry code relating to standard technical measures;</p> <p>3. not receive a financial benefit directly</p>	No specific safe harbour.	<p>Bill C-32 s 41.27.</p> <p>Different conditions re ILT technology: not modifying, complying with technical rules like robot exclusion rules; not interfering with technology to</p>	No specific safe harbour.

<sup>199</sup> In Europe protection is denied if *the recipient of the service* is acting *under the control or authority of the provider*. In Australia, a host loses the benefit of the Safe Harbour if they receive financial benefit from infringing activity, and have the *right and ability to control the infringing activity*. Though these conditions are targeted at the same kind of issue, the Australian condition is clearly stricter. One would assume that in many cases a host would have the right and ability to cease hosting (and thus the right and ability to control that infringement). The European condition only excludes a web host who is responsible for the user in a way that might otherwise cause them to be vicariously liable.

Provisions	Australia's Safe Harbours (Part V Div 2AA) ( <i>only carriage service providers</i> ). (US has Safe Harbours in similar terms)	EU/UK Provisions (ECommerce Directives/ ECommerce Regulations)	Canada's Bill C-32	New Zealand
	<p>attributable to infringing activity that the entity has the right and ability to control;</p> <p>4. expeditiously remove or disable access to copyright material residing on its system or network</p> <p>(a) upon receiving notice in prescribed form that the material has been found to be infringing by a court; or</p> <p>(b) on becoming aware that material is infringing or of facts or circumstances that make it apparent that the material is likely to be infringing;</p> <p>5. comply with prescribed procedure in relation to removing or disabling access to material.</p>		<p>obtain data on usage.</p> <p>But no reference to comply with technical measures or terminate repeat infringers.</p> <p>No requirement to pass on infringement notices.</p> <p>Requirement to take down infringing material only if already removed at source.</p>	

### Appendix 3: Australia's Exceptions for Creative Re-use and Personal Copying Compared

Appendix 1 and Appendix 2 address 'digital-specific' exceptions to copyright. Other exceptions in copyright law also, however, will have an impact on the legal risk scenario facing an Internet Intermediary. This is because (a) an Internet Intermediary could sometimes be a content provider, for example, as a joint communicator of content online, meaning it will directly benefit from the existence of exceptions to allow, for example, creative re-working of existing material, and (b) the existence and extent of direct infringement by end-users is relevant to authorisation liability. To prove authorisation requires a showing of direct infringement, and the extent of that infringement will be relevant in determining liability for authorisation. A technology where the vast majority of uses are infringements is less likely to be tolerated by the courts than one where many uses are allowed under copyright law. In a number of countries, Internet Intermediaries can benefit from the fact that third parties are allowed to make copies for an individual who relies on fair dealing.<sup>200</sup> Australian precedent however suggests that facilitators and intermediaries may not be entitled to benefit from fair dealing exceptions.<sup>201</sup>

Two kinds of general exceptions are likely to be most relevant to Internet Intermediaries. The first are exceptions that allow creative re-use of material. These are likely to be relevant to both Traditional Web Hosts and User-Created Content Platforms. Both these sets of actors may host material which has been created by individuals pursuant to some purpose allowed under copyright law: for example, for criticism or review. The second set of exceptions are those for personal copying of copyright material, which may be relevant to, for example, providers of cloud computing if individuals seek to 'back up' their material to online storage locations.

#### *Creative re-use*

From the perspective of Internet Intermediaries, particularly Intermediaries hosting third party content such as User-Created Content, the most important exceptions are those which allow creative (or transformative) re-use of material.

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<sup>200</sup> See, for example, *CCH v. Law Society of Upper Canada* [2004] 1 SCR 339, in which the Canadian Supreme Court held that a library *could* rely on the fair dealing (research) purpose of its clients in providing a photocopy and document delivery service.

<sup>201</sup> In *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, Justice Beaumont held that a media monitor was unable to rely on the research purposes of its customers in order to establish that it was engaging in fair dealing for the purpose of research or study.

One very interesting development is a proposal in Canada's Bill C-32 to create an exception for non-commercial user-generated content.<sup>202</sup> The exception specifically envisages the user 'authorising an intermediary to disseminate' the user-generated content, thus effectively providing an additional defence to intermediaries disseminating such non-commercial, user-generated content. The proposal (proposed s 29.21) is subject to conditions:

1. the copying or dissemination of the new work must be done solely for non-commercial purposes;
2. the source must be mentioned "if reasonable in the circumstances";
3. the individual must have had reasonable grounds to believe that the existing work was not infringing copyright; and
4. the copying or dissemination of the new work must "not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work ... or on an existing or potential market for it".

No similar exception exists in the jurisdictions considered here. In the US, some such uses would be arguable fair use. The EU has considered user-created content and opined that there is no need for legislative change at this point. In the UK, the government has proposed 'Making non-commercial use less onerous for consumers, for example by removing the need to seek permission and make payment for personal use of individual copyright works, [in order to] help tackle the "mismatch of expectations" problem'. The proposal however envisages allowing a range of activities from personal copying to use in UCC and hence might require 'fair compensation for owners'.<sup>203</sup> The proposal would require action at an EU level.

Other, more traditional exceptions can apply to some creative re-use or 'mash-ups' by individuals. Fair dealing exceptions in most jurisdictions allow for re-use of material in critical ways ('criticism or review') and, in Australia and some European countries, for parody or satire (a similar exception is proposed in Canada). But not all use that might be classed as 'transformative' and not all 'mash-ups' will be satirical, or parodic, or critical: some will take and re-use material in ways that could scarcely be seen as harming a copyright owner or author but which lack the explicit 'passing of judgment' that is the hallmark of criticism or review.<sup>204</sup> Material may be re-contextualised or combined with other material in ways that are useful or interesting but not critical. This is why the Canadian proposal is both interesting and important.

Table 5 compares exceptions in the various jurisdictions that cover activities that can involve creative re-use. As the Table shows, in terms of the legislation the Australian exceptions are at least as generous as those in these other jurisdictions. This is, perhaps, somewhat misleading, because

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<sup>202</sup> Bill C-32, Proposed s 29.21.

<sup>203</sup> UK Intellectual Property Office, © *the way ahead: A Strategy for Copyright in the Digital Age* (2009)

<sup>204</sup> *TCN Channel Nine v Network Ten* (2002) 190 ALR 468

judicial attitudes can be very important. This is clearly evidenced by the fact that the Canadian Supreme Court has interpreted exceptions broadly and generously: key examples include *CCH*, in which the Supreme Court of Canada interpreted the ‘private research and study’ exception generously, to cover commercial research (lawyers researching for the purposes of their practice) and to allow a library to make and supply copies to such researchers;<sup>205</sup> and *Tariff 22*, where the Supreme Court of Canada interpreted an exemption under s.2.4(1)(b) (excluding the activities of network providers from the communication right) to create a general exemption for many core activities of ISPs including reproduction in the form of caching and even some hosting.<sup>206</sup> As Carys Craig has noted, even these interpretations do not guarantee in Canada a broad and generous law of ‘users’ rights’.<sup>207</sup> Further, as (presently unpublished/draft PhD) empirical research conducted by a colleague, Emily Hudson, has shown, Canadian *institutions* seem to have little confidence in the attitude of the Canadian courts, and have continued to err on the side of caution in taking advantage of their ‘user rights’.

In relation to Europe, too, it can be misleading to look at only the Directive without considering, in more detail, domestic implementations of those Directives. Burrell and Coleman have pointed out that in the UK the conditions found in the EU Directives have been *added* to conditions already found in UK law, to make for exceptions considerably more restrictive than are necessary under EU law and more restrictive than they were prior to the Directive coming into force,<sup>208</sup> owing to the UK government simply adding additional conditions to exceptions found in the Directive, without subtracting any of its existing conditions, even if not required by the Directive.

It will be noted that orphan works are not considered in the Table. The US, EU and UK have all considered taking action in relation to orphan works. Canada has its own existing scheme which allows a prospective user of orphan material to seek permission from the Copyright Tribunal. These issues are beyond the scope of this document.

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<sup>205</sup> *CCH v. Law Society of Upper Canada* [2004] 1 SCR 339

<sup>206</sup> *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* [2004] 2 SCR 427

<sup>207</sup> Carys Craig, ‘The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform’, in Michael Geist (ed), *In the Public Interest: The future of Canadian Copyright Law* (2005) at 437ff.

<sup>208</sup> Burrell and Coleman, above n 112.

Table 5: Creative Re-use Exceptions Compared

	Australia	EU	UK	Canada	New Zealand	United States
Criticism/ review/ comment	Yes. ss 41, 103A Fair dealing for criticism or review subject to sufficient acknowledgment.	Allowed. ISD Art 5.3(d) optional exception for quotations for purposes 'such as' criticism or review, provided: <ul style="list-style-type: none"> <li>- material is already lawfully publicly available;</li> <li>- source is indicated (unless impossible);</li> <li>- use in accordance with fair practice;</li> <li>- use limited to extent required by purpose.</li> </ul>	Yes. s 30(1) Fair dealing for the purposes of criticism or review subject to sufficient acknowledgment and material being publicly available.	Yes. s 29.21 Fair dealing for criticism or review subject to acknowledgment of specific persons (more specific than UK or Australia). No change is proposed in Bill C-32.	Yes. s 42 Fair dealing for criticism or review subject to sufficient acknowledgment	Yes. Specifically mentioned as a fair use purpose in 17 USC §107.
Parodies and/or satires	Yes. ss 41A; 103AA fair dealing for the purpose of parody or satire.	Allowed. ISD Article 5(3)(k): optional exception for use for the purpose of caricature, parody or pastiche.	No. May be allowed as criticism or review. Parody defence was proposed by <i>Gowers Review</i> . December 2009 UK consultation paper indicates no intention to legislate (insufficient justification).	No but under consideration. May be allowed as criticism/review. Bill C-32 proposes new s 29 fair dealing for purposes of 'parody or satire'.	No. May be allowed as criticism/review.	Yes (for parody at least). <i>Campbell v Acuff-Rose</i> 510 US 569 (1994)
Reporting news	Yes. ss 42, 103B Fair dealing	Allowed. ISD Art 5(3)(c): optional	Yes. s 30(2): Fair dealing for	Yes. s 29.2: Fair dealing for the	Yes. s 42 Fair dealing for the	Yes. Specifically mentioned as

	Australia	EU	UK	Canada	New Zealand	United States
	for the purpose of reporting news subject to sufficient acknowledgment if the reporting occurs in a newspaper, magazine or similar periodical (no acknowledgment requirement for communication or film).	exception for reproduction by the press, comm'n to the public or making available of published articles on current economic, political or religious topics, provided: <ul style="list-style-type: none"> <li>- such uses not expressly reserved;</li> <li>- source including author's name is indicated.</li> </ul> For current events, 'reservation' condition does not apply and author's name not necessary if 'impossible'.	the purpose of reporting current events, subject to sufficient acknowledgment (acknowledgment not required where reporting via sound recording, film or broadcast.) Does not extend to photographs.	purpose of news reporting subject to acknowledgment of specific persons (more specific than UK or Australia). Also s.32.2(c) (reports of public lectures). No change is proposed in Bill C-32.	purpose of reporting news subject to sufficient acknowledgment if the reporting occurs in a newspaper, magazine or similar periodical (no acknowledgment requirement for communication or film).	a fair use purpose in 17 USC §107.
Political material and political uses	No specific exception beyond fair dealing for criticism/review or reporting news. Case law suggests there is no public interest defence: <i>Collier Constructions Pty Ltd v Foskett Pty Ltd</i> (1990) 97 ALR 460, 473.	Allowed. ISD Art 5(3)(f): Use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose, subject to indication of author's name.	No specific exception but there is a public interest exception: s 171(3). Case law recognises a defence exists, but narrow: <i>Ashdown v Telegraph Group Ltd</i> [2002] 2 Ch 149.	Yes. s 32.2(e): to make or publish, for the purposes of news reporting or news summary, a report of an address of a political nature given at a public meeting. No change is proposed in Bill C-32.		Potentially fair use depending on the assessment of the fairness factors: 17 USC §107.

**Private copying**

Another potentially important set of exceptions are those addressing personal or private copying. There has been a trend, brought on by the prevalence of portable digital devices (eg, mp3 players and smart phones) to allow personal copying both for time-shifting (to watch broadcasts at a different time) and format-shifting (copying music collections onto mp3 players, for example). As Table 6 illustrates, Australia's exception for time-shifting is less clearly restricted than similar exceptions in other countries; Australia's personal copying exceptions are similar to New Zealand's but more restricted than in Canada (although Australia does not have a levy system for sound recordings, as Canada does).

One potentially notable qualification on the personal copying exceptions, found in all countries which have *specifically* legislated for personal copying, and which may have an impact on Internet Intermediaries is the requirement that the device on which personal copies are made be *owned* by the person doing the copying. This clearly excludes any attempt to store personal media remotely (or 'in the cloud').

**Table 6: Private Copying Exceptions Compared**

	Australia	Europe	UK	Canada	New Zealand	United States
Time-shifting	Yes. Statutory Exception s 111: no infringement to record sound/film broadcast for private and domestic use by watching/listening at a more convenient time. Copy must not be dealt with/ distributed/copied. No exemption to anti-circumvention law.	Allowed. ISD Art 5.2(b) allows countries to introduce exceptions for copying by individuals for private non-commercial use. Right holders must receive 'fair compensation' (which could be zero: Directive Recital 35). Decision to allow time-shifting is for individual countries.	Yes. Statutory Exception s 70 in very similar terms to Australia's s 111. No exception to anti-circumvention law.	No but under consideration. Bill C-32 proposes s 29.23: allows recording, provided copy is only kept long enough watch/listen. Like Australia, copy must not be further distributed. No exemption to anti-circumvention law.	Yes. s 84 similar to Canada proposal. Allows recording, provided copy is only kept long enough watch/listen. Like Australia, copy must not be further distributed. No exemption to anti-circumvention law.	Yes. Fair use under 17 USC §107: see <i>Sony Corp. of America v Universal City Studios, Inc.</i> , 464 US 417 (1984).

	Australia	Europe	UK	Canada	New Zealand	United States
Personal copying (format-shifting)	<p>Yes for some items:</p> <ul style="list-style-type: none"> <li>- sound recordings</li> <li>- Books, newspapers and periodical publications (one copy only)</li> <li>- Photographs (one copy only, digital to hard copy or vice versa)</li> <li>- Films (from videotape to digital only)</li> </ul> <p>Exceptions allow copies in a different format for private and domestic use with no levy attached. Consumer must own the device and must not dispose of original or otherwise deal with copy, no anti-circumvention exception.</p>	<p>Allowed.</p> <p>ISD Art 5.2(b) allows countries to introduce exceptions for copying by individuals for private non-commercial use. Right holders must receive 'fair compensation' (which could be zero: Directive Recital 35). Decision to allow format shifting is for individual countries.</p>	<p>No.</p> <p>Gowers recommended limited exception (Recommendation 8) (format shifting only, one copy per format; no levy/compensation).</p> <p>IPO December 2009 Consultation: will not introduce exception; will suggest Europe consider more general (compensated) exception for non-commercial personal uses, including mash-ups/ transformative/ derivative uses.</p>	<p>Yes for sound recordings; proposed for other items. Statutory License for music in sound recordings only. Consumers can make copies for private use onto an audio recording medium. Consumers pay a levy on blank recording media (not including MP3 players: <i>Canadian Private Copying Collective v. Canadian Storage Media Alliance</i> 247 DLR (4th) 193)</p> <p>Bill C-32 proposes s 29.22 for other subject matters (no levy): allowing personal private copying where person legally obtained an original, owns the device, and does not give away their copy or original.</p>	<p>Yes for sound recordings. s 81A has conditions similar to Australia's s 109A: copy must be for personal use, made from legitimate copy and onto device consumer owns, both original and copy cannot be further distributed, only one copy per device.</p>	<p>Yes.</p> <p>At least some format-shifting can be fair use under 17 USC §107: <i>Recording Industry Association of America v Diamond Multimedia Systems Inc</i> 180 F 3d 1072 (9<sup>th</sup> Cir 1999)</p>