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Cloud Computing and the Future of Copyright Law

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☞ Australia; Cloud computing; Comparative law; Copyright; Injunctions; Online infringement; Permitted acts; United States; User-generated content

The rise of cloud technology has revolutionised the world of creativity by opening various channels for creators to distribute their work. The ease with which these works can be accessed and distributed has opened up more avenues by which information can be accessed, not only legitimately, but also illegitimately. This article examines the legal principles that underline the battle between copyright owners and cloud-based service providers in Australia, and analyses the legal position in Australia in comparison with that in the UK and the US.

Introduction

The digital economy is experiencing rapid growth, driven by broadband; in parallel, computing power and storage capacity continue to grow.¹ As a result, “cloud computing” has emerged as an increasingly profitable business. Amazon, for example, experienced almost a 50 per cent increase in 2015 first-quarter revenue for its cloud computing service, amounting to a total profit of US\$1.57 billion.² Cloud computing is defined as technology that

allows internet users to store data and harness the processing power of remote servers, often controlled by third-party providers.³ As Ben Kepes, principal at Diversity Analysis, has described, it is effectively an outsourcing of information technology (IT) services.⁴ This process involves a shared platform where the data are easily and inexpensively accessible, while opportunities are provided for enhanced collaboration, integration and analysis.⁵ Digital devices such as office and home computers, laptops, tablet computing devices and smartphones have encouraged the public to access their data and applications remotely through cloud computing.⁶ In fact,

“the user connects to these external devices by way of an Internet connection, but typically has no knowledge of the nature or even location of the server on which the data and software are located”.⁷

The US National Institute of Technical Standards has identified three “models” of cloud computing. The first is “Software as a Service” (SaaS) approach, whereby applications allow access to pooled storage resources by way of a subscription.⁸ An example is Microsoft Office 365, which allows subscribers to access Windows applications such as Microsoft Word from any computer connected to the internet and also store their files on servers owned by Microsoft.⁹ The second is a “Platform as a Service” (PaaS) approach, where the user is provided with a means of creating the software necessary to access the pooled resources by supplying a programming language.¹⁰ Examples include the “force.com” service provided by *Salesforce.com*, as well as Google apps.¹¹ The third type is known as “Infrastructure as a Service” (IaaS), in which infrastructure access is granted, but the user provides his or her own software and exerts control over certain aspects, such as the use of firewalls. This helps companies make profitable use of storage space.¹² An example is Amazon’s Elastic Compute Cloud (EC2)

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¹ Saroj Kar, “Copyright Infringement could Twinge Cloud Computing” (4 September 2012), <http://cloudtimes.org/2012/09/04/copyright-infringement-cloud-computing/> [Accessed 5 December 2016]; see also Christopher Soghoian, “Caught in the Cloud: Privacy, Encryption, and Government Back Doors in the Web 2.0 Era” (2010) 8 J. Telecom. & High Tech. L. 359, 364.

² “Amazon revenue beats, cloud computing more profitable than expected” (24 April 2015), *Sydney Morning Herald*, <http://www.smh.com.au/business/world-business/amazon-revenue-beats-cloud-computing-more-profitable-than-expected-20150423-1ms65s.html> [Accessed 5 December 2016]; see also Sharon K. Sandeen, “Lost in the Cloud: Information Flows and the Implications of Cloud Computing for Trade Secret Protection” (2014–15) 19(1) *Virginia Journal of Law & Technology* 1, 5.

³ Marc Aaron Melzer, “Copyright Enforcement in the Cloud” (2011) 21 *Fordham Intellectual Property, Media & Entertainment Law Journal* 403, 404; see also Mariliana Rico, “Cloud Computing and Copyright: New Challenges in Legal Protection”, 4th International Symposium on Information Management in a Changing World, IMCW 2013, Limerick, Ireland, 4–6 September 2013, who also says that “Cloud computing has emerged as a new computing paradigm that enables service providers to deliver computer applications and information that are sophisticated and high-powered, yet simple and easy-to-use, and which consumers could not otherwise access”.

⁴ Matthew Hall, “So, what is cloud?” (31 July 2012), <http://www.theage.com.au/it-pro/cloud/so-what-is-cloud-20120731-23bns.html> [Accessed 5 December 2016].

⁵ Mache Creeger, “Cloud Computing: An Overview” (12 June 2009), <http://queue.acm.org/detail.cfm?id=1554608> [Accessed 5 December 2016].

⁶ Herbert B. Dixon Jr, “Cloud Computing” (2012) 51(2) *Judges Journal* 36.

⁷ Daniel J. Gervais and Daniel J. Hyndman, “Cloud Control: Copyright, Global Memes and Privacy” (2012) 10 *Journal on Telecommunications and High Technology Law* 53, 56.

⁸ Australian Government, “Cloud Computing Policy — Version 3.0” (2014), <http://www.finance.gov.au/sites/default/files/australian-government-cloud-computing-policy-3.pdf> [Accessed 5 December 2016]; Scott Phillips and Evan Niu, “Motley Fool: What you need to know about cloud computing” (5 August 2014), *Sydney Morning Herald*, <http://www.smh.com.au/business/motley-fool/motley-fool-what-you-need-to-know-about-cloud-computing-20140805-100laf.html> [Accessed 5 December 2016].

⁹ Office 365 — *Business Online Software Programs virtually anywhere* (2015), <http://products.office.com/en-au/business/explore-office-365-for-business> [Accessed 5 December 2016].

¹⁰ Australian Government, “Cloud Computing Policy — Version 3.0” (2014), <http://www.finance.gov.au/sites/default/files/australian-government-cloud-computing-policy-3.pdf> [Accessed 5 December 2016].

¹¹ “The Complete History of Cloud Computing” (2015), <http://www.salesforce.com/uk/socialsuccess/cloud-computing/the-complete-history-of-cloud-computing.jsp> [Accessed 12 August 2015].

¹² Australian Government, “Cloud Computing Policy — Version 3.0” (2014), <http://www.finance.gov.au/sites/default/files/australian-government-cloud-computing-policy-3.pdf> [Accessed 5 December 2016].

service launched in 2006.¹³ The infrastructure itself may be deployed by way of a “private” service where use is exclusively for one organisation, a “community” service for different organisations with a common interest, a “public” service which is open for every person to access, or a “hybrid” service combining any of the previous three methods.¹⁴

A common use for cloud computing is database services, such as the Relational Database Service (or RDS) provided by Amazon Web Services.¹⁵ Among other things, the RDS creates storage space and assists in “managing time-consuming database administration tasks” that are necessary for the operation of businesses but do not benefit the customers directly.¹⁶ In addition, Amazon provides access to software packages (referred to as “database engines”) that enable users to access the RDS, which they automatically update when necessary. One of the benefits of this service is that it does not require users to download software or clutter their workspaces with forms of media used to store the data as all this information is stored in servers located offsite. Furthermore, the RDS has the ability to automatically duplicate data so that if information is unavailable owing to a disaster in an area where the data is stored, it can be accessed in its duplicate form from another location.¹⁷

Another popular use for cloud computing is that of “customer relationship management” (CRM), such as that provided by Salesforce.¹⁸ Salesforce provides a log of a salesperson’s interactions with their customers.¹⁹ It synchronises with calendar applications to indicate what steps need to be taken to secure a sale; it can allow emails and other communications to be sent to certain target audiences; and it enables users to create customer profiles and determine how resources are allocated to certain marketing activities.²⁰

Management of finances is also a common use for cloud computing. An example is Financial Force,²¹ which uses the same cloud platform as Salesforce²² and provides “real-time access to project status and profitability”, allowing staff and supply chains to be managed.²³ In doing so, it provides a holistic view of the relevant information so that informed decisions can be made.²⁴

Cloud computing technology has the potential to alter how the internet and information systems operate.²⁵ Although the internet has been available internally to the US military since the 1970s, the most crucial development occurred in 1991 when it was opened up for “non-commercial” use by members of the public with businesses being permitted from 1993.²⁶ Cloud computing began to emerge when web-based email services became available in the 1990s. These services arose because of a demand for people to access their email from any computer connected to the internet. As the email was stored on remote servers, it was effectively an early form of cloud computing.²⁷ The most pivotal event in the development of cloud computing itself, however, was the 1999 launch of the *SalesForce.com* and *Google.com* services, which, unlike their predecessors, were the first to be targeted at businesses and consumers.²⁸

The use of cloud services by both businesses and consumers has increased significantly since this time, especially in Australia. As of November 2014, 86 per cent of Australian organisations made use of cloud computing, compared with 60 per cent in France, Germany and Britain and 50 per cent in the US.²⁹ The use of cloud services to boost efficiency has also been recognised by the Australian Government, which has mandated that Commonwealth departments that are not corporations implement cloud services wherever financially practical or sufficiently secure. This will help

¹³ See “The Complete History of Cloud Computing” (2015), <http://www.salesforce.com/uk/socialsuccess/cloud-computing/the-complete-history-of-cloud-computing.jsp> [Accessed 12 August 2015].

¹⁴ See Australian Government, “Cloud Computing Policy — Version 3.0” (2014), <http://www.finance.gov.au/sites/default/files/australian-government-cloud-computing-policy-3.pdf> [Accessed 5 December 2016].

¹⁵ Government of Ontario, “Cloud Computing” (25 December 2015), <https://www.ontario.ca/page/cloud-computing>; Amazon RDS (2016), <https://aws.amazon.com/rds/> [Both accessed 5 December 2016].

¹⁶ Government of Ontario, “Cloud Computing” (25 December 2015), <https://www.ontario.ca/page/cloud-computing>; Amazon RDS (2016), <https://aws.amazon.com/rds/> [Both accessed 5 December 2016].

¹⁷ Amazon RDS (2016), <https://aws.amazon.com/rds/> [Accessed 5 December 2016].

¹⁸ Government of Ontario, “Cloud Computing” (25 December 2015), <https://www.ontario.ca/page/cloud-computing> [Accessed 5 December 2016].

¹⁹ Rachael King and Austen Hufford, “Salesforce to buy Demandware for \$US2.8 Billion” (2 June 2016), *The Australian*, <http://www.theaustralian.com.au/business/technology/salesforce-to-buy-demandware-for-us28-billion/news-story/906b8bde82eb3f4d75831eca9231fa69> [Accessed 5 December 2016].

²⁰ Tidewater Salesforce Consulting, “What Does Salesforce Do?” (2015), <http://www.tidewater-salesforce-consulting.com/what-does-salesforce-do.htm> [Accessed 5 December 2016].

²¹ Government of Ontario, “Cloud Computing” (25 December 2015), <https://www.ontario.ca/page/cloud-computing> [Accessed 5 December 2016].

²² Ben Kepes, “Financial Force.com Raises \$110 Million to Take on Giants” (26 March 2015), *Forbes*, <http://www.forbes.com/sites/benkepess/2015/03/26/financialforce-com-raises-110-million-to-take-on-giants/#564bfec61c3b> [Accessed 5 December 2016].

²³ Cloud Accounting, Services, “HR Software of Salesforce — Financial Force” (2016), Financial Force, <http://www.financialforce.com/> [Accessed 5 December 2016].

²⁴ Tom Tauli, “FinancialForce.com: A New Breed of ERP” (26 July 2015), *Forbes*, <http://www.forbes.com/sites/tomtaulli/2015/07/26/financialforce-com-a-new-breed-of-erp/#5557c27e12e0> [Accessed 5 December 2016].

²⁵ Amir Sharif, “It’s written in the cloud: the hype and promise of cloud computing” (2010) 23(2) *Journal of Enterprise Information Management* 131, 131.

²⁶ “The Complete History of Cloud Computing” (2015), <http://www.salesforce.com/uk/socialsuccess/cloud-computing/the-complete-history-of-cloud-computing.jsp> [Accessed 12 August 2015].

²⁷ Australian Communications and Media Authority, “The cloud-services, computing and digital data — Emerging issues in media and communications” Occasional Paper 3 (2013), <http://www.acma.gov.au/theACMA/About/The-ACMA-story/Connected-regulation/emerging-issues-cloud-computing> [Accessed 5 December 2016].

²⁸ “The Complete History of Cloud Computing” (2015), <http://www.salesforce.com/uk/socialsuccess/cloud-computing/the-complete-history-of-cloud-computing.jsp> [Accessed 1 December 2016].

²⁹ Stuart Corner, “Cloud Computing is Now Mainstream and Australia is Ahead” (4 November 2014), *The Age*, <http://www.theage.com.au/it-pro/cloud/cloud-computing-is-now-mainstream-and-australia-is-ahead-say-new-reports-20141103-11fze9.html> [Accessed 5 December 2016].

reduce the \$6 million the Government spends on IT services annually.³⁰ Also, 71 per cent of the general Australian population use cloud computing.³¹

However, the introduction and proliferation of cloud technology have resulted in significant criticism from government agencies, lawyers and academics in terms of the rights of users and others who are affected by its use. One of the most significant concerns has arisen out of cloud computing services being used to store and make available material in which copyright subsists. In many cases, this is by way of a legitimate means such as a library that has been granted a licence to make online articles available for their patrons.³² However, there are many cases where copyright is being infringed through the use of cloud services that have essentially created a new threat to creative industries.³³ The question arises as to where the line should be drawn in terms of copyright infringement.

Striking a proper balance between the interests of copyright owners and users of copyright protected works has been a perennial legal problem. The need to balance the interests of content owners, internet intermediaries and users of copyright protected works has arisen because of the prime importance of fostering creativity and the wide dissemination of its fruits for human development. Over the years, copyright law has striven to foster creativity through granting the creators exclusive rights to their creations. At the same time, copyright law has also recognised certain exceptions to these rights to ensure proper access. Technological change has always had an impact on copyright law; in particular, the steady expansion of copyright owners' rights, and the recognition of corresponding exceptions thereto, can primarily be seen as copyright law's responses to technical change.

The difficulties cloud computing presents to copyright in Australia are far-reaching and will continue to be part of the political landscape for years to come.³⁴ Although cloud computing has evolved into a new generation of information-sharing platforms, clearly defined copyright policies have not yet manifested and enforcement has

been more reactive than proactive.³⁵ Unfortunately, there are still significant divergences between legal systems in this area; in particular, the outdated statutory laws and inconsistent judicial interpretations are all factors that contribute to the digital copyright disorder. This article addresses a current priority with respect to copyright law in Australia by analysing and comparing the Australian position with that of the US and the UK.

Cloud computing and user-generated content

On the one hand, user-generated content (or UGC) provides a platform for people around the world to discover, watch and share videos, strengthening the need to facilitate unlicensed use of creative materials. On the other hand, "digital distribution, cloud computing and mobile Internet strengthen restrictions on the freedom of users to access, experience, transform and share creative materials".³⁶ The cloud computing industry fears that hosting UGC as a digital locker would make it liable for facilitating the infringement actions of their users.

UGC has been described as, "content that is created in whole or in part using tools specific to the online environment and/or disseminated using such tools".³⁷ The information provided by UGC therefore relates to the provision of "non-professional sources", which has had the benefit of creating access to content not available previously.³⁸ UGC is divided into three different varieties: information the users have created themselves, information the users have obtained via another source, and information that has been directly copied.³⁹

Although many aspects of UGC have existed for centuries prior to the internet, including through parodies and satire in a contemporary sense, it is essentially an online phenomenon.⁴⁰ UGC can be created on well-known social media platforms such as Facebook, Instagram and Twitter,⁴¹ on Wikipedia and in online video games. UGC has altered the nature of the internet since public access was first provided to this service, which in turn has impacted upon the legal landscape in which it operates.

³⁰ "The Complete History of Cloud Computing" (2015), <http://www.salesforce.com/uk/socialsuccess/cloud-computing/the-complete-history-of-cloud-computing.jsp> [Accessed 5 December 2016].

³¹ Australian Communications and Media Authority, "Cloud computing: emerging issues" (2015), <http://www.acma.gov.au/theACMA/About/The-ACMA-story/Connected-regulation/emerging-issues-cloud-computing> [Accessed 5 December 2016].

³² Australian Law Reform Commission, "Cloud Computing", Issues Paper 42 (2012), para.64.

³³ Melzer, "Copyright Enforcement in the Cloud" (2011) 21 *Fordham Intellectual Property, Media & Entertainment Law Journal* 403, 404; see also Rico, "Cloud Computing and Copyright" (September 2013).

³⁴ *Law and Bills Digest*, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/Copyright [Accessed 6 December 2016].

³⁵ *Law and Bills Digest*, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/Copyright [Accessed 6 December 2016].

³⁶ Niva Elkin Koren, "Copyright in a Digital Ecosystem: A User-Rights Approach" (July 2015), SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2637027 [Accessed 6 December 2016].

³⁷ Daniel Gervais, "The Tangled Web of UGC: Making Copyright Sense of User-Generated Content" (2009) 11 *Vanderbilt Journal of Entertainment & Technology Law* 841, 842.

³⁸ Teresa Scassa, "Acknowledging Copyright's illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in Michael Geist (ed.), *The Copyright Pentology* (Ottawa: University of Ottawa Press, 2013), p.431 at p.432.

³⁹ Gervais, "The Tangled Web of UGC: Making Copyright Sense of User-Generated Content" (2009) 11 *Vanderbilt Journal of Entertainment & Technology Law* 841 842; see also Scassa, "Acknowledging Copyright's illegitimate Offspring" in *The Copyright Pentology* (2013), p.431 at p.432.

⁴⁰ Scassa, "Acknowledging Copyright's illegitimate Offspring" in *The Copyright Pentology* (2013), p.431 at p.433.

⁴¹ Veronica Scott, "Riding the Web 2.0 wave — limiting liability for user generated content" (30 March 2010), *Minter Ellison*, http://www.minterellison.com/nl_201003_tmd/ [Accessed 6 December 2016].

In the early years of the internet, publishers had significant control over how material could be accessed. Therefore traditional copyright doctrines could be applied effectively. By contrast, with the growing use of social media, the dissemination of material has instead been placed in the hands of users.⁴² In 2014, for example, a selfie taken by Bradley Cooper with Ellen Degeneres had been shared 2 million times within two hours via Twitter.⁴³ The ability to disseminate and create content with ease through the use of UGC has placed uncertainty on the relevance of copyright laws in their current form.⁴⁴

There are also many far-reaching financial implications from the use of UGC through social media.⁴⁵ The issues of UGC within a business context, for example, is a lack of pure control, where some control is held by customers who can essentially post their opinions about the quality of goods and services.⁴⁶ Common UGC infringements of copyright include when a person creates a YouTube video and uses background music created by another person.⁴⁷ Other possible breaches could involve a person taking a picture of a painting of the Sydney Opera House, which they put on their Facebook page to celebrate Australia Day.⁴⁸ It is also arguable that social media, by allowing the pinning or sharing of posts, actually encourages infringing copyright.⁴⁹

There is evidence of jurisdictions throughout the world relaxing copyright requirements in relation to UGC. Canada, for example, has a “user-generated content” exception under its Copyright Act, which falls within the ambit of “fair dealing”. This exception is only available for completely “non-commercial” uses.⁵⁰ Furthermore, the person who is relying upon the exception needs to reasonably believe that the source was itself not infringing copyright.⁵¹ The use must also not unjustly jeopardise the interests of the original owner, including causing them financial harm.⁵²

Furthermore, the source needs to be acknowledged, including the names of the broadcaster, creator or performer.⁵³ This law is particularly useful with respect to users who create videos using YouTube as it allows

people to use background music created by other persons, in a process known as “mashup”.⁵⁴ However, this provision has a potentially broad application increasing to translations and mixes of original content. It is unclear where the courts will draw the line as to when a use can cause detriment to the owner.⁵⁵ It is argued that only individuals, and not companies, may rely on the exception and that private information cannot be subject to it.⁵⁶

That said, it is debatable whether direct copying can amount to UGC:

“UGC is not the simple wholesale appropriation of content. When a user simply copies an episode of their favourite television show and posts it on YouTube, they are not generating new content. In contrast, UGC is defined by possessing an element of either originality or transformativity or some combination of the two.”⁵⁷

Using cloud computing services to store UGC can certainly facilitate copyright infringement; for example, where illegally obtained content is uploaded to the cloud, or where content is copied for download to multiple devices.⁵⁸ The next section examines the role that uncertainty plays as a copyright enforcement mechanism.

Liability of cloud computing service providers (CCSPs) for copyright infringement

As noted before, the roles and functions of CCSPs are complex and may change depending on what contractual structure is used with other content providers or end users. While the liability of CCSPs for copyright infringement is necessarily determined by these contractual relationships, more broadly, any CCSP can be held liable for copyright infringement when it acts in a manner that violates one or more of copyright owners’ exclusive rights. As such, the liability of a CCSP primarily depends on two factors:

⁴² Matthew Hall, “The illusion of control — legal issues for social networking and user generated content” (31 March 2008) *Arts Law Centre of Australia*, <http://www.artslaw.com.au/articles/entry/the-illusion-of-control-legal-issues-for-social-networking-and-user-generated/> [Accessed 6 December 2016]; see also Scassa, “Acknowledging Copyright’s Illegitimate Offspring” in *The Copyright Pentology* (2013), p.431 at p.433.

⁴³ Amanda Parks, “The ‘It’s Complicated’ Relationship between Social Media and Australian Copyright Law” (2014) 33(2) *Communications Law Bulletin* 1, 1.

⁴⁴ See Scott, “Riding the Web 2.0 wave” (30 March 2010), *Minter Ellison*, http://www.minterellison.com/nl_201003_tmt/ [Accessed 6 December 2016].

⁴⁵ Scassa, “Acknowledging Copyright’s Illegitimate Offspring” in *The Copyright Pentology* (2013), p.431 at p.434.

⁴⁶ Scott, “Riding the Web 2.0 wave” (30 March 2010), *Minter Ellison*, http://www.minterellison.com/nl_201003_tmt/ [Accessed 6 December 2016].

⁴⁷ Anita Brown, “User-generated content and copyright” (31 July 2014), *Phillips, Ormonde, Fitzpatrick*, <https://www.pof.com.au/qa-user-generated-content-and-copyright/> [Accessed 6 December 2016].

⁴⁸ Parks, “The ‘It’s Complicated’ Relationship between Social Media and Australian Copyright Law” (2014) 33(2) *Communications Law Bulletin* 1, 1.

⁴⁹ Iain Freeman and Michael Douglas, “Guarding against unauthorised use of images on social media” (2013) 16(5) *Internet Law Bulletin* 120, 121.

⁵⁰ Copyright Act, RSC 1985, c. C-42, s.29.21(1)(a).

⁵¹ Copyright Act, RSC 1985, c. C-42, s.29.21(1)(c).

⁵² Copyright Act, RSC 1985, c. C-42, s.29.21(1)(d).

⁵³ Copyright Act, RSC 1985, c. C-42, s.29.21(1)(b).

⁵⁴ Michael Geist, “What the new copyright law means for you: Geist” (10 November 2012), http://www.thestar.com/business/2012/11/10/what_the_new_copyright_law_means_for_you_geist.html [Accessed 6 December 2016].

⁵⁵ Teresa Scassa, “User Generated Content under Canadian Copyright Law” (2013), http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=128:user-generated-content-under-canadian-copyright-law [Accessed 10 October 2015].

⁵⁶ Scassa, “Acknowledging Copyright’s Illegitimate Offspring” in *The Copyright Pentology* (2013), p.431 at p.439.

⁵⁷ Michael McNally et al., “User-Generated online content 2: Policy Implications” (2012), <http://journals.uic.edu/ojs/index.php/fm/article/view/3913/3267> [Accessed 6 December 2016].

⁵⁸ Rebecca Sadleir and Hamish Collings, “ALRC Inquiry — Copyright and the Digital Economy” (2012) 31(4) *Communications Law Bulletin* 15.

1. the nature and scope of copyright owners' exclusive rights, and
2. the nature and scope of the exceptions to these rights.⁵⁹

Australian copyright infringement law for a CCSP addresses both direct and secondary (indirect) liability of CCSP. Direct liability can arise when a CCSP carries out any of the activities that fall within the copyright owners' exclusive rights, without their consent or permission. By contrast, secondary liability can arise where a CCSP authorises a third party to commit direct infringement of any of the copyright owner's exclusive rights.

Generally, Australian copyright law grants copyright owners the exclusive rights to reproduce their works in a material form, publish them, perform them, make adaptations and communicate them to the public.⁶⁰ Of these exclusive rights, the right to reproduce, and the right to communicate to the public are particularly relevant since, for the most part, the CCSP liability in Australia arises in relation to them.

Direct liability for copyright infringement

Right to reproduce

A CCSP can be held directly liable for infringement of the copyright owners' right to reproduce when it makes copies without obtaining the requisite permission. Broadly, copies made by a CCSP can take two forms: permanent copies and temporary copies. It is important to note that while making permanent copies would (for the most part) be optional for many CCSPs, this would not be the case with regard to making temporary copies. In other words, although the need for CCSPs to make permanent copies of works (whether protected under copyright or not) would depend on the nature of the services provided to their users,⁶¹ making temporary copies would be essential for almost every CCSP that would require their transmission to their users via the Internet. This is because, owing to the intrinsic nature of the functioning of cloud computing systems, transmission of works always results in new copies being created that

are mostly transient. Moreover, in most cases, such copying occurs through an automated process. As such, liability of CCSPs for making temporary and automated copies takes a prominent place when considering their overall infringement liability.

Temporary copying

In the absence of any specific defence, Australian copyright law (unlike that of the US) does not distinguish between making permanent and temporary copies for the purpose of determining infringement.⁶² In particular, according to the Copyright Act 1968, reproduction occurs when a literary, dramatic or musical work is copied in any material form. The meaning of "material form" covers any visible or non-visible form of storage. Also, reproduction occurs when a work is converted from a hard copy or analogue form into a digital form.⁶³ This means that, in Australia, a CCSP can be held liable for infringement for both permanent and temporary copies. Notably, the second situation creates an elevated risk for CCSPs operating in Australia when compared with the US.

Even in the absence of any specific defence, US copyright law excludes the making of transient copies from the scope of reproduction.⁶⁴ This is because the Copyright Act 1976 defines "copies" as

"material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device",

and expounds that

"[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration".⁶⁵

⁵⁹ The question whether copyright has been infringed depends on the scope and nature of the rights which are given to the copyright owner, as well as the defences upon which a defendant may rely to avoid liability. See Mark J Davison, Ann L. Monotti and Leanne Wiseman, *Australian Intellectual Property Law*, 2nd edn (Cambridge: Cambridge University Press, 2012), p.250.

⁶⁰ Copyright Act 1968 s.31(1). In Australia, the Copyright Act 1968 grants the copyright owners of literary, dramatic or musical works the exclusive rights to: reproduce the work in a material form, publish the work, perform the work in public and, make adaptation of the work. Copyright owners of these works are also given the same rights in respect of adaptations of these works. When the copyright work in concern is an artistic work the owners are given only the rights to: reproduce the work in a material form, publish the work and, communicate the work to the public. Additionally, in the case of literary works (other than computer programs) or a musical or dramatic works, their copyright owners are given the right to enter into a commercial rental arrangement in respect of the works reproduced in a sound recording. And in the case of computer programs, their copyright owners are given the right to enter into commercial rental arrangements in respect of the programs.

In the UK, copyright owners have the exclusive rights to: copy the work, issue copies of the work to the public, rent or lend the work to the public, perform, show or play the work in public and, communicate the work to the public. They also have the right to make an adaptation of the work or do any of the above in relation to such adaptation. See Copyright, Designs and Patent Act 1988 (CDPA) s.16.

In the US, copyright owners are given the exclusive rights to: produce their copyright works in copies or phonorecords, prepare derivative works based upon their copyright works, and distribute copies or phonorecords of their copyright works to the public by sale or other transfer of ownership, or rental, lease or lending. They are also given the rights, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audio-visual works, to perform the copyright work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio-visual work, to display the copyright work publicly, and, in the case of sound recordings, to perform the copyright work publicly by means of a digital audio transmission. See Copyright Act 1976 s.106.

⁶¹ For instance, CCSPs providing email services may have to make permanent copies of works when backing up emails, etc.

⁶² Copyright Act 1968 s.21(1); Davison, Monotti and Wiseman, *Australian Intellectual Property Law* (2012), p.239.

⁶³ Copyright Act 1968 s.10(1).

⁶⁴ Copyright Act 1976 s.101.

⁶⁵ Copyright Act 1976 s.101.

As such, in *Cartoon Network v CSC Holdings Inc*,⁶⁶ the US Court of Appeals for the Second Circuit held that where a cable television provider provided a hosted digital video recorder (DVR) service, and buffered data from copyright protected works for that purpose, such buffering did not constitute the making of copies. In holding so, the court emphasised that the language in the US Copyright Act with regard to fixation plainly imposed two distinct but related requirements. That is, (1) the work must be placed in a medium such that it can be perceived, reproduced, etc., from it (the “embodiment requirement”), and (2) it must remain thus embodied “for a period of more than transitory duration (the ‘duration requirement’)”.⁶⁷ The court also disagreed with the previous decision of the US Court of Appeals (Ninth Circuit) in *Mai Systems Corp v Peak Computer Inc*,⁶⁸ where it was decided that an act of loading a software program into random access memory (RAM) by a computer repair technician during maintenance infringed copyright, because the copy created was fixed.

The upshot of the dissatisfaction with the decision in *Mai Systems Corp* was Title III of the Digital Millennium Copyright Act 1998 (DMCA).⁶⁹ Under this title, the present US law expressly excludes the making of ephemeral copies in connection with the maintenance and repair of computer systems from copyright infringement, provided that the copies are destroyed when the maintenance and repair are completed.⁷⁰ Further, Title II of the DMCA limits an online service provider’s liability for copyright infringement regarding transient storage of copyright protected works in several important situations. The broad definition of the term “service provider” seems to entitle many CCSPs to take advantage of this Title.⁷¹

Automated copying

Many CCSPs operate automated systems that make copies of works at the request or instigation of their users. An important issue, then, is who would be considered as the maker of the automated copies? More specifically, is the maker of the automated copies the user who requests the copying or the CCSP which operates the system? Notably, in *National Rugby League Investment Pty Limited v Singtel Optus Pty Ltd*⁷² (*NRL v Optus*), the Full Federal Court of Australia has decided this question in a manner that elevates the risk of liability of CCSPs by taking a much broader view of “making a copy” than in other countries.

In *NRL v Optus*, Optus operated an automated remote television recording service called “TV Now”, which enabled its users to record free-to-air programmes by simply clicking a button when browsing an electronic programme guide, and then subsequently playing it back via web browsers or mobile devices. Each time a programme was requested by a user, TV Now made four copies of it, one in each of the formats that the service supported. In answering this issue, the Full Federal Court specifically stated that although the user can properly be said to be the person who instigated the copying, it was Optus that effected it. Thus, the court finally decided that both Optus and the user, acting together, were the makers of the copies.

Essentially, the Full Federal Court decision in *NRL v Optus*, has posed significant implications for the future development and delivery of cloud computing services in Australia. As Giblin has noted, at the very least, that

“[t]he Australian law’s broad approach to ‘making’ [introduces] uncertainty for providers of cloud-based storage providers and other emerging cloud-based uses that involve any element of automated copying”.⁷³

In contrast to the situation in Australia, the concept of “volitional conduct” under US law provides some respite to automated CCSPs. In particular, the US Court of Appeals for the Second Circuit in *CoStar Group Inc v LoopNet Inc*,⁷⁴ recognised that although the liability for copyright infringement is strict, that principle is ill suited to cyberspace. Accordingly, the court emphasised that despite the fact that the defendant’s knowledge is not an essential requirement to hold him/her liable for copyright infringement, the volitional conduct of the defendant is essential to invoke liability for direct copyright infringement.⁷⁵ Thus, in *Cartoon Network v CSC Holdings*,⁷⁶ the US Court of Appeals applied the volitional conduct requirement in exonerating the defendant who provided an automated copying system. While emphasising that “volitional conduct is an important element of direct liability”, the court stated:

“In determining who actually ‘makes’ a copy, a significant difference exists between making a request to human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands engages in no volitional conduct.”⁷⁷

⁶⁶ *Cartoon Network v CSC Holdings Inc* 536 F. 3d 121 (2d Cir. 2008).

⁶⁷ *Cartoon Network v CSC Holdings Inc* 536 F.3d 121, 127 (2d Cir. 2008).

⁶⁸ *Mai Systems Corp v Peak Computer Inc* 991 F. 2d 511 (9th Cir. 1993).

⁶⁹ See Jonathan Band, “Digital Millennium Copyright Act Guide”, <http://www.ala.org/advocacy/copyright/dmca/guidance> [Accessed 6 December 2016].

⁷⁰ See Kent D. Stuckey, *Internet and Online Law* (Law Journal Press, 2004), §6.08[1].

⁷¹ See Jonathan Band, “Digital Millennium Copyright Act Guide”, <http://www.ala.org/advocacy/copyright/dmca/guidance> [Accessed 6 December 2016].

⁷² *National Rugby League Investment Pty Ltd v Singtel Optus Pty Ltd* [2012] FCAFC 59.

⁷³ Rebecca Giblin, “Response to the Australian Law Reform Commission’s Inquiry into the Adequacy of Australia’s Copyright Exceptions”, <http://www.alrc.gov.au/sites/default/files/subs/251.rgiblin.pdf> [Accessed 6 December 2016].

⁷⁴ *CoStar Group Inc v LoopNet Inc* 373 F. 3d 544 (4th Cir. 2004).

⁷⁵ Ira Steven Nathenson, “Aero’s Errors” (2014) 2 *Journal of International and Comparative Law* 171, 182.

⁷⁶ *Cartoon Network v CSC Holdings Inc* 536 F. 3d 121 (2d Cir. 2008).

⁷⁷ *Cartoon Network v CSC Holdings Inc* 536 F. 3d 121, 131 (2d Cir. 2008).

It is pertinent to note that in *NRL v Optus*, the defendant (Optus), through its arguments relating to “causative agency”, sought to rely on the volitional conduct approach adopted in the *Cartoon Network* case to determine the maker of the copy. However, the Full Federal Court of Australia rejected that approach.

Recently, the volition requirement came to the consideration of the US Supreme Court in *American Broadcasting Cos Inc v Aero Inc*.⁷⁸ The facts of the case were that Aero sold a service that allowed its subscribers to watch television programmes over the internet at about the same time as the programmes were broadcast over the air. The automated system for that purpose required the subscriber to select a show that was being broadcast from a menu on Aero’s website. Upon such selection, one of the several antennas in Aero’s system (dedicated to the use of each subscriber) was tuned in order to receive the signals, which was later translated by a transcoder into data that could be transmitted over the internet. A server then saved the data in a subscriber-specific folder on Aero’s hard drive and began streaming the show to the subscriber’s screen once several seconds of programming were saved.

The main issue which the US Supreme Court had to decide in this case was whether the aforesaid activities constituted “public performance” for Aero to be held liable for infringement of copyright under the Copyright Act 1976. The majority decision in this case (written by Justice Breyer) held that Aero was liable for performing publicly (by placing heavy emphasis on the nature of the service offered by Aero, which, in Justice Breyer’s view, was “highly similar” to the services offered by the Community Antenna Television systems (CATV), which were made infringing acts under the amendments made to the US Copyright Act in 1976).⁷⁹ However, the dissent of Justice Scalia (joined by Justices Thomas and Alito) answered this question in the negative. In particular, by applying the volitional conduct approach Justice Scalia emphasised that a “defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act”.⁸⁰ Since Aero lacked this, he decided that it had not performed (publicly) in terms of the provisions of the Copyright Act 1976 and, thus, it was not liable for copyright infringement.⁸¹

Regrettably, the majority decision in *American Broadcasting Cos v Aero*⁸² failed to spell out how the volition requirement applied to the conduct of the respondent Aero Inc. Instead, the majority justices were more concerned with the old mischief (the CATV providers broadcasting copyright protected material to their subscribers without being liable for infringement) that the Congress had tried to prevent by amending the Copyright Act in 1976.⁸³

Right to communicate to the public

Communicating copyright works to the public is a new right introduced into Australian copyright law in 2000, in order to implement art.8 of the WIPO Copyright Treaty.⁸⁴ This right covers a broad range of activities, including free-to-air television, cable, radio and the internet.⁸⁵ More specifically, the right to communicate in Australian copyright law comprises two sub-rights, namely, (1) the right to make copyright protected works available online, and (2) the right to electronically transmit such works. This is so because the Copyright Act 1968 defines the term “communicate” as making “available online or transmitting (whether over a path, or a combination of paths, provided by a material substance or otherwise) a copyright work”.⁸⁶

Along with its broad scope, the communication right raises many liability concerns for CCSPs operating in Australia. One such concern is who would become liable for infringement of this right. In particular, s.22(6) of the Copyright Act 1968 states that, “[f]or the purposes of [the] Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication”. The question that arises here is who is “the person responsible for determining the content of the communication”? Importantly, the Explanatory Memorandum (EM) accompanying the legislative changes, which brought the communication right into Australian copyright law, provides some assistance with regard to finding an answer to this question.⁸⁷ Yet, the EM does not fully resolve the question since it only indicates that the aim of s.22(6) is to exclude carriers and internet service providers (ISPs) from the liability for communication of material to the

⁷⁸ *American Broadcasting Cos Inc v Aero Inc* 134 S. Ct 2498 (2014).

⁷⁹ Nathenson, “Aero’s Errors” (2014) 2 *Journal of International and Comparative Law* 171, 171, 173, 187; *American Broadcasting Cos v Aero* 134 S. Ct 2498, 2511 (2014). In *Fortnightly Corp v United Artists Television Inc* 392 U.S. 390 (1968) and *Teleprompter Corp v Columbia Broadcasting System Inc* 415 U.S. 394 (1974), the US Supreme Court held that the activities of CATV providers fell outside the Copyright Act’s scope. In *Fortnightly Corp*, the court determined that a CATV provider was more like a viewer than a broadcaster, because its system merely enhanced the viewer’s capacity to receive the broadcaster’s signals by providing a well-located antenna with an efficient connection to the viewer’s television set. Accordingly, the court concluded that a CATV provider did not perform publicly. The court reached the same conclusion in *Teleprompter Corp*, where a CATV provider transmitted signals from hundreds of miles away. Congress amended the Copyright Act in 1976, primarily to overturn the Supreme Court’s findings in *Fortnightly Corp* and *Teleprompter Corp*. See *American Broadcasting Cos v Aero* 134 S. Ct 2498, 2499–2500 (2014).

⁸⁰ *American Broadcasting Cos v Aero* 134 S. Ct 2498, 2513 (2014).

⁸¹ Nathenson, “Aero’s Errors” (2014) 2 *Journal of International and Comparative Law* 171, 191–192.

⁸² *American Broadcasting Cos v Aero* 134 S. Ct 2498 (2014).

⁸³ A primary purpose of the Congress in amending the Copyright Act in 1976 was to overturn the Supreme Court’s finding in *Fortnightly Corp* 392 US 390 (1968) and *Teleprompter Corp v Columbia Broadcasting System* 415 U.S. 394 (1974) that the activities of CATV providers fell outside the Act’s scope.

⁸⁴ Andrew F. Christie and Eloise Dias, “The New Right of Communication in Australia”, Working Paper No.01/05, Intellectual Property Research Institute of Australia, University of Melbourne (February 2005).

⁸⁵ Adam Simpson, “Content and Copyright in the Digital Age: Impact on Contract” (2001) 12(1) *Journal of Law and Information Science* 70, 74–75.

⁸⁶ Copyright Act 1968 s.10 defines “communicate” in the following manner: “Communicate means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter.”

⁸⁷ Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999, para.40, http://www.austlii.edu.au/au/legis/cth/bill_em/caab1999304/memo1.html [Accessed 6 December 2016].

public via networks, where they do not generate the online content that is transmitted or made available.⁸⁸ Thus, as Christie and Dias noted,

“[t]his information [although] helpful, in that it tells us who does not make the communication (namely, one who merely provides the means by which the communication is effected) ... it does not tell us who does make the communication”.⁸⁹

Notably, many CCSPs engage in activities that enable transmission of copyright protected works stored on clouds to their users. A typical example is YouTube, which provides online space for its users to store and publish videos that may be protected under copyright. At the same time, YouTube also provides an online application that enables the playing of these videos stored on its database and communication of them to its users. One question that arises here is whether CCSPs that offer services similar to those offered by YouTube would be liable for infringement of the right to communicate when they transmit copyright protected works in the absence of the permission or consent of the owners. Unfortunately, there appears to be no clear answer to this issue in Australian copyright law as it stands now. In particular, although there is some clarity with regard to the position of CCSPs who merely provide the means by which the communication is effected, with regard to CCSPs who host user-created content (UCC) platforms and who may be considered as “joint communicators” with their users, the legal position in Australia remains largely unclear.⁹⁰

Secondary liability for copyright infringement

For the most part, secondary liability of the CCSPs in Australia arises through authorisation of direct infringement of one or more of the exclusive rights of the copyright owner, typically when they provide web hosting.

As Giblin notes, “[a]uthorisation is a distinct tort that was introduced into Australian copyright legislation almost 100 years ago”.⁹¹ Today, it is a statutory right conferred on owners of certain categories of copyright works. In particular, s.36(1) of the Copyright Act 1968 states that

“the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the license of the owner of the copyright, does in Australia, or *authorizes* the doing in Australia of any act comprised in the copyright”.

Similarly, s.101 provides that

“copyright subsisting [in subject-matter other than works] is infringed by a person who, not being the owner of the copyright, and without the license of the owner of the copyright, does in Australia, or *authorizes* the doing in Australia of any act comprised in the copyright”.

Direct infringement of one or more exclusive rights of the copyright owner by a third party is a precondition for a violation to occur through authorisation.⁹² Prior to the Copyright Amendment (Digital Agenda) Act 2000, this question was exclusively a matter for the Australian courts, which could exercise a great deal of flexibility in determining whether a defendant had authorised infringement. This gave rise to an expansive interpretation of the concept of authorisation in Australia, creating much uncertainty. In order to overcome this, the Copyright Amendment (Digital Agenda) Act attempted to codify the principles determining authorisation in common law, the objective of which was to provide “a degree of legislative certainty about liability for authorising infringements”.⁹³

However, all these attempts have signally failed to achieve their objective. Thus, as Giblin has correctly observed, the doctrine of authorisation in Australia is currently “in a shocking state”.⁹⁴ As several other scholars have also expounded, the Australian doctrine of authorisation in its present state is “unclear”, “hard to reconcile”, “enshrouded in confusion”, “incoherent” and “unnecessarily complex and uncertain”.⁹⁵ As such, liability for copyright infringement arising through authorisation poses a substantial risk for CCSPs operating in Australia.

Exceptions to the liability for copyright infringement

Copyright law provides for exceptions to infringement liability with the objective of striking a balance between the interests of copyright owners and users of copyright

⁸⁸ Christie and Dias, “The New Right of Communication in Australia” (February 2005), p.25; Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999, pp.9–10, http://parlinfo.aph.gov.au/parlinfo/download/legislation/ems/r910_ems_426f8e74-8b69-432b-8ebe-87e490e88bb6/upload_pdf/33832rem.pdf:fileType=application%2Fpdf [Accessed 22 November 2015].

⁸⁹ Christie and Dias, “The New Right of Communication in Australia” (February 2005), p.25; Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999, pp.9–10, http://parlinfo.aph.gov.au/parlinfo/download/legislation/ems/r910_ems_426f8e74-8b69-432b-8ebe-87e490e88bb6/upload_pdf/33832rem.pdf:fileType=application%2Fpdf [Accessed 22 November 2015].

⁹⁰ Kimberlee Weatherall, “Internet Intermediaries and Copyright: An Australian Agenda for Reform”, *Policy Paper for Discussion by the Australian Digital Alliance* (April 2011), p.9.

⁹¹ Rebecca Giblin, “The Uncertainties, Baby: Hidden Perils of Australia’s Authorisation Law” (2009) 20 A.I.P.J. 148, 148.

⁹² Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999, para.56, http://www.austlii.edu.au/au/legis/cth/bill_em/caab1999304/memo1.html [Accessed 6 November 2016]. See also Giblin, “The Uncertainties, Baby” (2009) 20 A.I.P.J. 148, 151: “[I]t is now settled law in Australia that no authorisation liability will attach in the absence of primary infringement.”

⁹³ As a result, the Copyright Act 1968 enumerates certain non-exhaustive factors that courts should take into consideration when determining whether a defendant has unlawfully authorised infringement.

⁹⁴ Giblin, “The Uncertainties, Baby” (2009) 20 A.I.P.J. 148, 149.

⁹⁵ Giblin, “The Uncertainties, Baby” (2009) 20 A.I.P.J. 148, 149.

protected works.⁹⁶ In Australia, the Copyright Act 1968 provides for a variety of different types of exceptions. When CCSPs are concerned, these exceptions fall into two categories: general fair dealing defences, and special provisions designed to deal with the digital environment.⁹⁷

General exceptions—fair dealing

In order to raise fair dealing as a defence, a CCSP must satisfy two requirements. First, it is necessary to show that the use of the copyright protected work was carried out for certain specified purposes: research or study; criticism or review; reporting new, professional advice given by a legal practitioner or patent attorney; and parody or satire.⁹⁸ Once it has been shown that the use of the copyright protected work was intended for one or more of these specified purposes, it becomes necessary to show that such use was “fair”.⁹⁹ In deciding this, the courts must consider a number of factors spelled out in the Copyright Act 1968. However, these factors are non-exhaustive in that a court can consider any other relevant factors.

The current fair dealing exception in Australia suffers from a number of shortcomings. Of these, the most striking is its purpose-based and narrow scope when compared with the US exception of fair use. Unlike the Australian fair dealing exception, the US fair use exception “is open-ended, that is, you do not have to fit into a stated category, you go right to the assessment of whether or not the use was fair under the circumstances”.¹⁰⁰ Also, the way in which the fair use doctrine has been promulgated by the US Congress and applied by the US Courts enables time shifting¹⁰¹ and space shifting¹⁰² to be brought within the scope of fair use. In contrast, it is highly doubtful whether the fair dealing exception in Australia would exempt time and space shifting. As such, the fair dealing exception in Australia as it now stands is woefully inadequate, especially in the context of cloud computing technology. To remedy this situation, the Australian Law Reform Commission (ALRC) has recently recommended adopting a broader and more flexible fair use exception that considers four non-exhaustive factors. Together with this exception, it has also recommended a non-exhaustive list of 11 illustrative uses or purposes that may qualify as fair

use.¹⁰³ Alternatively, if such open-ended fair use exception is not introduced, the ALRC has recommended that a new fair dealing exception should be introduced that consolidates the existing exceptions in the Copyright Act 1968 together with some new purposes.¹⁰⁴

Special exceptions

The special exceptions applicable to CCSPs include: (1) exemptions for temporary reproductions; (2) exemptions for communications protecting entities that provide facilities for transmission; (3) safe harbours; and (4) exemptions for private copying.

Exemptions for temporary reproductions

These exemptions ensure that the copying that occurs as an incidental part of a technical process will not constitute infringement of copyright. The Australian Act 1968 has two exemptions for temporary reproductions, one dealing with those made in the course of communications¹⁰⁵ and, the other dealing with those made in the course of the use of digital material.¹⁰⁶

Although the purpose behind these two exemptions is to ensure that copyright owners are not able to interfere unduly in caching, browsing or viewing copyright protected material online, or when incidental reproductions are made as part of a technical process, the scope of these exemptions is very limited when compared with similar exemptions in the UK¹⁰⁷ and the US.¹⁰⁸ In particular, the first exemption is subject to the important qualification that the making of the communication should not amount to an infringement.¹⁰⁹ Thus, as Weatherall has observed, the net effect is the possibility of holding the users who (even unknowingly) view infringing material online liable, although users who engage in equivalent acts offline, such as reading a photocopied book, would not become so liable.¹¹⁰ Moreover, this exemption does not afford any help to CCSPs who might provide services to users who deal with both infringing and non-infringing material.¹¹¹ Apart from this, the language of this exemption lacks clarity as to whether its scope would cover all temporary reproductions made by CCSPs.¹¹²

⁹⁶ Davison, Monotti and Wiseman, *Australian Intellectual Property Law* (2012), p.297.

⁹⁷ Davison, Monotti and Wiseman, *Australian Intellectual Property Law* (2012), p.297.

⁹⁸ Davison, Monotti and Wiseman, *Australian Intellectual Property Law* (2012), p.297.

⁹⁹ Davison, Monotti and Wiseman, *Australian Intellectual Property Law* (2012), p.305. “It has long been recognised that it is very difficult to determine how ‘fair’ is to be judged in this context. In part this is because it is a question of fact which will depend on the circumstances of the case.”

¹⁰⁰ Samuel E Trosow, “Copyright Consultations Submission” (2014) 2(2) *Osgoode Hall Review of Law and Policy* 169, 175.

¹⁰¹ Time shifting typically occurs where the consumers record a television programme on a storage device for later use.

¹⁰² Space shifting typically occurs when digital content is recorded on to different devices other than those for which it was originally assigned.

¹⁰³ Australian Law Reform Commission, “Copyright and the Digital Economy”, Final Report 122 (November 2013), pp.21–24.

¹⁰⁴ Australian Law Reform Commission, “Copyright and the Digital Economy” (November 2013), p.161.

¹⁰⁵ Copyright Act 1968 ss.43A and 111A.

¹⁰⁶ Copyright Act 1968 ss.43B and 111B.

¹⁰⁷ See Copyright, Designs and Patents Act 1988 s.28A; Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (EU Information Society Directive) art.5(1).

¹⁰⁸ See the definition of fixation in *Cartoon Network v CSC Holdings* 536 F. 3d 121, 127 (2d Cir. 2008); Digital Millennium Copyright Act 1998 Title II; Copyright Act 1976 s.107. See also Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.41.

¹⁰⁹ Copyright Act 1968 ss.43A and 111A.

¹¹⁰ Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.42.

¹¹¹ Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.41.

¹¹² Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.41.

The second exemption is also limited by certain important conditions. In particular, to invoke this exemption the temporary reproductions should not be made from: (1) infringing copies of works, or (2) copies of works made in another country that would be illegal if the person who made them had done so in Australia.¹¹³ Further, the exemption does not apply when the use of the copies itself constitutes an infringement. This means that, for the exemption to apply, the “use as well as the source must be non-infringing”.¹¹⁴ Moreover, the exemption does not cover any subsequent use of temporary reproductions. Apart from these limitations, it has been submitted that the language of this exemption is over-complicated.¹¹⁵

Notably, the exemptions for temporary reproduction in the US and the UK appear to be much broader than in Australia. As Weatherall observed, in the US, this is a result of three main factors. First, the decision in *Cartoon Network v CSC Holdings* has spelled out that liability for infringement arises only where the copies are embodied in a medium “for a period of more than transitory duration”. Accordingly, copies held in a buffer memory for around one or two seconds would not be construed as “copies”. Secondly, the scope of the US doctrine of fair use is broad enough to cover temporary copies made in appropriate circumstances.¹¹⁶ Thirdly, most of the temporary reproductions made by CCSPs would fall under the scope of US safe harbour provisions, which are broader than those recognised in Australian copyright law.¹¹⁷

In terms of art.5(1) of the EU Information Society Directive 2001,¹¹⁸ Member States are required to exempt certain temporary reproductions of copies from copyright infringement. In particular, Article 5(1) of the Directive exempts from the reproduction right temporary acts of reproduction that are transient or incidental and form an integral and essential part of a technological process and whose sole purpose is to enable (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made,

and which have no independent economic significance. In the UK, the provisions of art.5(1) of the EU Information Society Directive 2001 were implemented into domestic law through s.28A of the Copyright, Designs and Patents Act 1988 (CDPA).¹¹⁹ This section exempts the makers of temporary copies of copyright works (other than computer programs or databases) from liability. However, this is subject to the conditions that: (i) the copies must be transient or incidental; (ii) the making of the copies must be an integral and essential part of a technological process; (iii) the copying must be done in order to enable either transmission of the work in a network between third parties by an intermediary, or a lawful use of the work; and (iv) the copy should not have any independent economic significance.¹²⁰ Although some of these provisions are similar to the Australian ones, the UK provisions are overall more favourable for the CCSPs. This is partly because the requirement under the UK law that copies should be made as an “integral and essential” part of a technological process is less stringent than the Australian requirement that copies should be made as a “necessary” part of a technical process. Apart from this, the conditions attached to s.28A in the CDPA do not prima facie require that the communication should be non-infringing.¹²¹ However, as Bently and Sherman point out, these conditions still give rise to certain practical issues that make it difficult to predict when the exemption would apply.¹²²

Exemptions for persons facilitating communications

The Australian Copyright Act provides that a person (including a carrier or carriage service provider—CSP) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement merely because another person uses them to do something within the bounds of copyright.¹²³ However, this exemption suffers from a serious infirmity when compared with similar exceptions in other developed countries, such as the UK. That is, this

¹¹³ This means temporary copies from parallel-imported products are not exempt: Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.43.

¹¹⁴ Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.43.

¹¹⁵ Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.43.

¹¹⁶ See Copyright Act 1976 s.107.

¹¹⁷ Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.44.

¹¹⁸ Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society.

¹¹⁹ Inserted by the Copyright and Related Rights Regulations 2003 (SI 2003/2498) reg.8(1). See Lionel Bently and Brad Sherman, *Intellectual Property Law*, 3rd edn (Oxford: Oxford University Press, 2008), p.232, who observed that “[i]n order to implement Article 5(1) of the Information Society Directive, a new defence was introduced in October 2003 relating to the temporary copying of copyright works other than programs and databases”.

¹²⁰ Copyright, Designs and Patent Act 1988 s.28A: “Copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable: (a) a transmission of the work in a network between third parties by an intermediary, or (b) a lawful use of the work, and which has no independent economic significance.”

¹²¹ According to CDPA s.28A, copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringement by the making of a temporary copy which is transient or incidental, which is integral and essential part of a technological process and the sole purpose of which to enable (a) a transmission of the work in a network between third parties by an intermediary, or (b) a lawful use of the work, and which has no independent economic significance. As Weatherall observed, “[t]he reference to ‘lawful use’ certainly requires that the user’s act be non-infringing (like Australia); a ‘non-infringing source’ is not explicitly required but is implicit in the requirement of lawful use”: Weatherall, “Internet Intermediaries and Copyright” (April 2011), pp.44–45.

¹²² Bently and Sherman, *Intellectual Property Law* (2008), p.233. Also see Lionel Bently and Brad Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014), p.231.

¹²³ Copyright Act 1968 s.39B: “A person (including a carrier or carriage service provider) who provides facilities for making, of facilitating the making of, a communication is not taken to have authorised any infringement of copyright in an audio-visual item merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.” See also Copyright Act 1968 s.112E.

exception does not apply where a person does something more than “merely” providing facilities for making, or facilitating the making of, a communication,¹²⁴ or has knowledge of copyright infringement and takes no action to prevent it.¹²⁵ Thus, as Weatherall has opined, “[i]t is fair to say that as it stands, the exception is largely redundant”.¹²⁶ In contrast, the “mere conduit” exception in the UK (contained in the Electronic Commerce (EC Directive) Regulations 2002) appears to provide a more effective defence to persons who facilitate communication of copyright protected works online with regard to their liability.¹²⁷ Under that exception, a service provider is exempted from liability when it transmits information provided by a recipient, or provides access to a communication network, on the conditions that the service provider does not (i) initiate the transmission, (ii) select the receiver, and (iii) select or modify the information contained. Unlike the Australian provision, the “mere conduit” exception in the UK does not take into consideration the knowledge of the service provider. As such, even a conduit with knowledge of information has a defence. However, the mere conduit exemption in the UK applies only with regard to liability for damages, any other monetary remedy and criminal sanction. As such, courts are not prevented from granting any injunctions.

Safe harbours

The Australian Copyright Act provides for so-called “safe harbours” that make ISPs and telecommunication carriers (referred to as “carriage providers”) immune from monetary remedies for copyright infringement in the course of carrying out four specified categories of online activities: (1) acting as a conduit for internet activities by providing facilities for transmitting, routing or providing connections for copyright protected material; (2) caching through an automatic process; (3) storing copyrighted material on their systems or networks; and (4) referring users to an online location. These provisions protect carriage service providers (CSPs)¹²⁸ from both direct and secondary liability.¹²⁹ Thus, in essence, the safe harbour provisions give CSPs “some protection from the otherwise

unavoidable risk of liability for inadvertently hosting or communicating infringing material on behalf of their users”.¹³⁰

In order to take advantage of the safe harbours, the CSPs need to satisfy certain conditions that vary depending on the categories of online activities. However, there are two conditions that apply in relation to all categories of online activities: (1) the carriage service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers; and (2) if there is a relevant industry code in force, the carriage service provider must comply with its provisions relating to accommodating with standard technical measures used to protect and identify copyright material.¹³¹ Notably, these conditions are mostly aimed at requiring co-operation with copyright holders.¹³²

Despite the above, the safe harbour provisions in Australian copyright law suffer from certain serious limitations and infirmities. The main limitation is that they are only available to CSPs. According to the basic definition, a person becomes a provider if he or she supplies, or proposes to supply, a listed carriage service to the public using either (1) a network unit owned by one or more carriers, or (2) a network unit in relation to which a nominated carrier declaration is in force.¹³³ This definition is extremely narrow in that it does not even cover the range of service providers contemplated by the Australian-US Free Trade Agreement (AUSFTA). As such, a majority of the CCSPs are excluded from the protection of safe harbours in Australia. It has been observed that “[t]his creates an uneven playing field for innovation and commerce” in Australia.¹³⁴ In addition, the Australian Digital Alliance (ADA) and the Australian Libraries Copyright Committee (ALCC) have noted that “[t]he lack of safe harbour for the range of service providers contemplated by the AUSFTA is a serious impediment to the growth of Australia’s digital economy”.¹³⁵

In contrast to the situation in Australia, safe harbours in both the UK and US are applicable to a broad range of internet intermediaries, including CCSPs. In the UK, the beneficiaries are the so-called “information-society service providers”.¹³⁶ These cover entities that provide

¹²⁴ *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 I.P.R. 289; *Roadshow Films Pty Ltd v iiNet Ltd (No3)* (2010) 83 I.P.R. 430.

¹²⁵ *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23.

¹²⁶ “It is fair to say that as it stands, the exception is largely redundant. If any entity has 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 has knowledge of infringement by specific, identified users. One issue therefore remains open: whether generalised knowledge of infringement, without specific information (eg from copyright owner’s notice) about particular end-users, is sufficient, on its own, to negate the defence.” See Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.??.

¹²⁷ Electronic Commerce (EC Directive) Regulations 2002 reg.17.

¹²⁸ Basically, a CSP is a person who supplies or proposes to supply a listed carriage service to the public using (a) a network unit owned by one or more carriers or (b) a network unit in relation to which a nominated carrier declaration is in force. See Telecommunications Act 1997 s.87.

¹²⁹ Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.51.

¹³⁰ Australian Law Reform Commission, “Copyright and the Digital Economy” (November 2013), p.181.

¹³¹ Copyright Act 1968 s.116AH.

¹³² Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.51.

¹³³ Telecommunications Act 1997 s.87.

¹³⁴ Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.51.

¹³⁵ Joint submission from the ADA and ALCC in response to the Attorney-General’s Consultation Paper on revising the scope of the safe harbour scheme in the Copyright Act 1968. The ADA and ALCC support the expansion of safe harbours to cover the range of service providers contemplated by the Australia-US Free Trade Agreement (AUSFTA) 21 November 2011.

¹³⁶ Bently and Sherman, *Intellectual Property Law* (2008), p.158.

any service that is normally provided for remuneration, and that operates at a distance by electronic means, and at the individual request of a recipient of service.¹³⁷ In the US, safe harbours are applicable to the so-called “service providers”, which are defined in two ways. In particular, for the purposes of the safe harbour, they are somewhat narrowly defined as entities offering the transmission, routing or providing the connections for digital online communications, between or among points specified by a user, or material of the user’s choosing, without modification to the content of the material as sent or received.¹³⁸ However, service providers providing other services are very broadly defined to “encompass virtually every Internet or intranet provider or intermediary, including portal sites, search engines, universities, and intranet providers”.¹³⁹

Exception for private copying

Exemptions for private copying in Australia take two forms: exemption for “time shifting” and exemption for “format shifting”. In essence, the exemption for “time shifting” allows people to record broadcasts of radio or television programmes for replaying at a more convenient time without infringing copyright. However, this exemption only applies to “private and domestic uses”, which is defined to connote use on or off domestic premises.¹⁴⁰

Exemptions for format shifting in essence allow people to copy certain copyright protected works in a specified manner.¹⁴¹ More specifically, these exemptions allow the copying of: (1) book, newspaper or periodical contents into another format; (2) photographs from hardcopy into electronic format, or from electronic format into hardcopy form; (3) sound recordings from CD, tape, record, or digital download to any other format (except podcasts); and (4) films from video to electronic format.¹⁴² However, there are a number of conditions attached to this exemption: (1) copying should be made only for “private and domestic use”; (2) copying should be made only from a legitimately purchased or owned original; (3) the exception will not apply if the main copy is sold, hired, traded or distributed; (4) only one (direct) copy should be made in any given format; and (5) with the exception of sound recordings, all incidental copies made as a consequence of the format shifting must be “destroyed at the first practicable time”.¹⁴³

The private copying exemptions in Australia suffer from certain limitations. One such limitation is the purpose-based and restrictive scope of the time shifting defence, which was specifically highlighted in the Full Federal Court’s decision in *NRL v Optus*.¹⁴⁴ There the court laid down the general rule that when commercial entities make time shifted recordings on behalf of their subscribers, such entities are not protected by the Copyright Act 1968. Notably, the decision in *NRL v Optus* has severely elevated the risk of liability for copyright infringement of CCSPs and other commercial entities dealing with time shifted recordings. As such, in the days after this decision was handed down, each of the remote PVR services operating within Australia had to be shut down. Apart from this, the decision in *NRL v Optus* has also potentially rendered previous-generation time shifting technologies, such as TiVo, unlawful, which means that Australian consumers would not be not entitled in the future to time shift television on the current generation (and most user-friendly) “smart” technologies, such as remote storage DVRs.¹⁴⁵

In contrast to this situation in Australia, the US copyright law, even in the absence of a specific time shifting defence, affords a more favourable position for the CCSPs. This is because the US courts have recognised time shifting as a legitimate fair use.¹⁴⁶ As such, the time shifting defence in the US under the rubric of fair use envisages a much broader and flexible scope than the statutory specific time shifting exception in Australia.

The effect of the 2015 copyright amendments

The Copyright Amendment (Online Infringement) Bill 2015 (Cth) was introduced as a means by which copyright owners can take action against CSPs, whose facilities are used by members of the public to access material illegally, including those that allow users to access sports games streamed via the internet. Copyright owners can apply for an injunction requiring the CSP to take reasonable steps to prevent these people from accessing this material.¹⁴⁷ The amendment introduces a new s.115A to the Copyright Act 1968 (Cth), which creates a more efficient procedure by way of a “no-fault” scheme whereby action can be taken against the CSP without the copyright owner having to first establish that the provider is liable for infringement under the legislation.¹⁴⁸ The Bill

¹³⁷ Bently and Sherman, *Intellectual Property Law* (2008), p.158.

¹³⁸ YiJun Tian, “WIPO, Free Trade Agreement and Implications for ISP Safe Harbour Provisions (The Role of ISP in Australian Copyright Law)” (2004) 16(1) *Bond Law Review* 186, 188–189.

¹³⁹ Tian, “WIPO, Free Trade Agreement and Implications for ISP Safe Harbour Provisions” (2004) 16(1) *Bond Law Review* 186, 189.

¹⁴⁰ Copyright Act 1968 s.111(1). See Davison, Monotti and Wiseman, *Australian Intellectual Property Law* (2012), pp.308–309.

¹⁴¹ Davison, Monotti and Wiseman, *Australian Intellectual Property Law* (2012), pp.308–309.

¹⁴² Davison, Monotti and Wiseman, *Australian Intellectual Property Law* (2012), p.310.

¹⁴³ Davison, Monotti and Wiseman, *Australian Intellectual Property Law* (2012), p.310.

¹⁴⁴ *NRL v Optus* [2012] FCAFC 59.

¹⁴⁵ Giblin, *Response to the Australian Law Reform Commission’s Inquiry into the Adequacy of Australia’s Copyright Exceptions*, <http://www.alrc.gov.au/sites/default/files/subs/251.rgiblin.pdf> [Accessed 6 November 2016].

¹⁴⁶ *Sony Corp of America v Universal City Studios* 464 U.S. 417, 420 (1984).

¹⁴⁷ Copyright Act 1968 (Cth) s.115A(1) and (2).

¹⁴⁸ Many CSPs will no doubt have some familiarity with the existence of such a remedy as similar provisions have already been adopted in 39 jurisdictions throughout the world such as in Ireland, Singapore and the UK. See Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), paras 3, 7 and 21; Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, p.63 (Hon. Paul Fletcher MP).

addresses a legal loophole in Australian Law created through the decision of *Roadshow Films v iiNet*, where the High Court established that CSPs are excluded from liability for copyright infringement by way of authorisation.¹⁴⁹

The Bill was introduced in Parliament in response to concerns raised by owners of copyright (or groups representing these owners) about the proliferation of Australian infringement facilitated through the internet. These concerns had been aggravated by the impracticality for copyright owners to take legal action against individual users owing to the large number of people involved.¹⁵⁰ For example, the Australian Home Entertainment Distributors Association had been campaigning the Australian Government for such laws for approximately five years prior to the Bill being introduced.¹⁵¹ In doing so, owners of copyright have stressed that infringement by way of the internet in Australia is among “the worst in the developed world”. According to the Australasian Performing Rights Association in 2013, 44 per cent of people aged 18 to 30 in Australia have infringed copyright.¹⁵² For example, the television series *Game of Thrones* was illegally downloaded in Australia more than any other country during 2014.¹⁵³ Many of these downloads had occurred by way of the popular Pirate Bay and KickAssTorrent services, which are expected to be some of the first ones to be blocked under the new legislation.¹⁵⁴ Despite the economic loss to owners of copyright brought about by the large scale of online infringement, the amendments are not intended to be a “silver bullet” or complete solution to the problem.¹⁵⁵ On the other hand, they have been introduced with the imperative of “disrupt[ing] the business models” of websites that host this material.¹⁵⁶

The effect of the new s.115A is to provide a means for applying for and issuing injunctions against CSPs who allow users to access so-called “online locations outside of Australia”. These online locations will inevitably include those that provide cloud services in which users are able to store the material they have obtained in breach of copyright. Therefore, the provision is not intended to apply with respect to “online locations” located domestically.¹⁵⁷ Most importantly, however, s.115A also stipulates that the online location itself must have the

“primary purpose” of either infringing or facilitating copyright infringement.¹⁵⁸ As outlined in the Revised Explanatory Memorandum to the Bill, “this is an intentionally high threshold for the copyright owner to meet as a safeguard against any potential abuse”.¹⁵⁹ It is important to understand that this restriction will protect many innocent cloud service providers as the primary purpose test has the effect of “exclud[ing] online locations that are mainly operated for a legitimate purpose, but may contain a small percentage of infringing content”¹⁶⁰ or those that provide material that may be legitimate in some jurisdictions, but not in Australia.¹⁶¹ The term “online locations” has been worded broadly with the imperative of providing technological neutrality and adaptability with respect to new technology, although it will inevitably include websites.¹⁶²

Notably, the provision lists matters that the court “may” take into account in determining whether an injunction should be granted, including whether similar injunctions have been granted by other jurisdictions,¹⁶³ whether the owner of the “online location” has repeatedly infringed copyright.¹⁶⁴ The latter is of particular importance to CCSPs as it specifically allows the court to accommodate the interests of other legitimate users who may wish to access material on the site that is blocked. When the Bill was originally introduced, these factors were stipulated as those that the court “must” take into account; however, as part of their inquiry, the Senate Standing Committee on Legal Constitutional and Affairs Committee expressed concern about the lack of court discretion and the “proscriptive” nature of this wording which might unduly prejudice the ability of right holders to obtain such injunctions and recommended that it be changed to “may”.¹⁶⁵

A contentious issue has been whether injunctions could be ordered to block access to so-called virtual private networks (or VPNs) upon the basis that they are an “online location”. VPNs provide a means by which people in Australia can remotely enter a computer system in another international jurisdiction (such as the US) and then access content that is illegal in Australia, but not in that jurisdiction. This could inevitably include the streaming of sports events where a licence has been obtained with respect to distribution in the overseas

¹⁴⁹ Katrina Cooks, “Online copyright infringement — website blocking injunctions proposed” (2015), *Shelston Intellectual Property*, <http://www.shelstonip.com/news/online-copyright-infringement-website-blocking-injunctions-proposed> [Accessed 7 December 2016].

¹⁵⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, p.63 (Hon. Paul Fletcher MP).

¹⁵¹ Ben Grubb, “Australian senate passes controversial anti-piracy, website-blocking laws” (22 June 2015), *Sydney Morning Herald*, <http://www.smh.com.au/digital-life/digital-life-news/australian-senate-passes-controversial-antipiracy-websiteblocking-laws-20150622-ghuorh.html> [Accessed 7 December 2016].

¹⁵² Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, p.66 (Hon. Mark Dreyfus QC MP).

¹⁵³ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, p.66 (Hon. Mark Dreyfus QC MP).

¹⁵⁴ Weatherall, “Internet Intermediaries and Copyright” (April 2011), p.51.

¹⁵⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, p.81 (Hon. Malcolm Turnbull MP, Minister for Communications).

¹⁵⁶ Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), para.9.

¹⁵⁷ Copyright Act 1968 (Cth) s.115A(1)(a).

¹⁵⁸ Copyright Act 1968 (Cth) s.115A(1)(b) and (c).

¹⁵⁹ Revised Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), para.38.

¹⁶⁰ Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), para.20.

¹⁶¹ Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), para.39.

¹⁶² As part of the Second Reading Debate that was undertaken in the House of Representatives on 16 June 2015, the Hon. Paul Fletcher MP indicated the above. See Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, p.63 (Hon Paul Fletcher MP).

¹⁶³ Copyright Act 1968 (Cth) s.115A(5)(d).

¹⁶⁴ Copyright Act 1968 (Cth) s.115A(5)(c).

¹⁶⁵ Senate Standing Committee for Legal and Constitutional Affairs, Commonwealth Parliament, *Report on the Copyright Amendment (Online Infringement) Bill 2015* (2015), paras 2.60, 3.4, 3.5; Commonwealth, *Parliamentary Debates*, Senate, 22 June 2015, p.32 (Senator Ian MacDonald).

jurisdiction, but not to Australia. Although not canvassed specifically under s.115A, the Revised Explanatory Memorandum to the Bill makes it clear that the provision is not intended to apply to CSPs that provide access to VPNs.

This is because the VPN would not have the “primary purpose” of allowing access to illegal material. Australian users could still access the material because their computer would be identified as one from that overseas jurisdiction and therefore not be blocked. The most appropriate action would instead be direct action against the overseas VPN.¹⁶⁶

As part of this Bill, s.131A of the Copyright Act 1968 (Cth) has also been amended to include a new subs.(2), which stipulates that only the Federal Court may decide matters under s.115A. In effect, this provides an exception to s.39(A) of the Judiciary Act 1903 (Cth), which specifies that state courts may have jurisdiction over all matters, except the few that are listed under s.38 of the Judiciary Act 1903 (Cth).

Section 115A specifies that CSPs will not be responsible for paying any of the costs of the court proceedings themselves.¹⁶⁷ However, the CSP will be liable if it contests the proceedings.¹⁶⁸ The purpose behind this arrangement is to ensure minimum financial burden for providers who seek mutual co-operation in reducing online copyright infringement.¹⁶⁹ The cost of applying for the injunctions is significant and is specified as AU\$4,340 for a non-listed corporation.¹⁷⁰ It should be noted that numerous submissions made to the Senate inquiry criticised the filing fees, including the possibility of costs increasing for consumers. In doing so, they suggested the possibility of making such applications to the Federal Circuit Court. However, the Senate Standing Committee of Legal and Constitutional Affairs decided, for unspecified reasons, not to include this as part of its recommendations.¹⁷¹ In Britain, however, where a similar provision applies, there is evidence that, as a matter of practice, CSPs only contest the first injunctions that are applied for against them, but elect not to contest subsequent injunctions.¹⁷²

Although most submissions received by the inquiry were supportive in principle, there had been significant criticism of the effectiveness of this new law and the manner in which it applies.¹⁷³ One such criticism relates to the fact that there are many ways to access a website that has been blocked, such as using a VPN, as discussed above. This was highlighted during the second reading debate by Senator Scott Ludlum of the Australian Greens, who enunciated that there are dozens of ways of getting around a blocked website, ranging from using a VPN to using one of many streaming apps or websites, or just obtaining the files on a USB stick and running them from there.¹⁷⁴

It had found that, after the Pirate Bay site had been blocked in a number of overseas jurisdictions, there had actually been an increase in piracy due to people finding ways to circumvent the block.¹⁷⁵ Likewise, Google has also expressed concerns that stopping sites from being accessed does not necessarily prevent copyright infringement.¹⁷⁶ On the other hand, there is significant evidence indicating that blocks result in reduced access to illegal content. According to a report by Incopro in the UK, for example, the introduction of similar provisions in that jurisdiction resulted in a 73 per cent reduction in the use of these sites.¹⁷⁷ Furthermore, the Senate Inquiry in its Final Report acknowledged that it is not expected to be a total solution to the issue:

“The committee notes that the Bill does not purport to be a full solution to the problem of online copyright infringement and that the Bill would not detract from the ability of rights holders to use other remedies to protect their rights.”¹⁷⁸

An example was ASIC attempting to block one site in 2013 that it believed had been involved in fraudulent practices; however, access had also been blocked to some 250,000 completely legitimate sites.¹⁷⁹ It had been submitted as part of the Senate Inquiry that a warning notice scheme be developed whereby CSPs would be required to warn users of their accessing material that

¹⁶⁶ Revised Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), para.39. It should be noted that as part of the Second Reading Debate for this Bill, Senator Scott Ludlam moved an amendment that the provision specially exclude the use of a “geoblocking avoidance facility” used to “control, disguise or block the geographical location of a person or device” which would include a VPN. This amendment, however, did not pass as it was defeated by way of a division in the Senate of 12 senators for and 36 against: see Commonwealth, *Parliamentary Debates*, Senate, 22 June 2015, p.29 (Senator Scott Ludlam); Commonwealth, *Parliamentary Debates*, Senate, 22 June 2015, p.28 (Division).

¹⁶⁷ Copyright Act 1968 (Cth) s.115A(9).

¹⁶⁸ Revised Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), para.63.

¹⁶⁹ Supplementary Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), para.4.

¹⁷⁰ See Grubb, “Australian senate passes controversial anti-piracy, website-blocking laws” (22 June 2015), *Sydney Morning Herald*, <http://www.smh.com.au/digital-life/digital-life-news/australian-senate-passes-controversial-antipiracy-websiteblocking-laws-20150622-ghuorh.html> [Accessed 7 December 2016].

¹⁷¹ Senate Standing Committee for Legal and Constitutional Affairs, *Report on the Copyright Amendment (Online Infringement) Bill 2015* (2015), para.2.39; John Collins, Mary Still, Timothy Webb, Chris McLeod, Richard Hoad and Simon Newcomb, “Amendments to Copyright Act will strengthen copyright holders’ rights online” (29 June 2015), *Lexicology*, <http://www.lexicology.com/library/detail.aspx?g=74358665-2f0b-46ee-ab21-c88ebd9d6d3> [Accessed 7 December 2016].

¹⁷² Commonwealth, *Parliamentary Debates*, Senate, 22 June 2015, p.29 (Senator Scott Ludlam).

¹⁷³ Senate Standing Committee for Legal and Constitutional Affairs, *Report on the Copyright Amendment (Online Infringement) Bill 2015* (2015), para.2.1.

¹⁷⁴ Commonwealth, *Parliamentary Debates*, Senate, 22 June 2015, p.29 (Senator Scott Ludlam).

¹⁷⁵ *Ziggo BV v BREIN Foundation* NL:GHDHA:2014:88, Gerechtshof Den Haag [Hague Court of Appeal]; QUT Intellectual Property Law and Innovation Research Group, Submission 31, p.3.

¹⁷⁶ Commonwealth, *Parliamentary Debates*, Senate, 22 June 2015, p.29 (Senator Scott Ludlam).

¹⁷⁷ Incopro, “Site blocking efficacy study — United Kingdom (13 November 2014)”, http://auscreenassociation.film/uploads/reports/Incopro_Site_Blocking_Efficacy_Study-UK.pdf [Accessed 21 December 2016]; Senate Standing Committee for Legal and Constitutional Affairs, *Report on the Copyright Amendment (Online Infringement) Bill 2015* (2015), para.2.13.

¹⁷⁸ Senate Standing Committee for Legal and Constitutional Affairs, *Report on the Copyright Amendment (Online Infringement) Bill 2015* (2015), para.3.2.

¹⁷⁹ Grubb, “Australian senate passes controversial anti-piracy, website-blocking laws” (22 June 2015), *Sydney Morning Herald*, <http://www.smh.com.au/digital-life/digital-life-news/australian-senate-passes-controversial-antipiracy-websiteblocking-laws-20150622-ghuorh.html> [Accessed 7 December 2016].

infringes copyright.¹⁸⁰ However, this was to be included in an industry code of practice that is currently in the process of being implemented, which will work alongside the legislation.¹⁸¹ In 2014, the Government under Pt 6 of the Telecommunications Act 1997 (Cth) notified CSPs of the requirement to develop a code of practice including a warning system.¹⁸² This will be the so-called “relevant industry scheme”, which the court is allowed to consider for the purposes of establishing authorisation liability under ss.36(1A) (c) and 101(1A)(c) of the Copyright Act 1968 (Cth). The scheme came into effect on 1 September 2015.¹⁸³

Section 115A also stipulates that a court may grant a mandatory injunction that compels a CSP to block access to a website where the website itself has the dominant purpose of either infringing copyright or facilitating the infringement of copyright. In particular, s.115(5)(c) specifies that a court, in determining whether to grant this injunction, may account for “whether the owner or operator of the online location demonstrates a disregard for copyright generally”.

Therefore it is unlikely that a court would grant an injunction to block access to Flickr if Flickr also attempted to block access to infringing material for Australian citizens by way of geo-blocking in accordance with s.115A. This is because, by taking all efforts to prevent access to the material by persons located in Australia, the copyright owners are demonstrating that they have general respect for copyright law for the purposes of s.115(5)(c). This is despite the fact that it is technically possible for a person with advanced knowledge of the internet to use a VPN to remotely log on to a computer in a geographic location where, unlike in Australia, the material can be accessed legitimately and hence circumvent this geo-block.¹⁸⁴

Conclusion

Cloud computing plays a vital role in information technology, and is critical to the growth and expansion of the internet. On the other hand, copyright owners’

rights must also be protected against unfair commercial exploitation. This can be seen particularly in the context of Australia, where copyright law’s response to cloud computing is largely in favour of copyright owners rather than users. Striking a proper balance between competing interests of copyright owners, CCSPs and cloud users of copyright work is a perennial legal problem. The unresolved question is what should constitute copyright infringement within the sphere of cloud computing, and what practices should be deemed legitimate in order to facilitate adequate public access. Addressing this involves determining the boundaries between the use and storage of material subject to copyright in the cloud environment and the degree to which copyright law doctrines apply to cloud-based services.

The adaptation of copyright law to cloud computing is currently ambivalent and largely untested under the Australian Copyright Act 1968. In fact, Australian copyright law exposes cloud service providers to greater infringement liability risk, as well as greater legal uncertainty, than that of other competitor countries.¹⁸⁵ When measured against other jurisdictions, Australia’s copyright law is both less coherent and less amenable to innovation.¹⁸⁶ There is an urgent need to introduce a flexible fair use exception into Australian copyright law that permits unlicensed transformative uses of copyright material in order to stimulate further creativity and create a better environment for innovation.¹⁸⁷ It is argued that

“as a flexible doctrine, fair use can adapt to evolving technologies and new situations that may arise, and its long history demonstrates its importance in promoting access to information, future innovation, and creativity”.¹⁸⁸

It is therefore imperative that copyright law should not only protect the private interests of copyright owners, but it should also promote innovation and the interests of copyright users.

¹⁸⁰ Senate Standing Committee for Legal and Constitutional Affairs, *Report on the Copyright Amendment (Online Infringement) Bill 2015* (2015), para.2.25.

¹⁸¹ Senate Standing Committee for Legal and Constitutional Affairs, *Report on the Copyright Amendment (Online Infringement) Bill 2015* (2015), para.2.30; Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2015, 3593 (Hon Malcolm Turnbull MP, Minister for Communications).

¹⁸² Sebastien Cleve, “Crossing blades with online pirates: new government measures to tackle online copyright infringement” (2015) 18(1) *Internet Law Bulletin* 2, 3.

¹⁸³ David Yeates and Lauren Gore, “The Copyright Notice Scheme, Dallas Buyers Club and the future of online copyright infringement” (2015) 28(4) *Intellectual Property Law Bulletin* 1, 1.

¹⁸⁴ Elise Dalley, “Bypassing geo-blocked sites” (13 August 2014), *Choice Magazine*, <https://www.choice.com.au/electronics-and-technology/internet/internet-privacy-and-safety/articles/bypass-geo-blocking> [Accessed 7 December 2016].

¹⁸⁵ Copyright and the Digital Economy: Submission by the Australian Digital Alliance and Australian Libraries Copyright Committee to the Australian Law Reform Commission (2012).

¹⁸⁶ Kimberlee Weatherall, “Of copyright bureaucracies and incoherence: stepping back from Australia’s recent copyright reforms” (2007) 31(3) *Melbourne University Law Review* 967.

¹⁸⁷ ALRC, “Copyright and the Digital Economy” (November 2013), para.7.29.

¹⁸⁸ Matthew Rimmer, “The Fight for Fair Use in Australia: Copyright Law in an Age of Cloud Computing” (2014), <http://eprints.qut.edu.au/86901/> [Accessed 7 December 2016].