

Copyright Issues in a Converging Media Environment

John Fairbairn examines the impact of media convergence on copyright law and considers some options for reform.

Introduction

On 29 June 2012, the Attorney General released the much anticipated final Terms of Reference for the Australian Law Reform Commission (**ALRC**) inquiry into the operation of copyright exceptions in the digital environment.

The inquiry, which will not be completed until 2013, follows the Convergence Review, which proposed changes to Australia's media and communications regulation in response to 'the convergence of older technologies such as television with the internet'.¹ Copyright was not the focus of the Convergence Review and, other than in references to retransmission, was not mentioned in the Final Report issued in March 2012.

This is unfortunate because, as has been exposed in two recent Federal Court disputes,² many of the so called 'broken concepts' that are the focus of potential communications and media law reform are also embedded in the *Copyright Act 1968* (Cth) (**Copyright Act**). Copyright is also critical to a number of the principles of the Convergence Review. For example, Principle 8 provides that 'Australians should have access to the broadest possible range of content across platforms, services and devices'. This cannot be achieved without considering copyright as it has a direct effect on the ability to exploit and protect content across different platforms. On the one hand, copyright provides the legal means of commercialising that content and, on the other, it can create significant barriers to entry and innovation.

This paper seeks to assemble some of the copyright law issues created by developments in content delivery and analyse them from a perspective of technological neutrality. While it is not taken as a given that technological neutrality should be an overriding consideration in copyright reform, it is an approach that can address a number of anomalies arising from media convergence.

Convergence

While there is understandably a lot of interest in media convergence at the business level, this paper is focused on technological convergence. Developments in content formats, telecommunications networks and devices means that any form of content (whether print, music, film or broadcast) can be accessed in many different ways, cutting across traditional vertical, sector specific distribution channels. By way of example, the Australian public can enjoy an audio visual program by watching:

- (a) a broadcast of it over broadcasting services bands (**BSB**), via satellite or cable networks received by a television or set top unit;
- (b) a recording of the broadcast made on a personal video recorder (eg. using TiVo or iQ);
- (c) an on-demand stream via a subscription network, website, mobile portal or App (eg. FOXTEL On Demand, ABC iView or Apple TV);
- (d) a download of the program (temporary or permanent) (eg. using iTunes);

- (e) a live or simulcast stream via a website, mobile portal or App (eg. ABC live on Optus' Mobile TV);
- (f) a recording of the broadcast made in the 'cloud' and transmitted to their mobile phone (eg. Optus TV NOW); or
- (g) a DVD recording of the program purchased from a retail outlet.

Owners of iPads or internet connected TVs can effectively do all or most of these things using the one device.

While each of the services referred to above can deliver the same content to a consumer, copyright law interacts with each of them in different ways. As is explained further below, this creates different licensing requirements and risk profiles for the different forms of distribution, which has the potential to distort markets, as operators may seek to avoid some forms of distribution with heightened risks of infringement or prefer those that have the benefit of statutory licences or exceptions.

The technical act of making a copy of content onto a server in order to facilitate its distribution should not alter the characterisation of the retailer as being indirectly involved in any infringement

Liability for online supply

The Copyright Act treats the sale of hard copy and electronic content differently. A manifestation of this is that the liability for the sale of infringing hard copy material (eg. a book, a print newspaper or DVD) is different to that for the sale of the same content in electronic form online.

Assuming the hard copy retailer is not also the content creator, its liability is determined by reference to the 'indirect' infringement provisions. For example, section 38 of the Copyright Act provides that the offering for sale or sale of the article will only infringe copyright if the person '*knew, or ought reasonably to have known, that the making of the article constituted an infringement of the copyright or, in the case of an imported article, would, if the article had been made in Australia by the importer, have constituted an infringement.*' In other words, liability depends on the copyright owner discharging their onus of proving that the retailer knew (through actual or constructive knowledge) that it was dealing in infringing articles. For reputable retailers, this will not arise until a notice of infringement is received.

By contrast, sale of the same item in electronic form will require the retailer to make a copy of it on a server and, in the case of downloads, authorise the making of a further copy on the customer's device. In such cases, the retailer is treated in the same way as the content creator; liability is direct as the copyright work, or other

¹ Convergence Review Emerging Issues Paper, 6 July 2011, 4.

² *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited* (2012) 94 IPR 585; *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (2012) 94 IPR 1 and, on appeal, *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 95 IPR 321 (**TV Now case**).

subject matter, will be reproduced in electronic form by or on behalf of the retailer. Knowledge that the act was infringing is not necessary to establish liability for direct primary infringement. Instead, the retailer will be liable and it can only rely on the so called 'innocent infringer' defence in section 115(3) of the Copyright Act to limit its financial liability to an account of profits. To establish the defence, the retailer has the onus of proving that, at the time of the infringing act, it was not aware, and had no reasonable grounds for suspecting, that the relevant act was an infringement of copyright.

This can be a significant issue for online services that offer third party content from a large number of suppliers, such as YouTube and App Stores, particularly given the narrow application of the 'safe harbour' provisions discussed below. If technological neutrality is to be applied, it is difficult to justify differing liability for the act of selling content depending on whether the content is sold in hard copy or in electronic form. The technical act of making a copy of content onto a server in order to facilitate its distribution should not alter the characterisation of the retailer as being indirectly involved in any infringement. If the distinction is to be maintained for hard copy items, then technological neutrality suggests it should also apply to online retailers.

While there are policy considerations that underpin the protection of broadcasts as opposed to other forms of transmission, the approach of excluding the 'Internet' per se is leading to absurd results.

Liability of intermediaries

As one commentator remarked '*[a]t a time when the Federal Parliament endeavours to address media and communications convergence through new legislation, it is appropriate to also seek a converged approach to liability of internet intermediaries.*'³

The law with respect to the liability of intermediaries for copyright infringement is in an unsatisfactory state. Amongst other things, the provisions in the Copyright Act dealing with this issue are disjointed and inconsistent, being the result of:

- (a) legislative reform in 2000 that sought to codify, at least in part, liability for authorising copyright infringement;⁴
- (b) a particular and narrow 'exemption' to authorisation liability for providers of communications facilities (including carriers or carriage service providers) who merely provide facilities that are used by others to infringe copyright;⁵ and
- (c) subsequent legislative reform resulting from the Australia-United States Free Trade Agreement, which entered into force on 1 January 2005, creating conditional safe harbours for the benefit of carriage service providers.⁶

There is also uncertainty as to how the provisions in the Copyright Act apply in practice as evidenced by the recent dispute involving a prominent Internet service provider (*ISP*), iiNet,⁷ which was only resolved following protracted litigation resulting in an unsuccessful appeal to the High Court.

So called 'safe harbour' provisions (Part V Division 2AA of the Copyright Act), which provide an immunity from monetary relief if certain conditions are met, are narrow in application. In particular, the only beneficiaries of the immunity are '*carriage service providers*' ie. ISPs. The vast majority of online services, including Google, YouTube, Facebook and App Stores fall outside of the provisions. As discussed above, these services, now a ubiquitous part of modern Australian life, are deprived of this extra layer of protection from litigation arising out of third party content.

On 12 October 2011, then Commonwealth Attorney General, the Hon. Robert McClelland MP, launched a public consultation paper proposing amendments to the safe harbour provisions to make them more '*technologically neutral*'.⁸ However, the changes have not been implemented and it is questionable whether the proposed changes would achieve their stated goal given the narrow scope of activities covered by the safe harbours.

Exclusion of Internet transmissions

Content made available online has to fall within an established species of copyright to enjoy copyright protection. If, prior to transmission, the content is embodied in a pre-existing file, then depending on the nature of the content, it would generally be protected as either a work, a sound recording or a cinematograph film. In such cases, the copyright owner will enjoy exclusive rights to copy the content and communicate it to the public.⁹

However, a pre-existing file may not always be made prior to, or used for, the transmission of content. An example is live transmissions either from direct coverage of a sporting event, or using a dedicated live feed of coverage from a third party. Even if such pre-recording existed, only the owner or exclusive licensee of the copyright in the content can prevent unauthorised use of it. This may not be the case for many content service providers.

The only form of transmission that is protected by copyright is a 'broadcast'. Consequently, understanding whether a transmission constitutes a 'broadcast' is critical.

'Broadcast' is defined in section 10 of the Copyright Act to mean '*a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992 (Cth) (BSA).*' Under section 6(1) of the BSA, the following are expressly excluded from the definition of 'broadcasting service':

- (b) a service that makes programs available on demand on a point to point basis, including a dial up service; or
- (c) a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.'

In relation to (c), on 12 September 2000, a Ministerial Determination under the BSA was made on the following terms (**Determination**):

'A service that makes available television programs or radio programs using the Internet (other than a service that delivers television programs and radio programs using the broadcasting services bands) does not fall within the definition of a broadcasting service.'

However, it is not clear what constitutes use of the Internet in these contexts. The term is not defined in the Determination, the Copyright Act, the BSA or the *Telecommunications Act 1997 (Cth) (Telco*

3 Peter Leonard, 'Building Safe Harbours in Choppy Waters – Towards a Sensible Approach to Liability of Internet Intermediaries in Australia', (Paper presented at the Communications Policy and Research Forum, Sydney, 15-16 November 2010).

4 See sections 36(1A) and 101(1A), Copyright Act.

5 See sections 39B and 112E, Copyright Act.

6 See Part V, Division 2AA, Copyright Act.

7 See *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 95 IPR 29.

8 Attorney General's Department, *Revising the Scope of the Copyright 'Safe Harbour Scheme'* - Consultation Paper, (2011), 5.

9 See sections 31, 85 and 86, Copyright Act. The communication right is discussed further below.

Act) and has not been the subject of judicial consideration. Dictionary definitions define the 'Internet' by reference to its interconnecting networks and global coverage (see for example the Macquarie Dictionary, which defines it as *'the communications system created by the interconnecting networks of computers around the world'*). Australian courts have considered the term in other contexts and have defined it in a similar way.¹⁰

As stated by The Centre for Telecommunications and Information Networking in its 2002 report to the Australian Broadcasting Authority (the **ABA**):

'a lower case internet could be any network of networks. The upper case Internet is a global network of networks, fundamentally different because it has ubiquity of access via a public Internet carriage service and over a medium such as the public switched telephone network (known often simply as the PSTN). By comparison, a lower case internet is not global and access is limited to fewer points and fewer people.

Internet services are a subset of Online services. Whereas the Internet requires ubiquitous, public access, other Online services use a dedicated access medium which allows for restricted user access. Hence, while anyone can access the Internet through any Internet Service Provider or other Internet carriage service, Online services which are not the Internet are generally available only to closed user groups.¹¹

In this context, does the Internet exclusion apply to content:

- (a) delivered using internet protocols and any infrastructure that comprises the Internet;
- (b) accessed using an internet carriage service¹² (ie. the term *'Internet'* is synonymous with *'online'*); or
- (c) that is publicly available to anyone once connected to the global networks of networks that is the Internet?¹³

The latter approach is consistent with the language of the Determination and its Explanatory Statement, which in contrast to other parts of the BSA specifically refers to capital 'I' 'Internet'. As Associate Professor Brennan stated:

'As the programming content transmitted by Pay services (sharing its transmission infrastructure with cable broadband) and under the IPTV service paradigm (sharing its transmission infrastructure with telephony ADSL) does not originate 'from the Internet', but rather from Pay services or the IPTV service, each seems to fall outside the intended operation of the exclusion [in the Determination], and for the same reason.¹⁴

The purpose of this discussion is to highlight how different means of delivery of the same content can be characterised differently. For example:

- (a) downloads and video on demand services will not be broadcasts as they are transmissions made on an on demand point-to-point basis; and

- (b) streams available on the world wide web will not be broadcasts but
- (c) the same content could be a broadcast if:
 - (i) transmitted by mobile telephone operators to mobile phones;
 - (ii) it is a simulcast by a broadcaster of a broadcast using the BSB;¹⁵ or
 - (iii) transmitted online, but via a dedicated connection with subscribers (eg. where an ISP transmits content to its customers).¹⁶

This analysis is not only relevant to copyright subsistence, but also whether additional rights are available including:

- (a) the right to reproduce works and other subject matter for the purpose of broadcasting (see sections 47 and 107 of the Copyright Act);
- (b) rights in respect of unauthorised access to encoded broadcasts (see Part VAA of the Copyright Act);
- (c) the right to retransmit free-to-air broadcasts (see Part VC of the Copyright Act), which also expressly excludes retransmissions that take place *'over the Internet'*;¹⁷ and
- (d) compulsory licences in respect of the broadcast of sound recordings (see section 152 of the Copyright Act).

Why, as a matter of policy, should it be legal to record a television program on a personal video recorder, but illegal, without permission from all rights owners, to record webcast of the same program or use a remote storage service?

The Australian Copyright Council, in its submission to the Convergence Review, submitted that *'this platform-specific legislation clearly produces inconsistent outcomes. We understand, for example, that in the case of the new subscription services Fetch TV and Telstra T-Box, one falls into the "retransmission over the Internet definition" and the other does not, although both deliver a similar service to the customer'*¹⁸ (depending on how the term 'Internet' is construed, an alternative argument is that neither of those subscription services fall within the Internet exception).

Clearly, technological neutrality has been undermined by the importation of BSA concepts into the Copyright Act. While there are policy considerations that underpin the protection of broadcasts as opposed to other forms of transmission, the approach of excluding the 'Internet' per se is leading to absurd results. The problem will be starker if traditional broadcasting services are made available on the national broadband network (**NBN**).

10 See for example *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 and *Nominet UK v Diverse Internet Pty Ltd & Ors* (2004) 63 IPR 543.

11 Dr Paul Chapman, Jordan Pritchard and Dr Matthew Sorell, *Media Streaming and Broadband in Australia* (Report to the Australian Broadcasting Authority, The Centre of Telecommunications and Information Networking, 2002), 15.

12 See Schedule 5 of the BSA, which defines *'internet content'* by reference to, amongst other things, whether the content *'is accessed, or available for access, using an internet carriage service.'* '[I]nternet carriage service' is defined in the Telco Act to mean *'a listed carriage service that enables end-users to access the internet'*.

13 See David Brennan 'Is IPTV an internet service under the Australian Broadcasting and copyright law?' (2010) 60(2) *Telecommunications Journal of Australia* at 26.1.

14 *Ibid*, 26.7.

15 See *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited* (2012) 94 IPR 585 (note that the matter is on appeal).

16 See David Brennan's comments in relation to IPTV services, above n 13, 26.3.

17 See section 135ZZJA, Copyright Act.

18 Australian Copyright Council, Submission to the Convergence Review, October 2011, 7.

Copyright clearance

Ensuring that all of the copyright subsisting in content is cleared prior to it being transmitted can be a substantial barrier to entry. The problem is particularly acute for audio visual content as it embodies a number of elements, the copyright in which is separately controlled. This may include broadcast copyright, film copyright, literary or dramatic work copyright, sound recording copyright and musical works copyright.

Potentially, a web of licences needs to be negotiated. If any one of the copyright owners declines to grant a licence, the content cannot be made available without the risk of infringement. The problem is exacerbated by the fact that the service provider usually will not be the producer of the program and, at the time the program was produced, the underlying copyright clearances may not have expressly covered modern forms of content delivery. Further, certain rights are usually excluded from content deals.¹⁹

The practical consequence of this is that the content service provider bears the burden of obtaining the relevant copyright clearances. The national broadcaster, the ABC, has stated publicly that underlying licences (most notably music) are an impediment to it making archive content available online.²⁰

Changes to the Copyright Act need to protect the interests of content owners without creating unnecessary barriers to new forms of content distribution and use

The Copyright Act does provide some exemptions to these licensing requirements, but they are narrow in application and are not technologically neutral. By way of example:

- (a) as referred to above, sections 47 and 107 of the Copyright Act create free licences, subject to restrictions to reproduce works and other subject matter for the purpose of broadcasting; and
- (b) section 111 of the Copyright Act permits, subject to restrictions, a person to record a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made.

Consequently, it is possible to avoid the need for reproduction licences for copies of programs made for the purpose of broadcast (sections 47 and 107) and by viewers of those broadcasts (section 111).

However, those provisions only apply to 'broadcasts' (see discussion above). Further, as recent litigation has shown, even in relation to broadcasts, section 111 may not apply to new forms of content storage and delivery such as remote storage services.²¹ From the consumer's perspective, they are interested in being able to view a program at the time of their choice on the device of their choice. Why, as a matter of policy, should it be legal to record a television program on a personal video recorder, but illegal, without permission from all rights owners, to record webcast of the same program or use a remote storage service?

A further example, is the operation of statutory licences. Mechanisms exist in the Copyright Act to lift the burden on service providers in terms of copyright clearances while ensuring that adequate royalties are paid. Under section 212 of the BSA and Part VC of the Copyright Act, Australian broadcasts can be retransmitted without licence from any of the copyright owners subject to the payment of licence fees, (determined by the Copyright Tribunal), to a collecting society (Screenrights).

Again, the scheme is narrow in its application. Section 212 principally applies to re-transmissions of programs transmitted by the national broadcasting service or a commercial broadcasting licensee within a licence area or outside the licence area with the permission of the Australian Communications and Media Authority (ACMA). As discussed above, Part VC expressly excludes retransmissions that take place 'over the Internet'.²²

The problem is not alleviated by the availability of voluntary licence schemes. At the time of writing, a scheme exists for the reproduction and communication of underlying musical works in respect of music download services. There are no licence schemes for sound recording copyright (digital download services have to obtain licences from each recording company) or for audio visual content other than musical works. Further, developing these schemes often results in protracted and costly litigation in the Copyright Tribunal.

Loss of control

While new media provides enormous opportunities, it also has the potential to undermine existing revenue streams caused by a loss of practical control in the licensing and enforcement of exclusive rights.

Copyright owners enjoy broad exclusive rights including the right to control reproductions and 'communications to the public' under the Copyright Act. Sophisticated copyright owners have traditionally sought to maximise royalties by segmenting rights, offering exclusivity by territory and platform including via different release windows.

These practices have been affected by 'illegal' transmissions and downloads as consumers are able to bypass authorised distribution platforms and obtain content via unauthorised sources. Even putting piracy to one side:

- (a) Exclusive territorial rights can be undermined by the inability to impose cross-border restraints due to competition law.²³
- (b) Convergence makes it increasingly difficult to segment rights between platforms. For example, an iPad may receive content via the Internet (using a wi-fi connection) or via a 3G mobile network. Where a licensor seeks to grant separate mobile and online rights, exclusivity becomes illusory or at least creates difficulties in defining the scope of the rights. A further example is the controversy surrounding the Optus TV Now service, which, depending on the ultimate outcome of the TV Now case, could allow Optus customers to access content on mobile devices via free-to-air broadcasts where Telstra sought to acquire exclusive mobile rights.
- (c) The control over release windows has been eroded by convergence as copies are made available online either because of an earlier legal release in another territory or the availability of illegal copies.

19 For example, public performance or communication of musical works.

20 Australian Broadcasting Corporation, Submission to Department of Broadband, Communications and the Digital Economy in response to the consultation paper 'Digital Economy Future Directions', February 2009.

21 See *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (2012) 94 IPR 1 and, on appeal, *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 95 IPR 321.

22 See section 135ZJA, Copyright Act.

23 *Joined Cases C-403/08 and C-429/08, FA Premier League et al. v. QC Leisure et al. and Karen Murphy v. Media Protection Services*, Judgment of the Court of Justice of the European Union (Grand Chamber) 4 October 2011.

Potential reform

Changes to the Copyright Act to deal with the above issues need to protect the interests of content owners without creating unnecessary barriers to new forms of content distribution and use. The need for balance is particularly acute for broadcasters, as they are generally both creators (owners) and users (licensees) of copyright and are increasingly making their programs available on multiple platforms. The issues raised above highlight the need for a technologically neutral approach.²⁴

(a) A layered approach

In considering approaches to media regulation, the Convergence Review focused on a converged structure based on 'layers', namely:

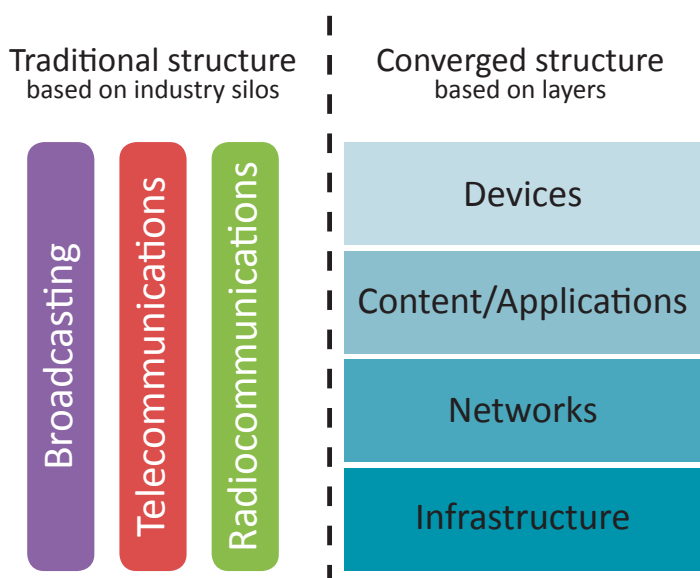


Figure 1: Comparing traditional industry silos with a layered structure likely under convergence.

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ACMA Chairman, Chris Chapman has made similar suggestions based on two or three layers stating that it provides a very useful tool for thinking and planning how to address convergence, albeit with limitations.²⁵

A similar approach could be adopted for copyright reform to ensure consistency in relation to protection, liability, exceptions and statutory licences. The 'layers' could comprise content creators, content providers (including online retailers), applications, networks and infrastructure. Authorisation liability could be refined in relation to each 'layer' to give greater certainty.

As part of this layered approach and in light of technological developments, the exclusion of the Internet from the definition of 'broadcast' and the retransmission right could be reconsidered.

(b) Expanded role for statutory licences

The retransmission regime in Part VC of the Copyright Act provides a statutory licensing structure, albeit one of narrow application, allowing content to be re-used without having to re-clear underlying rights.

Consideration should be given to the merits of expanding or adopting this type of licence to allow content, not just free-to-air broadcasts, to be re-used on different platforms. For example, if the controller of the film copyright (usually the producer) in a program wishes to licence it for distribution online, the service provider should not have to re-clear all underlying copyright. They should have the option of paying a predetermined royalty, which could subsequently be divided up amongst the relevant copyright owners eg. in accordance with the existing Screenrights royalty splits. Depending on price, this could reduce the barriers faced by content service providers and leave the complex issue of tariff distribution to specialised organisations, such as collecting societies.

(c) Practical means of enforcement and compensation

Dealing with the problem of online infringement requires legislative reform and international co-operation. It is a complex and controversial issue, but approaches other than litigation need to be considered.

Within our region, New Zealand has enacted the Copyright (Infringing File Sharing) Amendment Act 2011, which came into effect on 1 September 2011 putting in place a notice regime in relation to online infringement. The Communications Alliance has put forward a more moderate proposal for Australia. Under the proposal, which has been endorsed by Telstra, Optus and iiNet amongst others, users would receive an education notice if suspected of online infringement. Repeat infringers could attract up to three warning notices within a 12 month period, after which their details could be passed on to copyright holders to allow for legal action.

There are other approaches being advocated. For example, the CEO of APRA|AMCOS (Brett Cottle) has discussed a model whereby users are charged (via an ISP) a flat fee for a blanket licence. To work, this model would also require legislative changes. The model raises a number of difficult issues including, whether such a legislative scheme would be constitutional, whether all copyright owners (or at least aggregators) would agree to such a scheme and how it would be administered in terms of royalty distribution.

In conclusion, given the role that copyright plays in determining how content can be exploited across platforms, it must be reformed to operate effectively in the face of media convergence, particularly if the Government wants to encourage innovation in online services as the NBN develops. The upcoming ALRC inquiry can only focus on a sub-set of the issues raised in this paper. Clearly, it would be preferable if the Government took a more holistic approach to copyright reform. Historically, piecemeal and reactive amendments have tended to exacerbate rather than address many of the anomalies in the Copyright Act.

John Fairbairn is a Partner in Minter Ellison's Intellectual Property team and focuses on the media and technology sectors. The article is an expression of the author's views and not those of Minter Ellison or its clients.

²⁴ After this paper was written, the Supreme Court of Canada handed down five cases (*SOCAN v Bell* 2012 SCC 36; *ESA/C v SOCAN* 2012 SCC 34; *Rogers v SOCAN* 2012 SCC 35; *Re:Sound v MPTAC* 2012 SCC 38; *Alberta v Access Copyright* 2012 SCC 37) in which the notion of "technological neutrality" played a central role in the interpretation of the Canadian Copyright Act. That approach creates a significant divergence between Canadian and Australia copyright law.

²⁵ Chris Chapman, 'The "Convergence Phenomena" from a Regulator's Perspective' (2011) 30(1) *Communications Law Bulletin* 1, 13.