



Australian Government

Australian Law Reform Commission

# Copyright and the Digital Economy

DISCUSSION PAPER

You are invited to provide a submission  
or comment on this Discussion Paper

This Discussion Paper reflects the law as at 31 May 2013.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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ISBN: 978-0-9873872-2-6

Commission Reference: ALRC Discussion Paper 79, 2013

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## Making a submission

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Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Discussion Paper is 31 July 2013.

### Online submission form

The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual questions: <http://www.alrc.gov.au/content/copyright-inquiry-discussion-paper>. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions as you wish. There is space at the end of the form for any additional comments.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email [web@alrc.gov.au](mailto:web@alrc.gov.au), or phone +61 2 8238 6305.

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### Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents.

Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a Freedom of Information request. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions. See the ALRC policy on submissions and inquiry material for more information [www.alrc.gov.au/policies](http://www.alrc.gov.au/policies)

### Final Report

After considering submissions to this Discussion Paper, the ALRC will produce a final Report that will be delivered to the Commonwealth Attorney-General by 30 November 2013.



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# Terms of Reference

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## **ALRC Terms of Reference - Copyright and the Digital Economy**

Having regard to:

- the objective of copyright law in providing an incentive to create and disseminate original copyright materials;
- the general interest of Australians to access, use and interact with content in the advancement of education, research and culture;
- the importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies; and
- Australia's international obligations, international developments and previous copyright reviews.

I refer to the ALRC for inquiry and report pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* the matter of whether the exceptions and statutory licences in the *Copyright Act 1968*, are adequate and appropriate in the digital environment.

Amongst other things, the ALRC is to consider whether existing exceptions are appropriate and whether further exceptions should:

- recognise fair use of copyright material;
- allow transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and
- allow appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes.

### *Scope of Reference*

In undertaking this reference, the Commission should:

- take into account the impact of any proposed legislative solutions on other areas of law and their consistency with Australia's international obligations;
- take into account recommendations from related reviews, in particular the Government's Convergence Review; and

- not duplicate work being undertaken on: unauthorised distribution of copyright materials using peer to peer networks; the scope of the safe harbour scheme for ISPs; a review of exceptions in relation to technological protection measures; and increased access to copyright works for persons with a print disability.

*Timeframe*

The Commission is to report no later than 30 November 2013.

# Participants

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## **Australian Law Reform Commission**

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Professor Jill McKeough

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The Hon Justice John Middleton (from December 2012)

The Hon Justice Nye Perram (from December 2012)

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Patrick Fair, Baker & McKenzie and Deputy Chairman, Internet Industry Association

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The Hon Justice Susan Kenny, Federal Court of Australia (ALRC Part-time Commissioner, until July 2012)

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Associate Professor Kimberlee Weatherall, University of Sydney

The Hon Justice David Yates, Federal Court of Australia



# Proposals and Questions

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## 4. The Case for Fair Use in Australia

**Proposal 4-1** The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.

**Proposal 4-2** The new fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').

**Proposal 4-3** The non-exhaustive list of fairness factors should be:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material used;
- (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

**Proposal 4-4** The non-exhaustive list of illustrative purposes should include the following:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) non-consumptive;
- (f) private and domestic;
- (g) quotation;
- (h) education; and
- (i) public administration.

**Question 4–1** What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

**Question 4–2** If fair use is enacted, the ALRC proposes that a range of specific exceptions be repealed. What other exceptions should be repealed if fair use is enacted?

## 6. Statutory Licences

**Proposal 6–1** The statutory licensing schemes in pts VA, VB and VII div 2 of the *Copyright Act* should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

**Question 6–1** If the statutory licences are repealed, should the *Copyright Act* be amended to provide for certain free use exceptions for governments and educational institutions that only operate where the use cannot be licensed, and if so, how?

## 7. Fair Dealing

**Proposal 7–1** The fair use exception should be applied when determining whether a use for the purpose of research or study; criticism or review; parody or satire; reporting news; or professional advice infringes copyright. ‘Research or study’, ‘criticism or review’, ‘parody or satire’, and ‘reporting news’ should be illustrative purposes in the fair use exception.

**Proposal 7–2** The *Copyright Act* should be amended to repeal the following exceptions:

- (a) ss 40(1), 103C(1)—fair dealing for research or study;
- (b) ss 41, 103A—fair dealing for criticism or review;
- (c) ss 41A, 103AA—fair dealing for parody or satire;
- (d) ss 42, 103B—fair dealing for reporting news;
- (e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and
- (f) ss 104(b) and (c)—professional advice exceptions.

**Proposal 7–3** If fair use is not enacted, the exceptions for the purpose of professional legal advice in ss 43(2), 104(b) and (c) of the *Copyright Act* should be repealed and the *Copyright Act* should provide for new fair dealing exceptions ‘for the purpose of professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney’ for both works and subject-matter other than works.

**Proposal 7–4** If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright is infringed.



## 8. Non-consumptive Use

**Proposal 8–1** The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. ‘Non-consumptive use’ should be an illustrative purpose in the fair use exception.

**Proposal 8–2** If fair use is enacted, the following exceptions in the *Copyright Act* should be repealed:

- (a) s 43A—temporary reproductions made in the course of communication;
- (b) s 111A—temporary copying made in the course of communication;
- (c) s 43B—temporary reproductions of works as part of a technical process of use;
- (d) s 111B—temporary copying of subject-matter as a part of a technical process of use; and
- (e) s 200AAA—proxy web caching by educational institutions.

**Proposal 8–3** If fair use is not enacted, the *Copyright Act* should be amended to provide a new fair dealing exception for ‘non-consumptive’ use. This should also require the fairness factors to be considered. The *Copyright Act* should define a ‘non-consumptive’ use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

## 9. Private and domestic use

**Proposal 9–1** The fair use exception should be applied when determining whether a private and domestic use infringes copyright. ‘Private and domestic use’ should be an illustrative purpose in the fair use exception.

**Proposal 9–2** If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

**Proposal 9–3** The exceptions for format shifting and time shifting in ss 43C, 47J, 109A, 110AA and 111 of the *Copyright Act* should be repealed.

**Proposal 9–4** The fair use exception should be applied when determining whether a use of copyright material for the purpose of back-up and data recovery infringes copyright.

**Proposal 9–5** The exception for backing-up computer programs in s 47J of the *Copyright Act* should be repealed.

## 10. Transformative Use and Quotation

**Proposal 10–1** The *Copyright Act* should not provide for any new ‘transformative use’ exception. The fair use exception should be applied when determining whether a ‘transformative use’ infringes copyright.

**Proposal 10–2** The fair use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair use exception.

**Proposal 10–3** If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.

## **11. Libraries, Archives and Digitisation**

**Proposal 11–1** If fair use is enacted, s 200AB of the *Copyright Act* should be repealed.

**Proposal 11–2** The fair use exception should be applied when determining whether uses of copyright material not covered by specific libraries and archives exceptions infringe copyright.

**Proposal 11–3** If fair use is not enacted, the *Copyright Act* should be amended to provide for a new fair dealing exception for libraries and archives. This should also require the fairness factors to be considered.

**Question 11–1** Should voluntary extended collective licensing be facilitated to deal with mass digitisation projects by libraries, museums and archives? How can the *Copyright Act* be amended to facilitate voluntary extended collective licensing?

**Proposal 11–4** The *Copyright Act* should be amended to provide a new exception that permits libraries and archives to make copies of copyright material, whether published or unpublished, for the purpose of preservation. The exception should not limit the number or format of copies that may be made.

**Proposal 11–5** If the new preservation copying exception is enacted, the following sections of the *Copyright Act* should be repealed:

- (a) s 51A—reproducing and communicating works for preservation and other purposes;
- (b) s 51B—making preservation copies of significant works held in key cultural institutions’ collections;
- (c) s 110B—copying and communicating sound recordings and cinematograph films for preservation and other purposes;
- (d) s 110BA—making preservation copies of significant recordings and films in key cultural institutions’ collections; and
- (e) s 112AA—making preservation copies of significant published editions in key cultural institutions’ collections.

**Proposal 11–6** Any new preservation copying exception should contain a requirement that it does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.

**Proposal 11–7** Section 49 of the *Copyright Act* should be amended to provide that, where a library or archive supplies copyright material in an electronic format in response to user requests for the purposes of research or study, the library or archive must take measures to:

- (a) prevent the user from further communicating the work;
- (b) ensure that the work cannot be altered; and
- (c) limit the time during which the copy of the work can be accessed.

## 12. Orphan Works

**Proposal 12–1** The fair use exception should be applied when determining whether a use of an ‘orphan work’ infringes copyright.

**Proposal 12–2** The *Copyright Act* should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

- (a) a ‘reasonably diligent search’ for the rights holder had been conducted and the rights holder had not been found; and
- (b) as far as reasonably possible, the work was clearly attributed to the author.

**Proposal 12–3** The *Copyright Act* should provide that, in determining whether a ‘reasonably diligent search’ was conducted, regard may be had, among other things, to:

- (a) how and by whom the search was conducted;
- (b) the search technologies, databases and registers available at the time; and
- (c) any guidelines or industry practices about conducting diligent searches available at the time.

## 13. Educational Use

**Proposal 13–1** The fair use exception should be applied when determining whether an educational use infringes copyright. ‘Education’ should be an illustrative purpose in the fair use exception.

**Proposal 13–2** If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.

**Proposal 13–3** The exceptions for education in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed.

## 14. Government Use

**Proposal 14–1** The fair use exception should be applied when determining whether a government use infringes copyright. ‘Public administration’ should be an illustrative purpose in the fair use exception.

**Proposal 14–2** If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered.

**Proposal 14–3** The following exceptions in the *Copyright Act* should be repealed:

- (a) ss 43(1), 104—judicial proceedings; and
- (b) ss 48A, 104A—copying for members of Parliament.

## 15. Retransmission of Free-to-air Broadcasts

### Proposal 15–1

Option 1: The exception to broadcast copyright provided by the *Broadcasting Services Act 1992* (Cth), and applying to the retransmission of free-to-air broadcasts; and the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of the *Copyright Act*, should be repealed. This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

Option 2: The exception to broadcast copyright provided by the *Broadcasting Services Act*, and applying to the retransmission of free-to-air broadcasts, should be repealed and replaced with a statutory licence.

**Proposal 15–2** If Option 2 is enacted, or the existing retransmission scheme is retained, retransmission ‘over the internet’ should no longer be excluded from the statutory licensing scheme applying to the retransmission of free-to-air broadcasts. The internet exclusion contained in s 135ZZJA of the *Copyright Act* should be repealed and the retransmission scheme amended to apply to retransmission by any technique, subject to geographical limits on reception.

**Question 15–1** If the internet exclusion contained in s 135ZZJA of the *Copyright Act* is repealed, what consequential amendments to pt VC, or other provisions of the *Copyright Act*, would be required to ensure the proper operation of the retransmission scheme?

**Proposal 15–3** If it is retained, the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* should be clarified.

**Question 15–2** How should the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* be clarified and, in particular, its application to internet protocol television?

## 16. Broadcasting

**Proposal 16–1** The *Copyright Act* should be amended to ensure that the following exceptions (the ‘broadcast exceptions’), to the extent these exceptions are retained, also apply to the transmission of television or radio programs using the internet:

- (a) s 45—broadcast of extracts of works;
- (b) ss 47, 70 and 107—reproduction for broadcasting;

- (c) s 47A—sound broadcasting by holders of a print disability radio licence;
- (d) s 67—incidental broadcast of artistic works;
- (e) s 109—broadcasting of sound recordings;
- (f) s 135ZT—broadcasts for persons with an intellectual disability;
- (g) s 199—reception of broadcasts;
- (h) s 200—use of broadcasts for educational purposes; and
- (i) pt VA—copying of broadcasts by educational institutions.

**Question 16–1** How should such amendments be framed, generally, or in relation to specific broadcast exceptions? For example, should:

- (a) the scope of the broadcast exceptions be extended only to the internet equivalent of television and radio programs?
- (b) ‘on demand’ programs continue to be excluded from the scope of the broadcast exceptions, or only in the case of some exceptions?
- (c) the scope of some broadcast exceptions be extended only to content made available by free-to-air broadcasters using the internet?

**Proposal 16–2** If fair use is enacted, the broadcast exceptions in ss 45 and 67 of the *Copyright Act* should be repealed.

**Question 16–2** Section 152 of the *Copyright Act* provides caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings. Should the *Copyright Act* be amended to repeal the one per cent cap under s 152(8) or the ABC cap under s 152(11), or both?

**Question 16–3** Should the compulsory licensing scheme for the broadcasting of published sound recordings in s 109 of the *Copyright Act* be repealed and licences negotiated voluntarily?

## 17. Contracting Out

**Proposal 17–1** The *Copyright Act* should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect. These limitations on contracting out should apply to the exceptions for libraries and archives; and the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.



# 1. Introduction to the Inquiry

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## Introduction

1.1 This is the second stage in the consultation process in this Inquiry into whether the *Copyright Act* needs amendment to allow Australia to fully participate in a modern, digital economy. The first stage included the release of the Issues Paper, *Copyright and the Digital Economy* (ALRC IP 42), which generated 295 submissions.<sup>1</sup>

1.2 In releasing this Discussion Paper, the ALRC again calls for submissions to inform the final stage of deliberations leading up to the final Report, which is to be provided to the Attorney-General by the end of November 2013. This introductory chapter and Chapters 2 and 3 provide an overview of the policy framework and the background to questions and proposals in the Discussion Paper. They set out in detail the issues raised by the Terms of Reference, the research behind the proposals, a thorough analysis and discussion of stakeholder views.

1.3 In considering whether changes are needed to the *Copyright Act*, and options for reform, the ALRC is required to consider whether existing exceptions to copyright are appropriate, and whether further exceptions should be introduced. In doing so the ALRC has to take into account the impact of proposed changes on other areas of law, consistency with Australia's international obligations and recommendations from other reviews.

## Matters outside the Terms of Reference

1.4 In performing its functions in relation to this Inquiry, the ALRC has been asked not to duplicate work being undertaken in four areas of importance to the digital economy, namely:

- unauthorised distribution of copyright material using peer-to-peer networks;
- the scope of a safe harbour scheme for Internet Service Providers;

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1 The public submissions are available on the ALRC website at: [www.alrc.gov.au](http://www.alrc.gov.au).

- exceptions in relation to technological protection networks; and
- increased access to copyright works for persons with a print disability.

1.5 The items listed are under discussion at government level or the subject of separate processes. The first bullet point refers to concerns about controlling the unauthorised distribution of copyright material using the internet as a file sharing network. This type of sharing was originally typified by the Napster music file-sharing service and is now perhaps most commonly associated with the use of the BitTorrent peer-to-peer file sharing protocol. However, the focus of the ALRC inquiry is on legal exceptions to copyright rather than on measures to combat copyright infringement.

1.6 The second and third bullet points of the matters listed above concern work the ALRC is ‘not to duplicate’. This refers to work being undertaken by the Attorney-General’s Department into the safe harbour scheme for internet service providers (ISPs)<sup>2</sup> and technological protection measures (TPMs)<sup>3</sup> respectively. An Attorney-General’s Department Consultation Paper *Revising the Scope of the Copyright Safe Harbour Scheme* was released in 2011.

1.7 The fourth bullet point above refers to initiatives to facilitate access to published works by the visually impaired and the print disabled, including through the World Intellectual Property Organization (WIPO). WIPO discussed an instrument providing access to copyright works for persons with a print disability at its 24th Session in Geneva, July 2012.<sup>4</sup>

1.8 A number of submissions pointed out that enforcement, ISP safe harbour schemes and TPMs are matters of importance to many stakeholders, and highlighted the difficulty of making recommendations on matters within the Terms of Reference without taking account of the issues the ALRC is directed not to inquire into.<sup>5</sup> The ALRC, in conducting this Inquiry, has been receptive to concerns and the need to take into account enforcement and other issues faced by stakeholders.

1.9 APRA/AMCOS noted that to ‘maximise the potential contribution of content industries in the digital economy there are a number of significant challenges which will need to be overcome.’ This includes the ‘the ease with which digital content can be distributed and copied’ and ‘meaningful regulation of the ISP industry’.<sup>6</sup>

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2 The ‘safe harbour’ scheme refers to the provisions of the *Copyright Act* limiting remedies available against carriage service providers for infringements of copyright relating to carrying out of online activities: *Copyright Act 1968* (Cth) pt V, div 2AA. See Australian Government Attorney-General’s Department, *Revising the Scope of the Copyright ‘Safe Harbour Scheme’* (2011), Consultation Paper.

3 The use of circumvention technology to gain unauthorised access to electronic copyright works led to the amendments contained in the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). See further Australian Government Attorney-General’s Department, *Review of Technological Protection Measure Exceptions made under the Copyright Act 1968* (2012).

4 World Intellectual Property Organisation, *Standing Committee on Copyright and Related Rights: Twenty-Fourth Session* (2012).

5 iGEA, *Submission 192*, see also Australian Film/TV Bodies, *Submission 205*; Motion Picture Association of America Inc, *Submission 197*; Music Rights Australia Pty Ltd, *Submission 191*.

6 APRA/AMCOS, *Submission 247* citing also International Federation of the Phonographic Industry, *Digital Music Report 2012: Expanding Choice, Going Global* (2012).



1.10 Other stakeholders also raised the need to consider ISP and intermediary liability.<sup>7</sup>

### Related inquiries

1.11 Policy makers around the world are actively reconsidering the relationship between copyright exceptions and innovation, research, and economic growth, with a view to ensuring that their economies are capable of fully utilising digital technology to remain competitive in a global market.

1.12 Relevant Australian reviews notably include previous work by the Copyright Law Review Committee, including *Simplification of the Copyright Act*<sup>8</sup> and *Copyright and Contract*.<sup>9</sup> Other relevant reviews include the Ergas Report,<sup>10</sup> the Cutler Review<sup>11</sup> and the 2011 Book Industry Strategy Group Report.<sup>12</sup>

1.13 In its 2005 Fair Use Review, the Attorney-General's Department looked at whether it was appropriate to introduce a general fair use exception into the *Copyright Act*.<sup>13</sup> This review resulted in the time shifting, format shifting, parody and satire and flexible fair dealing exceptions being introduced into the Act in 2006.<sup>14</sup>

1.14 The interaction of copyright and contract is a relevant aspect of the current Inquiry, as the real value of copyright to many comes from arrangements that build on, but are only partly related to, property rights in copyright. One concern is that contractual provisions may unjustifiably restrict practices of users which are otherwise allowed. On the other hand, contractual arrangements may have the capacity to render nugatory the rights of creators.

1.15 The interaction between copyright and contracts is important in finding the balance between private arrangements and proprietary rights. As the Ergas Report noted, non-legislative alternatives to property rights (such as contractual mechanisms) may be *effective* but they run the risk of not being *efficient* in that social costs 'would almost certainly be higher under such arrangements, than they are under the current panel of protective instruments'.<sup>15</sup>

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7 COMPPS, *Submission 266*; AFL, *Submission 232*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*.

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

9 Copyright Law Review Committee, *Copyright and Contract* (2002).

10 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).

11 Department of Innovation, Industry, Science and Research, *Powering Ideas: An Innovation Agenda for the 21st Century* (2009).

12 Book Industry Strategy Group, *Final Report* (2011). See also Australian Government, *Government Response to Book Industry Strategy Group Report* (2012).

13 Australian Government Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*, Issues Paper (2005).

14 *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

15 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 25.

1.16 At the same time as this Inquiry, the Government is undertaking a review of contract law to increase efficiencies and boost productivity, with a view to improving the attractiveness of Australia as a business and investment destination.<sup>16</sup> It is likely that the ‘costs, difficulties, inefficiencies or lost opportunities for business’, which that review will look at, will also be relevant to this Inquiry.<sup>17</sup>

1.17 The Convergence Review<sup>18</sup> examined Australia’s communications and media legislation and advised the Government on potential amendments to ensure this regulatory framework is effective and appropriate in the emerging communications environment. The Convergence Review Committee was established to examine the operation of media and communications regulation in Australia and assess its effectiveness in view of the convergence of media content and communications technologies. Although copyright law and media regulation involve different regulatory environments and different industry players and conditions, these intersect and are therefore integrally related.

1.18 The Convergence Review noted that copyright-related issues in general may have implications for investment in the content services market. Advances in technology and evolving business models are providing new ways of accessing and distributing content, which are likely to have implications for content rights holders, and for users, in the converged environment. These changes have been highlighted in recent developments, such as the ruling of the Federal Court on the Optus cloud-based TV Now service.<sup>19</sup> The Convergence Review proposed that the issue of copyright and the retransmission of free-to-air broadcasts be examined as part of this Inquiry and that, in investigating content-related competition issues, the proposed new communications regulator should have regard to copyright implications and be able to refer any resulting copyright issues to the relevant minister for further consideration by the Government.

1.19 In the UK the Hargreaves Review<sup>20</sup> was intended to reshape copyright to be ‘fit for purpose’ in the digital environment. In its response to the Review the UK Government agreed that ‘the IP framework is falling behind and must adapt’.<sup>21</sup> A key aspect of this is said to be that:

the award of a limited monopoly to creators, in respect of their works, is balanced by limitations as to term and scope and exceptions for public benefit, such as the “fair use” or “fair dealing” exceptions variously found in different legal systems. In recent

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16 Australian Government Attorney-General’s Department, *Improving Australia’s Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (2012).

17 Submissions for the contract law review were due on 20 July 2012, and are available at <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Review-of-Australian-Contract-Law.aspx>.

18 Australian Government Convergence Review, *Convergence Review Final Report* (2012).

19 The Federal Court at first instance ruled that this service does not infringe any rights conferred by the *Copyright Act 1968* (Cth) but was a form of ‘time shifting’ allowed by s 111 of the Act. On appeal, the Full Federal Court overturned this decision: *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147. See Ch 10.

20 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

21 UK Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011), 2.

years, awareness has grown of the value both to users and to economic growth of a public domain created by such limitations and exceptions, complementing a productive copyright-protected zone.<sup>22</sup>

1.20 In January 2013, the European Commission announced seven new priorities for the European Digital Economy and Society. One of these steps is to ensure the EU copyright framework ‘remains fit for purpose in the digital context’.<sup>23</sup> Among the proposals are new EU Directives concerning activities of collecting societies in order to facilitate introduction of new business models that enhance online distribution of music. A review of copyright law is also taking place in Ireland<sup>24</sup> and the report date has been extended in light of the large number of submissions received in response to a discussion paper. In April 2013, the US House of Representatives announced ‘a comprehensive review of US copyright law’.<sup>25</sup>

1.21 In 2012, Canada introduced a *Copyright Modernization Act*<sup>26</sup> which includes an amendment to address the issue of user-generated content and specifically recognises fair dealing for educational purposes, as well as a number of other matters under consideration as part of the ALRC Inquiry.

### Reform proposals

1.22 The reforms proposed in this Discussion Paper include the introduction of a broad, flexible exception for fair use of copyright material and the consequent repeal of many of the current exceptions in the *Copyright Act*, so that the copyright regime becomes more flexible and adaptable. An alternative model, should fair use not be enacted, suggests the addition of new fair dealing exceptions, recognising fairness factors. Other reform proposals relate to the replacement of certain statutory licences with voluntary licensing more suited to the digital environment; the use of orphan works; provisions relating to preservation of copyright material by cultural institutions; and contracting out of the operation of certain copyright exceptions. Two alternative proposals relating to the scheme for the retransmission of free-to-air broadcasts are set out for comment from stakeholders, in addition to other proposals relating to broadcasting.

### How to make a submission

1.23 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions,

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- 22 L Edwards, *Hargreaves, Copyright, Technology and the Future of the Creative Industries : a UK multidisciplinary perspective*, Centre for Copyright and New Business Models in the Creative Economy <[www.create.ac.uk/hargreaves-copyright-technology-and-the-future-of-the-creative-industries](http://www.create.ac.uk/hargreaves-copyright-technology-and-the-future-of-the-creative-industries)> at 1 February 2013.
  - 23 European Commission, *Orientation Debate on Content in the Digital Economy* (2012).
  - 24 Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).
  - 25 US House of Representatives, Committee on the Judiciary, ‘Chairman Goodlatte Announces Comprehensive Review of Copyright Law’ (Press Release, April 24, 2013).
  - 26 *Copyright Modernization Act, C-11 2012* (Canada). See further M Patterson, R McDonald, Fraser Milner Casgrain LLP, *The Copyright Modernization Act: Canada’s New Rights and Rules* <[www.lexology.com/library](http://www.lexology.com/library)> at 22 March 2013.

or to any of the background material and analysis provided, to help advance the reform process in this Inquiry.

1.24 There is no specified format for submissions, although the questions and proposals provided in this document are intended to provide guidance for respondents. The ALRC welcomes submissions, which may be made in writing, by email or using the ALRC's online submission form. Submissions made using the online submission form are preferred.

1.25 Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

## 2. Framing Principles for Reform

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### Summary

2.1 The Issues Paper identified several principles for reform directed to providing an effective framework of exceptions and statutory licences in the *Copyright Act 1968* (Cth). Stakeholders overall supported the principles identified. Some submissions amplified and clarified the underlying principles, or suggested a ranking, which the Issues Paper did not attempt. Overall, stakeholders agreed about basic principles, but not about how they are to be interpreted or prioritised.

2.2 In defining the policy settings for this Inquiry in the form of specific framing principles, assistance may be derived from existing laws, other relevant reviews and government reports, and international developments. The principles outlined are not the only considerations in copyright reform, but they generally accord with other established principles, including those developed for the digital environment<sup>1</sup> and importantly, are the ones stakeholders have identified for the purposes of this Inquiry.

2.3 Following stakeholder input, the framing principles for this Inquiry are discussed below.

### Principle 1: Acknowledging and respecting authorship and creation

2.4 A number of stakeholders referred to the concept of 'authorship' as being the paramount consideration in any copyright discussion.<sup>2</sup> Alongside economic rights of creators are moral rights and cultural considerations, in particular, issues relating to

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1 See, eg, World Economic Forum, *Global Agenda Council on the Intellectual Property System Digital Copyright Principles* <[www3.weforum.org/docs/WEF\\_GAC\\_CopyrightPrinciples.pdf](http://www3.weforum.org/docs/WEF_GAC_CopyrightPrinciples.pdf)> at 1 February 2013.

2 See, eg, Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

Indigenous culture and cultural practices in the context of digitisation of individual, family and community material.<sup>3</sup>

2.5 An important aspect to be made explicit is the general principle of the rights of authors and makers of copyright material to determine how their works are exploited ‘while at the same time acknowledging the rights of consumers to engage with content in a manner which does not adversely impact the rights of creators’.<sup>4</sup>

Regardless of the status of economic infringement of rights, a creator should always be able to assert their moral rights and seek removal from the internet of derivative works considered to violate these rights.<sup>5</sup>

2.6 Some stakeholders preferred that the term ‘rights holders’ not be used in a manner which obscures the importance of authorship and creation of copyright material. It was observed that ‘the High Court in *IceTV* has recently emphasised the centrality of the concept of authorship in understanding the proper scope of protection for works under the 1968 Act’.<sup>6</sup>

2.7 On a point of terminology, one stakeholder pointed out that the *Copyright Act* does not refer to ‘creators’, but rather to ‘authors’ of works and ‘makers’ of other subject matter, although the term ‘author’ is the only expression used in the relevant international conventions, such as the *Berne Convention* and the World Intellectual Property Organisation Copyright Treaty.<sup>7</sup> In this Discussion Paper ‘creator’ is used at times as a generic term referring to authors or makers of copyright material.

2.8 The ALRC proposals for reform to copyright law should operate in a way that acknowledges and respects the rights of authors, artists and other creators.

## **Principle 2: Maintaining incentives for creation of works and other subject matter**

2.9 The Terms of Reference for this Inquiry refer to ‘the objective of copyright law in providing an incentive to create and disseminate original copyright materials’. Similarly, the objective of the Australian Government’s cultural policy is to increase

3 K Bowrey, ‘Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights?’ in K Bowrey, M Handler and D Nicol (eds), *Emerging Challenges in Intellectual Property* (2011): ‘... the digitisation and/or dissemination of “traditional cultural expressions”, including secret and sacred Aboriginal cultural heritage by museums, archives or other cultural institutions, should be subject to the free, prior and informed consent of Indigenous artists, custodians or communities’: Arts Law Centre of Australia, *Submission 171*; K Bowrey, *Submission 94*. See also J Anderson, ‘Anxieties of Authorship in the Colonial Archive’ in C Chris and D Gerstner (eds), *Media Authorship* (forthcoming 2013); T Janke, *Ethical Protocols from Deepening Histories of Place: Exploring Indigenous Landscapes of National and International Significance* (2013) <[www.deepeninghistories.anu.edu.au](http://www.deepeninghistories.anu.edu.au)> at 10 April 2013.

4 State Library of New South Wales, *Submission 168*.

5 Australian Major Performing Arts Group, *Submission 212*.

6 Law Council of Australia, *Submission 263*. The ALRC notes that the Ireland Copyright Review Committee refers to authors and rights holders together, albeit noting that the ‘situation of the individual author or artist is a dominant trope in copyright lore’: Ireland Copyright Review Committee, *Copyright and Innovation*, Consultation Paper (2012), 33.

7 Law Council of Australia, *Submission 263*.

the social and economic dividend from the arts, culture and the creative industries. This ALRC Inquiry is referred to in the cultural policy as being:

designed to ensure Australian copyright law continues to provide incentives for investment in innovation and content in a digital environment, while balancing the need to allow the appropriate use of both Australian and international content.<sup>8</sup>

2.10 The ALRC considers that maintaining incentives for creation through appropriate recognition of property rights in copyright material is an important aspect of copyright reform.

2.11 In many submissions, ranked equally with (or above) the emphasis on authorship was recognition of copyright as a form of property—specifically property that provides remuneration as a critical component of ongoing creative effort.<sup>9</sup> It was said that ‘the incentive theory (for creativity and innovation) underlies and continues to drive copyright law’.<sup>10</sup> Universities Australia submitted that the guiding principle for this Inquiry should be ‘to ensure that copyright law does not result in over regulation of activities that do not prejudice the central objective of copyright, namely the provision of incentives to creators’.<sup>11</sup>

2.12 Historically, copyright has been included among laws which ‘granted property rights in mental labour’.<sup>12</sup> In this tradition, Australian copyright law has been regarded primarily as conferring economic rights focusing on the protection of commercial activities designed to exploit material for profit.<sup>13</sup> Indeed, the *Copyright Act* refers to copyright as ‘personal property’.<sup>14</sup>

2.13 It is generally, although not universally,<sup>15</sup> assumed that creation of personal property underlies the incentive<sup>16</sup> to creation of copyright material.<sup>17</sup> While copyright ownership does play a role in the incentives of commercial producers of copyright

8 Australian Government, *Creative Australia: National Cultural Policy* (2013), [7.3.2].

9 ‘The purpose of copyright law is to provide incentive for creation of works for the benefit of society as a whole, and it is essential that any reform process takes account of that fact’: APRA/AMCOS, *Submission 247*; Australian Industry Group, *Submission 179*.

10 Arts Law Centre of Australia, *Submission 171*.

11 Universities Australia, *Submission 246*.

12 B Sherman and L Bently, *The Making of Modern Intellectual Property Law: The British Experience 1760–1911* (1999), 2.

13 *Copyright Act 1968* (Cth) s 196(1). ‘IP laws create property rights and the goods and services produced using IP rights compete in the market place with other goods and services’: ACCC, *Submission 165*. See also A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), [1.26].

14 *Copyright Act 1968* (Cth) s 196(1).

15 See NSW Young Lawyers, *Submission 195*.

16 ‘Today, this is the standard economic model of copyright law, whereby copyright provides an economic incentive for the creation and distribution of original works of authorship’: J Litman, *Digital Copyright* (2001), 80.

17 There is a body of commentary which doubts the link between copyright as a form of property as an incentive to create, and doubts the ‘blind belief in the necessity of copyright to power activity’: G Moody, *European Commission Meeting on Copyright* <<http://blogs.computerworlduk.com/open-enterprise/2012/12/european-commission-meeting-on-copyright/index.htm>> at 10 April 2013. See also W Patry, *How to Fix Copyright Law* (2011), 12; N Weinstock Netanel, ‘Copyright and Democratic Civil Society’ (1996) 106 *Yale Law Journal* 283. Nevertheless, for the purposes of this Inquiry, stakeholders have confirmed this principle as one fundamental to Australian copyright law.

works, who provide employment for creators, ‘the extent of this role has not been extensively studied and may be less than is commonly thought’.<sup>18</sup> The general proposition, however, is:

Orderly management of copyright is essential to promote the continued production of original copyright materials, to ensure sustainable business models and on-going investment and employment in Australia’s creative industries’.<sup>19</sup>

2.14 No-one suggested that copyright creators and owners should not be fairly rewarded. Most submissions espoused the ‘innovation incentive’ theory of copyright but views differed as to how far the incentive reached. The Centre of Excellence for Creative Industries and Innovation noted, for example, that ‘the evidence points to the need for caution in assessing claims that copyright as it currently operates is central to the ability of creators to earn a living from their creative works’.<sup>20</sup>

2.15 Professor Kathy Bowrey noted, ‘care needs to be taken not to conflate the position of original content creators with that of copyright owners’.<sup>21</sup> She pointed out that many creators ‘earn very low incomes with considerable numbers living below the poverty line’.<sup>22</sup> While the link between encouraging creativity and ownership of property rights is not inevitable, most stakeholders believe the property rights created by Australian copyright legislation provide the major incentive to creativity and production of new material.

2.16 The proprietary analysis was expressed by a number of stakeholders as a ‘need to correctly frame the discussion as one sensitive to the notion of property’, that is, the starting point in a discussion about copyright reform should not be ‘that consumers are entitled to use and exploit the products or property of another person who has privately invested in them’.<sup>23</sup> However, no property rights are ever unconstrained and it was noted in the United Kingdom Hargreaves Review that property principles cannot alone form the basis for copyright law as protection of creator’s rights may today be ‘obstructing innovation and economic growth’.<sup>24</sup>

2.17 It has been said that to talk of copyright as property is to employ a different ‘dominant metaphor’ than the traditional ‘bargain between authors and the public’.<sup>25</sup> However, ‘this proprietary approach’ is seen as the basis of encouragement to create copyright material, albeit that motivation will ‘vary from industry to industry’.<sup>26</sup>

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18 ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208* citing J Cohen, ‘Copyright as Property in the Post-Industrial Economy’ (2011) *Wisconsin Law Review* 141.

19 News Limited, *Submission 224*.

20 ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

21 K Bowrey, *Submission 94*.

22 Ibid citing D Throsby and A Zednik, ‘Multiple Job-holding and Artistic Careers: Some Empirical Evidence’ (2010) 20(1) *Cultural Trends* 9.

23 APRA/AMCOS, *Submission 247*; see also Walker Books Australia, *Submission 144*.

24 Cited in NSW Young Lawyers, *Submission 195*. B Scott submits that ‘the only people I have ever encountered who have discussed copyright as property are those with a vested interest in that characterisation’: B Scott, *Submission 166*.

25 J Litman, *Digital Copyright* (2001), 81.

26 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).



2.18 Reform should encourage innovation and creation to enhance the participation of Australian content creators in Australian and international markets. It was submitted that ‘the purpose of granting rights of property in the products of creative labour is to reward and encourage creativity’.<sup>27</sup> Indeed, the ‘objectives of copyright regulation are to support an environment that promotes the creation of new content for the benefit of Australian society as a whole’.<sup>28</sup>

2.19 An optimal system of copyright law will support individuals and enterprises as they establish new ways of doing business and seek out new commercial opportunities. Australia competes with other countries in a global digital economy.

2.20 The Australian Consumer and Competition Commission (ACCC) pointed to the important role that copyright plays in ‘establishing incentives for creation of copyright material’ but also noted the costs associated with placing too much weight on incentives, resulting in an inefficient copyright system ‘which could place Australia at an economic disadvantage in relation to the copyright industries as compared with countries that have a more efficient system’.<sup>29</sup>

2.21 If copyright law creates ‘a less conducive environment for a digital economy than the law of Australia’s competitors, this will put Australia at a disadvantage in attracting and retaining innovative digital companies’.<sup>30</sup> Civil Liberties Australia stated that ‘copyright is an aberration in Australia’s traditional free market system’.<sup>31</sup>

2.22 An aspect of recognising that copyright reform should do nothing to disturb innovation and creativity is understanding what does, or does not, impose ‘substantial harm’ to the incentives of copyright owners.<sup>32</sup> Many submissions which emphasised the proprietary nature of copyright also referred to the principle that copyright is a ‘balance between the rights of creator and user’.<sup>33</sup> It was submitted that ‘the right balance between rights and limitations is one that preserves the necessary incentives for licensing’.<sup>34</sup> On the other hand it was also argued that ‘high transaction costs, cumulative licensing requirements, and strategic behaviour make licensing prohibitive, resulting in the underproduction of valuable works’.<sup>35</sup>

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27 APRA/AMCOS, *Submission 247*. See also International Publishers Association, *Submission 256*; Telstra Corporation Limited, *Submission 222*; Australian Broadcasting Corporation, *Submission 210*; Australian Industry Group, *Submission 179*.

28 Copyright Agency/Viscopy, *Submission 249*. See also News Limited, *Submission 224*.

29 ACCC, *Submission 165*.

30 K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 2.

31 Civil Liberties Australia, *Submission 139*.

32 N Suzor, *Submission 172*.

33 APRA/AMCOS, *Submission 247*. See also Australian Broadcasting Corporation, *Submission 210*.

34 Copyright Agency/Viscopy, *Submission 249* quoting Michel Barnier, Member of the European Commission responsible for Internal Market and Services, ‘Making European Copyright Fit for Purpose in the Age of Internet’ (Press Release, 7 November 2011).

35 N Suzor, *Submission 172* citing P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011).

2.23 Other submissions put the view that ‘the relevant balance of interests in copyright law is not the balance between individual copyright owners and copyright users, but between public interest ... and the right of copyright owners to profit at any point in time’.<sup>36</sup>

### **Principle 3: Promoting fair access to and wide dissemination of content**

2.24 The Terms of Reference refer to the ‘general interest of Australians to access, use and interact with content in the advancement of education, research and culture’. There are important economic and social benefits in promoting access to and wide dissemination of information. Stakeholders articulated different aspects of the public interest including: advancing education and research,<sup>37</sup> developing and supporting culture, public participation in decision making<sup>38</sup> and promoting a transparent and accountable democracy.<sup>39</sup>

According to review after report after second reading speech, Australian copyright law exists to serve the public interest in both the creation and the dissemination of new works of knowledge and culture.<sup>40</sup>

2.25 A fundamental value in Australia is freedom of expression and this is inherent in any principle concerning dissemination of information.<sup>41</sup> Furthermore it is essential to recognise that ‘the digital economy is not measured purely by financial indicators, but also that cultural benefits play a significant part in the digital economy’.<sup>42</sup> A wide variety of content and platforms for delivering content ‘services our pluralistic society and allows for the ability for niche groups to express themselves through media and consumer media’.<sup>43</sup>

2.26 A number of stakeholders pointed out that wide dissemination and availability of content is vitally important to creation<sup>44</sup> of new copyright material:

To fulfil its public policy role, copyright needs to be consistent with, and promote, relevant individual rights, in particular the right to freedom of expression, as well as the public interest in ensuring the importance of education and research, and in safeguarding the functioning of public institutions which promote preservation of and public access to knowledge and culture, such as libraries, museums, galleries and

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<sup>36</sup> Box Hill Institute of TAFE, *Submission 77*.

<sup>37</sup> ADA and ALCC, *Submission 213*; Universities Australia, *Submission 246*.

<sup>38</sup> Art Gallery of New South Wales (AGNSW), *Submission 111*.

<sup>39</sup> National Archives of Australia, *Submission 155*; State Records NSW, *Submission 160*.

<sup>40</sup> R Burrell and others, *Submission 278*.

<sup>41</sup> Ibid; News Limited, *Submission 224*; Australian Broadcasting Corporation, *Submission 210*; Civil Liberties Australia, *Submission 139*.

<sup>42</sup> Australian Broadcasting Corporation, *Submission 210*; see also Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*; Arts Tasmania, *Submission 150*; National Gallery of Victoria, *Submission 142*; K Bowrey, *Submission 94*.

<sup>43</sup> AIMIA Digital Policy Group, *Submission 261*.

<sup>44</sup> See, eg, ADA and ALCC, *Submission 213*: ‘Our understanding of “creativity” does not merely encompass new copyright works, but new ways of accessing and engaging with content’. See also Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

archives ... Creation depends on access to existing cultural material, education, and freedom to express ourselves creatively.<sup>45</sup>

2.27 Some stakeholders refer to a concept of ‘users rights’, the view being that these are in fact ‘a central aspect of copyright’.<sup>46</sup> In economic terms, ‘the exclusive rights that copyright law grants to encourage creativity can impose costs in terms of reduced access and cumulative creativity. The exceptions and limitations to copyright can be understood as attempts to contain these costs and maintain an overall balance in copyright policy’.<sup>47</sup>

2.28 In line with the principle of fair access to material, one submission urged as a leading principle that copyright law should ‘focus on the end-user and their ability to access copyright material and not be used to unreasonably restrict the ability of end-users to view or use material that they otherwise have a legitimate right to view or use’.<sup>48</sup> However, allowing access on terms decided by the content owner is also considered fundamental by many stakeholders, even in circumstances ‘which may not be wide’ and to some may not appear ‘fair’ or ‘free’.<sup>49</sup>

2.29 Inherent in the notion of ‘fair access’ is providing appropriate remuneration to copyright owners<sup>50</sup> and always, attribution and other ‘key social norms’ need to be observed.<sup>51</sup> The National Archives of Australia submitted that:

in addressing fairness, it is relevant to consider that much copyright material held in archives, and especially in government archives, could be disseminated widely to the great benefit of the community and with no real harm to the commercial interests of the copyright owners.<sup>52</sup>

2.30 A variety of views is evident in determining the basis of appropriate remuneration. Understandably, rights owners organisations, on behalf of their constituents, argued for remuneration attaching to whatever is determined to be within the copyright owner’s exclusive rights. This raises questions about who should bear the cost of equitable remuneration: ‘should the cost be borne by the user, or, in effect, the content creator’.<sup>53</sup> A key issue in this Inquiry is whether free use exceptions should apply ‘if there is a licensing solution’ applicable to the user. On one view, ‘in principle, no exception should allow a use that a user can make under a licensing solution available to them’.<sup>54</sup>

45 R Burrell and others, *Submission 278*; see also N Suzor, *Submission 172*.

46 Universities Australia, *Submission 246* citing R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 279.

47 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 42.

48 Optus, *Submission 183*. See also Civil Liberties Australia, *Submission 139*.

49 News Limited, *Submission 224*.

50 Copyright Agency/Viscopy, *Submission 249*; iGEA, *Submission 192*; ACIG, *Submission 190*; News Limited, *Submission 224*; Music Council of Australia, *Submission 269*.

51 News Limited, *Submission 224*.

52 National Archives of Australia, *Submission 155*.

53 Copyright Agency/Viscopy, *Submission 249* (with respect to the statutory licensing scheme for various cultural institutions).

54 Ibid.

2.31 This approach assumes that the content creator is inevitably de-incentivised by not being paid, and that there is no middle ground between ‘someone paying for it’, either the creator or the user. This is a different question from ‘what should be paid for, and what should not’ which is ‘at the heart of all this’.<sup>55</sup>

2.32 In this Discussion Paper, the ALRC considers the interests of Australians in gaining access to content in the digital environment and makes recommendations designed to achieve wide distribution, taking into account social and economic benefits for all stakeholders.

### **Principle 4: Providing rules that are flexible and adaptive to new technologies**

2.33 The Terms of Reference refer to the emergence of ‘new digital technologies’ as relevant in copyright reform. Stakeholders strongly endorse the principle that copyright law should be responsive to new technologies, platforms and services and be drafted to recognise that the operation of the law is fundamentally affected by technological developments, which allow copyright material to be used in new ways.<sup>56</sup>

2.34 As far as possible, the *Copyright Act* should be technology neutral and predictable in application in such a way as to minimise and avoid unnecessary obstacles to an efficient market, and avoid transaction costs. The ACCC stated that ‘reforms should be in pursuit of economic efficiency’.<sup>57</sup> However, the ACCC acknowledged that economic efficiency is only one facet of the broader policy and legal framework and other policy considerations need to be taken into account.

2.35 Adaptability and technological neutrality as a framing principle is to be weighed up against other objectives. While not an end in itself, the ALRC considers technological neutrality should be a highly relevant consideration. Stakeholders note that it is ‘an important principle’ as long as benefits exceed costs and the aim of neutrality does not override the rights of creators and owners of copyright material.<sup>58</sup>

2.36 Some stakeholders submitted that the existing legislation is increasingly imposing costs through being out of date and unsuited to the digital environment. For example, rapid change in technology and consumer behaviour is creating a ‘growing rift between platform-specific provisions of the *Copyright Act* and the ways in which Australians are increasingly using copyright materials’.<sup>59</sup> The Australian Interactive Media Industry Association submitted that, despite all the opportunity offered by the

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55 P Banki, ‘Copyright and the Digital Economy: So Many Issues; So Little Time’ (2012) 30 *Copyright Reporter* 66, 67.

56 See, eg, ADA and ALCC, *Submission 213*; Law Institute of Victoria (LIV), *Submission 198*; Australian Industry Group, *Submission 179*; ACCC, *Submission 165*; Ericsson, *Submission 151*; Commercial Radio Australia, *Submission 132*. The Law Council submitted that ‘a guiding principle of exceptions reform should be that stated in the Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999: ensuring that the technical processes which form the basis of the operation of new technologies such as the Internet are not jeopardised’: Law Council of Australia, *Submission 263*.

57 ACCC, *Submission 165*.

58 Australian Copyright Council, *Submission 219*.

59 Australian Broadcasting Corporation, *Submission 210*.

digital economy, ‘the *Copyright Act* is too technology specific and inflexible and as a result is unable to support today’s and tomorrow’s innovations’.<sup>60</sup>

2.37 In a converged media environment, where a multitude of different technologies can be used to create and distribute content, it is imperative that regulation does not restrict or impede technological innovation and investment because of artificial and outdated technological limitations.<sup>61</sup> It is ‘absolutely critical to our success that the Act operates effectively in a converged environment’.<sup>62</sup>

2.38 The desirability of technological neutrality in copyright reform and, inherent in this concept, notions of simplicity and accessibility to the law has been recognised in previous reform discussions.<sup>63</sup> It is still a concern: ‘The complexity of existing copyright laws makes it really difficult to innovate with content’.<sup>64</sup>

2.39 Technological neutrality is regarded as an important policy basis underpinning reform to copyright law at the international level<sup>65</sup> and indeed, has motivated much review and some reform in Australia.<sup>66</sup> However, ‘technology neutral law’ is not necessarily simple to draft,<sup>67</sup> and drafting laws of enduring relevance in the face of changing technology may be a good concept but difficult to achieve in practice. Even attempting ‘technology neutral law’ may enshrine ‘issues that are peculiar to this point in time, thereby stifling incentives for copyright owners to develop new business models’.<sup>68</sup>

2.40 While copyright law needs to be able to respond to changes in technology, consumer demand and markets, it also needs to have a degree of predictability so as to ensure sufficient certainty as to the existence of rights and the permissible use of copyright materials, leading to minimal transaction costs for owners and users and avoiding uncertainty and litigation. Uncertainty is created by definitions that become redundant or differentiate between subject matter or rights holders based on technology rather than underlying principle. As noted by the Ireland Copyright Review Committee:

If copyright law were unclear, or if there were widespread misunderstanding about its scope, then this would certainly create barriers to innovation. Moreover, as has often

<sup>60</sup> AIMIA Digital Policy Group, *Submission 261*.

<sup>61</sup> Google, *Submission 217*. ‘The *Copyright Act* should not seek to draw distinctions between uses of copyright material merely because it is accessed via one technology over another. The underlying technology should be agnostic in defining whether a right exists to use or not use material. In any event, in a converged environment the differences between technologies are becoming increasingly blurred and technological boundaries are harder to define’: Optus, *Submission 183*. See also eBay, *Submission 93*.

<sup>62</sup> Foxtel, *Submission 245*.

<sup>63</sup> Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.01].

<sup>64</sup> Australian Broadcasting Corporation, *Submission 210*.

<sup>65</sup> iiNet Limited, *Submission 186* citing F Gurry, *Keynote Speech at Blue Sky Conference: Future Directions in Copyright Law* (2011) <[www.wipo.int/about-wipo/en/dgo/speeches/dg\\_blueskyconf\\_11.html](http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html)> at 29 May 2012.

<sup>66</sup> See, eg, the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) and Australian Copyright Council, *Submission 219*.

<sup>67</sup> See Cyberspace Law and Policy Centre, *Submission 201*.

<sup>68</sup> Australian Copyright Council, *Submission 219*.

been observed, predictions are difficult, especially about the future. Hence, as many of the submissions emphasised, it is important that copyright law be as technology-neutral as possible. It is equally as important that it be capable either of adapting or of being easily adapted to unforeseen technological innovations. These are standards by which to judge both existing copyright law and any possible amendments.<sup>69</sup>

2.41 Some submissions indicated that the current *Copyright Act* applies inconsistently with respect to certain rights, exceptions, statutory licences or formats.<sup>70</sup> Schools point to remunerable activities under statutory licences being technology specific and/or referring to outdated technologies, creating anomalies.<sup>71</sup>

2.42 Stakeholders also strongly argued that ‘reform should not distinguish between technologies but should instead focus on the intention or purpose for which activities are undertaken.’<sup>72</sup> Copyright should not be dictating the direction of technological innovation or hampering the development of more efficient systems.<sup>73</sup>

## **Principle 5: Providing rules consistent with Australia’s international obligations**

2.43 Australia is bound by treaty obligations requiring the protection of copyright, notably under the *Berne Convention*.<sup>74</sup> There is also a direct link between intellectual property law and international trade obligations—the explicit basis for the TRIPS Agreement. Alongside multilateral harmonisation of copyright law is an emerging environment of bilateral trade agreements<sup>75</sup> and negotiations. The Terms of Reference refer to ‘having regard to Australia’s international obligations, international developments and previous copyright reviews’.

2.44 As the Copyright Law Review Committee (CLRC) observed:

The permissible scope of any statutory exceptions to those rights must also be determined by reference to the exceptions allowed for in those international agreements.<sup>76</sup>

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69 Ireland Copyright Review Committee, *Copyright and Innovation*, Consultation Paper (2012) (accessed 4 February 2013).

70 Free TV Australia, *Submission 270*; Internet Industry Association, *Submission 253*; Optus, *Submission 183*.

71 Copyright Advisory Group—Schools, *Submission 231*.

72 Telstra Corporation Limited, *Submission 222*.

73 ADA and ALCC, *Submission 213*; Grey Literature Strategies Research Project, *Submission 250*.

74 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

75 For example *Australia-US Free Trade Agreement*, 18 May 2004, [2005], ATS 1 (entered into force on 1 January 2005).

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

2.45 A number of these agreements contain provisions which ‘delineate the acceptable contours’<sup>77</sup> of any limitations or free use exceptions.<sup>78</sup> The ALRC is mindful that its proposals for new copyright exceptions or amendments to existing exceptions must be consistent with the three-step test.

2.46 International consistency is a major factor in ‘allowing Australian businesses to participate in global activities and industries; and Australian consumers to benefit from use of those global activities and industries’.<sup>79</sup> Australia needs to ensure that our copyright laws harmonise with those of our trading partners to facilitate export and import of copyright material.<sup>80</sup> For example, difficulties in the lack of reciprocity with regard to rights for foreign film directors means that Australian film directors are unable to benefit from certain collecting schemes in other countries.<sup>81</sup>

2.47 One aspect of international consistency, which many stakeholders commented on, was that ‘all free exceptions must be viewed from within the prism of our international treaty obligations’,<sup>82</sup> in particular the ‘three-step test’ from the *Berne Convention*. The ALRC does not consider the three-step test to be itself a ‘framing principle’<sup>83</sup> but it is said to be ‘the central plank underlying exceptions to copyright in international law’.<sup>84</sup>

2.48 Some submissions raised the three-step test as an impediment to introducing reform into Australian copyright law. Others pointed out that focusing on the three-step test should not be at the expense of other important international instruments supporting human rights, the development of science and culture and freedom of expression.<sup>85</sup>

2.49 The ALRC considers that proposals made in this Discussion Paper are consistent with Australia’s international obligations. However, this Inquiry may also provide an opportunity for suggesting policy parameters within which future international negotiations take place.<sup>86</sup> This might include an interpretation of the three-step test in the *Berne Convention* which allows for greater flexibility in the ‘general interest of Australians to access, use and interact with content in the advancement of education,

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77 E Hudson, ‘Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia’, *Thesis*, University of Melbourne, 2011, 21.

78 See Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [B.5], [B.11], [B.20]–[B.22], [B.25], [B.28].

79 Optus, *Submission 183*.

80 See further National Impact Analysis, *Regulation Impact Statement Australia-United States Free Trade Agreement* (2004), 13.

81 Australian Directors Guild, *Submission 226*.

82 Screenrights, *Submission 215*; ‘Australia’s international treaty obligations must be the starting point for any consideration of copyright law and policy’: APRA/AMCOS, *Submission 247*.

83 Music Rights Australia Pty Ltd, *Submission 191*; Australian Copyright Council, *Submission 219*.

84 Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*. See also Pearson Australia/Penguin, *Submission 220*; Australian Film/TV Bodies, *Submission 205*; Motion Picture Association of America Inc, *Submission 197*.

85 Civil Liberties Australia, *Submission 139*.

86 This point has been made with respect to a review of patent extensions for pharmaceuticals: Australian Government, *Pharmaceutical Patents Review: Draft Report* (2013). See also Civil Liberties Australia, *Submission 139*.

research and culture', as set out in the Terms of Reference for this Inquiry. As the UK Government has noted in response to the Hargreaves Review:<sup>87</sup>

Having accepted the general case for broader copyright exceptions within the existing EU framework, the UK will be in a stronger position to argue that other flexibilities are needed now and in the future.<sup>88</sup>

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87 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

88 UK Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011), 8.



## 3. Policy Context of the Inquiry

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### Summary

3.1 This chapter discusses some of the broader context within which the ALRC is conducting this Inquiry and comments on the Terms of Reference, drawing out some concerns of stakeholders and identifying aspects of the needs and expectations of Australian business and consumers. This context includes:

- the concept of the digital economy;
- trends in consumer use of copyright material;
- the complexity of copyright law;
- the implications of cultural policy for copyright reform; and
- current modes of regulation.

### The concept of the digital economy

3.2 The Terms of Reference for this Inquiry refer to the ‘importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies’. The ALRC takes this to refer to innovation within Australia and engagement globally in digital opportunities.

3.3 The ‘digital economy’ has been defined by the Australian Government as ‘the global network of economic and social activities that are enabled by information and communications technologies, such as the internet, mobile and sensor networks’.<sup>1</sup> This includes conducting communications, financial transactions, education, entertainment and business using computers, phones and other devices. Australia has made a

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<sup>1</sup> Department of Broadband, Communications and the Digital Economy, *Australia’s Digital Economy: Future Directions* (2009).

commitment to becoming a leading digital economy,<sup>2</sup> and faces competition from comparable countries that have also adopted a focus on promoting a local digital economy. ‘Without open access to appropriate categories of information, Australia may not enjoy the potential innovation in the digital economy’.<sup>3</sup>

3.4 Copyright law is an important part of Australia’s digital infrastructure and is relevant to commercial, creative and cultural policy. Some stakeholders pointed out that the ‘digital economy’ is part of the economy generally and not a separate entity. Furthermore, it should be ‘interpreted broadly, to include the contributions made to the Australian economy by formal education, self-education, health services, social services, volunteer work and unpaid domestic work, as well as by commerce, agriculture, mining and industry’.<sup>4</sup>

3.5 Alongside digitisation of copyright material, online activities are a major aspect of the digital economy.

The internet has profoundly altered the delivery of government services, access to education and information, commercial innovation, social interaction and community engagement with culture over the past decade, and continues to evolve at a rapid pace.<sup>5</sup>

In this context, ‘copyright has a profound influence in regulating access to education, culture, social interaction, commercial innovation and the provision of essential government services’.<sup>6</sup>

3.6 The Australian Interactive Media Industry Association (AIMIA) observed that search functions, cloud-based solutions and other digital platforms mean the internet is a major contributor to economic efficiency for Australia in that it provides savings and efficiencies for individuals and businesses, increasing wealth in real terms and driving further economic growth.<sup>7</sup> Stakeholders generally agreed that ‘participation in the digital economy is likely to be a critical source of innovation for Australian firms and consumers’.<sup>8</sup> However, perspectives differ as to the optimum copyright environment to create sufficient incentives for investment and innovation.

3.7 There was some concern that in an assessment of global competitiveness ‘Australia ranked below the OECD average for factors such as technological readiness, business sophistication and innovation’.<sup>9</sup> According to the most recent Department of

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2 Ibid, 2. See also K Henry, ‘The Shape of Things to Come: Long Run Forces Affecting the Australian Economy in Coming Decades’ (Address to Queensland University of Technology Business Leaders’ Forum, Brisbane, 22 October 2009), cited in ADA and ALCC, *Submission 213*.

3 Department of Broadband, Communications and the Digital Economy, *Australia’s Digital Economy: Future Directions* (2009), 12.

4 National Library of Australia, *Submission 218*.

5 ADA and ALCC, *Submission 213*.

6 Ibid. See also Foxtel, *Submission 245*, Ericsson, *Submission 151*.

7 AIMIA Digital Policy Group, *Submission 261*. See also AIIA, *Submission 211*.

8 Australian Industry Group, *Submission 179*. Google submitted that ‘Copyright needs to be “future-proofed”, making it more flexible and technology-neutral. This will generate an economic benefit of \$600m per annum in Australia’: Google, *Submission 217*.

9 World Economic Forum, *Global Competitiveness Report 2011-2012* (2011), 94 cited in Australian Industry Group, *Submission 179*.

Innovation, Industry, Science and Research Report, Australia's investment in 'intangible innovation capabilities' is lower than for other OECD countries.<sup>10</sup>

Australia is investing significantly in a national broadband network to lay the foundation of the Australia's digital economy over the coming decade. Without proactively removing barriers to digital content and service uptake, we risk falling behind the rest of the world when it comes to actually accelerating our transition to the digital economy.<sup>11</sup>

3.8 In announcing a review of copyright law in the EU, a background paper states:

The digital economy has been a major driver of growth in the past two decades ... The emergence of new business models capitalising on the potential of the internet to deliver content represents a challenge and an opportunity for the creative industries, authors and artists as well as the other actors in the digital economy.<sup>12</sup>

The 'actors' are identified as content creators and owners, content hosts and social networks, internet service providers and end-users.

3.9 Stakeholders acknowledged the importance, but also the uncertainty of the digital economy as it is not possible to anticipate what new technologies will emerge over coming years and decades. What is clear is that copyright will have direct and indirect impact:

It is therefore imperative that Australia puts in place an intellectual property framework that supports rather than hinders investment in the digital economy and that is sufficiently flexible to provide breathing space for the research and development that is essential to innovation without the need for constant readjustment.<sup>13</sup>

3.10 Some submissions made reference to the fact that students undergoing education and training are highly relevant to developing the digital economy. Copyright law is a significant issue for institutions that are developing our human capital—namely schools, TAFEs and universities.<sup>14</sup> The National Panel for Economic Reform has noted that Australia needs 'reforms which will drive long-term productivity growth' and that human capital is the main area of investment to achieve these goals.<sup>15</sup> Box Hill Institute of TAFE submitted that 'vocational training is at its core a system to encourage and facilitate economic participation'<sup>16</sup> and went so far as to say that the Issues Paper 'lacked a comprehensive functional analysis of the requirements of a digital economy' in that it did not have TAFE education vocational training 'at the

10 Department of Innovation, Industry, Science and Research (DIISR) (2011), *Australian Innovation System Report 2011*, 3, cited in Australian Industry Group, *Submission 179*.

11 Ericsson, *Submission 151*.

12 European Commission, *Orientation Debate on Content in the Digital Economy* (2012) (accessed 20 February 2013).

13 Universities Australia, *Submission 246*. See also Google, *Submission 217*; Powerhouse Museum, *Submission 137*; Pandora Media Inc, *Submission 104*.

14 See Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Copyright Advisory Group—TAFE, *Submission 230*.

15 Julia Gillard (Prime Minister of Australia), 'National Panel for Economic Reform—Meeting One—Communiqué' (Press Release, 29 January 2013) (accessed 30 April 2013).

16 Box Hill Institute of TAFE, *Submission 77*.

centre of the inquiry's scope'. Although no one sector of the economy should dominate the policy debate, the education sector is a significant stakeholder in this Inquiry.

3.11 The assumption that law reform is required to access the economic opportunities of the digital economy is not endorsed by some stakeholders, who warn of the dangers of disruption to developing business models organically adapting to the emerging environment.<sup>17</sup> It was suggested that 'content providers have in fact demonstrated an ongoing ability to adapt to changes in technology' and any reform of copyright law will 'have a further negative economic effect on publishing'.<sup>18</sup>

3.12 On the other hand, 'economists have long had concerns that copyright has a moral hazard effect on incumbent firms, including those in the creative industries, by encouraging them to rely on enforcement of the law rather than adopt new technologies and business models to deal with new technologies'.<sup>19</sup>

3.13 The Australian Consumer and Competition Commission (ACCC) submitted that the aim of copyright reform should be the 'pursuit of economic efficiency',<sup>20</sup> and IP Australia argued that the purpose of copyright law reform is to 'provide a net social and economic benefit for Australia'.<sup>21</sup>

3.14 A major concern of stakeholders is that reform should be 'evidence-based'.<sup>22</sup> The ACCC considered it important that the ALRC takes into account available economic evidence when considering reform, as well as stakeholder views and economic rationales for reform.<sup>23</sup>

3.15 APRA/AMCOS submitted that theoretical economic studies of the copyright and related industries are of little value and 'the only way to assess the impact of copyright law on the digital economy is by examining the available evidence'.<sup>24</sup> The ACCC noted that most of the empirical, rather than theoretical, economic evidence available is focused overseas and relates to particular industries, particularly unauthorised copying in the music industry and that the results can be 'inconclusive'.<sup>25</sup>

3.16 In the UK, perhaps the main outcome of the Hargreaves Review has been the setting up of the CREATe Centre intended to investigate issues relating to copyright and new business models in the creative economy. A major concern of the Centre is to

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17 Pearson Australia/Penguin, *Submission 220*; iGEA, *Submission 192*; Australian Film/TV Bodies, *Submission 205*; Allen&Unwin Book Publishers, *Submission 174*; Evolution Media Group, *Submission 141*.

18 Thomson Reuters, *Submission 187*. See also Motion Picture Association of America Inc, *Submission 197*.

19 R Towse, 'What We know, What We Don't Know and What Policy Makers Would Like Us to Know About the Economics of Copyright' 8(2) *Review of Economic Research of Copyright Issues* 101, cited in Ericsson, *Submission 151*. See also ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

20 ACCC, *Submission 165*.

21 IP Australia, *Submission 176*.

22 Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; Newspaper Works, *Submission 203*.

23 ACCC, *Submission 165*.

24 APRA/AMCOS, *Submission 247*.

25 ACCC, *Submission 165*.

investigate the question of what constitutes evidence for the purposes of copyright policy.<sup>26</sup>

3.17 In the US, a major report on building evidence for copyright policy in the digital era noted that ‘not all copyright policy questions are amenable to economic analysis. In some cases, it may be possible to determine only the direction of the effect of policy change, not the magnitude’.<sup>27</sup> The Report further noted that copyright policy research can use a variety of methods, including ‘case studies, international and sectoral comparisons, and experiments and surveys’.<sup>28</sup>

3.18 In Australia, the ARC Centre of Excellence for Creative Industries (CCI) focuses on research on the contribution of creative industries and their constituent disciplines to a more dynamic and inclusive innovation system and society. The CCI submission stated that ‘there are substantial costs and inefficiencies for creators associated with current copyright arrangements that adversely affect public access to new and original creative works.’ CCI recommended ‘a broadened concept of “fair use” that permits unlicensed use of copyright material ... in socially beneficial ways’.<sup>29</sup>

3.19 With respect to theoretical research, one submission noted that it is simply too early to tell what the economic effect of the digital environment is for many sectors, particularly creators. Therefore ‘proposals for new exceptions to copyright should be based on clearly identified policy grounds as the economic analysis of the digital environment is contentious’.<sup>30</sup> Pointing to the Hargreaves Report The Arts Law Centre of Australia identified three obstacles to using evidence on the economic impacts of changes to intellectual property regimes:

absence of reliable data from which conclusions can be drawn to guide intellectual property policy; evidence relevant to policy questions involving new technologies or new markets, such as digital communications, is problematic as the characteristics of these markets are not well understood or measured; and the data that is available is held by firms operating these new technologies and the data, when it enters the public domain, cannot be independently verified.<sup>31</sup>

3.20 While many stakeholders urged caution in making changes that may disrupt the emerging digital economy, the ACCC supported ‘a review of the use and extent of copyright across the digital economy to ensure that the benefits continue to exceed the costs’.<sup>32</sup> The ACCC submission applied an economic analysis to the incentives to create and produce copyright material in the digital environment and evaluated economic literature and the presumptions upon which the literature relies. The ACCC concluded that the ‘available literature mainly focuses on the impact of digital

26 M Kretschmer and R Towse, *What Constitutes Evidence for Copyright Policy?* (2013).

27 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 2.

28 Ibid, 2.

29 ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*. The CCI also considers that development of a digital exchange would assist in reducing transaction costs associated with legal re-use of copyright materials.

30 Arts Law Centre of Australia, *Submission 171*

31 Ibid, citing I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

32 ACCC, *Submission 165*.

technologies on copyright holders and submits that such analysis is incomplete, as the interests of consumers and intermediate users must also be considered'.<sup>33</sup>

3.21 There is some economic evidence regarding the economic contribution of Australia's copyright industries, notably the PricewaterhouseCoopers (PwC) Report which demonstrates that copyright content industries in 2010–11 generated the equivalent of 6.6% of gross domestic product and employed 8% of the Australian workforce.<sup>34</sup> A report by Lateral Economics takes the approach of looking at the contribution of a wider group of industries described as 'exceptions industries' including 'education and research'. Taking into account the economic contribution of industries using this expanded methodology, in 2009–10 they were responsible for 14% of gross domestic product and employed 21% of Australia's workforce.<sup>35</sup>

3.22 It is clear that the economic contribution of Australia's copyright industries is significant. What is contentious is how to increase that contribution to the benefit of copyright owners, users and the community, and what reform, if any, would effect this.

3.23 Another Lateral Economics report provides an analysis of the potential efficiency gains and 'substantial growth to Australia's economic growth and innovation' through amending copyright law to be more flexible with respect to exceptions and limitations.<sup>36</sup>

3.24 The ALRC observes that these economic reports have been commissioned by different stakeholders and that the methodology and analysis of the Lateral Economics Reports has been criticised in another report, funded by a stakeholder in this Inquiry.<sup>37</sup>

3.25 However, it is recognised that a number of industries claim that they 'would not exist, or be much smaller, but for the limitations and exceptions to copyright law' including 'Internet publishing and broadcasting, Internet service producers and search engines, data services, computer equipment and components, computer services, telecommunications, and other industry segments'.<sup>38</sup> Indeed, it is suggested that 'valuable research could build upon initial attempts to quantify the benefits of exceptions and limitations in terms of the economic outputs and welfare effects of

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33 Ibid.

34 PricewaterhouseCoopers, *The Economic Contribution of Australia's Copyright Industries 1996–97–2010–11* (2012), prepared for Australian Copyright Council, 4.

35 Lateral Economics, *Exceptional Industries: The Economic Contribution of Australian Industries Relying on Limitations and Exceptions to Copyright* (2012), prepared for the Australian Digital Alliance, 6. See favourable comments on this research in eBay, *Submission 93*.

36 Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe Harbour Provisions* (2012), prepared for Australian Digital Alliance, 2.

37 G Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore* (2012), Centre for Law and Economics Ltd. Funded by Village Roadshow. WIPO is recognising the need to quantify the contribution of 'non core' copyright industries including interdependent and support industries, World Intellectual Property Organization, *WIPO Studies on the Economic Contribution of the Copyright Industries* (2012).

38 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

those individuals, businesses, educational institutions and other entities that rely on them'.<sup>39</sup>

3.26 Commissioned research on the economic benefits of fair use in copyright law, using Singapore as a case study, found copyright industries to be 'relatively unaffected' by the introduction of fair use although significant stimulation of growth in private copying technology occurred.<sup>40</sup>

3.27 Questions about the benefits of statutory licensing are explicitly raised by the Terms of Reference. The benefits and detriments of the current system are heavily contested as between licensees and licensors. For example, the TAFE sector submitted that statutory licensing for TAFE is not economically efficient or streamlined, and does not provide easy access to copyright material.<sup>41</sup> Furthermore, existing current exceptions do not map well onto the dynamic and varied nature of education in the VET sector.<sup>42</sup>

3.28 Other educational licensees have been more blunt, suggesting that 'Australia's statutory licences are unsuitable for a digital age and must be repealed'.<sup>43</sup> The ACCC considered that relevant factors in reviewing statutory licences include the transaction costs associated with the licences and the potential for the extent and use of the rights conferred by copyright to restrict competition and create market power.<sup>44</sup>

3.29 Some stakeholders noted that there are ways in which the statutory licensing system could work better, both in terms of the legislative framework and the way the rights are managed in practice.<sup>45</sup> The Australian Society of Authors, while stating that pt VB of the *Copyright Act* 'works well for educational institutions and creators',<sup>46</sup> also noted that 'there could be more transparency in the process – particularly how much money is paid to which publishers and authors'.<sup>47</sup> The Society also submitted that:

the central reasons for some statutory licence schemes should be revisited and reassessed ... these schemes are paying massive amounts of money to foreign publishers of educational materials, with only a small amount trickling to Australian creators. This goes against the original intent.<sup>48</sup>

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39 Ibid, 42.

40 R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), prepared for Google, accessed 9 April 2013.

41 Copyright Advisory Group—TAFE, *Submission 230*. See also Universities Australia, *Submission 246*, but see Screenrights, *Submission 215*; Copyright Agency/Viscopy, *Submission 249*.

42 Copyright Advisory Group—TAFE, *Submission 230*.

43 Copyright Advisory Group—Schools, *Submission 231*. See also Universities Australia, *Submission 246*.

44 ACCC, *Submission 165*.

45 Copyright Agency/Viscopy, *Submission 287*.

46 Australian Society of Authors, *Submission 169*.

47 Ibid; see also ALAA, *Submission 129*.

48 Australian Society of Authors, *Submission 169*.

The Australian Writer's Guild pointed to the inflexibility of audiovisual statutory licensing and some 'conflation' of rights streams and lack of transparency in use of data.<sup>49</sup>

3.30 The digital environment provides an opportunity for greater licensing as markets develop to satisfy consumer needs. Furthermore, markets can be seen as being about 'fairness and opportunity' as negotiated between parties, along with a 'reasonable level of regulation'.<sup>50</sup> Universities Australia submitted that 'a competitive commercial licensing model'<sup>51</sup> makes it appropriate that copyright legislation should operate to create markets based on the rights given under copyright legislation and determined by agreement between parties, rather than a statutory licence. In similar vein, the proposals relating to the introduction of fair use made in this Discussion Paper are part of the context of developing markets in a digital environment; fair use is not intended to detract from new and emerging markets for copyright material.

3.31 On the aspect of licensing of copyright material more generally, the ACCC submitted that s 51(3) of the *Consumer and Competition Act*<sup>52</sup> should be repealed, noting that in other jurisdictions such as the United States, intellectual property rights are subject to the same competition laws as all other property rights, without apparent impact on the rights of creators or incentives for production of copyright material:

In order to fully exploit the substantial potential benefits arising in the digital economy, it is important that competition laws are able to complement IP laws, including copyright laws, by preventing anti-competitive conduct associated with copyright usage that is not in the public interest.<sup>53</sup>

3.32 The ALRC is aware of a number of 'user friendly'<sup>54</sup> licensing arrangements which demonstrate a dynamic market place able to address consumer needs. Rights holders consider this removes the need for government intervention by way of amendments to copyright law, for example, in the form of exceptions allowing greater private copying. It is clear that many licensing practices are pro-competition and pro-consumer, and presumably the application of a general competition test, without the intervention of s 51(3) would pose no problems.

3.33 Concerns about developing 'digital ecosystems' are expressed by the Australian Society of Authors which opposes the 'loosening' of copyright as likely to advantage overseas owners and distributors since 'distribution (of copyright material) is largely in the hands of overseas tech giants and/or e-tailers such as Amazon'.<sup>55</sup> The possibility of

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49 Australian Writers' Guild & Australian Writers' Guild Authorship Collecting Society, *Submission 265*.

50 R Murdoch, 'Markets Radiate Morality', *The Weekend Australian*, April 6-7 2013, 19.

51 Universities Australia, *Submission 293*.

52 *Competition and Consumer Act 2010* (Cth) s 51(3) provides a limited exception for certain licence conditions from some competition provisions of the Act.

53 ACCC, *Submission 165*. This recommendation was made previously by the Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000) and is discussed further in Ch 17.

54 iGEA, *Submission 192*.

55 Australian Society of Authors, *Submission 169*.



creating closed ecosystems through licensing arrangements tied to particular devices would also be open to competition law scrutiny.<sup>56</sup>

3.34 The ACCC noted that there is a lack of economic research regarding the magnitude of transaction costs of licensing in the Australian context, especially regarding these costs in relation to the digital economy.<sup>57</sup> However, the ACCC noted that the ALRC Inquiry may result in the submission of valuable evidence regarding transaction costs and inefficiencies for both creators and users from those who participate in the assignment or licensing of copyright material. ‘Where costs of licensing exceed benefits, this may affect overall production of copyright material especially where users are increasingly creators’. The ACCC considered that such evidence is likely to provide a useful starting point for considering the costs and benefits of potential solutions to any problems associated with high transaction costs.<sup>58</sup>

### Trends in consumer use of copyright material

3.35 The Terms of Reference for this Inquiry direct the ALRC to consider whether the *Copyright Act* needs reform to allow:

- transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and
- appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes.

The Terms of Reference require the ALRC to consider reform in the context of the ‘real world’ range of consumer and user behaviour in the digital environment. Many stakeholders agree that ‘law reform should be driven by a desire to simplify the law, provide certainty, promote accessibility and maintain the relevance of the law’.<sup>59</sup>

3.36 Maintaining the relevance of copyright law was explicitly recognised as an aim of the 2006 amendments to the *Copyright Act*.<sup>60</sup> The Attorney-General, the Hon Philip Ruddock, referred in his second reading speech to making the law more ‘sensible and defensible’ by ‘making sure that ordinary consumers are not infringing the law through everyday use of copyright products they have legitimately purchased’.<sup>61</sup>

3.37 Clarifying which activities infringe copyright now, and whether certain activity should continue to be categorised as infringement, is part of this Inquiry. This context

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56 M Bales, *Smash the Machine: Digital Monopolies Have You Trapped* (2013) The Conversation <<http://theconversation.edu.au>> at 27 February 2013.

57 See discussion of possible economic evidence in assessing copyright law in Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

58 ACCC, *Submission 165*.

59 Arts Law Centre of Australia, *Submission 171*. ‘Copyright law needs to be in step with common, established community practice. This is important to promote public perception of copyright law as a constructive, flexible and sensible framework for governing protection and access to content’: Law Institute of Victoria (LIV), *Submission 198*.

60 *Copyright Amendment Act 2006* (Cth).

61 *Debates*, House of Representatives, 19 October 2006, 1 (Philip Ruddock MP, Commonwealth Attorney-General).

is an integral part of reform discussions taking place around the world. In the EU, for example:

Citizens increasingly voice concerns that copyright laws hinder what they view as their freedom to access and use content. Experience shows that many of them would rather pay for legal offers than use illegal content, but they often do not know whether what they download, stream or share is illegal. Businesses increasingly argue that the current copyright model is a barrier to developing the business models they consider necessary for the digital economy. These consumers and businesses agree, for different reasons, that copyright rules have to be made more flexible.<sup>62</sup>

3.38 In his book *Making Laws for Cyberspace*, Chris Reed points out:

Attempting to impose rules which clash with strongly established norms, or making law in such detail that the cyberspace user is not able to understand or comply with it, are not the only ways in which laws can be rendered meaningless. Law needs to regulate the reality which is faced by those who are subject to the law.<sup>63</sup>

3.39 The ACCC referred to ‘consumer empowerment over consumption’ where consumers wish to organise use of copyright material around their own preferences in terms of time, location and method of consumption.<sup>64</sup> This could lead to a situation where:

worthy individuals and citizens, many of them children (some maybe even judges), are knowingly, ignorantly or indifferently finding themselves in breach of international and national copyright law. And they intend to keep on doing exactly as before.<sup>65</sup>

3.40 The Australian Communications Consumer Action Network (ACCAN) observed that:

Currently multiple everyday activities without any commercial implications are likely to breach copyright. Indeed, many consumers would be surprised to learn they were breaking the law by privately copying and recording in a way that has been commonplace for decades and in using devices that have been marketed to them vigorously.<sup>66</sup>

3.41 Any suggestion that taking note of consumer attitudes and practices is a consideration in law reform was treated with alarm by other stakeholders:

The ALRC must not allow social norms which condone illegitimate use of copyright material, or would be used to justify unreasonably broad exemptions to copyright infringement provisions, or to dictate amendments to copyright law which will diminish the ability of content creators and owners to appropriately exploit their protected works.<sup>67</sup>

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<sup>62</sup> European Commission, *Orientation Debate on Content in the Digital Economy* (2012), 1.

<sup>63</sup> C Reed, *Making Laws for Cyberspace* (2012), 151.

<sup>64</sup> ACCC, *Submission 165*.

<sup>65</sup> M Kirby foreword to B Fitzgerald and B Atkinson (eds), *Copyright Future, Copyright Freedom* (2011), 4. See also NSW Young Lawyers, *Submission 195*, citing I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) on this point.

<sup>66</sup> ACCAN, *Submission 194*.

<sup>67</sup> Foxtel, *Submission 245*. See also Music Council of Australia, *Submission 269*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; ALPSP, *Submission 199*. Some stakeholders note that consumers do not generally consider ‘infringement of copyright is justified’: AFL, *Submission 232*; Cricket Australia, *Submission 228*.

3.42 In this context some stakeholders stated that it is preferable for law to shape consumer behaviour, rather than for consumer behaviour to shape the law.<sup>68</sup> This would include educating consumers about copyright and ‘why the legislation is in place’.<sup>69</sup>

3.43 However, laws that are almost universally ignored are not likely to engender respect for the more serious concerns of copyright owners: ‘[p]eople don’t obey laws they don’t believe in’.<sup>70</sup> CCI submitted that:

The wide gap between law and norms in terms of private use is not desirable for copyright law. It is possible that widespread, pervasive disregard for copyright rules in terms of private use may support a broader legitimacy problem in copyright. It seems clear that the gap between social norms and the law should be reduced where possible.<sup>71</sup>

3.44 The concern that lack of enforcement is a more significant issue than most other issues was expressed by a number of stakeholders.<sup>72</sup> In discussing whether driving social norms through ‘education and more pervasive enforcement procedures’ achieves compliance with copyright law, CCI observed that the economic evidence available indicates that innovative new business models, rather than strengthened regimes of copyright enforcement, will ultimately be of most significance in reducing piracy and copyright infringement. CCI submitted that available evidence supports the view that a broader concept of ‘fair use’ would assist in removing existing inhibitions to ‘the development of new business models’.<sup>73</sup>

3.45 Consistent with the framing principles set out in Chapter 2, the ALRC does not intend in any way to undermine property rights or a fair reward to copyright creators, owners and distributors. However, questions of recognising ways in which individuals use and communicate ideas and experiences, without damaging the economic interests of the copyright owner, are relevant. The Australian Communications and Media Authority (ACMA) has conducted research which shows that Australians are:

pragmatic about the limited capacity to regulate content distributed over the internet and, with the exception of illegal content, expected that much of the content available online would not be regulated.<sup>74</sup> These expectations may be helpful in framing individual rights and responsibilities for copyright material.<sup>75</sup>

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68 APRA/AMCOS, *Submission 247*.

69 ALPSP, *Submission 199*.

70 J Litman, *Digital Copyright* (2001), 112. See also R Xavier, *Submission 146*; EFA, *Submission 258*.

71 ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*

72 See eg AFL, *Submission 232*; Cricket Australia, *Submission 228*.

73 ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208* citing H Varian, ‘Copying and Copyright’ (2005) 19 *Journal of Economic Perspectives* 136 and J Karaganis, *Media Piracy in Developing Countries* (2011), Social Science Research Council. Hal Leonard Australia suggested that in the context of print music ‘copyright law has had zero impact on the introduction of new and innovative business models’: Hal Leonard Australia Pty Ltd, *Submission 202*.

74 Australian Communications and Media Authority, *Digital Australians—Expectations about Media Content in a Converging Media Environment* (2011).

75 ACMA, *Submission 214*.

3.46 Not all infringing behaviour is regarded as ‘piracy’ or ‘theft’.<sup>76</sup> There is clearly an understanding among stakeholders that some infringing use of copyright material is ‘fair enough’<sup>77</sup> and other use is more egregious. There is also a distinction between consumers who may (or may not) erroneously believe that certain practices constitute copyright infringement, and those who would blatantly infringe, steal or engage in piracy.<sup>78</sup>

3.47 One way of taking consumer preferences into account is through market responses in providing copyright content as consumers wish to consume it. The ALRC is aware of a number of emerging business models that recognise time and format shifting, among other consumer behaviour. It is suggested that ‘providing convenient and legal means for consumers to access content may also reduce demand for illegal downloading’.<sup>79</sup> Indeed, the digital environment creates new market opportunities and ‘more sophisticated, flexible and efficient means for companies to measure and charge for usage’.<sup>80</sup>

3.48 The ALRC considers that the reform proposals in this Discussion Paper recognise legitimate use of copyright material that does not detract from the rights of owners and will allow markets to operate efficiently.

## Complexity of copyright law

3.49 Reform should not add further complications to an already complex statute.<sup>81</sup> Ideally, reform should promote clarity and certainty for creators, rights holders and users. The many amendments to the current legislation have resulted in complex numbering and ‘a feeling that the Act is unable to be understood by copyright creators and users’.<sup>82</sup> Aspects of the Act are ‘pointlessly narrow’ and there are ‘obvious deficiencies in drafting’.<sup>83</sup> The ALRC considers that one aspect of this Inquiry should be to reduce the complexity of the current *Copyright Act* and, with that, transaction costs for users and rights holders.

3.50 Reducing complexity can have a number of dimensions. Certainly, stakeholders are largely in favour of the concept ‘don’t make the statute more complex than it already is’. Many would go further and suggested overall simplification of what is

<sup>76</sup> See a distinction made between individual infringing behaviour and piracy in C Geiger, ‘Counterfeiting and the Music Industry: towards a criminalisation of end users? The French ‘HADOPI’ example’ in C Geiger (ed) *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (2012) 386; P Yu, ‘Digital Copyright and Confuzzling Rhetoric’ (2011) 13 *Vanderbilt Journal of Entertainment and Technology Law* 881, 887.

<sup>77</sup> For example, consumers who believe they have the ‘right’ to copy material legally acquired; ADA and ALCC, *Submission 213*.

<sup>78</sup> Cricket Australia, *Submission 228*; AFL, *Submission 232*; Australian Industry Group, *Submission 179*; ALAA, *Submission 129*.

<sup>79</sup> Australian Industry Group, *Submission 179*. See also Cricket Australia, *Submission 228*.

<sup>80</sup> Australian Industry Group, *Submission 179*. See also AIMIA Digital Policy Group, *Submission 261*.

<sup>81</sup> NSW Department of Attorney General and Justice, *Submission 294*; Australian Copyright Council, *Submission 219*; National Library of Australia, *Submission 218*.

<sup>82</sup> A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), 146.

<sup>83</sup> P Knight, *Submission 182*.

already there. The fear is always that attempting either aspect—let alone both—will result in even greater incoherence.<sup>84</sup>

3.51 For law to be meaningful, ‘first, the law must be understandable, and if understood it must appear to the user to be reasonably possible to comply with its requirements’.<sup>85</sup> Setting out compliance requirements in exhaustive detail may seem to avoid uncertainty, but is not easy to understand, and may not further the law’s aims. The Internet Industry Association noted that the *Copyright Act*:

contains many provisions designed for specific cases and circumstances that appear to apply similar fundamental principles. This makes the Act difficult to penetrate, even for specialists.<sup>86</sup>

3.52 The National Archives of Australia considered that the complexity of copyright law was an impediment to providing ‘fair access to archival material’.<sup>87</sup> and State Records of South Australia asked for ‘simplification and consolidation of exceptions’ as the ‘complexity and piecemeal nature of the Act makes the provision of access to information difficult for both the public and archival institutions’.<sup>88</sup> Similarly, News and Foxtel would welcome having four separate format shifting exceptions replaced by one.<sup>89</sup>

3.53 While ‘a degree of complexity may be unavoidable’,<sup>90</sup> a number of stakeholders submitted that there is considerable scope for changing copyright law to make it more accessible:

Copyright law needs to be in step with common, established community practice. This is important to promote public perception of copyright law as a constructive, flexible and sensible framework for governing protection and access to content.<sup>91</sup>

3.54 APRA/AMCOS pointed to the undesirability of having ‘comprehensibility of a statute’ as an underlying principle for law reform, recognising, however, that unnecessary complexity results from confusion and redundancy.

3.55 Some stakeholders considered that reform for the purposes of simplification and clarity may be a ‘Trojan horse’ for substantive change in the law—there is opposition to using a ‘reducing complexity argument to support the introduction of a broad “fair use” exception’.<sup>92</sup>

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84 S Ricketson, ‘Simplifying Copyright Law: Proposals from Down Under’ (1999) 21(11) *European Intellectual Property Review* 537.

85 C Reed, *Making Laws for Cyberspace* (2012), 23.

86 Internet Industry Association, *Submission* 253.

87 National Archives of Australia, *Submission* 155.

88 State Records South Australia, *Submission* 255.

89 Foxtel, *Submission* 245; News Limited, *Submission* 224.

90 Law Council of Australia, *Submission* 263.

91 Law Institute of Victoria (LIV), *Submission* 198; Arts Law Centre of Australia, *Submission* 171—‘Law reform should be driven by a desire to simplify the law, provide certainty, promote accessibility and maintain the relevance of the law’.

92 News Limited, *Submission* 224. See also AAP, *Submission* 206.

3.56 While accepting that lawyers will always be needed to interpret complex legislation,<sup>93</sup> the ALRC considers that willingness to develop an understanding of desirable reform by stakeholders should be assumed. Some submissions seem to consider that Australian courts, industries and consumers are incapable of developing an understanding of concepts which, in a number of jurisdictions, including the US, courts, citizens and businesses deal with on a day-to-day basis.

3.57 This Inquiry is not aimed at overall simplification of the *Copyright Act* despite the concern of many stakeholders over the complexity and difficulty of the legislation. The ALRC considers that any reforms recommended should, at the very least, not add to that complexity. Many stakeholders endorse the view that a working understanding of copyright law should be more accessible so as to reduce transaction costs and facilitate more efficient transactions for business,<sup>94</sup> the public<sup>95</sup> and other users.<sup>96</sup> The various chapters in this Discussion Paper discuss how proposed reforms are intended to achieve this.

### **The implications of cultural policy for copyright reform**

3.58 Many stakeholders in this Inquiry are at the forefront of cultural life in Australia, and it is clear that copyright law directly affects a broad range of cultural activity. The Terms of Reference specifically refer to ‘the general interest of Australians to access, use and interact with content in the advancement of ... culture’. The ALRC has been urged ‘not to think about copyright law solely or primarily in terms of trade and economic policy but to recall its central role in cultural policy’.<sup>97</sup>

3.59 A National Cultural Policy Discussion Paper was launched by the Minister for the Arts, the Hon Simon Crean MP, in August 2011. It noted that: ‘a creative nation is a more productive nation’.<sup>98</sup> Following extensive feedback from organisations, community groups and individuals, a new National Cultural Policy was launched on 13 March 2013.<sup>99</sup> It explicitly recognises the importance of copyright law—and the ALRC Inquiry—in reform aimed at providing:

incentives for investment in innovation and content in a digital environment, while balancing the need to allow the appropriate use of both Australian and international content.<sup>100</sup>

3.60 The objective of the new National Cultural Policy is to increase the social and economic dividend from the arts, culture and the creative industries and is explicitly

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93 Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*.

94 iiNet Limited, *Submission 186*; ACCC, *Submission 165*.

95 See Internet Industry Association, *Submission 253*; Evolution Media Group, *Submission 141*.

96 Including cultural and community groups: State Library of New South Wales, *Submission 168*; State Records NSW, *Submission 160*; Blind Citizens Australia, *Submission 157*; National Archives of Australia, *Submission 155*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*.

97 Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

98 G Trainor and A James, *Review of the Australia Council* (2012), 9.

99 Australian Government, *National Cultural Policy Discussion Paper* (2011) accessed 13 March 2012.

100 Ibid, 83.

linked to the opportunities to be provided by the National Broadband Network. In this context, a number of stakeholders point to desirable reform of copyright law to allow greater digitisation and communication of works by public and cultural institutions.<sup>101</sup>

3.61 The Issues Paper canvassed the various ways in which the *Copyright Act* provides for galleries, libraries, archives and museums (collectively, the ‘GLAM sector’). In considering reform that is beneficial for Australians in terms of accessing and interacting with culture: ‘we need to keep in mind the particular kind of cultural products we want to have access to and craft rights to support culturally meaningful forms of engagement with copyright works’.<sup>102</sup>

3.62 Greater access to cultural material in a way that does not impede incentives to innovate and the capacity for a creator to be fairly rewarded is a common theme in submissions. For example, digitisation of material for library and archival purposes, for ‘non-commercial access’ during the copyright term is regarded as being of a different order to digitising collections for access on the internet.<sup>103</sup>

3.63 In 2011, a Copyright Council Expert Group produced a statement of fundamental principles of Australian copyright law, recognising ‘the importance of encouraging the endeavours of authors, performers and creators by recognising economic rights’ (and also moral rights), ‘subject to limitations’, and in a manner that ‘takes account of evolving technologies, social norms and cultural values’.<sup>104</sup>

3.64 One aspect of access to cultural heritage, which has attracted a great deal of comment from Australian cultural institutions, is the extension of the term of copyright protection.<sup>105</sup> Although extension of the term from 50 to 70 years has not in itself created the issues cultural institutions face in preserving and using material donated and otherwise acquired, it exacerbates them.<sup>106</sup> One issue here is that the copyright term commences from first publication of a work or other subject matter. For older material this means an even more extended time before it enters the public domain.<sup>107</sup>

3.65 Difficulties in clearing rights in digital material leads to skewed representation of cultural aspects and history, and creates what has been termed ‘blockbuster skew’ or ‘digital skew’.<sup>108</sup>

The sense of history which comes with access to the whole, or a substantial part, of an archive, is of much greater cultural value than a small selection curated through the

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101 ADA and ALCC, *Submission 213*; Australian War Memorial, *Submission 188*.

102 K Bowrey, *Submission 94*.

103 Arts Law Centre of Australia, *Submission 171*.

104 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011).

105 See discussion in M Rimmer, *Digital Copyright and the Consumer Revolution* (2007) particularly Chapter 1 ‘The Dead Poets Society: The Copyright Term and the Public Domain’, 24; see also Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 80–84.

106 M Rimmer, *Submission 127*.

107 National Library of Australia, *Submission 218*.

108 J Given, *Submission 185* citing E Hudson and A Kenyon, ‘Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions’ (2007) 4(2) *SCRIPT-ed* 197 and S McCausland, ‘Getting Public Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use’ (2009) 14 *Media Arts Law Review* 21.

random prism of copyright clearance. ... There is a danger that in the digital age the publicly available cultural history of broadcasting will skew: we will remain familiar with ubiquitous blockbuster programs which are available everywhere more than we will remember local Australian programs left in the archives.<sup>109</sup>

3.66 The ‘cultural value’ of works with no economic value is often high but ‘copyright protects equally works of economic value as well as those of no economic value’.<sup>110</sup> and there can be onerous costs of compliance with copyright law, but with no resulting benefit to any creator or owner. Perhaps this could amount to circumstances where:

the policy rationale for any new exception should be based on the *purpose* for which content can be used without permission. This purpose should, as a matter of public interest, be more important than a content creator’s right to manage the use of their work.<sup>111</sup>

3.67 Even those advocating an approach to copyright law reform based on evidence—particularly economic evidence—note that copyright exceptions and limitations applicable to the role of libraries and archives as ‘cultural custodians’ have important effects on ‘individual welfare, autonomy and freedom of expression which are harder to quantify but nonetheless critical’.<sup>112</sup>

3.68 It is clear that particular protocols and considerations may apply to Indigenous cultural material, whether within copyright protection or not.<sup>113</sup> Considerable work has been done on developing and implementing protocols for digitisation and use of Indigenous material.<sup>114</sup> The moral rights regime introduced into the *Copyright Act* in 2002 has deficiencies but also possibilities in recognising the importance of cultural and religious sensitivities. Moral rights can assist in ‘distinguishing between the two situations of the Aboriginal artist and the non-Aboriginal artist’, including around the very act of unauthorised reproduction itself.<sup>115</sup> One existing exception in the *Copyright Act*, relating to parody and satire, may in particular set up a tension between moral rights and ‘the public interest in expressive freedom’ which is ‘a matter which would have to be worked out on a case by case basis in the courts’.<sup>116</sup>

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109 S McCausland, ‘Getting Public Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use’ (2009) 14 *Media Arts Law Review* 21, 24. See also Australian War Memorial, *Submission 188*.

110 Australian War Memorial, *Submission 188*.

111 Copyright Agency/Viscopy, *Submission 249*.

112 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 8.

113 Arts Law Centre of Australia, *Submission 171*; ADA and ALCC, *Submission 213*; State Library of New South Wales, *Submission 168*.

114 Arts Tasmania, *Submission 150*; M Nakata and others, ‘Indigenous Digital Collections: An Early Look at the Organisation and Culture Interface’ (2008) 39(4) *Australian Academic and Research Libraries Journal* 137. See also M Nakata and others, ‘Libraries, Indigenous Australians and a Developing Protocols Strategy for the Library and Information Sector’ in M Nakata and M Langton (ed) *Australian Indigenous Knowledge and Libraries* (2005).

115 P Loughlan, ‘The Ravages of Public Use: Aboriginal art and moral rights’ (2002) 17 *Media and Arts Law Review* 24.

116 *Ibid*, 25, discussing parody of work albeit before the exception for parody and satire was introduced in 2006.



3.69 Concerns relating to Indigenous material do not centre only on outsiders using cultural material. Sometimes the issues are the reverse, where copyright can prevent access by Indigenous people to their own heritage. Arts Tasmania identified this as an issue of ‘cultural maintenance’:

There are instances where access to important cultural material has been denied to Aboriginal people by the copyright owners. Aboriginal living people should be allowed access to the cultural material of their ancestors to interpret, adapt and republish.<sup>117</sup>

## Current regulatory models

3.70 Reform should promote the development of a policy and regulatory framework that is adaptive and efficient. The costs and benefits to the community should be taken into account in formulating options for reform. The *Australian Government Best Practice Regulation Handbook* requires law reform to ‘deliver effective and efficient regulation—regulation that is *effective* in addressing an identified problem and *efficient* in terms of maximising the benefits to the community, taking account of the costs’.<sup>118</sup>

3.71 A number of stakeholders pointed to uncertainty in applying current copyright law, due to the complexity or inadequacy of current legislation that deters innovation and promotes risk-averse behaviour.<sup>119</sup> For example, State Records NSW advised that it is constrained in ‘exploring new digital means of access to government archives due to uncertainty in how to apply the many exceptions provided in the *Copyright Act*’.<sup>120</sup>

3.72 A number of submissions questioned whether the current legal and institutional structures in copyright law offer an effective, efficient and functional model for dealing with digital content copyright issues, and what alternatives might apply. For example, the ACMA pointed to the need for ‘a mix of regulatory strategies’ for dealing with digital content issues in any revised copyright framework. These include: direct regulation with an emphasis on compliance and enforcement of rights and obligations; industry co-regulation and self-regulation; technology applications to assist with content management; and cultural and behavioural changes needed to promote and protect access to content.<sup>121</sup>

3.73 One theme that emerged from submissions was the desirability of ‘principles-based’ drafting of the Act,<sup>122</sup> with details and examples supplied by regulations to the Act, supplemented by industry codes, guides to best practice and the like.<sup>123</sup>

<sup>117</sup> Arts Tasmania, *Submission 150*.

<sup>118</sup> Australian Government, *Best Practice Regulation Handbook* (2010); *Australian Law Reform Commission Act (1996)* (Cth) s 24(2)(b).

<sup>119</sup> See for example Yahoo!7, *Submission 276*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; Australian War Memorial, *Submission 188*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

<sup>120</sup> State Records NSW, *Submission 160*.

<sup>121</sup> ACMA, *Submission 214*.

<sup>122</sup> Drawing on experience as a regulator, ACMA points out that increasingly ‘current regulatory schemes provide standards-setting arrangements’: *Ibid*. See also K Bowrey, *Submission 94*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*, citing authorities on the ‘expressive function of law’. Civil Liberties Australia

3.74 An example of a current legislative approach incorporating principles-based drafting can be seen in provisions relating to unconscionability in the *Competition and Consumer Legislation Act 2010* (Cth), where there is a list of factors for a court to weigh up.<sup>124</sup> In the copyright context, the ALRC is proposing a fair use model incorporating a list of the purposes and the fairness factors to be considered in an assessment as to whether any use of copyright material is ‘fair’.<sup>125</sup>

3.75 With respect to developing an understanding of legislative principles, the Arts Law Centre of Australia points to the usefulness of *Fair Use Codes* and *Codes of Best Practice* guidelines developed in the US by Peter Jaszi and Pat Aufderheide, designed to educate users on fulfilling the requirements of copyright legislation.<sup>126</sup> A number of submissions commented on the possible uses of guidelines agreed between owners and users to find ‘common ground’ in terms of practices relating to copyright material.<sup>127</sup>

3.76 The Department of Science, Information Technology, Innovation and the Arts (Qld) pointed out the many ‘legally ambiguous’ areas in the Act at present, and stated that ‘the business community would benefit from greater clarity in relation to copyright and acceptable practices, and the formulation of clear guiding principles’.<sup>128</sup>

3.77 In a similar vein, News Ltd pointed to the undesirability of legislation defining too closely what ‘reporting the news’ is, and also what volume of material should be included in the concept. Rather, negotiations between news organisations and sports organisations, with the ACCC assisting, have led to a code of practice for sports news reporting.<sup>129</sup>

3.78 Development of an industry code is recommended by the *Book Industry Strategy Group Report* to be adopted ‘in accordance with the legislative framework’ in order to combat book piracy, with the government acting as an intermediary in negotiations. In responding to the Report the Government noted that a number of meetings had already taken place with the Attorney-General’s Department and industry to find an acceptable way forward.<sup>130</sup> The ALRC is aware that talks relating to ISP activities have faltered

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recommended ‘the development of a general objects clause for the Copyright Act’: Civil Liberties Australia, *Submission 139*.

123 See NAVA, *Submission 234*.

124 The *Competition and Consumer Act 2010* (Cth) has a statement of interpretative principles in the unconscionable conduct provisions.

125 Ch 5.

126 Arts Law Centre of Australia, *Submission 171* referring to work done by Peter Jaszi and Pat Aufderheide at the Centre for Social Media (American University, Washington, DC): P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011). See, however, comments on these studies in J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

127 Copyright Agency/Viscopy, *Submission 249*. See also APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*, PPCA, *Submission 240*.

128 DSITIA (Qld), *Submission 277*.

129 News Limited, *Submission 286*. Note that, in contrast, Major Professional and Participation Sports would prefer a ‘reporting the news’ exemption that is more prescriptive: COMPPS, *Submission 266*. See also Cricket Australia, *Submission 228*.

130 Australian Government, *Government Response to Book Industry Strategy Group Report* (2012).

following the iiNet case<sup>131</sup> but raises the possibility that agreements and industry codes relating to ‘purposes’ in the *Copyright Act* could be provided for in the legislation.

3.79 Although these ‘inter-industry compacts’ do not always proceed as quickly as some parties would like, ‘privately negotiated arrangements will continue to emerge as new technologies make access, re-use, and distribution of content an inherent part of our culture and economy’.<sup>132</sup>

3.80 Stakeholders also noted that this Inquiry is not dealing with the whole picture of reform, and piecemeal amendment ‘may not reflect the policy underlying the copyright regime’.<sup>133</sup> Furthermore, copyright is just one aspect of digital media markets which are themselves ‘a construction of the interplay of media, telecommunications and copyright law’.<sup>134</sup> In this context and ‘in accordance with historical jurisprudential tradition, the *Copyright Act* should be confined to expressing legal principles that affect us all, in a manner that assists in generating the required normative framework that allows it to be broadly understood’.<sup>135</sup> The statute cannot alone achieve clarity and certainty without the capacity to capture relevant policy and context factors.

3.81 The need for an ‘appropriate regulatory model to support copyright businesses’ innovation and sustainable growth’ is referred to in economic research prepared for the Australian Copyright Council.<sup>136</sup> The point about having an appropriate regulatory environment to encourage innovation in technology start-up companies is also made in another PwC report.<sup>137</sup>

3.82 Stakeholders in this Inquiry have differing views as to what an ‘appropriate regulatory environment’ is, and many stress the importance of not destabilising ‘current existing legal structures on which copyright holders and their licensees rely as the basis for their business models’.<sup>138</sup>

3.83 The Australian Copyright Council’s submission discusses the broader debate concerning legal rules and standards in the context of copyright law, specifically in the context of critiquing the problems with a flexible exception such as fair use, which is one specific aspect of this Inquiry.<sup>139</sup> The Australian Copyright Council noted that ‘an appropriate regulatory model’ needs to operate in ‘the broader copyright ecosystem’

131 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] 16 HCA.

132 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), citing, eg, the 2007 User Generated Content Principles as used in YouTube’s UGC portal; voluntary best practice codes for payment services where sites sell counterfeit goods and the flexible Copyright Alert System to discourage infringing distribution of copyright material, among others.

133 APRA/AMCOS, *Submission 247*, expressing a concern also that the Terms of Reference may result in ‘particular stakeholders’ having disproportionate influence.

134 K Bowrey, *Submission 94*.

135 *Ibid*.

136 PricewaterhouseCoopers, *The Economic Contribution of Australia’s Copyright Industries 1996–97–2010–11* (2012), prepared for Australian Copyright Council, 4. This comment is not explained further in the Report.

137 PricewaterhouseCoopers, *The Startup Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013).

138 BSA, *Submission 248*.

139 Australian Copyright Council, *Submission 219*.

which includes some matters not within the Terms of Reference and in particular, supports the Copyright Agency/Viscopy observation concerning a regulatory environment which protects ‘the principal incentive to create new content’ and ‘the opportunity to determine how that content will be used by others’.<sup>140</sup>

3.84 The Australian Copyright Council seemed to cast doubt on a ‘standards’ approach on the basis that a ‘rules’ approach is more appropriate for Australia, given the different constitutional and legal tradition in which Australian and US jurisdictions operate.<sup>141</sup> Uncertainty of application, lack of precedent and the existence of satisfactory exceptions are also reasons given for not recommending a fair use exception in Australian law, views shared by a number of stakeholders. However, alternative views expressing the desirability of introducing fair use into Australian copyright law have been expressed by a large number of other stakeholders.

3.85 In the educational context, the report commissioned by Screenrights from the Kernochan Center for Law, Media and the Arts of Columbia University<sup>142</sup> usefully reviews the principal US copyright exceptions relevant to educational uses and comments on the possibility for Australia of such a provision. An important aspect of the fair use environment in the US is the development of guidelines as to how it should operate. Universities Australia submitted that in determining whether a particular use amounts to fair use/fair dealing or requires a licence ‘universities would adopt guidelines or similar instructions to staff that assist in making such decisions’ as in comparable jurisdictions.<sup>143</sup>

3.86 An important aspect of the discussion in the Kernochan Center report concerns the divergence of views on fair use and the length of time disputes take to resolve, despite the development of various sets of guidelines. However, the Standing Council on School Education and Early Childhood explicitly referred to the time and resources taken up dealing with the inefficiencies of the current educational copyright licensing environment.<sup>144</sup> The Council also stated that it is not correct to assume that the current environment creates greater certainty than an open-ended flexible exception.<sup>145</sup>

3.87 The process of developing an understanding about how fair use might operate in response to the ‘changing technological frontier’ is discussed in the Kernochan Center report which refers to the Conference on Fair Use convened under the Clinton Administration,<sup>146</sup> the ‘best practice’ codes referred to above<sup>147</sup> and the attempts of various universities and schools to interpret fair use for their institutions.<sup>148</sup>

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140 Copyright Agency/Viscopy, *Submission 249*.

141 Australian Copyright Council, *Submission 219*.

142 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

143 Universities Australia, *Submission 293*.

144 Copyright Advisory Group—Schools, *Submission 290*.

145 Copyright Advisory Group—Schools, *Submission 231*.

146 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

147 *Ibid*, 33.

148 *Ibid*, 43.

3.88 While the process of producing codes and guidelines can be summarised as producing a ‘mixed bag’ of outcomes<sup>149</sup> the ALRC asks whether the risks of uncertainty documented by stakeholders are outweighed by the advantages of the reforms proposed in this Discussion Paper—albeit that change requires some adaptation:

The broader question implicated by these issues—whether fair use is a sound regulatory tool—is one that should certainly engage local policy makers in their deliberations as to the virtues of fair use.<sup>150</sup>

3.89 In May 2013, Productivity Commission chair Mr Peter Harris called for a policy-making structure that reinforces the expectation of change:

a mechanism under which continuous reform is invited ... An integrated approach, where the voice of any one affected sector or region may not dominate; and where the breadth of necessary changes and the combined potential for economy-wide gains can be clearly set against any costs ... a generic way forward. But clearly there is scope in this idea for a regular, wide-ranging review of productivity-oriented reforms ... This is not a concept that can be created overnight.<sup>151</sup>

3.90 The ACCC endorsed a regulatory framework in which negotiating an understanding of acceptable uses of copyright material may be more effective and efficient in reducing inefficiencies than a strict enforcement regime which potentially inhibits innovation:

where the parameters can be set so that the rights of copyright holders are able to be preserved and protected commensurate with the objectives of providing incentives to create copyright material ... balanced against the potential for innovative business practices to meet and develop consumer expectations and practices.

3.91 Creation of this understanding can come through industry guidelines matched with consumer expectations. The ACCC also pointed to its role in drafting guidelines to which the Copyright Tribunal is required to have regard in determining licence conditions that are the subject of determinations by the Copyright Tribunal.<sup>152</sup>

3.92 The ALRC proposes that in the digital environment a standard—a general rule based on principle—provides the flexibility to respond to technological change in a principled manner using criteria worked out between parties or ultimately a court.<sup>153</sup> This Discussion Paper canvasses views for and against the introduction of ‘fair use’ and proposes a particular model for a fair use exception in Chapter 4.

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149 Ibid, 65.

150 G Austin, ‘The Two Faces of Fair Use’ (25) *New Zealand Universities Law Review* 285, 314.

151 P Harris, *The Productivity Reform Outlook* <[www.pc.gov.au/speeches/peter-harris/reform-outlook](http://www.pc.gov.au/speeches/peter-harris/reform-outlook)> at 1 May 2013.

152 *Copyright Act 1968* (Cth) s 157A.

153 See discussion of ‘principles based’ legislation in Ch 4.



## 4. The Case for Fair Use in Australia

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### Summary

4.1 The Terms of Reference direct the ALRC to consider whether existing exceptions in the *Copyright Act 1968* (Cth), such as the fair dealing exceptions, are adequate and appropriate and also whether further exceptions should recognise 'fair use' of copyright material.

4.2 This chapter provides context for the ALRC's consideration of fair use. It outlines arguments raised both for and against Australia introducing a broad, flexible exception based on fair use.

4.3 The chapter outlines the changed environment since previous Australian reviews considered the issue. It examines current approaches to formulating standards (open-ended and general) as compared with rules (closed-ended and more prescriptive).

4.4 Having considered these matters, the ALRC proposes that the *Copyright Act* should be amended to provide a broad, flexible exception for fair use. The last part of the chapter outlines key aspects of the proposed fair use exception.

## What is fair use?

4.5 Fair use is a defence to copyright infringement. It essentially asks of any particular use, ‘is this fair?’ This is determined on a case by case basis. The statute does not define what is fair.

4.6 In deciding whether a use is fair, a number of criteria—‘fairness factors’—are considered. These fairness factors are set out in the fair use statutory provision. Law that incorporates such principles or standards is generally more flexible and adaptive than prescriptive rules.

4.7 Most fair use provisions around the world list the same four fairness factors. These are also factors that appear in the current Australian exceptions for fair dealing for the purpose of research or study.<sup>1</sup> The four fairness factors are non-exhaustive; other relevant factors may be considered.

4.8 In other jurisdictions fair use provisions set out illustrative purposes—these are examples of broad types or categories of use or purposes that may be fair. A particular use does not have to fall into one of these categories to be fair. This is one of the key benefits of fair use. Unlike the fair dealing provisions, fair use is not limited to a set of prescribed purposes.

4.9 Also, just because a use falls into one of the categories of illustrative purpose, does not mean that such a use will necessarily be fair. It does not even create a presumption that the use is fair. In every case, the fairness factors must be ‘explored, and the results weighed together, in light of the purposes of copyright’.<sup>2</sup>

4.10 Where copyright legislation includes an exception for fair use, there will also be other more specific exceptions that operate in addition to fair use.

4.11 Fair use is not a radical exception. It largely codifies the common law. Fair use and fair dealing share the same common law source.<sup>3</sup> Fair use has been enacted in a number of countries,<sup>4</sup> but most notably, in the United States.<sup>5</sup>

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1 *Copyright Act 1968* (Cth) ss 40(2), 103C(2), 248A(1A).

2 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 577.

3 See, eg, W Patry, *Patry on Fair Use* (2012), 9–10; M Sag, ‘The Prehistory of Fair Use’ (2011) 76 *Brooklyn Law Review* 1371; A Sims, ‘Appellations of Piracy: Fair Dealing's Prehistory’ (2011) *Intellectual Property Quarterly* 3; M Richardson and J Bosland, ‘Copyright and the New Street Literature’ in C Arup (ed) *Intellectual Property Policy Reform: Fostering Innovation and Development* (2009) 199, 199; R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 253–64; Copyright Law Review Committee, *Copyright and Contract* (2002), 25.

4 See, eg, *Copyright Act 1967* (South Korea) art 35–3; *Copyright Act 2007* (Israel) s 19; *Intellectual Property Code of the Philippines*, Republic Act No 8293 (the Philippines) s 185.

5 *Copyright Act 1976* (US) s 107.



4.12 The codification of fair use in the US took effect in 1978. The intention was to restate copyright doctrine—‘not to change, narrow, or enlarge it in any way’.<sup>6</sup> There was no intention ‘to freeze the doctrine in the statute, especially during a period of rapid technological change’.<sup>7</sup> Section 107 of the US *Copyright Act* provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

## Reviews that have considered fair use

4.13 The Terms of Reference direct the ALRC to take into account recommendations from related reviews. A number of reviews, in Australia and in other jurisdictions, have considered the merits, or otherwise, of introducing fair use.

### Recent international reviews

4.14 The Hargreaves Review was specifically asked to investigate the benefits of a fair use exception and how these benefits might be achieved in the United Kingdom (UK).<sup>8</sup> The Review expressed regret that it could not recommend that the UK promote a fair use exception to the European Union (EU)—‘the big once and for all fix’<sup>9</sup>—as it had been advised that there would be ‘significant difficulties’ in attempting to transpose US-style fair use into European law.<sup>10</sup>

4.15 At the time of this Inquiry, a review of Irish copyright law is also taking place, to examine the ‘optimum’ copyright law for Ireland, including consideration of whether a fair use doctrine would be appropriate in the Irish/EU context.<sup>11</sup>

6 United States House of Representatives, Committee on the Judiciary, *Copyright Law Revision (House Report No. 94-1476)* (1976), 5680.

7 Ibid.

8 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 101.

9 Ibid, 52.

10 Ibid, 46. Some scholars have challenged the view that a Member State of the EU cannot introduce flexible copyright norms. See, eg, B Hugenholtz and M Senftleben, *Fair Use in Europe: In Search of Flexibilities* (2011).

11 Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).

### Australian reviews

4.16 This Inquiry is not the first Australian review to consider whether the *Copyright Act* should recognise the fair use of copyright material,<sup>12</sup> although some stakeholders consider that it has not been given ‘a sufficiently thorough examination in Australian law reform processes’ to date.<sup>13</sup>

#### *The CLRC simplification review*

4.17 In 1996, the Australian Government asked the Copyright Law Review Committee (CLRC) to consider how the *Copyright Act* could be simplified ‘to make it able to be understood by people needing to understand their rights and obligations’.<sup>14</sup> The CLRC was mindful that it did not have ‘a mandate to undertake a wholesale review of the Act or recommend significant changes to the policy underpinning the law’.<sup>15</sup>

4.18 In 1998, the CLRC recommended, among other things, the consolidation of the existing fair dealing provisions into a single section and the expansion of fair dealing to an ‘open-ended model’ that would not be confined to the existing ‘closed-list’ of fair dealing purposes.<sup>16</sup> The CLRC recommended that the existing non-exhaustive list of five fairness factors in s 40(2) of the *Copyright Act* specifically apply to all fair dealings.<sup>17</sup>

4.19 The CLRC recommended the following text for the consolidated statutory provision:

- (1) Subject to this section, a fair dealing with any copyright material for any purpose, including the purposes of research, study, criticism, review, reporting of news, and professional advice by a legal practitioner, patent attorney or trade mark attorney, is not an infringement of copyright.
- (2) In determining whether in any particular case a dealing is a fair dealing, regard shall be had to the following:
  - (a) the purpose and character of the dealing;
  - (b) the nature of the copyright material;
  - (c) the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price;
  - (d) the effect of the dealing upon the potential market for, or value of, the copyright material;

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12 For an overview of the history see M Wyburn, ‘Higher Education and Fair Use: A Wider Copyright Defence in the Face of the Australia-United States Free Trade Agreement Changes’ (2006) 17 *Australian Intellectual Property Journal* 181.

13 R Burrell and others, *Submission 278*.

14 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [1.03].

15 *Ibid.*, [6.28].

16 *Ibid.*, [2.01]–[2.03].

17 See also *Ibid.*, [2.04], [6.36]–[6.44].

- (e) in a case where part only of the copyright material is dealt with—the amount and substantiality of the part dealt with, considered in relation to the whole of the copyright material.<sup>18</sup>

4.20 The CLRC considered that its model was ‘sufficiently flexible to accommodate new uses that may emerge with future technological developments’ and that it also contained ‘enough detail to provide valuable guidance to both copyright owners and users’.<sup>19</sup> This model has been described as ‘a neat and elegant one that will bring the existing multiplicity of exceptions into a coherent and orderly relationship’.<sup>20</sup> The Australian Government did not formally respond to the recommendations made in this CLRC report.

4.21 The CLRC’s model is similar to that proposed by the ALRC in this Discussion Paper.

#### ***Intellectual Property and Competition Review Committee***

4.22 In September 2000 the Intellectual Property and Competition Review Committee, chaired by Henry Ergas (Ergas Committee), considered the CLRC’s recommendation for expansion of the fair dealing purposes. It reported that it did ‘not believe there is a case for removing the elements of the current *Copyright Act*, which define certain types of conduct as coming within the definition of fair dealing’.<sup>21</sup> In the context of reviewing copyright in terms of competition policy, the Ergas Committee considered that, at that time, the transaction costs of changing the *Copyright Act* would outweigh the benefits.<sup>22</sup>

#### ***The Attorney-General’s Department’s Fair Use Review***

4.23 The Australian Government Attorney-General’s Department’s Fair Use Review (AGD Fair Use Review) considered the CLRC and Ergas Committee’s respective relevant recommendations, as well as a recommendation that had been made by the Joint Standing Committee on Treaties (JSCOT) in the context of its consideration of whether the *Australia-United States Free Trade Agreement* (AUSFTA) would be in the national interest.

4.24 JSCOT had recommended replacing fair dealing with something closer to the US fair use doctrine ‘to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting’.<sup>23</sup>

4.25 Submissions to the AGD Fair Use Review contained a number of arguments for and against Australia adopting such a fair use approach. As the AGD Fair Use Review

<sup>18</sup> Ibid, [6.143].

<sup>19</sup> Ibid, [6.08].

<sup>20</sup> S Ricketson, ‘Simplifying Copyright Law: Proposals from Down Under’ (1999) 21(11) *European Intellectual Property Review* 537, 549.

<sup>21</sup> Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 15.

<sup>22</sup> Ibid, 129.

<sup>23</sup> The Joint Standing Committee on Treaties—Parliament of Australia, *Report 61: The Australia-United States Free Trade Agreement* (2004), Rec 17.

observed, the main difference between a provision which is open-ended, compared with one that is closed, is that the former is more likely to provide flexibility and the latter, certainty.<sup>24</sup> Views differed as to which was preferable.

4.26 A final report was not issued. However, a number of reforms were enacted in response to the Review—notably exceptions for time and format shifting and fair dealing for parody and satire.

4.27 The Australian Government did not enact a fair use exception for two reasons. First, the Government stated that, in the public consultation phase, ‘no significant interest supported fully adopting the US approach’.<sup>25</sup> Secondly, it appears that the Government may have been concerned about compliance with the three-step test in international copyright law.<sup>26</sup>

## **The changed environment**

4.28 Some stakeholders submitted that nothing had changed since 1996–98, 2000 and 2005–06 when the CLRC, the Ergas Committee and the AGD were considering, respectively, the issue of a fair use-style exception. However, the ALRC considers that developments in recent years provide further evidence in support of Australia introducing fair use.

4.29 The most important change is the development of the digital economy. There has been a noticeable degree of change with respect to digital technology, including increasing convergence of media and platforms. There has also been a significant move from rule-directed legislation to principles-based legislation in Australia. These changes are discussed further below.

4.30 The opportunities made possible by the digital economy provide further evidence in favour of fair use. In 2013, a report by PricewaterhouseCoopers (PwC) identified the possibilities for technology start-ups contributing 4% of the nation’s gross domestic product (\$109 billion) and up to 540,000 jobs by 2033, with the right fostering and ‘eco system’ in which ‘culture skills and entrepreneurship’ would be essential.<sup>27</sup> PwC stated that Australia has a ‘considerably higher “fear of failure” rate than nations such as the US and Canada’ and that an optimum environment for innovation includes appropriate copyright law.<sup>28</sup>

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24 Australian Government Attorney-General’s Department, *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age*, Issues Paper (2005), [1.5].

25 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 10. However, it should be noted that a number of submissions—presumably defined as coming before ‘the public consultation phase’—did argue in favour of a broad, flexible exception. Further, ‘personal consumers’ had supported an open-ended exception: Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 12.

26 See Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 10–11.

27 PricewaterhouseCoopers, *The Startup Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013). See, also, C Griffith, ‘Entrepreneurs “need a leg up”’, *The Australian*, 23 April 2013, 29.

28 PricewaterhouseCoopers, *The Startup Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013), 13. The report did not suggest any particular changes to copyright law.

4.31 Another change since earlier reviews is that successive governments have given an increased focus to the use of competition to encourage microeconomic reform and to enable the Australian economy to blossom in a more open world economy.<sup>29</sup> For example, creative industries protected by copyright law have experienced many changes designed to enhance competition, including: freeing up the market for books, sound recordings, computer programs and other copyright material; removing parallel importing restrictions based only on labels of goods; the ‘Digital Agenda’ amendments; the introduction of moral rights and allowing decompilation of computer programs for the purposes of interoperability. Stakeholders in this Inquiry have demonstrated their capacity to respond to change: to develop and adapt in the digital economy.<sup>30</sup>

4.32 The ALRC considers there is now more of an appetite for a broad, flexible exception to copyright. Since earlier reviews, there are new understandings of the interpretation of the three-step test. As one submission remarked, many leading copyright experts support ‘an open-textured understanding of the three-step test’ and ‘the compatibility of open-ended drafting with the three-step test’.<sup>31</sup>

4.33 Finally, the ALRC considers that the potential benefits of introducing fair use now outweigh the transaction costs.

### Arguments in favour of fair use for Australia

4.34 There were four main arguments advanced in support of fair use in submissions, that it:

- provides flexibility to respond to changing conditions as it is principles-based and technology neutral;
- assists innovation;
- restores balance to the copyright system; and
- assists with meeting consumer expectations.

4.35 While some characterised these arguments slightly differently—for example, referring to ‘responsiveness’, ‘efficiency’ and ‘justice’—arguably they align.

29 This process began in October 1992: Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (1993) (known as the ‘Hilmer Report’). The Ergas Committee undertook the specialist review of intellectual property under these principles: Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).

30 See, eg, News Limited has announced that it will introduce a metered digital subscription model for its mastheads: D Davidson, ‘Demand for paid digital content “at tipping point”’, *The Weekend Australian*, 11–12 May 2013, 23.

31 R Burrell and others, *Submission 278*, citing Lionel Bently, William Cornish, Graeme Dinwoodie, Josef Drexler, Christophe Geiger, Jonathan Griffiths, Reto Hilty, Bernt Hugenholtz, Annette Kur, Martin Senftleben and Uma Suthersanen.

**Fair use provides flexibility to respond to changing conditions**

4.36 Stakeholders acknowledge that the digital economy facilitates many new developments, such as new technologies, services and uses, at a rapid rate. A number of submissions suggested that a broad, principles-based exception, which employs technology-neutral drafting such as fair use, would be more responsive to rapid technological change and other associated developments than the current specific, closed-list approach to exceptions.<sup>32</sup>

4.37 Many stakeholders suggested that specific exceptions will inevitably reflect the circumstances that prevailed at the time of their enactment, while a general exception can respond to a changing environment. Furthermore: ‘there is nothing “natural” or inevitable about the current fair dealing defences in Australian law’.<sup>33</sup> Rather, the privileging of these particular uses as exceptions is the product of certain historical conditions. For example, the time shifting exception is an example of a technology-specific exception that has limited application beyond the technologies specified.<sup>34</sup>

4.38 As Telstra noted:

the current exceptions are generally created in response to existing technologies, economies and circumstances. As a result, they tend to have a narrow ‘patchwork’ application to circumstances existing at the time the exception is introduced.<sup>35</sup>

4.39 There was a view that there were various uses that ought to be permitted, but for which the *Copyright Act* does not make allowance because of the closed-list approach.<sup>36</sup> Yahoo!7 submitted that ‘the existing exceptions under the Act are no longer sufficient by themselves to protect and support the new services introduced by Internet and technology companies’.<sup>37</sup> For example:

In Australia, the absence of a robust principle of fair use within the existing fair dealing exceptions means that digital platforms offering search tools are not able to provide real time high quality communication, analysis and search services with protection under law.<sup>38</sup>

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32 See, eg, Law Council of Australia IP Committee, *Submission 284*; R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; Law Council of Australia, *Submission 263*; Telstra Corporation Limited, *Submission 222*; Google, *Submission 217*; ALIA and ALLA, *Submission 216*; ADA and ALCC, *Submission 213*; Law Institute of Victoria (LIV), *Submission 198*; Optus, *Submission 183*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

33 Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

34 R Burrell and others, *Submission 278*; R Giblin, *Submission 251*.

35 Telstra Corporation Limited, *Submission 222*.

36 See, eg, R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; Telstra Corporation Limited, *Submission 222*; Google, *Submission 217*.

37 Yahoo!7, *Submission 276*.

38 Ibid.

4.40 Telstra referred to caching,<sup>39</sup> others to certain uses by government bodies and the ‘incidental inclusion’ of copyright material in a subsequent work or production.<sup>40</sup> Many examples are given in other parts of this Discussion Paper.

4.41 Stakeholders were concerned about the lengthy delay between the emergence of a new use and the legislature’s consideration of the need for a specific exception.<sup>41</sup> The Law Council of Australia explained that, at present, ‘each new situation needs to be considered and dealt with in separate amending legislation which usually occurs well after the need is identified’.<sup>42</sup> A copyright exception permitting time-shifting was not enacted in Australia until 22 years after time-shifting had been found to be fair use in the US.<sup>43</sup> Electronic Frontiers Australia submitted that the inflexibility of the current purpose-based exceptions, together with the increasingly rapid pace of technological change, ensure that ‘the law now lags years behind the current state of innovation in technology and service delivery’.<sup>44</sup>

4.42 One submission noted that ‘[p]olicymakers simply cannot be expected to identify and define *ex ante* all of the precise circumstances in which an exception should be available’.<sup>45</sup> Similarly, Yahoo!7 and Google were of the view that no legislature can anticipate or predict the future.<sup>46</sup> Google submitted that ‘innovation and culture are inherently dynamic’ and that ‘you cannot legislate detailed rules to regulate dynamic situations; you can only set forth guiding principles’.<sup>47</sup>

4.43 Others submitted that one of the advantages of a technology-neutral, open standard such as fair use, is that it has the requisite dynamism,<sup>48</sup> agility<sup>49</sup> or malleability<sup>50</sup> to respond to ‘future technologies, economies and circumstances—that don’t yet exist, or haven’t yet been foreseen’.<sup>51</sup> That is, fair use may go some way to ‘future-proof’<sup>52</sup> the *Copyright Act*. As the Law Council saw it, ‘a flexible fair use provision ... will enable the Act to adapt to changing technologies and uses without the need for legislative intervention’.<sup>53</sup>

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39 Telstra Corporation Limited, *Submission 222*.

40 R Burrell and others, *Submission 278*. See also eBay, *Submission 93*.

41 See, eg, Law Council of Australia IP Committee, *Submission 284*; R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; Law Council of Australia, *Submission 263*; R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Google, *Submission 217*.

42 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*.

43 R Giblin, *Submission 251*.

44 EFA, *Submission 258*.

45 R Burrell and others, *Submission 278*.

46 Yahoo!7, *Submission 276*; Google, *Submission 217*.

47 Google, *Submission 217*.

48 ADA and ALCC, *Submission 213*.

49 Law Institute of Victoria (LIV), *Submission 198*.

50 R Burrell and others, *Submission 278*.

51 Telstra Corporation Limited, *Submission 222*.

52 Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; Australian Broadcasting Corporation, *Submission 210*.

53 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*.

**Fair use assists innovation**

4.44 Another argument advanced in some submissions was that fair use may assist in encouraging innovation.<sup>54</sup> This is because, unless the use of third party copyright material would come within one of the existing exceptions, there is an ‘automatic no’,<sup>55</sup> to its use, regardless of whether that use could be perceived as innovative or socially useful and regardless of whether it would affect the rights holder’s market.<sup>56</sup>

4.45 It is argued that Australia is ‘a hostile regulatory environment for technology innovators and investors’ and this has ‘long discouraged innovation and investment by technology providers and content owners alike’.<sup>57</sup> Yahoo!7 submitted:

Under Australia’s existing copyright regime, very many socially useful and economically beneficial technological innovations would simply have no breathing space to emerge. They would be blocked at the first post by a copyright regime that is insufficiently flexible to accommodate technological innovation.<sup>58</sup>

4.46 Yahoo!7 provided an example of a technology that was ‘only possible due to the flexibility offered by the US copyright regime’.<sup>59</sup> One of its innovative mobile applications reproduces less than 1–2 seconds of the audio stream of a television program that a user is watching and matches that thumbprint against a database of thumbprints in order to inform the user of the program that they are watching.

4.47 Similarly, Google stated that it could not have created and started its search engine in Australia under the current copyright framework, as ‘innovation depends on a legal regime that allows for new, unforeseen technologies’.<sup>60</sup> The Australian Interactive Media Industry Association’s Digital Policy Group noted the adverse effect the Australian copyright regime was having on the Australian digital industry’s ability to innovate and compete globally.<sup>61</sup> Other stakeholders shared the view that the current copyright regime puts Australian companies and individuals at a disadvantage compared with those in the US, or other countries that have a fair use exception.<sup>62</sup>

4.48 As with a number of other stakeholders, the Law Institute of Victoria considered that fair use ‘would promote a framework to encourage innovation and investment in technological development in Australia’.<sup>63</sup> eBay submitted that a fair use exception ‘would enhance the environment for e-commerce in Australia’,<sup>64</sup> and both Google and

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54 See, eg, R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; AIMIA Digital Policy Group, *Submission 261*; R Giblin, *Submission 251*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; Law Institute of Victoria (LIV), *Submission 198*; iiNet Limited, *Submission 186*.

55 Google, *Submission 217*.

56 See, eg, R Burrell and others, *Submission 278*; AIMIA Digital Policy Group, *Submission 261*; R Giblin, *Submission 251*; Google, *Submission 217*.

57 R Giblin, *Submission 251*.

58 Yahoo!7, *Submission 276*.

59 Ibid.

60 Google, *Submission 217*.

61 AIMIA Digital Policy Group, *Submission 261*.

62 See, eg, Universities Australia, *Submission 246*; Google, *Submission 217*.

63 Law Institute of Victoria (LIV), *Submission 198*.

64 eBay, *Submission 93*.



Yahoo!7 considered that a regime based upon a flexible, broad, principles-based exception would assist local start-ups.<sup>65</sup> Yahoo!7 submitted:

Application development can thrive in Australia if there is a broader approach to how content can be used by others while still ensuring that such use does not deprive the rights holder of a legitimate revenue stream or impact the market value of the underlying work. Given the relatively low barrier of entry to the digital innovation marketplace, it would also provide software and application developers the ideal regulatory environment to capitalize on the roll-out of the National Broadband Network.<sup>66</sup>

4.49 The Copyright Advisory Group—Schools stated:

The flexibility of the fair use exception in the US has in effect operated as innovation policy within the copyright system because it creates incentives to build innovative products, which yield complementary technologies that enhance the value of the copyright works.<sup>67</sup>

### Fair use restores balance to the copyright system

4.50 Some submissions argued that a fair use exception would restore the balance between rights holders and users.<sup>68</sup> It was said that fair use ‘counterbalances what would otherwise be an unreasonably broad grant of rights to authors and unduly narrow set of negotiated exceptions and limitations’.<sup>69</sup> iiNet submitted that fair use would ‘play a role’ in countering the effects of the AUSFTA, especially for consumers.<sup>70</sup>

4.51 There were calls from parts of the educational sector for a better balance in the *Copyright Act*.<sup>71</sup> Universities Australia submitted that there was a need for ‘an appropriate balance’ to ‘enable universities and their students to make full use of technology to create and disseminate knowledge’.<sup>72</sup> The Copyright Advisory Group—Schools compiled a table comparing a number of differences between the copyright laws that apply to schools in Australia, the US and Canada and submitted that the results suggest that the ‘balance struck in the Australian *Copyright Act* does not adequately recognise the public interest in allowing limited free uses of copyright materials for educational purposes’.<sup>73</sup>

<sup>65</sup> Google, *Submission 217*; Yahoo!7, *Submission 276*.

<sup>66</sup> Yahoo!7, *Submission 276*.

<sup>67</sup> Copyright Advisory Group—Schools, *Submission 231* citing Fred von Lohmann, ‘Fair Use as Innovation Policy’ (2008) 23 *Berkeley Technology Law Journal* 289.

<sup>68</sup> See, eg, University of Sydney, *Submission 275*; Universities Australia, *Submission 246*; iiNet Limited, *Submission 186*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

<sup>69</sup> ADA and ALCC, *Submission 213*, citing P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537, 2618.

<sup>70</sup> iiNet Limited, *Submission 186*. See, also, Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

<sup>71</sup> See, eg, Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*.

<sup>72</sup> Universities Australia, *Submission 246*.

<sup>73</sup> Copyright Advisory Group—Schools, *Submission 231*.

**Fair use assists with meeting consumer expectations**

4.52 Related to this view about balance was the idea that fair use would assist with meeting consumer expectations<sup>74</sup>—the ‘common standards in society’.<sup>75</sup> The Hargreaves Review identified a ‘growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people’ as a ‘significant problem’.<sup>76</sup>

4.53 Consumers expect to be able to post a photo of goods on eBay in order to sell them. However, eBay stated that those using its services may infringe copyright when the photograph includes an artistic work on the cover of a book or a garment bearing an artwork. In its view, in such a case ‘there is no loss or damage suffered by a copyright owner’. It submitted that within its business, and ‘a wide range of markets’, a fair use exception would provide ‘an opportunity to prevent the occurrence of repeated technical infringement of copyright’.<sup>77</sup>

4.54 Similarly, Google submitted that there was a ‘disconnect between the law and practices that are both ubiquitous and unlikely to harm copyright owners’.<sup>78</sup> This disconnect was said to be undermining the copyright system and bringing the law into disrepute.<sup>79</sup> Electronic Frontiers Australia commented that:

Many Australian consumers, when the limitations of fair dealing exceptions are explained to them, roll their eyes in disbelief that the law insists that things they consider to be legitimate everyday activities are in fact illegal. Discussions on this topic tend to ridicule the law.<sup>80</sup>

4.55 A number of submissions cited with approval the statement that ‘fair use exceptions keep copyright closer to the reasonable expectations of most people and thus help make sense of copyright law’,<sup>81</sup> or made similar points.<sup>82</sup>

4.56 Google submitted that flexible and technology-neutral exceptions permitting consumers to make personal uses of legitimately purchased content would ‘greatly restore people’s faith that the law makes sense’ and would not harm rights holders’ economic interests.<sup>83</sup>

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74 See, eg, EFA, *Submission 258*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*; S Hawkins, *Submission 15*.

75 S Hawkins, *Submission 15*.

76 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), [5.10].

77 eBay, *Submission 93*.

78 Google, *Submission 217*.

79 Ibid.

80 EFA, *Submission 258*.

81 M Sag, ‘Predicting Fair Use’ (2012) 73 *Ohio State Law Journal* 47, 50.

82 ; EFA, *Submission 258*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

83 Google, *Submission 217*.

## Arguments against fair use in Australia

4.57 There were four main arguments advanced against fair use in submissions, that it:

- is unnecessary and no case is made out for it;
- would create uncertainty and expense;
- originated in a different legal environment; and
- may not comply with the three-step test.

### Fair use is unnecessary and no case is made out for it

4.58 First, a number of rights holder interests submitted that there is no need for a fair use exception to be introduced in Australia because the existing copyright system is effective. This argument was based upon views that: the existing exceptions are adequate and appropriate;<sup>84</sup> the common law was capable of ‘addressing the needs of promoting innovation’;<sup>85</sup> and business models, including licensing solutions, have been developed, or are evolving, to meet legitimate consumer expectations.<sup>86</sup>

4.59 The Combined Newspapers and Magazines Copyright Committee submitted that ‘the current fair dealing exceptions sufficiently protect the public interest’.<sup>87</sup> The Australian Film and TV Bodies were of the view that:

The existing legislative framework (perhaps with some simplification and modernisation of its terminology) is an adequate and appropriate way forward for Australia in the digital age. ... The miscellaneous exceptions reflect the principled and balanced consensus between the various stakeholders, are largely technologically neutral and benefit from being nuanced and tailored to deal with specific situations.<sup>88</sup>

4.60 Copyright Agency/Viscopy considered that it was also helpful to look at the test for infringement. It considered that some of the situations for which users were wanting a flexible exception may not actually constitute infringement at all because the part used would not constitute a ‘substantial part’.<sup>89</sup>

4.61 BSA—The Software Alliance (BSA) submitted that it ‘has not been shown that the Australian common law system is incapable of addressing the needs of promoting innovation through case law development’ and gave the example of implied licences.<sup>90</sup>

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84 See, eg, Australian Publishers Association, *Submission 225*; BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; ARIA, *Submission 241*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Film/TV Bodies, *Submission 205*; TVB (Australia) Pty Ltd, *Submission 124*.

85 BSA, *Submission 248*.

86 iGEA, *Submission 192*.

87 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

88 Australian Film/TV Bodies, *Submission 205*.

89 Copyright Agency/Viscopy, *Submission 249*.

90 BSA, *Submission 248*.

4.62 The Interactive Games and Entertainment Association Ltd submitted that the games industry had already developed and introduced innovative business models under the existing regime, which meant that consumers were receiving many of the benefits that might flow from a fair use exception.<sup>91</sup>

4.63 Secondly, a number of stakeholders asserted that there is no evidence that fair use is necessary and disagreed with other stakeholders arguing in favour of fair use.<sup>92</sup> For example, ARIA contested the view that ‘a closed list approach restricts new uses and acts as a disincentive for technological development’, and submitted that it misrepresented the situation to speak of a ‘closed’ list, as s 200AB constitutes a flexible exception.<sup>93</sup> Other stakeholders considered that fair use may not actually benefit users.<sup>94</sup> For example, Screenrights expressed concern about a ‘chilling effect’ where the need to obtain legal advice, together with fears over the possibility of being subject to expensive litigation, may deter the use of copyright material.<sup>95</sup>

4.64 The argument that fair use would assist innovation was criticised by stakeholders in a number of submissions,<sup>96</sup> including on the basis that:

- there was no ‘evidence’ that innovation would be assisted<sup>97</sup>—rather, the technology sector was operating,<sup>98</sup> indeed ‘expanding’,<sup>99</sup> in Australia under the existing regime;
- the Hargreaves Review was said to have rejected the argument, noting that ‘other factors such as attitudes towards business risk and investor culture were more important’;<sup>100</sup> and
- the introduction of a fair use exception in Australia may actually provide a less helpful environment for business,<sup>101</sup> including start ups.<sup>102</sup>

4.65 Foxtel submitted that ‘companies like Google and Facebook have very successfully established their Australian operations within the bounds of the existing regime’.<sup>103</sup>

4.66 Some stakeholders, who considered that rights holders would be harmed, viewed the balance in the copyright system differently from those stakeholders in favour of fair

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91 iGEA, *Submission 192*.

92 See, eg, Foxtel, *Submission 245*; ARIA, *Submission 241*; Australian Film/TV Bodies, *Submission 205*; Music Rights Australia Pty Ltd, *Submission 191*; Tabcorp Holdings Ltd, *Submission 164*.

93 ARIA, *Submission 241*. See Ch 11 for a discussion of the considerable dissatisfaction with s 200AB.

94 SBS and others, *Submission 295*; APRA/AMCOS, *Submission 247*; Commercial Radio Australia, *Submission 132*.

95 Screenrights, *Submission 215*.

96 See, eg, Australian Film/TV Bodies, *Submission 205*.

97 Ibid.

98 Foxtel, *Submission 245*.

99 Australian Film/TV Bodies, *Submission 205*.

100 ARIA, *Submission 241*.

101 Tabcorp Holdings Ltd, *Submission 164*.

102 Screenrights, *Submission 215*.

103 Foxtel, *Submission 245*.

use.<sup>104</sup> APRA/AMCOS were concerned that ‘an open-ended exception would result in the balance between the interests of copyright owners and the interests of copyright users being too heavily in favour of users’.<sup>105</sup> Others wrote of their concern that: fair use could be ‘stretched too far to justify activity that is quite harmful to a robust copyright system’;<sup>106</sup> the ensuing ‘detriment to the public interest’<sup>107</sup> (bearing in mind that the public interest includes rights holders’ interests); and the likely creation of ‘a new class of people not satisfied with the state of affairs’.<sup>108</sup>

4.67 TVB (Australia) described the present system as representing ‘a complete balance of the various stakeholders’ interests’.<sup>109</sup> In Foxtel’s view, ‘Australian copyright law sets a fair and finely struck balance between the rights holders and those of end users’.<sup>110</sup>

4.68 The Australian Film and TV Bodies submitted that economic evidence ‘suggests that the introduction of fair use has a harmful impact on content-producing industries’.<sup>111</sup> Foxtel submitted it was necessary for ‘clear and indisputable evidence’ in order to justify upsetting the existing balance.<sup>112</sup> Another stakeholder submitted that a fair use exception could not be enacted until there was complete data on the impact on all stakeholders concerned; an exercise described as ‘almost impossible’.<sup>113</sup>

4.69 Some submissions specifically mentioned the likely detriment to existing licensing arrangements.<sup>114</sup> The Motion Picture Association of America (MPAA) submitted that:

it is almost inevitable that some licensees would be compelled to re-examine whether they any longer needed to obtain a licence for particular uses, or whether they could instead rely upon the expanded exception resulting from the new fair use provision. The likelihood that this would destabilize settled markets for the licensing of copyrighted material seems high.<sup>115</sup>

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104 See, eg, Screenrights, *Submission 289*; Free TV Australia, *Submission 270*; Music Council of Australia, *Submission 269*; BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Australian Publishers Association, *Submission 225*; Australian Film/TV Bodies, *Submission 205*; ALPSP, *Submission 199*; Motion Picture Association of America Inc, *Submission 197*; Commercial Radio Australia, *Submission 132*; TVB (Australia) Pty Ltd, *Submission 124*.

105 APRA/AMCOS, *Submission 247*.

106 BSA, *Submission 248*.

107 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

108 TVB (Australia) Pty Ltd, *Submission 124*.

109 Ibid.

110 Foxtel, *Submission 245*.

111 Australian Film/TV Bodies, *Submission 205* citing G Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore* (2012), Centre for Law and Economics Ltd. See, also, Australian Publishers Association, *Submission 225*.

112 Foxtel, *Submission 245*.

113 ALPSP, *Submission 199*.

114 See, eg, Motion Picture Association of America Inc, *Submission 197*; Australian Film/TV Bodies, *Submission 205*; Music Rights Australia Pty Ltd, *Submission 191*.

115 Motion Picture Association of America Inc, *Submission 197*.

### Fair use would create uncertainty and expense

4.70 Many of those opposed to fair use were concerned that a lack of clear and precise rules would result in uncertainty about what the law is,<sup>116</sup> and possibly misunderstanding and misapplication as well.

4.71 One reason given in some submissions as to why fair use is undesirable is because of the view that the scope of rights should be determined by the legislature. Some stakeholders were concerned that a fair use exception would mean that the judiciary, not the legislature, would be determining the scope of copyright.<sup>117</sup> Some, like APRA/AMCOS, saw this as ‘an abrogation of parliament’s role in determining important public matters’.<sup>118</sup> Others were concerned about the judiciary having such a role. The BSA submitted that ‘the Courts are not well equipped for legislating broad economic and policy issues of this type’,<sup>119</sup> while NSW Young Lawyers was concerned that copyright law would be placed ‘too much in the hands of the judiciary and judges would have an undesirable level of discretion in individual cases, at least in the early years’.<sup>120</sup>

4.72 A group of US academics characterised US law on fair use as a ‘moving target’ and observed that ‘[i]t can often take a long time to get final fair use determinations, with lower courts being reversed with regularity’.<sup>121</sup>

4.73 Some submitted that such an environment of legal uncertainty would constitute ‘an obstacle both to use and creation’.<sup>122</sup>

4.74 There was a view that there would be no precedents, at least for a time after fair use was introduced;<sup>123</sup> and that it would take many years to develop case law — especially given that Australia is not as populous or litigious a society as the US;<sup>124</sup>

116 See, eg, SPAA, *Submission 281*; Music Council of Australia, *Submission 269*; COMPPS, *Submission 266*; International Publishers Association, *Submission 256*; BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Australian Publishers Association, *Submission 225*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; Australian Film/TV Bodies, *Submission 205*; IASTMP, *Submission 200*; ALPSP, *Submission 199*; Motion Picture Association of America Inc, *Submission 197*; NSW Young Lawyers, *Submission 195*; Music Rights Australia Pty Ltd, *Submission 191*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*; Tabcorp Holdings Ltd, *Submission 164*; TVB (Australia) Pty Ltd, *Submission 124*.

117 See, eg, BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Australian Publishers Association, *Submission 225*; NSW Young Lawyers, *Submission 195*.

118 APRA/AMCOS, *Submission 247*.

119 BSA, *Submission 248*.

120 NSW Young Lawyers, *Submission 195*.

121 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights, 5, 24. However, Barton Beebe has asserted that reversal rates are not ‘especially high’ based upon his comprehensive empirical analysis of fair use case law: B Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions, 1978–2005’ (2008) 156 *University of Pennsylvania Law Review* 549, 574–5.

122 International Publishers Association, *Submission 256*.

123 See, eg, Motion Picture Association of America Inc, *Submission 197*; Music Rights Australia Pty Ltd, *Submission 191*.

124 ARIA, *Submission 241*.

and that all of the existing jurisprudence in respect to fair dealing would be open to re-interpretation.<sup>125</sup>

4.75 A number of stakeholders were concerned that the ‘uncertainty’ of fair use would be likely to cause higher transaction costs.<sup>126</sup> There was a view that it would make things harder for both users and rights holders of copyright material<sup>127</sup> as a result of an increased need for legal advice and litigation.<sup>128</sup> There were concerns that rights holders would face increased costs in litigation—including recourse to appeal courts<sup>129</sup>—in order to attain certainty about the scope of the exception<sup>130</sup> and to enforce their rights.<sup>131</sup> In ARIA’s view, the uncertainty of the law would encourage users, including defendants, ‘to assert even an implausible fair use defense in the hope of avoiding liability or at least extracting favourable settlement terms’.<sup>132</sup>

4.76 Tabcorp submitted that the introduction of fair use into Australia would ‘increase operating costs and add more red tape and administrative burden to some of the most innovative and dynamic industries in Australia’.<sup>133</sup> Similarly, the Association of Learned and Professional Society Publishers was concerned that a fair use exception would have a negative impact on small and medium-sized publishers—who ‘make up the vast majority of companies in the publishing industry’—and, in turn, this ‘could have serious implications for the creative digital economy in Australia’.<sup>134</sup>

4.77 The need to litigate, to determine what constitutes fair use, was also seen as increasing costs to the judicial system.<sup>135</sup>

4.78 Particular concerns were expressed with respect to artists,<sup>136</sup> musicians,<sup>137</sup> filmmakers,<sup>138</sup> and literary creators,<sup>139</sup> some of whom may be affected on both sides of their practice (being both creators and users of copyright material), and in respect of individuals and others who do not have sufficiently ‘deep pockets’ for litigation.<sup>140</sup>

4.79 The Arts Law Centre of Australia submitted that its clients ‘are usually low income earners who are unlikely to be able to afford to bring or defend a court action to

125 See, eg, SBS and others, *Submission 295*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Motion Picture Association of America Inc, *Submission 197*.

126 APRA/AMCOS, *Submission 247*; Australian Publishers Association, *Submission 225*; iGEA, *Submission 192*.

127 APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*.

128 Music Council of Australia, *Submission 269*; APRA/AMCOS, *Submission 247*.

129 APRA/AMCOS, *Submission 247*.

130 Music Council of Australia, *Submission 269*; Foxtel, *Submission 245*; ARIA, *Submission 241*; iGEA, *Submission 192*.

131 ARIA, *Submission 241*.

132 Ibid.

133 ALPSP, *Submission 199*; Tabcorp Holdings Ltd, *Submission 164*.

134 ALPSP, *Submission 199*.

135 ARIA, *Submission 241*.

136 See, eg, Arts Law Centre of Australia, *Submission 171*.

137 See, eg, Music Council of Australia, *Submission 269*.

138 See, eg, Screenrights, *Submission 289*; SPAA, *Submission 281*.

139 See, eg, Australian Society of Authors, *Submission 169*.

140 See, eg, Pearson Australia/Penguin, *Submission 220*; AMPAL, *Submission 189*.

determine if a use is fair or not'.<sup>141</sup> The Music Council of Australia submitted that most musicians and composers would not be able to afford to litigate matters and so it feared that 'over time, their interests could be marginalised'.<sup>142</sup> The Australian Society of Authors stated that copyright litigation 'is already mostly beyond the resources of literary creators'.<sup>143</sup>

4.80 AMPAL submitted that a fair use exception is 'really only feasible for large, well resourced companies'.<sup>144</sup> Pearson Australia/Penguin made a similar argument, submitting that in the US the average cost for each opposing party in a fair use case is US \$1 million, 'rendering such recourse inaccessible in practice to all but the richest entities'.<sup>145</sup>

### **Fair use originated in a different legal environment**

4.81 A number of submissions argued that because fair use developed in the US it would be difficult to transplant the concept to Australia as the legal environments are very different.<sup>146</sup>

4.82 Specific differences identified included that the US has:

- a Bill of Rights which expressly protects freedom of speech;<sup>147</sup>
- express articulation in the *US Constitution* of the purpose of copyright;<sup>148</sup>
- statutory damages for copyright infringement;<sup>149</sup>
- a higher volume of litigation than Australia generally;<sup>150</sup> and
- extensive case law on fair use.<sup>151</sup>

4.83 With respect to the final point, some submissions noted that the fair use exception in the US is based on over 170 years of case law,<sup>152</sup> with 35 of those years being years when the codified version of the doctrine has been interpreted.<sup>153</sup> The MPAA noted these precedents provide 'content to the fair use framework in particular factual settings' and enable 'counsel, and the companies and individuals they advise, to

141 Arts Law Centre of Australia, *Submission 171*.

142 Music Council of Australia, *Submission 269*.

143 Australian Society of Authors, *Submission 169*.

144 AMPAL, *Submission 189*.

145 Pearson Australia/Penguin, *Submission 220*.

146 See, eg, International Publishers Association, *Submission 256*; ARIA, *Submission 241*; Australian Publishers Association, *Submission 225*; Pearson Australia/Penguin, *Submission 220*; Screenrights, *Submission 215*; IASTMP, *Submission 200*; Motion Picture Association of America Inc, *Submission 197*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*.

147 Screenrights, *Submission 215*; Arts Law Centre of Australia, *Submission 171*.

148 ARIA, *Submission 241*; Australian Publishers Association, *Submission 225*.

149 AMPAL, *Submission 189*.

150 Screenrights, *Submission 215*; IASTMP, *Submission 200*.

151 International Publishers Association, *Submission 256*; Pearson Australia/Penguin, *Submission 220*; Motion Picture Association of America Inc, *Submission 197*; AMPAL, *Submission 189*.

152 Pearson Australia/Penguin, *Submission 220*.

153 International Publishers Association, *Submission 256*.



rely upon the doctrine'.<sup>154</sup> Some stakeholders submitted that this canon of case law 'could not be lifted and dropped wholesale into Australian jurisprudence',<sup>155</sup> either because it would be inappropriate<sup>156</sup> to do so or because '[i]t cannot be assumed the Australian Courts will follow US court decisions',<sup>157</sup> especially in light of different constitutional guidance.<sup>158</sup>

### Fair use may not comply with the three-step test

4.84 Despite the fact that the US has had a fair use exception for 35 years, an often-repeated argument against the introduction of fair use is that it may,<sup>159</sup> or would,<sup>160</sup> not comply with the three-step test under international copyright law.

4.85 Article 9(2) of the *Berne Convention*, provides:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.<sup>161</sup>

4.86 The three-step test has become the international standard for assessing the permissibility of copyright exceptions generally. For example, in 1994 the three-step test was incorporated into the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs).<sup>162</sup> With respect to copyright, it now applies to exceptions to an author's exclusive right of reproduction and to all economic rights under copyright excluding moral rights and the so-called related or neighbouring rights. Another obligation which should be noted is the AUSFTA, which requires Australia to employ the three-step test for exceptions to all exclusive rights of the copyright owner.<sup>163</sup>

154 Motion Picture Association of America Inc, *Submission 197*.

155 Pearson Australia/Penguin, *Submission 220*.

156 AMPAL, *Submission 189*.

157 Arts Law Centre of Australia, *Submission 171*.

158 ARIA, *Submission 241*.

159 SPAA, *Submission 281*; Copyright Agency/Viscopy, *Submission 249*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Copyright Council, *Submission 219*; Arts Law Centre of Australia, *Submission 171*; Australian Society of Authors, *Submission 169*.

160 International Publishers Association, *Submission 256*; APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; Australian Publishers Association, *Submission 225*; Screenrights, *Submission 215*; Australian Film/TV Bodies, *Submission 205*.

161 The three-step test was retained in this form in the Paris Act of 24 July 1971, the latest Act of the *Berne Convention*: M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004), 52.

162 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, ATS 38 (entered into force on 1 January 1995). The three-step test was incorporated in a number of ways. First, the three-step test is included in TRIPs in respect of copyright, in respect of patents (albeit a modified version of the test) and arguably there are certain elements of the test present in respect of the general article relating to exceptions for trade marks. See M Ficsor, 'How Much of What? The "Three-Step Test" and its Application in Two Recent WTO Dispute Settlement Cases' (2002) 192 *Revue Internationale du Droit D'Auteur* 110, 111, 113. Secondly, in respect of copyright, the three-step test was incorporated by way of a 'double insertion'. The first insertion is by operation of art 9(1) of TRIPs which incorporates art 9(2) of the *Berne Convention* into TRIPs. The second insertion is by operation of art 13 of TRIPs.

163 *Australia-US Free Trade Agreement*, 18 May 2004, [2005], ATS 1 (entered into force on 1 January 2005) art 17.4.10(a).

4.87 As its name suggests, the test consists of three cumulative steps or conditions. Limitations or exceptions to exclusive rights must be confined to

- (1) 'certain special cases';
- (2) which do 'not conflict with a normal exploitation' of the copyright material;<sup>164</sup> and
- (3) do 'not unreasonably prejudice the legitimate interests' of the rights holder.<sup>165</sup>

4.88 The precise meaning of each limb or step of the test is far from certain. For example, there has been only one World Trade Organization (WTO) Panel decision on the three-step test as it relates to copyright under TRIPs.<sup>166</sup> That decision took a limited, 'dictionary approach' to the interpretation of the first limb of the three-step test, seeing it as 'requiring some clear definition of the contours of an exception'.<sup>167</sup>

4.89 Many of the submissions expounding the view that fair use may not comply with the three-step test specified the first step of the test as being the part that would not be met.<sup>168</sup> Some submissions also considered that the second<sup>169</sup> and third steps<sup>170</sup> may also not be met.

4.90 The first step of the test uses the phrase 'certain special cases' and a number of submissions referred to Professor Sam Ricketson's commentary that this requires an exception to be 'clearly defined' and 'narrow in scope and reach'.<sup>171</sup> Some submissions argued that a broad, flexible exception such as fair use would not meet these requirements. For example, Australian Film and TV Bodies submitted that '[e]xceptions based on notions of "fairness" or "reasonableness", in the absence of sufficiently interpretative jurisprudence are not sufficiently clear or defined to satisfy that test'.<sup>172</sup> Similarly, APRA/AMCOS argued that fair use is 'too broad to be described as being confined to certain special cases—the cases are uncertain by definition'.<sup>173</sup>

164 The broad term 'copyright material' is used here rather than the particular works or subject-matter other than works that are used in the treaties.

165 Article 9(2) of the Berne Convention uses the word 'author' whereas TRIPs uses the word 'right holder'.

166 World Trade Organization, *Panel Report on United States–Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).

167 D Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) 8(1) *University of Ottawa Law & Technology Journal* 1, 26.

168 Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Copyright Council, *Submission 219*; Australian Film/TV Bodies, *Submission 205*.

169 Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Film/TV Bodies, *Submission 205*.

170 ARIA, *Submission 241*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Film/TV Bodies, *Submission 205*.

171 See, eg, Copyright Agency/Viscopy, *Submission 249*; Australian Copyright Council, *Submission 219* and Australian Film/TV Bodies, *Submission 205* citing references such as S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003), prepared for the World Intellectual Property Organization Standing Committee on Copyright and Related Rights Ninth Session.

172 Australian Film/TV Bodies, *Submission 205*.

173 APRA/AMCOS, *Submission 247*.

4.91 One submission referred to the ‘considerable body’ of international academic opinion that fair use is inconsistent with the three-step test.<sup>174</sup> Another commented: ‘although the US fair use regime has never been challenged on the grounds of non-compliance with the three-step test, the issue of its compliance with the test is not without controversy’.<sup>175</sup>

### **ALRC’s proposals for reform**

4.92 The ALRC has considered the various arguments made for and against the enactment of a fair use exception in Australia and concludes that fair use:

- is suitable for the digital economy and will assist innovation;
- provides a flexible standard;
- is coherent and predictable;
- is suitable for the Australian environment; and
- is consistent with the three-step test.

### **Suitable for the digital economy and will assist innovation**

4.93 The ALRC considers that fair use would provide flexibility to respond to changing conditions and would assist innovation. These arguments outlined earlier are not repeated here. In the ALRC’s view, a fair use regime will: employ technology neutral legislative drafting; assist predictability in application; minimise unnecessary obstacles to an efficient market; and reduce transaction costs.

4.94 The ALRC considers that a fair use exception is appropriate in the context of the digital economy and considers the proposals for reform in this Discussion Paper are likely to enhance adjustment to the digital environment.

4.95 As the CLRC stated in 1998:

[m]uch of the present complexity in the fair dealing provisions and the miscellany of other provisions and schemes that provide for exceptions to copyright owners’ exclusive rights is due to the fact that they operate on the basis of a particular technology or in relation to dealings with copyright materials in a particular material form.<sup>176</sup>

4.96 This statement is still relevant. Further, it could be said that the digital environment is highlighting and exacerbating the ‘technological redundancy’ of a number of specific exceptions, even those introduced in 2006.<sup>177</sup>

4.97 The ALRC considers that the enactment of fair use would foster an entrepreneurial culture which contributes to productivity. Although ‘the conditions for

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<sup>174</sup> ARIA, *Submission 241*.

<sup>175</sup> Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

<sup>176</sup> Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.01].

<sup>177</sup> R Burrell and others, *Submission 278*.

innovation depend on much more than the details of copyright law, including everything from tax law to the availability of an educated workforce to matters of business culture',<sup>178</sup> an appropriate regulatory framework is a key aspect to innovation.<sup>179</sup> The ALRC considers that introducing fair use into Australian copyright law would contribute to such an environment and will constitute a measure that will assist in making Australia a more attractive market for technology investment and innovation.

4.98 The Hargreaves Review noted that the economic benefits of fair use 'may sometimes have been overstated'.<sup>180</sup> However, the report went on to state that intellectual property issues are important for the success of innovative, high technology businesses.<sup>181</sup> The Hargreaves Review noted the introduction of fair use in other jurisdictions, but considered that the 'very protracted political negotiations'<sup>182</sup> that would result for the UK made it unfeasible in the European context. This does not detract from the substantive merits of fair use for Australia.

4.99 The ACCC espoused the benefits of flexible regulation for business:

By ensuring that regulations remain flexible, regulation will not have the unintended effect of curtailing innovation and the creation of new copyright material. The ACCC considers that there is a fine balance that must be struck between providing certainty and stability in relation to regulation of copyright and providing sufficient flexibility to ensure that industries reliant on copyright can continue to develop and innovate ... The ACCC's view of stability encompasses the need to ensure that the law can adapt to a rapidly changing technological and consumer environment in order for businesses to have confidence in investing in new products and services.<sup>183</sup>

4.100 Some stakeholders submitted that fair use would not necessarily cause economic harm to rights holders, citing economic studies.<sup>184</sup> Further, Google remarked that many companies are both owners and users of copyright materials and submitted that:

The idea that fair use somehow reduces copyright owners' rights is belied by the regular practice of large US media companies applying fair use in their every day commercial decisions.<sup>185</sup>

4.101 The ALRC considers that the introduction of a broad, flexible exception for fair use into Australian law should allow flexible and fair mediation between the interests of owners and users in the digital environment.

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178 Ibid.

179 PricewaterhouseCoopers, *The Startup Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013).

180 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), [5.16].

181 Ibid, [5.17].

182 Ibid, [5.18].

183 ACCC, *Submission 165*.

184 Copyright Advisory Group—Schools, *Submission 231* citing R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), prepared for Google; Google, *Submission 217* citing Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe Harbour Provisions* (2012), prepared for Australian Digital Alliance.

185 Google, *Submission 217*.

### A flexible standard

4.102 Copyright exceptions that are more like standards than rules will generally be more flexible and better able to adapt to new technologies, services, licensing environments and consumer practices.

4.103 This distinction between rules and standards is commonly drawn in legal theory. Rules are more specific and prescribed. Standards are more flexible and allow decisions to be made at the time of application, and with respect to a concrete set of facts.<sup>186</sup>

4.104 Rules and standards are of course points on a spectrum. Rules are ‘not infinitely precise, and standards not infinitely vague’.<sup>187</sup> The legal philosopher H L A Hart wrote that rules have a core of settled meaning surrounded by a penumbra of uncertainty.<sup>188</sup> The distinction is nevertheless useful.

4.105 Another way of talking about standards is to refer to ‘principles-based’ legislation. In 2002, a study by Australian academic Professor John Braithwaite concluded that, as between principles and rules:

1. When the type of action to be regulated is simple, stable and does not involve huge economic interests, rules tend to regulate with greater certainty than principles.
2. When the type of action to be regulated is complex, changing and involves large economic interests:
  - (a) Principles tend to regulate with greater certainty than rules;
  - (b) Binding principles backing non-binding rules tend to regulate with greater certainty than principles alone;
  - (c) Binding principles backing non-binding rules are more certain still if they are embedded in institutions of regulatory conversation that foster shared responsibilities.<sup>189</sup>

4.106 Standards are becoming more common in Australian law, including, for example, in consumer protection and privacy legislation.

4.107 The well-known prohibition on ‘misleading or deceptive conduct’, previously in s 52 of the *Trade Practices Act 1974* (Cth) and now contained in s 18 of the Australian Consumer Law,<sup>190</sup> is an example of this kind of legislative drafting—that is, providing a broad standard that can be applied flexibly to a multitude of possible situations.

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186 F Schauer, ‘The Convergence of Rules and Standards’ (2003) (3) *New Zealand Law Review* 303.

187 Ibid, 309.

188 Quoted in Ibid, 308.

189 J Braithwaite, ‘Rules and Principles: A Theory of Legal Certainty’ (2002) 27 *Australian Journal of Legal Philosophy* 47, 75.

190 *Competition and Consumer Act 2010* (Cth) sch 2, s 18.

4.108 Similarly, the unfair contracts provisions of the Australian Consumer Law provide a simple formulation of when a term of a consumer contract is ‘unfair’. Under that law, a term is unfair when:

- (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.<sup>191</sup>

4.109 Such standards are sometimes accompanied by factors a court may, or must, take into account in applying the standard, or examples of when the standard may have been breached, or complied with.

4.110 Again, the Australian Consumer Law provides illustrations of these approaches. The unconscionable conduct provisions contain an extensive, but non-exhaustive, list of factors to which a court may have regard in determining unconscionable conduct.<sup>192</sup> The unfair contracts provisions contain examples of unfair terms.<sup>193</sup>

4.111 There are parallels between these approaches and the ALRC’s proposal for the enactment of a new copyright exception based on a broad standard of fair use, together with fairness factors and illustrative purposes.

4.112 In another field, the *Privacy Act 1988* (Cth) is an example of principles-based legislation. The National Privacy Principles and Information Privacy Principles provide the basis for regulating the handling of personal information by private sector organisations and public sector agencies.<sup>194</sup> The principles provide broad standards such as obligations: not to collect personal information unless the information is ‘necessary’; not to use personal information other than for the ‘primary purpose’ of collection; and to take ‘reasonable steps’ to protect personal information from misuse.

4.113 Principles-based regulation was considered the best approach to regulating privacy for several reasons, including that principles have greater flexibility in comparison to rules. That is, being high-level, technology-neutral and generally non-prescriptive, principles are capable of application to all agencies and organisations subject to the *Privacy Act*, and to the myriad of ways personal information is handled in Australia. Further, principles allow for a greater degree of ‘future-proofing’ and enable the regime to respond to new issues as they arise without having to create new rules.<sup>195</sup> In the ALRC’s view, these rationales can also be seen as applying to the concept of fair use in copyright law.

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191 Ibid sch 2, s 24(1).

192 Ibid sch 2, s 22.

193 Ibid sch 2, s 25.

194 From 12 March 2014, the Australian Privacy Principles will replace the National Privacy Principles and Information Privacy Principles: *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

195 See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

4.114 The ALRC considers that the potential benefits of enacting fair use outweigh any transaction costs, especially given that the argument that fair use would increase transaction costs often ‘paints an unrealistic picture of the status quo for both owners and users’.<sup>196</sup>

4.115 The ALRC is aware that many stakeholders are opposed to fair use, and yet in their submissions many argue the points that favour the introduction of such a concept. For example, the capacity for business to influence the terms on which licensing should take place and to allow room for industry practice.

4.116 From the user point of view, fair use has the capacity to create more confidence and certainty and reduce transaction costs. There is evidence that the current rule-based approach has not provided certainty.

4.117 One submission observed that:

reliance on rules places a great deal of trust in the ability of the legislature—both intellectually, and as a matter of time and resources—to draft clear, detailed and appropriate exceptions to cover heterogeneous conduct.<sup>197</sup>

4.118 The ALRC considers that it may be more efficient to move to open-ended rather than closed-ended drafting so as to save the legislature from constant law reform to ‘catch up’ with new technologies and uses. Rather, the law could ‘self-update through changes to the interpretative practices of copyright owners, users and the courts’.<sup>198</sup> Of course, the legislature could still act when it wanted to respond to particular developments.<sup>199</sup>

### Coherent and predictable

4.119 The choice between standards and rules may also be a choice between simplicity and certainty. In drafting laws, there must necessarily be some compromise. However, a commentator on making laws in the digital environment has written, ‘there should be general agreement that compromise, in the form of a law which is too complex to be understood easily but still contains major uncertainties of meaning, is the worst possible option’.<sup>200</sup>

4.120 Some would say that Australia’s copyright law is uncertain, despite being highly complex and prescriptive. Australia’s existing copyright exceptions are largely made up of rules.

4.121 The ALRC considers that the enactment of a fair use exception in the *Copyright Act* would not result in excessive uncertainty. First, the current copyright exceptions are also not entirely predictable or certain. Secondly, the ALRC considers that fair use can operate with sufficient certainty.

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196 R Burrell and others, *Submission 278*.

197 *Ibid.*

198 *Ibid.*

199 *Ibid*; Google, *Submission 217*.

200 C Reed, *Making Laws for Cyberspace* (2012), 241.

4.122 A number of stakeholders stated that aspects of the existing regime of specific copyright exceptions and, in some cases statutory licences as well, are uncertain.<sup>201</sup> For example, the fair dealing exceptions, which have been described as ‘ostensibly standard-like’,<sup>202</sup> were criticised for the lack of statutory factors to guide application (other than in the case of research or study). It is possible that ‘a new flexible exception may in fact make Australian law *less* uncertain when compared with the status quo’.<sup>203</sup> As the fair use provision does contain certain criteria, owners, users and courts do have something to work with.

4.123 The evidence that is available, from recent research, suggests that fair use in the US is not as uncertain as some of its critics have argued.<sup>204</sup>

4.124 In January 2008, Professor Barton Beebe’s empirical study of US fair use case law through to the year 2005 was published.<sup>205</sup> He argued that the results ‘show that much of our conventional wisdom about that case law is mistaken’.<sup>206</sup>

4.125 In 2009, Professor Pamela Samuelson published her ‘qualitative assessment’ of the fair use case law, which was built upon Beebe’s study.<sup>207</sup> Samuelson has argued that ‘fair use is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns’.<sup>208</sup> She has explained that it is generally possible to predict whether a use is likely to be fair use by analysing previously decided cases in the same policy cluster.<sup>209</sup>

4.126 In 2012, Matthew Sag published his work that built upon these two studies.<sup>210</sup> He went further than Samuelson and ‘assesse[d] the predictability of fair use in terms of case facts which exist prior to any judicial determination’.<sup>211</sup> He argued that his work

demonstrates that the uncertainty critique is somewhat overblown: an empirical analysis of the case law shows that, while there are many shades of gray in fair use

201 See, eg, Law Council of Australia IP Committee, *Submission 284*; R Burrell and others, *Submission 278*; Law Council of Australia, *Submission 263*; CSIRO, *Submission 242*; Copyright Advisory Group—Schools, *Submission 231*; Telstra Corporation Limited, *Submission 222*; ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*; K Bowrey, *Submission 94*.

202 E Hudson, ‘Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia’, *Thesis*, University of Melbourne, 2011, 8.

203 R Burrell and others, *Submission 278*.

204 See, eg, *Ibid*; Google, *Submission 217*.

205 B Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions, 1978–2005’ (2008) 156 *University of Pennsylvania Law Review* 549. Note that Beebe has updated the results ‘through 2011’ but this work has not yet been published. B Beebe, ‘An Empirical Study of US Copyright Fair Use Cases, 1978–2011’ (Paper presented at Fordham Intellectual Property Law Institute and Emily C and John E Hansen Intellectual Property Institute 20th Annual Intellectual Property Law and Policy Conference, New York, 12–13 April 2012).

206 B Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions, 1978–2005’ (2008) 156 *University of Pennsylvania Law Review* 549, 550.

207 P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537, 2542–43.

208 *Ibid*, 2541.

209 *Ibid*, 2542.

210 M Sag, ‘Predicting Fair Use’ (2012) 73 *Ohio State Law Journal* 47.

211 *Ibid*, 51.



litigation, there are also consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection.<sup>212</sup>

4.127 One stakeholder characterised and dismissed this literature as the work of ‘a small number of US pro fair use academics’,<sup>213</sup> however, other stakeholders referred with approval to this research<sup>214</sup> and also directed the ALRC to further recent empirical research which argues:

a recurring criticism of fair use is that it is inchoate and uncertain, however at least amongst institutions participating in this study, the doctrine was used more broadly and confidently than this perspective might suggest.<sup>215</sup>

4.128 In that study, the fieldwork indicates that ‘fair use can and does play a meaningful role for US cultural institutions, even amongst those who prefer a more restricted interpretation of its application’.<sup>216</sup>

4.129 The US experience and empirical research suggest that certainty can come from things such as guidelines developed by peak bodies, industry protocols, and internal procedures and documentation.<sup>217</sup> As discussed in Chapter 3, the Australian Communications and Media Authority points to the benefits of industry co-regulation and self-regulation in setting standards and developing understanding of practices.<sup>218</sup>

4.130 Further, a number of stakeholders point to the capacity of business, consumers and government to develop an understanding of acceptable practices. The Australian Content Industry Group (ACIG) discussed the benefits of an industry code being developed between the Australian Government and relevant industry participants for a ‘graduated response’ to unauthorised downloading.<sup>219</sup> This has not been concluded, but such a process is a guide as to how an understanding of indicative purposes and factors in legislation can be applied in specific industries and sectors. Indeed, ACIG specifically requested that the ALRC recommend the development of such a code. While this would be technically outside the Terms of Reference for the Inquiry, it provides a useful example of how ‘purpose-based’ legislation may gain an interpretation which serves the needs of all parties.

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212 Ibid, 49.

213 ARIA, *Submission 241*.

214 See, eg, R Burrell and others, *Submission 278*; Google, *Submission 217*.

215 E Hudson, ‘Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia’, *Thesis*, University of Melbourne, 2011, 4.

216 Ibid *Thesis*, 174.

217 R Burrell and others, *Submission 278*.

218 ACMA, *Submission 214*. See also News Limited, *Submission 286*.

219 ACIG, *Submission 190*. Music Rights Australia also strongly endorses this approach: Music Rights Australia Pty Ltd, *Submission 191*.

### Suitable for the Australian legal environment

4.131 The ALRC considers that there is nothing so intrinsically American about a fair use exception that one could not be enacted in Australia. Others agree.<sup>220</sup> For example, some stakeholders highlighted American commentaries suggesting that the US First Amendment has made limited direct impact on copyright jurisprudence on fair use.<sup>221</sup> The recognition that copyright protects expression only—not ideas—has been found to be sufficient to protect freedom of expression without the need to substantively engage with the First Amendment.<sup>222</sup>

4.132 Further, what may be regarded as differences between the two legal environments—such as the fact that there is no express recognition of moral rights in the US—may not be so different in practice. One commentator recently remarked that, in fact, ‘the inherent dignity of creators that these rights protect [is] implicit in many copyright provisions’ in the US.<sup>223</sup>

4.133 As mentioned earlier, US ‘fair use’ and English and Australian ‘fair dealing’ share the same common legal sources. UTS law academics submitted:

much turns on the decision of legislators of the 1911 Act to codify the exceptions to copyright in terms that referred to specified defined purposes. Had they not done so, it seems not improbable that we might have ended up with something much more similar to the modern United States law of fair use, which shares more with the case law of the eighteenth and nineteenth century than does the Anglo-Australian modern law of infringement and exceptions.<sup>224</sup>

4.134 The ALRC’s proposed fairness factors derive from the same body of case law upon which the US doctrine developed.

4.135 The Australian Government took a positive view of the harmonisation of Australian intellectual property law with that of the US in the context of the AUSFTA:

The harmonisation of our laws with the world’s largest intellectual property market will provide Australian exporters with a more familiar environment and certain legal environment for the export of value-added goods to the United States. In turn, US

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220 See, eg, R Burrell and others, *Submission 278*; Copyright Advisory Group—Schools, *Submission 231* citing Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012); E Hudson, ‘Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia’, *Thesis*, University of Melbourne, 2011, 8.

221 R Burrell and others, *Submission 278*.

222 *Harper & Row Publishers, Inc. v. Nation Enterprises* (1985) 471 US 539, 560; *Roy Export Co v CBS Inc.*, 672 F2d 1095 (2nd Cir, 1982), 1099; *Sid & Marty Krofft Television Prods Inc v McDonald's Corp.*, 562 F2d 1157 (9th Cir, 1977), 1170; *Eldred v Ashcroft*, 537 US 186 (239 F.3d 372, 2003). See also N Netanel, ‘Locating Copyright Within the First Amendment Skein’ 54(1) *Stanford Law Review* 1, 3–4.

223 T Hart, *Calculating Copyright: National Research Council Releases Copyright Report* <[www.copyright.com/2013/05/calculating-copyright-national-research-council-releases-copyright-report/](http://www.copyright.com/2013/05/calculating-copyright-national-research-council-releases-copyright-report/)> at 7 May 2013.

224 Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

investors will be attracted to the Australian market because of greater familiarity and confidence in our legal system.<sup>225</sup>

4.136 However, critics of the extension of copyright term pursuant to the AUSFTA considered that it granted significant benefits to owners without the countervailing fair use doctrine.<sup>226</sup>

4.137 In the words of one stakeholder:

Australia's copyright laws should seek to align with best practice approaches in other jurisdictions. This is justified both on the grounds of good policy and in recognition of the fact that we compete in a global economy and the law should assist Australian businesses to compete in that global economy.<sup>227</sup>

### Consistent with the three-step test

4.138 The ALRC considers that fair use is consistent with the three-step test. A number of stakeholders share this view.<sup>228</sup> Reasons include that:

- 'historical and normative' arguments<sup>229</sup> have been made since the WTO Panel decision<sup>230</sup> which challenge a limited interpretation of the test;<sup>231</sup>
- the US provision has not been challenged in international fora;<sup>232</sup> and
- other countries have introduced fair use or extended fair dealing exceptions and have not been challenged in international fora.<sup>233</sup>

4.139 There is significant commentary challenging a narrow interpretation of the three-step test.<sup>234</sup>

4.140 The three-step test was first incorporated into international copyright law during the 1967 Stockholm revision of the *Berne Convention*.<sup>235</sup> This revision also saw the

225 National Impact Analysis, *Regulation Impact Statement Australia-United States Free Trade Agreement* (2004), 7.

226 A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), 255, [8.36].

227 Optus, *Submission 183*.

228 See, eg, R Burrell and others, *Submission 278*; R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*.

229 R Burrell and others, *Submission 278*.

230 World Trade Organization, *Panel Report on United States—Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).

231 R Burrell and others, *Submission 278*, citing Lionel Bently, William Cornish, Graeme Dinwoodie, Josef Drexler, Christophe Geiger, Jonathan Griffiths, Reto Hilty, Bernt Hugenholtz, Annette Kur, Martin Senftleben and Uma Suthersanen; Universities Australia, *Submission 246*, citing the work of Senftleben, Hugenholtz, and Geiger; Copyright Advisory Group—Schools, *Submission 231* citing the work of Senftleben; Google, *Submission 217*, citing the work of Senftleben. See also M Sag, *The Imaginary Conflict Between Fair Use and International Copyright Law* <<http://matthewsag.com/>> at 25 March 2013.

232 R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*. See W Patry, *Patry on Fair Use* (2012), 554–57; W Patry, *Fair Use and Fair Dealing* (2008).

233 G Pessach, 'The New Israeli Copyright Act: A Case-Study in Reverse Comparative Law' (2010) 41 *International Review of Intellectual Property and Competition Law* 187, 192–93.

234 See, eg, see R Burrell and others, *Submission 278* and the many references cited.

235 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

introduction of the right of reproduction. Those developing the revised treaty text thought it necessary to have a provision setting out a general standard that exceptions to the right of reproduction must meet in order to be permissible.

4.141 As some national laws already contained various exceptions to the right of reproduction, that members to the *Berne Convention* wanted to retain, those developing the text were mindful that it would be necessary ‘to ensure that this provision did not encroach upon exceptions that were already contained in national laws’ and that ‘it would also be necessary to ensure that it did not allow for the making of wider exceptions that might have the effect of undermining the newly recognized right’.<sup>236</sup>

4.142 A number of submissions<sup>237</sup> referred to Dr Senftleben’s comprehensive study of the three-step test published in 2004.<sup>238</sup> For example, the Copyright Advisory Group—Schools submitted:

Dr Senftleben has shown that the three-step test was intended to reconcile the many different types of exceptions that already existed when it was introduced, and to be an abstract, open formula that could accommodate a ‘wide range of exceptions’.<sup>239</sup>

4.143 Another historical development to note is that in 1996 the three-step test was incorporated into the *World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)*<sup>240</sup> and *WIPO Performances and Phonograms Treaty (WPPT)*,<sup>241</sup> both sometimes collectively referred to as the WIPO Internet treaties. Article 10 of the WCT applies the three-step test to the rights newly protected under the WCT, such as the right of communication, as well as to those rights already protected by the *Berne Convention*. Article 16 of the WPPT extends the three-step test so that it is applicable to exceptions to all economic rights of performers and producers of phonograms (that is, some of the holders of so-called related or neighbouring rights).

4.144 The Diplomatic Conference that adopted the WCT and WPPT texts, adopted the following agreed statement in respect of art 10 of the WCT, which applies ‘mutatis mutandis’ to art 16 of the WPPT.<sup>242</sup>

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the

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236 S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003), prepared for the World Intellectual Property Organization Standing Committee on Copyright and Related Rights Ninth Session, 20.

237 See, eg, R Burrell and others, *Submission 278*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*.

238 M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004).

239 Copyright Advisory Group—Schools, *Submission 231*.

240 *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002). There was another ‘double insertion’. The first insertion is by operation of art 1(4) of the WCT which incorporates art 9(2) of the *Berne Convention* into the WCT. The second insertion is by operation of art 10 of the WCT.

241 *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, ATS 27 (entered into force on 20 May 2002).

242 *Agreed statements concerning WIPO Performances and Phonograms Treaty*, adopted by the Diplomatic Conference on December 20, 1996, concerning art 16.

*Berne Convention*. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.<sup>243</sup>

4.145 One commentator has observed:

Pursuant to article 31(2)(a) of the *Vienna Convention [on the Law of Treaties]*, ‘any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty’ forms part of the context for the purpose of interpretation. The agreed statement concerning article 10 WCT is thus a relatively strong source of interpretation. ... [I]t must be considered directly in connection with the treaty text itself.<sup>244</sup>

4.146 The CLRC took the view that its extended fair dealing model would be consistent with the three-step test, in part because it considered that its model would be ‘one such appropriate extension into the digital environment’ and so would be ‘in the spirit of art 10’ of the WCT in light of the agreed statement.<sup>245</sup>

***No challenges in international fora***

4.147 The US has never seriously been challenged about the consistency of its fair use exception with the three-step test.<sup>246</sup> Opportunities for such challenge included the steps taken to adhere to the *Berne Convention*—‘years of public hearings before the US Congress, as well as numerous consultations with WIPO and foreign experts’<sup>247</sup>—where transcripts of hearings reveal that not once was there considered to be a problem with fair use and the three-step test.<sup>248</sup> Further, one submission referred to a WTO review of copyright legislation in 2006 where in response to a question about the consistency of US fair use with art 13 of TRIPs, the US replied:

The fair use doctrine of US copyright law embodies essentially the same goals as Article 13 of TRIPs, and is applied and interpreted in a way entirely congruent with the standards set forth in that Article.<sup>249</sup>

4.148 Universities Australia made a similar point, submitting:

Hugenholz and Senftleben have noted that the Minutes of Main Committee for the 1996 WIPO Diplomatic Conference (that led to the adoption of the WIPO Internet Treaties) provide evidence of ‘the determination to shelter use privileges’, including determination on the part of the US to ‘safeguard the fair use doctrine’.<sup>250</sup>

243 Agreed Statements Concerning the WIPO Copyright Treaty, adopted by the Diplomatic Conference on 20 December 1996, concerning art 10.

244 M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004), 106.

245 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), 54.

246 R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*.

247 W Patry, *Fair Use and Fair Dealing* (2008), 8.

248 Ibid.

249 R Giblin, *Submission 251*. See W Patry, *Patry on Fair Use* (2012), 554–57. Giblin notes the response was accepted.

250 Universities Australia, *Submission 246* citing B Hugenholz and M Senftleben, *Fair Use in Europe: In Search of Flexibilities* (2011), 22.

4.149 Finally, a number of other countries have introduced an exception for fair use or extended fair dealing, including: The Philippines, Israel, the Republic of Korea and Singapore.<sup>251</sup> Like Australia, all of these countries are party to the *Berne Convention*, the WCT and the WPPT, amongst other WIPO treaties, and are WTO members.<sup>252</sup> None of these countries have been challenged in international fora about their enactment of such provisions.

**Proposal 4–1** The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.

**Proposal 4–2** The new fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').

## The proposed fair use exception

### The fairness factors

4.150 The fair use exception proposed contains four fairness factors. These serve as a checklist of factors to be considered in a given case, with no one factor being more important than another. Rather, all factors would need to be considered and balanced and a decision made in view of all of them.

4.151 The list of fairness factors is non-exhaustive. Other factors may be considered. For example, principles of justice, equity and perhaps even acknowledgment of moral rights may also be relevant in determining the fairness of a use.

4.152 The fairness factors proposed are based upon the four factors that are common to both the US fair use provision and the existing Australian provisions for fair dealing for the purpose of research or study—specifically the CLRC's consolidated expression of them. The ALRC proposes wording that closely paraphrases these similar factors but also seeks to improve the clarity of the language.

<sup>251</sup> *Copyright Act 1987* (Singapore) ss 35, 109.

<sup>252</sup> The fact that these other countries have fair use provisions is insufficient to constitute 'subsequent practice' for the purpose of the interpretation of *TRIPs*. See *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980), art 31(3)(b); M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004), 108–9; M Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5 *Journal of International Economic Law* 17, 32–35.

4.153 Analysis of the four factor test in the US requires consideration of the following matters.<sup>253</sup>

- *First factor*—‘*the purpose and character of the use*’. This factor encompasses two issues. First, was the defendant’s use commercial? Secondly, was the use ‘transformative’?<sup>254</sup>
- *Second factor*—‘*the nature of the copyrighted work*’. Again there are two separate matters to be considered. First, was the plaintiff’s work creative? Secondly, was that work published?
- *Third factor*—‘*the amount and substantiality of the portion used in relation to the copyrighted work as a whole*’. This consists of an evaluation of two matters. First, how much is the defendant alleged to have taken? Secondly, how important was that taking in the context of the plaintiff’s work?
- *Fourth factor*—‘*effect upon the market for or value of the copyrighted work*’. What is the market effect of the defendant’s conduct?

4.154 A number of submissions called for the use of the existing fairness factors for the fair dealing exceptions for research or study<sup>255</sup> or the US fairness factors<sup>256</sup>—a number commenting on their similarity<sup>257</sup>—in determining the fairness of a use under a new fair use exception.

4.155 Reasons given in support of a new Australian fair use exception which adopts these fairness factors included:

- they derive from the common law;<sup>258</sup>
- the four factors in the US and Australia are substantially the same,<sup>259</sup> so Australian courts are familiar with them<sup>260</sup> and so are ‘academics and students who have relied on the fair dealing exception to undertake their own research and study’;<sup>261</sup>
- they are ‘easily understood’ so would ‘assist users to feel confident making their own evaluation of how they are able to use copyright material in their own specific circumstance’;<sup>262</sup>

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253 See, eg, M Sag, ‘Predicting Fair Use’ (2012) 73 *Ohio State Law Journal* 47, 54–5.

254 See Ch 11.

255 See, eg, EFA, *Submission* 258; Copyright Advisory Group—Schools, *Submission* 231; Google, *Submission* 217.

256 See, eg, Universities Australia, *Submission* 246; Copyright Advisory Group—Schools, *Submission* 231; Google, *Submission* 217.

257 See, eg, Google, *Submission* 217. The similarity of four of the five fairness factors was also recognised by rights holders and others assisting them. For example, Copyright Agency/Viscopy, *Submission* 249; Australian Copyright Council, *Submission* 219.

258 Universities Australia, *Submission* 246.

259 Ibid.

260 ADA and ALCC, *Submission* 213.

261 Universities Australia, *Submission* 246.

262 R Wright, *Submission* 167.

- they are already being applied by some institutions with respect to orphan works and other copyright material in the mistaken belief that Australia already provides a fair use exception;<sup>263</sup>
- they are substantially the same as those used in other countries such as Israel and the Philippines;<sup>264</sup> and
- Australian courts would be able to have regard to extensive US jurisprudence<sup>265</sup> as well as that of other countries who have adopted a similar flexible, fairness-based model.<sup>266</sup>

4.156 Some also commented that this would afford courts and users greater statutory guidance than currently exists with respect to assessing the fairness of dealings for the specified purposes other than research or study.<sup>267</sup>

**Proposal 4–3** The non-exhaustive list of fairness factors should be:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material used;
- (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

### The illustrative purposes

4.157 The fair use exception should contain a non-exhaustive list of illustrative uses or purposes of fair use. These may be thought of as examples of the broad types of uses that may be fair.

4.158 The fair use exceptions in the US and other countries that have enacted fair use or extended fair dealing exceptions, all include illustrative purposes or examples of fair use.

4.159 The importance of listing illustrative purposes in the fair use exception was noted in a number of submissions.<sup>268</sup> For example, the Law Council of Australia

<sup>263</sup> ADA and ALCC, *Submission 213*.

<sup>264</sup> Universities Australia, *Submission 246*.

<sup>265</sup> R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria (LIV), *Submission 198*.

<sup>266</sup> R Giblin, *Submission 251*; Universities Australia, *Submission 246*.

<sup>267</sup> R Burrell and others, *Submission 278*; K Bowrey, *Submission 94*.

<sup>268</sup> See, eg, Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*; Grey Literature Strategies Research Project, *Submission 250*; Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Law Institute of Victoria (LIV), *Submission 198*; R Wright, *Submission 167*; M Rimmer, *Submission 122*.



suggested a fair use model ‘that would include reference to the existing specific copyright exceptions which would then act as examples to courts of the types of activities that constitute fair use’.<sup>269</sup> Similarly, the National Library of Australia called for some existing exceptions

[to] be gathered together under the umbrella of a new fair use exception, and that existing exceptions be listed as within this general exception, illustrating but not defining the extent, of the fair use exception.<sup>270</sup>

4.160 The fact that a particular use falls into one of the categories of illustrative purposes does not necessarily mean that the use will be fair. Nor does this create a presumption that the use is fair.

4.161 Conversely, the fact that a use is not included as an illustrative purpose will not be a bar to that use constituting a fair use. In theory, a use for any purpose may be considered under the fair use exception.

4.162 Some submissions noted the need for the purposes to be illustrative only and non-exhaustive.<sup>271</sup> For example, Universities Australia stressed the need for the exception to be ‘sufficiently flexible to allow courts to determine that uses that are not expressly referred to in any opening words or preamble are nevertheless permitted subject only to a fairness test’.<sup>272</sup> It continued:

it should be sufficiently flexible to allow courts to determine that uses that are unanticipated at the time that the exception is introduced come within the scope of the exception if found to be fair.<sup>273</sup>

4.163 The ALRC’s list of proposed illustrative purposes includes purposes that are:

- currently the subject of purpose-based exceptions—for example, all but one of the existing fair dealing purposes; and
- not currently the subject of express free use exceptions in the *Copyright Act*—for example, quotation and non-consumptive use.

4.164 A number of submissions supported this approach, particularly with respect to consolidating the existing fair dealing provisions into a more general fair use exception.<sup>274</sup>

4.165 The rationale for including the specific illustrative purposes proposed below is made in a number of other chapters in this Discussion Paper.<sup>275</sup>

269 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*.

270 National Library of Australia, *Submission 218*. This idea was supported by Grey Literature Strategies Research Project, *Submission 250*.

271 See, eg, Grey Literature Strategies Research Project, *Submission 250*; Universities Australia, *Submission 246*; National Library of Australia, *Submission 218*.

272 Universities Australia, *Submission 246*.

273 Ibid.

274 See, eg, Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Law Institute of Victoria (LIV), *Submission 198*; M Rimmer, *Submission 122*.

275 See Ch 7 (Fair Dealing); Ch 8 (Non-consumptive Use); Ch 9 (Private and Domestic Use); Ch 10 (Transformative Use and Quotation); Ch 13 (Educational Use) and Ch 14 (Government Use).

**Proposal 4-4** The non-exhaustive list of illustrative purposes should include the following:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) non-consumptive;
- (f) private and domestic;
- (g) quotation;
- (h) education; and
- (i) public administration.

**Question 4-1** What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

### Relationship with existing exceptions

4.166 If Australia is to adopt the new fair use exception then it is critical to determine the relationship with exceptions currently in the *Copyright Act*. It might be said that the issue of how fair use would fit with the existing exceptions and statutory licences was considered ‘very little’ during the earlier debates.<sup>276</sup>

4.167 In the Issues Paper, the ALRC asked whether a new broad, flexible exception should replace all or some existing exceptions or should apply in addition to existing exceptions.<sup>277</sup> Submissions in favour of a new broad, flexible exception appeared to give the greatest attention to answering this issue. Among the options canvassed there was support for repeal of some exceptions,<sup>278</sup> perhaps with a transitional approach.<sup>279</sup>

4.168 The main concerns expressed in response to this question were for a model that would best ensure the retention of the existing Australian jurisprudence,<sup>280</sup> provide

276 M Wyburn, ‘Higher Education and Fair Use: A Wider Copyright Defence in the Face of the Australia-United States Free Trade Agreement Changes’ (2006) 17 *Australian Intellectual Property Journal* 181, 208.

277 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 53.

278 See, eg, NSW Government, *Submission 294*; R Burrell and others, *Submission 278*; Universities Australia, *Submission 246*; State Records NSW, *Submission 160*; S Hawkins, *Submission 15*.

279 S Hawkins, *Submission 15*. Singapore appears to have included transitional provisions in its move to a general fair dealing exception so as to protect existing rights under contracts entered into under the former law. See Singapore, *Parliamentary* 16 November 2004, 1041 (Professor S Jayakumar—Deputy Prime Minister and Minister for Law).

280 See, eg, SBS and others, *Submission 295*; Internet Industry Association, *Submission 253*; Australian Broadcasting Corporation, *Submission 210*.

clarity,<sup>281</sup> as well as allow the development of further exceptions in response to changing technology and practices.<sup>282</sup>

4.169 The Copyright Advisory Group—Schools suggested that a degree of certainty may be attained in other ways, including drawing upon the Israeli model of deeming certain uses as fair *ex ante*—that is, before the event.<sup>283</sup> Under the fair use regime in Israel, the Minister of Justice may make regulations prescribing conditions under which a use shall be deemed a fair use.<sup>284</sup> As one commentator has remarked:

This novel method may provide some certainty and clarity for future users who wish to rely on the fair-use defense. It overcomes some of the chilling effects that vague standard-based exemptions involve; especially regarding users who by nature are risk-averse. However, sec 19(c) could also lead to its minimum safe harbors becoming a de-facto ceiling.<sup>285</sup>

4.170 The ALRC considers that it is preferable to introduce a model that replaces some of the existing exceptions, particularly where it is anticipated that many of the existing excepted uses would be covered by the new fair use exception. This would reduce the length and detail of the *Copyright Act* and should assist in mitigating statutory interpretation problems.

4.171 Elsewhere, this Discussion Paper contains proposals to repeal a range of specific exceptions, if fair use is enacted. The exceptions are as follows:

- In Chapter 7 ('Fair Dealing'): ss 40(1), 103C(1), 41, 103A, 41A, 103AA, 42, 103B, 43(2), 104(b).
- In Chapter 8 ('Non-consumptive use'): ss 43A, 111A, 43B, 111B, 200AAA.
- In Chapter 9 ('Private and Domestic Use'): ss 43C, 47J, 109A, 110AA, 111.
- In Chapter 11 ('Libraries, Archives and Digitisation'): s 200AB.
- In Chapter 13 ('Educational Use'): ss 28, 44, 200, 200AAA.
- In Chapter 14 ('Government Use'): ss 43(1), 104(1), 48A, 104A.
- In Chapter 16 ('Broadcasting'): ss 45, 67.

4.172 On further review, there may be other exceptions that should also be repealed, if fair use is enacted. Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall submitted a comprehensive list of such provisions, and a list of those that should clearly remain.<sup>286</sup> The former list contains a range of provisions, including

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281 SBS and others, *Submission 295*; Internet Industry Association, *Submission 253*.

282 Australian Broadcasting Corporation, *Submission 210*.

283 Copyright Advisory Group—Schools, *Submission 231*.

284 *Copyright Act 2007* (Israel) s 19(c).

285 G Pessach, 'The New Israeli Copyright Act: A Case-Study in Reverse Comparative Law' (2010) 41 *International Review of Intellectual Property and Competition Law* 187, 190.

286 R Burrell and others, *Submission 278*.

exceptions relating to product information for chemicals and medicines,<sup>287</sup> and computer programs,<sup>288</sup> which the ALRC has not examined at this stage.

4.173 Other stakeholders suggested the repeal of certain exceptions, regardless of fair use reform. For example, the Arts Law Centre of Australia submitted that ss 65–68, which provide exceptions for the use of public art and artistic works should be repealed ‘at the least insofar as they permit commercial uses of any reproductions made under them’.<sup>289</sup>

4.174 Repeal of specific exceptions is proposed, in part, in the expectation that most uses now covered would remain permitted under a developing Australian fair use law. However, it is possible that some uses covered by these specific exceptions may not meet the test under the proposed fair use exception. As ARIA observed, ‘[i]n some cases exceptions in Australian law are more generous than those found under US law’.<sup>290</sup>

**Question 4–2** If fair use is enacted, the ALRC proposes that a range of specific exceptions be repealed. What other exceptions should be repealed if fair use is enacted?

### Interpreting fair use

4.175 The fair use exception contains some guidance for users of copyright material and the courts—namely the list of illustrative purposes and more importantly, the four fairness factors. This would provide users and courts with more statutory guidance than they currently have with respect to some of the exceptions such as the fair dealing exceptions for purposes other than research or study.<sup>291</sup>

4.176 Further guidance may be found in:

- existing Australian case law;
- other relevant jurisdictions’ case law; and
- any industry guidelines that are developed.

4.177 A number of submissions considered that, if a new fair use exception were enacted, existing Australian case law, particularly that pertaining to fair dealing, would be of some relevance and provide some guidance to the courts.<sup>292</sup> For example, the Law Institute of Victoria submitted, ‘[g]iven the similarity of the US fair use factors

287 *Copyright Act 1968* (Cth) ss 44B, 44BA.

288 *Ibid* ss 47AB, 47A, 47B, 47C, 47D, 47E, 47F, 47G, 47H.

289 Arts Law Centre of Australia, *Submission 171*. The ALRC proposes the repeal of s 67: see Ch 16.

290 ARIA, *Submission 241*.

291 R Burrell and others, *Submission 278*; K Bowrey, *Submission 94*.

292 R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria (LIV), *Submission 198*.

with the Australian factors for determining fair dealing, our jurisprudence on when a dealing is fair may also be of assistance'.<sup>293</sup>

4.178 However, others were concerned that 'it may result in arguments that the current fair dealing exceptions have been relaxed'.<sup>294</sup> In a joint submission, SBS, Commercial Radio Australia and the ABC expressed concern that any proposal to include the fair dealing exceptions for the purposes of reporting news, criticism or review, and parody or satire within a fair use provision would mean that these exceptions would be 'open to re-litigation' and their operation may be restricted.<sup>295</sup>

4.179 A number of submissions were of the view that it would be helpful if Australian courts could draw upon US or other countries' jurisprudence.<sup>296</sup> The Law Council of Australia submitted:

as a relatively small country, the amount of litigation in relation to copyright should also be relatively small. Drawing upon the jurisprudence of the United States would permit Australia to take advantage of the intellectual and financial investment in the creation of that jurisprudence over many years without the disadvantage of having to expend significant judicial resources in the development of a completely stand alone Australian view of fair use.<sup>297</sup>

4.180 Google submitted that Australian courts would be able to draw upon the approaches taken in other relevant jurisdictions and clarified:

This is not to say, of course, that US or other foreign jurisprudence would be exported in its entirety to Australia; but rather that Australian judges would not necessarily be starting with a blank slate when deciding fair use cases.<sup>298</sup>

4.181 Some who considered that Australian courts would be able to use US or other countries' jurisprudence to inform their decisions submitted that it would be helpful for this to be specified,<sup>299</sup> possibly by an express statement in the relevant Explanatory Memorandum.<sup>300</sup> As the Australian Digital Alliance and Australian Libraries Copyright Committee submitted:

If the ALRC believes there is merit in referring Australian courts to the approach adopted by courts in the United States, it could recommend that this be clarified by a statement in an accompanying explanatory memorandum to any new provision.<sup>301</sup>

4.182 In the ALRC's view, an express statement about the extent to which US or other countries' jurisprudence should be taken into account by Australian courts is unnecessary. It is well-established that foreign case law may be used by Australian

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293 Law Institute of Victoria (LIV), *Submission 198*.

294 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

295 SBS and others, *Submission 295*.

296 See, eg, Law Council of Australia IP Committee, *Submission 284*; R Burrell and others, *Submission 278*; Law Council of Australia, *Submission 263*; Universities Australia, *Submission 246*; Google, *Submission 217*.

297 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*.

298 Google, *Submission 217*.

299 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*; Universities Australia, *Submission 246*.

300 R Burrell and others, *Submission 278*; ADA and ALCC, *Submission 213*.

301 ADA and ALCC, *Submission 213*.

courts, to the extent that the reasoning of such decisions is persuasive.<sup>302</sup> If fair use is enacted, the ALRC would expect that Australian courts may look to US case law, in particular, as one source of interpretative guidance, but would not be bound by such decisions.

4.183 Another way in which some certainty could be sought in a fair use regime is by the development of industry guidelines and codes of practice.<sup>303</sup>

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302 In *Tabet v Gett* (2010) 240 CLR 537, a negligence case, the High Court referred to case law in England, Canada, the United States, France, the Netherlands, Italy, Portugal, Spain, Germany, Austria, Greece, Norway, Estonia and Lithuania. See also *Hancock v Nominal Defendant* [2002] 1 Qd R 578, another negligence case, in which the Queensland Court of Appeal referred to case law from England, Canada, New Zealand, South Africa, Scotland, the United States and Ireland. Byrne J alone cited more than 60 US cases.

303 There is precedent for such use in the US, although views diverge as to the assistance such documents provide: J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights; P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011); K Crews, 'The Law of Fair Use and the Illusion of Fair-Use Guidelines' (2001) 62 *Ohio State Law Journal* 599.

## 5. Third Parties

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### Summary

5.1 Should a company be free to copy and store broadcast television programs for its customers, or copy music the customer has already bought, from one device to another or to the cloud? Should a school be free to copy material for its students, or a library for its patrons, if the students or patrons would have been permitted to copy the material themselves? This chapter considers such ‘third party’ uses of copyright material, where the third party copies or otherwise uses copyright material on behalf of others. These are unlicensed uses to deliver a service, sometimes for profit, in circumstances where the same use by the ‘end-user’ would be permitted under a free-use exception.

5.2 The ALRC concludes that such uses should be considered under the fair use exception proposed in Chapter 4, in determining whether the use infringes copyright.

5.3 A use might sometimes be considered fair when a third party appears merely to be facilitating an otherwise fair use, such as some types of private and domestic use. Other factors, however, such as whether the use is transformative, for a commercial purpose, or harms the rights holder’s market, may be more important.

### Examples of third party uses

5.4 Many organisations, businesses and technologies may be thought to help ‘facilitate’ uses of copyright material. To varying degrees, computers, home recording devices, many software programs and popular apps, the internet itself, all facilitate copying—some more directly than others.

5.5 Some businesses sell machines, computers, or software programs that enable their customers to make copies in their homes; other businesses make, store and communicate the copies more directly. Some services help people copy material they

already own; others copy and collect material the consumer may only be free to access, such as so-called ‘free’ web and broadcast content, and books in libraries.

5.6 The spectrum of these activities is wide. At one end may be pure storage services. A third party such as an internet service provider may offer a cloud storage facility that allows customers to store a copy of a music file, for example, on a remote server.<sup>1</sup> Many argue that simply storing customers’ files in remote computer servers should not infringe copyright, even if the service provider must make copies of the files and communicate those files to ‘the public’ (that is, to their customer).

5.7 Other services on this spectrum may include:

- scanning a customer’s computer and then copying the files and storing them for back-up, perhaps on a remote computer;
- educational institutions copying material for students;
- a photocopying company copying material for students;
- a video hosting web platform copying and communicating the transformative works of its users;
- taking a customer’s collection of music CDs and making digital copies for the customer to use;
- scanning hardcopies of a customer’s books (that is, ‘format shifting’ them), and giving the customer electronic versions;
- a web application that allows users to copy and collect web pages, perhaps stripping them of advertisements and images to make the text easier to read; and
- a web application for managing research resources that allows users to store copies of web pages, journal articles and other copyright material in the cloud.

5.8 These are all existing business models that arguably involve a third party using copyright material for a customer, in a way that the customer may be permitted to use themselves. Many more examples could be provided.

### **Should third parties benefit?**

5.9 One way to consider the question of whether unlicensed third parties should be permitted to facilitate such copying is to ask, as the ALRC asked in the Issues Paper in the context of the time-shifting exception, whether it should matter who makes the copies.<sup>2</sup>

5.10 Some stakeholders told the ALRC that it matters very much who makes the copies. Foxtel submitted that it was critically important because if ‘the recording is not made by a private individual, rights holders’ ability to monetise their content may be

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1 This chapter does not concern the related question of internet service provider liability, or other third party liability, for copyright infringement, which is outside the Terms of Reference.

2 The private copying exceptions are considered more broadly in Ch 9.



seriously prejudiced'.<sup>3</sup> The Coalition of Major Professional and Participation Sports said that there is a

fundamental distinction between recordings made by consumers but later stored on a remote server and recordings made by companies, for commercial gain, and stored on remote servers for their subscribers to access. The latter can significantly impact on the ability of content owners to exploit their rights and should not be allowed without the consent of the rights holder.<sup>4</sup>

5.11 Free TV Australia similarly submitted that:

Third parties exploiting free to air signals without the permission or compensation of broadcasters as copyright owners are undermining the economic interests of broadcasters. Broadcasters as copyright owners are entitled to control the exploitation of their signals and should be appropriately compensated by third parties reaping commercial gain from their broadcast signals.<sup>5</sup>

5.12 Many submissions, even some which supported exceptions for private copying, drew the line at unlicensed third parties commercially benefiting from making copies for consumers. This was not confined to time-shifting. Commercial Radio Australia, for example, said consumers should be able to take full advantage of technology, but commercial gain should be reserved for rights holders.<sup>6</sup> Exceptions should be limited

to prevent an erosion of rightholders' ability to control the commercial exploitation of their content. New uses and technologies should not provide a means by which rightholders might be wrested of such control. .... The time and format shifting exceptions should not cover copying by a company on behalf of an individual, where that company stands to make commercial gain from the copying. Commercial exploitation rights should be reserved for rightholders.<sup>7</sup>

5.13 Tabcorp said that the private copying exceptions 'should be limited to private individuals and should not be extended to companies who can commercially exploit the recordings so as to prevent the diminution of the value of the broadcasters' rights'.<sup>8</sup>

5.14 Foxtel stated that expanding the exceptions 'to allow unlicensed third parties to profit at the expense of those who invest in the creation of content would be entirely inequitable'.<sup>9</sup>

5.15 Telstra also submitted that the time-shifting exception should be clarified, and a distinction made between 'recordings made by a customer using their own technology and later stored on a remote server; and recordings made by entities, not licensed by rights holders, and stored on remote servers for subscribers to access'. The latter category, Telstra said, is a commercial exploitation and must require a licence from the content owner.<sup>10</sup>

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3 Foxtel, *Submission 245*.

4 COMPPS, *Submission 266*.

5 Free TV Australia, *Submission 270*.

6 Commercial Radio Australia, *Submission 132*.

7 Ibid.

8 Tabcorp Holdings Ltd, *Submission 164*.

9 Foxtel, *Submission 245*.

10 Telstra Corporation Limited, *Submission 222*.

5.16 The Music Council of Australia submitted:

If a service provider is obtaining a commercial benefit from the use of copyright material—that is, capturing the copyright owner’s public—it should obtain a licence and pay remuneration to the copyright owner. Such remuneration is a cost of doing business, like any other.<sup>11</sup>

5.17 One common objection is that these businesses are ‘free riding’.

## **Inhibiting innovation**

5.18 Others submitted that blanket prohibitions on third parties benefiting from such uses of copyright material may inhibit innovation. For example, iiNet submitted that it should not matter who makes a recording from a broadcast, if it is made ‘in a domestic setting’ and ‘if the underlying purpose of the recording is fair’. In this way, iiNet said, ‘competition between technologies will be promoted’.<sup>12</sup>

5.19 Ericsson also submitted that it should not matter who makes the recording.

The success of the digital economy, enabled primarily by the IT and telecommunications sectors, has been based on sustained and continuous innovation. This has driven continuous improvement of technologies and services and has provided a competitive incentive for differentiation amongst competing players across different industries. Therefore, using [information and communications technology] to simplify or differentiate services or offerings should not be prohibited by law.<sup>13</sup>

5.20 Dr Rebecca Giblin saw the Full Federal Court’s *Optus TV Now*<sup>14</sup> decision as a potential threat not only to new digital technologies, but also to established recording devices. Rights holders, Giblin submitted, may now ‘exert pressure on Australian [digital video recorder] providers to reduce the features they offer’.

Australians may be limited to ‘dumb’ technologies that don’t offer the most convenient and useful features. Alternatively, technology providers may be obliged to license rights to avoid the threat of litigation, forcing consumers to pay higher prices and effectively abrogating their statutory right to time-shift. The judgment also introduces uncertainty for providers of unrelated technologies, particularly cloud or remote storage providers.<sup>15</sup>

5.21 Others drew a distinction between ‘pure copying’ and ‘value-added services’. The ACCC said there was potential for growth in products and services that enable consumers to use copyright material for personal use. If confined ‘purely to copying, as opposed to transforming or value-adding’, the ACCC said, ‘these markets should be opened to parties other than copyright owners’.

Limiting the development of such services risks reducing the incentives for copyright owner to innovate to meet consumer demands.<sup>16</sup>

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11 Music Council of Australia, *Submission 269*.

12 iiNet Limited, *Submission 186*.

13 Ericsson, *Submission 151*.

14 *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.

15 R Giblin, *Submission 251*.

16 ACCC, *Submission 165*.

## Depends on the market

5.22 Some stakeholders also said it was important to consider whether the rights holders offer a comparable service. If a rights holder has already created a scheme through which consumers can view programming at a later time, for example, then personal or third-party time-shifting should not be allowed. The ABC submitted that:

Where the cloud service is being offered in competition with the true rights holder, then it is important to consider what legal access to the content is already available to the public. If the content is already accessible on demand by way of a catch-up service by a legitimate rights holder, then the competing cloud service should not be able to offer that content.<sup>17</sup>

5.23 Taking this argument further, some might ask whether exceptions for time-shifting free to air broadcasts are now fair at all, when the programs can be watched at a later time through online catch-up services. ARIA noted that Australia's time-shifting exception had its origins in 'an era of analogue broadcasts where programming and time constraints meant that the opportunities to catch up on a missed broadcast program were limited'.<sup>18</sup>

5.24 However few would now say that all unlicensed copying of broadcast material for time-shifting should be prohibited. Consumers very much expect to be able to make these copies. Further, some argue that exceptions to allow the making of private and domestic copies encourage the development of innovative and efficient services and consumer products.<sup>19</sup>

## Who made the copy?

5.25 As suggested above, the question of whether a use is fair can sometimes be avoided altogether by arguing that the material was not in fact used by the third party at all—that it was not the third party, but only the end-user, who used the rights. The threshold question will often be: who made the copy? In other cases, the question might be whether the material was communicated to the public.

5.26 The question of third parties facilitating private and domestic uses has most recently been discussed in Australia in the context of the Optus TV Now service, and the Federal Court cases it prompted. The service enabled subscribers:

to have free to air television programmes recorded as and when broadcast and then played back at the time (or times) of the subscriber's choosing on the subscriber's compatible Optus mobile device or personal computer. The system which permits such 'time-shifting' of programme viewing requires the copying and storing of each

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<sup>17</sup> Australian Broadcasting Corporation, *Submission 210*.

<sup>18</sup> ARIA, *Submission 241*.

<sup>19</sup> For example, one recent study found that a fair use policy in Singapore positively influenced growth rates in the private copying technology industries: R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), prepared for Google.

television broadcast recorded for a subscriber, hence the allegations of copyright infringement in this matter.<sup>20</sup>

5.27 The Optus TV Now technology was described in the judgment. Essentially, copies of broadcasts were made, stored, and later transmitted from an Optus data centre, on instruction from Optus subscribers using electronic program guides.

5.28 Optus argued before the Federal Court that it did not copy these broadcasts, its customers did. Optus emphasised that ‘the person who made the copy was the person who did the act of making, eg by selecting the material to be copied and by initiating the other acts to create the copy. Optus merely provided the automated service by which the recording could be made’.<sup>21</sup>

5.29 The Full Federal Court disagreed, and concluded that

each cinematograph film and sound recording of the broadcasts and copies of the films in the Agreed Facts which was brought into existence after a subscriber had clicked the ‘record’ button on that subscriber’s Optus compatible device, was not made by the subscriber alone. It was made either by Optus alone or by Optus and the subscriber.<sup>22</sup>

5.30 Related questions concerning whether a service communicates works to the public have also been raised recently in the United States, perhaps most importantly in the 2008 Supreme Court case, *Cartoon Network LP v CSC Holdings*. In this case, a cable television company, Cablevision, offered a remote personal video recorder service. It stored copies of television programs in digital lockers dedicated to each of its customers, and would later transmit those copies to its customers, when the customers wanted to view the program. Cablevision successfully argued that this transmission is not ‘to the public’, because each customer had a dedicated copy, and that copy was only streamed to that particular customer.<sup>23</sup>

5.31 A similar question arose again in response to a new US company, Aereo, which captures live broadcast television on thousands of small aerials—one aerial for each customer—and then delivers the broadcast content to its customers via the internet. Aereo is not licensed to do this; it does not pay the retransmission fees that cable companies pay to broadcasters. In April 2013, the US Court of Appeals for the Second Circuit concluded that ‘Aereo’s transmissions of unique copies of broadcast television programs created at its users’ requests and transmitted while the programs are still airing on broadcast television are not “public performances” of the Plaintiffs’ copyrighted works under *Cablevision*’.<sup>24</sup>

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20 *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147, [1].

21 *Ibid.*

22 *Ibid.*

23 J Ginsburg and R Gorman, *Copyright Law* (2012), 169.

24 *WNET, Thirteen, Fox Television Stations, Inc. v. Aereo, Inc.*, USCA (2nd Circuit, 2013).

5.32 In a strong dissenting opinion, Judge Chin said the Aereo service was ‘over-engineered in an attempt to avoid the reach of the *Copyright Act* and to take advantage of a perceived loophole in the law’.<sup>25</sup> Further, Judge Chin wrote:

Under Aereo’s theory, by using these individual antennas and copies, it may retransmit, for example, the Super Bowl ‘live’ to 50,000 subscribers and yet, because each subscriber has an individual antenna and a ‘unique recorded cop[y]’ of the broadcast, these are ‘private’ performances. Of course, the argument makes no sense. These are very much public performances.<sup>26</sup>

5.33 The *Cablevision* decision has also been criticised. US professors Jane Ginsburg and Robert Gordon have written that the ‘court’s parsing of the text in the *Copyright Act* is very problematic’. Among other things, Ginsburg and Gordon stress that ‘it should not matter whether “the performance” originates from a single source copy repeatedly transmitted to individual members of the public “in different places at different times,” or from multiple copies each corresponding to a particular place and/or time’.<sup>27</sup>

5.34 Elsewhere, Ginsburg, discussing *Cablevision*, writes:

Arguably, if the end-user’s copying would be fair use, then assisting that copying should not be infringing either, whether the assistance comes in the form of enabling the end-user to do the copying herself, or instead doing the copying for the user. But the caselaw is far from clear that copying on behalf of the user is fair use. For example, the decisions involving photocopy shops generally reject the proposition that the commercial photocopyist is in a sense subrogated to what might be educational fair use copying by the end-user.<sup>28</sup>

5.35 The ALRC is wary of attempts, using new technologies, to avoid the question of whether the rights were exploited at all. In such cases, as a matter of policy, it may be preferable to give a generous interpretation to the scope of the rights, and then to consider the important question of whether the exploitation of the rights was fair.

## Whose purpose?

5.36 Unlike fair use, many exceptions are confined to a particular purpose or set of circumstances. The framing of these exceptions often raises the question of whether the person who uses the material, rather than the end-user, must have the requisite purpose for the exception to apply.

5.37 For example, the time-shifting exception in s 111 of the *Copyright Act* only applies if the person who makes the copy is the same person for whom the copy is made (to watch at a more convenient time). Considering the Optus TV Now service, discussed above, the Full Federal Court held:

There is nothing in the language, or the provenance, of s 111 to suggest that it was intended to cover commercial copying on behalf of individuals. Moreover, the natural

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25 Ibid.

26 Ibid.

27 J Ginsburg and R Gorman, *Copyright Law* (2012), 170.

28 J Ginsburg, *Recent Developments in US Copyright Law—Part II, Caselaw: Exclusive Rights on the Ebb?*, Columbia Public Law & Legal Theory Working Paper 08158 (2008), 17.

meaning of the section is that the person who makes the copy is the person whose purpose is to use it as prescribed by s 111(1). Optus may well be said to have copied programmes so that others can use the recorded programme for the purpose envisaged by s 111. Optus, though, makes no use itself of the copies as it frankly concedes. It merely stores them for 30 days. And its purpose in providing its service—and, hence in making copies of programmes for subscribers—is to derive such market advantage in the digital TV industry as its commercial exploitation can provide. Optus cannot invoke the s 111 exception.<sup>29</sup>

5.38 The fair dealing exceptions are likewise confined to the prescribed purposes, such as the purpose of research or study. In *De Garis*, the Federal Court said the relevant purpose required by the fair dealing for the purpose of research or study exception in s 40 of the *Copyright Act* was that of the defendant, a news clipping service, not that of its customers.<sup>30</sup> The news clipping service was not copying for the purpose of research or study, even if the copies were to be used by its customers for that purpose.

5.39 This distinction was criticised in some submissions to this Inquiry. Some Australian copyright academics submitted that it is

entirely artificial to privilege acts of reproduction or copying that can be done by a researcher themselves over acts that require the involvement of a third party, such as an intermediary to assist with the copying or a publisher to disseminate the research output.<sup>31</sup>

5.40 A more flexible reading of a fair dealing provision was recently made by the Supreme Court of Canada. In 2012, the Court considered ‘whether photocopies made by teachers to distribute to students as part of class instruction can qualify as fair dealing’ under Canadian copyright legislation—and concluded that they could qualify.<sup>32</sup> The Court stated that photocopies made by a teacher and given to students are ‘an essential element in the research and private study undertaken by those students’.<sup>33</sup> The Court held that teachers

have no ulterior motive when providing copies to students. Nor can teachers be characterised as having the completely separate purpose of ‘instruction’; they are there to facilitate the students’ research and private study.<sup>34</sup>

5.41 Sometimes a third party’s use may seem merely to amount to facilitating another person’s fair use; they will have no ulterior purpose themselves. But often there will be some other ulterior purpose.

5.42 Applying fair use, the question then might be, is a third party use of copyright material more *likely* to be fair than it otherwise would, if the use is simply for another person who would be entitled to make the same use? Is a third party use that facilitates

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29 *Singtel Optus v National Rugby League Investments (No 2)* [2012] 34 FCA (1 February 2012).

30 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99.

31 R Burrell and others, *Submission 278*.

32 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada), [1].

33 *Ibid*, [25].

34 *Ibid*, [23].

a use covered by one of the illustrative purposes more likely to be fair than a third party use that facilitates a use not covered by one of the illustrative purposes? In the ALRC's view, the answer is probably yes, it would be more likely to be fair—but only marginally, and this factor is not as important as the four factors set out in the fair use exception. Of course the finding of a commercial purpose in a particular use, though by no means determinative, will tend not to favour a finding of fair use.

### **Fair dealing and fair use**

5.43 The fair dealing exceptions, including those proposed in this Discussion Paper, such as 'fair dealing for private and domestic use', are less flexible and less well-suited to the digital age than a general fair use exception. Importantly, with the fair dealing exceptions, the permitted uses are confined to the prescribed purposes. If a given use is for some other ancillary purpose, the fair dealing exceptions will not apply, and the question of whether the use is fair will not even be asked.

5.44 However, it would seem preferable at least to consider whether any particular use is fair, rather than automatically excluding uses not for prescribed purposes.

5.45 Some extra flexibility might be found in the new fair dealing exceptions proposed in this Discussion Paper (that is, proposed as alternatives to the ALRC's preferred exception, fair use). These alternative exceptions would at least expand the number of prescribed purposes or categories of use that may be considered under a fairness exception. However, many of the uses of copyright material discussed in this chapter are unlikely to be fair dealing for these or any of the other prescribed purposes in the fair dealing provisions.

5.46 To say that these uses should at least be considered under the fair use exception is not to say the uses would be fair. But copyright law that is conducive to new and innovative services and technologies should at least allow for the question of fairness to be asked.

5.47 Some have suggested that the *Copyright Act* should entrench strict technology-neutral exceptions. If an exception now allows users to make copies in their homes, some argue, then it should allow the copies to be made remotely using new technologies, and it should probably allow others to make the copies for them.

5.48 Others might respond that consumers should not be free even to store their copies on remote servers operated by others, and if a third party appears to be profiting from making the copy, then the third party service should pay the rights holder for the use.

5.49 Some copying by third parties is unlikely to harm the rights holders' market, and may help develop new markets for rights holders to exploit. Prohibiting such unlicensed copying through overly confined exceptions, even if technology neutral, may inhibit the development of the digital economy.

5.50 Some of these third party uses are also ‘transformative and productive’, to draw on the language in US case law discussing the first fairness factor.<sup>35</sup> The first fairness factor to be considered in determining fair use, under the exception proposed by the ALRC and under the US provision, is the purpose and character of the use. In considering this, US courts often ask whether the use is transformative or productive. ‘A transformative or productive use is one where the defendant has created something new, repurposed the original work, or otherwise added value’.<sup>36</sup> A court asks

whether the new work ‘merely supersedes the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message ... in other words, whether and to what extent the new work is transformative.<sup>37</sup>

5.51 Prescriptively confining Australian copyright exceptions to particular purposes may deny Australia such transformative and productive new technologies and services. The fair use exception asks the right questions of new business models that use copyright material.

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35 The fairness factors are set out in Ch 4.

36 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights, 16.

37 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579.



## 6. Statutory Licences

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### Summary

6.1 Statutory licences allow for certain uses of copyright material, without the permission of the rights holder, subject to the payment of reasonable remuneration. They are a type of compulsory licence; where the licence applies, rights holders cannot choose not to license their material.

6.2 This chapter proposes the repeal of the statutory licences for educational and other institutions in pts VA and VB of the *Copyright Act*, and the statutory licence for the Crown in pt VII div 2 of the *Copyright Act*.<sup>1</sup>

6.3 The digital environment appears to call for a new way for these licences to be negotiated and settled. Like most other licences for use of copyright material in Australia and abroad, these licences should be negotiated voluntarily. Voluntary licences—whether direct or collective—are less prescriptive, more efficient and better suited to a digital age.

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1 The statutory licences for retransmission of free-to-air broadcasts and for radio broadcast of sound recordings are discussed separately in Chs 15 and 16 respectively.

6.4 This reform should help Australian educational institutions and governments take better advantage of digital technologies and services. New licensing models may also facilitate more efficient remuneration of rights holders.

### **What is a statutory licence?**

6.5 Compulsory licences grant broad rights to use copyright material ‘subject to the payment of a fixed royalty and the fulfilment of certain other conditions’.<sup>2</sup> Rights holders cannot opt out of the statutory licence.<sup>3</sup> Professors Ricketson and Creswell write that compulsory or statutory licences represent ‘a form of “forced taking” or compulsory acquisition from the copyright owner’.<sup>4</sup>

6.6 Copinger and Skone James note seven factors which seem to influence when the United Kingdom legislature has favoured non-voluntary licences:

- (i) where a change in the law (such as extension of the term of copyright, or the addition of new rights) alters the assumptions upon which owners may have acquired copyright and potential users planned their activities;
- (ii) where in the light of technological change (such as the emergence of sound recordings), the refusal to license the use of copyright works might impede the emergence of certain industries or activities, or a negotiated price might give the copyright owner an unjustified windfall;
- (iii) where the copyright owner has failed to supply the needs of the public and other producers and distributors are available;
- (iv) where copyright owners have refused to license use of their works or have imposed conditions which do not reflect the purposes for which copyright is granted;
- (v) where there is evidence of abuse of monopoly;
- (vi) where there exist otherwise insuperable transaction costs or delays;
- (vii) where a negotiated price would be too high and it is deemed desirable to subsidise users, for example those which are public institutions.<sup>5</sup>

6.7 The most common policy justification for imposing a statutory licence seems to be market failure due to prohibitively high transaction costs—that is, where ‘the costs of identifying and negotiating with copyright owners outweigh the value of the resulting licence’.<sup>6</sup> The Franki Committee, which recommended the introduction of the statutory licences for educational institutions, stated that it was usually not practicable for educational institutions to obtain specific permission in advance from individual copyright owners to make copies. It said that

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2 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.0].

3 Copyright Agency/Viscopy, *Submission 249*.

4 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.0].

5 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [28-08].

6 E Hudson, ‘Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia’, *Thesis*, University of Melbourne, 2011, 56.

very often the administrative costs involved in seeking permission would be out of all proportion to the royalties reasonably payable in respect of the reproduction of the work.<sup>7</sup>

6.8 Professor Jane Ginsburg has expressed reservations about such transaction cost analyses, in part because ‘in many cases transaction costs may be subdued by voluntary collective licensing’.<sup>8</sup> Ginsburg finds the purpose of compulsory licences elsewhere:

The effect, and, I would argue, the real purpose of a compulsory license is to reduce the extent to which copyright ownership of the covered work conveys monopoly power, so that the copyright owner must make the work available to all who wish to access and exploit it. Imposition of a compulsory license reflects a legislative judgment that certain classes or exploitations of works should be more available to third parties (particularly ‘infant industries’) than others.<sup>9</sup>

6.9 Statutory licences are largely enacted for the benefit of certain licensees. If the licensees claim they do not want or need a statutory licence, because they are inefficient and costly, then this may suggest the statutory licences should be repealed.

### Australian statutory licences

6.10 There are two statutory licensing schemes in the *Copyright Act* for the use of copyright material by educational institutions: one relates to the copying and communication of broadcasts, in pt VA; the other concerns the reproduction and communication of works and periodical articles, in pt VB.<sup>10</sup>

6.11 The pt VB licence applies to all copies and communications of text and images, including digital material, from any source, including the internet, but ‘in some cases, the licence does not allow the use of an entire work that is available for purchase’.<sup>11</sup>

6.12 The statutory licensing scheme for Crown or government use is contained in pt VII div 2 of the *Copyright Act*.<sup>12</sup> Under this scheme, copyright is not infringed by a government use of copyright material if that use is ‘for the services of the Commonwealth or State’.<sup>13</sup>

6.13 Under these schemes, educational institutions and Commonwealth and state governments pay fees or royalties—‘equitable remuneration’—to collecting societies for certain uses of copyright material. Collecting societies distribute royalties to their members—authors, film-makers and other rights holders.

7 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (the Franki review), [6.29].

8 J Ginsburg, ‘Creation and Commercial Value: Copyright Protection of Works of Information’ (1990) 90 *Columbia Law Review* 1865, 1926.

9 Ibid, 1926.

10 This chapter concerns the statutory licences for educational and other institutions and the licences for government. The statutory licence for retransmission of broadcasts is discussed in Ch 15.

11 Copyright Agency/Viscopy, *Submission* 287.

12 Sections 183 and 183A refer to ‘the Crown’, ‘the Commonwealth or a State’ and ‘a government’. These phrases appear to be interchangeable. The position of local government is discussed in Ch 14.

13 *Copyright Act 1968* (Cth) s 183(1).

6.14 For both the education and government schemes, Copyright Agency is the declared collecting society for text, artworks and music (other than material included in sound recordings or films). Screenrights is the declared collecting society for the copying of audiovisual material, including sound recordings, film, television and radio broadcasts.<sup>14</sup>

6.15 The *Copyright Act* mandates various administrative requirements for both schemes. For example, it requires that notice be given to rights holders or collecting societies when copyright material is used.

6.16 The Spicer Committee recommended the introduction of a statutory licence for government in 1959. The majority were of the view that

the Commonwealth and the States should be empowered to use copyright material for any purpose of the Crown, subject to the payment of just terms to be fixed, in the absence of agreement, by the Court. ... The occasions on which the Crown may need to use copyright material are varied and many. Most of us think that it is not possible to list those matters which might be said to be more vital to the public interest than others. At the same time, the rights of the author should be protected by provisions for the payment of just compensation.<sup>15</sup>

6.17 Two members of the Spicer Committee considered that the right to use the material without the rights holder's consent should be 'confined to use for defence purposes only'.<sup>16</sup>

6.18 The statutory licensing schemes for education were a response to widespread photocopying in educational institutions. In *University of New South Wales v Moorhouse*,<sup>17</sup> the High Court of Australia

established the potential liability of universities for authorising infringements of copyright that occurred on machines located on their premises, and this gradually led to a greater awareness, on the part of these institutions, of the need for them to comply with copyright laws.<sup>18</sup>

6.19 Soon after *Moorhouse*, the Franki Committee recommended the introduction of a statutory licence for educational establishments, stating that it believed that:

the very considerable element of public interest in education, together with the special difficulties that teachers and others face in Australia in obtaining copies of works needed for educational instruction, justifies the institution of a system of statutory licences in non-profit educational establishments.<sup>19</sup>

6.20 The Franki Committee made this recommendation despite concerns that a statutory licensing scheme for educational institutions 'might seem to favour the

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14 Australian Government Attorney-General's Department, *Australian Government Intellectual Property Manual* <www.ag.gov.au> at 9 August 2012.

15 Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959), 77.

16 Ibid, 77.

17 *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

18 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.100].

19 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (the Franki Report), [6.40].

interests of education as against the interests of copyright owners'.<sup>20</sup> It is therefore surprising that some thirty or so years later, educational institutions are calling for the repeal of these statutory licences.

6.21 The Australian Publishers Association submitted that 'the basis on which statutory licensing was initially introduced for the educational sector was a matter of pragmatics, and not high principle', and referred to the Franki Committee's discussion of the practical difficulties and high transaction costs of educational institutions licensing material voluntarily.<sup>21</sup>

### ***Institutions assisting persons with disability***

6.22 The schemes in pts VA and VB of the *Copyright Act* also apply to institutions assisting persons with disability.

6.23 Dr Matthew Rimmer submitted that Australia's laws in respect of copyright and disability rights are 'a disgrace'. The exceptions are 'messy ... technology-specific; copyright subject matter specific; disability specific; and sometimes limited to institutions'. Rimmer also submitted that the statutory licences are 'not a good means of providing access to cultural materials for those with disabilities'.<sup>22</sup>

6.24 The Terms of Reference instruct the ALRC not to duplicate work being undertaken on increased access to copyright works for persons with a print disability. However, many of the arguments in this chapter may also apply to the statutory licences as they relate to institutions assisting persons with disability.

6.25 Furthermore, many uses by institutions assisting persons with disability may well be fair, under the fair use exception proposed in Chapter 4. Such fair uses should not need to be licensed, and do not need to be covered by statutory licences. The freedom to format shift is particularly important for certain persons with disability. Blind Citizens Australia submitted that

a fair usage provision which recognises the needs for individuals with a print disability to format shift from an inaccessible to accessible copy would dramatically enhance access for a significant portion of the population and also advantage copyright owners through increased sales of their works.<sup>23</sup>

### **Fair remuneration for rights holders**

6.26 Some stakeholders submitted that the current statutory licences for educational institutions were working well. Many stressed the importance of educational institutions paying for their uses of copyright material.

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<sup>20</sup> Ibid, [6.63].

<sup>21</sup> Australian Publishers Association, *Submission 225*.

<sup>22</sup> M Rimmer, *Submission 161*.

<sup>23</sup> Blind Citizens Australia, *Submission 157*.

6.27 The Australian Publishers Association submitted that its members consider the

Part VB schemes—and particularly the ‘10%/1 chapter’ rules of thumb as to what constitutes a ‘reasonable portion’—are generally well understood in the education sectors, and are generally operating efficiently.<sup>24</sup>

6.28 The Australian Society of Authors said the scheme was ‘a very effective balance’ and ‘works well for educational institutions and creators’:

There could be more transparency in the process—particularly how much money is paid to which publishers and authors—but all in all it operates quite well.<sup>25</sup>

6.29 Some submissions from governments, collecting societies and others supported the existence of the statutory licence for government,<sup>26</sup> on the basis that it would be impractical to seek permission of copyright owners before using the material<sup>27</sup> and that government use is for the public benefit, rather than private or commercial ends.<sup>28</sup>

6.30 Many justified the statutory licences by stressing the importance of fairly remunerating publishers, creators and other rights holders. This was perhaps the most common justification for the statutory licences in submissions to this Inquiry. For example, Screenrights submitted that a recent survey of its members showed that more than half regard the Screenrights’ royalties as ‘important to the ongoing viability of their business, and close to 20 per cent said this money was essential’.<sup>29</sup>

6.31 Some stakeholders submitted that the pt VB licence scheme is efficient, cost effective and well understood and that, with sufficient education and transparency, it would receive wider support. The publisher Pearson Australia/Penguin submitted that despite the imperfections of the statutory licence for education,

for consumers it has created an efficient and cost effective way for instructors and institutions to legally access and reproduce very significant amounts of print and digital content. At an average cost of \$16 per student per year, in the context of the total education cost per annum (roughly \$10k per student), this is a very small price.<sup>30</sup>

6.32 The Australian Copyright Council said that, based on its experience in conducting training for educational institutions, ‘the Part VB statutory licence is generally well understood and operates efficiently’.<sup>31</sup>

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24 Australian Publishers Association, *Submission 225*.

25 Australian Society of Authors, *Submission 169*.

26 Victorian Government, *Submission 282*; Department of Defence, *Submission 267*; Law Council of Australia, *Submission 263*; State Records South Australia, *Submission 255*; Copyright Agency/Viscopy, *Submission 249*; Screenrights, *Submission 215*; Tasmanian Government, *Submission 196*; SAI Global, *Submission 193*.

27 Victorian Government, *Submission 282*.

28 Ibid; Department of Defence, *Submission 267*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

29 Screenrights, *Submission 215*.

30 Pearson Australia/Penguin, *Submission 220*.

31 Australian Copyright Council, *Submission 219*.

6.33 Firefly Education said that the ‘strength of the education statutory licence is that it offers authors and publishers fair remuneration for their intellectual property’.<sup>32</sup> Oxford University Press Australia likewise submitted:

The statutory licensing scheme has served the education community, and educational authors and publishers well in the print environment; it has compensated creators of intellectual property adequately so that we have been motivated and supported to continue to invest time, money and energy into the creation of materials that support teaching and learning in educational environments. The statutory licensing scheme has meant that this aim has been achieved for print products without massive administrative burden on educational publishers and educational institutions.<sup>33</sup>

6.34 More fundamentally, Copyright Agency/Viscopy questioned the very distinction between statutory licences and free use exceptions. It stated that the dichotomy is misleading because statutory licences allow free uses, and there are costs associated with ‘free exceptions’ that are not associated with statutory licences.<sup>34</sup>

In truth, this is not a discussion about whether a use should be covered by a free exception (with its attendant compliance costs), but about the value of the use allowed without permission, and who should bear the cost of equitable remuneration for that value. Should the cost be borne by the user, or, in effect by the content creator?<sup>35</sup>

6.35 Few stakeholders explicitly argued for the benefits of statutory licensing over voluntary licensing. Some of the benefits of statutory licensing arrangements may be replicated under a voluntary licence. The ALRC is interested in further comment on this matter.

6.36 Some submitted that the scope of the statutory licences for education should be broadened, so that licensees pay for a greater range of uses of copyright material.

6.37 A further benefit of statutory licences is that they can provide a safety net for users of copyright material, allowing uses that an organisation may not otherwise be able to license voluntarily. Copyright Agency/Viscopy submitted that with the statutory licences in place, schools can still

choose to acquire content through a direct licensing arrangement, but teachers remain entitled to use the content in ways not covered by the licence, such as ‘offline’ or ‘downstream’ uses of content acquired via online subscription.<sup>36</sup>

## Repeal of statutory licences

6.38 The ALRC proposes the repeal of the statutory licences for government, educational institutions, and institutions assisting persons with a print disability. Voluntary licences would be more efficient and better suited to a digital age. The following section outlines some arguments for repeal of these statutory licences.

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32 Firefly Education, *Submission 71*.

33 Oxford University Press Australia, *Submission 78*.

34 Copyright Agency/Viscopy, *Submission 249*.

35 Ibid.

36 Copyright Agency/Viscopy, *Submission 287*.

**Derogation from rights holders' rights**

6.39 Australia's statutory licences are a type of compulsory licence. Under a compulsory licence, rights holders are essentially compelled to license their material. A leading UK copyright textbook states, with respect to compulsory licensing:

In general, if copyright owners choose not to allow others to exploit their rights then that is their prerogative. However, in certain exceptional circumstances, the law will intervene to force the copyright owner to license the work and require the 'licensee' to pay a fee.<sup>37</sup>

6.40 The copyright market 'comprises the right to exclude others from exploiting the work'.<sup>38</sup> Compulsory licensing, however, 'substitutes compensation for control over the copyrighted work'.<sup>39</sup> The Australian Film/TV Bodies submitted that the

exclusive right to authorise the reproduction or communication of a copyrighted work is undermined by a compulsory licence and in some circumstances a compulsory licence may not be justifiable at all.<sup>40</sup>

6.41 International standards are said to be 'generally antipathetic' to non-voluntary licences.<sup>41</sup> Ginsburg has written that non-voluntary licences are 'administratively cumbersome, unlikely to arrive at a correct rate, and contrary to copyright's overall free market philosophy'.<sup>42</sup>

6.42 The United States is wary of statutory licences, preferring licences to be negotiated on the free market. A 2011 report of the US Copyright Office about mass digitisation stated:

Congress has enacted statutory licenses sparingly because they conflict with the fundamental principle that authors should enjoy exclusive rights to their creative works, including for the purpose of controlling the terms of public dissemination ... Historically, the Office has supported statutory licenses only in circumstances of genuine market failure and only for as long as necessary to achieve a specific goal. In fact, Congress recently asked the Office for recommendations on how to eliminate certain statutory licenses that are no longer necessary now that market transactions can be more easily accomplished using digital tools and platforms.<sup>43</sup>

6.43 The same report also noted the 'frequent complaint that statutory licences do not necessarily provide copyright owners with compensation commensurate with the actual use of their works or the value of those uses'.<sup>44</sup>

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37 L Bentley and B Sherman, *Intellectual Property Law* (3rd ed, 2008), 270.

38 J Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865, 1925.

39 *Ibid*, 1925.

40 Australian Film/TV Bodies, *Submission* 205.

41 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [28–06].

42 J Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865, 1872.

43 United States Copyright Office, *Legal Issues in Mass Digitisation: A Preliminary Analysis and Discussion Document* (2011), 38.

44 *Ibid*, 39.



6.44 Some rights holders have suggested that statutory licensing schemes should not be available where access to the works is available on a commercial basis. This is similar to the argument that free use exceptions should never be available where material can be licensed for a fee. Statutory licences should only correct market failure, this argument implies, and should not prevent publishers and others from charging higher rates for the use of their material, perhaps using micro-licences or micro-payments.

6.45 For example, BSA—The Software Alliance submitted that statutory licensing and Crown use provisions

should not apply to computer programs, because there is no market failure of access and availability to address with respect to software. Commercial licensing and distribution of computer programs is already widely available and accessible. This should continue to be a market-based commercial arrangement between vendors and Government customers.<sup>45</sup>

6.46 ARIA submitted that statutory licences should not be expanded because

with the rapid development of licensing models for the delivery and use of content by educational institutions an expansion of the statutory licence scheme is not justified ... increasingly, as content is moved into the digital environment, innovative licensing models are being used which more and more obviate the need for statutory licences.<sup>46</sup>

6.47 Changes to the statutory licensing schemes, ARIA submitted, ‘should be carefully considered in order not to inadvertently undermine these licences’.<sup>47</sup>

6.48 The collecting society APRA/AMCOS also expressed some concern about extending statutory licences, noting that

voluntary licensing arrangements between APRA/AMCOS and educational institutions demonstrate that there is an existing market for licensing beyond the limits of the statutory licences.<sup>48</sup>

6.49 Copyright Agency/Viscopy also noted that, internationally, statutory licences are sometimes seen as ‘an unjustifiable derogation from content creators’ exclusive rights’, but submitted that Australia has ‘a long tradition of statutory licences, and both content creators and licensees have adjusted their practices accordingly’.<sup>49</sup>

While there are uses allowed by statutory licences that some content owners would like to prevent, or license on their own terms, content creators by and large accept that the statutory licences enable efficient use of content by the education sector on terms that are generally fair.<sup>50</sup>

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45 BSA, *Submission 248*

46 ARIA, *Submission 241*.

47 Ibid.

48 APRA/AMCOS, *Submission 247*.

49 Copyright Agency/Viscopy, *Submission 287*.

50 Ibid.

### Schools and universities seek repeal

6.50 Submissions to the Inquiry from Australian schools, universities and TAFEs called for the statutory licences to be repealed.<sup>51</sup> Licences should instead be negotiated voluntarily, they submitted.

6.51 The Copyright Advisory Group—Schools (the Schools) expressed their objection to the statutory licences in strong terms.

This submission should be read as a strong statement on behalf of every Government school in Australia, and the vast majority of non-Government schools, that the current system for educational copyright use in Australia, based on statutory licensing, is broken beyond repair and must be replaced with a more modern and fair system.<sup>52</sup>

6.52 The Schools submitted that there are ‘four fundamental problems with statutory licences that make them unsuited for Australia’s digital economy goals’:

1. the statutory licences are inherently unsuitable to the digital environment;
2. statutory licences were created in a ‘data vacuum’. Efforts by the education sector to use better data access to better manage copyright expenditures are making the licences less efficient for copyright owners and licensees. These inefficiencies are becoming more pronounced with the increased use of new technologies;
3. statutory licences put Australian schools and students at a comparative disadvantage internationally and do not represent emerging international consensus regarding copyright in the digital environment;
4. statutory licensing is economically inefficient.<sup>53</sup>

6.53 Each of these points is discussed at some length in the Schools’ submission. A few of the points are considered below. Some arguments for repeal of the statutory licences more closely concern the question of which uses should be held to infringe copyright, and are therefore discussed in Chapters 13 and 14.

### Technical copying

6.54 One of the more persuasive arguments for repealing the statutory licences is that they were not built for, and may not be suited to, a digital age. Digital technologies allow for new, innovative, and efficient uses of copyright material. Many of these uses rely on multiple acts of copying and communication—with copies being stored and effortlessly moved between multiple computers and devices, some local, some stored remotely in the cloud. To the extent that the *Copyright Act* requires these acts of copying and communication to be strictly accounted for and paid for, then it may prevent licensees from taking full advantage of the efficiencies of new digital technologies.

6.55 Schools and universities submitted that there is a disincentive to use new digital technologies built into the statutory licensing schemes:

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51 Copyright Advisory Group—Schools, *Submission 231*; Copyright Advisory Group—TAFE, *Submission 230*; Universities Australia, *Submission 246*; ADA and ALCC, *Submission 213*.

52 Copyright Advisory Group—Schools, *Submission 231*.

53 Ibid.

The simple act of using more modern teaching methods potentially adds up to four remunerable activities under the statutory licence in addition to the potential costs incurred by more traditional 'print and distribute' teaching methods ... The requirements of the statutory licence to record in a survey (and potentially pay for) every technological copy and communication involved in teaching simply do not reflect the realities of modern education in a digital age... At the same time as schools are being encouraged to adopt the benefits of broadband and convergent technologies, the statutory licences provide a direct financial and administrative disincentive to do so.<sup>54</sup>

6.56 The statutory licences are not suitable for a digital age, the Schools submitted, in part because rates, even when set on a per student basis, are largely derived by reference to the volume of past and anticipated copying and communication. That is, 'volume is still a critical element of rate negotiations'.

While a 'cost per use' model may have made sense in the age of the photocopier and the VHS recorder, it makes much less sense in an internet age. It is a reality of modern technology that many copies and transmissions are made during the use of distributed technologies.<sup>55</sup>

6.57 The Schools argued that a model that 'links the volume of copies and communications either directly or indirectly to remuneration in all circumstances cannot be sustained indefinitely' and does not work in an internet age. Rather, it is better to 'consider the nature and purpose of the use involved (eg, providing content to students as part of a classroom activity) than the number of technical steps, copies and communications made as part of that use'.<sup>56</sup>

6.58 Universities Australia observed:

This 'per copy' method of determining remuneration may well have made sense in a print environment, but it has become highly artificial in a digital environment. In a digital environment, copying is ubiquitous. The existence of the statutory licence provides an opportunity for CAL [Copyright Agency/Viscopy] to seek a price hike for every technological advance that results in digital 'copies' being made.<sup>57</sup>

6.59 The Australian Digital Alliance and Australian Libraries Copyright Committee (ADA and ALCC) also criticised the statutory licences for including 'all reproductions and communications—no matter how essential to the use of new digital technologies'.<sup>58</sup> The licence, it said, 'deems many new forms of delivery to be remunerable, no matter how minor or technical the copying'.<sup>59</sup> The 'technological specificity of educational copying provisions and the statutory licences are impeding the development of new forms of delivery for educational content'.<sup>60</sup>

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54 Ibid.

55 Ibid.

56 Ibid.

57 Universities Australia, *Submission 246*.

58 ADA and ALCC, *Submission 213*.

59 Ibid.

60 Ibid.

6.60 The ADA and ALCC also submitted that technology specificity has an impact on

long-distance educational use of learning, internal use of content management systems, and may result in potential difficulties for assisting students with a disability, especially students with hearing difficulties.<sup>61</sup>

6.61 In the ALRC's view, more efficient methods of remunerating rights holders are available. Voluntary contracts for digital services appear to be more flexible and do not require such strict accounting of copies and communications. If indeed the statutory licences are discouraging educational institutions and governments from taking advantage of new digital technologies and services, the licences should be reviewed.

6.62 However, repealing the statutory licences is not the only option. This question of 'technical copying' is related to the questions discussed in Chapter 8 of this Discussion Paper, concerning 'non-consumptive' uses of copyright material, such as caching. The ALRC considers that such non-consumptive uses will sometimes be fair uses. If the statutory licences are not repealed, then the *Copyright Act* should be amended to clarify that fair uses of copyright material, or uses otherwise covered by a free use exception, such as non-consumptive uses, need not be licensed.

### **Determining equitable remuneration**

6.63 Some submissions suggested that the statutory licences facilitate an overly strict accounting of usage that leads to unreasonably high fees.

6.64 Universities Australia submitted that the 'statutory licensing model for determining remuneration is firmly based in a "per-copy-per-view-per-payment" paradigm'.<sup>62</sup> Surveys are used to determine what material is copied and communicated. If collecting societies and the licensees cannot agree on a rate, the Copyright Tribunal of Australia can determine the 'equitable remuneration' that should be paid for the making of licensed copies or licensed communications.<sup>63</sup>

6.65 To many, it may seem unsurprising that the statutory licensing system is designed to measure the amount of copying and communication that occurs.<sup>64</sup> However, for Universities Australia, this 'model for determining remuneration takes no account of the realities of the modern educational environment'. The number of articles a lecturer uploads onto an e-reserve or otherwise makes available to students, for example, is a 'highly artificial measure' and a poor proxy for student use:

The dilemma that universities face is: do we take full advantage of digital technology to provide our students with access to the widest possible array of content (knowing that [Copyright Agency/Viscopy] will seek payment based on the number of articles etc made available multiplied by the number of students who could have accessed that article) or do we revert to the old print model of selecting a small range of articles etc for each class because this will inevitably cost less under the statutory licence? The

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61 Ibid..

62 Universities Australia, *Submission 246*.

63 *Copyright Act 1968* (Cth) ss 135ZWA(1), 153C(2).

64 Universities Australia, *Submission 246*.

very fact that universities are having to ask these questions underscores the unsuitability of the statutory licence to a digital educational environment.<sup>65</sup>

6.66 Universities Australia would instead prefer that remuneration be determined on a ‘commercial basis’ and ‘without direct reference to the amount of copying and communication that has actually occurred’.<sup>66</sup>

6.67 A good collective licence must allow for some flexibility and should not be a disincentive to the use of new and efficient digital technologies. Nor are licensees likely to be attracted to licensing models that equate the availability of material with the use of the material. As Copyright Agency/Viscopy submitted, ‘there is a limit to the total amount of content a student can reasonably consume in the course of their studies’.<sup>67</sup> In the ALRC’s view, the *Copyright Act* should not prescribe a method of settling equitable remuneration that results in an overemphasis on the volume of material made available to—as opposed to actually used by—students, educational institutions, and government. One would hardly wish that the fee for using a new music service like Spotify were set by reference to the amount of music the service makes available to customers (many millions of songs).

6.68 The *Copyright Act* also specifies that the method of working out equitable remuneration under the government statutory licences must take into account the estimated number of copies made and specify the sampling system to be used for estimating the number of copies.<sup>68</sup>

6.69 Governments also find that the sampling required by s 183A of the *Copyright Act* is problematic.<sup>69</sup> The NSW Government submitted that, in practice, ‘the scheme established by s 183A has proved to be cumbersome, burdensome and costly, and insufficiently flexible to adapt to technological advances’.<sup>70</sup>

Designing a sampling survey is a complex task requiring specialist knowledge and skills in the areas of statistics, copyright law, Government systems and administrative and copying practices.<sup>71</sup>

6.70 The Tasmanian Government submitted that:

The requirement to develop, negotiate and administer a survey has imposed a substantial burden, created an ongoing source of tension in dealings between governments and declared collecting societies, and increased the cost and resources required by governments to discharge their copyright liabilities.<sup>72</sup>

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65 Ibid.

66 Ibid.

67 Copyright Agency/Viscopy, *Submission 249*.

68 *Copyright Act 1968* (Cth) s 183A(3).

69 DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

70 NSW Government, *Submission 294*.

71 Ibid.

72 Tasmanian Government, *Submission 196*.

6.71 The Queensland Government also raised concerns:

The design of a national survey of copying in State and Territory Governments has been a particularly difficult issue. Governments are concerned that surveys should be as unobtrusive and inexpensive as possible and measure only remunerable copying.<sup>73</sup>

6.72 Governments and collecting societies have not been able to agree on a method for surveys. There is uncertainty about whether the free use exceptions are available to governments and whether governments can rely on implied licences from copyright owners, which has contributed to the disagreement and delay.<sup>74</sup> No survey has been conducted since 2002–03.<sup>75</sup> Despite this lack of agreement, neither side has asked the Copyright Tribunal to determine a method.<sup>76</sup> Instead, for the last ten years, payments have been made based on the results of the 2002–03 survey. However, governments point out that, since that time, there has been increased use of direct licences, for example for subscriptions to online journals.<sup>77</sup> Because the material that is now directly licensed was included in the 2002–03 survey, governments say that it is likely that they are now paying twice for a range of materials.<sup>78</sup>

6.73 Copyright Agency/Viscopy agreed that sampling for the government statutory licence ‘has not worked as intended’ and suggested that the *Copyright Act* specify a method to be used where no method has been agreed upon or determined. Copyright Agency/Viscopy proposed that the method should be the same as that for the education statutory licence.<sup>79</sup>

6.74 Copyright Agency/Viscopy also submitted that, except for ‘the small number of teachers involved in surveys of usage from time to time, compliance requirements are negligible’.<sup>80</sup>

For most teachers and students, the statutory licence is practically invisible. A very small proportion of teachers participate in annual surveys of usage, for a limited period of time.

Schools provide information about all their usage. We process the usage data according to Data Processing Protocols agreed with schools’ representatives. These protocols involve the exclusion of records of usage made outside the statutory licence.<sup>81</sup>

6.75 However, the Schools also criticised the ‘overly prescriptive and technical requirements of the statutory licence’.<sup>82</sup> Voluntary licences have proven ‘more

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73 DSITIA (Qld), *Submission 277*.

74 State Records South Australia, *Submission 255*.

75 DSITIA (Qld), *Submission 277*.

76 *Copyright Act 1968* (Cth) ss 183A(2)(b), 153K.

77 Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255* (who suggest remunerable copying is about 3% of all government copying); Tasmanian Government, *Submission 196*.

78 Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

79 Copyright Agency/Viscopy, *Submission 249*.

80 Copyright Agency/Viscopy, *Submission 287*.

81 *Ibid.*

82 Copyright Advisory Group—Schools, *Submission 231*.

efficient and simpler to negotiate'. For example, in the Schools' voluntary agreement with music collecting societies,

it was possible to negotiate a commercial rate for a licence that allows schools to store musical works and sound recordings on a school intranet server, without entering into technical discussions and survey/record keeping requirements about the number of copies and communications that might entail on a practical basis when a variety of technologies are used to access that stored music by teachers and students. This is in stark contrast to the highly complex and burdensome administrative and technical issues required to be taken into account in similar negotiations under statutory licences.<sup>83</sup>

6.76 Copyright Agency/Viscopy acknowledged that the current mechanism for measuring digital usage (electronic use surveys) is imprecise, but 'technological advances are enabling new methods of measuring usage':

Two important initiatives are automated data capture from multi-function devices (machines that print, scan, photocopy, fax and email), and tools for reporting content made available from learning management systems. As with current measurement methods, the objective is to estimate the extent to which content is consumed by students.<sup>84</sup>

### Complexity

6.77 Ricketson and Creswell write of the 'complexity and prolixity' of the statutory licence schemes.<sup>85</sup> This complexity, particularly in pts VA and VB of the *Copyright Act*, was criticised in some submissions. Robin Wright said that the scheme in pt VB of the *Copyright Act* 'consists of highly complex media and format specific rules which are increasingly difficult to administer in the digital environment'.

The complex drafting style and structure of the provisions makes the section almost impossible to understand, even for regular users, without an external interpretive layer. The different rules applicable to hard copy works and works in electronic form are increasingly difficult to apply or explain in a convergent world.<sup>86</sup>

6.78 The Schools submitted examples of provisions of the *Copyright Act* that it called 'overly technically complex' and make the statutory licences ill-suited to the digital environment.

6.79 Section 135ZMD of the *Copyright Act* concerns the multiple reproduction and communication of works in electronic form by educational institutions, under the statutory licence. Section 135ZMD(3) limits what may be made available online: if a part of a work has already been made available online, for example on a school's learning management system, then another part of the same work cannot also be made available online. The Schools submitted that in 'an age of learning management systems, centralised content delivery systems and networked interactive whiteboards in

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83 Ibid.

84 Copyright Agency/Viscopy, *Submission 287*.

85 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.280].

86 R Wright, *Submission 167*.

classrooms, provisions such as s 135ZMD(3) make compliance with the statutory licence using modern education tools increasingly difficult'.<sup>87</sup>

6.80 Section 135ZMB concerns the multiple reproduction and communication of *insubstantial* parts of works in electronic form, under the statutory licence. It features a similar restriction, in s 135ZMB(4), limiting what parts of a work may be made available online. However, the Schools submitted that s 135ZMB(5) makes the restriction even less reasonable, by providing that 'passages from the work that are not continuous are all different parts of the work'.<sup>88</sup> Using insubstantial parts of works generally does not infringe copyright so, in theory, schools must pay for some insubstantial parts because the parts are non-consecutive. The Schools noted, however, that it is unclear whether this is caught in survey data.

6.81 Sections 135KA and 135ZXA of the *Copyright Act* require licensees to provide notices in relation to 'each communication' made. The Schools submitted that this is difficult if not impossible to comply with. This, the Schools said, 'further illustrates how the technical requirements of the statutory licence are not suited to the modern teaching and learning environment'.<sup>89</sup>

6.82 Repealing the statutory licences for educational institutions will not only simplify the *Copyright Act*, but make it more flexible and adaptive to new and efficient digital technologies.

### **Licensing fees**

6.83 The question of which uses by educational institutions and governments should be covered by free use exceptions is discussed in Chapters 13 and 14. A related concern is whether the statutory licences facilitate the payment for uses of copyright material that would otherwise not infringe copyright, and that do not infringe copyright in other countries.

6.84 The ADA submitted that under the statutory licensing regime,

Australian schools pay significantly more per FTE [full time equivalent student] than schools in the UK, Canada and New Zealand. Additionally, under the statutory licences, a number of uses that are free in these jurisdictions are remunerable for Australian educational institutions.<sup>90</sup>

6.85 One reason Australian educational institutions may pay more is that the *Copyright Act* now provides that certain exceptions do not apply to uses that may be licensed.<sup>91</sup> Such provisions should be repealed.

6.86 Another reason that Australian educational institutions may pay more is that rights holders may charge more for the use of their work in Australia than they do in other countries. Price discrimination between countries is common, and though it has

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<sup>87</sup> Copyright Advisory Group—Schools, *Submission 231*.

<sup>88</sup> *Copyright Act 1968* (Cth) s 135ZMB(5).

<sup>89</sup> Copyright Advisory Group—Schools, *Submission 231*.

<sup>90</sup> ADA and ALCC, *Submission 213*.

<sup>91</sup> See eg, *Copyright Act 1968* (Cth) s 200AB(6).



been criticised, for example in relation to information technology pricing, this issue is not a concern of this Inquiry.

6.87 It is unclear whether the prices paid by Australian educational institutions are in fact excessive. It may well be that educational institutions outside Australia should be paying writers, publishers and other rights holders more for using their material, rather than Australian institutions paying less. The ALRC would prefer not to ground reform in this area by referring to the comparative cost of licensing these uses.

### **Availability of direct licensing**

6.88 The NSW Government submitted that it should not be required under the *Copyright Act* to enter licensing arrangements with collecting societies. Governments should be able to make their own ‘commercial decision on how to manage their copyright liabilities’.<sup>92</sup>

Books, journals and similar material are increasingly delivered online under agreements that include copyright licences ... Digital technology and the advance of ebooks have changed the shape of the publishing industry, and major publishers have incorporated many of the smaller publishing houses. The combined effect is that governments increasingly deal directly with publishers, and those agreements now cover most of the External Material used by Government staff. NSW Government Departments spend millions of dollars annually on such agreements.<sup>93</sup>

### **Anti-competitive**

6.89 The statutory licences are economically inefficient, the Schools suggested, partly because statutory licences are monopolies ‘administered by monopoly collecting societies declared under the Act’.<sup>94</sup>

6.90 However, repealing the statutory licence may be unlikely to create a competitive market in collective rights management. Educational institutions and governments are likely to continue to need to enter into collective licensing arrangements with collecting societies, even if the existing statutory licences are repealed. Direct licensing is unlikely to cover all the needs of educational institutions and governments, even if micro-licensing improves considerably and new business models emerge that offer broad, blanket licences.

6.91 Also, new collecting societies are perhaps unlikely to emerge to compete with the long established collecting societies. It is not even clear that rights holders or users would benefit from the existence of multiple and competing collecting societies, each representing different rights holders. Collecting societies have been said to have a ‘de facto monopolistic nature’.<sup>95</sup> Although this can be grounds for criticism, it also has its benefits. Copinger and Skone James state that ‘as a rule, there should be only one organisation for any one category of rights owner open for membership to all rights owners of that category on reasonable terms’:

<sup>92</sup> NSW Government, *Submission 294*.

<sup>93</sup> *Ibid.*

<sup>94</sup> Copyright Advisory Group—Schools, *Submission 231*.

<sup>95</sup> K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [27–15].

The existence of two or more organisations in the same field may diminish the advantages of collective administration for both rights owners and users. For the rights owners, competing societies lead to duplication of function and reduction in economies of scale in operation and thus are unlikely to bring benefits to their members. For the user, a multiplicity of societies representing a single category of rights owner would also cause uncertainty, duplication of effort and extra expense. The user would have to check, for each work he wished to use, which society controlled it and whether he had the appropriate licence. For both parties, administration costs would be greater, reducing the revenue available for distribution to rights owners and increasing the overall cost of obtaining licences for the user.<sup>96</sup>

6.92 The Australian Competition and Consumer Commission (ACCC) discussed some of these benefits of collective licensing in its submission to this Inquiry, and then outlined some of the costs, particularly to competition. Without collecting societies, licensors ‘might otherwise be in competition with one another’.

This may raise concerns about the potential creation and exercise of market power. Competition concerns may arise from collecting societies’ market power and the likelihood that a collecting society would have both the ability and incentive to exercise that market power (leading to higher licence fees) in its dealings with both its members and potential licensees.<sup>97</sup>

6.93 Various factors outlined in its submission may, the ACCC said, ‘result in users having no genuine alternative means of acquiring a licence to use copyright materials and collecting societies will be able to set prices for access to copyright material without consideration as to what the efficient price of those rights would be’.<sup>98</sup>

6.94 The ACCC submitted that there may be:

a trade-off between the efficiency benefits that collecting societies offer by lowering licensing transaction costs and the possible lessening of competition in the licensing of material arising from the collecting society’s market power.<sup>99</sup>

6.95 If the market power of the existing collecting societies is problematic, then in the ALRC’s view, repealing the statutory licences is unlikely to remedy this problem. In theory, the market power of a collecting society could be abused in the negotiation of both a voluntary and a compulsory licence, if no reasonable alternative method of licensing the material is available.

6.96 The question of whether further measures are necessary to control the market power of collecting societies is outside the Terms of Reference for this Inquiry, but some of these measures are discussed by the ACCC.<sup>100</sup> For example, the ACCC calls for the repeal of s 51(3) of the *Competition and Consumer Act* (Cth), which provides a limited exemption from some of that Act’s prohibitions on restrictive trade practices for contraventions resulting from copyright licensing. The repeal of this provision has previously been recommended by the Ergas Committee. The ACCC submitted that ‘a

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96 Ibid, [27–12].

97 ACCC, *Submission* 165.

98 Ibid.

99 Ibid.

100 Ibid.

blanket exemption for conditions imposed in IP [intellectual property] licensing and assignment arrangements is not justified' and the licensing or assignment of IP rights 'should be subject to the same treatment under the CCA as any other property rights'.<sup>101</sup> Repeal of s 51(3) would

prevent copyright owners imposing conditions in relation to the licence or assignment of their IP rights for an anticompetitive purpose or where the conditions had an anticompetitive effect. All other uses would be unaffected.<sup>102</sup>

### Licensing uses covered by exceptions

6.97 Like all other users of copyright material, educational institutions and governments should not need to pay for uses of copyright material that would otherwise not infringe copyright because they are covered by an exception. If governments and educational institutions were required to pay for licences for these uses, then they would be paying for uses that others, including commercial enterprises, do not have to pay for.

6.98 Screenrights submitted that voluntary licensing would add to the complexity of licensing arrangements. If the pt VA licence were replaced with fair use and voluntary licensing,

it would be necessary to determine whether each new use fell within the free fair use provision or required a licence and payment. Resolving this threshold question may then lead to the even more complex question of who actually controls the rights.

The difficulty in drawing a clear demarcation line between fair use and those uses that require permission would also impact on contract negotiations between each of the rightsholders in an audiovisual work. It would be difficult to determine which rights need to be acquired from underlying rightsholders and what their value (if any) would be.<sup>103</sup>

6.99 The NSW Government, on the other hand, submitted that the *Copyright Act* should clarify that governments may rely on the free use exceptions.<sup>104</sup>

6.100 If market failure were the only proper justification for a free use exception, then the availability of a collective licence may suggest that an exception should not apply. If it can be paid for, it should not be free. In the ALRC's view, the availability of a licence is an important, but not determinative, consideration in both crafting exceptions, and in the application of the fair use exception. Other matters, including questions of the public interest, are also relevant.

6.101 If fair use is enacted, then licences should be negotiated in the context of which uses are fair. If the parties agree, or a court determines, that a particular use is fair, then educational institutions and governments should not be required to buy a licence for that particular use. Licences negotiated on this more reasonable footing may also be more attractive to other licensees.

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101 Ibid.

102 Ibid.

103 Screenrights, *Submission 289*.

104 NSW Government, *Submission 294*.

**Proposal 6–1** The statutory licensing schemes in pts VA, VB and VII div 2 of the *Copyright Act* should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

## When licences cannot be obtained voluntarily

### License it or lose it

6.102 If the statutory licence for government and educational uses is repealed, then it may be necessary to amend the *Copyright Act* to provide that certain important uses of copyright material by these institutions do not infringe copyright if a licence for the use is not available. This policy, enacted in New Zealand and the UK, has been called ‘license it or lose it’.

6.103 One concern with repealing a statutory licence is that voluntary licences may not be offered for certain rights. The underlying rights in broadcasts, for example, may not be offered to educational institutions to license. Collecting societies may not be able to secure those rights.

6.104 The scope of statutory licences is sufficiently broad to cover uses of copyright material, even when the rights cannot be obtained, and even when the rights holders are not members of the relevant collecting society, and therefore do not obtain royalties.

6.105 If a fair use exception is enacted in Australia, then the availability of a licence for certain rights will affect whether a use is fair. If a licence is not available for the underlying rights in a broadcast, for example, then it is more likely that an educational use of the underlying works in a broadcast will be held to be a fair use. But the use will not *necessarily* be fair. If the use is vital to governments and educational and other institutions, and there is a sufficient public interest in overriding the copyright owner’s right not to license their material, then some legislative provision may be necessary.

6.106 In New Zealand, the *Copyright Act 1994* (NZ) provides for a free use exception for the copying and communication of ‘communication works for educational purposes’—but the exception does not apply when licences authorising the copying and communication are available under a licensing scheme.<sup>105</sup>

6.107 The UK similarly provides that an education institution can record and communicate broadcasts (in certain circumstances) without infringing the copyright in the broadcast or in the works included in the broadcast, but that the exception does not apply if there is a certified licensing scheme in place.<sup>106</sup>

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105 *Copyright Act 1994* (NZ) s 48. (‘communication work means a transmission of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme’: s 2.)

106 *Copyright, Designs and Patents Act 1988* (UK) s 35.

The Act thus provides an incentive to owners to offer licences on reasonable terms. In this instance the Act benefits educational establishments not by conferring a limited privilege upon them, but rather by strengthening their bargaining position as against copyright owners.<sup>107</sup>

6.108 There is a similar exception for reprographic copying allowing educational institutions to make copies of passages from published literary, dramatic or musical works, provided a licence for this use is not available.<sup>108</sup>

### Extended collective licensing

6.109 Extended collective licensing (ECL) is another way to deal with this problem of repertoire. As discussed in Chapter 11, the UK Government is considering allowing ECL for the first time. With ECL, ‘collecting societies that meet the necessary standards for protecting rights holders’ interests could seek permission to license on behalf of rights holders who are not members, with the exception of those who opt out of the scheme’.<sup>109</sup> The UK Government policy statement stated that ECL was ‘particularly supported by institutions that hold large archives of copyrighted work’ and that there was ‘also significant support for the proposal from collecting societies and from licensees, including commercial and public sector use’.

6.110 In the context of educational and government licences, Australian collecting societies could, for example, seek to license on behalf of the underlying rights holders in broadcasts.

6.111 The scheme proposed in the UK allows rights holders to opt out of ECL. This means that collecting societies might offer blanket licences, but subject to exceptions. ECL thus gives the rights holders greater control over the exercise of their rights than the ‘license it or lose it’ option discussed above. Rights holders are free to refuse to license their works, should they wish to.

6.112 However, this also means that schools and other educational institutions may not have access to material they need. There would also be administrative costs in checking whether a rights holder had withheld his or her rights from the collecting society.

**Question 6–1** If the statutory licences are repealed, should the *Copyright Act* be amended to provide for certain free use exceptions for governments and educational institutions that only operate where the use cannot be licensed, and if so, how?

107 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [9–105].

108 *Copyright, Designs and Patents Act 1988* (UK) s 36. These UK provisions may be amended so that they cover distance learning and the use of interactive whiteboards.

109 UK Government, *Government Policy Statement: Consultation on Modernising Copyright* (2012), 10.



## 7. Fair Dealing

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### Summary

7.1 This chapter outlines the existing fair dealing exceptions and examines the operation of the exceptions in the digital environment; whether there is a need for simplification of the provisions; and whether new specific fair dealing exceptions should be introduced.

7.2 The purpose-based, or close-ended, nature of the fair dealing exceptions is problematic in the digital environment. Rather than take a piecemeal approach and propose the addition of further specific exceptions in the hope of addressing gaps, the ALRC proposes the repeal of the existing fair dealing provisions and application of the new fair use exception discussed in Chapter 4. The ALRC proposes that all but one of the fair dealing purposes in the existing exceptions should be included specifically as illustrative purposes in the new fair use exception.<sup>1</sup>

7.3 If fair use is not enacted, the ALRC proposes that the *Copyright Act 1968* (Cth) should be amended so that all existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should be subject to the fairness factors<sup>2</sup> discussed in Chapter 4.<sup>3</sup>

### Current law

7.4 Australia's copyright legislation has long provided for fair dealing. Australian legislation first used the expression 'fairly dealing' in its *Copyright Act 1905* (Cth)—the first common law country to do so.<sup>4</sup> Subsequent Acts—the *Copyright Act*

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1 Proposal 4–4.

2 Proposal 7–4.

3 Proposal 4–3.

4 M De Zwart, 'A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age' (2007) 1 *Intellectual Property Quarterly* 60, 89.

1912 (Cth), which declared the *Copyright Act 1911* (Imp) to be in force in Australia<sup>5</sup> and the current *Copyright Act* which replaced the 1912 Act—use the term ‘fair dealing’. These latter two Acts, including amendments to the current *Copyright Act*,<sup>6</sup> have instituted a list of specific exceptions under the fair dealing rubric.

7.5 The *Copyright Act* does not define a fair dealing. Rather, specific fair dealing exceptions exist for the purposes of:

- research or study;<sup>7</sup>
- criticism or review;<sup>8</sup>
- parody or satire;<sup>9</sup>
- reporting news;<sup>10</sup> and
- a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.<sup>11</sup>

7.6 Not all of these exceptions are available for all types of copyright material. The *Copyright Act* provides that fair dealings for these specified purposes may be made with the following copyright material:

- literary, dramatic, musical or artistic works;<sup>12</sup>
- adaptations of literary, dramatic or musical works;<sup>13</sup> and
- audio-visual items<sup>14</sup>—defined as sound recordings, cinematograph films, sound broadcasts or television broadcasts.<sup>15</sup>

7.7 Where the use of a ‘substantial part’<sup>16</sup> or more<sup>17</sup> of the work, adaptation, or audio-visual item constitutes a fair dealing, there is no infringement of the copyright in

5 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [3.360].

6 The most recent amendment to note in this regard is the *Copyright Amendment Act 2006* (Cth) which introduced fair dealing exceptions for the purpose of parody or satire.

7 *Copyright Act 1968* (Cth) ss 40(1), 103C(1).

8 *Ibid* ss 41, 103A.

9 *Ibid* ss 41A, 103AA.

10 *Ibid* ss 42, 103B.

11 *Ibid* s 43(2). Note s 104(c), which could be seen as the equivalent provision for subject-matter other than works, does not in fact use the term ‘fair dealing’. Similarly, ss 43(1), 104(a) (anything done for the purposes of a judicial proceeding or a report of a judicial proceeding) and 104(b) (someone seeking professional advice from a legal practitioner, registered patent attorney or registered trade marks attorney) do not use the term ‘fair dealing’. All of these exceptions are broader than the fair dealing exceptions.

12 *Ibid* s 40(1) (research or study), s 41 (criticism or review), s 41A (parody or satire), s 42 (reporting news), s 43(2) (the giving of professional advice by certain individuals).

13 *Ibid* s 40(1) (research or study), s 41 (criticism or review), s 41A (parody or satire), s 42 (reporting news).

14 *Ibid* s 103C(1) (research or study), s 103A (criticism or review), s 103AA (parody or satire), s 103B (reporting news).

15 *Ibid* s 100A.

16 *Ibid* s 14.

17 As Ricketson and Creswell observe, ‘acts done in relation to insubstantial parts do not constitute infringement of copyright and the defences of fair dealing only come into operation in relation to



that specific copyright material. Further, in the case of an audio-visual item, there is no infringement of the copyright in any work or other audio-visual item that is included in that audio-visual item.<sup>18</sup>

7.8 Additionally, the *Copyright Act* provides that certain direct or indirect sound recordings or cinematograph films of performances, which constitute fair dealing for specified purposes, are outside the scheme affording protection to performers in their live performances.<sup>19</sup> That is, the use of those recordings and films of the performances are permitted as exceptions.

### **When will a use be a fair dealing?**

7.9 Determining whether a use comes within the bounds of a fair dealing exception is a two-step process. First, the use must be for one of the specific purposes provided for in the *Copyright Act*. Secondly, the use must be fair. Whether a particular use is fair will depend on the circumstances of the case.

#### ***Requirement to provide sufficient acknowledgement***

7.10 The fair dealing provisions for the purpose of criticism or review, and those for the purpose of, or associated with, the reporting of news in a newspaper, magazine or similar periodical contain an additional requirement for a ‘sufficient acknowledgment’ of the work or audio-visual item.<sup>20</sup>

#### ***Quantitative test***

7.11 The fair dealing exception for the purpose of research or study with respect to works and adaptations contains a quantitative test that deems the use of certain quantities of copyright material to be fair.<sup>21</sup> The concept of ‘reasonable portion’ is fixed by reference to chapters, or 10% of the number of pages or number of words.<sup>22</sup>

#### ***General guidance as to fairness***

7.12 The fair dealing exceptions for the purpose of research or study and s 248A(1A) (indirect sound recordings of performances) are the only exceptions that list matters to be considered when determining whether the use constitutes a fair dealing. These matters include, but are not limited to:

- the purpose and character of the dealing or recording;

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substantial parts or more’: Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.15].

18 *Copyright Act 1968* (Cth) s 103A (criticism or review), s 103AA (parody or satire), s 103B (reporting news), s 103C(1) (research or study).

19 Such recordings and films come within the definition of ‘exempt recording’. Ibid s 248A(1)(aa), (f), (fa), (g). See also s 248A(1A) which contains a list of matters—which is in largely the same form as the factors in ss 40(2) and 103C(2)—which must be regarded when determining whether a recording is a fair dealing for the purpose of research or study under s 248A(1)(aa). One important difference is that ss 40(2) and 103C(2) are stated to be inclusive lists, whereas the language of s 248A(1A) is not so clear.

20 Ibid ss 41 and 103A (criticism or review); ss 42(1)(a) and 103B(1)(a) (reporting news).

21 See Ibid s 40(3)–(8).

22 See Australian Copyright Council, *Research or Study: Information Sheet G053v08* (2012) <[www.copyright.org.au/find-an-answer/browse-by-a-z/](http://www.copyright.org.au/find-an-answer/browse-by-a-z/)> at 27 July 2012.

- the nature of the work, adaptation, audio-visual item or performance;
- the possibility of obtaining the work, adaptation, audio-visual item or an authorised recording of the performance within a reasonable time at an ordinary commercial price;
- the effect of the dealing or recording upon the potential market for, or value of, the work, adaptation, audio-visual item or authorised recordings of the performance; and
- in a case where part only of the work, adaptation, audio-visual item or performance is reproduced, copied or recorded—the amount and substantiality of the part copied, taken or recorded in relation to the whole work, adaptation, item or performance.

7.13 In 1976, the Copyright Law Committee which considered reprographic reproduction (the Franki Committee) recommended that this list of matters—with respect to works and adaptations—be included in s 40.<sup>23</sup> The matters listed are based to a large extent on principles derived from the case law on fair dealing.<sup>24</sup> The list of matters in ss 40(2) and 103C(2) are not the only relevant matters for assessment of the fairness of a dealing for the purpose of research or study, as these are inclusive rather than exhaustive lists.<sup>25</sup> The Franki Committee observed that it is for the courts to decide whether particular uses of copyright material constitute fair dealing and it was of the opinion that it would be ‘quite impracticable’ to attempt to remove this duty entirely.<sup>26</sup>

7.14 One submission noted that the Australian approach with respect to the other fair dealing exceptions has been ‘to leave it completely to the courts to determine what factors are relevant to determining fairness in any particular case’.<sup>27</sup> Another remarked that there was ‘remarkably little useful guidance’ to be gleaned from the Australian case law and, in effect, one is ‘forced to look to old English precedents to try to determine what factors a court would be likely to look to when deciding whether a use would be fair’.<sup>28</sup>

23 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (Franki Report), [2.60]. One possible reason why the Franki report did not recommend that these factors specifically apply to the other fair dealing exceptions may be due to the fact that the Franki Report was confined to investigating reprographic reproduction: M Sainsbury, ‘Parody, Satire and Copyright Infringement: The Latest Addition to Australian Fair Dealing Law’ (2007) 12 *Media and Arts Law Review* 292, 306.

24 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* [11.35]; Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.09].

25 Other factors may also be relevant. For example, Michael Handler and David Rolph have suggested seven factors which may assist a court in determining the fairness of a particular dealing; not all will be relevant in every case. M Handler and D Rolph, ‘“A Real Pea Souper”: *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’ (2003) 27 *Melbourne University Law Review* 381, 418.

26 Copyright Law Committee, *Report on Reprographic Reproduction* (1976), [2.59].

27 Copyright Advisory Group—Schools, *Submission 231*.

28 R Burrell and others, *Submission 278*.

7.15 The Copyright Law Review Committee (CLRC) suggested that it is ‘reasonable to assume’ that the matters listed in the statute ‘are also relevant in determining the fairness of a dealing for purposes other than research or study’.<sup>29</sup> This is because the matters in s 40(2) were derived from principles in the case law and because those principles were not limited to a specific purpose.<sup>30</sup>

### To whom do the exceptions apply?

7.16 Unlike some other exceptions in the *Copyright Act* and the statutory licences, the fair dealing exceptions appear on their face to be available to any users of the copyright material provided that *their* particular use—or ‘dealing’—falls within the bounds of one of those exceptions. A number of submissions were critical of court interpretations—particularly *De Garis v Neville Jeffress Pidler Pty Ltd*<sup>31</sup>—confining the availability of the exceptions.<sup>32</sup> As Universities Australia explained:

On the current state of the law with respect to fair dealing—which directs a court to look to the purpose of the person *making* the copy rather than the actual *user* of the copy—the ‘maker’ of the copy ... may not be in a position to claim the benefit of the fair dealing exception.<sup>33</sup>

### The operation of fair dealing exceptions in the digital environment

7.17 The relationship between the fair dealing exceptions and the statutory licences—particularly whether the former can be relied upon where provision is made for the latter—is another contentious issue for copyright rights holders and users.<sup>34</sup>

7.18 The ALRC asked three questions about Australia’s fair dealing exceptions.

- what problems, if any, are there with any of the existing fair dealing exceptions in the digital environment;<sup>35</sup>
- how could the fair dealing exceptions be usefully simplified;<sup>36</sup> and
- Should the *Copyright Act* provide for any other specific fair dealing exceptions?<sup>37</sup>

7.19 Views diverged about whether there are any problems with Australia’s current fair dealing exceptions in the digital environment.

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29 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.09]. Later, at [6.36], the CLRC also referred to comments to similar effect made by Professors Ricketson and Lahore in each of their loose-leaf services.

30 Ibid, [4.09].

31 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, 105–6.

32 For example, R Burrell and others, *Submission 278*; Universities Australia, *Submission 246*. See also Ch 5.

33 Universities Australia, *Submission 246*.

34 See Ch 6 and Ch 14.

35 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 45.

36 Ibid, Question 46.

37 Ibid, Question 47.

7.20 A number of rights owners and entities representing or assisting rights owners submitted that the current fair dealing exceptions operate adequately and effectively.<sup>38</sup> They were of the view that no change,<sup>39</sup> or at least no substantial change,<sup>40</sup> was required to the fair dealing exceptions. For example, publisher John Wiley & Sons submitted that the current fair dealing exceptions ‘are well defined and understood’.<sup>41</sup> Australian Associated Press (AAP) submitted:

The current [fair dealing] exceptions, as drafted, together with the guidance provided by judicial interpretation of these exceptions, provide sufficient certainty as to the respective rights of content producers and users. The existing exceptions also strike an appropriate balance between the interests of copyright owners and those who have a legitimate basis for using copyright material without consent.<sup>42</sup>

7.21 A number of stakeholders, including the Australian Copyright Council, commented that they were unaware of any practical problems<sup>43</sup>:

While the digital economy may give rise to different fact situations, the Copyright Council is not aware of any specific difficulties in applying fair dealing in this environment.<sup>44</sup>

7.22 A number of stakeholders considered that the current provisions are sufficiently adapted, or flexible to respond, to the digital environment.<sup>45</sup> For example, Screenrights observed that the term ‘dealing’ is ‘technology neutral and covers all uses of works and other subject matter’.<sup>46</sup>

7.23 APRA/AMCOS submitted that ‘many of the criticisms of the existing fair dealing exceptions are made in an academic context, and are not evidence based’.<sup>47</sup> There were calls for any reform to the exceptions to be evidence based<sup>48</sup> and include an assessment of the potential economic detriment for content owners.<sup>49</sup> Some called for no change where this would ‘give consumers and users greater freedom to undermine the rights of creators’<sup>50</sup>—that is, by ‘impact[ing] on the capacity of content

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38 SPAA, *Submission 281*; Free TV Australia, *Submission 270*; Music Council of Australia, *Submission 269*; BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; ASTRA, *Submission 227*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; AAP, *Submission 206*; AMPAL, *Submission 189*; Allen&Unwin Book Publishers, *Submission 174*; Arts Law Centre of Australia, *Submission 171*; Tabcorp Holdings Ltd, *Submission 164*; Commercial Radio Australia, *Submission 132*; ALAA, *Submission 129*.

39 For example, ASTRA, *Submission 227*; AAP, *Submission 206*; AMPAL, *Submission 189*; ALAA, *Submission 129*.

40 Music Council of Australia, *Submission 269*; BSA, *Submission 248*.

41 John Wiley & Sons, *Submission 239*.

42 AAP, *Submission 206*.

43 For example, Foxtel, *Submission 245*; ARIA, *Submission 241*; AMPAL, *Submission 189*; ALAA, *Submission 129*.

44 Australian Copyright Council, *Submission 219*.

45 For example, ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; Australian Film/TV Bodies, *Submission 205*; Confidential, *Submission 16*.

46 Screenrights, *Submission 215*.

47 APRA/AMCOS, *Submission 247*.

48 Ibid; Foxtel, *Submission 245*; AAP, *Submission 206*; AMPAL, *Submission 189*.

49 ASTRA, *Submission 227*.

50 Australia Council for the Arts, *Submission 260*.

owners to receive a fair and reasonable return for their investment'.<sup>51</sup> There were calls for any reform to be justified on public policy grounds<sup>52</sup> and comply with Australia's international obligations (particularly the 'three-step test').<sup>53</sup>

7.24 Some respondents submitted that, rather than making changes to the current fair dealing exceptions, efforts instead should be focused on enhancing the public awareness and understanding of them.<sup>54</sup> For example, the Music Council of Australia submitted:

To the extent that there are any problems with the existing fair dealing exceptions, the MCA considers that many of these can be overcome by the Government addressing issues relating to clarity and education.<sup>55</sup>

7.25 The Arts Law Centre of Australia stated that '[p]ublic awareness is essential to the success of our copyright laws' and in its view '[t]here seems to be a lack of public understanding as to how web users can engage with the fair dealing exceptions'.<sup>56</sup> Accordingly, the Centre supported 'an education campaign directed at informing Australians of their copyright rights and obligations'.<sup>57</sup>

7.26 Stakeholders identified a range of problems with the fair dealing exceptions, including:

- for those wanting change, that the exceptions do not extend far enough;
- for some others, that the exceptions extend too far; and
- specific problems with the exceptions if they are to be retained.

7.27 Not all of these problems stem from the digital environment. However, technological change has highlighted existing problems, including with Australia's traditional approach to drafting specific, purpose-based copyright exceptions.

### ***The exceptions do not extend far enough***

7.28 A number of responses—notably from a number of copyright users—submitted that the fair dealing exceptions are problematic because they do not extend far enough.<sup>58</sup> There were three discernible arguments.

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51 ASTRA, *Submission 227*.

52 Australian Film/TV Bodies, *Submission 205*.

53 BSA, *Submission 248*; Australian Film/TV Bodies, *Submission 205*. The three-step test is discussed in Ch 4.

54 Music Council of Australia, *Submission 269*; Arts Law Centre of Australia, *Submission 171*.

55 Music Council of Australia, *Submission 269*.

56 Arts Law Centre of Australia, *Submission 171*.

57 Ibid.

58 R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; Grey Literature Strategies Research Project, *Submission 250*; Universities Australia, *Submission 246*; CAMD, *Submission 236*; Small Press Network, *Submission 221*; National Library of Australia, *Submission 218*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; R Wright, *Submission 167*; Society of University Lawyers, *Submission 158*; Powerhouse Museum, *Submission 137*.

7.29 First, some submissions were of the opinion that the fair dealing exceptions are not sufficiently broad to provide an effective balance between owners and users in the digital environment.<sup>59</sup>

7.30 Secondly, for some, this was a complaint about the purpose-based, or closed-ended, nature of the existing fair dealing exceptions; and, in some cases, a complaint about their problematic interpretation by Australian courts.<sup>60</sup>

7.31 Such submissions were of the view that the fair dealing exceptions are not sufficiently adapted, or flexible to respond, to changed and changing circumstances caused by new technologies and uses<sup>61</sup>—an environment where ‘almost every use of technology will involve making copies’.<sup>62</sup> Many of the submissions which expressed this view advocated the introduction of a flexible, ‘open-ended’ exception such as fair use.<sup>63</sup>

7.32 Thirdly, a few submissions considered that particular fair dealing exceptions were generally too specific due to drafting errors.<sup>64</sup>

***The purpose-based, or close-ended, nature of the exceptions is problematic***

7.33 The existing fair dealing exceptions were characterised as ‘pernickety’.<sup>65</sup> A number of submissions were of the view that the fair dealing exceptions were insufficiently broad and responsive to deal with current or future uses.<sup>66</sup> For example, Robyn Wright submitted:

By favouring particular activities, purpose-based exceptions already restrict the exercise of some publicly valuable acts and also potentially limit the development of future unanticipated and innovative uses in the changing digital environment.<sup>67</sup>

7.34 Others gave specific examples of uses which they considered to be beneficial to the public yet which they considered may, or would, not come within the bounds of the existing fair dealing exceptions. These uses were seen to encompass important public interest purposes such as free speech, cultural purposes and access to justice. For example:

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59 Grey Literature Strategies Research Project, *Submission 250*; ADA and ALCC, *Submission 213*; Powerhouse Museum, *Submission 137*.

60 R Burrell and others, *Submission 278*.

61 For example, *Ibid*; University of Sydney, *Submission 275*; Universities Australia, *Submission 246*; M Rimmer, *Submission 122*.

62 Universities Australia, *Submission 246*.

63 For example, R Burrell and others, *Submission 278*; Grey Literature Strategies Research Project, *Submission 250*; R Wright, *Submission 167*; Society of University Lawyers, *Submission 158*; Powerhouse Museum, *Submission 137*.

64 For example, R Burrell and others, *Submission 278*; Australian Broadcasting Corporation, *Submission 210*.

65 K Bowrey, *Submission 94*.

66 For example, Yahoo!7, *Submission 276*; Universities Australia, *Submission 246*; ADA and ALCC, *Submission 213*; R Wright, *Submission 167*; Society of University Lawyers, *Submission 158*; M Rimmer, *Submission 122*.

67 R Wright, *Submission 167*.

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- accessible formats of texts—including ‘verbalisation of elements such as page numbers or spelling of proper names’ and navigational tools<sup>68</sup>—for blind or vision impaired persons;<sup>69</sup>
  - less formal research such as ‘the undertaking of inquiries to satisfy personal curiosity, without the need for some new discovery or insight to be made as a result’;<sup>70</sup>
  - the communication to the public of works created by students and researchers using museum collections;<sup>71</sup>
  - ‘use of images in a presentation or seminar to illustrate the point being made’;<sup>72</sup>
  - ‘use of short quotations in academic publications’;<sup>73</sup>
  - the communication to the public of the datasets underlying research results which could assist in independent verification of those results, particularly for online qualitative research;<sup>74</sup>
  - a university’s creation of an open digital repository of theses and other research publications;<sup>75</sup>
  - a university’s communication of a student’s assignment to other students ‘as a “good example” or as part of a collaborative learning exercise’;<sup>76</sup>
  - a university’s reproduction and distribution of ‘reference articles obtained by one researcher for the rest of the research team’;<sup>77</sup>
  - the reproduction of ‘an extract from a book in the course of reviewing a film’ of that book;<sup>78</sup>
  - the reproduction of ‘an extract from a play in the course of reviewing a performance of a play’;<sup>79</sup>
  - criticism of individuals’ actions, including public figures, ‘cit[ing] works in support of an argument, analysis or review’;<sup>80</sup>

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68 Vision Australia, *Submission 181*.

69 Blind Citizens Australia, *Submission 157*.

70 R Burrell and others, *Submission 278*. See also State Library of New South Wales, *Submission 168*; National Archives of Australia, *Submission 155*.

71 CAMD, *Submission 236*; Powerhouse Museum, *Submission 137*.

72 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*. R Wright, *Submission 167* also gave this example.

73 R Wright, *Submission 167*.

74 ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

75 Ibid; Society of University Lawyers, *Submission 158*.

76 Society of University Lawyers, *Submission 158*.

77 Ibid.

78 R Burrell and others, *Submission 278*.

79 Ibid.

80 Ibid.

- commentary or the expression of opinion rather than ‘reporting’ of events; for example, ‘some types of newspaper opinion piece and humorous topical news programmes’;<sup>81</sup>
- publication of previously unpublished copyright material even if for the purpose of criticism, review or news reporting;<sup>82</sup>
- ‘the full range of contemporary cultural practices that might be thought of as “parodies” or as being “satirical”’, for example, pastiche or caricature;<sup>83</sup>
- downstream uses of satirical or parodic material;<sup>84</sup>
- professional legal or law-related services ‘such as preparing and executing agreements, mediation, arbitration or Alternative Dispute Resolution, or preparation of patent or trademark applications’;<sup>85</sup> and
- 3D printing.<sup>86</sup>

### ***The exceptions extend too far***

7.35 By contrast, there were some submissions, mainly from rights holders, that suggested that the current fair dealing exceptions—perhaps as misunderstood by some users<sup>87</sup>—extend too far. There were three discernible arguments.

7.36 First, some rights holders identified problems with the fair dealing exception for the purpose of reporting news which have, or could have, a negative effect on their businesses.<sup>88</sup>

7.37 Secondly, there were some stakeholders, particularly publishers, who suggested that the fair dealing exceptions should not apply where licences—including the statutory licence for educational purposes—are available.<sup>89</sup> For example, Spinifex Press submitted that:

The fair dealing exceptions for research should not apply in a way that affects licences such as those offered by Copyright Agency. These income streams are important for underpaid writers and also for independent publishers.<sup>90</sup>

7.38 Copyright Agency/Viscopy made a similar argument with respect to fair dealing for the purpose of research or study in s 40. It called for the exception to:

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81 Ibid.

82 Ibid.

83 Ibid.

84 Ibid.

85 NSW Government, *Submission 294*.

86 M Rimmer, *Submission 122*.

87 Australian Society of Authors, *Submission 169*; Confidential, *Submission 02*.

88 COMPPS, *Submission 266*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; News Limited, *Submission 224*.

89 Copyright Agency/Viscopy, *Submission 249*; ALPSP, *Submission 199*; RIC Publications Pty Ltd, *Submission 147*; Spinifex Press, *Submission 125*; Confidential, *Submission 14*.

90 Spinifex Press, *Submission 125*.



- contain ‘an express condition that the exception not apply if there is a licensing solution applicable to the user’; and
- specifically exclude commercial research noting that ‘[t]his is the approach in the UK, where commercial research is allowed, but under licences from rightsholders and rights management organisations’.<sup>91</sup>

7.39 Thirdly, some submissions suggested that the fair dealing exceptions were misunderstood by some users and that this leads to infringement.<sup>92</sup> For example, the Australian Society of Authors submitted:

in practice consumers now infringe creators’ rights more broadly than ‘fair dealing’ allows, because digital technology provides the capacity to do this, and the capacity is utilised.<sup>93</sup>

7.40 The first argument was the most detailed of the three. A few rights holders expressed concern that their copyright material was being freely used by others for commercial purposes under the guise of news reporting when the rights holders considered the use to be for another purpose.<sup>94</sup> These submissions advocated change in this respect but otherwise wanted the current fair dealing exceptions to remain.<sup>95</sup>

7.41 The Combined Newspapers and Magazines Copyright Committee (CNMCC) was specifically concerned with *who* may avail themselves of the exception under s 42(1)(b)—which provides that a dealing with a work or adaptation of a work will be a fair dealing if ‘it is for the purpose of, or associated with, the reporting of news by means of a *communication* or in a cinematograph film’.<sup>96</sup> The CNMCC provided information about the legislative history and rationale for the substitution of the word ‘communication’ for ‘broadcasting’ in s 42(1)(b) and submitted:

The change in the *Copyright Act* to include all ‘communications’ in the fair dealing defence had the unintended effect of greatly extending the scope of the defence by potentially making it available to anyone who wished to communicate a news item to the public, as opposed to a small number of organisations which supplied a broadcasting or diffusion service.<sup>97</sup>

7.42 The CNMCC expressed concern that non-news organisations are taking articles and photographs about that organisation’s products and services that have been published in newspapers and magazines and are communicating them—either posting them on that organisation’s website or emailing them to that organisation’s clients or other organisations.<sup>98</sup> The CNMCC submitted that the exception was not intended to

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91 Copyright Agency/Viscopy, *Submission 249*.

92 Australian Society of Authors, *Submission 169*; Confidential, *Submission 02*.

93 Australian Society of Authors, *Submission 169*.

94 COMPPS, *Submission 266*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; News Limited, *Submission 224*.

95 Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; News Limited, *Submission 224*.

96 Emphasis added.

97 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

98 Ibid.

apply to such acts. News Limited, which is a member of the CNMCC, characterised such behaviour as free riding on publishers' investment.<sup>99</sup>

7.43 The CNMCC submitted that:

Publishers, through the Copyright Agency Limited (CAL), do provide licences to allow organisations to place articles on their intranets, send them to clients and make them available on the internet subject to conditions on the quantity of articles that can be used, the length of time on which they can appear on an organisation's website and payment of an appropriate fee. Photographs can also be purchased, usually direct from the publisher. If the fair dealing provisions can be used as claimed, a significant part of the business of the publishers will be undermined, in a market which is already facing severe pressures.<sup>100</sup>

7.44 The CNMCC expressed concern that such activity, in lieu of licensing, 'may become an increasingly common occurrence'.<sup>101</sup> It called for amendment of the *Copyright Act* to:

make it clear that the communication of newspaper or magazine articles is not permitted under the fair dealing exception unless such activity is performed by an organisation which provides a news or information service.<sup>102</sup>

7.45 It advocated that 'news or information service' be defined exclusively as

a service conducted by an organisation whose principal business is the commercial provision of news or information to the public, including the publisher of a newspaper, magazine or similar periodical publication.<sup>103</sup>

7.46 Further, it called for the fair dealing exception to be amended 'to explicitly state that it would not be available to an organisation whose news service is principally that of a news aggregator until after a specified time'.<sup>104</sup> In its first submission, News Limited supported the CNMCC's recommendations in respect of this fair dealing exception.<sup>105</sup> However, in its supplementary submission, News Limited submitted that the fair dealing exceptions, including that for news reporting, did not require amendment as they were 'functioning well'.<sup>106</sup>

7.47 Several sports bodies were concerned that media organisations were using 'excessive' amounts of the sports bodies', or their exclusive licensees', audio-visual content or photographs—specifically highlights from games or matches—for the purpose of providing entertainment, including encouraging traffic to websites or apps, rather than for the purpose of news reporting.<sup>107</sup>

7.48 The Coalition of Major Professional and Participation Sports (COMPPS) submitted that '[m]edia organisations which compile and broadcast unlicensed

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99 News Limited, *Submission 224*.

100 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

101 *Ibid.*

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*

105 News Limited, *Submission 224*.

106 News Limited, *Submission 286*.

107 COMPPS, *Submission 266*; AFL, *Submission 232*; Cricket Australia, *Submission 228*.

highlight packages of matches are directly exploiting copyright material for commercial gain'.<sup>108</sup> It explained:

The value of media rights to a sporting event is particularly susceptible to being damaged by the broadcast of relatively small proportions of the event. For example, in some sports, there may only be a small number of scoring movements or highlights.<sup>109</sup>

7.49 Cricket Australia submitted that 'a reasonably short video package or series of clips' of cricket matches 'has the potential to significantly undermine' its digital licensing program.<sup>110</sup> Both Cricket Australia and the Australian Football League (AFL) submitted that they were supportive of 'genuine' news reporting of their sports.<sup>111</sup> However, the AFL was of the view that 'extensive and unreasonable use' was becoming more frequent; submitting that media organisations' websites 'are pushing the boundaries further and further under the guise of fair dealing for the reporting of the news'.<sup>112</sup> It too considered that such use constituted 'a real threat' to its digital licensing arrangements.<sup>113</sup>

7.50 All three sports bodies submitted that the current fair dealing exception for the purpose of news reporting is imprecise and/or uncertain.<sup>114</sup> The AFL also submitted that it was costly to enforce its rights in this context: '[t]o say that sports bodies can litigate to deal with these matters is naïve, given the proliferation of these activities and the high cost of litigation'.<sup>115</sup>

7.51 The three sports bodies called for legislative or regulatory amendments to provide greater clarity and certainty as to *when* the exception applies.<sup>116</sup> They called for such reform to encompass:

- guidance as to, or specific restrictions on, the *amount* of material that could be used—with COMPPS referring to the similar approach taken with fair dealing for the purpose of research or study, and the AFL noting that 'a one size fits all quantitative test' may not be appropriate for all sports;
- 'guidance on the distinction between reporting news and providing content for entertainment or aggregation purposes',<sup>117</sup> that is 'the *boundaries*',<sup>118</sup> of the exception; and
- a requirement that in order to come within the exception the *use must not materially impact the value of the copyright material*—that is, not materially

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108 COMPPS, *Submission 266*.

109 Ibid.

110 Cricket Australia, *Submission 228*.

111 AFL, *Submission 232*; Cricket Australia, *Submission 228*.

112 AFL, *Submission 232*.

113 Ibid.

114 COMPPS, *Submission 266*; AFL, *Submission 232*; Cricket Australia, *Submission 228*.

115 AFL, *Submission 232*.

116 Only Cricket Australia specifically mentioned this possibility.

117 Cricket Australia, *Submission 228*.

118 COMPPS, *Submission 266*. Emphasis added.

impact the rights holder's ability to exploit its rights,<sup>119</sup> including both its existing and potential market for the content.<sup>120</sup>

7.52 News Limited's supplementary submission responded to these arguments. With respect to the suggestion that use of the reporting of news exception was undermining the value of sports organisations' media rights, it submitted that '[t]he evidence—media rights deals—suggests that this claim is unfounded'.<sup>121</sup> It provided information about media rights agreements, which it stated were increasing in value and breadth. It also observed that if a sports organisation believes that the *Copyright Act* has been breached, 'action can be taken via the courts'. It was strongly of the view that '[a]ttempts to define news and/or set limits on the amount of material to be used to report news would pose significant threats to freedom of speech and freedom of press':<sup>122</sup>

To claim that the exception is imprecise and uncertain and to suggest that what constitutes news could be articulated by boundaries and limitations is dangerous to the Australian public's right to know.<sup>123</sup>

### ***Specific problems with the exceptions***

7.53 Some submissions detailed particular problems with some of the fair dealing exceptions.

7.54 The fair dealing provisions for the purpose of criticism or review and reporting of news in a text form contain a requirement for a 'sufficient acknowledgment' to be made of the work or audio-visual item.<sup>124</sup> There is no such requirement with respect to the fair dealing provisions for the purpose of reporting news by means of a communication or in a cinematograph film.<sup>125</sup>

7.55 NSW Young Lawyers noted that the digital environment provides many opportunities and platforms for a person to criticise or review topics in which they may include or refer to third party copyright material. They submitted that the requirement for sufficient acknowledgment in order for a use to come within the criticism or review exceptions is problematic 'in the context of sharing or posting a URL online or in character-limited communication such as a tweet' and in cases where the identity of the original author is unclear or unknown.<sup>126</sup>

7.56 The CNMCC acknowledged that it would be 'difficult' for broadcasters and others to provide an acknowledgment of the work they are dealing with in the course of

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119 Cricket Australia, *Submission 228*.

120 AFL, *Submission 232*.

121 News Limited, *Submission 286*.

122 Ibid.

123 Ibid.

124 One submission was concerned about the inflexibility of the requirement as it could be unjust: failure to comply could 'automatically prevent an exception applying irrespective of whether the defendant acted in good faith and in accordance with ordinary industry practices'. A possible reform option would be for the factor to be considered when assessing fairness: R Burrell and others, *Submission 278*.

125 *Copyright Act 1968* (Cth) ss 42(1)(b) and 103B(1)(b).

126 NSW Young Lawyers, *Submission 195*.

reporting news but nevertheless were of the view that ‘there appears to be no reason why communications of a work by newspapers, magazines and similar services should not require sufficient acknowledgment’.<sup>127</sup> That is, they sought to rectify the inconsistency between s 42(1)(a) and (b) and suggested a draft form of wording for such an amendment to s 42(1)(b).

7.57 A second problem concerns the provisions relating to the use of works and subject matter other than works in the context of professional advice, which were described as ‘a mess’.<sup>128</sup> Section 43(2) provides a fair dealing exception with respect to *works* for the purpose of a legal practitioner, registered patent attorney or registered trade marks attorney *giving* professional advice. Section 104(c), which could be seen as the equivalent provision for *subject-matter other than works*, does not in fact use the term ‘fair dealing’ so it is a broader exception. Similarly, s 104(b), which provides an exception for someone *seeking* professional advice from a legal practitioner, registered patent attorney or registered trade marks attorney, does not use the term ‘fair dealing’. There is no corresponding exception—fair dealing or otherwise—with respect to works.

7.58 The CLRC noted these inconsistencies, for which it could see no basis, and recommended that the distinctions be removed.<sup>129</sup> At least one submission echoed the CLRC’s recommendation and called for ss 43(2), 104(b) and 104(c) to be made consistent with one another if reform is to be effected ‘within the existing paradigm’ of specific exceptions.<sup>130</sup> The authors of this submission went further, submitting:

The fact that what should be a straightforward and uncontroversial defence has been implemented in such an incoherent manner should give us serious pause for thought about the ability of the legislature to adequately draft provisions that exempt specific practices from infringement.<sup>131</sup>

7.59 Some submissions identified some drafting errors.<sup>132</sup> For example, the ABC identified a drafting ‘oversight’ in the fair dealing exceptions for the purpose of reporting news. The ABC referred to the presence of the word ‘communication’ in ss 42(1)(b) and 103B(1)(b) but its point was different to that which had been made by the CNMCC, mentioned earlier. It presumed that ‘communication’ covered both television and radio broadcasting but was ‘concerned’ that it might not cover a ‘sound recording’. However, it held the view that ‘the practice of using sound recordings for reporting news is widely accepted within the industry’.<sup>133</sup>

7.60 Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall identified a number of drafting ‘mishaps’.<sup>134</sup> For example, they observed that the

127 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

128 R Burrell and others, *Submission 278*.

129 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.28]–[4.29], [6.137].

130 R Burrell and others, *Submission 278*.

131 *Ibid.*

132 *Ibid.*; Australian Broadcasting Corporation, *Submission 210*.

133 Australian Broadcasting Corporation, *Submission 210*.

134 R Burrell and others, *Submission 278*.

definition of ‘sufficient acknowledgment’ in s 10(1) applies to ‘works’ only.<sup>135</sup> They submitted that this creates ‘real uncertainty’ as to the form any acknowledgment should take with respect to the use of audio-visual items for the purpose of reporting news (s 103B(1)(a)) or criticism or review (s 103A). Further, they criticised the wording of the provisions detailing fair dealing for the purposes of criticism and review, submitting:

a newspaper or blogger could not set out a passage from Tolkien’s *The Hobbit* in the course of a review of the Peter Jackson film. The extract would be taken from a literary work and, as such, s 41 would be the operative provision (s 103A only applying where there is a dealing with an audio-visual item). Section 41 only applies where the criticism or review is *of that work or another work*, and ‘work’ is defined ... so that it specifically does *not* include a ‘cinematograph film’.<sup>136</sup>

7.61 They regarded the outcome as ‘clearly preposterous’. They held the view that such ‘mishaps’ are ‘inevitable’ if exceptions are approached from the perspective of being available only ‘in the most carefully defined circumstances’.<sup>137</sup>

## Reducing complexity

7.62 The CLRC’s simplification review is a key related review. The consolidation and expansion of the fair dealing purposes to an open-ended model was an important aspect of the CLRC’s review in 1998. Further, the CLRC recommended that the fair dealing provisions be simplified by:

- absorbing the provisions relating to the acts done for the purpose of professional advice in relation to subject matter other than works (ss 104(b) and 104(c)) within fair dealing; ...
- removing the provisions that require sufficient acknowledgment in relation to fair dealings for the purpose of reporting news (ss 42(1)(a) and 103B(1)(a)); and
- adopting a modified quantitative test (s 40(3)).<sup>138</sup>

7.63 With respect to the third point, the *Copyright Amendment Act 2006* (Cth) repealed the former s 40(3) and (4) and substituted new s 40(3)–(8)<sup>139</sup> to improve clarity and certainty with respect to the quantitative test in s 40.<sup>140</sup>

7.64 In the Issues Paper, the ALRC invited comments on how the fair dealing exceptions might usefully be simplified or made more coherent.

7.65 A few submissions, notably from those representing rights holders, argued that there was no need for, or benefit to be obtained from, simplification of the fair dealing

135 Ibid. The CLRC also noted this error: Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.119].

136 R Burrell and others, *Submission 278*.

137 Ibid.

138 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [2.01].

139 *Copyright Amendment Act 2006* (Cth) sch 6 pt 4.

140 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [6.64]; Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [63]–[69].

exceptions.<sup>141</sup> The Music Council of Australia submitted that to the extent that the exceptions are complex, any problems could be ‘overcome by the Government providing explanatory material and guidelines which address operational issues’; that is, information on the practical operation of the exceptions.<sup>142</sup>

7.66 SBS held the view that the fair dealing exceptions for the purpose of criticism, review, reporting news, parody and satire—upon which it ‘relies strongly’—‘are clear and well established’ so it ‘would not support any change’ to the provisions.<sup>143</sup> Notwithstanding its comments that some of these provisions are unclear and would benefit from greater consistency, the ABC held the view that the fair dealing exceptions could not be usefully simplified. It submitted that compared with other provisions in the *Copyright Act*, these provisions ‘are relatively technology neutral and simply drafted’. It was concerned that ‘[t]oo much prescription could narrow the exceptions and remove flexibility in the digital environment’.<sup>144</sup>

7.67 AAP was concerned that consolidation of all aspects of the fair dealing provisions into a single omnibus provision, which it may have incorrectly understood the CLRC’s model to be,<sup>145</sup> ‘risk[s] generating unnecessary confusion and uncertainty’.<sup>146</sup> Its reasons included the failure to account for nuances such as the requirement to provide sufficient acknowledgment and the omission of certain language which risks changing the meaning of the exceptions.<sup>147</sup>

7.68 By contrast, a number of other submissions were of the view that the fair dealing exceptions could be usefully simplified or made more coherent, including by:

- consolidation of the exceptions;
- greater consistency between the exceptions;
- narrowing the scope of the exceptions; and
- broadening the scope of the exceptions by enacting a broad, flexible open-ended exception for fair use.

141 For example, Music Council of Australia, *Submission 269*; AAP, *Submission 206*; Australian Society of Authors, *Submission 169*; ALAA, *Submission 129*.

142 Music Council of Australia, *Submission 269*.

143 SBS, *Submission 237*.

144 Australian Broadcasting Corporation, *Submission 210*.

145 With respect to the quantitative test, the CLRC recommended that its reformed test be included in ‘a stand-alone provision separate from the new fair dealing provision’ which was extracted in Chapter 4. With respect to the requirement to provide sufficient acknowledgment, the CLRC considered that this requirement could be removed from the exceptions pertaining to the economic rights of copyright and instead be dealt with under the then newly proposed moral rights regime. In the case of the requirement for sufficient acknowledgment with respect to criticism or review, the CLRC considered that a specific provision may need to be maintained unless the moral rights provisions were amended to provide sufficient compliance with art 10(3) of the *Berne Convention* which requires both identification of the author and the source. See Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.10], [6.29] and [6.122].

146 AAP, *Submission 206*.

147 Ibid.

7.69 Some submissions supported the consolidation or simplification of the existing fair dealing exceptions, with some of these submissions supporting expansion of the existing purposes by way of an open-ended exception,<sup>148</sup> and others opposing this aspect.<sup>149</sup>

7.70 Foxtel submitted that simplification of the *Copyright Act* would be ‘in the best interests of industry and consumers’—provided this could be achieved without upsetting the existing ‘balance’.<sup>150</sup> However, ARIA saw ‘little reason’ to introduce a consolidated—but not expanded—model for fair dealing as it considered that it would result in only ‘a modest degree of simplification’, given the structure of the *Copyright Act*, which distinguishes between works and subject-matter other than works.<sup>151</sup>

7.71 Some submissions were ‘concerned’ about the possible results of a simplified and consolidated fair dealing provision.<sup>152</sup> The Business Software Alliance was concerned it may lead to uncertainty and the Arts Law Centre of Australia was concerned that such a provision ‘could have the unintended result of substantially changing the law’.<sup>153</sup>

7.72 A few submissions advocated greater consistency between the provisions.<sup>154</sup> The Internet Industry Association noted the inconsistency as to the extent of copying permitted and the requirement to provide sufficient acknowledgment and submitted that ‘[a]s far as reasonably possible each fair dealing right should apply to the same set of rights and be subject to the same conditions’.<sup>155</sup> The ABC submitted that there should be consistency of application between the exceptions with respect to ‘works’, ‘subject-matter other than works’ and ‘performances’.<sup>156</sup> It provided an example of existing inconsistency between the fair dealing exceptions as they apply to performances:

when reviewing a script of a film, the use of the cinematograph film and sound track and other underlying works would be permitted under s 41. However, a critique of a performance under s 248A in the definition of exempt recording (f) and (fa) (where arguably the review or critique must be of the performance) does not permit the use of other underlying works associated with that critique (and vice versa).<sup>157</sup>

7.73 Some submissions suggested other reform options to simplify the fair dealing exceptions. Some of these would operate to narrow the scope of the exceptions while others would broaden the scope.

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148 For example, Copyright Advisory Group—Schools, *Submission 231*; ADA and ALCC, *Submission 213*.

149 For example, Foxtel, *Submission 245*; ALPSP, *Submission 199*; Arts Law Centre of Australia, *Submission 171*.

150 Foxtel, *Submission 245*.

151 ARIA, *Submission 241*.

152 BSA, *Submission 248*; AAP, *Submission 206*; Arts Law Centre of Australia, *Submission 171*.

153 Arts Law Centre of Australia, *Submission 171*.

154 For example, Internet Industry Association, *Submission 253*; Australian Broadcasting Corporation, *Submission 210*.

155 Internet Industry Association, *Submission 253*.

156 Australian Broadcasting Corporation, *Submission 210*.

157 Ibid.



7.74 Copyright Agency/Viscopy proposed a number of changes that arguably would narrow the scope of the exceptions. It considered that the following changes would improve consistency and simplicity:

- a requirement in all cases that the source and author be acknowledged;
- an obligation to retain any rights management information (eg metadata);
- an express condition that the exception not apply if there is a licensing solution applicable to the user; and
- an express condition that the other factors in section 40(2) apply to all fair dealings.<sup>158</sup>

7.75 It also called for s 40(3)—relating to the quantitative test for the fair dealing exception for the purpose of research or study with respect to works—to be amended so that it presumes, rather than deems, the use of a ‘reasonable portion’ to be fair, viewing this as ‘a more equitable outcome’.<sup>159</sup> In its supplementary submission, Copyright Agency/Viscopy noted s 40(5) effectively deems ‘a reproduction for research or study of 10% of the pages, or a chapter, of a work in an edition (or 10% of the words of a work in electronic form)’ as ‘fair, irrespective of whether or not the use would be fair if the criteria in section 40(2) were applied’.<sup>160</sup> It agreed with the education sector that there should not be a prescribed proportion of work whose use is deemed to be ‘fair’.<sup>161</sup>

7.76 The Copyright Advisory Group—Schools submitted that a quantitative-based deeming provision should not be included in an open-ended fairness provision.<sup>162</sup> As discussed, the CLRC had also been of this view.<sup>163</sup> It is important to note that the Schools did not appear to be advocating the removal of this aspect of the fair dealing exception for research or study alone but rather it was in the context of their call for the introduction of a new open-ended, flexible exception.

## Reform of fair dealing exceptions

7.77 Some stakeholders called for new specific fair dealing exceptions. Many submissions called for a specific exception for quotation,<sup>164</sup> which is discussed in Chapter 10. However, stakeholders also suggested other possible fair dealing exceptions, including:

<sup>158</sup> Copyright Agency/Viscopy, *Submission 249*.

<sup>159</sup> *Ibid.*

<sup>160</sup> Copyright Agency/Viscopy, *Submission 287*.

<sup>161</sup> *Ibid.*

<sup>162</sup> Copyright Advisory Group—Schools, *Submission 231*.

<sup>163</sup> Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.67].

<sup>164</sup> For example, Pirate Party Australia, *Submission 223*; Australian Broadcasting Corporation, *Submission 210*; R Wright, *Submission 167*; R Xavier, *Submission 146*; K Bowrey, *Submission 94*.

- fair dealing for the purpose of governmental and political discussion (with express reference to the implied constitutional right);<sup>165</sup>
- fair dealing for ‘the purpose of discussing matters of public interest’ (possibly an extension of the existing fair dealing exception for reporting news or of any new fair dealing for the purpose of governmental and political discussion);<sup>166</sup>
- fair dealing for the purpose of ‘the Crown to publish and disseminate research findings that arise from publicly funded research’;<sup>167</sup> and
- fair dealing for the purpose of independent researchers being able to access, read and make one copy of content (seen as the ‘equivalent to access to hard copies in a public library’).<sup>168</sup>

7.78 The ALRC has considered the various arguments and detailed discussion in submissions about the operation of the fair dealing exceptions in the digital environment and whether these provisions could be usefully simplified or made more coherent. While some submissions were of the view that no or minimal reform is warranted, a number of other submissions identified gaps in coverage and provided information about inconsistencies and drafting errors. The ALRC considers that such issues merit attention.

7.79 The ALRC proposes that:

- the new fair use exception should be applied when determining whether a use for one of the existing fair dealing purposes—or another unspecified purpose—infringes copyright;
- the existing fair dealing exceptions, as well as broader exceptions for professional advice, be repealed;
- if fair use is not enacted, that the existing professional legal advice exceptions be repealed and that new fair dealing exceptions for the purpose of professional advice be enacted; and
- if fair use is not enacted, that the existing fair dealing exceptions proposed in this Discussion Paper—including the new professional advice exceptions proposed above—should provide that the fairness factors in Proposal 4–3 must be considered in determining whether copyright is infringed.

7.80 Some of those who called for reform of the existing fair dealing exceptions advocated for, or were sympathetic to, the introduction of a flexible exception such as

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165 Australian Broadcasting Corporation, *Submission 210*. Civil Liberties Australia, *Submission 139* also appeared to support such an exception, submitting that existing exceptions ‘should be strengthened to protect the interests of the community in political communication, free expression and debate and criticism’.

166 Australian Broadcasting Corporation, *Submission 210*. SBS, *Submission 237* also supported a fair dealing ‘right’ to ‘include a use of copyright material in the public interest where an existing provision did not apply’.

167 Civil Liberties Australia, *Submission 139*.

168 I Turnbull, *Submission 67*.

fair use,<sup>169</sup> while others were opposed to this.<sup>170</sup> The ALRC considers that the close-ended nature of the fair dealing exceptions is problematic in the digital environment as it is not sufficiently adapted, or flexible to respond, to changing circumstances. For example, the CSIRO submitted:

It is not always clear whether activity falls within the concept of ‘research or study’ and reticence to misuse another’s IP may mean that uses that facilitate dissemination and communication of scientific and technical information may be avoided despite there being no or marginal impact on the legitimate interests of a copyright owner. If a more general purpose exception applied this concern may be alleviated, the focus then being on the key issue of the impact of the use on the legitimate interests of the copyright owner.<sup>171</sup>

7.81 Further, the degree of detail with which some of the fair dealing exceptions have been drafted has caused some complexity: gaps, different treatment and uncertainty. A new fair use exception, rather than new additional specific fair dealing exceptions, would provide an effective basis for responding to changed and changing circumstances caused by new technologies and uses, without unnecessarily complicating the *Copyright Act*. In light of this view, the ALRC proposes the repeal of the existing fair dealing provisions and application of the new fair use exception discussed in Chapter 4 when determining whether such uses infringe copyright.

7.82 The ALRC also proposes that the professional advice exceptions in ss 104(b) and (c)—which are not fair dealing exceptions—be repealed and replaced with the new fair use exception.

7.83 The ALRC proposes that all of the existing fair dealing purposes—apart from professional advice—be included specifically as illustrative purposes in the new fair use exception. Some submissions advocated a similar approach.<sup>172</sup> For example, the Law Institute of Victoria submitted:

Whilst the exception should be open-ended, the Australian Act should set out a non-exhaustive list of examples that would constitute ‘fair use’. The sorts of examples that might be listed could include current fair dealing exceptions.<sup>173</sup>

7.84 While the professional advice provisions serve an important public interest—in the CLRC’s view they serve ‘to facilitate access to the legal system and, indirectly, to lower legal costs’<sup>174</sup>—the ALRC does not consider that all the current fair dealing

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169 For example, Grey Literature Strategies Research Project, *Submission 250*; National Library of Australia, *Submission 218*; Google, *Submission 217*; Society of University Lawyers, *Submission 158*; Powerhouse Museum, *Submission 137*.

170 For example, Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; NSW Young Lawyers, *Submission 195*.

171 CSIRO, *Submission 242*.

172 For example, Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Law Institute of Victoria (LIV), *Submission 198*; M Rimmer, *Submission 122*. See also APRA/AMCOS, *Submission 247*.

173 Law Institute of Victoria (LIV), *Submission 198*.

174 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.136].

exceptions need be expressly listed as illustrative purposes in the new fair use exception. As was explained in Chapter 4, the illustrative purposes are not exhaustive.

7.85 With respect to assessing fairness, the ALRC notes that a divergent group of submissions called for the *Copyright Act* to outline factors to be considered in determining the fairness of the dealing or use of copyright material beyond the existing exceptions for research or study.<sup>175</sup> The current approach where fairness factors are expressly stated in the fair dealing exceptions for research or study only was seen to make ‘little sense’, particularly where the Australian case law ‘provides remarkably little useful guidance as to how the “fairness” of a dealing for the purposes of criticism, review, news reporting, etc is to be determined’.<sup>176</sup> The Australian Copyright Council acknowledged that ‘people sometimes find the case-by-case nature of fair dealing difficult to apply’ and submitted that applying a general set of fairness factors, such as those already existing with respect to the research or study exceptions, may assist in this regard.<sup>177</sup> The ALRC’s proposals for the repeal of the existing fair dealing exceptions, together with ss 104(b) and (c), and application of the new fair use exception would essentially effect such a change in approach. The fairness factors detailed in Proposal 4–3, along with any other fairness factors considered relevant in a particular case, would be considered in determining whether a particular use constitutes a fair use.

7.86 The ALRC makes two additional proposals concerning the fair dealing exceptions in order to provide an alternative in the event that fair use is not enacted. Many of the complaints raised about the existing fair dealing exceptions would require careful consideration if the purpose-based approach to exceptions were to be retained. The CLRC considered a number of these issues in its 1998 report.

7.87 One issue that was raised in both reviews—which the ALRC considers could be simply rectified—is reform of the professional advice provisions so that they are made more coherent. Accordingly, the first of ALRC’s alternative proposals is that ss 43(2), 104(b) and (c) of the *Copyright Act* be repealed and new fair dealing exceptions introduced ‘for the purpose of professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney’ for both works and subject-matter other than works. This essentially echoes the CLRC’s recommendations.<sup>178</sup>

7.88 The second proposal, in the event that fair use is not enacted, is for all existing fair dealing exceptions and the new fair dealing exceptions for professional advice and others that are proposed in various parts of this Discussion Paper, to be subject to the fairness factors in Proposal 4–3. The ALRC considers that this would provide greater consistency across the provisions and should assist in determining their application. One negative would be that such an approach would likely lengthen the provisions.

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175 For example, R Burrell and others, *Submission 278*; Copyright Agency/Viscopy, *Submission 249*; Australian Copyright Council, *Submission 219*.

176 R Burrell and others, *Submission 278*.

177 Australian Copyright Council, *Submission 219*.

178 See Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.138]–[6.140].

**Proposal 7–1** The fair use exception should be applied when determining whether a use for the purpose of research or study; criticism or review; parody or satire; reporting news; or professional advice infringes copyright. ‘Research or study’, ‘criticism or review’, ‘parody or satire’, and ‘reporting news’ should be illustrative purposes in the fair use exception.

**Proposal 7–2** The *Copyright Act* should be amended to repeal the following exceptions:

- (a) ss 40(1), 103C(1)—fair dealing for research or study;
- (b) ss 41, 103A—fair dealing for criticism or review;
- (c) ss 41A, 103AA—fair dealing for parody or satire;
- (d) ss 42, 103B—fair dealing for reporting news;
- (e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and
- (f) ss 104(b) and (c)—professional advice exceptions.

**Proposal 7–3** If fair use is not enacted, the exceptions for the purpose of professional legal advice in ss 43(2), 104(b) and (c) of the *Copyright Act* should be repealed and the *Copyright Act* should provide for new fair dealing exceptions ‘for the purpose of professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney’ for both works and subject-matter other than works.

**Proposal 7–4** If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright is infringed.



## 8. Non-consumptive Use

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### Summary

8.1 This chapter considers ‘non-consumptive’ uses of copyright material. This captures uses which do not trade on the underlying creative and expressive purpose of the material. Examples of non-consumptive uses include caching and indexing by search engines, and possibly text and data mining.

8.2 The ALRC proposes that the fair use exception proposed in Chapter 4 should be used to determine whether activities such as caching and indexing, or data and text, mining constitute infringement. If fair use is not enacted, the *Copyright Act 1968* (Cth) should be amended to provide for a new fair dealing exception for non-consumptive use.

8.3 The current exceptions in the *Copyright Act* that relate to temporary reproductions should be repealed.

### Defining ‘non-consumptive’ use

8.4 In 2011, the Hargreaves Review recommended that the UK implement an exception for ‘non-consumptive use’, which was defined as use of a work enabled by

technology which does not trade on the underlying creative and expressive purpose of the work:

The idea is to encompass the uses of copyright works where copying is really only carried out as part of the way technology works. For instance, in data mining or search engine indexing, copies need to be created for the computer to analyse; the technology provides a substitute for reading all the documents ... that these new uses happen to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect.<sup>1</sup>

8.5 The digital age has seen the emergence of many ‘copy-reliant technologies’ such as search engines, which copy expressive works for non-expressive aims.<sup>2</sup> US Professor Matthew Sag has written that:

because expressive communication to the public implicitly defines and limits the extent of the copyright owner’s exclusive rights, acts of copying that do not communicate the author’s original expression to the public do not generally constitute copyright infringement.<sup>3</sup>

8.6 The idea that certain non-consumptive or non-expressive uses ought not to be protected by copyright can be traced to a fundamental distinction in copyright law: that between ideas and expression.<sup>4</sup> Australian and overseas courts have reiterated that copyright law does not exist to protect facts or information, but the expression of ideas and information.<sup>5</sup> Sag notes that the ideas/expression distinction is central to balancing the interest of authors in preventing exploitation of their works and society’s interest in the free flow of ideas, information and commerce:

Subsequent authors may not compete with the copyright owner by offering her original expression to the public as a substitute for the copyright owner’s work, but they are free to compete with their own expression of the same facts, concepts and ideas.<sup>6</sup>

8.7 This distinction is also drawn by Professor Kathy Bowrey, although she refers to the term ‘culturally meaningful uses’:

The economic logic of copyright is tied to a cultural logic. That a use such as caching can be assigned an economic value does not justify a copyright return. A copyright owner’s right is *a right to control culturally meaningful uses*, not every use of a work. To maintain the integrity and consistency of copyright’s logic, dealings with mere data should be distinguished from culturally meaningful dealings with copyright works and subject-matter.<sup>7</sup>

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1 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 47.

2 M Sag, ‘Copyright and Copy-Reliant Technology’ (2009) 103(4) *North Western University Law Review* 1607, 1608.

3 Ibid, 1609.

4 A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), 154.

5 See eg, *Ice Tv Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; *Feist Publications, Inc., v Rural Telephone Service Co.* (499 U.S. 340, 1991).

6 M Sag, ‘Copyright and Copy-Reliant Technology’ (2009) 103(4) *North Western University Law Review* 1607, 1629.

7 K Bowrey, *Submission 94*.



8.8 Two types of uses identified in the Issues Paper are discussed below. These relate to caching, indexing and other internet functions; and data and text mining. In both instances, the ALRC considers that such uses should be considered under the fair use exception. Alternatively, if fair use is not enacted, they should be considered under a new fair dealing exception for ‘non-consumptive’ use.

### Caching and indexing and network-related functions

8.9 Internet service providers, search engines, web hosts and other internet intermediaries rely on indexing and caching for their efficient operation. For example, Google’s search engine works by using automated web crawlers that find and make copies of websites on the internet. These copies are then indexed and stored on its cache.<sup>8</sup> When a user enters a search query, Google uses the cached version to judge if the page is a good match for the query, and displays a link to the cached site.<sup>9</sup>

8.10 Caching improves the internet’s performance by allowing search engines to quickly retrieve cached copies on its server, rather than having to repeatedly retrieve copies from other servers. It is also helpful when the original page is not available due to internet traffic congestion, an overloaded site, or if the owner has recently removed the page from the web.<sup>10</sup>

8.11 One Australian internet service provider submitted that approximately 70% of the traffic it delivers to customers is from overseas, and submitted that:

in the event that we are able to cache files locally, we can improve the delivery process, ensure error-free delivery and reduce the time required to download and view content. In our experience, by using caching, transmission overheads can reduce to 1% of what they otherwise would be, without caching.<sup>11</sup>

8.12 Google and Yahoo!7 made similar comments in their submissions on the value of ‘system-level caching’ to the efficient delivery of internet services to Australians.<sup>12</sup>

8.13 The Australian Broadcasting Corporation (ABC) noted that caching and indexing are ‘an essential part of the technical delivery process’, without which it would be unable to provide reliable streamed television programming over the internet of a quality acceptable to customers.<sup>13</sup> Similarly, Screenrights noted in relation to its

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8 Caching can be described as the copying and storing of data from a webpage on a server’s hard disk so that the page can be quickly retrieved by the same or a different user the next time that page is requested. Caching can operate at the browser level (eg, stored on a computer’s hard drive and accessed by the browser) or at a system/proxy level by internet intermediaries and other large organisation: see, Webopedia, *Proxy Cache* <[www.webopedia.com/TERM/P/proxy\\_cache.html](http://www.webopedia.com/TERM/P/proxy_cache.html)> at 31 July 2012.

9 Ibid.

10 Google Guide, *Cached Pages* <[www.googleguide.com/cached\\_pages.html](http://www.googleguide.com/cached_pages.html)> at 30 July 2012. A website can specifically prevent a crawler from accessing parts of their website which would otherwise be publically viewable, by inserting a piece of code called ‘robot.txt protocol’.

11 iiNet Limited, *Submission 186*.

12 Google pointed to a report from Lateral Economics which suggests that total internet traffic demand per month in Australia is around 800 Gbps with around 80% of that traffic coming from the United States, 60% of which is capable of being cached. If this traffic could be cached, it was suggested cost savings of \$45 million a year could be made: Google, *Submission 217*. See also, Yahoo!7, *Submission 276*.

13 Australian Broadcasting Corporation, *Submission 210*.

Enhance Direct TV service that ‘the operation of s 200AAA facilitates proxy caching so as to make the service more technically viable for participating institutions’.<sup>14</sup>

8.14 The Australian Digital Alliance and Australian Libraries Copyright Committee (ADA and ALCC) submitted that libraries also rely on caching to ‘improve the speed and scalability of user searches’.<sup>15</sup>

### **Current law**

8.15 There is no specific exception in the *Copyright Act* that permits the copying or reproduction of copyright material for the purposes of caching or indexing. However, there are a number of provisions that deal with ‘temporary reproductions’ and one specific section that deals with ‘proxy caching’ by educational institutions.

- Sections 43A and 111A allow for the temporary reproduction of a work, an adaptation of a work or an audio-visual item as part of the ‘technical process of making or receiving a communication’.<sup>16</sup>
- Sections 43B and 111B provide that copyright in a work or subject-matter is not infringed by temporary copying or reproduction ‘incidentally made as a necessary part of a technical process’ of using a copy of the work or subject-matter.<sup>17</sup>
- Section 116AB allows for the reproduction of copyright material on a system or network controlled or operated by, or for, a ‘carriage service provider’ in response to an action by a user in order to facilitate efficient access to that material by that user or other users.<sup>18</sup>
- Section 200AAA allows automated caching by computers operated by or on behalf of an educational institution.

### **Criticisms of the current exceptions**

8.16 A review in 2000 of intellectual property legislation expressed concerns about whether ss 43A and 111A were sufficiently wide to cover proxy caching.<sup>19</sup> The review recommended that if there is evidence that caching is not permitted as an exception,

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14 Screenrights, *Submission 215*.

15 ADA and ALCC, *Submission 213*. The State Library of NSW advised that it ‘generates significant quantities of digital content of its analogue collections, and collects current digital content, it will want to be able to temporarily index this material for clients to facilitate searching’: State Library of New South Wales, *Submission 168*.

16 *Copyright Act 1968* (Cth) s 43A deals with a work, or adaptation of a work and s 111A deals with audiovisual items. Neither provision applies if the making of the communication is an infringement of copyright: ss 43A(2), 111A(2).

17 It is suggested that ss 43B and 111B could apply to caching: K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 16.

18 ‘Carriage service provider’ is defined in s 78 of the *Telecommunications Act 1997* (Cth) to include a party who uses infrastructure provided by a licensed carrier to supply carriage services to the public. Only public internet access providers such as Telstra Bigpond are deemed carriage service providers.

19 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 108–113.

then the *Copyright Act* should be amended. For example, the review stated that s 43A could be modified to include:

other works temporarily made merely as an element in and so as to enhance the efficiency of the technical process of making or receiving a communication.<sup>20</sup>

8.17 Stakeholders suggested a number of problems with the current provisions. The Australian and Competition and Consumer Commission (ACCC) submitted that ss 43 and 111A do not capture the full scope of copying and communication that may be undertaken in performance of caching and indexing functions since:

- it is not clear what constitutes ‘temporary’ reproduction;
- infringement issues may arise where copying might not be considered part of the technical ‘process of making or receiving a communication’; and
- the exception does not exempt communication of copyright material, such as when communicated to a user.<sup>21</sup>

8.18 eBay argued that caching exceptions should recognise the making of persistent copies for the purposes of facilitating communication, analysis and research.<sup>22</sup> eBay also submitted that lack of protection for such activities makes Australia an unattractive place to locate facilities that deliver, in particular, data analysis and search services over the internet.<sup>23</sup>

8.19 Telstra expressed concerns that the current exceptions do not recognise that, in the digital environment, ‘multiple reproductions and communications may occur’.<sup>24</sup>

8.20 Optus stressed the importance of caching and indexing to cloud computing. For example, in relation to ‘data centres’ it pointed to estimates that

over 85% of total global data centre traffic within its data centre, and between data centre traffic—that is, data that does not go to the end user. This traffic will involve automatic copying, including for backup and parallel processing purposes. Under the current Australian copyright regime, this may involve infringement of copyright laws.<sup>25</sup>

8.21 The Law Council of Australia argued that the legal position in relation to caching is ‘confused’ and that ‘it is undesirable to have several overlapping, but distinct provisions aimed at the same basic phenomenon and offering only partial and uncertain protection’.<sup>26</sup>

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20 Ibid, 113.

21 ACCC, *Submission 165*. Similar concerns were expressed by Telstra Corporation Limited, *Submission 222* and Law Council of Australia, *Submission 263*.

22 eBay, *Submission 93*.

23 Ibid.

24 Telstra Corporation Limited, *Submission 222*.

25 Optus, *Submission 183*.

26 Law Council of Australia, *Submission 263*.

### International comparisons

8.22 A number of other jurisdictions have specific exceptions that deal with caching and indexing. Article 13 of the European Council's *E-Commerce Directive* provides an exception for caching.<sup>27</sup> The UK has a specific exception—mirroring the *E-Commerce Directive*—that allows a provider to cache copyright material so long as the service provider:

- does not modify the information;
- complies with any conditions on access to, and updating of, the information;
- does not interfere with the lawful use of technology to obtain the data or use the information; and
- acts expeditiously to remove or disable access to the material upon obtaining knowledge that the work has been removed at the initial source, access has been disabled, or a court or administrative body has ordered such removal or disablement.<sup>28</sup>

8.23 A similar exception for caching exists in New Zealand under s 92E of the *Copyright Act 1994* (NZ).

8.24 In Canada, s 31.1 of the *Copyright Act* (Can) provides an exception that allows persons who provide services 'related to the operation of the Internet or another digital network' to telecommunicate or reproduce the work or other subject-matter through the internet or that network.<sup>29</sup> The section specifically provides that caching to make a telecommunication more efficient does not, by virtue of that act alone, infringe copyright, and appears to cover both the reproduction and communication of cached material.<sup>30</sup>

8.25 The Canadian *Copyright Act* also provides that copyright owners are limited to injunctive relief against a provider of an 'information location tool',<sup>31</sup> found to have infringed copyright by making a reproduction of copyright material, or by communicating that reproduction to the public by telecommunication.<sup>32</sup>

8.26 In the United States, caching, indexing and communication of search results may be non-infringing under fair use. For example, in *Field v Google Inc* it was held

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27 Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the internal market (entered into force on 8 June 2000) ('Directive on electronic commerce').

28 *Electronic Commerce Regulations 2002* (UK) reg 18.

29 *Copyright Act 1985* (Can) s 31 provides that infringement does not occur 'solely by providing those means' for the telecommunication or reproduction.

30 Ibid s 31.2 The exception is subject to a number of factors including that the person: does not modify work; ensures that caching is done in accordance with industry practice; and does not interfere with the use of technology that is lawful and consistent with industry practice in order to obtain data on the use or the work or other subject matter: s 31.3.

31 This is defined to mean 'any tool that makes it possible to locate information that is available through the Internet or another digital network': *Copyright Act 1985* (Can) s 41.27(5).

32 Providers must adhere to certain conditions to benefit from this protection.

that Google did not infringe copyright by caching a story that the plaintiff had posted to his website.<sup>33</sup> The court considered that the practice was fair use because, among other things, it was ‘transformative’ in nature and there was no evidence that Google intended to profit from the caching.<sup>34</sup> It also considered that Google was able to rely on the US safe harbour provisions for intermediate and temporary storage.<sup>35</sup> Similar findings were made in *Parker v Google Inc.*<sup>36</sup>

### The need for greater certainty

8.27 Stakeholders who called for reform suggested that the law concerning caching and indexing should be clarified to achieve greater certainty. A number suggested that caching and indexing should be covered by a fair use exception, noting especially the difficulty in drafting a technology-neutral exception.<sup>37</sup> The ADA and ALCC argued that a specific exception ‘will always be playing catch up with intermediary activities’.<sup>38</sup> Telstra suggested that network functions should be protected by a fair use exception which recognises that ‘multiple reproductions and communications are likely to occur’. It argued that the approaches taken in other jurisdictions

remain device/technology centric and therefore risk becoming obsolete as digital technology functions continue to evolve ... redrafting based on today’s technical knowledge and standards is likely to render the exemption obsolete in the context of future innovations.<sup>39</sup>

8.28 The Law Council of Australia submitted that a generally worded, abstract provision aimed at essential technical and internet functions could be adopted, with fairness factors ‘to protect the interest of copyright owners’.<sup>40</sup>

8.29 Optus argued that the current exceptions may not adequately account for the fact that cloud computing will increasingly require copying of data that is not accessed by the end user.<sup>41</sup> Universities Australia argued that as universities and other bodies migrate to cloud based systems the education-specific exception under s 200AAA ‘may well come under challenge’.<sup>42</sup>

8.30 Others supported a tightly-worded exception. For example, the Arts Law Centre of Australia supported an exception ‘limited to what is necessary for the technical

33 *Field v Google* 412 F Supp 2d, 1106.

34 *Ibid*, 1117–23.

35 *Ibid*, 1123–25.

36 422 F Supp 2d 492, 497.

37 Grey Literature Strategies Research Project, *Submission 250*; Law Council of Australia, *Submission 263*; EFA, *Submission 258*; Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; Law Institute of Victoria (LIV), *Submission 198*.

38 ADA and ALCC, *Submission 213*.

39 Telstra Corporation Limited, *Submission 222*.

40 Law Council of Australia, *Submission 263*.

41 Optus, *Submission 183*.

42 Universities Australia, *Submission 246*.

functions of search engines and other internet intermediaries and has no detrimental effects on artists’.<sup>43</sup>

### **Infringement concerns and current practices**

8.31 Other stakeholders argued that there was no practical impediment to caching and indexing in Australia and that the law did not need to be changed.<sup>44</sup> For example, Australian Film and TV bodies argued that:

Caching and indexing are not new internet functions; in fact, they happen every day. Despite this, no provider of caching, indexing or hyper-linking services, other than the ISP in the unique circumstances of *Cooper v Universal Music* has been found liable by an Australian court for copyright infringement by authorisation.<sup>45</sup>

8.32 Concerns were also raised that providing access to cached versions of websites may prevent access to underlying works and deprive owners of advertising revenue from their website.<sup>46</sup> For example, the Arts Law Centre of Australia argued that to the extent that internet-related functions ‘reproduce copyright works or assist copyright infringers to access works’, they can prejudice the ability of artists to earn an income.<sup>47</sup> The collecting society APRA/AMCOS did not support any exception that permitted the caching of downloads ‘tethered to subscription services, or material located behind a paywall’.<sup>48</sup>

8.33 The ABC believed that some of these concerns may be addressed as the industry continues ‘to drive the development of more sophisticated means to protect digital content made available online, such as encryption, digital rights management (DRM), progressive downloading and client verification/authenticating systems’.<sup>49</sup> The availability of technological protection measures (TPMs) counterbalances the risk of any unauthorised access to digital content. Google also submitted that the ‘robot.txt’ protocol is ‘widely accepted and allows website owners to have complete control over whether and how their content is indexed’.<sup>50</sup>

### **Interaction with safe harbour review**

8.34 The safe harbour provisions are found in div 2AA of the *Copyright Act*. The scheme limits the remedies available against ‘carriage service providers’—as intermediaries—against copyright infringement that takes place on their systems,

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43 The Arts Law Centre of Australia argued that there should be implementation of protocols for take down notices procedures that require ISPs, and internet connection hosts to remove works from caching and indexing services: Arts Law Centre of Australia, *Submission 171*.

44 BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; ARIA, *Submission 241*; PPCA, *Submission 240* News Limited, *Submission 224*; Screenrights, *Submission 215*; Australian Film/TV Bodies, *Submission 205*; iGEA, *Submission 192*; TVB (Australia) Pty Ltd, *Submission 124*.

45 Australian Film/TV Bodies, *Submission 205*.

46 NSW Young Lawyers, *Submission 195*.

47 Arts Law Centre of Australia, *Submission 171*.

48 APRA/AMCOS, *Submission 247*. See also CCH Australia Ltd, *Submission 105*. CCH argued that web searches should not allow back door access to pay for view content.

49 Australian Broadcasting Corporation, *Submission 210*.

50 Google, *Submission 217*.

which they do not control, initiate or direct. The scheme currently covers certain activities of carriage service providers including:

- Category A—acting as a conduit for internet activities by providing facilities for transmitting, routing or providing connections for copyright material;<sup>51</sup>
- Category B—caching through an automatic process;<sup>52</sup>
- Category C—storing copyright material on their systems or network;<sup>53</sup> and
- Category D—referring users to an online location.<sup>54</sup>

8.35 The Australian Government Attorney-General's Department has issued a Consultation Paper which proposes to extend the application of the safe harbour regime, by replacing the term 'carriage service provider' with 'service provider'.<sup>55</sup> The new term would cover 'internet service providers' and operators of online services.

8.36 A number of stakeholders suggested that caching and indexing by internet service providers could be dealt with by extending the definition of 'carriage service provider' under the safe harbour provisions rather than through copyright exceptions.<sup>56</sup>

8.37 ARIA submitted that the balance established under the safe harbour scheme should not be undermined by copyright exceptions, and that if some entities are not protected in respect of their caching activities, 'this should be reviewed through the scope of the safe harbour scheme'.<sup>57</sup> APRA/AMCOS suggested that:

It would be appropriate to consider the exception through the prism of the safe harbour provisions, ensuring that any entity that was able to take advantage of the exception was also constrained by an appropriate mandatory code of practice for the use of the cached material.<sup>58</sup>

8.38 Other stakeholders argued that the safe harbour provisions do not provide a complete answer.<sup>59</sup> For example, eBay submitted that if the safe harbours were:

extended beyond carriage service providers, it could operate to exempt from monetary damages the infringement of copyright that occurs in the course of providing many services online. However, this half way approach would not overcome the logical difficulty of providing a 'safe harbour' to support copyright infringement. It would be far preferable to substitute a wider but targeted exemption.<sup>60</sup>

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51 *Copyright Act 1968* (Cth) s 116AC.

52 *Ibid* s 116AD.

53 *Ibid* s 116AE.

54 *Ibid* s 116AF.

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

56 Music Council of Australia, *Submission 269*; Internet Industry Association, *Submission 253*; APRA/AMCOS, *Submission 247*; Australian Copyright Council, *Submission 219*.

57 ARIA, *Submission 241*, noting that 'any such review should also develop a code of conduct to apply to all ISPs requiring them to take steps to address all types of copyright infringing activities on their networks or through the use of their services'.

58 APRA/AMCOS, *Submission 247*.

59 R Xavier, *Submission 146*; eBay, *Submission 93*.

60 eBay, *Submission 93*.

8.39 Similarly, the Law Council of Australia noted that one approach may be to reform exceptions for natural persons and leave service providers ‘to the protection of (extended) safe harbours’. However, it argued that

this approach has its weaknesses. It is not clear that all entities engaged in caching in particular would be online service providers. Further, the Safe Harbours were not designed to operate as a general set of regulations requiring compliance from all actors engaged in network related activities ... Creating additional exceptions for direct infringement will still leave work for the safe harbours, which protect from both direct and authorisation liability.<sup>61</sup>

8.40 Under the Terms of Reference, the ALRC is not to duplicate work being done in relation to a safe harbour scheme. However, in the ALRC’s view, safe harbours need not be used protect ‘internet service providers’ from liability for caching and indexing activities that are not infringement because of fair use.

## Text and data mining

8.41 Data and text mining has been defined as ‘automated analytical techniques’ that work by ‘copying existing electronic information, for instance articles in scientific journals and other works, and analysing the data they contain for patterns, trends and other useful information’.<sup>62</sup> Data and text mining has also been described as ‘a computational process whereby text or datasets are crawled by software that recognises entities, relationships and actions’.<sup>63</sup>

8.42 The growth of digital technology has seen increasing amounts of data stored in databases and repositories. Use of data and text mining to extract patterns across large data sets and journal articles is becoming more widely used in a number of research sectors, including medicine, business, marketing, academic publishing and genomics.<sup>64</sup> This type of research has been referred to as ‘non-consumptive’ research, because it does not involve reading or viewing of the works.<sup>65</sup>

8.43 The Terms of Reference refer to the general interests of Australians to ‘access, use and interact with content in the advancement of education, research and culture’. Researchers and research institutions have highlighted the value of data mining in paving the way for novel discoveries, increased research output and early identification of problems.<sup>66</sup>

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61 Law Council of Australia, *Submission 263*.

62 UK Government Intellectual Property Office, *Consultation on Copyright* (2011), 80. See also, D Sašo, ‘Data Mining in a Nutshell’ in S Džeroski and N Lavrač (eds), *Relational Data Mining* (2001). Data mining programs are often called data-analytics software.

63 IASTMP, *Submission 200*.

64 R Van Nooren, ‘Text Mining Spats Heats Up’ (2013) 495 *Nature* 295 provides examples of text mining including: linking genes to research, mapping the brain and drug discovery.

65 C Haven, *Non-consumptive research? Text-mining? Welcome to the Hotspot of Humanities Research at Stanford* (2012) <<http://news.stanford.edu/news/2010/december/jockers-digitize-texts-120110.html>> at 22 April 2013; Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012).

66 UK Government, *Consultation on Copyright: Summary of Responses* (2012), 17.



8.44 The Cyberspace Law and Policy Centre submitted that data mining

has the potential to grant ‘immense inferential power’ to allow businesses, researchers and institutions to ‘make proactive knowledge-driven decisions’. There are significant potential commercial benefits—data mining has the potential to improve business profits by allowing businesses to better understand and predict the interests of customers so as to focus their efforts and resources on more profitable areas.<sup>67</sup>

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

### Current law

8.46 There is no specific exception in the *Copyright Act* for text or data mining. Where the text or data mining process involves the copying, digitisation, or reformatting of copyright material without permission, it may give rise to copyright infringement.

8.47 One issue is whether text mining, if done for the purposes of research or study, would be covered by the fair dealing exceptions. The reach of the fair dealing exceptions may not extend to text mining if the whole dataset needs to be copied and converted into a suitable format. Such copying would be more than a ‘reasonable portion’ of the work concerned.<sup>69</sup> Nor is it clear whether copying for text mining would fall under the exception relating to temporary reproduction of works as part of a technical process, under s 43B of the *Copyright Act*, but it seems unlikely.

### International comparisons

8.48 The need for a specific text mining exception has been hotly contested in the UK. The Hargreaves Review recommended that the UK Government ‘press at EU level for the introduction of an exception allowing uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work’.<sup>70</sup> One example given of such a use was data mining. The report also recommended that the Government ensure that such an exception cannot be overridden by contract.<sup>71</sup>

8.49 In response to the Hargreaves Review, the Business, Innovation and Skills Committee of the UK Parliament did not endorse a specific exception to deal with data mining for research. Rather, it urged the Government to encourage the early

<sup>67</sup> Cyberspace Law and Policy Centre, *Submission 201*.

<sup>68</sup> McKinsey Global Institute, *Big Data: The Next Frontier for Innovation, Competition and Productivity* (2011), Executive Summary. It is suggested that big data equates to financial value of \$300 billion (US Health Care); 250 billion Euros (EU Public sector administration); global personal location data (\$100 billion in revenue for service providers and \$700 billion for end users).

<sup>69</sup> *Copyright Act 1968* (Cth) s 40(5) setting out what is a ‘reasonable portion’ with respect to different works.

<sup>70</sup> I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 47.

<sup>71</sup> *Ibid*, 51.

development of models in which ‘licences are readily available at realistic rates to all bona fide licensees’.<sup>72</sup>

8.50 However, the UK Government has proposed to amend the *Copyright, Designs and Patents Act 1988* (UK) so that ‘it is not an infringement of copyright for a person who already has a right to access the work (whether under a licence or otherwise) to copy the work as part of a technical process of analysis and synthesis of the content of the work for the sole purpose of non-commercial research’.<sup>73</sup> The rationale for this exception was that

the copying involved in text and data analytics is a necessary part of a technical process, and is unlikely to substitute for the work in question (such as a journal article). It is therefore unlikely that permitting mining for research will itself negatively affect the market for or value of copyright works. Indeed, it may be that removing restrictions from analytic technologies would increase the value of articles to researchers.<sup>74</sup>

8.51 It was also proposed that a licence could not prevent the use of works under the exception, but may impose conditions of access to a licensor’s computer system or to third party systems on which the work is accessed. Where a TPM prevents a researcher from benefiting from this exception, appeal can be made to the Secretary of State.

8.52 Text and data mining has also been considered in the US in the context of ‘transformative use’. In *The Authors Guild v HathiTrust*, the trial judge found that non-expressive uses such as text searching and computational analysis are fair use and therefore do not infringe the copyright in the underlying material.<sup>75</sup>

### Licensing solutions

8.53 A number of stakeholders submitted that there was no impediment to data or text mining in the *Copyright Act*.<sup>76</sup> Some suggested that data and text mining activities may already be covered under the existing research or study fair dealing provisions, or may be covered by statutory licence if done for educational purposes.<sup>77</sup>

8.54 In particular, publishers argued that the market for data and text mining is still developing, and that solutions to the perceived problem have not had a chance to evolve. For example, John Wiley & Sons submitted that:

There is currently little or no uniform understanding of what TDM (text/data mining) actually is, nor how best it can be enabled or supported. From our experience, there is little consistency across TDM projects as far as activities, processes and results are

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72 House of Commons Business, Innovation and Skills Committee, *The Hargreaves Review of Intellectual Property: Where next?* (2012), 19.

73 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 37.

74 Ibid.

75 This analysis was supported in submissions from the ADA and ALCC, *Submission 213* and R Xavier, *Submission 146*.

76 Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*; Australian Directors Guild, *Submission 226*; Australian Copyright Council, *Submission 219*.

77 Copyright Agency/Viscopy, *Submission 249*; Australian Publishers Association, *Submission 225*.

concerned, let alone definitions around content access methods and protocols or standard licensing terms.<sup>78</sup>

8.55 The Association of Learned and Professional Society Publishers (ALPSP) argued that ‘publishers are not blocking access to articles for text and data mining—publishers are reporting that current requests are very low, and in the main, they are granted’.<sup>79</sup> Therefore, it was suggested that solutions lie in co-operation between users and publishers to create licensing solutions.<sup>80</sup> Exceptions, it was argued, would not create an environment conducive to collaboration:

Data and text mining solutions are best found in market-based initiatives, like proactive voluntary licensing, that offer faster and more flexible ways to adapt to changing market needs and preferences. These solutions must be based on collaboration between users and publishers. Value proposals and business models for publishers in the field of data and text mining are only now emerging, and publishers are experimenting with various contractual and operational models.<sup>81</sup>

8.56 Publishers also argued that licensing helps offset publishers’ costs to support content mining on a large scale, and that increases in costs ‘could act as a significant disincentive to publishers to continue to invest in programmes to enrich and enhance published content, which in turn facilitates greater usage and encouragement’.<sup>82</sup>

8.57 Publishers warned that ‘the relative immaturity of the TDM market should not be considered as indicative of market failure demanding legislative intervention’.<sup>83</sup>

8.58 Other stakeholders were concerned about the reach of any data and text mining exception into commercial operations.<sup>84</sup> For example, Telstra recognised the value of data and text mining ‘in the context of research, education and culture’, but was opposed to reform that would allow the use of data mining tools or software for commercial exploitation. For example:

an offshore data-miner that scrapes (or copies) data from an online Australian database, such as a telephone directory. The data-miner then uses the scraped content to establish a competing business, without the need to source, verify, supplement or format the content. The data-miner also avoids the need to employ Australian staff, or to invest in the creation or development of content.<sup>85</sup>

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78 John Wiley & Sons, *Submission 239*.

79 ALPSP, *Submission 199*.

80 Australian Publishers Association, *Submission 225*.

81 IASTMP, *Submission 200*.

82 John Wiley & Sons, *Submission 239*. The APA argued that cost implications arise because ‘crawling can affect platform performance and response times, and may require the development and maintenance of parallel content delivery systems; costs are then incurred to ensure that adequate performance and access (whether for licensed or unlicensed users) is maintained: Australian Publishers Association, *Submission 225*.

83 John Wiley & Sons, *Submission 239*; Australian Publishers Association, *Submission 225*; ALPSP, *Submission 199*.

84 Telstra Corporation Limited, *Submission 222*; Australian Broadcasting Corporation, *Submission 210*; Cyberspace Law and Policy Centre, *Submission 201*. The Cyberspace Law and Policy Centre stressed that ‘there is a need to manage access to address, technical, competitive and commercial risks’.

85 Telstra Corporation Limited, *Submission 222*.

8.59 IASTMP argued that publishers are increasingly providing licensing solutions for commercial text mining and that they should be allowed to continue providing or facilitating customised data and text mining solutions.<sup>86</sup>

### **Facilitating research and study**

8.60 A number of stakeholders argued that data and text mining should be permitted, drawing on the principle of ‘non-expressive’ use, or uses that do not trade on the underlying or expressive purpose of the work.<sup>87</sup>

8.61 For example, the Australian Industry Information Association argued that it is important for legislative reform to encourage research, development and competition in the data analytics field. It suggested a specific exception to allow data and text mining for the purposes of ‘comparison, classification or analysis’ would not negatively impact on the original data provider’s rights and commercial interests because the technology is not intended to reprint the original data, but to provide a synthesised result. These outcomes do not interfere with the economic value of the copyright material nor compete with it.<sup>88</sup>

8.62 Similarly, others referred to use of academic materials and journals that could be considered as ‘transformative’ uses.<sup>89</sup> The ADA and ALCC suggested that data and text mining, as a subset of transformative use may be best supported by a flexible, open ended exception:

uses which may have been characterised as transformative, such as text and data mining, but may be better seen as ‘non-expressive’ or ‘orthogonal’ uses. Fair use in the US provides the flexibility for new technologies to develop which may straddle the two definitions, and similarly providing courts with the tools to deem when such uses will unreasonably harm the copyright owner.<sup>90</sup>

8.63 A number of submissions referred to the importance of data and text mining for non-commercial research and study.<sup>91</sup> However, the Commonwealth Scientific and Industrial Research Organisation (CSIRO) argued that the commercial/non-commercial distinction is not useful, since:

such a limitation would seem to mean that ‘commercial research’ must duplicate effort and would be at odds with a goal of making information (as opposed to illegal copies of journal articles, for example) efficiently available to researchers ... As noted, much research is conducted through international collaboration. If the laws in Australia are more restrictive than elsewhere or if the administration of any rights system is cumbersome or onerous and creates excessive cost for research, then that might be expected to impact on the desirability of Australia as a research destination.<sup>92</sup>

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86 IASTMP, *Submission 200*.

87 ADA and ALCC, *Submission 213*; Australian Industry Group, *Submission 179*.

88 AIIA, *Submission 211*. See also Internet Industry Association, *Submission 253* who also supported an exception around copying for the purposes of extracting information.

89 ADA and ALCC, *Submission 213*; R Xavier, *Submission 146*; M Rimmer, *Submission 138*.

90 ADA and ALCC, *Submission 213*.

91 CSIRO, *Submission 242*; Telstra Corporation Limited, *Submission 222*; M Rimmer, *Submission 138*.

92 CSIRO, *Submission 242*.

## **Non-consumptive uses and fair use**

8.64 Australian copyright law should recognise that the reproduction of copyright material is a necessary part of the effective functioning of technology in the digital environment. The fact that copyright material has been copied—for example by a search engine—should not, of itself, provide a full answer to the question of infringement. Copyright exists to protect the expression of ideas and facts, rather than the facts themselves.

8.65 The ALRC proposes that the fair use exception proposed in Chapter 4 should be applied when determining whether uses of copyright material for the purposes of caching, indexing or text mining infringes copyright.

8.66 The ALRC also proposes that ‘non-consumptive’ uses should be one of the illustrative purposes of the fair use exception.<sup>93</sup> This should signal that uses that fall within the broader category of ‘non-consumptive use’ are more likely to be fair than uses that do not fall into this, or any other, category of illustrative purpose. However, this does not mean that all non-consumptive uses will be fair. A wider inquiry into the fairness factors is necessary and crucial.

8.67 There is a spectrum along which uses of copyright material may, to a greater or lesser extent, be said to be ‘trading on’ the underlying and expressive purpose of the copyright material. In the ALRC’s view, the fairness factors, including the nature and use of the copyright material; the portion of the material that is taken; and the impact on the potential market for the work provides a flexible framework for balancing the interests of users and rights holders in a way that specific exceptions cannot.

8.68 In the event that fair use is not enacted, the ALRC proposes an alternative, namely, fair dealing for ‘non-consumptive’ uses. This fair dealing exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the general fair use exception.

8.69 The *Copyright Act* should define ‘non-consumptive’ use to mean uses of copyright material ‘that do not trade on the underlying or expressive purpose the material’. The ALRC proposes that ‘non-consumptive use’ be defined, because unlike the existing fair dealing provisions—such as parody and satire or reporting the news—it is not immediately clear what this term means.

8.70 The section below explains the ALRC’s reasoning as to why caching and indexing, and data and text mining, should be considered under fair use.

## **Caching and indexing**

8.71 In the ALRC’s view, the use of copyright material for caching, indexing and other similar functions that are necessary in the digital environment should not infringe copyright. Indeed, the fact that no company has been sued in Australia for caching and

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93 See Ch 4.

indexing might suggest that rights holders consider such activities to be ‘fair use’, or that such uses do not sufficiently prejudice existing markets to warrant litigation.<sup>94</sup>

8.72 There are strong arguments that lack of protection for such activities comparable to other jurisdictions may create an environment of uncertainty which could have an impact on investment decisions about whether to operate in Australia or contribute to increases in the cost of providing services to the Australian public, such as internet streaming of television programs. The development of cloud computing services will also increase the need for temporary copies to be made.

8.73 Further, it appears difficult to draft a specific exception for caching and indexing that would be technology neutral, and that would accommodate the different interests of the parties. Technology reliant on copying will continue to evolve, and the *Copyright Act* needs to be to adaptive to such technological changes.

8.74 In the ALRC’s view, a general fair use exception may provide more flexibility to consider the impact on the market than blanket exception that permits caching and indexing.

8.75 The caching and communication of content located behind a ‘paywall’ or ‘subscription content’ is unlikely to be fair use.<sup>95</sup> On the other hand, as argued by Pandora, where a licence has been obtained to communicate recordings and temporary copies are made for the purposes of exercising that licence, this should not be subject of further licensing.<sup>96</sup> This appears on its face to be a non-consumptive use more likely to be fair (that is, incidental copying in order to exercise a right).

8.76 The *Copyright Act* contains a number of disparate provisions that deal with ‘temporary copying’ that are intended to cover different forms of caching or copying that is required as part of the way a technology functions. It is undesirable to have multiple provisions that do not adequately cover the full spectrum of caching activities. If fair use is enacted, these existing exceptions should be repealed.

### **Data and text mining**

8.77 For similar reasons, the ALRC considers that the use of copyright material for data and text mining should also be considered under the fair use exception, in determining whether copyright is infringed.

8.78 There is not enough evidence of market failure to warrant a specific exception to deal with data and text mining, and the benefits of the data analytics industry are capable of being maximised through collaboration between researchers and publishers. In particular, the ALRC considers that voluntary licensing should be pursued for commercial uses of data and text mining.

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94 In consultations the ALRC heard that rights holders consider some caching or indexing activities as having an implied or zero licence, rather than accepting that the use is fair.

95 Having regard to the portion that is copied and the fact that there is market for subscription access to copyright material.

96 Pandora Media Inc, *Submission 104*.

8.79 In the ALRC's view, fair use would not undermine emerging market solutions for data analytics. Rather, the availability of licensing solutions would be one factor in determining whether a data or text mining use is fair. The fairness factors are intended to provide a framework within which a number of competing interests can be balanced. In respect of data and text mining, these can include but are not limited to:

- the amount of copyright material that was copied;
- whether the data or text mining will be used for a non-commercial purpose;
- whether the use is to facilitate education and research;
- the existence of any agreed industry guidelines; and
- whether the copying resulted in an end use that is considered transformative and that does not trade on the underlying expressive purpose of the copyright material that is copied.<sup>97</sup>

**Proposal 8–1** The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. 'Non-consumptive use' should be an illustrative purpose in the fair use exception.

**Proposal 8–2** If fair use is enacted, the following exceptions in the *Copyright Act* should be repealed:

- (a) s 43A—temporary reproductions made in the course of communication;
- (b) s 111A—temporary copying made in the course of communication;
- (c) s 43B—temporary reproductions of works as part of a technical process of use;
- (d) s 111B—temporary copying of subject-matter as a part of a technical process of use; and
- (e) s 200AAA—proxy web caching by educational institutions.

**Proposal 8–3** If fair use is not enacted, the *Copyright Act* should be amended to provide a new fair dealing exception for 'non-consumptive' use. This should also require the fairness factors to be considered. The *Copyright Act* should define a 'non-consumptive' use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

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97 Whether a use is transformative can be considered when applying fair use. See Ch 10.





## 9. Private and Domestic Use

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### Summary

9.1 Australia should continue to allow exceptions for certain uses of copyright material for private and domestic purposes. Some of these uses do not greatly affect the market for the material, and will not reduce incentives to create. Private copying and use of copyright material is a common occurrence, and is often factored into the price of the material.

9.2 However, private uses of copyright material are not always fair. Sometimes they may harm a market that a rights holder should be able to exploit. This chapter proposes that the fair use exception should be applied when determining whether a private and domestic use infringes copyright.

9.3 ‘Private and domestic use’ should also be an illustrative purpose in the proposed fair use exception, to signal that many private uses may be fair. This does not mean that all private and domestic uses are fair—the fairness factors in the fair use exception must be considered.

9.4 As discussed in Chapter 5, the fair use exception should also be applied when determining whether a third party who uses copyright material to facilitate a private and domestic use infringes copyright.

9.5 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for private and domestic use.

9.6 Either way, the existing private copying exceptions in the *Copyright Act* for format shifting and time shifting should be repealed. They are too prescriptive and inflexible to keep up with an evolving digital environment.

9.7 Private and domestic use is a much narrower concept than ‘social use’. Some social uses of copyright material—for example in creating and sharing user-generated content—may be fair, particularly when transformative. Such social uses can be considered under the fair use exception. But the ALRC does not propose that ‘social uses’ be an illustrative purpose in the fair use exception, or otherwise be given any special stature in copyright exceptions.

## Current law

9.8 Format shifting and time shifting are two types of private-use exception currently provided for in the *Copyright Act*.

9.9 Format shifting exceptions were introduced in 2007. They allow for the copying, in limited circumstances, of books, newspapers and periodicals,<sup>1</sup> photographs,<sup>2</sup> videotapes,<sup>3</sup> and sound recordings.<sup>4</sup> These exceptions have common elements. For example, the exceptions apply only if the owner of the original makes the copy, and the original is not an infringing copy.

9.10 Some of these conditions may mean the exceptions do not apply to copies stored on remote servers in the cloud. For example, the exception for format shifting of sound recordings only applies if the copy is to be used with a device owned by the user.<sup>5</sup> Further, the exception for books, newspapers and periodicals only allows users to make one copy in each format, and storing content in the cloud may require multiple copies.<sup>6</sup>

9.11 The format shifting exceptions apply only if the owner of the earlier copy makes the later copy. This raises questions about whether others should be able to make these copies for the owner’s private and domestic use.<sup>7</sup>

9.12 The format shifting exception for films only applies to copies made from films in analog form.<sup>8</sup> It does not allow digital-to-digital copying. This means the exception does not apply to copies made for example, from DVDs and Blu-Ray discs and digital copies downloaded from the internet. One reason given for this limitation is that

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1 *Copyright Act 1968* (Cth) s 43C.

2 *Ibid* s 47J.

3 *Ibid* s 110AA.

4 *Ibid* s 109A.

5 *Ibid* s 109A(1)(b).

6 *Ibid* 43C(1)(e).

7 This is discussed later in this chapter, and more broadly in Ch 5.

8 *Copyright Act 1968* (Cth) s 110AA(1)(a).

‘unrestricted digital-to-digital copying could allow consumers to reproduce the full picture quality and features provided in commercially produced digital film content’.<sup>9</sup>

9.13 Section 111 of the *Copyright Act*, introduced in 2007, provides an exception for the making of ‘a cinematograph film or sound recording of 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’.<sup>10</sup>

9.14 This exception is confined to recordings of ‘a broadcast’, defined to mean a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* (Cth). By ministerial determination, a service that makes available television and radio programs using the internet is not a broadcasting service under the *Broadcasting Services Act*.<sup>11</sup> This raises the question of whether the time shifting exception in the *Copyright Act* should apply to content made available using the internet or internet protocol television.<sup>12</sup>

9.15 Another important question is how this exception should operate with new technologies and services, such as the cloud. The answer to this question may depend on the nature of the service. Recordings made by consumers using their own technology, but later stored on a remote server, may be distinguished from recordings made by companies and stored on remote servers for their subscribers to access.

## Fair use

9.16 The ALRC proposes that the fair use exception should be used to determine whether a private and domestic use of copyright material infringes copyright. The fair use provision should include ‘private and domestic use’ as an example of a fair use—an illustrative purpose. The existing exceptions for time shifting and format shifting in the *Copyright Act* should be repealed.

9.17 If fair use is not enacted, then the ALRC proposes that the *Copyright Act* be amended to provide for a new fair dealing for private and domestic uses. For private and domestic uses, this would essentially have the same outcome as the fair use exception.

9.18 A number of stakeholders submitted that a general fair use or fair dealing exception should be used to determine whether private copying infringes copyright.<sup>13</sup> For example, the Australian Communications Consumer Action Network submitted that

9 Australian Government Attorney-General's Department, *Copyright Exceptions for Private Copying of Photographs and Films, Review of sections 47J and 110AA of the Copyright Act 1968* (2008), [2.11].  
10 *Copyright Act 1968* (Cth) s 111.

11 *Determination under paragraph (c) of the definition of ‘broadcasting service’* (No 1 of 2000), Commonwealth of Australia Gazette No GN 38, 27 September 2000.

12 The application of broadcast exceptions to the transmission of television or radio programs using the internet is discussed in Chs 15 and 16.

13 For example, Telstra Corporation Limited, *Submission 222*; EFA, *Submission 258*; iiNet Limited, *Submission 186*; Law Institute of Victoria (LIV), *Submission 198*.

the current private or domestic use exception needs to be replaced with a fair dealing or fair use provision that is technology-neutral and that allows for the increasingly diverse ways that the public might consume and arrange content for their private enjoyment.<sup>14</sup>

9.19 It was also submitted that a further purpose-based exception could supplement a more general, open-ended provision.<sup>15</sup> Some stakeholders also submitted that private purposes should be included as an example of a fair use, in part to promote certainty.<sup>16</sup> Others suggested there should be a single, technology-neutral exception for private use, but did not mention fair use or fair dealing.

### **Social norms**

9.20 One of the primary justifications for private and domestic use exceptions relate to public expectations and social norms. In Australia, many private uses of copyright material are commonly thought by members of the public to be fair. This is one factor that suggests that some private uses of copyright material should not infringe copyright.

9.21 Many stakeholders said that Australians do not understand or respect the current copyright laws, and that the law does not reflect community attitudes or practice. The *Copyright Act* is said to be ‘out of sync with consumer behaviour and contemporary attitudes,’ because

technology and the myriad applications available to consumers provide consumers with new, cheap (often free) ways to use and store material, including copyright material, particularly for personal use.<sup>17</sup>

9.22 Expanding the private and domestic use permitted under copyright law would simply legalize what consumers are already doing, some said. Many submitted that the law should take account of consumer expectations. Commercial Radio Australia, for example, said:

The current copyright framework cannot be considered fit for the digital age when so many users repeatedly breach copyright, simply by shifting a piece of content from one device to another. Users expect to be able to store content on a variety of devices—including computers, mobile phones, tablets—and in a variety of locations, such as on local servers and in the cloud. Copyright law should recognise these changing use patterns and reflect them, to permit private individuals to take advantage of new technologies and storage devices available.<sup>18</sup>

9.23 The ADA and ALCC submitted:

It seems likely that the majority of Australian consumers aren’t aware that many of the ways in which they enjoy and engage with copyright works fall outside of the scope of what is permitted under copyright law. ... If consumers widely believe they have the ‘right’ to copy content they’ve acquired legally for personal enjoyment, and

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14 ACCAN, *Submission 194*.

15 ADA and ALCC, *Submission 213*.

16 Eg, Law Institute of Victoria (LIV), *Submission 198*; Telstra Corporation Limited, *Submission 222*.

17 NSW Young Lawyers, *Submission 195*.

18 Commercial Radio Australia, *Submission 132*.

it's generally recognised as acceptable consumer behaviour, copyright laws should reflect this.<sup>19</sup>

9.24 Similarly, Ericsson submitted that copyright laws must meet reasonable consumer expectations:

Consumers increasingly expect to be able to consume creative content on demand anytime, any device and anywhere. Thus the ability to shift lawfully acquired content within the private sphere is an integral and necessary step of modern consumer behaviour.<sup>20</sup>

9.25 Professor Kathy Bowrey submitted that changing technologies, often beyond the consumer's control, can 'effectively frustrate or terminate access to legitimate works'. An e-book bought for one device, for example, will often not work on another. Bowrey said it is 'hard for consumers to understand why they do not have the right to maintain functional access to content they have purchased, because of technical decisions made by third parties'.<sup>21</sup>

9.26 Professor Pamela Samuelson, discussing US law, has said that 'ordinary people do not think copyright applies to personal uses of copyrighted works and would not find acceptable a copyright law that regulated all uses they might make of copyrighted works'.<sup>22</sup> Other US scholars refer to research that shows that 'most members of the public ... believe that personal use copying is acceptable as long as the copies are not sold'.<sup>23</sup> There is a core belief, Ashley Pavel argues, that strictly private uses of a purchased copy are 'none of the copyright owner's business'.<sup>24</sup>

9.27 Laws that are widely ignored also lower the community's respect for the law more generally, and particularly other copyright laws. The force of the message that peer-to-peer file sharing of copyright material between strangers is illegal may be diluted by the message that copying a purchased DVD to a computer for personal use is also illegal. The Explanatory Memorandum for the Copyright Amendment Bill 2006 stated that failure to recognise such common practices as time and format shifting 'diminishes respect for copyright and undermines the credibility of the Act'.<sup>25</sup>

9.28 Many submissions made these points. The ACCC said that failing to recognise common practices, such as format shifting purchased music or time shifting a broadcast, 'diminishes respect for copyright and undermines the credibility of the Act'.<sup>26</sup> Sally Hawkins spoke of restrictions that 'are simply ignored for the most part' and said this 'casts the law in a bad light in so much as it fails to reflect what are

<sup>19</sup> ADA and ALCC, *Submission 213*.

<sup>20</sup> Ericsson, *Submission 151*.

<sup>21</sup> K Bowrey, *Submission 94*.

<sup>22</sup> P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537, 2591.

<sup>23</sup> A Pavel, 'Reforming the Reproduction Right: The Case for Personal Use Copies' (2009) 24 *Berkeley Technology Law Journal* 1615, 1617.

<sup>24</sup> *Ibid*, 1617. See also A Perzanowski and J Schultz, 'Copyright Exhaustion and the Personal Use Dilemma' (2012) 96(6) *Minnesota Law Review* 2067, 2077.

<sup>25</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 6.

<sup>26</sup> ACCC, *Submission 165*.

common expectations and standards'.<sup>27</sup> The Law Institute of Victoria said there was a 'widespread public expectation that making such copies of legally sourced material should be legally permitted':

if the law significantly diverges from widespread expectation and common community practice, then there is a serious risk that credibility for copyright law will become undermined.<sup>28</sup>

9.29 Robert Xavier stated that 'imposing unenforceable liability for common acts that cause no conceivable harm will only encourage contempt for copyright law and lead to more infringement'.<sup>29</sup>

9.30 Some are sceptical about the relevance of social norms to copyright policy. Clearly, the fact that some people shoplift does not suggest that shoplifting should be legalised. Some submissions stressed that consumer expectations and behaviour should not justify changes to the law. For example, Foxtel submitted:

While we understand the Government's desire to ensure that Australian copyright law keeps pace with legitimate consumer practices, simply because digital technology is available which makes copying and storing content easier does not mean that the law should be amended to legitimise infringing conduct.<sup>30</sup>

9.31 Others said that, if the public does not know that common practices are illegal, then this is not an argument for law reform, but for a public awareness campaign.<sup>31</sup>

9.32 The ALRC agrees that social norms should not dictate the law. But the law should at least account for social norms. If a practice is very widespread, and commonly thought to be harmless, then this should, at least, be one consideration when determining whether the practice should be prohibited.

### **Complexity of existing provisions**

9.33 The existing specific exceptions in the *Copyright Act* are complex. They may not be understood by members of the public who have not made a study of copyright law. A number of submissions criticised the complexity of the current private copying exceptions, and said this should be simplified. Telstra submitted that it 'believes that the current private and domestic use exceptions should be clarified and simplified, with an emphasis on encouraging the creation and consumption of legally acquired content across technologies and devices'.<sup>32</sup> Robin Wright said that having the private and domestic use exceptions 'scattered throughout the Act does not assist non-specialist users to understand what they are permitted to do and encourages individual rule-making decisions by poorly informed users about how copyright law works'.<sup>33</sup>

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27 S Hawkins, *Submission 15*.

28 Law Institute of Victoria (LIV), *Submission 198*.

29 R Xavier, *Submission 146*.

30 Foxtel, *Submission 245*.

31 COMPPS, *Submission 266*.

32 Telstra Corporation Limited, *Submission 222*.

33 R Wright, *Submission 167*.

9.34 Case law applying fair use may not be widely understood by members of the public either, but at least the concept of fairness is easy to comprehend.

### **A single, technology neutral provision**

9.35 A number of stakeholders agreed that a single, technology-neutral exception for private and domestic use, though not necessarily fair use, would simplify and clarify the *Copyright Act*. The ABC submitted that ‘a single, technology-neutral, format-shifting exception with common restrictions that reflects the underlying policy of the exception would be preferable’.<sup>34</sup>

9.36 A technology-neutral approach to copyright policy might suggest that whatever users may do using technology in their own home, they should be able to do using technology stored remotely. Individuals are increasingly using cloud computing services to store copies of copyright material, enabling consumers to access their content from multiple computers and devices more easily. This also raises the question, discussed in Chapter 5, of third parties facilitating private uses.

9.37 Some stakeholders said any such exception should focus on the purpose of the use, rather than on any particular technology or on the type of material being used.<sup>35</sup> This would allow the law to better adapt to new technology.

9.38 Some called for a more technology-neutral application of time-shifting exceptions, saying that they should not be confined to broadcast material. Ericsson submitted, for example, that a time-shifting exception ‘should apply irrespective of content delivery method or underlying technology’ and that it ‘strongly believes that copyright law should adhere to a technology neutral principle, where the basis or an exception should be the purpose rather than the technology itself’.<sup>36</sup>

9.39 The type of copyright material used should also not matter, other submitted. Rather, exceptions for time shifting should be content neutral. It should not be about the nature of the content, or the platform on which it is offered, but rather the nature of the activity. Is a service merely a recording and storage facility, or something more?<sup>37</sup>

9.40 The Internet Industry Association submitted that, if advertiser-supported television content were made available on the internet, without payment of a subscription, then time-shifting exceptions should apply.<sup>38</sup> The ABC made a similar point, but said the exception should be confined to ‘ephemeral content’:

The ABC believes the time-shifting exception should apply to ephemeral content made available using the internet, for example, ephemeral content made available by IPTV services. If the ABC were to communicate a scheduled stream of content in an ephemeral manner on a point to point basis, regardless of whether it is simulcast with

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<sup>34</sup> Australian Broadcasting Corporation, *Submission 210*.

<sup>35</sup> For example, K Bowrey, *Submission 94*.

<sup>36</sup> Ericsson, *Submission 151*. See also ACCAN, *Submission 194*; ACCC, *Submission 165*.

<sup>37</sup> See, eg, Australian Broadcasting Corporation, *Submission 210*.

<sup>38</sup> Internet Industry Association, *Submission 253*.

a point to multipoint service, the exception should apply to such internet protocol television if no catch-up service is provided.<sup>39</sup>

9.41 Other submissions questioned whether the private copying exceptions could usefully be simplified and consolidated. The Association of Learned and Professional Society Publishers said:

It is difficult to see how a single one-size-fits-all exception could provide appropriate protection to the myriad different digital works that are available. It would be clearer, simple and more user-friendly to define specific allowed uses to different categories of work. Scope for confusion would then be removed.<sup>40</sup>

9.42 All works are not created equal, others submitted. The market for digital music operates quite differently from that of digital sheet music, which operates differently from that of e-books and software. One exception for private copying cannot work for all of these markets. Free TV submitted:

Markets for film, music, photographs, books and newspapers are uniquely different and the test of financial harm will differ for each market. Specific exceptions are required to ensure no substantial harm is caused to any particular market and provide greater certainty for consumers and copyright owners.<sup>41</sup>

9.43 Similar reasoning was used in a departmental review of the format shifting exceptions for films and photographs in 2008, which recommended that no changes be made at the time. The review considered whether the two exceptions should be made to align with the broader exception for format shifting of music. The Department stated that it recognised the advantages of consistency and simplicity, but also that:

The test of financial harm must be applied to particular markets. Markets for digital music, photographs and films are very different. This will produce differences in exceptions unless they are drafted in a common form which causes no substantial harm to any copyright market.<sup>42</sup>

9.44 The computer games industry submitted that it ‘understands the demand for format flexibility and continues to adapt their business models to address this demand’, but noted that the introduction of ‘a broader format shifting exception would conflict with the proprietary nature of the major game formats and challenge the effectiveness of technological protection measures’.<sup>43</sup>

Insofar as format shifting applies to printed music, the economic realities of creating physical editions in a rapidly declining (and already small) market, while at the same time investing significant funds in digital print music services do not warrant any extension in reproductions for private or domestic use.<sup>44</sup>

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39 Australian Broadcasting Corporation, *Submission 210*.

40 ALPSP, *Submission 199*.

41 Free TV Australia, *Submission 270*.

42 Australian Government Attorney-General's Department, *Copyright Exceptions for Private Copying of Photographs and Films, Review of sections 47J and 110AA of the Copyright Act 1968* (2008), [3.16], [3.17].

43 iGEA, *Submission 192*.

44 Hal Leonard Australia Pty Ltd, *Submission 202*.



9.45 In the ALRC's view, fair use and fair dealing exceptions with fairness factors considered, are likely to be able to better account for the differences in markets and technologies between types of copyright material and different types of uses. This is one important reason the ALRC prefers these fairness exceptions to a new specific exception that does not allow for a proper consideration of the likely effect of a use on a rights holder's interests.

9.46 The fair use and fair dealing for private and domestic use exceptions proposed in this Discussion Paper are both technology neutral, but when applied, uses with some technologies may be found to be fair, while others are not. The ALRC sees this as a strength of fair use.

9.47 Exceptions should not be confined to copies made or stored on devices owned by the consumer. This is not to say that third parties, such as companies that provide cloud computing services, should necessarily be free to use copyright material for their customers.<sup>45</sup> However, it seems clear to the ALRC that to confine exceptions explicitly to uses of copyright material made on computers and other devices owned by the user, is to insist on a technology distinction that, in view of cloud computing, is already outdated.

### **Business models and market harm**

9.48 Some private and domestic uses of copyright material are unlikely to have any significant effect on the market for the material, particularly if the material is only used privately and the original or copies are not sold or given away. Few people will buy the same item twice, some might say, because the law prohibits them from making a copy. Members of the public may also be unlikely to seek licences for other purely domestic non-commercial uses.

9.49 This is one reason why private and domestic uses may be a good example of a fair use. However, this does not mean that private and domestic uses will always be fair. Sometimes, a private use of copyright material may well harm a market that rights holders should be able to exploit. The effect of private copying on the market for copyright material may often be greater when third parties facilitate the private copying.

9.50 Copyright owners may license users to make multiple copies of copyright material, or otherwise access copyright material from multiple computers, phones, tablets and other devices. For example, subscription music services,<sup>46</sup> relatively new to Australia, may allow users to stream music to multiple devices and download music files to their smart phones. Comparable cloud services allow users to watch films and television programs from multiple devices. Films sold on DVD and Blu-ray discs are sometimes sold with a digital file that may be stored and played for example, on, computers and tablets. Books bought on the Kindle store, to take another example, may

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45 See Ch 5.

46 Such as Spotify and MOG.

be read by consumers using a Kindle or a Kindle app on a smart phone, computer or other device.

9.51 The provision of these licensed services may suggest there is a market for providing consumers with multiple copies of copyright material, or access to such material from multiple devices, for private and domestic use and that rights holders are increasingly exploiting this market. Some argue that if the market for private copying had ever failed, it has now been corrected. Rights holders can licence private copying; this can give them a competitive advantage over those who do not; therefore the Act should not make any private copying free.

9.52 Such arguments were made by rights holders and others in submissions to this Inquiry. The Australian Copyright Council submitted that ‘business models are reducing the need to engage in private copying’ and that there was no need to extend the private copying exceptions.<sup>47</sup> The Arts Law Centre submitted that ‘enhanced format shifting can be a competitive advantage to differentiate that rights holder’s products from other suppliers’.<sup>48</sup> The Software Alliance submitted that ‘a wide variety of rights to copy legally acquired computer programs for private and domestic use is currently provided for in the applicable license agreements for the programs’.<sup>49</sup>

The copying permitted is determined by a range of competitive market factors, and consideration of business model implemented by the rights holder for delivery of and any payment for use of the program.<sup>50</sup>

9.53 Copyright Agency/Viscopy acknowledged that there are ‘reasonable consumer expectations regarding how they may use content that they have purchased’, but that these ‘are often addressed by the terms of use for the content’.<sup>51</sup> ARIA referred to Apple’s iTunes as an example, a program that ‘allows customers to store downloads on five authorized devices at any time, and burn an audio playlist up to seven times for personal non commercial use’:

Against this background, it is clear that s 109A has become a provision of limited utility as many acts of copying are now covered under licensing provisions.<sup>52</sup>

9.54 Discussing time shifting, the Australian Film and TV Bodies submitted that the commercial development of the legitimate online business models, including ‘licensed cloud based services, online video on demand, and catch-up online television ... are already enabling consumers to watch copyright material at a time that suits them’.

A blanket proposal to allow time-shifting in online environments would diminish the development of authorised online content providers and the capacity for rightsholders to extract value in online environments.<sup>53</sup>

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47 Australian Copyright Council, *Submission 219*.

48 Arts Law Centre of Australia, *Submission 171*.

49 BSA, *Submission 248*.

50 Ibid.

51 Copyright Agency/Viscopy, *Submission 249*.

52 ARIA, *Submission 241*.

53 Australian Film/TV Bodies, *Submission 205*.

9.55 In deciding whether a particular private use is fair, under the fair use exception proposed in Chapter 4, consideration might be given to whether the content was provided with advertising, or upon payment of a fee. Also relevant will be whether the consumer purchased a permanent copy, or whether they were only entitled to have access to the content for a limited period of time. These questions, among others of course, might be considered under the fourth fairness factor, which concerns the effect of the use on the market for the material.

9.56 Some submissions stated that consumers should have the ability to time shift only ‘free’ advertiser-supported content. The ABC submitted that the time shifting exception:

presumes that members of the public have legal access to the broadcast content in order to tape it off-air—they either access it freely, or they have paid their subscription for the pay television broadcast. With the advent of cloud services and the potential for other new technologies to emerge, the issue should be approached in terms of legal *access* and the market for rights.<sup>54</sup>

9.57 The Australian Copyright Council stressed that the source of the content is relevant, that is, the ‘relevant business model and the market is central to determining whether or not making a copy for private purposes would meet the three-step test’.<sup>55</sup>

9.58 The ALRC does not favour confining exceptions for private and domestic uses in the *Copyright Act*. Rather, these matters are best considered when determining whether a particular use is fair. Blanket legislative prohibitions—and endorsements—of specific uses are likely to date quickly.

9.59 In the ALRC’s view, the proposed fair use exception is better suited to account for the effect of a given use on the market for copyright material than specific, closed exceptions. Fair use is a flexible exception that, unlike the existing Australian time and format shifting exceptions, requires consideration of the ‘effect of the use upon the potential market for, or value of, the copyright material’. Where the market offers properly licensed copies, then it may be less likely that a person should be free to make their own private and domestic copies. Where a television station offers an online catch-up service, for example, then a competing service that makes copies of broadcasts for consumers is less likely to be fair.

## Piracy

9.60 Some object to exceptions for private copying on the grounds that they may facilitate piracy. It may be fine for the owner of a DVD to make a copy of the film for his or her own use but if this is permitted, it is argued, then the person may be more likely to share the copy with others, including through peer-to-peer networks. Foxtel, while open to the idea of a new single exception for private copying, expressed concern about digital-to-digital copying of films, and the possible facilitation of online piracy.<sup>56</sup>

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54 Australian Broadcasting Corporation, *Submission 210*.

55 Australian Copyright Council, *Submission 219*.

56 Foxtel, *Submission 245*. See also News Limited, *Submission 224*.

9.61 However, it seems unlikely that laws prohibiting digital-to-digital copying are having any great effect on preventing piracy. If a person is prepared to infringe copyright laws by sharing a film on a peer-to-peer network, that person will presumably have little regard to laws that prohibit digital-to-digital copying of films.

9.62 On this point, Bowrey submitted that ‘targeting those that facilitate piracy is preferable to restricting arguably legitimate uses of conversion technologies’.<sup>57</sup>

9.63 There is no suggestion that piracy, such as unauthorised peer-to-peer file sharing of music and films, would be fair use or a ‘fair dealing for private and domestic use’.

### **An illustrative purpose**

9.64 The ALRC proposes that ‘private and domestic’ be one of the illustrative purposes listed in the fair use provision. This will signal that a particular use that falls within the broader category of ‘private and domestic use’ is more likely to be fair than a use which does not fall into this or any other illustrative purpose category.

9.65 However, in deciding whether the particular use is fair, the fairness factors must be considered. As discussed in Chapter 4, the fact that a particular use falls into, or partly falls into, one of the categories of illustrative purpose, does not necessarily mean the particular use is fair. In fact, it does not even create a presumption that the use is fair. A consideration of the fairness factors is crucial.

### **International law**

9.66 The fair use exception has been adopted in a number of countries, most notably the US, and is consistent with Australia’s international legal obligations, including the Berne three-step test.<sup>58</sup>

9.67 The Committee of Government Experts that prepared the program for the 1967 Berne Conference, included the following paragraph, which was debated, amended and became art 9(2)—the three-step test:

It shall be a matter for legislation in the countries of the Union to permit the reproduction in such works

- (a) for private use;
- (b) for judicial or administrative purposes;
- (c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work.<sup>59</sup>

9.68 Ricketson and Ginsburg point out that this proposal elicited a wide range of amendments. Some sought to restrict the scope of the exception; others to expand it. France, for example, proposed the substitution of the words ‘for individual or family

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<sup>57</sup> K Bowrey, *Submission 94*.

<sup>58</sup> See Ch 4.

<sup>59</sup> Quoted in S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 762.

use' for the words 'for private use', to avoid the possibility of commercial enterprises claiming that their copying was for private purposes. These differences, Ricketson and Ginsburg state, 'perhaps made delegates more ready to consider a proposal advanced by the UK which sought to embrace all possible exceptions within a single generalized exception consisting simply of paragraph (c) of the programme amendment'.<sup>60</sup>

9.69 The provision drafted by the Committee of Government Experts seems to countenance private use exceptions that are not confined by the limitations in paragraph (c)—for example, 'not contrary to the legitimate interests of the author'. The final provision that was later accepted and became art 9(2), and the fair use exception proposed by the ALRC, are both narrower than the provision drafted by the Committee of Government Experts. The ALRC only proposes private uses be excepted where the use is fair, having regard to the fairness factors. However, it is interesting to note that private use has long been considered a likely subject of exceptions to copyright, and sometimes in terms considerably broader than proposed by the ALRC.

### **Fair dealing and third parties**

9.70 If fair use is not enacted, the ALRC proposes that an alternative exception be enacted—fair dealing for private and domestic purposes. This fair dealing exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the general fair use exception. Applying the two exceptions to a private and domestic use should therefore produce the same result.

9.71 The difference between the two options—a general fair use exception and a range of fair dealing exceptions confined to specified purposes—should only affect uses that are not covered by one of the fair dealing provisions.

9.72 As discussed in Chapter 5, the fair dealing exceptions leave less room for unlicensed third parties to use copyright material in circumstances where they facilitate private and domestic uses. This is because the fair dealing exceptions are confined to uses for the specified purposes, and third parties will often have a purpose ancillary to the specified purpose (for example, a profit motive). While many of these third party uses may not be fair, a general fair use exception is preferable to the confined fair dealing exceptions, because with fair use, the question of fairness can at least be considered. Uses for ancillary purposes are not automatically excluded.

9.73 Copyright law that wishes to allow for the development of new technologies and services should not presumptively exclude uses of copyright material for particular purposes, without asking whether the use would be fair. For this reason, the ALRC prefers the general fair use exception. However, a flexible exception that requires consideration of key principles, even if confined to a specified purpose, is still preferable to the current specific exceptions.

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60 Ibid, 762.

### Contracting out and TPMs

9.74 Copyright owners may sometimes provide their material only to customers who agree not to copy, or use in other prescribed ways, their material. This raises the question of ‘contracting out’ of copyright exceptions.

9.75 Technological protection measures (TPMs) may also be used to enforce these provisions. These contracts and TPMs can work to lock consumers into content ‘ecosystems’. The more a person buys from one company, the more convenient it is to buy other content from that company, and the more difficult or inconvenient it becomes to buy content from another company. This becomes more pronounced, as content providers increasingly offer to store content for their customers in the cloud.

9.76 Exceptions in relation to TPMs are outside the ALRC’s Terms of Reference, and contracting out of copyright exceptions is discussed in Chapter 17. In this chapter, it is sufficient to note that exceptions for private and domestic use will be of less value to consumers, if they cannot circumvent TPMs and they must contract out of the exceptions before being given access to copyright material.

**Proposal 9–1** The fair use exception should be applied when determining whether a private and domestic use infringes copyright. ‘Private and domestic use’ should be an illustrative purpose in the fair use exception.

**Proposal 9–2** If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

**Proposal 9–3** The exceptions for format shifting and time shifting in ss 43C, 47J, 109A, 110AA and 111 of the *Copyright Act* should be repealed.

### An alternative—a new confined exception

9.77 It has been argued that fair use may not allow for a sufficiently wide range of private and domestic uses—particularly for uses that are non-transformative, for example copying an entire film or television program from one format to another.

9.78 The US Supreme Court has held that transformative works do not ‘merely supersede the objects of the original’, but instead ‘add something new, with a further purpose or different character, altering the first with new expression, meaning, or message’.<sup>61</sup> US copyright academic Ashley Pavel has argued that fair use is ‘inadequate due to the difficulty of proving that a personal copy is transformative’. Although the Supreme Court had ruled that using a video recorder to time shift

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61 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579. See Ch 10.

television broadcasts was fair use, ‘many distributors of newer technologies allowing analogous uses have been found to be infringing or sued out of existence’.<sup>62</sup>

9.79 Furthermore, private and domestic uses are increasingly offered for licence by content owners. Unremunerated uses may harm this market, which may make such uses less likely to be fair. The ALRC argues that this reasoning is one of the benefits of fair use. For others, including Pavel, this unreasonably confines fair use:

With the advance of technology, personal use copies are no longer beyond the reach of copyright owners ... [A]bsent a strong legislative statement that personal use copies should be beyond the reach of copyright liability, it is only a matter of time before the fair use feedback loop consumes personal use copying, and extends the prying eyes of copyright enforcers into the privacy of the user’s home.<sup>63</sup>

9.80 Pavel recommends that the US Copyright Act be amended to include a specific private use exception in the following terms:

private uses of works protected under this title shall not give rise to any cause of action. Private uses are to include any use of a work in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends. Third parties who enable such private uses are not subject to liability under this title.<sup>64</sup>

9.81 The Law Institute of Victoria submitted that, if a fair use exception is not accepted, ‘then a separate, single exception should be introduced, along the lines of Canada’s *Copyright Modernization Act 2012* (Can)’.<sup>65</sup> Rather than a separate format shifting exception for each type of work (one for films, one for music, etc), each with its own conditions, Canada’s Copyright Act contains only one exception for reproductions for private purposes. This exception applies to ‘a work or other subject-matter or any substantial part of a work or other subject-matter’.<sup>66</sup>

9.82 Some submissions opposed the introduction of a new private copying exception. The Australian Film and Television Bodies submitted that:

With the existing scale of online copyright infringement, particularly of motion pictures and television programs, the risks associated with an overly permissive, non-conditional and format agnostic private copying exception is likely to result in a free-for-all in Australia and one that has no parallel internationally.<sup>67</sup>

9.83 If neither a fair use, nor a fair dealing for private and domestic use, exception is enacted in Australia, then the ALRC suggests that the existing private copying exceptions in the *Copyright Act* should be consolidated and simplified. Such an exception would not refer to fairness factors, but would instead simply describe the circumstances in which a private or domestic copy might be made.

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62 A Pavel, ‘Reforming the Reproduction Right: The Case for Personal Use Copies’ (2009) 24 *Berkeley Technology Law Journal* 1615, 1630.

63 Ibid, 1634.

64 Ibid.

65 Law Institute of Victoria (LIV), *Submission 198*.

66 *Copyright Modernization Act, C-11 2012* (Canada) s 29.22(1).

67 Australian Film/TV Bodies, *Submission 205*. See also Screenrights, *Submission 215*; ARIA, *Submission 241*; AMPAL, *Submission 189*.

9.84 However, in the absence of a fairness test, the ALRC fears such an exception may be too broad, and furthermore, likely to date as technology changes. It would also be inflexible, and may hinder the development of new technologies and services.

## Social uses

9.85 Some social uses of copyright material would be fair use. However, sharing content outside the domestic sphere is less likely to be fair—particularly if the use is non-transformative and harms a market that rights holders should be entitled to exploit. The ALRC does not propose that ‘social uses’ be included as an illustrative purpose for fair use; nor does the ALRC propose a new fair dealing exception for social uses.

9.86 Transformative uses of copyright material are discussed in Chapter 10. However, many online uses of copyright material are not transformative, and some are clearly not fair. Arguably the ‘sharing’ of copyright content that is most unfair and causes the greatest damage to rights holders is the use of peer-to-peer file sharing networks, digital lockers and other means to exchange entire films, television programs, music and e-books.

9.87 Some submissions stressed that some so-called ‘social’ uses of copyright material must not be confused with true private and domestic uses. The Music Council of Australia said that a ‘clear distinction must be drawn between burning a compilation CD at home to play on the kitchen stereo, on the one hand, and disseminating to 800 “friends” via social media such as Facebook’.<sup>68</sup>

9.88 However, many other ‘sharings’ of copyright material—for example, some sharing of user-generated content<sup>69</sup>—are arguably less harmful and now commonplace. These may even include uses that are unlicensed, not transformative, and feature on commercial platforms.

9.89 Existing exceptions, such as the one for parody or satire,<sup>70</sup> may apply to some user-generated content that uses copyright materials. However, much user-generated content will not be covered by these existing exceptions—for example, using a copyright sound recording in a home video.

9.90 Some of these uses of copyright material have been called not only an inevitable, but a desirable, feature of a new digital age. Jeff Lynn, chairman of the UK Coalition for a Digital Economy has written that this ‘incidental’ sort of copyright infringement is ‘part and parcel of using the internet and participating in innovation’:

It is simply impossible to confirm the rights to every image, block of text or sound clip that one shares with friends on Facebook or incorporates into a home video to send to the grandparents.

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68 Music Council of Australia, *Submission 269*.

69 Content made publicly available over the internet, which ‘reflects a certain amount of creative effort’ and is ‘created outside of professional routines and practices’. User-generated content includes, for example, audio-visual excerpts from copyright material, such as movies or music, perhaps associated with commentary by the individual: Organisation for Economic Co-operation and Development, *Participative Web and User-Created Content* (2007), 9.

70 *Copyright Act 1968* (Cth) ss 41A, 103AA.



And while this sort of copying may not always be innovative itself, its inextricable link with the highly innovative activities associated with Internet use means that quashing it results in quashing a lot of collateral good. At the same time, this type of infringement has no real effect on the rights holders ... any hypothetical loss from the failure of a handful of people to buy a licence to a given work shared casually among a small network is not only negligible but it is almost certainly outweighed by the discovery advantages.<sup>71</sup>

9.91 While they may be infringing copyright, individuals who upload copyright material onto social websites—such as YouTube—are not often the subject of legal action by rights holders. The ALRC understands that rights holders increasingly work with internet platforms to manage content by other means. For example, in the case of YouTube, rights holders may choose to ‘monetize, block or track’ the use of their content.<sup>72</sup>

9.92 The ALRC agrees with the Copyright Council Expert Group’s observation that user-generated content ‘reflects a full spectrum of creative and non-creative re-uses’ and should not automatically qualify for protection under any proposed exception aimed at fostering innovation and creativity.<sup>73</sup>

9.93 Non-transformative social uses of copyright material that do not fall into one of the categories of illustrative purposes for fair use, proposed in Chapter 4, are less likely to be fair than a transformative use that does fall into one of those categories. However, some of these uses may be fair, and are best considered on a case-by-case basis, applying the fairness factors in the fair use exception. It is doubtful that attempting to prescribe types of social uses that should not infringe copyright would be beneficial. Attempts to distinguish between types of user-generated content without using general fairness principles seem unlikely to be successful.

## Back-up and data recovery

9.94 Australians routinely use copyright material, such as computer programs, music, e-books and films, for the purpose of back-up and data recovery.<sup>74</sup> Many might be surprised to hear that making copies of this material for these purposes may often infringe copyright.

9.95 In the ALRC’s view, using copyright material for back-up and data recovery purposes should often be a fair use of copyright material. Rather than propose new or extended exceptions for this activity, as have recently been enacted in Canada,<sup>75</sup> the

71 J Lynn, *Copyright for Growth* in Lisbon Council, *Intellectual Property and Innovation: A Framework for 21st Century Growth and Jobs* (2012), Ian Hargreaves (ed.), Paul Hofheinz (ed.), 15.

72 YouTube, *Content ID* <[www.youtube.com/t/contentid](http://www.youtube.com/t/contentid)> at 24 July 2012.

73 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

74 Of course, businesses and other organisations also need to make and store back-up copies of copyright material.

75 Section 29.24 of the *Copyright Modernization Act, C-11 2012* (Canada) applies broadly to ‘a work or other subject-matter’. The person who owns or has a licence to use the source copy may reproduce it ‘solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable’. The copy is limited to personal use, the original must not be an infringing copy, the person must not circumvent a TPM to make the copy, and the person must not give away any of the reproductions.

ALRC proposes that the fair use exception should be used to determine whether such uses infringe copyright.

9.96 Some stakeholders submitted that the fair use exception could expressly refer to reproduction for the purpose of back-up and data recovery.<sup>76</sup> However, the ALRC does not think that this is a sufficiently broad category of use to justify including it as an illustrative purpose of fair use.

9.97 If fair use is enacted, the existing specific exception in s 47C of the *Copyright Act* for making back-up copies of computer programs should be repealed.

9.98 Many stakeholders submitted that there should be an exception to allow consumers to back-up their digital possessions without infringing copyright. Many stressed the importance of protecting consumers' rights and meeting reasonable consumer expectations.<sup>77</sup>

9.99 The Internet Industry Association submitted that exceptions for back-up should not distinguish between different types of digital content:

Backing up should not require a further permission of the copyright owner and should not be restricted as to the technology used or the place where the stored copy is made or held.<sup>78</sup>

9.100 Many submitted that a fair use exception, rather than new specific exceptions for back-up and data recovery, should be used in these circumstances.<sup>79</sup> For example, Dr Rebecca Giblin submitted that

a narrow purpose-based exception would be poorly adapted to the changing technological environment and potentially hinder the development and uptake of new back-up and recovery technologies. A flexible exception in the style of fair use would be a far preferable method of achieving the same aims.<sup>80</sup>

9.101 Other submissions expressed concern about exceptions for the purpose of back-up and data recovery. Modern business models often involve contracts with consumers to allow them to make copies of copyright works for the purposes of back-up and data recovery, and so, it was argued, an exception is either not necessary, or would harm the rights holders' interests. The Australian Film and TV Bodies, for example, submitted that there is

substantial evidence of online business models and content delivery services that permit a consumer to re-download or re-stream content if another copy is legitimately required. iTunes is a popular example. The introduction of a right of back-up for any content downloaded from iTunes would undercut existing licensing models and therein licensees' ability to offer specific licence conditions for authorised content (including at different price points).<sup>81</sup>

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<sup>76</sup> See eg, Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria (LIV), *Submission 198*.

<sup>77</sup> See eg, R Giblin, *Submission 251*.

<sup>78</sup> Internet Industry Association, *Submission 253*.

<sup>79</sup> Whether making back-up copies is fair use does not appear to have been properly tested in US courts.

<sup>80</sup> R Giblin, *Submission 251*. See also EFA, *Submission 258*.

<sup>81</sup> Australian Film/TV Bodies, *Submission 205*.

9.102 APRA/AMCOS also expressed concern that a new exception might interfere with established markets.<sup>82</sup> ARIA submitted that

this concern is already addressed through the commercial models already operating in the market, with download stores allowing consumers to make additional copies of recordings under the terms of the licensed service. Therefore an additional exception for this purpose is unnecessary and unjustified.<sup>83</sup>

9.103 The computer games industry body submitted that business models are addressing users' desire to back-up content. Users can often re-download a game 'multiple times if for any reason they accidentally, or intentionally, remove the game from their device'.<sup>84</sup>

9.104 Some stakeholders expressed concern that new exceptions for back-up and data recovery might allow users to copy copyright material which they are only entitled to access for a limited time or so long as they pay an ongoing subscription fee. A subscription to a magazine, for example, may come with access to digital copies of the magazine's entire back catalogue. Subscribers should not then be free to copy and keep that entire back catalogue. To take another example, APRA/AMCOS submitted that if exceptions extend to the back-up of tethered downloads, it would have a 'chilling effect on innovation' and 'may lead to the exit from the Australian market of Spotify, Rdio and others'.<sup>85</sup>

9.105 Similarly, Foxtel submitted that it makes content available to its subscribers to stream or download for a limited time, and this period of time is usually determined by the content owner. If copyright exceptions allowed subscribers to copy this content, 'this would conflict with Foxtel's and/or the rights holder's ability to exploit that content at a later time'.<sup>86</sup>

9.106 In the ALRC's view, copying such 'tethered' downloads is unlikely to be fair use. Further, such fine distinctions between fair and unfair copying for private purposes or the purpose of keeping back-up copies, highlights the benefit of having a flexible, principled exception like fair use.

9.107 Third parties increasingly offer data back-up and retrieval services, often allowing users to store their digital belongings on remote servers in the cloud. Some of these services will automatically scan a customer's computer, and upload files to a remote server. Many submissions stated that third parties should be allowed freely to assist with back-up and data recovery. For example, the ADA and ALCC submitted

A number of cloud-based back up services, for example, now offer an automatic back up service ... Any exception must account for consumers and organisations 'making' copies of information for back-up purposes, and service providers who facilitate back up automatically, on their behalf.<sup>87</sup>

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82 APRA/AMCOS, *Submission 247*.

83 ARIA, *Submission 241*.

84 iGEA, *Submission 192*.

85 APRA/AMCOS, *Submission 247*.

86 Foxtel, *Submission 245*.

87 ADA and ALCC, *Submission 213*.

9.108 Telstra submitted that exceptions should allow cloud service operators to back-up and store legally-acquired material on behalf of their customers, but should not be able to ‘commercially exploit material under the protection of a private use exception’.<sup>88</sup>

9.109 In the ALRC’s view, the use of copyright material by some back-up and data recovery services may well be fair use. Although commercial, some such services may well be considered transformative and non-consumptive, and may not harm the markets of rights holders. However, other services that do more than merely back-up files, and perhaps offer a service similar to services offered by rights holders, may not be fair.<sup>89</sup>

**Proposal 9–4** The fair use exception should be applied when determining whether a use of copyright material for the purpose of back-up and data recovery infringes copyright.

**Proposal 9–5** The exception for backing-up computer programs in s 47J of the *Copyright Act* should be repealed.

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<sup>88</sup> Telstra Corporation Limited, *Submission 222*. See also Music Council of Australia, *Submission 269*.

<sup>89</sup> How fair use may apply to third party uses of copyright material is discussed more broadly in Ch 5.

## 10. Transformative Use and Quotation

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### Summary

10.1 The Terms of Reference ask the ALRC to consider whether new exceptions under the *Copyright Act 1968* (Cth) should be introduced to allow ‘transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit’. This chapter considers whether there should be a new exception specifically to allow ‘transformative’ use of copyright materials, and discusses the possible scope and rationales for such an exception.

10.2 The ALRC concludes that transformative use of copyright material should be considered under the fair use exception proposed in Chapter 4, rather than under a new specific exception, in determining whether copyright is infringed. The proposed fair use exception can be expected to allow individuals to use copyright materials more freely in some transformative uses.

10.3 Relying on a fair use exception to deal with uses that may be characterised as transformative, rather than introducing a specific exception, is preferable in view of the difficulties involved in framing such an exception. These difficulties include defining whether a use is transformative, and determining the extent to which commercial uses of copyright materials should be covered. For similar reasons, the ALRC does not propose that any new specific transformative use exception should be introduced, even if a fair use exception is not.

10.4 The chapter also considers suggestions that the *Copyright Act* should provide a specific exception for quotation of copyright materials. The ALRC concludes that the use of copyright material for the purposes of quotation should also be considered under the fair use exception, rather than under a specific exception. Further, ‘quotation’ should be one of the illustrative purposes listed in the fair use exception.

10.5 If fair use is not enacted, the ALRC proposes that the *Copyright Act* should be amended to provide for a new exception for quotation. The Act should provide that in determining whether a dealing for quotation is fair, regard should be given to the fairness factors.

### Defining ‘transformative’ use

10.6 In this chapter, the term ‘transformative’ is used generally to refer to uses of pre-existing works to create something new, that is not merely a substitute for the pre-existing work. Works that are considered transformative include those described as ‘sampling’, ‘mashups’ or ‘remixes’.

10.7 Sampling is the act of taking a part, or sample, of a work and reusing it in a different work. The concept is most well-known in relation to music, where samples of one or more sound recordings are reused in a different composition.<sup>1</sup>

10.8 A mashup is a composite work comprising samples of other works. In music, a mashup is a song created by blending two or more songs, usually by overlaying the vocal track of one song onto the music track of another.<sup>2</sup> Remixes are generally a combination of altered sound recordings of musical works.<sup>3</sup> For example:

- *The Grey Album* by Danger Mouse, is a mashup remixing music and vocals from Jay Z’s *The Black Album* and the self-titled *The Beatles* album, known as ‘The White Album’.
- *Somebodies: A YouTube Orchestra*, created by Australian artist Gotye, samples and remixes audio-visual material, combining YouTube covers and parodies of the hit single *Somebody I Used to Know*.<sup>4</sup>

10.9 Many other instances of sampling, mashups and remixes of copyright material can be found on the internet, including musical compositions, new films, art works and fan fiction.<sup>5</sup>

10.10 More broadly, transformative use can also refer to some appropriation-based artistic practices, including collage, where images or object are ‘borrowed’ and re-contextualised. Examples of appropriation art include Jeff Koons’ sculpture, *String of*

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1 *The Macquarie Dictionary Online.*

2 *The Macquarie Dictionary Online.*

3 See *The Macquarie Dictionary Online*; APRA/AMCOS, *Submission 247*.

4 ADA and ALCC, *Submission 213*.

5 See examples cited in *Ibid*.

*Puppies*,<sup>6</sup> and Shepard Fairey's poster of Barack Obama ('Hope'), which were both based on photographs taken by others.

## Transformative use and fair use

10.11 United States fair use doctrine, as discussed in Chapter 4, permits limited use of copyright material without acquiring permission from the rights holders. The first of the fairness factors—both in the US fair use exception and the fair use exception proposed by the ALRC—is the 'purpose and character of the use'. In US law, this essentially concerns whether the use is transformative. On some analyses, whether a use is transformative is the key question in US fair use doctrine.

10.12 A much greater emphasis on transformativeness in US case law followed the influential 1990 *Harvard Law Review* article by Judge Pierre N Leval, 'Toward a Fair Use Standard'. The first fairness factor, the purpose and character of the use, Judge Leval said, 'raises the question of justification':

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely 'supersede the objects' of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.<sup>7</sup>

10.13 This transformative use doctrine was adopted by the US Supreme Court in 1994, in *Campbell v Acuff-Rose*, and may now be 'the prevailing view in fair use case law'.<sup>8</sup> In *Campbell*, the Court stated:

Although such transformative use is not absolutely necessary for a finding of fair use, ... the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright ... and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.<sup>9</sup>

10.14 Professor Neil Weinstock Netanel's review of several empirical studies and his own analysis of US case law led him to conclude that, since 2005, 'the transformative

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6 See *Rogers v Koons*, 960 F 2d 301 (2nd Cir, 1992), in which the US Court of Appeals found Koons liable for copyright infringement.

7 P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105, 1111.

8 N Weinstock Netanel, 'Making Sense of Fair Use' (2011) 15 *Lewis and Clark Law Review* 715, 746.

9 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579 (citations omitted).

use paradigm has come to dominate fair use case law and the market-centered paradigm has largely receded into the pages of history’.

Today, the key question for judicial determination of fair use is not whether the copyright holder would have reasonably consented to the use, but whether the defendant used the copyrighted work for a different expressive purpose from that for which the work was created.<sup>10</sup>

10.15 Other commentators, though noting this trend, find the results less clear. Ginsburg and Gorman have written that under the first fair use factor,

the courts have indeed given great weight to the transformative aspects of an otherwise infringing work, but the decisions do not form an altogether coherent pattern. Moreover, contradictions have come to riddle the assessment of whether a work is transformative.<sup>11</sup>

10.16 William Patry states that finding a use is ‘productive’ or ‘transformative’ is not ‘essential for a fair use determination, nor is it necessarily the most important factor. The key issue in every case is whether the use is beneficial to society.’<sup>12</sup>

### Transformative purpose

10.17 United States copyright academic Professor Pamela Samuelson has distinguished US fair use cases concerning transformative uses as falling into three categories:<sup>13</sup>

- transformative—creating new works that ‘draw upon pre-existing works and transform expression from them in creating new works that criticize, comment upon, or offer new insights about those works and the social significance of others’ expressions’, including parody and satire;<sup>14</sup>
- productive—for example, quoting from an author’s writing in a critical biography or taking photographs of sculptures on which an author will be writing a commentary;<sup>15</sup> and
- orthogonal—using copyright material in ways different in purpose from the original, for example, copying a photograph in order to generate or report controversy about an event, or copying a book in connection with litigation concerning the author.<sup>16</sup>

10.18 These ‘productive’ and ‘orthogonal’ uses, in Samuelson’s taxonomy, appear to concern uses that have a transformative purpose. Ginsburg and Gorman state that

10 N Weinstock Netanel, ‘Making Sense of Fair Use’ (2011) 15 *Lewis and Clark Law Review* 715, 768.

11 J Ginsburg and R Gorman, *Copyright Law* (2012), 187.

12 W Patry, *Patry on Fair Use* (2012), 115.

13 P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537, 2544; P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011), Kindle locations 553–555.

14 P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537, 2548–2549.

15 In Australia, some such uses may be covered by the fair dealing exceptions, eg, fair dealing for criticism or review: *Copyright Act 1968* (Cth) s 41.

16 In Australia, some such uses may be covered by the fair dealing for reporting news and judicial proceedings exceptions: *Ibid* s 42, 43.



‘recent cases evidence a drift from “transformative *work*” to “transformative *purpose*”; in the latter instance, copying of an entire work, without creating a new work, may be excused if the court perceives a sufficient public benefit in the appropriation’.<sup>17</sup>

10.19 Some important transformative purpose uses of copyright material are considered in the context of ‘non-consumptive’ uses, in Chapter 8. The two concepts overlap. Many non-consumptive uses may also have a transformative purpose. However, some transformative uses that have been found to be fair in the US courts do not appear to be ‘non-consumptive’, for example, using digital copies of books to facilitate access for print-disabled persons.<sup>18</sup>

10.20 Another instructive example of a transformative but consumptive use of copyright material may be displaying ‘thumbnail’ images of copyright photographs in search engine results.<sup>19</sup> In 2007, a US District Court considered this use in *Perfect 10 v Amazon*, and held that Google’s use of thumbnails was ‘highly transformative’:

Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. ... [A] search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.<sup>20</sup>

10.21 That Google incorporated entire images into its search engine results did not, the Court said, diminish the transformative nature of the use. The Court concluded that ‘the significantly transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s superseding and commercial uses of the thumbnails in this case’.<sup>21</sup>

10.22 As under US fair use doctrine, some broader concept of transformative use can be expected to emerge from the application of the fairness factors under the ALRC’s proposed fair use exception. Whether Australian courts should follow the recent trend in US case law to put transformativeness at the heart of fair use is an important question, on which the ALRC hopes to receive further submissions.

10.23 This chapter considers the merits of a stand-alone exception for transformative use outside fair use. The ALRC concludes that there should not be a stand-alone exception that does not require consideration of the fairness factors.

## Australian law

10.24 Depending on the facts of any particular case, existing exceptions may apply to some transformative uses. Most obviously, the *Copyright Act* provides that fair dealing

17 J Ginsburg and R Gorman, *Copyright Law* (2012), 187.

18 *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012).

19 *Perfect 10, Inc v Amazon.com, Inc*, 508 F 3d 1146 (9th Cir, 2007).

20 *Ibid*, [11].

21 *Ibid*, [12].

for the purposes of criticism or review;<sup>22</sup> and parody or satire,<sup>23</sup> do not constitute an infringement of copyright.

10.25 However, not all uses that might be classed as transformative will be parody, satirical or critical. Sampling, mashups or remixes will not usually fall within the scope of these exceptions and such uses will constitute infringement when a substantial part of the work or other copyright subject matter is used.

10.26 In *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (the Kookaburra case), for example, EMI's recordings of the Men at Work song 'Down Under' were found to have infringed the copyright in the song 'Kookaburra Sits in the Old Gum Tree'.<sup>24</sup>

10.27 The Kookaburra case confirmed existing law that, in order to establish infringement of copyright in a musical work, it must be shown that a substantial part of it has been copied. Determining what is substantial in this context depends on whether what is reproduced is a 'substantial, vital and essential part of the original'.<sup>25</sup>

10.28 Australian law may not be as clear in articulating how the notion of a 'substantial part' will apply to the sampling of sound recordings. In particular, there are concerns that courts may follow approaches in the US,<sup>26</sup> which suggest that any copying of a sound recording may amount to an infringement of copyright.<sup>27</sup>

10.29 Professor Kathy Bowrey observed that, while the Australian *Copyright Act* arguably lends itself to a similar narrow interpretation, the High Court of Australia has suggested a narrow and legalistic approach would lead to the over-protection of subject-matter other than works—including sound recordings.<sup>28</sup> The High Court, in considering the appropriate scope of copyright protection of a television broadcast, reaffirmed the importance of keeping separate the concepts of substantial part and fair dealing. This means that copying does not constitute an infringement, and the defences of fair dealing do not come into operation, unless a substantial part is copied.<sup>29</sup>

10.30 Finally, some transformative uses may infringe an author's moral rights under pt IX of the *Copyright Act*.<sup>30</sup> For example, in *Perez v Fernandez*, the Federal Magistrates Court held that a mashup involving only a few words mixed into a song

22 *Copyright Act 1968* (Cth) ss 41, 103A.

23 *Ibid* ss 41A, 103AA.

24 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444.

25 *Ibid*, [48]–[49].

26 B Fitzgerald and D O'Brien, 'Digital Sampling and Culture Jamming in a Remix World: What Does the Law Allow?' (2005) 10(4) *Media and Arts Law Review* 279.

27 In *Bridgeport Music Inc v Dimension Films Inc*, the US Court of Appeals held that even where a small part of a sound recording is sampled, then the part taken is something of value, and will therefore infringe copyright: *Bridgeport Music Inc v Dimension Films Inc*, 410 F 3d 792 (6th Cir, 2005).

28 K Bowrey, *Submission 94*.

29 *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273, [21].

30 The three moral rights in Australian law are: the right to be attributed as the author; the right against false attribution; and the right of integrity, that is, the right not to have one's work treated in a derogatory way: *Copyright Act 1968* (Cth) pt IX.

was prejudicial to the artist's moral right of integrity.<sup>31</sup> Allowing new transformative uses of copyright materials may lead to more frequent assertion of moral rights.

### A stand-alone transformative use exception

10.31 This section considers a possible stand-alone transformative use exception. However, it is concerned only with the first of Samuelson's three categories of transformative use, set out above. It is not concerned with quotation (discussed separately) or using copyright material in ways different in purpose from the original. Nor is it concerned with other uses, such as displaying 'thumbnail' images of copyright photographs in search engine results,<sup>32</sup> or using digital copies of books to facilitate access for print-disabled persons,<sup>33</sup> which have been held to be fair use under US law.

10.32 In this Inquiry, a range of reasons have been put forward for introducing a transformative use exception in Australia.<sup>34</sup> These included that:

- a transformative use exception is needed to encourage cultural production and to legitimise current artistic practices;<sup>35</sup>
- existing exceptions are not broad enough—for example, because not all transformative use is parodic, satirical or critical;<sup>36</sup> and
- a transformative use exception, properly framed, would not prejudice the legitimate interests of copyright holders.<sup>37</sup>

10.33 Stakeholders observed that transformative use is an important part of creative practice, and is likely to become increasingly so in the digital environment.<sup>38</sup> In the words of one stakeholder, copyright law should:

allow certain fair transformative uses to be freely permitted to encourage creativity and provide Australian artists with the confidence to experiment and engage with different ways of using copyright material that don't damage the commercial use of the original.<sup>39</sup>

10.34 The Internet Industry Association observed that, in the 'world of digital media, there is a wide range of content shared by millions of people, many of whom have the tools to record, edit and manipulate the content being consumed'. It submitted that it would be 'an ordinary natural development to permit non-commercial transformative

31 *Perez v Fernandez* [2012] FMCA 2 (10 February 2012).

32 *Perfect 10, Inc v Amazon.com, Inc*, 508 F 3d 1146 (9th Cir, 2007).

33 *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012).

34 Those in favour of a transformative use exception included Internet Industry Association, *Submission* 253; Pirate Party Australia, *Submission* 223; ARC Centre of Excellence for Creative Industries and Innovation, *Submission* 208; NSW Young Lawyers, *Submission* 195; R Wright, *Submission* 167; N Suzor, *Submission* 172; M Rimmer, *Submission* 143; K Bowrey, *Submission* 94.

35 Google, *Submission* 217; ARC Centre of Excellence for Creative Industries and Innovation, *Submission* 208; NSW Young Lawyers, *Submission* 195; K Bowrey, *Submission* 94.

36 Pirate Party Australia, *Submission* 223; M Rimmer, *Submission* 143.

37 N Suzor, *Submission* 172.

38 R Wright, *Submission* 167; M Rimmer, *Submission* 143.

39 R Wright, *Submission* 167.

uses in order to enrich the way we communicate'.<sup>40</sup> NSW Young Lawyers considered that a transformative use exception would 'potentially reflect common consumer expectations and behaviours' and, if carefully drafted, would 'not be at odds with similar positions being explored internationally'.<sup>41</sup>

10.35 Similarly, Google observed that, in an increasingly media-saturated age,

it is more and more natural for individuals to create 'mashups' or 'remixes' [of] the media around them for expressive purposes. While some of these creative acts would be permitted by existing fair dealing exceptions, many would not. As a result, transformative uses of existing material may be unduly hampered.<sup>42</sup>

10.36 Those opposing a transformative use exception<sup>43</sup> did so for a range of reasons, including on the basis that existing exceptions and licensing adequately cover legitimate cultural and artistic practices.<sup>44</sup> A transformative use exception would, it was suggested:

- create complexity and uncertainty in relation to its coverage;<sup>45</sup>
- prejudice the legitimate interests of copyright holders and interfere with the existing markets for derivative works;<sup>46</sup>
- conflict with the three-step test in international law;<sup>47</sup> and
- legitimise interference with the moral rights of creators;<sup>48</sup>

10.37 Many stakeholders commented on complexities and uncertainties that would be involved in framing a transformative use exception. These difficulties, and in particular, those concerning distinctions between commercial and non-commercial uses of copyright material, are discussed in detail later in this chapter.

10.38 Some stakeholders questioned whether there are any significant 'socially beneficial' transformative uses of works that cannot be enabled by existing exceptions and available licensing solutions.<sup>49</sup> For example, Copyright Agency/Viscopy observed that the current Australian copyright framework enables transformative uses in a number of ways, including where the use is: of part of the work, but not a substantial

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<sup>40</sup> Internet Industry Association, *Submission 253*.

<sup>41</sup> NSW Young Lawyers, *Submission 195*.

<sup>42</sup> Google, *Submission 217*.

<sup>43</sup> For example, SPAA, *Submission 281*; Music Council of Australia, *Submission 269*; COMPPS, *Submission 266*; Australia Council for the Arts, *Submission 260*; Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; NAVA, *Submission 234*; AFL, *Submission 232*; ASTRA, *Submission 227*; Australian Film/TV Bodies, *Submission 205*; IASTMP, *Submission 200*; ALPSP, *Submission 199*; iGEA, *Submission 192*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*; Australian Society of Authors, *Submission 169*; ALAA, *Submission 129*.

<sup>44</sup> Copyright Agency/Viscopy, *Submission 249*.

<sup>45</sup> SPAA, *Submission 281*; APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*.

<sup>46</sup> Australian Film/TV Bodies, *Submission 205*; AMPAL, *Submission 189*; Australian Society of Authors, *Submission 169*.

<sup>47</sup> AFL, *Submission 232*; Arts Law Centre of Australia, *Submission 171*.

<sup>48</sup> COMPPS, *Submission 266*; NAVA, *Submission 234*.

<sup>49</sup> Australia Council for the Arts, *Submission 260*; Copyright Agency/Viscopy, *Submission 249*.

part; licensed; for the purposes of parody, satire, criticism, or review; for the purposes of reporting news; allowed by other exceptions or statutory licences.<sup>50</sup>

10.39 The Arts Law Centre stated that, in its experience, there is no ‘demand within the artistic community for a greater freedom to engage in appropriation techniques’, and artists that use appropriation techniques can operate within existing fair dealing exceptions or get permission from the rights holders.<sup>51</sup>

10.40 Australian Film and TV Bodies considered that the introduction of a transformative use exception has the capacity to ‘disrupt legitimate markets for “mash-ups”, “collages” and other related products incorporating protected works’.

For instance, Movieclips.com is a legitimate site where consumers can use clips from popular movies free of charge without resorting to movie piracy. In exchange for licensing film content free-of-charge, Movieclips advertises a site where consumers can rent or purchase the full length feature. It is also the case that online providers, such as YouTube, are working with the film industry to allow for authorised streaming and use of copyright material.<sup>52</sup>

10.41 APRA/AMCOS stated that there is a ‘well established market for licensing transformative uses of musical works’ and that the licensing of sampling is a significant part of music publishers’ and composers’ income. It submitted that allowing transformative uses would compromise ‘existing commercial markets and significantly interfere with the value of copyright rights’.<sup>53</sup>

10.42 A number of stakeholders<sup>54</sup> suggested that any transformative use exception would be likely to conflict with the ‘three-step test’ under the *Berne Convention* and other international copyright conventions.<sup>55</sup> However, the Australian Copyright Council stated that there may be ‘some scope for certain productive or “transformative” uses of copyright material by individuals to amount to a special case’ under the three-step test, based on the promotion of ‘innovation and social discourse, rather than a practical inability to regulate such activities’.<sup>56</sup>

50 Copyright Agency/Viscopy, *Submission 249*.

51 Arts Law Centre of Australia, *Submission 171*.

52 Australian Film/TV Bodies, *Submission 205*.

53 APRA/AMCOS, *Submission 247*.

54 COMPPS, *Submission 266*; ARIA, *Submission 241*; AFL, *Submission 232*; Australian Film/TV Bodies, *Submission 205*.

55 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 9(2), as incorporated in: *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, ATS 38 (entered into force on 1 January 1995), art 13; *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002), art 10; *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, ATS 27 (entered into force on 20 May 2002), art 16; *Australia-US Free Trade Agreement*, 18 May 2004, [2005], ATS 1 (entered into force on 1 January 2005), art 17.4.10(a).

56 Australian Copyright Council, *Submission 219*.

10.43 Finally, concerns about the possible adverse effects on the moral rights of creators were raised by some stakeholders.<sup>57</sup> The Small Press Network, for example, suggested that, if copyright law were amended to allow transformative uses, ‘such uses should be introduced in the context of safe harbour or take down provisions’, so that authors (or copyright holders) would ‘have the option to request the take down of transformed works which breach the author’s right to maintain the integrity of the work’.<sup>58</sup> APRA/AMCOS anticipated more litigation involving infringement of authors’ moral rights.<sup>59</sup>

10.44 The Music Council of Australia commented that ‘the potential requirement for a consequential amendment of moral rights highlights the degree to which the existing rights of authors and copyright owners would have to be qualified for there to be an introduction of a general exception for transformative use’.<sup>60</sup>

### **Framing a transformative use exception**

10.45 A number of law reform and other bodies in Australia and overseas have recommended changes to copyright laws that would provide broader exceptions permitting transformative use of copyright materials. These generally apply only to non-commercial use, however defined.

10.46 In Australia, the Copyright Council Expert Group recommended, in 2011, an exception for transformative use of copyright works. The Group highlighted that this exception is particularly relevant in light of the rise of user-generated content. It suggested that an exception ‘permitting private, non-commercial, transformative uses would preserve the balance in copyright law between interests of creators and users, and preserve public respect for the relevance and integrity of copyright law’.<sup>61</sup>

10.47 The Group argued that such an exception would legitimise a large number of practices that are already occurring, without harming copyright owner interests<sup>62</sup>—in particular, creative uses on the internet characterised as being part of a new ‘remix’ culture.<sup>63</sup>

10.48 The most important existing model of such an exception is in Canada, where the *Copyright Modernization Act 2012* (Can) created a new exception for content

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57 Music Council of Australia, *Submission 269*; APRA/AMCOS, *Submission 247*; COMPPS, *Submission 266*; ARIA, *Submission 241*; NAVA, *Submission 234*; AFL, *Submission 232*; Small Press Network, *Submission 221*; Australian Film/TV Bodies, *Submission 205*; Arts Law Centre of Australia, *Submission 171*.

58 Small Press Network, *Submission 221*.

59 APRA/AMCOS, *Submission 247*.

60 Music Council of Australia, *Submission 269*.

61 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

62 Ibid, 4.

63 Professor Lawrence Lessig has suggested that non-commercial creative use (which he calls ‘amateur remix’) should be entirely exempted from the scope of US copyright law: L Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (2008), 245–255. This remix culture can also be seen as a continuation of a longer tradition of postmodern appropriation. See, eg, E Shimanoff, ‘The Odd Couple: Postmodern Culture and Copyright Law’ (2002) 11 *Media Law and Policy* 12.

generated by non-commercial users (the Canadian provision).<sup>64</sup> The Canadian provision is entitled ‘Non-commercial User-generated Content’ and has also been referred to as the ‘UGC’ (user-generated content) or ‘mashup exception’,<sup>65</sup> and as the ‘YouTube clause’.<sup>66</sup>

10.49 The Canadian provision applies to the use, for non-commercial purposes, of a publicly available work in order to create a new work. In full, it states:

- (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual—or, with the individual’s authorization, a member of their household—to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if
  - (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
  - (b) the source—and, if given in the source, the name of the author, performer, maker or broadcaster—of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
  - (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and
  - (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter—or copy of it—or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

### Defining ‘transformative’

10.50 Stakeholders in this Inquiry were concerned about the possible definition of ‘transformative’ for the purpose of any new exception. Screenrights, for example, stated that the term itself was ‘too broad and vague’, and that such an exception would have ‘a significant impact on the copyright owner’s market for derivative works, such as translations and adaptations (from a film to a game for example)’.<sup>67</sup> The Law Council of Australia submitted that, by definition, a ‘transformative’ use cannot be an ‘adaptation’ within the present meaning of that term in the *Copyright Act* and rejected the idea that any use of a publicly available work in the creation of a new work should be considered transformative.<sup>68</sup>

64 *Copyright Act 1985* (Can) s 29.21. The Ireland Copyright Review Committee has invited submissions on whether a similar exception for non-commercial user-generated content should be enacted in Ireland: Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).

65 D Lithwick, M Thibodeau and Parliament of Canada, *Legislative Summary of Bill C-11: An Act to amend the Copyright Act* <[www.parl.gc.ca/About/Parliament/LegislativeSummaries](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries)> at 16 July 2012.

66 M Patterson, R McDonald, Fraser Milner Casgrain LLP, *The Copyright Modernization Act: Canada’s New Rights and Rules* <[www.lexology.com/library](http://www.lexology.com/library)> at 22 March 2013.

67 Screenrights, *Submission 215*. See also, SPAA, *Submission 281*.

68 Law Council of Australia, *Submission 263*.

10.51 The Combined Newspapers and Magazines Copyright Committee observed that transformative uses can ‘potentially cover most of the exclusive rights of a copyright owner’.<sup>69</sup> The Arts Law Centre noted that uncertainty in determining whether a specific reuse of an existing work is transformative ‘illustrates the difficulty of framing an exception to permit the materials produced by appropriation techniques’ to be more freely used.<sup>70</sup>

10.52 The Copyright Council Expert Group stated that transformative implies something more than ‘just pasting two things together without any further modification’—for example, using a song as background to a home video posted to a video-sharing website is not ‘transformative’.<sup>71</sup> Bowrey suggested that a ‘transformative work could be defined as a form of expression that, notwithstanding use of or reference to prior works in its creation, stands alone in terms of exhibiting its own artistic integrity and identity’.<sup>72</sup> Similarly, the ABC suggested transformative use should cover ‘new works that combine pre-existing works in a way that indicates a level of curatorship or editorial judgement’.<sup>73</sup>

10.53 To address concerns about uncertainty, NSW Young Lawyers suggested that, in framing an exception, a ‘list of circumstantial uses of a work that would be presumed to be transformative, in conjunction with a list of characteristics which may help identify transformative works’ would be useful.<sup>74</sup>

10.54 Stakeholders commented on the concept of copyright material that is ‘publicly available’—or ‘available to the public’, in the words used in the Canadian provision. The Australian Football League stated that such a formulation was ‘illogical’ in suggesting, for example, that content available on free-to-air television would be ‘more open for (mis)use than audio-visual content available behind a pay wall’.<sup>75</sup> Foxtel also submitted that the concept of a ‘publicly available work’ was problematic.

Rights holders rarely make their works freely available for unrestricted use. A concept of this nature may validate (incorrect) consumer perceptions that works accessible via digital technologies are freely available to consumers to use as they see fit, which is rarely the case.<sup>76</sup>

10.55 There has been no judicial interpretation of the meaning and scope of the Canadian provision. However, it appears to require only that the use of an existing work is in the creation of a ‘new work’. In Australian law, providing a later work is not a ‘mere slavish copy’, it will constitute ‘an original work in its own right if the author

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69 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

70 Arts Law Centre of Australia, *Submission 171*.

71 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

72 K Bowrey, *Submission 94*.

73 Australian Broadcasting Corporation, *Submission 210*.

74 NSW Young Lawyers, *Submission 195*.

75 AFL, *Submission 232*.

76 Foxtel, *Submission 245*.



has expended sufficient independent skill and labour in bringing it into material form'.<sup>77</sup>

10.56 Using the concept of an original work in an Australian exception would provide a very low threshold for what amounts to transformative use. Framing any higher threshold, however, would raise the problem of how to distinguish transformative use from the making of an adaptation; and how to define the extent to which a transformative work needs to be original or creative.

10.57 Another related issue concerns subsequent uses of the transformative work. APRA/AMCOS submitted that, even if there were to be a transformative use exception, it could only apply to the original use:

All subsequent uses are, by definition, not themselves transformative. Thus the communication of a work that includes a transformative use of another work is itself not a transformative use and could not be the subject of the exception.<sup>78</sup>

10.58 That is, a transformative use exception may permit the creation of a new work but not the communication of the work—for example, by making it available on a social networking website. However, it appears that the Canadian provision is intended to facilitate the communication of the new work, as discussed further below.

### **Commercial and non-commercial uses**

10.59 A major complexity in considering a transformative use exception concerns the relevance of distinctions between commercial and non-commercial uses of copyright materials and how any such distinction should be framed. The commercial or non-commercial nature of uses needs to be considered in relation to both the original use and subsequent uses of the new work. A transformative use exception could be restricted to non-commercial uses, or be broader and extend to some commercial uses.

10.60 However, distinguishing between commercial and non-commercial uses of copyright material has become increasingly complex.<sup>79</sup> Changes in the digital economy have 'substantially increased the opportunities for the creation of user-generated "non-commercial" copyright materials'.<sup>80</sup> For example, the Australian Competition and Consumer Commission (ACCC) reflected that 'technology to splice or intersperse video with other content, such as TV clips, photos, and audio recordings is much more widely and cheaply available, and allows the creation of a wider range of productions by consumers for their private use'.<sup>81</sup>

10.61 At the same time, however, the sharing and distribution of such material may involve commercial entities. While many users of Facebook communicate copyright material for non-commercial purposes, Facebook, as an advertising-funded business

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77 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [7.103].

78 APRA/AMCOS, *Submission 247*.

79 ACCC, *Submission 165*.

80 Ibid.

81 Ibid.

model, is dependent on its members producing these materials.<sup>82</sup> Further, while some copyright material may be created without an intention to commercialise the work, digital platforms provide an opportunity for creators subsequently to commercialise their work. For example, users who post content on YouTube can apply to partner with YouTube to monetise that content both before and after the video has been posted.<sup>83</sup>

10.62 John Wiley & Sons Inc observed that social media platforms ‘cannot be accurately described as commercial free zones, with the plethora of advertising and monetisation options available’. Rather, to create a transformative use exception would ‘prejudice copyright holders by withholding their ability to participate in this new area of the digital economy; whilst still allowing online social platforms, software companies and commercial users to benefit without restrictions’.<sup>84</sup>

10.63 APRA/AMCOS submitted that ‘whatever the intentions of the maker of user generated content, once it is released to the public online it enters the commercial arena’ and strongly opposed the introduction of a new exception on this basis.<sup>85</sup> Similarly, the Arts Law Centre stated that ‘social networking websites (such as Facebook) and video aggregation sites (such as YouTube) are intrinsically commercial operations’.<sup>86</sup> Copyright Agency/Viscopy stated that, if a new exception were to be introduced,

it should be confined to private and domestic use, not apply where there is a licensing solution available to the user, be subject to the other fair dealing criteria in section 40(2), and not apply to the uploading to an online platform, or other forms of ‘sharing’.<sup>87</sup>

10.64 The Australian Copyright Council submitted that, while there may be limited scope for an exception for ‘non-commercial or private and domestic’ transformative uses, ‘a licensing regime would need to apply in relation to commercial entities hosting that material online’.<sup>88</sup> The Council stated that, alternatively, ‘it may be possible to address this issue through a license it or lose it model whereby uses are allowed unless there is a licence on offer’.<sup>89</sup>

10.65 APRA/AMCOS opposed the suggestion that a licensing scheme ‘for the communication of copyright material created pursuant to a transformative use exception on a license it or lose it basis’ was necessary or desirable, as this would interfere with existing markets.<sup>90</sup>

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82 Ibid.

83 Ibid.

84 John Wiley & Sons, *Submission 239*.

85 APRA/AMCOS, *Submission 247*.

86 Arts Law Centre of Australia, *Submission 171*.

87 Copyright Agency/Viscopy, *Submission 249*.

88 Australian Copyright Council, *Submission 219*.

89 Ibid.

90 APRA/AMCOS, *Submission 247*.

10.66 Other stakeholders considered that any transformative use exception should not be strictly limited to non-commercial use.<sup>91</sup> For example, Nicolas Suzor stated that the scope of a transformative use exception ‘should be based primarily on demonstrable harm to the direct licensing interests of copyright owners—the core of copyright’. Accordingly, the exception should ‘clearly permit uses which are not substitutes for (or do not directly compete with) the copyright material’.<sup>92</sup> The Internet Industry Association submitted that commercial transformative use should be permitted, at least where the use does not conflict with normal exploitation or unreasonably prejudice the legitimate interests of the owner of the copyright.<sup>93</sup>

10.67 Google observed that the ‘Australian fair dealing tradition has long recognised that commercial uses of copyright materials can be fair’ and submitted that there is no ‘public policy justification for limiting an exception for transformative uses by automatically excluding any uses with a commercial purpose’.<sup>94</sup>

10.68 The Canadian provision limits the scope of the exception to circumstances where the use of, or authorisation to disseminate, the new work is solely for non-commercial purposes; and the use, or authorisation to disseminate, does not have a substantial adverse effect on the exploitation of the existing work.

10.69 It is not entirely clear how this provision is intended to operate. However, it appears that, while the creator of the new work is prohibited from receiving a commercial benefit, an online platform such as YouTube may benefit from disseminating it—without remunerating the owners of copyright in either the original or the new work.

10.70 That is, while the authorisation to disseminate must be done solely for non-commercial purposes, actual dissemination can be for the commercial purposes of, for example, an internet intermediary, provided only that the authorisation itself does not have a substantial adverse effect on the exploitation of the existing work and the new work is not a substitute for the existing one.<sup>95</sup>

10.71 This may not provide adequate protection for the owner of copyright in the original from the possible effects on that owner’s interests of dissemination of the new work by the internet intermediary. The application of the Canadian provision means that the creation and authorisation to disseminate the new work does not infringe copyright. Removing primary copyright infringement in this manner seems to rule out any possibility of liability on the part of the intermediary to the original copyright owner.

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91 Internet Industry Association, *Submission 253*; Universities Australia, *Submission 246*; Pirate Party Australia, *Submission 223*; Google, *Submission 217*; N Suzor, *Submission 172*; K Bowrey, *Submission 94*.

92 N Suzor, *Submission 172*.

93 Internet Industry Association, *Submission 253*.

94 Google, *Submission 217*.

95 *Copyright Act 1985* (Can) s 29.21(1)(d).

**Fair use and transformative use**

10.72 Many stakeholders who favoured some additional leeway for transformative use considered that such uses of copyright material should be covered by a fair use exception, rather than under a new specific exception.<sup>96</sup> A fair use exception would be expected to allow individuals to use copyright materials more freely in transformative uses.

10.73 In some cases, this position was influenced by the problems involved in determining whether a transformative use should be considered commercial or non-commercial. For example, Google acknowledged that ‘a user’s commercial purpose would be relevant to whether a particular use should be permitted’, but considered that it would be more appropriate for the commerciality of the use to be considered ‘as part of a broader assessment of whether that use is fair’.<sup>97</sup>

10.74 Similarly, the Copyright Advisory Group—Schools stated that fair use is the best model, rather than ‘an exception which arbitrarily excludes all commercial transformative uses of copyright materials from being considered to be fair’.<sup>98</sup> The Australian Communications Consumer Action Network noted that:

There is little to be gained from having courts applying themselves to assessing ‘mash-ups’ or a ‘re-mix’ to ascertain whether they fall within a tightly-worded exception, when the real issue is whether the use is fair and the extent of the harm to the creator/owner.<sup>99</sup>

10.75 The Australian Digital Alliance and Australian Libraries Copyright Committee considered that ‘adopting a flexible fair use-style exception, rather than attempting to prescribe the scope of a purpose-based transformative exception’ would better cover the range of current transformative uses.<sup>100</sup> Robert Xavier submitted:

It would be best to use transformative use in the same way as it is used by US copyright law, where it is a legal concept, with a special meaning, that can form part of the basis for fair use. Repurposing the concept for a separate exception for derivative works would just be confusing.<sup>101</sup>

**Rejecting a stand-alone transformative use exception**

10.76 In the ALRC’s view, there is no case for introducing a stand-alone transformative use exception. The reasons for rejecting a transformative use exception are that:

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96 For example, EFA, *Submission 258*; R Burrell and others, *Submission 278*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; ACCAN, *Submission 194*; M Rimmer, *Submission 163*; R Xavier, *Submission 146*.

97 Google, *Submission 217*.

98 Copyright Advisory Group—Schools, *Submission 231*.

99 ACCAN, *Submission 194*.

100 ADA and ALCC, *Submission 213*.

101 R Xavier, *Submission 146*.

- transformative uses of copyright material would be better considered under a fair use exception where a range of factors can be balanced in determining whether a particular use is permitted; and
- framing such an exception presents numerous problems, notably in how to define transformative use, and in determining the extent to which commercial uses of copyright materials should be covered.

10.77 Transformative uses of copyright material would be better considered under the fair use exception, rather than under a specific exception, in determining whether copyright is infringed.

10.78 As under US fair use doctrine, some concept of transformative use can be expected to emerge from the application of the fairness factors under the ALRC's proposed fair use exception. However, the issue should be whether a use is fair, given the extent of any interference with the interests of the copyright holder, rather than whether use falls within a narrowly drafted specific exception.

10.79 Under fair use, the extent to which a use is transformative, in view of the purpose and character of the use, and the commercial aspects of a use—that is, the effect of the use upon the potential market for, or value of, the copyright material—can be considered as part of a broader inquiry into fairness.

10.80 The ALRC does not propose that any new specific exception should be introduced, even if a fair use exception is not enacted, or that transformative use be included as an illustrative purpose in the fair use exception.

10.81 There are many difficulties in framing a stand-alone transformative use exception. These problems include how to distinguish transformative use from the making of an adaptation; and the extent to which a transformative work needs to be original or creative.

10.82 Transformative use would need to be distinguished from the making of an adaptation, which is the subject of a specific exclusive right under the *Copyright Act*, in the case of original literary, dramatic and musical works.<sup>102</sup> An adaptation is a new and original work in its own right. Some dividing line would need to be drawn between an adaptation, which should be the subject of a licence, and a work that is transformative.

10.83 The Canadian provision requires only the creation of a 'new work'. Such a low threshold would have a serious impact on the principle of acknowledging and respecting authorship and creation (Principle 1).<sup>103</sup> On the other hand, drafting some new threshold of originality would be problematic—for example, if two works are simply pasted together without any further modification, this should not constitute a transformative work—but what else should be required? Any new standard of originality would likely be novel, in Australian law and internationally, and produce a level of uncertainty.

<sup>102</sup> *Copyright Act 1968* (Cth) s 31(1)(a)(vi).

<sup>103</sup> See Ch 2.

10.84 For example, where only part of copyright material is used, as in the case of sampling, the fact that this is incorporated in a new work will not prevent the use from being an infringement because ‘substantial part’ is assessed in relation to the copyright material used, rather than the new work in which the sample has been incorporated. Arguably, it would be a radical step to propose an exception that might mean that the substantial part requirement is to be overridden in the case of transformative use.

10.85 Limiting any transformative use exception to non-commercial purposes is problematic because the boundary between non-commercial and commercial purposes is not clear given ‘a digital environment that monetises social relations, friendships and social interactions’.<sup>104</sup> In particular, a creator may create a transformative work for a non-commercial purpose, but later opt to receive payments from advertising associated with a website, and many online business models now rely on views of user-generated content to make revenue.

10.86 An exception that allows those who disseminate works created for a non-commercial purpose to profit may, in the words of one stakeholder, ‘prejudice copyright holders by withholding their ability to participate in this new area of the digital economy; whilst still allowing online social platforms, software companies and commercial users to benefit without restrictions’.<sup>105</sup> Such an exception would also cut across the way rights holders currently work with internet platforms to manage copyright content uploaded by users. For example, in the case of YouTube, rights holders may choose to ‘monetize, block or track’ the use of their content.<sup>106</sup>

**Proposal 10–1** The *Copyright Act* should not provide for any new ‘transformative use’ exception. The fair use exception should be applied when determining whether a ‘transformative use’ infringes copyright.

## Quotation

10.87 In copyright terms, quotation refers to the taking of some part of a greater whole—a group of words from a text or a speech, a musical passage or visual image taken from a piece of music or a work of art—where the taking is done by someone other than the creator of the work.<sup>107</sup>

10.88 The *Copyright Act* does not provide a stand-alone exception for quotation. However, copyright infringement is generally dependent on use of a substantial part of copyright material. That is, the Act provides that an act will infringe copyright only if the act is done in relation to ‘substantial part’ of a work or other subject matter.<sup>108</sup>

104 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

105 John Wiley & Sons, *Submission* 239.

106 YouTube, *Content ID* <[www.youtube.com/t/contentid](http://www.youtube.com/t/contentid)> at 24 July 2012.

107 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 788, commenting on the quotation right provided for in the *Berne Convention*.

108 *Copyright Act 1968* (Cth) s 14(1)(a).

10.89 The phrase ‘substantial part’ has been held to refer to the quality of what is taken rather than the quantity, and courts have always refused to prescribe any particular proportion as amounting to a substantial part.<sup>109</sup> In determining whether the quality of what is taken makes it a ‘substantial part’, a number of factors are relevant, the most important being a general inquiry into the importance that the part bears in relation to the work as a whole—that is, whether it is an ‘essential’ or ‘vital’ or ‘material’ part.<sup>110</sup>

10.90 Some quotation may be covered incidentally by existing exceptions—in particular, fair dealing for criticism or review; parody or satire; and news reporting.<sup>111</sup> The coverage of quotation is incidental in that a quotation will not be fair dealing unless it is for a fair dealing purpose, such as criticism or review. While in some cases, the copying of the whole of a work may be regarded as a fair dealing for the purpose of research or study,<sup>112</sup> this is unlikely in other cases, such as criticism and review.

10.91 The Issues Paper noted suggestions that art 10(1) of the *Berne Convention* could be employed in Australia as the basis for a new exception for non-commercial transformative use; an exception permitting the quotation of copyright works in commercial works;<sup>113</sup> or an exception for fair dealing for the purpose of quotation.<sup>114</sup>

10.92 Article 10(1) of the *Berne Convention* provides:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.<sup>115</sup>

10.93 Article 10(1) is generally considered to impose an obligation to provide an exception for fair quotation,<sup>116</sup> rather than just permitting such an exception, although this was contested by some stakeholders.<sup>117</sup>

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109 See Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [9.20].

110 Ibid, [9.20], citing, eg, *Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396.

111 *Copyright Act 1968* (Cth) ss 41, 41A, 42.

112 Ibid s 40(2).

113 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

114 E Adeney, ‘Appropriation in the Name of Art: Is a Quotation Exception the Answer?’ (2013) 23(3) *Australian Intellectual Property Journal* 142.

115 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

116 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 783.

117 ARIA, *Submission 241*. ARIA stated that a plain reading of the English text makes it clear that ‘permissible’ can only mean there is ‘a possibility to permit’ quotation, rather than an obligation, and that this construction is reinforced by the preceding provisions that state parties cannot provide beneficiaries under the *Berne Convention* a level of protection that is lower than that prescribed in it, but do not prohibit the granting of a higher level of protection.

10.94 The ‘quotation right’ provided for by the *Berne Convention*<sup>118</sup> is not limited to text-based copyright material. The word ‘work’ is used to encompass all the types of works that are listed in art 2. That is, literary and artistic works (including, for example, dramatic works, choreographic works, cinematographic works and photographic works), derivative works (including translations, adaptations and arrangements of music) and collections of works such as anthologies and encyclopaedias.

10.95 The text of art 10(1) makes it clear that a quotation must meet three requirements to be permitted under the provision.<sup>119</sup> These are, first, that the work in question must have been ‘lawfully made available to the public’; secondly, that the making of the quotation must be ‘compatible with fair practice’; and, thirdly, that the extent of the quotation must ‘not exceed that justified by the purpose’.

### A new quotation exception

10.96 In the Issues Paper, the ALRC asked whether there should be a fair dealing exception for the purpose of quotation.<sup>120</sup>

10.97 An example of when such an exception might be relevant arose in litigation over whether EMI’s recordings in the Kookaburra case had infringed copyright.<sup>121</sup> On appeal, Emmett J expressed his ‘disquiet’ in finding copyright infringement in the circumstances of the case.<sup>122</sup> He stated:

The better view of the taking of the melody from Kookaburra is not that the melody was taken ... in order to save effort on the part of the composer of Down Under, by appropriating the results of Ms Sinclair’s efforts. Rather, the quotation or reproduction of the melody of Kookaburra appears by way of tribute to the iconicity of Kookaburra, and as one of a number of references made in Down Under to Australian icons.<sup>123</sup>

10.98 The idea of a quotation exception received some support from stakeholders,<sup>124</sup> including because existing exceptions are not broad enough;<sup>125</sup> and as an alternative to a transformative use exception.<sup>126</sup>

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118 Ricketson has noted that due to the mandatory character of the exception, ‘article 10(1) is the one *Berne Convention* exception that comes closest to embodying a “user right” to make quotations’: S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 788–789.

119 Ibid, 785–786.

120 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 47.

121 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444.

122 Ibid, [98].

123 Ibid, [99].

124 For example, CSIRO, *Submission 242*; Pirate Party Australia, *Submission 223*; Australian Broadcasting Corporation, *Submission 210*; R Wright, *Submission 167*; R Xavier, *Submission 146*; M Rimmer, *Submission 143*; Civil Liberties Australia, *Submission 139*; Spinifex Press, *Submission 125*; K Bowrey, *Submission 94*.

125 For example, Australian Broadcasting Corporation, *Submission 210*; R Wright, *Submission 167*; R Xavier, *Submission 146*; K Bowrey, *Submission 94*.

126 K Bowrey, *Submission 94*.



10.99 Several stakeholders referred to the Kookaburra case as illustrating a gap in the law.<sup>127</sup> For example, Robert Xavier stated that reasonable sampling should be covered by an exception for quotation (and should not need a transformative use exception).

A quotation exception would be a very good thing. It is already the case that reproductions that are not 'substantial' do not infringe copyright, but 'substantial' has been interpreted so as to cover reproductions of almost any expressive elements of a work. No legitimate purpose or interest is served by preventing fair quotation, and legal action taken on the basis of quotations is often blatant rent-seeking.<sup>128</sup>

10.100 Robin Wright stated that the issue of 'using quotations of third-party copyright material for academic purposes is of significant concern in universities', in particular because university staff often have considerable difficulty determining if the amount they wish to use would be considered less than a substantial part of a work.

10.101 Wright suggested that any exception aimed at allowing quotation 'should permit academic users and their publishers to include a deemed amount of a third-party copyright item as a quotation without seeking permission, but still be subject to an evaluation of fairness factors to allow for some flexibility'.<sup>129</sup> The CSIRO held similar concerns about the need for a 'specific fair quotation right' applying to existing published material cited in reports or literature studies;<sup>130</sup> and Professor Kathy Bowrey noted that a quotation exception could 'empower some authors to resist unreasonable publisher requests to clear quotations'.<sup>131</sup>

10.102 The International Association of Scientific, Technical and Medical Publishers stated that it would support an exception for 'academic use' that was clearly defined, compliant with art 10(1) of the *Berne Convention* and required proper attribution.<sup>132</sup> The ABC advised that quotation is common in some genres of radio programming such as live talk-back and history programming. Section 45 allows for the use of an extract of a literary or dramatic work of reasonable length in a broadcast, but this exception does not cover recordings of broadcasts or online transmission.<sup>133</sup>

10.103 The Australian Digital Alliance and Australian Libraries Copyright Committee considered that 'any uses of copyright material that would be covered by a fair dealing exception for "quotation" would be more simply and effectively covered by a broad, flexible exception'.<sup>134</sup>

127 For example, R Wright, *Submission 167*; R Xavier, *Submission 146*; M Rimmer, *Submission 143*.

128 R Xavier, *Submission 146*.

129 R Wright, *Submission 167*.

130 CSIRO, *Submission 242*.

131 K Bowrey, *Submission 94*.

132 IASTMP, *Submission 200*.

133 Australian Broadcasting Corporation, *Submission 210*. Section 45 and other copyright exceptions applying to broadcasting are discussed in Ch 15.

134 ADA and ALCC, *Submission 213*.

10.104 Those opposing a quotation exception<sup>135</sup> did so for a range of reasons, primarily on the basis that existing exceptions adequately cover quotation. It was also suggested that a broader quotation exception would interfere with existing licensing practices<sup>136</sup> and present significant drafting problems and uncertainty,<sup>137</sup> including in relation to any conflict with the three-step test.<sup>138</sup> Screenrights, for example, stated:

Works may be quoted under the fair dealing provisions, provided the quote falls within one of the specified purposes. To allow for quotation outside these purposes, for example to sample one work in another or to use a work for the purpose of transforming it, can be, and is, adequately dealt with under a commercial licence obtained from the rightsholder. Filmmakers and publishers are used to obtaining permission to quote from other works and have well-established procedures to do this.<sup>139</sup>

10.105 The Australian Copyright Council observed that creating a ‘new fair dealing exception for quotation to facilitate mashups and other user-generated content would need to be justified on significant public policy grounds’ and that an exception ‘simply to legitimate common consumer behaviour would sit oddly as a fair dealing’.<sup>140</sup> The Arts Law Centre submitted that the framing of a fair dealing exception ‘simply for the purpose of quotation and for no other public purpose’ would be problematic—particularly as under the *Berne Convention* quotations need not be text-based.<sup>141</sup>

10.106 The Music Council of Australia acknowledged that the existing exceptions will not always be ‘a complete answer to the multitude of uses and methods of using musical works and materials and that certain musical genres (such as jazz and hip hop) rely on the quotation of existing copyright material as part of their vernacular’. The Council considered, however, that there is already sufficient uncertainty in the application of the tests concerning a ‘substantial part’. It stated that ‘including a further similar flexible (and thereby inherently uncertain) concept into the fair dealing exception’ may raise more problems than it purports to solve.<sup>142</sup>

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135 For example, Music Council of Australia, *Submission 269*; Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Directors Guild, *Submission 226*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; Australian Film/TV Bodies, *Submission 205*; Arts Law Centre of Australia, *Submission 171*; Australian Society of Authors, *Submission 169*.

136 APRA/AMCOS, *Submission 247*; Screenrights, *Submission 215*; Australian Society of Authors, *Submission 169*.

137 Music Council of Australia, *Submission 269*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Copyright Council, *Submission 219*; Arts Law Centre of Australia, *Submission 171*.

138 Australian Copyright Council, *Submission 219*; Australian Film/TV Bodies, *Submission 205*.

139 Screenrights, *Submission 215*.

140 Australian Copyright Council, *Submission 219*.

141 Arts Law Centre of Australia, *Submission 171*. ARIA was strongly of the view the concept of quotation has no application to neighbouring rights and that there should be no exception for the ‘quotation’ of sound recordings, broadcasts or performances: ARIA, *Submission 241*.

142 Music Council of Australia, *Submission 269*.

### Framing a quotation exception

10.107 A number of models for a quotation exception have been suggested. For example, in 2011, the Copyright Council Expert Group discussed an exception permitting the quotation of copyright material in commercial works, before recommending the development of a non-commercial transformative use exception.<sup>143</sup>

10.108 Associate Professor Elizabeth Adeney has proposed draft clauses providing fair dealing exceptions for quotation.<sup>144</sup> Her model provides for separate exceptions in relation to: (i) reproductions and communications of works; and (ii) and performances of works. Both exceptions would provide that a use would not constitute copyright infringement if:

- it is for the purpose of quotation;
- the quotation constitutes a fair dealing with the quoted material; and
- sufficient acknowledgement of the quoted material is made.

10.109 Both provisions would also provide a list of discretionary matters to consider in determining whether the use of a 'quotation' satisfies 'fair dealing.' These include:

- whether the quotation has been used in good faith;
- the extent of the quotation and whether or not this exceeds the purpose for which the quotation is used;
- the degree to which the quotation interferes with the commercial interests of the copyright owner of the quoted work; and
- whether the use of the quotation furthers the community interest in free speech and the freedom of artistic expression.<sup>145</sup>

10.110 Adeney acknowledges that any exception for quotation would have to address a number of complexities, including whether the provisions should apply only to published works; how 'quotation' is to be defined; and how an exception for quotation would interact with other fair dealing exceptions.<sup>146</sup> She states that specific exceptions for quotation:

would support or extend other fair dealing arguments in the areas of scholarship and debate and, like the recently implemented exception for parody and satire, it would have the capacity to soften the impact of copyright in the arts sphere. This capacity would be strengthened if a consideration of the freedom of art were to be mandated, going to the question of fair dealing in the quotation context. The defence would also bring Australian copyright law into closer alignment with both the European jurisdictions and the *Berne Convention*/TRIPS requirements.<sup>147</sup>

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143 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

144 E Adeney, 'Appropriation in the Name of Art: Is a Quotation Exception the Answer?' (2013) 23(3) *Australian Intellectual Property Journal* 142, 156.

145 Ibid, 156.

146 Ibid, 158.

147 Ibid, 159.

**Fair use and quotation**

10.111 In the ALRC's view, there are strong arguments that Australian copyright law should provide more scope for the quotation of copyright material—particularly where there is little or no effect on the potential market for, or value of, the copyright material. The intention of such a reform would be to promote fair access to and wide dissemination of content (Principle 3), while continuing to acknowledge and respect authorship and creation; and to maintain incentives to the creation of works and other subject matter (Principles 1 and 2).<sup>148</sup>

10.112 The preferable means of reform is for quotation to be considered under the proposed fair use exception where a range of factors can be balanced in determining whether a particular use is permitted.

10.113 The concept of quotation is central to US fair use doctrine. The *Copyright Act 1976* (US) provides that one of the factors determining fair use is 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole'.<sup>149</sup> Even before codification, fair use was considered to cover the quotation of excerpts in a review or criticism for purposes of illustration or comment, and the quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations.<sup>150</sup> The amount of the copyrighted work quoted is not always determinative of fair use, and will depend on the application of other fair use factors.<sup>151</sup> It has been held that there is both a quantitative and qualitative element to determining whether a 'quotation' is fair use.<sup>152</sup>

10.114 The ALRC proposes that 'quotation' be one of the illustrative purposes listed in the fair use provision. This will signal that a particular use that falls within the broader category of 'quotation' is more likely to be fair than a use which does not fall into this, or any other, illustrative purpose category. However, all the fairness factors must be considered in determining whether a particular use is fair. As discussed in Chapter 4, the fact that a particular use falls into, or partly falls into, one of the categories of illustrative purpose, does not necessarily mean the particular use is fair. In fact, it does not even create a presumption that the use is fair. A consideration of all the fairness factors remains necessary.

10.115 Providing quotation as an illustrative purpose may be criticised on the basis that referring to quotation without reference to a particular purpose (such as criticism or review) may lack meaning. That is, without further context it would refer simply to the act of using a part, rather than the whole, of a work. The ALRC is interested in further comment on whether quotation should be framed as an illustrative purpose.

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148 See Ch 2.

149 *Copyright Act 1976* (US) s 107(3).

150 United States House of Representatives, Committee on the Judiciary, *Copyright Law Revision* (House Report No. 94-1476) (1976), 5678–5679.

151 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 586–587.

152 *Harper & Row Publishers, Inc. v. Nation Enterprises* (1985) 471 US 539.

10.116 In the event that a fair use exception is not enacted, the ALRC proposes an alternative, namely, fair dealing for the purpose of quotation. This fair dealing exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the fair use exception. Applying the two exceptions to instances of quotation should, therefore, produce the same result.

**Proposal 10–2** The fair use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair use exception.

**Proposal 10–3** If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.



# 11. Libraries, Archives and Digitisation

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## Summary

11.1 This chapter considers the activities of libraries and archives in the digital environment. The ALRC proposes that the flexible exception in s 200AB for libraries and archives be repealed. In the ALRC's view, the exception is not working appropriately and effectively in the digital environment.

11.2 Instead, digitisation and communication activities by libraries and archives—such as web harvesting, digitisation and communication of unpublished works—should be considered under the fair use exception proposed in Chapter 4. In the particular case of mass digitisation projects, the ALRC asks whether the *Copyright Act 1968* (Cth) should be amended to facilitate voluntary extended collective licensing.

11.3 The ALRC also proposes that certain exceptions relating to the core functions of libraries and archives—preservation copying and document supply—be retained in an amended form. The ALRC considers that retaining some specific exceptions for these purposes is justified in the interest of cultural policy and the wider public interest in education and research.

11.4 The proposed reforms will give libraries and archives more freedom to make preservation copies, and to supply electronic copies of works for study and research, subject to a number of safeguards limiting use and access.

### **Cultural institutions in the digital environment**

11.5 In this chapter, the ALRC uses the term ‘cultural institutions’ to refer to libraries, archives, museums, galleries and public broadcasters.<sup>1</sup>

11.6 The digital environment has continually changed the ways in which copyright materials are created, stored, preserved, published and consumed. In response to changing public expectations, cultural institutions have had to adapt their practices in order to fulfil their public missions of providing public access to cultural and historical knowledge.<sup>2</sup>

11.7 These changing practices increasingly involve the digitisation and communication of collections in ways that conflict with emerging publishing platforms. As a 2008 report into the libraries and archives exceptions in the United States highlighted:

The use of digital technologies has served to blur somewhat the traditional roles of libraries and archives and rights holders. Libraries and archives can become ‘publishers’ in the sense that they have reproduction and distribution capabilities far beyond those provided by older, analog technologies. At the same time publishers, with their newly acquired abilities to create, manage, and provide access to databases of information, can now provide some of the functions that in the past were associated primarily with libraries and archives.<sup>3</sup>

11.8 In the digital environment, two main issues face cultural institutions in fulfilling their public service missions: the preservation of materials in their collections and provision of access to the public.<sup>4</sup>

11.9 The importance of digitisation and access to cultural knowledge and information has been recognised in government policy. As part of the National Cultural Policy Discussion Paper, the Australian Government highlighted that ‘changing community

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1 *Copyright Act 1968* (Cth) s 10 defines ‘archives’ to mean archival material in the custody of: the Australian Archives; the Archives Office of NSW; the Public Record Office; the Archives Office of Tasmania; or a collection of documents or other material of historical or public interest in custody of a body that does not operate or maintain the collection for the purposes of deriving a profit. The Act also refers to ‘key cultural institutions’ as being bodies administering libraries and archives under a law of the Commonwealth or State, or bodies prescribed by the regulations. The prescribed bodies include the Australian Broadcasting Corporation, Special Broadcasting Service Corporation and the Australian National University Archives Program: *Copyright Regulations 1969* (Cth) sch 5.

2 See A Christie, *Cultural Institutions, Digitisation and Copyright Reform* (2007), Intellectual Property Research Institute of Australia Working Paper No 9/07, 21–25 noting that digital technology has transformed libraries from traditionally holding analog works for physical access, to a 21<sup>st</sup> century-type institution that provides public access to digital representations of the cultural institutions ‘online and around the clock’.

3 *The Section 108 Study Group Report* (2008), 28.

4 Many cultural institutions in Australia have statutory obligations to develop, maintain and provide wide access to their collections. See eg, *National Sound and Film Archive Act 2008* (Cth); *Archives Act 1983* (Cth); *Australian War Memorial Act 1980* (Cth); *National Library Act 1960* (Cth).



expectations of access and service have created additional areas of common interest, including education, interpretation, regional delivery and digitisation of collections'.<sup>5</sup> The final report, *Creative Australia*, emphasised that:

The digitisation of our National Collections Institutions will change significantly. The digitisation of their collections and increasing online engagement, using the potential of the NBN, will exponentially increase the value and role of our national collections in telling Australian stories.<sup>6</sup>

11.10 Consistent with these objectives, cultural institutions called for reforms to the *Copyright Act* to give them greater freedom to engage in:

- routine digitisation of collection material;<sup>7</sup>
- digitisation and making public unpublished material (for example, on a museum's website);<sup>8</sup>
- digitisation and communication of non-Crown copyright material that forms part of government records;<sup>9</sup>
- capturing and archiving Australian web content;<sup>10</sup> and
- mass digitisation projects.<sup>11</sup>

11.11 A key question for this Inquiry is whether the current exceptions for libraries and archives are working adequately in the digital environment to facilitate such uses in fulfilment of the National Cultural Policy, and whether further exceptions are required. While the ALRC's Terms of Reference refer to 'the general interest of Australians to access, use and interact with content in the advancement of education, research and culture', the ALRC recognises that reform should acknowledge and respect authorship and creation.<sup>12</sup>

### **Is s 200AB working adequately in the digital environment?**

11.12 The proposition that cultural institutions require greater flexibility to make use of copyright material is not new in copyright law reform. In 2006, the Australian Government inserted s 200AB into the *Copyright Act*. The intention was to provide cultural institutions with 'a flexible exception to enable copyright material to be used

<sup>5</sup> Australian Government, *National Cultural Policy Discussion Paper* (2011), 6.

<sup>6</sup> Australian Government, *Creative Australia: National Cultural Policy* (2013), 100.

<sup>7</sup> Grey Literature Strategies Research Project, *Submission 250*; National Library of Australia, *Submission 218*.

<sup>8</sup> State Records South Australia, *Submission 255*; Grey Literature Strategies Research Project, *Submission 250*; CAMD, *Submission 236*; National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; National Archives of Australia, *Submission 155*.

<sup>9</sup> National Archives of Australia, *Submission 155*; CAARA, *Submission 271*.

<sup>10</sup> National Library of Australia, *Submission 218*.

<sup>11</sup> Art Gallery of New South Wales (AGNSW), *Submission 111*.

<sup>12</sup> See Ch 2.

for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties'.<sup>13</sup>

11.13 Section 200AB only applies to cultural institutions, educational institutions and users assisting those with a disability. For cultural institutions, use of copyright material is not infringement if it is:

- made by or on behalf of the body administering the library or archive;
- made for the purposes of maintaining or operating the library or archives; and
- not made partly for the purposes of the body obtaining a commercial advantage or profit.<sup>14</sup>

11.14 Importantly, any use under s 200AB is subject to the three-step test language found in the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS Agreement). In order to be protected by s 200AB the use of the copyright material must:

- amount to a special case;
- not conflict with the normal exploitation of the work or subject matter; and
- not unreasonably prejudice the legitimate interests of the owner of copyright.<sup>15</sup>

11.15 Further, the exception is only available if no other exception or statutory licence is available to the user.<sup>16</sup>

### Limited application in practice

11.16 Since its introduction, a number of guidelines have been developed by various groups to facilitate the use of s 200AB.<sup>17</sup> Despite these guidelines, it appears that the provision has been used rarely. The Australian Digital Alliance and the Australian Libraries and Copyright Committee (ADA and ALCC) has argued that adoption of s 200AB has been slow:

The provision has not been used to a great extent because it is too limited, and cultural institutions are unsure about how to use s 200AB in accordance with their institutional risk management, relationship management and other policies.<sup>18</sup>

<sup>13</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [6.53].

<sup>14</sup> *Copyright Act 1968* (Cth) s 200AB(2)(a)–(c).

<sup>15</sup> *Ibid* s 200AB(1)(a)–(d). Section 200AB(7) defines 'conflict with the normal exploitation', 'special case' and 'unreasonably prejudice the legitimate interest' with reference to Article 13 of the *TRIPS Agreement*. See also, E Hudson, 'Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia', *Thesis*, University of Melbourne, 2011 where she states that 'no-one who contributed to the [Fair Use] review had asked for such a provision, which is unique to Australian law'.

<sup>16</sup> *Copyright Act 1968* (Cth) s 200AB(6).

<sup>17</sup> L Simes, *A User's Guide to the Flexible Dealing Provisions for Libraries, Educational Institutions and Cultural Institutions* (2008), Australian Libraries Copyright Committee and the Australian Digital Alliance; Australian Copyright Council, *Special Case and Flexible Dealing Exception: s 200AB* (2012).

<sup>18</sup> Australian Digital Alliance and the Australian Libraries Copyright Committee, *Response to the Engage: Getting on with Government 2.0 Draft Report* (2009), 9.

11.17 Submissions from cultural institutions to this Inquiry broadly confirmed this view. For example, a number of those institutions stated that they had never used s 200AB.<sup>19</sup> One particular exception was the Australian War Memorial, which found that s 200AB, in part, addressed the conflicting requirements under its statute to digitally preserve its collection while adhering to its obligations under the *Copyright Act*.<sup>20</sup>

11.18 Others have used s 200AB in a limited way to facilitate the use of orphan works. For example, the Art Gallery of NSW stated that it relied on s 200AB for the communication and publication of works in exhibitions where the author is unknown or un-contactable after a reasonably diligent search.<sup>21</sup> Similarly, the Council of Australian Museum Directors (CAMD) submitted that some museums have applied, with legal assistance, the test embodied in s 200AB in order to place material online.<sup>22</sup>

### Uncertainty in the language

11.19 The ADA and ALCC submitted that its consultations with cultural institutions suggested that many viewed s 200AB as ‘a failure’. A report attached to its submission argued that s 200AB was not working in practice because:

- the incorporation of the three-step test into s 200AB has created a high degree of uncertainty as to its practical application and scope;
- s 200AB(6)(b) appears to limit its operation;<sup>23</sup>
- the inability to circumvent technical protection measures (TPMs) for the purposes of s 200AB, combined with increasing use of TPMs on audio-visual works, has resulted in a growing number of works that fall outside the exception; and
- the uncertainty surrounding the three-step test, combined with the general culture of risk aversion, has led cultural institutions to refrain from using the exception at all for fear of facing legal challenges.<sup>24</sup>

11.20 A number of submissions supported the view that incorporation of the language of the three-step test caused uncertainty, and therefore led to minimal reliance on the

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19 Australian Broadcasting Corporation, *Submission 210*; State Library of New South Wales, *Submission 168*, State Records NSW, *Submission 160*; Powerhouse Museum, *Submission 137*.

20 Australian War Memorial, *Submission 188*.

21 Art Gallery of New South Wales (AGNSW), *Submission 111*.

22 CAMD, *Submission 236*.

23 That is, s 200AB does not apply if a licence is available. For example, the Council of Australasian Archives and Records Authority was not clear on ‘whether s 200AB is even applicable for government archives where s 183(1) applies: CAARA, *Submission 271*.

24 See Policy Australia, *Flexible Exceptions for the Education, Library and Cultural Sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?* (2012), Report prepared for Australian Digital Alliance/Australian Libraries Copyright Committee: ADA and ALCC, *Submission 213*.

provision.<sup>25</sup> In particular, stakeholders highlighted uncertainty around the meaning of ‘special case’ and were concerned about ‘the effort and knowledge required to rule out all other exceptions before using s 200AB’.<sup>26</sup> Cultural institutions considered that they could not interpret the provision without legal advice.<sup>27</sup> The combination of these factors deterred cultural institutions from litigation to determine whether a use is permitted by s 200AB.<sup>28</sup>

11.21 Australian copyright academics suggested that lack of case law surrounding s 200AB has entrenched a narrow interpretation of the section in practice. That is:

if no one is willing to be the test case, it makes it difficult for industry practice to emerge, not just because of an absence of law, but because the muted practice themselves can end up justifying the interpretation of the exception as limited in scope, even if such an interpretation was never intended.<sup>29</sup>

11.22 On the other hand, the Australian Copyright Council argued that slow uptake of s 200AB could be attributed to cultural norms and that the law is only part of the answer. It suggested that some of the problems associated with s 200AB could be overcome through agreed industry guidelines: for example, that agreement could be reached in relation to certain, common scenarios.<sup>30</sup> A number of collecting societies agreed with this view.<sup>31</sup> Copyright Agency/Viscopy argued that while there is a trade-off between ‘certainty’ and ‘flexibility’, the section:

is less ‘uncertain’ than some think. There are now a number of guides to the operation of s 200AB for libraries and other institutions. There is more commonality than difference in these guides, and we think there is scope to identify more common ground. The additional ‘confidence’ that some institutions would like can be achieved through a guide that is endorsed by representatives of both cultural institutions and organisations representing creators and publishers of content.<sup>32</sup>

### **Fairness approach is familiar to cultural institutions**

11.23 A number of cultural institutions called for s 200AB and for it to be replaced with something broader—like a fair use exception, or a flexible fair dealing right for cultural institutions.<sup>33</sup>

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25 R Burrell and others, *Submission 278*; CAARA, *Submission 271*; National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

26 National Library of Australia, *Submission 218*.

27 For example, the Powerhouse Museum suggested that s 200AB ‘requires an in-house lawyer to provide us with an in depth analysis of how we could use it’: Powerhouse Museum, *Submission 137*.

28 National Archives of Australia, *Submission 155*.

29 R Burrell and others, *Submission 278*.

30 The Australian Copyright Council suggested that transparency in the guidelines could be overcome by registration of such guidelines under the *Legislative Instruments Act 2003*: Australian Copyright Council, *Submission 219*. See also, Australian Directors Guild, *Submission 226*.

31 APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; PPCA, *Submission 240*.

32 Copyright Agency/Viscopy, *Submission 249*.

33 R Burrell and others, *Submission 278*; CAARA, *Submission 271*; CAMD, *Submission 236*; National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; State Library of New South Wales, *Submission 168*; R Wright, *Submission 167*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*.

11.24 In supporting a move to fair use, the ADA and ALCC argued that cultural institutions already take a ‘fairness’ approach to providing access to their collections in the digital environment.<sup>34</sup> They argued that an exception based on ‘fairness factors’, would provide more certainty than the language in s 200AB:

One theme that was repeated in discussions with stakeholders was that the language of the three-step test is not as familiar or instinctive as the language of fairness ... For example, Australians are used to assessing whether uses for research or study, or criticism or review are fair. In terms of determining the practical application of an exception based on fairness, there would also have been jurisprudence for would-be-users to draw upon.<sup>35</sup>

11.25 In the educational context, Universities Australia expressed a similar view that university copyright officers have long been used to applying a fairness analysis.<sup>36</sup>

11.26 Some Australian copyright academics agreed that the attitudes and behaviours of cultural institutions were ‘eminently suited to a flexible exception’, and that many had taken a ‘risk analysis’ approach in making works available.<sup>37</sup> They queried why such ‘risk analysis’ did not lead to the conclusion that s 200AB would apply, and suggested that the reason for this might be that:

institutions found it difficult to connect these considerations to the TRIPS-based language that appears in s 200AB, and had internalised the view that the ‘special case’ requirement permitted only discrete uses of copyright works. To the extent there was uncertainty with s 200AB, this related not to the underlying concepts, but the particular language used in that provision.<sup>38</sup>

## Fair use

11.27 In Chapter 4, the ALRC proposes that a fair use exception be introduced into the *Copyright Act*. Consequently, and for a number of reasons, the ALRC also proposes that s 200AB be repealed.

11.28 First, the ALRC considers it telling that the sectors s 200AB was intended to benefit are calling for its repeal. There was little support from stakeholders for amending s 200AB.<sup>39</sup> It is clear that the provision is not working as intended, and that the lack of uptake can be attributed to a number of factors, including: the uncertainty of the language; lack of case law and practice; lack of legal resources to interpret the provision and the risk averse nature of cultural institutions.

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<sup>34</sup> National Archives of Australia, *Submission 155*.

<sup>35</sup> Policy Australia, *Flexible Exceptions for the Education, Library and Cultural Sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?* (2012), Report prepared for Australian Digital Alliance/Australian Libraries Copyright Committee.

<sup>36</sup> Universities Australia, *Submission 246*.

<sup>37</sup> R Burrell and others, *Submission 278* ‘Relevant factors that informed their analysis included the nature and age of the copied work, whether the copyright owner could be ascertained and located or, if not, the likelihood that there existed an active copyright owner, and the accessibility and commerciality of the institution’s use’.

<sup>38</sup> *Ibid.*

<sup>39</sup> Burrell and others considered broadening the exception to ‘all users’, but did not recommend this approach, given the problems with the current language of the provision: *Ibid.*

11.29 Secondly, the ALRC considers that cultural institutions may feel more comfortable applying a fair use test than s 200AB. Fair use requires consideration of the ‘fairness factors’, which provides a framework for balancing competing factors. Requiring cultural institutions to apply a ‘fairness’ test—for which they have some familiarity with the underlying concepts—should result in greater uptake and application and contribute to wider dissemination and access to materials in the public interest. The ALRC stresses that fair use does not mean free use. The fairness factors require consideration of the effect of the use upon the potential market for, or the value of, the copyright material.

11.30 Further, if it is accepted that the starting point for fair use is not as uncertain as s 200AB, the ALRC sees greater potential for guidelines, around the concept of fairness, to be effective.<sup>40</sup>

11.31 Thirdly, fair use could be much more flexible in its operation than s 200AB. Fair use is not limited to any class of user or type of use. As cultural institutions’ practices change over time, the fair use framework can be applied to determine whether such practices constitute infringement.

11.32 In sum, a fair use approach should provide cultural institutions with the ability to better analyse when communication or digitisation of copyright material would be fair, taking into account the interests of rights holders.

11.33 In the event that a general fair use exception is not enacted, the ALRC proposes that the *Copyright Act* be amended to provide ‘fair dealing for libraries and archives’. In considering whether uses by libraries or archives constitute fair dealing, regard should be given to the fairness factors. This would ensure that the concept of fairness is the standard with which to consider whether uses of copyright material constitute infringement.

11.34 The ALRC considers that the fair use exception may allow cultural institutions to engage in a number of activities that they suggested were currently being impeded by the *Copyright Act*. Some of these are discussed below.

### Unpublished works

11.35 A number of stakeholders called for a reduction in the term of copyright to allow the digitisation and communication of unpublished material.<sup>41</sup> Under the *Copyright Act*, copyright subsists in a literary, dramatic, musical or artistic work until 70 years after the end of the calendar year in which the author died.<sup>42</sup> If a literary, dramatic or

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<sup>40</sup> See Ch 4.

<sup>41</sup> For example, the Australian War Memorial suggested that an ideal reform would be a ‘provision whereby an individual unpublished literary work moves into the public domain following 50 years of donation into a public institution’: Australian War Memorial, *Submission 188*. See also National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*, National Archives of Australia, *Submission 155*; Art Gallery of New South Wales (AGNSW), *Submission 111*. See *Copyright Act 1968* (Cth) s 29(1) which provides that literary, dramatic, musical or artistic works, cinematograph film or a sound recording shall be deemed to have been published, if and only if, reproductions/copies/records have been supplied to the public.

<sup>42</sup> *Copyright Act 1968* (Cth) s 33(2).

musical work was not published before the author died, the copyright term of 70 years does not start to run until one calendar year after it is first published.<sup>43</sup> In effect, if a work is never published copyright in the work remains in perpetuity.

11.36 Under the fair use exception proposed, the fact that a work is unpublished does not rule out the case for fair use. The fair use provision in the US specifically recognises that ‘the fact that a work is unpublished shall not of itself bar a finding of fair use if such a finding is made upon consideration of all the above factors’.<sup>44</sup> Similarly, under the ALRC’s model, the fact that a work is unpublished is not determinative of the fair use question.<sup>45</sup> Whether a use is fair will be determined by the fairness factors, including the nature of the use; the amount that is copied; and the impact on any potential market for the material.<sup>46</sup>

### Harvesting of Australian web content

11.37 The National Library of Australia (NLA) called for a specific exception that would allow it to harvest and preserve Australian internet content. It advised that, despite not relying on any exception to do so, it has conducted annual harvests of Australian web material since 2005, gathering 5 billion files and 200 terabytes of data. In harvesting, the library ‘posts information for website owners on the Pandora website and places a link to this notice in the web harvest robot’s request to the targeted servers’. That is, the library does not contact the owners before harvesting the material, rather notification of the harvesting is done at the time the website is harvested.<sup>47</sup>

11.38 The NLA noted that responses from website owners have been minimal.<sup>48</sup> Despite this, the NLA argued that because it has effectively copied the content without the copyright owner’s permission, it has not permitted public access to the data. However, it has responded to individual research requests to analyse the data.

11.39 To the extent that the NLA has not received many takedown requests, this might suggest that copyright holders consider such harvesting to be fair use. Use of technology to copy publicly available websites and index it for search purposes, might be considered to be a non-consumptive use as defined in Chapter 8. Whether the communication of harvested material constitutes infringement will need to be considered against the fairness factors outlined in Chapter 4. The fairness factors are more likely to support communication of publicly available material for public interest purposes such as research and study. However, communication of content on websites that are behind a ‘paywall’ or for which access would otherwise require payment of a licence, would be less likely to be fair use.

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43 Ibid s 33(3). A work is considered published if it has been ‘supplied (whether for sale or otherwise) to the public’: s 29(1).

44 *Copyright Act 1976* (US) s 107.

45 The list of illustrative uses or purposes can be found in Proposal 4–4.

46 See Ch 4.

47 The National Library of Australia advised that ‘the only way to identify and alert website owners on the scale required is through automated harvesting process’: National Library of Australia, *Submission 218*.

48 Only eleven responses were received after the first harvest and the number of responses has declined since then, Ibid.

*Internal administration and archival purposes*

11.40 The Australian Broadcasting Corporation (ABC) argued for an exception that would allow it to make copies and communicate ‘low resolution viewing copies’ of digitised works that are used by program makers searching for relevant audio or video segments. It suggested that its staff should be able to browse these archived copies on their local computers:

Such a system would not infringe the rights of non-ABC rights holders in its archived content, as none of the audio and video material it contains could be used for program-making without directly addressing those rights.<sup>49</sup>

11.41 The National Archives of Australia called for an exception to allow archives to communicate non-Crown copyright material once it is available under the relevant archival legislation, meaning that

Copyright third party material provided to government for administrative purposes could continue to be used for purposes of public administration, including public research in government archives, without copyright infringing or requiring payment of compensation.<sup>50</sup>

11.42 Similarly, the Council of Australasian Archives and Records Authority argued that the Act ‘does not readily facilitate/support online access to public sector information which incorporates material in which the Crown does not own copyright’.<sup>51</sup>

11.43 The ALRC considers that the above uses may fall under the illustrative purpose of ‘public administration’, outlined in Chapter 14. The ALRC considers that uses for public administration would include government uses required by statute, such as, making surveyors’ plans publicly available and releasing third party material as required by freedom of information laws. To the extent that archives or public broadcasters can be considered the Crown for the purposes of the *Copyright Act*, and where the use of third party material is required by statute, such uses are likely to fall under the rubric of ‘public administration’. However, the fact that a use falls under the illustrative purpose of ‘public administration’ alone is not determinative of the question of fair use. Regard must still be had to the fairness factors.

**Proposal 11–1** If fair use is enacted, s 200AB of the *Copyright Act* should be repealed.

**Proposal 11–2** The fair use exception should be applied when determining whether uses of copyright material not covered by specific libraries and archives exceptions infringe copyright.

<sup>49</sup> Australian Broadcasting Corporation, *Submission 210*.

<sup>50</sup> The National Archives of Australia pointed to ss 48, 49 of the *Copyright, Designs and Patents Act 1988* (UK) as a model: National Archives of Australia, *Submission 155*.

<sup>51</sup> CAARA, *Submission 271*.



**Proposal 11–3** If fair use is not enacted, the *Copyright Act* should be amended to provide for a new fair dealing exception for libraries and archives. This should also require the fairness factors to be considered.

## Mass digitisation

### A rights clearance problem

11.44 Cultural institutions suggested that s 200AB has not been used to facilitate mass digitisation projects. A key reason relates to the fact that uses under s 200AB must be a ‘special case’, and it is unclear whether mass digitisation would fall under this definition.<sup>52</sup> The Australian Society of Archivists (ASA) suggested that s 200AB does not consider ‘the economic impact on an archive attempting to fulfil its duties to preserve and make available its collection as a whole’.<sup>53</sup>

11.45 A common theme in submissions from the cultural institutions was the inability to clear rights due to lack of resources, time, or the scale of the project.<sup>54</sup> For example, the Powerhouse Museum submitted that:

The collections of museums and galleries are diverse and have a range of complex copyright issues that need to be dealt with on a daily basis. Most institutions don’t have access to legal services and need to spend many hours finding copyright holders and negotiating license agreements.<sup>55</sup>

11.46 The ABC submitted that inability to quickly clear rights in relation to its archival content meant that its digitisation activities were restricted to material that:

- did not require clearance of underlying rights;
- are owned by the ABC and which require minimal clearance; and
- are digitised for uses that recoup the cost of rights clearance through sales revenue.<sup>56</sup>

11.47 Archival institutions also expressed difficulty clearing non-Crown copyright material that form essential parts of government records.<sup>57</sup>

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<sup>52</sup> CAMD, *Submission 236*; National Archives of Australia, *Submission 155*. The National Library of Australia also suggested that copying large volumes of material may not amount to a ‘special case’: National Library of Australia, *Submission 218*.

<sup>53</sup> Australian Society of Archivists Inc, *Submission 156*.

<sup>54</sup> ADA and ALCC, *Submission 213*; Australian Broadcasting Corporation, *Submission 210*; State Library of New South Wales, *Submission 168*.

<sup>55</sup> Powerhouse Museum, *Submission 137*.

<sup>56</sup> Australian Broadcasting Corporation, *Submission 210*.

<sup>57</sup> CAARA, *Submission 271*; National Archives of Australia, *Submission 155*.

### Overseas comparisons

11.48 In the United States, the Copyright Office is reviewing the libraries and archives provisions of s 108 of the *Copyright Act 1976* (US). In its 2011 Discussion Paper on mass digitisation, it was argued that ‘collective licensing may be an attractive option for user groups, provided that antitrust concerns can be alleviated’. In particular

Voluntary collective licensing ... may be able to provide transactional licenses that give copyright owners the ability to set prices and terms and conditions of use for specific types of licensees and for specific types of use.<sup>58</sup>

11.49 In the United Kingdom, passage of the *Enterprise and Regulatory Reform Act 2013* (UK) will facilitate voluntary extended collective licensing. Under a new s 116B of the *Copyright, Patents and Designs Act 1988* (UK), collecting societies may ‘be authorised to grant copyright licences in respect of works in which copyright is not owned by the body or person on whose behalf the body acts’.<sup>59</sup>

11.50 Before being authorised to engage in extended collective licensing, regulations will require collection societies to:

- demonstrate that they are significantly representative of rights holders affected by the scheme;
- demonstrate that they have the support of members in the application; and
- have in place a code of conduct to ensure minimum standards of governance transparency and protection for non-member rights holders.<sup>60</sup>

11.51 The UK Government expects that voluntary extended collective licensing will ‘be more attractive in high-volume, low-value transactions with high administrative costs for individual clearance—such as those where collective licensing already plays a big role’.<sup>61</sup> The scheme is intended to be voluntary, as rights holders can opt-out of the scheme and collecting societies are not obliged to apply for it. The UK Government envisages that extended collective licensing is ‘an additional tool being made available where it makes sense for the sector to do so’.<sup>62</sup>

11.52 Extended collective licensing has also been pursued for mass digitisation and making available of ‘out-of-commerce works’ in Europe.<sup>63</sup> A Memorandum of Understanding (MOU) between libraries, publishers, authors, and collection societies encourages and underpins voluntary licensing agreements for digitisation of out-of-

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58 United States Copyright Office, *Legal Issues in Mass Digitisation: A Preliminary Analysis and Discussion Document* (2011), 33.

59 *Enterprise and Regulatory Reform Act 2013* (UK) s 77.

60 UK Government, *Government Policy Statement: Consultation on Modernising Copyright* (2011), 10.

61 Ibid.

62 Ibid, 11.

63 The Memorandum of Understanding defines an ‘out-of-commerce’ as being when the work, in all of its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand books and antiquarian bookshops).

commerce books and journals that are part of a library's collection.<sup>64</sup> The MOU notes that 'legislation might be required to create a legal basis to ensure that publicly accessible cultural institutions and collective management organisations benefit from legal certainty, when under an applicable presumption, the collective management organisations represent rights holders that have not transferred the management of their rights to them'.<sup>65</sup>

11.53 Under the principles of the MOU, the parties are to negotiate for digitising and making available works which are 'not for direct or indirect economic or commercial advantage'. The agreement should define the types and number of works covered, and level of remuneration for rights holders.

11.54 Similar to the UK proposal, licences under the European Union system will only be granted by collective management organisations 'in which a substantial number of authors and publishers affected by the agreement are members, and appropriately represented in the key decision making bodies'. Rights holders also retain the right to opt-out of any such agreement.

### Licensing solutions

11.55 Collecting societies opposed further exceptions that would allow cultural institutions to engage in mass digitisation, particularly in relation to material that is commercially available, including under a licence from a publisher or collecting society.<sup>66</sup> For example, ARIA considered that the 'current arrangements in the *Copyright Act* facilitate digitisation projects and that the scope of the current provisions is adequate to meet the preservation requirements of public and cultural institutions' and that 'mass digitisation projects can, and should be the subject of licence agreements'.<sup>67</sup>

11.56 Screenrights noted that s 183 provides a mechanism for state, territory and Commonwealth libraries and archives to negotiate individual payments for mass digitisation projects, but none have availed themselves of this exception. Screenrights is a declared collecting society for the licensing of broadcast material only. It argued for an extension of s 183A to provide for a declared collecting society to collect for

64 European Union, *Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works* (2011). Signatories included: the Association of European Research Libraries (LIBER); Conference of European National Libraries (CENL); European Bureau of Library, Information and Documentation Association (EBLIDA); European Federation of Journalists (EFJ); European Publisher's Council (EPC); European Visual Artists (EVA); Federation of European Publishers (FEP); International Association of Scientific, Technical and Medical Publishers (STM); and International Federation of Reprographic Rights Organisations (IFRRO).

65 Ibid, 1.

66 APRA/AMCOS, *Submission 247*; Australian Publishers Association, *Submission 225*; Australian Society of Authors, *Submission 169*; ALAA, *Submission 129*. See Arts Law Centre of Australia, *Submission 171* 'the availability of copyrighted works on the internet will impact on the ability of creators of those works to generate revenue from those works'.

67 APRA/AMCOS, *Submission 247*; Australian Publishers Association, *Submission 225*.

uses other than copying by government to allow cultural institutions to make their collections available online, without the need for notifying each individual.<sup>68</sup>

11.57 In light of the ALRC's proposal in Chapter 6 to repeal s 183, the ALRC considers that voluntary extended collective licensing may be considered a more appropriate mechanism for mass digitisation.<sup>69</sup>

11.58 The Australian Copyright Council argued that 'if institutions require certainty it may be appropriate to consider some kind of extended collective licence to cover mass digitisation of material that is in copyright'.<sup>70</sup> Extended collective licensing was also supported by Copyright Agency/Viscopy which argued that, for institutions not covered by a government statutory licence, extended collective licensing would provide 'equitable remuneration' to rights holders:

For mass digitisation, the approach to equitable remuneration would be similar to that for other blanket licences: all uses are licensed but a global fee takes account of higher value uses and content, lower value uses and content, and uses that are zero-rated. There is a public policy question about who bears the cost of equitable remuneration. Should it be the government through its funding of the cultural institution, or should it effectively be the content owners, by forgoing any remuneration?<sup>71</sup>

11.59 Copyright Agency/Viscopy suggest that the calculation of 'equitable remuneration' would vary according to the content and the use including:

- the benefit to the cultural institution (including the benefit of not having to get copyright clearance); and
- the value and use of the content to the content owner (likely to be affected by factors such as the currency of the work; the nature of the use; and how many people can receive or view content).<sup>72</sup>

11.60 The Association of Learned Professional Society Publishers submitted that extended collective licensing 'should probably only be considered for mass digitisation projects'.<sup>73</sup> It also pointed to 'other options to cover identifying and clearing appropriate rights in such large projects, such as the ARROW project'.<sup>74</sup>

11.61 The Australia Council for the Arts also noted that 'it is worth considering whether greater digitisation and communication by public and cultural institutions is impeded by legislation or whether this is a question of resources provided to these

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<sup>68</sup> Screenrights, *Submission 215*.

<sup>69</sup> See Ch 6, Proposal 6–1.

<sup>70</sup> Australian Copyright Council, *Submission 219*.

<sup>71</sup> Copyright Agency/Viscopy, *Submission 249*.

<sup>72</sup> Ibid.

<sup>73</sup> ALPSP, *Submission 199*.

<sup>74</sup> The Accessible Registries of Rights Information and Orphan Works is a tool to assist in the diligent search for rights status and rights holders. See ARROW, *Website* <<http://www.arrow-net.eu/faq/what-arrow.html>> at 12 May 2013.

institutions to cover the cost of using copyright material'.<sup>75</sup> Professor Jock Given cautioned that

the complexity of rights-holding alone is not a sufficient reason to completely undermine rights granted to all creators at any time, in favour of open, unremunerated access to an unrestricted class of users. Law changes made to support mass digitisation projects need to provide the right base for creativity in the distant future, not just a convenient tool for easier access to already-existing material in the present.<sup>76</sup>

## Orphan works

11.62 Many mass digitisation projects may involve substantial numbers of orphan works. In Chapter 12, the ALRC proposes that remedies available to a rights holder be limited where use of an orphan work has been made following a 'reasonably diligent search'. However, it may be impracticable or impossible to conduct a 'reasonably diligent search' in a mass digitisation project. Further, the fair use exception may not always apply—much will depend on how well the project maps to the contours of the fair use and the fairness factors.

11.63 The attraction of extended collective licensing is that a user can license a multitude of works in one transaction—including orphan works—as well as those belonging to rights holders who are not part of the collective. While the problem that money collected may not reach the rights holder remains, the benefits of absolute certainty from the risk of injunctive relief may justify up-front payment. For example, Google submitted that:

If a rights holder later comes forward, there should be a way for them to be reasonably compensated, but not in a way that can kill good faith projects. No large scale project will make the necessary investment in time and money if the whole endeavour can be shut down at anytime if a rights holder later comes forward and demands punishing monetary damages or an injunction.<sup>77</sup>

11.64 Licensing solutions could make it easier for cultural institutions to engage in mass digitisation and communication of orphan works for commercial reasons, or where public-private partnerships require agreements that allow partners to use copyright material for commercial purposes.<sup>78</sup> As noted in Chapter 12, if the option of voluntary extended collective licensing existed, users may wish to pursue this option rather than relying on fair use or the limitation on remedies following a diligent search.

11.65 In Chapter 6, the ALRC proposes repeal of the statutory licences for educational and government uses of copyright material in favour of voluntary licensing. Australia

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<sup>75</sup> Australia Council for the Arts, *Submission 260*.

<sup>76</sup> J Given, *Submission 185*.

<sup>77</sup> Google, *Submission 217*.

<sup>78</sup> For example, 'non-profit institutions and public lending entities often forge partnerships with commercial entities, seeking the support of technology companies or similar actors to fund or implement their projects, and entering into agreements that may allow their partners to use the digital collection—including, in some instances, works protected by copyright law—for commercial purposes': United States Copyright Office, *Legal Issues in Mass Digitisation: A Preliminary Analysis and Discussion Document* (2011), 9.

has a number of established collecting societies who could grant licences for mass digitisation projects. However, these collection societies may be need to be empowered to grant licences on behalf of rights holders who are not members in order to facilitate mass digitisation projects.

11.66 The ALRC welcomes stakeholder comments on whether the *Copyright Act* should be amended to facilitate voluntary extended collective licensing for mass digitisation projects. For example, should the *Copyright Act* be amended to provide a framework that facilitates voluntary extended collective licensing, similar to that proposed in the UK?

**Question 11–1** Should voluntary extended collective licensing be facilitated to deal with mass digitisation projects by libraries, museums and archives? How can the *Copyright Act* be amended to facilitate voluntary extended collective licensing?

## Certain exceptions should be retained

### The public interest and copyright

11.67 In Chapter 4, the ALRC asks what exceptions should be retained if Australia introduces a fair use exception.<sup>79</sup> In the ALRC's view, the exceptions relating to preservation copying and document supply by libraries and archives ought to be retained in order to promote the public interest in research and study and the preservation of cultural heritage.

11.68 The preamble to the *World Intellectual Property Organization Copyright Treaty 1996* recognises 'the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the *Berne Convention*'.<sup>80</sup> Similar statements have been made at the domestic level. The Explanatory Memorandum to the 2006 amendments recognised that while the *Copyright Act* gives exclusive economic rights to copyright owners to promote creativity, these rights may need to be restricted, in some circumstances, in favour of wider public interests.<sup>81</sup>

11.69 As noted above, many public institutions have statutory obligations to preserve and provide access to material in their collections. The ALRC considers that the public interest is served by delineating clearly what libraries and archives are permitted to do with copyright material in fulfilling their core public service missions. Retaining some

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<sup>79</sup> See Ch 4, Question 4–2.

<sup>80</sup> *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002), preamble.

<sup>81</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 5.

specific exceptions for libraries and archives would be consistent with the approach taken in other jurisdictions, including those that have fair use.<sup>82</sup>

### Preservation copying

11.70 The digital environment has enabled digital preservation by libraries and archives, not only as a means to preserve ‘legacy’ works—such as old manuscripts and films—but equally those that are ‘born digital’ in the face of technological obsolescence.<sup>83</sup>

11.71 The ALRC proposes that a number of provisions relating to preservation copying should be repealed. Instead, the *Copyright Act* should provide, in one provision, that libraries and archives are able to, in respect of both published and unpublished material, make ‘as many copies as is reasonable’ for preservation purposes.

### Current law

11.72 There are numerous provisions in the *Copyright Act* that deal with preservation copying by cultural institutions—these are divided between copying of ‘works’<sup>84</sup> and ‘subject matter other than works’.<sup>85</sup>

11.73 Under s 51A, a library or archive can make and communicate a reproduction of the work if :

- the work is in manuscript form or is an original artistic work—for the purpose of preserving against loss or deterioration or for research that is being carried out at the library or archive;<sup>86</sup> or
- the work is in published form but has been damaged, deteriorated, lost or stolen—for the purpose of replacing the work.<sup>87</sup>

11.74 In relation to works held in published form, preservation copying is only available subject to a commercial availability declaration. That is, preservation copying is only permitted if, after reasonable investigation, the library or archive is satisfied that a copy (not being a second-hand copy) cannot be obtained within a reasonable time at an ordinary commercial price.<sup>88</sup> Further, reproductions of original artistic works can

82 See eg, *Intellectual Property Code of the Philippines*, Republic Act No 8293 (the Philippines) s 188; *Copyright Act 1967 (South Korea)* s 31; *Copyright Act 2010 (Taiwan)* art 48; *Copyright Act 1976 (US)* s 108.

83 For example, the National Library of Australia stated that in 2011, it made preservation copies of 16,235 works. See also, National Archives of Australia, *Obsolescence—A Key Challenge In the Digital Age* <[www.naa.gov.au/records-management/agency/preserve/e-preservation/obsolescence.aspx](http://www.naa.gov.au/records-management/agency/preserve/e-preservation/obsolescence.aspx)> at 24 March 2013.

84 *Copyright Act 1968 (Cth)* s 10 defines a ‘work’ as a literary, dramatic, musical or artistic work. An artistic work is further defined to mean ‘an artistic work in which copyright subsists’.

85 Ibid, ss 51A, 51B deals with copying ‘works’ while ss 110B, 110BA and 112AA deal with subject-matter other than works, which includes sound recordings and cinematograph films and published works.

86 Ibid s 51A(1)(a).

87 Ibid s 51A(1)(b), (c).

88 Ibid s 51A(4)(a).

only be communicated via copy disabled computer terminals installed within the premises of the library or archive.<sup>89</sup>

11.75 Mirror provisions can be found in s 110B in relation to reproductions of sound recordings, cinematographic films, including the commercial availability test, and the restriction of online communication to computer terminals installed within the premises of the library or archive.<sup>90</sup>

11.76 In 2007, three further exceptions were inserted into the *Copyright Act*: ss 51B, 110BA and 112AA. These provisions allow certain ‘key cultural institutions’ to make up to three reproductions of ‘significant works’, being ‘works of historical or cultural significance to Australia’ for preservation purposes.<sup>91</sup> They apply separately and are in addition to the provisions that apply to library and archives generally.<sup>92</sup> The Supplementary Explanatory Memorandum noted that:

The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation.<sup>93</sup>

## UK

11.77 In the UK, authorised persons may only produce one copy of any item in the permanent collection of the library or archive, to replace or preserve the item, or to replace an item in another library that has been lost, destroyed or damaged.<sup>94</sup> Preservation copying is subject to a similar commercial availability test as in Australia.<sup>95</sup> The exception only applies to literary, dramatic and musical works and not artistic works, and sound recordings or films. Permission or licences from rights holders are necessary to make preservation copies of works not covered by the exception.

11.78 In 2006, the Gowers Review of intellectual property law recommended that the preservation exception be amended to integrate a general purposed-based exception which would permit the reproduction of all classes of copyrighted works for preservation purposes, and an exception for format-shifting of archival copies of works to ensure that records do not become obsolete.<sup>96</sup>

<sup>89</sup> Ibid s 51A(3A).

<sup>90</sup> Ibid s 110B. In relation to sound recordings, the provision refers to reproduction of a ‘first record’ of a sound recording or a ‘first copy’ of a cinematograph film.

<sup>91</sup> Ibid s 51B (deals with manuscripts, original artistic works, published work); s 110BA (deals with: first record, or unpublished record, embodying sound recording; first copy or unpublished copy of a film; published film); s 112AA (published editions of works).

<sup>92</sup> Ibid ss 51B(1), 110BA(1), 112AA(1). The provisions define a ‘key cultural institution’ as those administering the library or archive with a statutory function of developing and maintaining the collection. Other institutions may be prescribed by the Regulations. Current institutions that are prescribed include: the Australian Broadcasting Corporation; Australian National University Archives Program and the Special Broadcasting Corporation: *Copyright Regulations 1969* (Cth) sch 5.

<sup>93</sup> Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [76].

<sup>94</sup> *Copyright, Designs and Patents Act 1988* (UK) s 42(1)(a) and (b).

<sup>95</sup> Ibid s 42(2): ‘where it is not reasonable practicable to purchase a copy of the item in question to fulfil that purpose’.

<sup>96</sup> A Gowers, *Gowers Review of Intellectual Property Law* (2006), Rec 10(a) and (b).



11.79 In response to the Hargreaves Review, the UK Government intends to amend the *Copyright, Designs and Patents Act 1988* (UK) to:

- extend preservation copying to any type of copyright work and provide that the work could be copied as many times as necessary to preserve the work;
- ensure that this permitted act cannot be undermined by restrictive contract terms; and
- retain the current restriction to works in a permanent collection for which it is not reasonably practicable to purchase a replacement, to minimise potential harm to rights holders.<sup>97</sup>

## US

11.80 In the US, the preservation copying provisions distinguish between published and unpublished works. Under s 108(b) of the *Copyright Act 1976* (US), libraries and archives may make up to three copies of an unpublished copyrighted work in their collection for the purposes of preservation and security of the deposit or research use in other libraries or archives.<sup>98</sup> With respect to published works, s 108(c) provides that three copies are permitted to replace a work in a collection that is lost, deteriorating, stolen or the format of which has become obsolete. However, the provision only applies where an unused replacement cannot be obtained at a fair price after reasonable effort.

11.81 In both instances, copies made in digital formats cannot be made available to the public outside library or archive premises.<sup>99</sup>

11.82 Section 108(c) has been criticised for not allowing for pre-emptive preservation as it requires one of the triggering events to occur, and therefore is ‘ineffective as a means to preserve works that can easily be damaged or lost before preservation copies can be made’.<sup>100</sup> However, the libraries and archives provisions do not operate to limit the operation of the fair use provision under s 107, which may be invoked to reproduce more than three copies of published or unpublished works, or pre-emptive preservation.<sup>101</sup>

## Canada

11.83 In Canada, libraries, archives and museums can make a copy of a work or other subject matter, whether published or unpublished, in its permanent collection if the work is deteriorating, damaged or lost, or is at risk of being so.<sup>102</sup> Copying is also

97 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 45.

98 *Copyright Act 1976* (US) s 108(b). The work must be in the library or archive’s collection and any copy made in digital format cannot be made available to the public outside the library or archive premises.

99 Ibid ss 108(b)(2), 108(c)(2).

100 Library of Congress National Digital Information, Joint Information Systems Committee, Open Access to Knowledge Law Project and SURF Foundation, *International Study of the Impact of Copyright Law on Digital Preservation* (2008), 44.

101 *Copyright Act 1976* (US) s 107.

102 *Copyright Act 1985* (Can) s 30.1(1)(a).

permitted if the library ‘considers that the original is currently in a format that is obsolete or is becoming obsolete, or that the technology required to use the original is unavailable or is becoming unavailable’.<sup>103</sup>

11.84 Preservation copying does not apply where an ‘appropriate copy is commercially available in a medium and of a quality that is appropriate’.<sup>104</sup>

***Meeting preservation best practice principles***

11.85 It is striking to compare the disparate and complex preservation copying provisions in the *Copyright Act* with those of other jurisdictions. The ALRC considers that the *Copyright Act* can be simplified by repealing the current preservation exceptions, and inserting one provision that would allow libraries or archives to make copies of material necessary for the purpose of preservation. This would apply to both published and unpublished material.

11.86 A number of international best practice guidelines on digital preservation suggest that more than three preservation copies are required. For example, the International Standards Organisation (ISO) contemplates a range of different archived copies, including:

- an archived master copy from which access copies are derived;
- at least one access copy that is accessible to the public or restricted audience, and multiple copies may be desirable to facilitate access through different formats or platforms;
- at least one local backup which enables the restoration of the archived copy in the event that information system is compromised; and
- at least one remote disaster recovery function in a physically separate location.<sup>105</sup>

11.87 Submissions from cultural institutions argued strongly that the limit of three copies under the *Copyright Act* was inadequate to deal with digital preservation.<sup>106</sup> The ADA and ALCC called for the introduction of an exception that is ‘technology neutral, allowing as many copies to be made as is necessary to facilitate effective preservation’.<sup>107</sup> Others called for the provisions to be simplified using technology

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<sup>103</sup> Ibid s 30.1(1)(c).

<sup>104</sup> Ibid s 30.(2)

<sup>105</sup> See International Standards Organisation, *Reference Model for an Open Archival Information System (OAIS) Recommended Practice (IOS 14721:2012)*, (2012), 8. See also United Nations Educational, Scientific and Cultural Organisation, *Guidelines for the Preservation of Digital Heritage* (2003), 93.

<sup>106</sup> National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; Australian Broadcasting Corporation, *Submission 210*; National Archives of Australia, *Submission 155*.

<sup>107</sup> ADA and ALCC, *Submission 213*. Similar sentiments were echoed by State Records South Australia, *Submission 255*; Grey Literature Strategies Research Project, *Submission 250*; Australian War Memorial, *Submission 188*; Arts Law Centre of Australia, *Submission 171* National Archives of Australia, *Submission 155*; Powerhouse Museum, *Submission 137*.

neutral wording such as ‘copy’ to replace ‘reproduction’, ‘facsimile’ and ‘comprehensive photographic reproduction’.<sup>108</sup>

11.88 Robert Burrell, Michael Handler, Kim Weatherall and Emily Hudson queried whether the distinction between original and published works remains tenable in the digital environment and argued that the preservation exceptions should apply to all works, whether published or unpublished. They also questioned the policy reasons for the three copy limit applying to ‘key cultural institutions’ and not other libraries and archives:

The Explanatory Memorandum did not explain why these provisions should not be available as a matter of course to all cultural institutions, and it would be difficult to argue that only key cultural institutions are the repositories of significant works.<sup>109</sup>

11.89 Rights holders did not express major concerns about copying works for preservation purposes, but were concerned with controlling access to the works.<sup>110</sup> ARIA, Copyright Agency/Viscopy and the Arts Law Centre of Australia argued that there is a distinction between archiving for the purposes of preservation and the potential for subsequent uses of such material, in ways that affect the ability of the owner to commercially exploit the material.<sup>111</sup>

11.90 The ALRC considers that preservation of copyright material is in the best interests of both users and rights holders. Cultural institutions are in the best position to determine how to preserve their collections and should be free to make copies necessary to preserve copyright material. Consistent with other jurisdictions, the ALRC proposes that the commercial availability requirement be retained to ensure that there is no prejudice to rights holders.

11.91 There appears to be little utility in having different preservation exceptions addressing ‘works’ and ‘subject matters other than works’. Preservation is required of all types of copyright material. There appears to be no strong policy reason as to why the *Copyright Act* stipulates the three copy limit only for ‘key cultural institutions’. While it may be argued that these institutions have the capacity to engage in best preservation practices, that fact alone should not rule out other libraries and archives, as defined by the *Copyright Act*, that may also hold culturally significant material that requires preservation.<sup>112</sup>

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108 National Library of Australia, *Submission 218*. Also supported by Grey Literature Strategies Research Project, *Submission 250*.

109 R Burrell and others, *Submission 278*.

110 Australian Publishers Association, *Submission 225*; ARIA, *Submission 241*.

111 Copyright Agency/Viscopy, *Submission 249*; ARIA, *Submission 241*; Australian Publishers Association, *Submission 225*; Pearson Australia/Penguin, *Submission 220*; Australian Copyright Council, *Submission 219*.

112 For example, s 50(10) defines a library, for the purposes of that section, to mean: ‘a library all or part of whose collection is accessible to members of the public directly or through interlibrary loans’; or ‘a library whose principal purpose is to provide library services for members of a Parliament’ or ‘an archives all or part of whose collection is accessible to members of the public’. This definition is wider than ‘key cultural institutions’.

11.92 The ALRC also agrees with rights holders that there is a distinction between preservation and the subsequent communication of such works, which should be considered separately. While the ALRC's proposals extend the preservation exceptions, the question of access is left to fair use or licensing solutions.

**Proposal 11-4** The *Copyright Act* should be amended to provide a new exception that permits libraries and archives to make copies of copyright material, whether published or unpublished, for the purpose of preservation. The exception should not limit the number or format of copies that may be made.

**Proposal 11-5** If the new preservation copying exception is enacted, the following sections of the *Copyright Act* should be repealed:

- (a) s 51A—reproducing and communicating works for preservation and other purposes;
- (b) s 51B—making preservation copies of significant works held in key cultural institutions' collections;
- (c) s 110B—copying and communicating sound recordings and cinematograph films for preservation and other purposes;
- (d) s 110BA—making preservation copies of significant recordings and films in key cultural institutions' collections; and
- (e) s 112AA—making preservation copies of significant published editions in key cultural institutions' collections.

**Proposal 11-6** Any new preservation copying exception should contain a requirement that it does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.

### Document supply for research and study

11.93 Submissions expressed divergent views on whether reforms to the exceptions relating to document supply for the purposes of research and study are needed. There is a clear tension in this area between the role of libraries to facilitate research and study and the potential effect of the exception on emerging markets for journals and publications.

#### *Current law*

11.94 Under ss 49 and 50 of the *Copyright Act*, a person may make a request in writing to be supplied with a reproduction of an article, or part of an article contained in a periodical or published work held by the library or archive.<sup>113</sup> There are a number

<sup>113</sup> *Copyright Act 1968* (Cth) s 49(2). Section 50(1)(a) allows an officer in charge of a library to request another library to supply an article or part of an article in contained in a periodical publication, or the

of limits to reproduction.<sup>114</sup> A key limit is that where a request is made for reproduction of the whole of the work, or part of a work that contains more than a reasonable portion of the work, reproduction cannot be made unless:

- the work forms part of the library or archives collection; and
- before a reproduction is made, an authorised officer, after reasonable investigation is satisfied that the work cannot be obtained within a reasonable time at an ordinary commercial price.<sup>115</sup>

11.95 Where a library acquires a work in an electronic form, the library may make available the work online within the library premises in a manner such that users cannot make an electronic copy of the work, or communicate the article or the work.<sup>116</sup>

11.96 The supply of unpublished works is covered by s 51, under which recordings and films can be copied and supplied for research or study, or with a view to publication.<sup>117</sup> Works that qualify for preservation copying under ss 51A and 110B can also be reproduced for research; however, this appears to be limited to onsite research.<sup>118</sup>

### *International comparisons*

11.97 Canada, the UK, the US and New Zealand all have specific provisions allowing libraries and archives to supply users or other libraries with reproductions of works or whole works for research and study purposes. Each of these jurisdictions imposes limits on the delivery of documents.

### *Canada*

11.98 In Canada, it is not an infringement for a library or archive ‘to do anything on behalf of a person that the person may do personally under s 29 or s 29.1’.<sup>119</sup> Section 30.2 deals with copies of articles for research and study. It permits a library, archive or museum to make, by reprographic reproduction a copy of a work that is, or is contained in, an article published in:

- a scholarly, scientific or technical periodical; or

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whole or part of published work other than an article contained in a periodical publication, for the purposes of supplying the reproduction to a person who has made a request under s 49. This is known as inter-library loan.

114 There are limits including that a request is not for reproduction of, or parts of two or more articles in the same periodical publication unless the articles are requested for the same research course or study: s 49(4).

115 *Copyright Act 1968* (Cth) s 49(5AB) provides that in determining whether a work could be obtained within a reasonable time, the authorised officer must take into account: the time by which the person requests requires it; the time within which a reproduction of the work at the ordinary price could be delivered to the person; and whether an electronic reproduction of the work could be obtained within a reasonable time at a reasonable price.

116 *Copyright Act 1968* (Cth) s 49 (5A).

117 *Ibid* s 51(d).

118 *Ibid* ss 51A(1)(a), 110B(1)(a) and (2)(a).

119 *Ibid* s 29 states that ‘fair dealing for the purposes of research, private study, education, parody or satire does not infringe copyright’. Section 29.1 deals with fair dealing for the purposes of criticism and review.

- a newspaper or periodical, other than a scholarly, scientific or technical periodical, if the newspaper or periodical was published more than one year before the copy is made.<sup>120</sup>

11.99 A limitation applies to providing a copy to a person in digital form. The statute requires that the providing library take measures to prevent a person who has requested the copy from: making any reproductions, including any paper copies, except for printing one copy of it; communicating it to any other person; or using the copy for more than five business days from the day on which the person first uses it.<sup>121</sup>

### ***The UK***

11.100 Under the *Copyright, Designs and Patents Act 1988* (UK), a librarian of a prescribed library can make and supply a copy of an article in a periodical, or from a published edition a copy of part of a literary, dramatic or musical work, subject to the following conditions:<sup>122</sup>

- The librarian must be satisfied that the person requires them for the purpose of research for a non-commercial purpose or private study, and will not use them for any other purpose.<sup>123</sup>
- No person is furnished with more than one copy of the same article or with copies of more than one article contained in the same periodical.<sup>124</sup>
- The person who receives the copy must pay a sum not less than the cost of the copies (including a contribution to the general expenses of the library).<sup>125</sup>

11.101 The Australian Publishers Association (APA) highlighted an example of how these provisions are implemented by the British Library. Copies made by the British Library are made available to the client over a secure server that the client is able to access for 14 days. Clients have 30 days in which to access the file, after which it is deleted from the server. After that time, a client must make an additional payment and request. The file cannot be converted into any other format and cannot be 'cut and pasted'.<sup>126</sup>

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120 *Copyright Act 1985* (Can) s 30.2. This restriction does not apply in respect of a work of fiction or poetry or dramatic or musical work.

121 *Ibid* s 31(5.02). Further, where intermediate copies are made in order to copy the work, once given to the patron, the intermediate copy must be destroyed: s. 31(5.1).

122 *Copyright, Designs and Patents Act 1988* (UK) s 38 covers articles in periodicals and s 39 covers parts of published works.

123 *Ibid* s 38(2)(a)(i), (ii); s 39(2)(a)(i)

124 *Ibid* s 38(2)(b); s 39(2)(b).

125 *Ibid* s 38(2)(c); s 39(2)(c).

126 If a user wishes to receive an unencrypted file, they must order a licence from the relevant Copyright Licensing Agency.

11.102 The payment of a fee for reproduction of the document is separate from a ‘copyright fee’, which is payable if the customer is requesting the document for non-commercial purposes, or requires documents to be delivered within 2 hours or as an immediate download.<sup>127</sup>

### ***The US***

11.103 Under s 108(d) of the *Copyright Act 1976* (US), libraries and archives can supply in response to a request, ‘no more than one article or other contribution to a copyrighted collection or periodical issue, or ... a copy or phonorecord of a small part of any other copyright work’. Under s 108(e), a library or archive can reproduce or distribute an entire work in response to a user request if it first determines that ‘a copy or phonorecord of the work cannot be obtained at a fair price’. In both instances, the library must have no notice that the work will be used for any purpose other than private study, scholarship and research.<sup>128</sup>

11.104 There are limits to s 108(d) and (e), including a qualification that the library or archive derive no commercial gain from the reproduction.<sup>129</sup> Further, supply must include a notice that the work may be protected under copyright law.

11.105 The Section 108 Study Group recommended that electronic delivery of copies under s 108 (d) and (e) should be permitted only if libraries take additional measures to:

- ensure that access is provided only to the specified requesting user; and
- deter unauthorised reproduction or redistribution of the work.

11.106 The Group members agreed that adequate measures will depend on the type of work and the context of use, but there was no consensus on which measures were adequate, and whether technological protection measures should be required in any given case.<sup>130</sup>

### ***New Zealand***

11.107 Under the *Copyright Act 1994* (NZ), a library or archive can supply periodicals or parts of a published work, subject to limitations. In particular, s 56A provides that a library or archive does not infringe copyright by communicating a digital copy to an authenticated user if the following conditions are met:

- the librarian or archivist has obtained the digital copy lawfully;
- the librarian must ensure that each user is informed in writing about the limits of copying and communicating under the statute;

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127 British Library, ‘Document Supply Service Handbook for Business Account Management’ (2011).

128 *Copyright Act 1976* (US) s 108(d), (e).

129 *Ibid* s 108(1).

130 *The Section 108 Study Group Report* (2008), 98.

- the digital copy is communicated to a user in a form that cannot be altered or modified; and
- the number of users who access the digital copy at any one time is not more than the aggregate number of digital copies of the work that the library or archive has purchased or for which it is licensed.<sup>131</sup>

11.108 An ‘authenticated user’ is defined as someone who has a legitimate right to use library or archive services and can access the digital copy only through a verification process.

### ***Emerging distribution markets***

11.109 A number of publishers submitted that any expansion of the library and archives exceptions relating to document supply would undermine emerging distribution and licensing models.<sup>132</sup> For example, the APA argued that part of the historical rationale that underpins the document supply exceptions—such as Australia’s geographical isolation and inability to retrieve materials quickly—no longer applies in the digital environment. It argued that such ‘legacy’ provisions should be repealed.<sup>133</sup> The APA stressed there is now immediate access to authorised copies and that digital technology assists in both identifying and communicating with publishers and/or collection societies able to license the use of copyright material on behalf of publishers. It was argued that the exceptions ‘have no place in copyright legislation that supports a digital economy’.<sup>134</sup>

11.110 Concerns relating to market effects were summarised by the International Publishers Association:

When considering any revision of the current provisions, care should be taken not to impede the growing document delivery and other online services, provided by commercial entities, including publishers themselves ... Libraries are major clients of publishers, in particular of academic publishers. In the digital environment, their digital services compete to a certain extent with publishers in serving readers. Any revised provision should not interfere with the sustainability of developing new delivery and business models, and therefore the viability of the publishing industry as a whole.<sup>135</sup>

11.111 Publishers were concerned that ss 49 and 50 may be used, including by overseas parties, as a way of securing cheaper, or free, documents rather than purchasing or licensing such works. It was argued that the document supply provisions should only be available to users in Australia, and expressly for the purposes of private

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131 *Copyright Act 1994* (NZ) s 56A.

132 Australia Council for the Arts, *Submission 260*; Australian Publishers Association, *Submission 225*; Pearson Australia/Penguin, *Submission 220*; Australian Copyright Council, *Submission 219*.

133 Australian Publishers Association, *Submission 225*. The Australian Copyright Council, *Submission 219* also highlighted that the libraries and archives provisions ‘reflect the importance of such institutions in a geographically disparate nation’ and queried ‘whether the policy basis for all these provisions remain valid in the digital economy’.

134 Australian Publishers Association, *Submission 225*.

135 International Publishers Association, *Submission 256*.



study and non-commercial research.<sup>136</sup> Further, communication of digital material should be limited to terminals on library premises only.<sup>137</sup>

11.112 A further concern was that files distributed by libraries and archives were susceptible to further distribution by users on file-sharing sites. Allen & Unwin suggested that libraries ‘frequently create files without any digital security and send them to patrons as email attachments’ and that ‘requiring library patrons to warrant the file is for personal use is no real protection with a digital file’.<sup>138</sup>

11.113 The ADA and ALCC and the NLA were aware of such concerns. The ADA and ALCC suggested that there ‘has not been any expectation on the part of libraries that these copies would be made available for wider public access, or to reduce purchasing of digital content licenses’.<sup>139</sup> In its submission, the NLA drew attention to a survey it conducted which showed that file sharing as a result of document supply is low.<sup>140</sup>

11.114 As an alternative to the repeal of the provisions, the APA suggested that document supply could be modelled on that of the British National Library, as a solution that ‘meets the needs of the library and researchers without unduly prejudicing the interests of copyright owners’. Under this model:

- libraries are required to pay a licence fee;
- copies are required to be supplied with relevant TPMs in place (either as provided with the publication by the publisher or as may reasonably limit the uses to which the copy may be put in light of the purposes of the supply);
- copies are required to be supplied with all relevant electronic rights management information in place; and
- use is expressly limited to private study and non-commercial research.<sup>141</sup>

11.115 Copyright Agency/Viscopy suggested that ‘making different provisions for commercial entities would not impede their access to content’ as they could acquire works from libraries on a ‘cost recovery’ basis or on payment of a ‘copyright fee’.<sup>142</sup> Alternatively, ‘libraries could supply the materials to corporations that are covered by a licensing solution for the use of the material’.<sup>143</sup> The Arts Law Centre argued that a ‘statutory licence system could be put in place to provide effective remuneration to rights holders for these uses’.<sup>144</sup>

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136 John Wiley & Sons, *Submission 239*.

137 Ibid; Australian Publishers Association, *Submission 225*; IASTMP, *Submission 200*.

138 Allen&Unwin Book Publishers, *Submission 174*.

139 ADA and ALCC, *Submission 213*.

140 National Library of Australia, *Submission 218*.

141 Australian Publishers Association, *Submission 225*.

142 Copyright Agency/Viscopy, *Submission 249*.

143 Ibid.

144 Arts Law Centre of Australia, *Submission 171*.

*Effects on scholarship and research*

11.116 Cultural institutions voiced concerns over the complexity of the document supply provisions, including their limited breadth and inefficiency in operation. The ADA and ALCC argued that:

- the 1,600 word provision is complex and difficult to administer for library staff;
- there is real uncertainty about whether libraries can fulfil document supply requests for purposes other than research and study under s 200AB; and
- the need to destroy all electronic copies sent to the user as soon as practicable has resulted in inefficiencies and increased cost for end users.<sup>145</sup>

11.117 At the same time, the NLA advised that document requests in electronic form have been steadily increasing. Since the introduction of its Copies Direct service, requests from individuals have increased from 2000 in 2002 to 13,000 in 2012.<sup>146</sup>

11.118 The ADA and ALCC submitted that ‘libraries, who may be the only source of material requested by a user, should be permitted to supply documents in any circumstance where the user’s purpose is recognised as legitimate under copyright law’.<sup>147</sup> The National Library suggested that a new fair use provision could allow it to provide copies for purposes which combine research and study with other uses, as it currently declines requests that do not fall squarely under research and study.

11.119 The websites of these cultural institutions also confirmed that where a request falls outside the parameters of a current fair dealing exceptions, the onus is on the individual to clear the rights.<sup>148</sup>

11.120 The Independent Scholars Association of Australia (ISAA) argued that when considering issues relating to access to electronic material, the needs of ‘independent public scholars who do not have access to specialised academic support when conducting research’ should be a consideration:

From the viewpoint of ISAA members who are engaged in research (like myself) the crucial enabling factor is to have free access to academic journals and other scholarly resources, all of which are now available electronically and often, electronically only. I could not do the work required for my current project without free access to an academic library.<sup>149</sup>

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145 The ADA and ALCC provided some statistics in their submission: ADA and ALCC, *Submission 213*.

146 National Library of Australia, *Submission 218*.

147 ADA and ALCC, *Submission 213*.

148 See eg, National Gallery of Australia, *Reproductions and Digital Print Services* <<http://nga.gov.au/Collection/repro.cfm>> at 27 May 2013; National Library of Australia, *Do I need the Library's Permission as well as the Copyright Owner's Permission?* <<http://www.nla.gov.au/node/2260>> at 27 May 2013; State Library of Victoria, *Terms & Conditions—online copy ordering service* <<http://www.slv.vic.gov.au/terms-conditions-online-copy-ordering>> at 27 May 2013.

149 ISAA Inc, *Submission 149*.

***Protection of the public interest***

11.121 The debate in relation to document supply is, in many ways, one about what ought to be a legitimate role of libraries in a digital environment. In the ALRC's view, the emergence of markets providing licensed on demand access to journal articles and copyright works should not, of itself, override the wider public interest in research and education. However, there ought to be reasonable limits on document supply services to recognise the role of emerging distribution markets.

11.122 In the ALRC's view, the approaches taken in Canada, the UK, the US and New Zealand and the Section 108 Study Group recommendations have merit. The ALRC proposes that the current document supply provisions be simplified and amended to provide that libraries and archives may provide electronic copies of a work to a person for private study and research subject to limitations, including measures to ensure that:

- the person requesting the document cannot make further copies or communicate the work to other persons;
- the work cannot be altered; and
- access to the work is only provided for a limited time period.

11.123 The ALRC recognises that, in many cases, libraries are the only means by which people may be able to access certain types of copyright material and libraries should be able to continue their role in promoting research, education and study.

11.124 In the analog era, where access was limited to the physical location of the library or archive, the user had to suffer some inconvenience by travelling to the location in order to access the works. There was an incentive for the user to overcome this inconvenience by buying a copy of the work they wished to use. In the digital era—in particular with the rollout of the National Broadband Network—it is harder to justify a requirement that every user must access copies of works in the physical locations of the libraries.

11.125 However, the ALRC considers that access can be provided without impeding emerging markets for document delivery. For example, libraries could provide access to documents through a secure website to ensure that only the person who requested the document can access it. Technologies could be implemented to limit the type of use (for example, read only) and to ensure that the work cannot be altered. Limits could also be placed on the time available for the copy to be accessed, and perhaps, where the work can be accessed from (for example, only within Australia).

11.126 The ALRC invites stakeholder discussion on whether the limits proposed are appropriate and adequate for the digital environment.

**Proposal 11–7** Section 49 of the *Copyright Act* should be amended to provide that, where a library or archive supplies copyright material in an electronic format in response to user requests for the purposes of research or study, the library or archive must take measures to:

- (a) prevent the user from further communicating the work;
- (b) ensure that the work cannot be altered; and
- (c) limit the time during which the copy of the work can be accessed.

## Technological protection measures and contracting out

11.127 Some cultural institutions raised issues relating to TPMs. The ADA and ALCC were concerned that

increasing tendency of digital content licenses to contract libraries out of existing copyright exceptions, and ways in which TPMs impede preservation and long-term access to copyright works in the public interest.<sup>150</sup>

11.128 It called for ‘mirrored exceptions permitting circumvention of TPMs where an exception for digitisation or fair use or proposed legislative alternative exists’.<sup>151</sup>

11.129 The ALRC notes that the Australian Government Attorney-General’s Department is conducting an inquiry into whether exceptions for TPMs under the *Copyright Act* are appropriate and whether new exceptions should be added. That review is considering whether further exceptions in sch 10A of the *Copyright Regulations* that encompass ‘reproduction and communication of copyright material by libraries, archives and cultural institutions for certain purposes’ are needed.<sup>152</sup> The Terms of Reference direct the ALRC not to duplicate work in relation to this review.

11.130 However, as discussed in Chapter 17—and consistent with the ALRC’s views in this chapter—the inherent public interest in libraries and archives exceptions requires that there be no contracting out of these exceptions. The ALRC proposes that this be the case, whether or not fair use is implemented.<sup>153</sup> The ALRC also notes that if limitations on contracting out are implemented, consistent amendments to TPM provisions may be justified. That is, there may be little point in restricting contracting out of exceptions, if TPMs can be used unilaterally by copyright owners to achieve the same effect.<sup>154</sup>

<sup>150</sup> ADA and ALCC, *Submission 213*.

<sup>151</sup> *Ibid.*

<sup>152</sup> Australian Government Attorney-General’s Department, *Review of Technological Protection Measure Exceptions made under the Copyright Act 1968* (2012).

<sup>153</sup> See Ch 17, Proposal 17–1.

<sup>154</sup> See Ch 17.

## 12. Orphan Works

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### Summary

12.1 The fair use exception may be used to determine whether a use of an orphan work infringes copyright. However, where such a use is found not to be fair and infringes copyright, the remedies for infringement should in some circumstances be limited.

12.2 The ALRC proposes that the *Copyright Act 1968* (Cth) be amended to provide that remedies available for copyright infringement be limited where a defendant establishes that the work in question was an orphan work, and a ‘reasonably diligent search’ was conducted for the rights holder and the rights holder was not found.

12.3 What constitutes a ‘reasonably diligent search’ may change as new technologies, databases, registers and services emerge. The *Copyright Act* should therefore not set out precisely what constitutes a reasonable search, nor provide that only declared bodies may conduct such searches. Rather, the *Copyright Act* should provide that a number of factors may be considered in determining whether a reasonably diligent search has been conducted.

12.4 In Chapter 11 the ALRC discusses amending the *Copyright Act* to facilitate extended collective licensing for mass digitisation projects. If collecting societies offer licences for the use of orphan works, some users may prefer to obtain such licences, rather than rely on a provision limiting the remedies available to the rights holder.

## Scope of the orphan works problem

12.5 Orphan works are copyright material where an owner cannot be identified or located by someone wishing to obtain rights to use the work.<sup>1</sup> Use of orphan works may constitute copyright infringement unless the use is covered by an exception or other defence, such as fair use.

12.6 While orphan works are normally associated with older ‘analog’ works, the problem also arises in the digital environment where works are often placed online without identifying rights information. The ALRC heard that photographs are susceptible to being ‘orphaned’ due to rights information being removed when placed online.<sup>2</sup>

12.7 Submissions received from the galleries, libraries, archives and museum sector emphasised the scale of the orphan works problem. For example, the National Library Australia (NLA) estimated that it has some 2,041,720 unpublished items in its collection, a significant number of which are orphan[ed] works.<sup>3</sup> The result of a survey of members of the Australian Digital Alliance and the Australian Libraries Copyright Committee (ADA and ALCC) indicated that library collections comprise between 10% and 70% unpublished orphan works.<sup>4</sup>

12.8 A number of museums also indicated that a substantial number of orphan works reside in their collections.<sup>5</sup> The Council of Australian Museum Directors (CAMD) noted that orphan works ‘in some collections are virtually invisible to the public as well as academic historians and researchers, which fosters significant gaps in knowledge and impedes scholarly research’.<sup>6</sup>

12.9 Public broadcasters—the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS)—also drew attention to the problems of using orphan works in derivative works. The ABC noted that it ‘frequently confronts situations in which copyright clearances are required for orphan works, particularly in relation to literary works’.<sup>7</sup> Free TV Australia also observed that broadcasters had

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1 See, United States Copyright Office, *Report on Orphan Works* (2006), 1. For example, the copyright owner may be deceased, the publisher who owns the copyright may now be defunct, or there is no data that identifies the author of the work.

2 Copyright Agency/Viscopy, *Submission 249*; Australian Copyright Council, *Submission 219*; ALPSP, *Submission 199*.

3 The National Library of Australia’s survey of 800 works held in the library, selected to cover a range of dates and creation formats, found that 12.9% had ‘copyright undetermined’ status in its rights management system. The Library’s submission also refers to other examples where: the copyright owner was untraceable; there was no response from the owner; and a work was ‘unorphaned’, bringing the owner and the copyright material together: National Library of Australia, *Submission 218*.

4 See ADA and ALCC, *Submission 213*. The survey did not include published works, and among the types of works that were orphaned, photographs were the most common.

5 National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

6 CAMD, *Submission 236*.

7 Australian Broadcasting Corporation, *Submission 210*.

problems using archival material such as audio-visual footage or photographs where the owner could not be found.<sup>8</sup>

12.10 Stakeholders suggested that the orphan works problem has been exacerbated by extensions to the term of copyright and by prohibitions on imposing formalities, such as registration of works, in international agreements.<sup>9</sup>

12.11 The inability to use orphan works means that their productive and beneficial uses are lost.<sup>10</sup> The Australian Attorney-General's Department review of orphan works (the AGD orphan works review) noted that

there are numerous potential benefits of enabling orphan works to be used more readily. For example, these works could contribute to research, education, culture and to the creation of further transformative works. These works could also be used for commercial purposes, thus increasing the already considerable contribution of copyright industries to the Australian economy.<sup>11</sup>

12.12 The AGD orphan works review also pointed out that orphan works affect a wide range of owners and users including: information technology companies, Indigenous creators, news and print media, composers, photographers and web-based creators.<sup>12</sup>

12.13 While the public interest in dissemination and use of orphan works underpins the ALRC's reform approach in this area, reform must also acknowledge and respect authorship and creation.<sup>13</sup> The ALRC's proposed reforms are intended to:

- increase the quantities and types of orphan works available for use;
- ensure that rights holders are adequately compensated;
- promote efficiency and reduce unnecessary burdens on users and public and cultural institutions;
- be cost effective; and
- be compliant with Australia's international obligations.<sup>14</sup>

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8 Free TV Australia, *Submission 270*.

9 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972) art 5. See also Pirate Party Australia, *Submission 223*; ADA and ALCC, *Submission 213*; NSW Young Lawyers, *Submission 195*. As discussed in Ch 12, some stakeholders seek amendments to reduce the term of copyright for unpublished works.

10 See, eg, United States Copyright Office, *Report on Orphan Works* (2006), 15. Orphan works are 'the starkest failure of the copyright system to adapt' and that the system is 'locking away millions of works' in public libraries and archives: I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 38. Similar comments were made in submissions from Universities Australia, *Submission 246*; IASTMP, *Submission 200*; NSW Young Lawyers, *Submission 195*.

11 Australian Attorney-General's Department, *Works of Untraceable Copyright Ownership—Orphan Works: Balancing the Rights of Owners with Access to Works* (2012), 3.

12 Ibid, Attachment B.

13 See Ch 2.

14 These principles are broadly in line with those expressed in the AGD orphan works review.

## Current law

12.14 There is no specific exception in the *Copyright Act* for the use of orphan works. Without an exception or appropriate licensing solution, an orphan work cannot be used until it falls into the public domain at the end of the copyright term.

12.15 However, orphan works may be used when covered by a fair dealing exception or a statutory licence. For example, the statutory licences under pts VA and VB of the *Copyright Act* allow the copying and communication of materials for education, whether or not they are orphaned, subject to the payment of reasonable remuneration to a declared collecting society. Cultural institutions that are covered by a government statutory licence under s 183 may copy orphan works for government purposes.<sup>15</sup>

12.16 Libraries, archives and educational institutions may also use orphan works for socially useful purposes under s 200AB. However, as noted in Ch 12, s 200AB has rarely been used to deal with orphan works primarily because of the uncertainty in the language of the section.<sup>16</sup> Some users have taken a ‘risk management’ approach, for example, by undertaking a diligent search before using an orphan work.<sup>17</sup>

## International comparisons

12.17 In other jurisdictions, a number of different models exist, or have been proposed to deal with orphan works. The ALRC has been informed by these models in formulating its proposal.

### *Limitations on remedies after diligent search*

12.18 In 2006, the US Copyright Office’s *Orphan Works Report* recommended limitations on statutory remedies against those who made use of an orphan work after having conducted a good faith, ‘reasonably diligent search’.<sup>18</sup> This is broadly in line with the ALRC’s proposals later in this chapter.

12.19 The Copyright Office did not seek to define what ought to be a ‘reasonably diligent search’. Rather, it acknowledged that the search standard was ‘very general’ and favoured ‘the development of guidelines’ by users and stakeholders.<sup>19</sup> It was argued that a truly ‘ad hoc’ system—where users simply conduct a reasonable search and then commence use, without formality—is most efficient.<sup>20</sup>

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15 Copyright Agency/Viscopy, *Submission 249*.

16 See eg CAMD, *Submission 236*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

17 The National Gallery of Victoria advised that ‘where it has not been possible to clear copyright, we have published the orphan work and invited the copyright holders to contact the NGV. We would much rather publish these works than risk them being unknown to the public’: National Gallery of Victoria, *Submission 142*.

18 United States Copyright Office, *Report on Orphan Works* (2006), 92.

19 Ibid, 108–10.

20 Ibid, 113.



12.20 Where a user had conducted a reasonably diligent search, the liability for infringement is limited to ‘reasonable compensation’, rather than statutory damages.<sup>21</sup> In most cases, reasonable compensation would be the amount a user would have paid to the owner had they engaged in negotiations before the infringing use commenced.<sup>22</sup> The term ‘reasonable’ imports the notion that some uses may attract a zero or low royalty payment.

12.21 No relief is available for non-commercial uses of orphan works, provided that the user ceased using the work expeditiously upon receiving an infringement notice.<sup>23</sup> Future uses of the work would be the subject of negotiations between the parties.

12.22 It was recommended that injunctive relief be limited in two ways. First, where a user has made a derivative use of an orphan work that also includes ‘substantial expression’ of the user—such as incorporating it into another work—a court would not restrain its use.<sup>24</sup> Rather, the user is to pay ‘reasonable compensation’ for use of the orphan work, and is required to adequately attribute the work.<sup>25</sup> If a work is used without transforming the content, a full injunction is still available, but a court would take into account and accommodate the interest of the user that might be harmed by an injunction.<sup>26</sup>

12.23 The Office emphasised that an orphan works solution should not act as a replacement or substitute for fair use:

The user of an orphan work should consider whether her use might fall within fair use, or curtailing her use in a way to have it more clearly fall within the exemption, in addition to or in lieu of reliance on any orphan works provision.<sup>27</sup>

12.24 Part of the reasoning for a legislative solution was that many stakeholders to that inquiry expressed a view that the ‘uncertain nature of fair use and the idea/expression dichotomy’ contributes to a user’s hesitation in using orphan works, even in cases that seem to ‘fall squarely within classic fair use situations’.<sup>28</sup>

12.25 Despite a number of Bills before Congress to implement the Copyright Office’s proposals, these were not passed.<sup>29</sup> The drafters of the Bills grappled with particular issues, including: recognising and accounting for the concerns of photographers; the

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21 In cases of infringement, US courts may award statutory damages ranging from \$750 to \$30,000 in respect of any one work: *Copyright Act 1976* (US) s 504(c)(1).

22 United States Copyright Office, *Report on Orphan Works* (2006), 116. It was suggested that the onus is on the owner to demonstrate that the work had a fair ‘market value’. It was not enough for the owner to assert the amount it would have been licensed for ex-post.

23 Under 17 USC § 504 (c) a court can, instead of awarding actual damages, award statutory damages that can range between \$750 to \$ 30,000 in respect of any one work.

24 The term ‘significant expression’ is intended to exclude situations where the work is simply put into a collection of other works, like an electronic database: United States Copyright Office, *Report on Orphan Works* (2006), 120.

25 Ibid, 119–121.

26 United States Copyright Office, *Report on Orphan Works* (2006), 120.

27 Ibid, 56.

28 Ibid, 57.

29 These included: *Orphan Works Act of 2006*, H.R. 5439, 109<sup>th</sup> Cong. (2006); *Orphan Works Act of 2008*, H.R. 5589, 110<sup>th</sup> Cong (2008); and *Shawn-Bentley Orphan Works Act of 2008* S. 2193 (2008).

contours of a ‘reasonably diligent search’ and the role of searchable electronic databases.<sup>30</sup>

12.26 In late 2012, the Copyright Office launched a further inquiry into orphan works, seeking to find answers regarding the ‘current state of play for orphan works’ and ‘what has changed in the legal and business environments in the last few years that might be relevant to a resolution of the problem and what additional legislative, regulatory, or voluntary solutions deserve deliberation’.<sup>31</sup>

12.27 Submissions to date have emphasised that a ‘reasonably diligent search’ is the appropriate test to determine whether the user of an orphan work is entitled to protection. Many stakeholders have also called for the establishment of a copyright register, which may help identify owners of orphan works.

### ***European Directive on certain permitted uses of orphan works***

12.28 In October 2012, the European Union adopted its Directive on Certain Permitted Uses of Orphan Works. Member states are required to implement the Directive in national legislation by 29 October 2014. In short, the Directive allows publicly accessible cultural institutions to reproduce and communicate orphan works in furtherance of their public interest mission.<sup>32</sup> The Directive only applies in respect of certain types of work held by institutions: text; audiovisual and cinematographic works; and phonograms that are first published or broadcast within an EU member state.<sup>33</sup> Photographs are only covered to the extent that they are incorporated into other works.

12.29 Orphan works can only be used after the institution conducts a ‘reasonably diligent search’. The Directive leaves discretion for member states to determine the sources that are appropriate to include in diligent search criteria for each category of work.<sup>34</sup> It also leaves open the possibility to allow external organisations to conduct a diligent search for a fee.<sup>35</sup>

12.30 Importantly, the Directive establishes a central EU orphan works register and requires reciprocal recognition of orphan work status across member states. Results of a diligent search are recorded and provided to a competent national authority and made

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30 For example, the *Orphan Works Act of 2006* required users to document their search, and proposed that that the Copyright Office set out authoritative information on search tools and that legislation should list indicative factors to guide the search. See, B Yeh, *CRS Report for Congress: “Orphan Works in Copyright Law”* (2008).

31 Federal Register 6455 Vol 77, No 204 (Monday October 22).

32 *Directive 2012/28 of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works* arts 2(1) & 3(1). These public institutions include libraries, educational establishments and museums, archives, film and audio heritage institutions, and public service broadcasting institutions.

33 *Ibid* art 1.

34 *Ibid* art 3(2).

35 *Ibid* art 3(1) and recital 13.

available on a publicly accessible online database to be established and managed by the European Commission's Office for Harmonization in the Internal Market.<sup>36</sup>

12.31 The Directive directs that rights holder should, at any time, be able to put an end to the orphan work status insofar as their rights are concerned. Fair compensation is then due to the rights holder. Again, the member states retain the discretion to determine the circumstances under which compensation may be organised.<sup>37</sup>

### ***Centralised licensing***

12.32 Since 1998, users in Canada can petition the Copyright Board of Canada for a non-exclusive licence to use an orphan work, after 'reasonable efforts' have been made to locate the copyright owner.<sup>38</sup> The orphan work must be one that is published or fixed.<sup>39</sup>

12.33 The Board works closely with the Canadian Copyright Licensing Agency (CCLA) in setting the royalty fee and the terms and conditions of the licence.<sup>40</sup> Royalties collected are held in a fund for five years after the expiration of the licence for collection by the copyright owner.<sup>41</sup> If the royalty is not collected, the Board will allow the CCLA to dispose of the fee to its members as it sees fit.<sup>42</sup> Since it was enacted in 1998, the Board has opened 411 files relating to a total of 12,640 orphan works.<sup>43</sup> Similar systems are in place in Japan, South Korea, and India.<sup>44</sup>

12.34 In the UK, the Hargreaves Review recommended that the government should legislate to enable clearance procedures for use of individual works, based upon a diligent search.<sup>45</sup> In response, the UK government announced that it would introduce legislation to enable the use of orphan works after a diligent search confirmed by an independent authorising body.<sup>46</sup> The proposal is similar to the Canadian model.

12.35 Passage of the *Enterprise and Regulatory Reform Act 2013* (UK) will allow an independent body to license, for commercial and non-commercial use, individual orphan works, subject to a diligent search.<sup>47</sup>

36 Ibid art 5—organisations are to also provide information about the use the organisation is to make of the orphan work, any change to the orphan work status and relevant contact information of the organisations concerned.

37 Ibid art 6(5).

38 *Copyright Act 1985 (Can)* s 77.

39 Ibid. The *Copyright Act 1985 (Can)* requires that orphan works and sound recordings be 'published' and performances and communication signals to be 'fixed'.

40 *Copyright Act 1985 (Can)* s 77(2).

41 Ibid s 77(3).

42 Ibid.

43 See J de Beer and M Bouchard, *Canada's "Orphan Works" Regime: Unlocatable Copyright Owners and the Copyright Board* (2009), 31–32.

44 See *Copyright Act 1970* (Japan) s 67; *Copyright Act 1967* (South Korea) s 47; *Copyright Act 1957* (India) s 31(A).

45 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 39–40.

46 UK Government, *Government Policy Statement: Consultation on Modernising Copyright* (2012), 8.

47 See *Enterprise and Regulatory Reform Act 2013* (UK) pt 6. A new s 116A will be inserted into the *Copyright, Designs and Patents Act 1988* (UK) that allows the Secretary to approve an independent body to license orphan works.

12.36 The regulations are to provide that, for a work to qualify as an orphan work, ‘it is a requirement that the owner of copyright in it has not been found after a diligent search made in accordance with the regulations’.<sup>48</sup> The Intellectual Property Office argued that allowing persons to obtain permission to use orphan works after up-front payment and following a diligent search:

should enable the use of orphan works; reduce legal uncertainty for users of orphan works; ensure that rights holders can see what content is being used; and give returning rights holders easy access to any fees that have been paid.<sup>49</sup>

12.37 It is envisaged that the independent body would maintain a registry of orphan works, set fees, levy fees, approve third parties who wish to use the orphan works, ensure that diligent searches are undertaken and approve individual cases.<sup>50</sup> The independent body will not validate individual diligent searches. Rather, it ‘would regularly test the quality of searching and the methods of accredited institutions through a sampling approach—where they take a sample of diligent searches to ensure that the quality of the search is sufficient’.<sup>51</sup> The estimated cost of setting up such a scheme is said to be between £2.5m and £10.5m.<sup>52</sup>

12.38 Opposition to the legislative changes have come from a range of actors, most notably from the photography industry.<sup>53</sup> For example, a briefing paper signed by 70 organisations representing photographers argued that under the scheme proposed, photographers’ livelihoods will be jeopardised because of the ‘de facto standard rate set by those schemes for the use of particular types of works, and it will be more difficult for individuals to negotiate higher rates where the quality and nature of their work justifies it’.<sup>54</sup>

12.39 In Australia, copyright academics Professors David Brennan and Michael Fraser have proposed a ‘non-commercial use exception for natural persons using unpublished subject matter derived from lawfully obtained material’.<sup>55</sup> The proposed exception would apply where the relevant copyright owner is not able to be located after a ‘diligent search’.<sup>56</sup> A similar suggestion has been proposed by the Copyright Council Expert’s Group.<sup>57</sup>

12.40 Brennan and Fraser also propose a broader exception for published material where there are missing owners. The model is akin to a centralised licensing system:

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48 *Copyright, Designs and Patents Act 1988* (UK).

49 Intellectual Property Office, *Orphan Works Impact Statement: BIS 1063* (2012), 3.

50 *Ibid.*

51 *Ibid.*, 5.

52 *Ibid.*, 6. Equivalent to \$3.9m—\$16.3m (at 21 May 2013).

53 British Journal of Photography, *Photography Industry Shows Mass Opposition to Government Copyright Changes* (2013) <[www.bjp-online.com/](http://www.bjp-online.com/)> at 25 February 2013.

54 *Ibid.* See also Stop43 and others, *Briefing for Members of House of Lords Second Reading Debate Enterprise & Regulatory Reform Bill* (2012).

55 D Brennan and M Fraser, *The Use of Subject Matter with Missing Owners—Australian Copyright Policy Options* (2012), 7.

56 *Ibid.* The authors also argue that the exception should apply only to economic rights and not moral rights, or rights found in other legal regimes.

57 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 8–9.

- A ‘diligent search’ must be conducted and then a notice must be lodged with a declared collecting society. Once accepted, the work would be placed on an orphan works register. If an owner comes forward within three months, no exception would apply in favour of the user.
- If the copyright owner does not present within three months, but supplies a warranty of ownership to the collecting society within three years, the remedies available to the owner are limited in the event that an action is brought against the user.
- If the copyright owner does not supply a warranty to the collecting society within the three years, the owner’s sole enforcement rights would be through a compulsory licence administered by the collecting society.<sup>58</sup>

12.41 The proposed exception under this model seeks to balance user accountability, predictability for users and fairness to rights holders.<sup>59</sup> This model received some support from stakeholders.<sup>60</sup>

### ***Extended collective licensing***

12.42 Several Nordic countries use extended collective licensing schemes that allow users to pay licence fees to a collecting society comprising a ‘substantial number’ of rights holders of a certain type of works.<sup>61</sup> A feature of extended collective licensing schemes is that the collecting societies are authorised by statute to grant licences on behalf of the copyright owner, even where the owner is not a member of the collective.<sup>62</sup> Some rules allow copyright owners the option to ‘opt-out’ of the system and instead deal directly with licensees.<sup>63</sup>

12.43 Under extended collective licensing schemes, a licence is granted for specific purposes and gives users a degree of certainty that their use will not risk infringement. However, to the extent that some owners have opted out, the system does not provide complete certainty to prospective users.

12.44 In the UK, the *Enterprise and Regulatory Reform Act* will also provide for voluntary extended collective licensing. It will allow appointed authorised licensing bodies, for certain class of materials, to grant copyright licences in respect of works in which copyright is not owned by the body or a person on whose behalf the body acts. The regulations will provide an ‘opt out’ provision for the copyright owner.

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58 D Brennan and M Fraser, *The Use of Subject Matter with Missing Owners—Australian Copyright Policy Options* (2012), 9–12.

59 Ibid.

60 Screenrights, *Submission 215*; APRA/AMCOS, *Submission 247*. However, APRA/AMCOS did not agree that the model should extend to intermediaries or service providers.

61 See J Axhamn and L Guibault, *Cross-broder extended collective licensing: a solution to online dissemination of Europe's cultural heritage?* (2011), prepared for EuropeanaConnect, 25–59 for an outline of extended collective licensing in Nordic Countries.

62 For example, *The Consolidated Act on Copyright 2010* (Denmark) ss 51(i)–(iii) prescribes that remuneration under an ECL extends to unrepresented right holders who are: not members of the collective, foreign rights holders and dead authors.

63 For example, *The Consolidated Act on Copyright 2010* (Denmark) ss 24A, 30, 30A, 35, 50.

## Licensing orphan works

12.45 In the ALRC's view, users should not be required to obtain a licence before using an orphan work in all circumstances. This would be inefficient and burdensome on individual and institutional users, and would overly inhibit the use of orphan works.

12.46 Some centralised or collective licensing models require users to pay a fee to collecting societies before using an orphan work. Some stakeholders submitted that without requiring up-front payment, the market for other non-orphan works would be harmed.<sup>64</sup>

12.47 For example, Copyright Agency/Viscopy suggested that collective licensing is preferred on the basis that 'there should be no benefit to a licensee in choosing to use an orphan rather than equally suitable identified work'.<sup>65</sup> It proposed a model under which a licence to use an orphan work could be granted by a collecting society, but only if an equally suitable licensed work was not available.<sup>66</sup> Upon payment of the licence fee, Copyright Agency/Viscopy would undertake to search for the rights holder. If the rights holder is found and wants to licence the work, the licence fee will be paid to the rights holder, less the search cost. Alternatively, if the rights holder does not want to licence the work, the licence fee is refunded to the user less the cost of the search.

12.48 Where the rights holder is not found, the licence fee would be held in trust for a specified period to allow the rights holder to be identified. If identified, the rights holder receives the fee, less the reasonable administrative fees of the collecting society. If the rights holder is not identified within the period, the licence fee is used for the benefit of rights holders in the same class (for example, photographers), provided the collecting society has done a proportionate search.<sup>67</sup>

12.49 The Music Council of Australia suggested that up-front payment was preferred 'rather than create uncertainty where the copyright owner might have to seek payment in the future, once the work has already been used'.<sup>68</sup>

12.50 Wiley and Sons proposed a model similar to the UK, with a licensing body or bodies appointed to operate an orphan works scheme. It suggested that 'the cost of the scheme would be covered by reasonable subvention from licensing fees, with the balance held in a secure escrow account'.<sup>69</sup> In granting the licence, the user would be indemnified by the authority against future action by the rights holder, and the licence could not be terminated by the rights holder when they come forward.<sup>70</sup>

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64 The Association of Learned and Professional Society Publishers argued that an exception that allows the use of orphan works without payment 'would naturally make orphan works more attractive than other copyright works that the same user may have to pay for the use of, photographs being a prime example. This puts other creators at a disadvantage and creates an unfair marketplace': ALPSP, *Submission 199*.

65 Copyright Agency/Viscopy, *Submission 249*.

66 The value of the licence would be assessed having regard to 'a normal fee charged for such use'.

67 Copyright Agency/Viscopy, *Submission 249*.

68 Music Council of Australia, *Submission 269*.

69 John Wiley & Sons, *Submission 239*.

70 Ibid.

12.51 There was also some support for a statutory licence. The SBS was open to a statutory licence provided that it was ‘efficient and tailored to particular industry needs’ and should be in addition to a limitation on remedies after a diligent search.<sup>71</sup> The University of Sydney also suggested a statutory licence could ‘ensure that important research and dissemination of information for the public good is not impeded by legal uncertainty’.<sup>72</sup> Pearson/Penguin said that it would support a scheme under which, after a duly diligent search, a licence is granted ‘at low cost, with any rights holder coming forward retaining the right to royalties and subsequent control over use of the work’.

12.52 A narrower statutory licence was suggested by Professor Jock Given—based on a diligent search model—but limited to works of a certain age. Under the model proposed, an orphan works scheme would ‘be limited to works created, published or deposited in an archive’ a number of years ago—cautiously 50 years or, more expansively, at the ‘open access period’ prescribed in the *Archives Act 1983* (Cth).<sup>73</sup> If a rights holder comes forward within a reasonable time after re-use of the work, he or she should be entitled to equitable remuneration.<sup>74</sup>

12.53 A number of stakeholders submitted that requiring up-front payment of a licence fee to a centralised body or collecting society when there is no guarantee or little likelihood that the money will find its way to the copyright holder is problematic.<sup>75</sup> As the CSIRO argued:

The suggestion that a licence fee would be paid to a collecting society seems strange where the issue is the identity of the recipient. Disbursement of money after a period to members of the collecting society seems unfair to the user of material who may claim to be entitled to a refund or to be obliged simply to agree to pay a reasonable royalty should the correct rights holder be identified.<sup>76</sup>

12.54 Even where the money is held in an escrow account and redistributed to other copyright holders, the recipients may have no great connection with the orphan work. This does not appear consistent with the purpose of copyright; to remunerate the author of the work and provide an incentive to create. Similarly, the AGD orphan works review has cautioned that

There are policy questions about whether it would be appropriate to confer the rights of orphan works owners on collection societies and other representative bodies, which may prioritise corporate advantages ahead of author and user interests.<sup>77</sup>

12.55 Further, up-front payment does not account for the fact that some orphan works were never intended to be commercially exploited, such as those donated to public

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<sup>71</sup> SBS, *Submission 237*.

<sup>72</sup> University of Sydney, *Submission 275*.

<sup>73</sup> J Given, *Submission 185*.

<sup>74</sup> *Ibid.*

<sup>75</sup> CAMD, *Submission 236*; State Records NSW, *Submission 160*; National Archives of Australia, *Submission 155*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*; Art Gallery of New South Wales (AGNSW), *Submission 111*; H Rundle, *Submission 90*.

<sup>76</sup> CSIRO, *Submission 242*.

<sup>77</sup> Australian Attorney-General's Department, *Works of Untraceable Copyright Ownership—Orphan Works: Balancing the Rights of Owners with Access to Works* (2012).

libraries or archives. Both fair use and the ALRC's proposed limitation on remedies approach take into account the nature of the work, and whether it is used for non-commercial purposes.

12.56 The ALRC queries whether a centralised licensing system would be an efficient and cost-effective measure to facilitate the use of orphan works, without burdening cultural institutions and users. For example, commentators have criticised the Canadian system as being an expensive and lengthy process, and for which only a small amount of licences have been granted over a long period of time.<sup>78</sup>

12.57 There would be also large transaction costs in setting up a centralised licensing system, and there are questions as to how centralised licensing might operate in practice.

## **Fair use**

12.58 Use of orphan works may in some circumstances be fair, under the fair use exception proposed in Chapter 4. Cultural institutions may be more likely to rely on a fair use exception, including when using orphan works, than the current exception in s 200AB.<sup>79</sup>

12.59 Cultural institutions have submitted to the current US Copyright Office's Inquiry that the fair use exception is now more certain than it once was, and that further legislative reform to enable the use of orphan works may not be necessary for cultural institutions. For example, the Library Copyright Alliance has written:

we are convinced that libraries no longer need legislative reform in order to make appropriate uses of orphan works. However, we understand that other communities may not feel comfortable relying on fair use and may find merit in an approach based on limiting remedies if the user performed a reasonably diligent search for the copyright owner prior to use.<sup>80</sup>

12.60 Professor Jennifer Urban argues that fair use provides a partial solution to the orphan works problem for libraries and archives that digitise and communicate orphan works for non-commercial reasons. She argues that:

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78 See D Khong, 'Orphan Works, Abandonware and the Missing Market for Copyrighted Goods' 15 *International Journal of Law and Information Technology* 54, 75; J de Beer and M Bouchard, *Canada's "Orphan Works" Regime: Unlocatable Copyright Owners and the Copyright Board* (2009) noting that between 1988 and 2009 only 441 applications have been filed in relation to 12,640 orphan works, and only 230 licences were granted. The ADA and ALCC also argued that the model imposes 'undue administrative burdens, leading to lengthy delays and providing little public benefit': ADA and ALCC, *Submission 213*.

79 See also Ch 12.

80 Library Copyright Alliance, *Comments of the Library Copyright Alliance in Response to the Copyright's Office's Notice of Inquiry Concerning Orphan Works and Mass Digitisation* <[www.copyright.gov/orphan/comments/noi\\_10222012/Library-Copyright-Alliance.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Library-Copyright-Alliance.pdf)> 20 May 2013.



- inquiry into a work's 'orphan' nature would give useful guidance as to whether incentives to create would be harmed by digitising and communicating the work;<sup>81</sup>
- orphan works represent a 'complete market failure' because one party to any proposed transaction is missing and since there is no party exploiting the work, there is no existing market that can be harmed;<sup>82</sup> and
- the purposes for which orphan works are used by libraries and archives, such as communication to promote education and research should often be recognised as fair use.<sup>83</sup>

12.61 The option of fair use may be attractive to libraries and archives who wish to use orphan works. However, not all uses of orphan works will be fair, and the question will require consideration of the 'fairness factors'. For example, certain commercial uses of orphan works may not be fair use.

### Limitation on remedies

12.62 The ALRC proposes that the *Copyright Act* be amended to provide that remedies for infringement be limited where an orphan work has been used and a 'reasonably diligent search' has been conducted and the rights holder has not been found. The ALRC considers that this approach will promote the use of orphan works to further education, research and access to cultural heritage, without taking away all the rights of rights holders to their works.

#### *A reasonably diligent search*

12.63 The first step in the ALRC's model requires a user to conduct a reasonably diligent search for the copyright holder. There was universal support from stakeholders that a diligent search ought to be conducted. Requiring a 'reasonably diligent search' recognises the need to try and bring owners and users together to facilitate licensing of works.<sup>84</sup>

12.64 Here, the ALRC's approach differs somewhat to the US Copyright Office recommendations. In particular, the ALRC considers that there is a role for legislation to provide for a number of factors that may be considered in determining what constitutes a 'reasonably diligent search'.

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81 J Urban, 'How Fair Use Can Help Solve the Orphan Works Problem' (2012) 27 *Berkeley Technology Law Journal* 1, 18. For example, the 'orphan' work whose owner cannot be located suggests a high probability that it has been economically abandoned, or further inquiry might find that the work was not created for the purposes of copyright exploitation. Both of these factors would weigh in favour of fair use.

82 Ibid, 25.

83 Ibid, 35–46.

84 This is consistent with the principle of acknowledging and respecting authorship and creation: Ch 2.

12.65 There was consensus among stakeholders that a diligent search should be conducted in order to locate the rights holder before any use of an orphan work.<sup>85</sup> A number of stakeholders were against having any prescriptive definition of a diligent search in the *Copyright Act*. For example, the ADA and ALCC were wary of adopting an overly restrictive legislative definition and suggested that any criteria should be ‘flexible’ and ‘proportionate’, taking into account the diverse nature of the work, its age and any commercial value, in Australian cultural institutions.<sup>86</sup>

12.66 The International Association of Scientific, Technical and Medical Publishers (STM Publishers) agreed that regulations should refrain from prescribing minimum search steps or information sources to be consulted. It suggested that only a flexible approach could cater for individual circumstances of each orphan work, as well as rapidly changing information sources and search techniques.<sup>87</sup>

12.67 Similarly, Google warned against a legislative criterion that was ‘so high that small museums, artists or other actors cannot meet, or so vague that users can never achieve certainty that their search is over’.<sup>88</sup>

12.68 A number of stakeholders suggested that industry guidelines could be developed to inform the concept of reasonably diligent search. SBS suggested that ‘what is a reasonable search in relation to one type of material will not necessarily be relevant and sufficient in relation to another’. Therefore, ‘reference to industry standards may alleviate concerns that may be specific to particular creative industries’.<sup>89</sup> Professor Jock Given argued that standards should reflect the principle that ‘effort required should be greater where the work is recent, or created for professional purposes or proposed to be used in ways that are hard to revoke’.<sup>90</sup>

12.69 The person or entity conducting the diligent search might often be expected to keep records of the search.<sup>91</sup> As Robert Xavier submitted, it is ‘reasonable to require records to be kept of attempts made to discover the holder of copyright before a work is treated as orphaned’.<sup>92</sup> Professor Given suggested libraries could ‘include information about the copyright status of works in their catalogue records, including information about any diligent search already conducted’.<sup>93</sup>

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85 John Wiley & Sons, *Submission 239*; Pearson Australia/Penguin, *Submission 220*; ADA and ALCC, *Submission 213*; ALPSP, *Submission 199*; J Given, *Submission 185*. Some stakeholders also referred to ‘reasonable efforts’. See, eg, Universities Australia, *Submission 246*.

86 ADA and ALCC, *Submission 213*, noting, for example, that the requirement to conduct a diligent search for each individual item would stifle mass digitisation programs. See also Universities Australia, *Submission 246*, arguing that ‘procedural requirements ... run the risk of imposing unreasonable burdens on institutional users who in any event can be relied upon to act in good faith’.

87 IASTMP, *Submission 200*.

88 Google, *Submission 217*.

89 SBS, *Submission 237*.

90 J Given, *Submission 185*.

91 NSW Young Lawyers, *Submission 195*; J Given, *Submission 185*; R Xavier, *Submission 146*.

92 R Xavier, *Submission 146*.

93 J Given, *Submission 185*.

12.70 The question of who should perform the search was raised in a number of submissions. Wiley and Sons indicated that it would favour an authorised licensing body offering a service to conduct a diligent search on behalf of users:

This would facilitate generally understood industry norms in relation to diligent search. Users of such a service should be protected from legal action by a suitable indemnity from the authorised licensing body. To be useful, the search would need to be carried out efficiently within agreed timeframes.<sup>94</sup>

12.71 The CSIRO agreed that having a central authority would benefit in ‘ensuring consistency and generation of records, but may not always be able to respond speedily to inquiries or carry out searches relevant to all jurisdictions where a prospective user may be exposed, potentially resulting in duplication’. It considered that a user should be entitled to conduct the diligent search and not be obliged to have a central authority conduct those searches.<sup>95</sup>

12.72 Providing some certainty around the concept of a ‘reasonably diligent search’ may be important. However, search technology and the availability of databases and services that might be used to conduct a diligent search may change, perhaps rapidly. New industry practices and guidelines might also emerge.

12.73 In the ALRC’s view, the exact requirements of a diligent search should therefore not be set out in legislation. In fact, what amounts to a diligent search should change as technology, databases and services change. A reasonably diligent search in 2013 may not be sufficiently diligent in 2023. The ALRC therefore proposes that the *Copyright Act* provide for a number of factors that may be considered in determining whether a reasonably diligent search has been conducted.

12.74 Collecting societies or others may offer to perform diligent searches for a fee. That a reputable organisation confirmed in writing that it conducted a search and that the work appeared to be an orphan would no doubt be highly persuasive evidence that the work was in fact an orphan. However, the *Copyright Act* should not provide that only some organisations may perform such searches. Such monopolies may be less likely to be efficient and innovative.

12.75 The ALRC recognises that in some instances it may not be possible to do a ‘diligent search’. For example, in the context of a mass digitisation project where there may be thousands of orphan works covering a spectrum of different types of copyright material, it may not be possible or economically feasible to conduct such searches. In such cases—and if the mass digitisation project is not fair use—a user may prefer to obtain a licence for use of the work, rather than rely on a provision limiting the remedies available to the rights holder.

12.76 Collecting societies may need to be empowered to license orphan works in these circumstances. In Ch 11, the ALRC raises the possibility of voluntary extended collective licensing to cover mass digitisation, including of orphan works.

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94 John Wiley & Sons, *Submission 239*.

95 CSIRO, *Submission 242*.

***A copyright or orphan works register***

12.77 One persuasive factor that might be considered when determining whether a reasonably diligent search was conducted may be whether or not the work in question appeared on a register of orphan works.

12.78 A number of stakeholders highlighted an important role for technology in facilitating diligent searches and improving ways in which owners and users can find each other.<sup>96</sup> The Business and Software Alliance urged copyright industries to ‘develop and integrate databases of copyright information to suit the particular types of works and business models’.<sup>97</sup>

12.79 Pearson Australia/Penguin highlighted that it had ‘contributed to voluntary schemes in many jurisdictions to facilitate diligent search’ and recognised that ‘the onus is on industry to do this’.<sup>98</sup> The ABC agreed that a register of orphan works could help eliminate duplicate searches and create opportunities for owners of orphan works to identify themselves.<sup>99</sup>

12.80 The collecting society APRA/AMCOS noted that orphan works are not a significant issue for owners of musical works, due to its comprehensive database:

APRA/AMCOS have online works search facility that allow any member of the public to search musical works by title. The search results show the works that have the relevant title, the authors of those works, and in many cases the artists associated with performing the works. AMCOS also offers a research facility whereby, for a small fee, AMCOS will provide author and publisher information in relation to specified musical works.<sup>100</sup>

12.81 The Music Council of Australia suggested that a number of online systems, platforms and processes could be developed with the assistance of the Government, and that such a system could benefit both users and creators and ‘could enable the licensing of orphan works’.<sup>101</sup>

12.82 A key recommendation of the Hargreaves Review was the establishment of a Digital Copyright Exchange that would allow users to quickly identify and license works, while also giving users increased options to license their works and defend against rogue ‘orphaning’ of works, through digital finger-printing.<sup>102</sup>

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96 BSA, *Submission 248*; PPCA, *Submission 240* ‘it is too early to see what, if any, shape the UK digital exchange is likely to take. However, the commercial radio industry would be interested in any proposal that seek to simplify the ever more complex task of obtaining clearances for material used on a multitude of technological platforms; N Suzor, *Submission 172* (DCE not intended to replace fair use, but complement it); Australian Copyright Council, *Submission 219*; Google, *Submission 217*; Art Gallery of New South Wales (AGNSW), *Submission 111*; Walker Books Australia, *Submission 144* (digital copyright exchange before considering exceptions).

97 BSA, *Submission 248*.

98 Pearson Australia/Penguin, *Submission 220*.

99 Australian Broadcasting Corporation, *Submission 210*.

100 APRA/AMCOS, *Submission 247*.

101 Music Council of Australia, *Submission 269*.

102 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 31.

12.83 Many submissions to the US Copyright Office's current inquiry into orphan works also supported the creation of a voluntary copyright register.<sup>103</sup> A register was said to be a crucial step in reducing the incidence of 'abandoned' as well as 'kidnapped' orphan works.<sup>104</sup>

12.84 The ALRC considers that such registers could play an important role in informing a 'reasonably diligent' search criterion and help to prevent digital works from being orphaned.

12.85 A register that encourages copyright owners to identify their works and make themselves locatable is important in signalling that rights holders also bear some responsibility for solving the orphan works problem. In the ALRC's view, the register should be voluntary, as any expanded requirement of formalities would likely violate the *Berne Convention*, which mandates that the exercise of copyright rights 'shall not be subject to any formality'.<sup>105</sup>

### **Attribution**

12.86 The ALRC proposes that in using orphan works, a user should as far as possible attribute the work to the author. The primary reason for this requirement is to increase the likelihood that copyright owners will be alerted to the fact that their work is being used. A user who has conducted a reasonably diligent search would likely have developed material that could go into the attribution.<sup>106</sup>

12.87 A number of stakeholders argued that use of orphan works should recognise and respect moral rights, and require where possible attribution to the author and copyright owner.<sup>107</sup> For example, STM Publishers argued 'where a copyright notice is present in the orphan work, credit should be given to in a manner that reflects the notice'.<sup>108</sup>

12.88 Others also suggested that guidelines may inform how a work should be used. For example, SBS submitted:

SBS would also support provisions referencing industry standards in relation to 'good faith' or 'reasonable' use. These could include the taking of steps to avoid moral rights infringements, as the SBS policy provides, or to put in place industry standard measures to prevent the unauthorised use of the material by third parties.<sup>109</sup>

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103 US Copyright Office, *Comments on Orphan Works* (2013) <[www.copyright.gov/orphan/comments/noi\\_10222012/](http://www.copyright.gov/orphan/comments/noi_10222012/)> at 3 March 2013. See submissions from American Association of Law Libraries and others (#4); Microsoft Corporation (#66); Science Fiction and Fantasy Writers of America (#81), and Copyright Alliance (#28).

104 Ibid.

105 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972) art 5.

106 United States Copyright Office, *Report on Orphan Works* (2006), 111.

107 ARIA, *Submission 241*; ADA and ALCC, *Submission 213*; Australian Society of Archivists Inc, *Submission 156*.

108 IASTMP, *Submission 200*.

109 SBS, *Submission 237*. See also, Special Broadcasting Service, *SBS Statement on Orphan Works [1.0 February 2011]* <[www.sbs.com.au/aboutus/corporate/view/id/541/h/SBS-Statement-on-Orphan-Works-1.0-February-2011](http://www.sbs.com.au/aboutus/corporate/view/id/541/h/SBS-Statement-on-Orphan-Works-1.0-February-2011)> at 28 May 2012.

12.89 A number of stakeholders also highlighted the importance of attribution and moral rights of Indigenous material. For example, the Australia Council for the Arts argued that:

There have been instances where Non-Indigenous institutions such as galleries and museums classify unattributed material as ‘orphan’ when Indigenous people and communities are more than capable of identifying the material. Misuse and abuse of the material and its owners in these circumstances is likely to be extremely hurtful to the people concerned.<sup>110</sup>

12.90 Similarly, Arts Law Centre of Australia was concerned that any orphan works scheme not become a ‘trojan horse’ for copyright infringement or cultural harm to Indigenous creators and peoples.<sup>111</sup> Professor Kathy Bowrey argued that as part of a consideration of any orphan works scheme, ‘the constitution and funding of alternative dispute mechanisms to resolve the neighbouring issues around ownership of works needs to be considered’.<sup>112</sup>

12.91 Users of orphan works should also have regard to any protocols relating to Indigenous material. For example, users might consult with relevant Indigenous groups before using an Indigenous orphan work.<sup>113</sup>

### ***Limitation on remedies***

12.92 Where a user conducts a reasonably diligent search and then proceeds to use the work for commercial purposes, or profits from the use of the work, the ALRC considers that there should be some way for rights holders to be compensated when they are found. At the same time, limiting the remedies that would otherwise have been available for infringement recognises that the user, in good faith, has put time and effort into locating the owner but was unable to do so.

12.93 A number of stakeholders expressly supported a limitation on remedies approach to deal with orphan works, but did not express a view on the exact nature of the limitations.<sup>114</sup>

12.94 Others suggested that a remedy should amount to reasonable compensation. For example, Google suggested:

If a rights holder later comes forward, there should be a way for them to be reasonably compensated, but not in way that kills good faith projects. No large scale projects will make the necessary investment in time and money if the whole endeavour can be shut down at any time if a rights holder later comes forward and demands punishing damages or an injunction.<sup>115</sup>

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110 Australia Council for the Arts, *Submission 260*.

111 Arts Law Centre of Australia, *Submission 171*.

112 K Bowrey, *Submission 94*.

113 Australia Council for the Arts, *Protocols for Producing Indigenous Australian Visual Arts* (2nd ed, 2007), 19.

114 BSA, *Submission 248*; ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; ADA and ALCC, *Submission 213*; Australian Broadcasting Corporation, *Submission 210*.

115 Google, *Submission 217*.

12.95 STM Publishers submitted that a rights holder should be entitled to remuneration for previous use, being ‘a licence fee for the entire term of use as would have been negotiated by the parties prior to commencement of use’.<sup>116</sup> If the parties could not negotiate a fee, such a fee could be set by the Copyright Review Tribunal.<sup>117</sup>

12.96 Others argued that remedies should be limited to future profits, so as not to stifle mass digitisation projects.<sup>118</sup> Wiley & Sons publishers agreed that a rights holder should be entitled to payment based upon a ‘reasonable commercial rate licence fee’ for any new uses, but ongoing previous uses should be allowed without authorisation.<sup>119</sup> Similarly, SBS submitted that remedies around ‘account of profits’ should not be available where the use of the work is included in another work.<sup>120</sup> In contrast, ARIA suggested that ‘the remedies of the author should be limited, excluding an account of profits or other reasonable compensation’.<sup>121</sup>

12.97 In Australia, a court can provide for relief of copyright infringement through injunctive relief and either damages or an ‘account of profits’.<sup>122</sup> A court can also award additional damages as it considers appropriate in the circumstances.<sup>123</sup> The basic measure of damages is the loss of value of the copyright caused by the infringement. However, a court may consider other measures such as fair remuneration for use of the work, or loss of profits due to the infringer’s activities where appropriate.<sup>124</sup> This suggests that there a number of ways in which remedies may be limited, including:

- amending s 115(3) of the *Copyright Act* to provide that, in an action for infringement, where it is established that a user has conducted a reasonably diligent search and the owner could not be found prior to the infringing use, the plaintiff is not entitled to any damages, but may be entitled to an ‘account of profits’ or injunctive relief;
- providing that damages for the use of orphan works be capped;<sup>125</sup>
- limiting remedies in the same manner as recommended in the US Copyright Office’s 2006 report, for example, to ‘reasonable compensation’; or

116 IASTMP, *Submission 200*. See also NSW Young Lawyers, *Submission 195*.

117 CSIRO, *Submission 242*; ARIA, *Submission 241*.

118 Google, *Submission 217*; R Xavier, *Submission 146*.

119 Wiley also highlighted the possibility of a licensing body established to operate an orphan works licensing scheme.

120 SBS argued that an account of profits would almost never form part of a licensing negotiation with the rights holder in an underlying work or program ... an account of profits is therefore an inappropriate and punitive remedy in relation to use of an orphan work in good faith in a new creative work: SBS, *Submission 237*.

121 ARIA, *Submission 241*.

122 *Copyright Act 1968* (Cth) s 115(2).

123 *Ibid* s 115(4).

124 A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), 272–273.

125 Australian Attorney-General's Department, *Works of Untraceable Copyright Ownership—Orphan Works: Balancing the Rights of Owners with Access to Works* (2012) suggests that ‘different uses could attract different licence fees or damages caps. For example, payment or damages limitations for non-commercial use could be set much lower (or waived altogether) than commercial use.’

- providing that a court, in exercising its discretion to award damages, consider that a reasonably diligent search has been conducted, and reduce the amount of damages accordingly.

12.98 The ALRC invites stakeholder discussion on how remedies should be limited for the use of orphan works, after a diligent search has been conducted.

**Proposal 12–1** The fair use exception should be applied when determining whether a use of an ‘orphan work’ infringes copyright.

**Proposal 12–2** The *Copyright Act* should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

- (a) a ‘reasonably diligent search’ for the rights holder had been conducted and the rights holder had not been found; and
- (b) as far as reasonably possible, the work was clearly attributed to the author.

**Proposal 12–3** The *Copyright Act* should provide that, in determining whether a ‘reasonably diligent search’ was conducted, regard may be had to, among other things:

- (a) how and by whom the search was conducted;
- (b) the search technologies, databases and registers available at the time; and
- (c) any guidelines or industry practices about conducting diligent searches available at the time.



## 13. Educational Use

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### Summary

13.1 Some uses of copyright material by educational institutions are the subject of free-use exceptions in the *Copyright Act 1968* (Cth). Other uses are paid for through licensing arrangements.

13.2 Educational institutions should continue to pay for many uses of copyright material, particularly when reasonable and efficient licences are offered by rights holders. An incentive to create is necessary not only for writers, publishers and other rights holders, but also for the students and educational institutions that need educational resources.

13.3 However, the ALRC considers that exceptions to copyright are appropriate for some educational uses of copyright, and proposes that the fair use exception should be applied when determining whether an educational use infringes copyright. Further, ‘education’ should be an illustrative purpose in the fair use exception.

13.4 If a fair use test is not enacted, the ALRC proposes that a new ‘fair dealing for education’ exception be introduced. This would also require consideration of what is fair, having regard to the same fairness factors in the fair use exception.

13.5 In Chapter 6, the ALRC proposes the repeal of the statutory licences in pts VA and VB of the *Copyright Act*. These statutory licences appear to be unsuitable for a digital age. Rights holders, collecting societies and educational institutions should be able to negotiate more flexible and efficient licensing arrangements voluntarily.

## Education and exceptions

13.6 Education has been called ‘one of the clearest examples of a strong public interest in limiting copyright protection’.<sup>1</sup>

13.7 The preamble to the *World Intellectual Property Organization Copyright Treaty* (WCT) refers to ‘the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the *Berne Convention*’.<sup>2</sup>

13.8 The use of copyright material for teaching, when fair, has long been recognised as a legitimate type of exception in international law. Article 10(2) of the *Berne Convention* provides:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.<sup>3</sup>

13.9 The references to purpose and fair practice, Ricketson and Ginsburg state:

make the provision more open-ended, implying no necessary quantitative limitations. The words ‘by way of illustration’ impose some limitation, but would not exclude the use of the whole of a work in appropriate circumstances.<sup>4</sup>

13.10 However, Ricketson and Ginsburg express some doubt about whether anthologies or course packs consisting of chapters taken from various books would fall within the scope of art 10(2) of the *Berne Convention*. It would be ‘a distortion of language’, they state, to describe such uses as ‘by way of illustration ... for teaching’.<sup>5</sup> They also note that such usages are ‘well-developed forms of exploitation in many countries, subject to voluntary licensing arrangements or even compulsory licensing schemes’.<sup>6</sup>

## Current exceptions

13.11 The *Copyright Act* contains a number of free-use exceptions for educational institutions. There are exceptions for:

- s 28—performing material, including playing music and films in class;
- s 44—including short extracts from material in a collection;

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1 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [9–96].

2 *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002), preamble.

3 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

4 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 791.

5 *Ibid*, 794.

6 *Ibid*, 794.

- ss 135ZG, 135ZMB—copying insubstantial portions;
- s 200—use of works and broadcasts for educational purposes; and
- s 200AAA—proxy web caching by educational institutions.

13.12 There is also a broad exception in s 200AB of the *Copyright Act* for, among others, bodies administering an educational institution. The exception covers a use that is for the purpose of giving educational instruction and not for a profit.<sup>7</sup> The use must amount to a special case, must not conflict with a normal exploitation of the material and must not unreasonably prejudice the legitimate interests of the owner of the copyright.<sup>8</sup>

13.13 The *Copyright Act* also provides exceptions for fair dealing for the purpose of research or study, in ss 40 and 103C.<sup>9</sup> However, these exceptions have been held not to extend to uses by educational institutions, but only to private research and study by individuals.<sup>10</sup>

## Fair use and education

13.14 A new fair use exception is proposed in Chapter 4. That some educational uses may be fair is clear from the US fair use provision. The US fair use exception twice refers explicitly to education. The preamble includes, as an illustrative purpose, ‘teaching (including multiple copies for classroom use), scholarship, or research’. Furthermore, the first of the four fairness factors in the US provision is the ‘purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes’.

13.15 In a recent US cases that involved making copies of excerpts of copyrighted works for teaching students and for scholarship, a US District Court considered this first fairness factor and stated that the ‘language of s 107 itself and the Supreme Court’s opinion in *Campbell* compel the decision that the first fair use factor favors [the defendant university]’.<sup>11</sup> The Court distinguished commercial copying held not to be fair in other cases, and the ‘purely nonprofit, educational purposes’ of the university. It also noted the importance of the transformative nature of a use, but cited the statement of the Supreme Court in *Campbell* that the ‘obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution’.<sup>12</sup>

13.16 Precisely which educational uses would be held by a court to be fair use is an important question. Fair use should be considered on a case by case basis. The ‘fact of

7 *Copyright Act 1968* (Cth) s 200AB.

8 *Ibid* s 200AB.

9 *Ibid* ss 40, 103C, 248(1)(aa). See also Ch 7, ‘Fair Dealing’.

10 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99; *Haines v Copyright Agency Ltd* (1982) 64 FLR 185.

11 *Cambridge University Press v Becker* (*Georgia State University*), Civ. Action No. 1:08-CV-1425-ODE (District Court for North District of Georgia, 11 May 2012), 49.

12 *Ibid*, 49.

a nonprofit educational purpose does not automatically ensure fair use’ as other factors are important.<sup>13</sup> This flexibility is one of the main benefits of fair use, particularly in a changing digital environment. Although this Discussion Paper does not come to conclusions about exactly which educational uses are likely to be held by courts to be fair use, it is instructive to consider perspectives on which educational uses might be fair.

## Technical copying

13.17 One example of a fair use for education may be some of the so-called ‘technical copying’ that is done when using new digital technologies in the classroom.<sup>14</sup> This was a particular concern expressed in submissions from the education sector. The Copyright Advisory Group—Schools (the Schools), for example, submitted that

The simple act of using more modern teaching methods potentially adds up to 4 remunerable activities under the statutory licence in addition to the potential costs incurred by more traditional ‘print and distribute’ teaching methods.<sup>15</sup>

13.18 The education sector appears to consider that it should not have to pay for some types of ‘technical’ copying and communication of copyright material.

The requirements of the statutory licence to record in a survey (and potentially pay for) every technological copy and communication involved in teaching simply do not reflect the realities of modern education in a digital age.<sup>16</sup>

13.19 Universities Australia submitted that the scope of the express exception for caching in s 200AAA of the *Copyright Act* is too narrow, and may inhibit the use of cloud technologies and services:

As the digital activities of universities and other educational institutions increasingly migrate from systems ‘operated by or on behalf of’ the university to cloud based systems, this education-specific exception may well come under challenge.<sup>17</sup>

13.20 Such uses may also be characterised as ‘non-consumptive’ uses, a type of use discussed in Chapter 8. As noted in that chapter, some consider the strict accounting of copying and communicating to be inconsistent with the broader purpose of copyright law, which should instead be more concerned with the ultimate uses of the material. Chris Reed has written that, ‘in cyberspace, and to a large extent in the physical world as well, the control of copying has ceased to be an effective proxy for control of use’:

a third party may copy information without making any use of the creation which is legally significant, or alternatively may use the creation for economic gain without copying it.<sup>18</sup>

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13 Ibid, 50.

14 Some of these uses are discussed in Ch 6, ‘Statutory Licences’.

15 Copyright Advisory Group—Schools, *Submission 231*.

16 Ibid.

17 Universities Australia, *Submission 246*.

18 C Reed, *Making Laws for Cyberspace* (2012), 154.

13.21 In Chapter 8, the ALRC concludes that some non-consumptive uses of copyright material are likely to be fair, and that ‘non-consumptive use’ be an illustrative purpose in the fair use exception.

### **‘Freely available’ material**

13.22 More contentiously, some have submitted that schools and universities should be able to use, without payment, some material that is otherwise ‘free’—uses such as copying material on the internet and copying content broadcast on free-to-air television.

13.23 The Australian education sector has recommended that such material should be removed from the scope of the statutory licensing scheme. The education sector has recommended the introduction of a new exception allowing educational institutions to copy and communicate free and publicly available material on the internet for non-commercial educational purposes.<sup>19</sup>

13.24 In its submission to this Inquiry, the Schools further elaborated on why they should not pay for content that is freely available online. Paying for this content was said to threaten the Government’s digital economy goals, including ‘the success of the Government’s investments in digital education’. It ‘potentially adds millions of dollars to education budgets each year’, and furthermore, ‘Australia is the only place in the world where schools are legislatively required to pay for printing a page from a website’.<sup>20</sup>

13.25 Likewise, Universities Australia submitted that freely available internet material is copied in homes and businesses throughout Australia and ‘no one is seeking to be paid for it’:

We are particularly concerned that at the very time that a wide range of high quality audio-visual resources are being made freely available—such as content on YouTube EDU and the Open University on iTunesU—Screenrights is proposing to seek extension of the Part VA licence that may result in content of this kind becoming remunerable in Australia.<sup>21</sup>

13.26 Universities Australia also submitted that educational institutions should not have to pay to use free-to-air broadcasts.

No one but the education sector is paying to time-shift this content. The payments extracted from the education sector for educational use of this freely available content cannot in any way be said to be necessary to provide an incentive for the continued creation of the content.<sup>22</sup>

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19 D Browne, ‘Educational Use and the Internet – Does Australian Copyright Law Work in the Web Environment?’ (2009) 6(2) *SCRIPT-ed* 450, 461.

20 Copyright Advisory Group—Schools, *Submission 231*.

21 Universities Australia, *Submission 246*. See also Society of University Lawyers, *Submission 158*.

22 Universities Australia, *Submission 246*.

13.27 Screenrights submitted that the call by the education sector wrongly assumes that ‘free’ material on the internet is not valued by the copyright owner.

The proposal presumes that the content is given away by being made available online without a direct payment. This is completely incorrect. Copyright owners like Screenrights’ professional filmmaker members make material available online for very clear commercial reasons. They may choose to make it available for a fee, such as with commercial video on demand services or they may choose to license a website to stream the content for a period of time without charging the consumer directly (such as ABC iView). In the latter case, the consumer still pays for the content, either by watching associated advertising, or through brand attachment to the website and there are clear cross promotional benefits to other platforms where the content is available for a fee, such as via DVD or Blu-ray discs.<sup>23</sup>

13.28 Material ‘freely’ available on the internet, Screenrights said, ‘is very like material broadcast ‘freely’ on television’:

When an educational institution copies a free to air broadcast, it is required to compensate the copyright owners via the Part VA scheme that Screenrights administers. Fundamentally, Screenrights can see no difference with content made available online for free. There may very well be a debate about the value of the content and the price of the compensation, but the principle is the same.<sup>24</sup>

13.29 It is important to distinguish between different types of material on the internet which may be accessed without paying a fee. Some of this content may be provided without any expectation that rights holders will collect fees from educational institutions and governments for the use of the material. At other times, rights holders may only wish to provide their content under limited circumstances.

13.30 Of course, a film shown with advertisements on free-to-air television is not really ‘free’. Advertising is also not the only way of selling content without explicitly charging for its use: giving a customer access to a free book, for example, so that the customer enters a content ‘ecosystem’ in which he or she is more likely to buy other books, or indeed films, television shows and other material, is not necessarily the same as giving the book away for free.

13.31 The fair use exception proposed in Chapter 4, and the alternative fair dealing for education exception proposed in this chapter, may capture some uses of this content by educational institutions. As discussed below, these exceptions require consideration of the likely harm a particular free use might have on a market. The exceptions are flexible and principle-based, and therefore better equipped to distinguish between types of ‘freely available’ material than more prescriptive exceptions.

## Small portions

13.32 Some publishers called for a removal of the ‘small portions’ free-use exceptions in ss 135ZG and 135ZMB of the *Copyright Act*, so that educational institutions pay for the use of this material.

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<sup>23</sup> Screenrights, *Submission 215*.

<sup>24</sup> Ibid.

13.33 Walker Books Australia said that the ‘small portions’ exceptions are ‘perhaps not really fair in relation to works such as picture books, or poems, where a small portion might represent a significant part of a work’.<sup>25</sup> Cengage Learning Australia submitted that

two pages is often the exact extent (often one page is) of a relevant classroom exercise or lesson plan that we create and seek to sell in a ‘bundle’ of classroom and homework exercises, tests and lesson plans. A two-page portion from our work can represent 100% of value of that portion downloaded.<sup>26</sup>

13.34 Extending the licence to cover these uses ‘would provide a fairer system for all interested parties’, RIC Publications said, and ‘allow greater clarity for the Copyright Agency in its administration process, again for the benefit of all parties’.<sup>27</sup>

13.35 Universities Australia, however, submitted that current copyright laws are ‘stifling academic engagement’. For example, it was argued that universities risk infringing copyright simply by making available on an online repository a student thesis which features short excerpts or images from other copyright material.

To avoid this risk, they generally require their students to obtain permission for use of third party content (which can be highly costly, and in many cases impossible) or, alternatively, to remove this content from their thesis.<sup>28</sup>

13.36 Many of these factors are relevant in any consideration of the fair use exception. For example, the third fairness factor requires consideration of ‘the amount and substantiality of the part dealt with, considered in relation to the whole of the copyright material’.<sup>29</sup>

13.37 This third fairness factor was considered in 2012 by a US District Court in *Cambridge University Press v Becker (Georgia State University)*. The Court stated that the word ‘substantiality’ as used in the US fair use provision means ‘value’.<sup>30</sup> It also stated:

With respect to fair use factor three, the amount of the copying as a percentage of the book varies from book to book. In determining what percentage of a book may be copied, the Court looks first to the relationship between the length of the excerpt and the length of the book as a whole. Then, the relationship between the value of the excerpt in relation to the value of the book is examined. The Court also considers the value of a chapter in itself (rather than just a few paragraphs).<sup>31</sup>

25 Walker Books Australia, *Submission 144*.

26 Cengage Learning Australia Pty Ltd, *Submission 68*.

27 RIC Publications Pty Ltd, *Submission 147*.

28 Universities Australia, *Submission 246*.

29 The fairness factors are set out in Ch 4.

30 *Cambridge University Press v Becker (Georgia State University)*, Civ. Action No. 1:08-CV-1425-ODE (District Court for North District of Georgia, 11 May 2012), 67. It has been reported that this case will be appealed.

31 *Ibid*, 87.

13.38 The Court also considered the other fairness factors. In relation to the fourth factor, which concerns market harm and is discussed further below, the Court stated:

Unpaid use of a decidedly small excerpt (as defined under factor three) in itself will not cause harm to the potential market for the copyrighted book. That is because a decidedly small excerpt does not substitute for the book. However, where permissions are readily available from CCC or the publisher for a copy of a small excerpt of a copyrighted book, at a reasonable price, and in a convenient format (in this case, permissions for digital excerpts), and permissions are not paid, factor four weighs heavily in Plaintiffs' favor. Factor four weighs in Defendants' favor when such permissions are not readily available.<sup>32</sup>

13.39 Finally, the Court considered whether the use would 'disserve the purposes of the copyright laws', and concluded that

the unpaid use of small excerpts will not discourage academic authors from creating new works, will have no appreciable effect on Plaintiffs' ability to publish scholarly works, and will promote the spread of knowledge.<sup>33</sup>

## Commercial use and third parties

13.40 A use is less likely to be fair if it is commercial. The fact that the material will ultimately be used for educational purposes does not necessarily mean the use will be fair, particularly if the use was made by a commercial entity.

13.41 For example, in *Basic Books v Kinko's Graphics Corp.*,<sup>34</sup> the copying of copyright material to form course packs was found by a US District Court not to be fair use. The use was found to have undermined the market for the full texts from which excerpts had been taken. The Court placed particular weight on the profit-making motive of the defendant, a commercial photocopying business.<sup>35</sup>

13.42 There was a similar outcome in *Princeton University Press v Michigan Document Services Inc.*<sup>36</sup> Michigan Document Services was a commercial copy shop that, without a licence, reproduced substantial segments of copyrighted works and bound and sold them as course packs to students. Professors Ginsburg and Gorman explain that the majority of the Court held, among other things, that there was not a blanket exemption in s 107 for 'multiple copies for classroom use'; that the 'verbatim duplication of whole chapters and other large portions of the plaintiff-publishers' books weighed heavily against fair use'; and that 'the photocopying adversely affected not only the publishers' book sales but also the photocopying royalties that they would otherwise be paid by a by-then thriving licensing and collecting agency'.<sup>37</sup>

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32 *Cambridge University Press v Becker (Georgia State University)*, Civ. Action No. 1:08-CV-1425-ODE (District Court for North District of Georgia, 11 May 2012), 89.

33 *Ibid*, 89.

34 *Basic Books v Kinko's Graphics Corp* 758 F.Supp. 1522 (S.D.N.Y 1991).

35 J Ginsburg and R Gorman, *Copyright Law* (2012), 194.

36 *Princeton University Press v Michigan Document Services Inc* 99 F.3d 1381 (6th Cir. 1996).

37 J Ginsburg and R Gorman, *Copyright Law* (2012), 194.



13.43 These cases concerned commercial copying. Copying and other uses by a nonprofit educational institution are more likely to be fair, though the fairness factors would need to be considered.

### Market harm

13.44 Many vital educational resources might not be created without the protection of copyright laws. The incentive to write or publish a textbook, for example, might be undermined if the authors and publishers were not paid for the use of their books by students and educators. The public interest in education could be undermined by ‘weak’ copyright laws. As noted earlier, education is said to be ‘one of the clearest examples of a strong public interest in limiting copyright protection’.<sup>38</sup> However, the authors of this authoritative textbook go on to write that

just because education is a worthy cause does not mean that some form of blanket exception to copyright should be allowed. It must be remembered that it is works made for educational purposes that will often be copied in educational establishments. A wide exception would therefore undermine the market for such works, so that a publisher would be unlikely to invest in their production.<sup>39</sup>

13.45 The importance of education does not mean creators should subsidise education in Australia. Although this Inquiry is about exceptions to copyright, the ALRC appreciates the need for copyright laws to help ensure authors, publishers, film makers and other creators have an incentive to create.

13.46 A number of stakeholders opposed any new or extended free-use exception for educational institutions on the grounds that this would reduce the incomes of creators and publishers. Many stressed that this would be particularly damaging in an environment in which creators and rights holders are already struggling to fight piracy and maintain successful business models in a new digital age.

13.47 One publisher warned that allowing more free uses for education ‘would result in drying up of income streams for writers’.<sup>40</sup> A reasonably secure source of income was considered particularly important for creators in an industry ‘where sales and therefore royalties tend to decline after a year or so’.<sup>41</sup> Secondary licence fees can ‘give much-needed stability to a creator’.<sup>42</sup>

13.48 One publisher said it ‘strongly disagrees’ with the proposition that any uses of copyright material now covered by the statutory licences for education should instead be free.

Quality education materials, especially those tailored for a specific Australian curriculum, take significant time, resources and skill to develop and the efforts and rights of the creators and copyright holders should be recognised.<sup>43</sup>

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38 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [9–96].

39 Ibid.

40 Spinifex Press, *Submission 125*.

41 Walker Books Australia, *Submission 144*.

42 Ibid.

43 John Wiley & Sons, *Submission 239*.

13.49 The Australian Publishers Association (APA) submitted that:

except in relation to the existing free *de minimus* uses such as copying material onto whiteboards and so on (section 200) or uses that fall within section 200AB, there are *no* compelling grounds on which educational sectors should be entitled to use copyright material without payment.<sup>44</sup>

Publishers rely on royalties from the statutory licences, the APA submitted, including to produce ‘new resources and platforms’ which are important for the digital economy.

13.50 Publishers warned that expanding the free-use exceptions for educational institutions will discourage investment in and the development of educational content. John Wiley and Sons submitted that:

the primary market of many texts and resources are for their express use in schools and educational institutions, so to allow any extended right of free use (particularly in the digital arena) would significantly reduce the ability of, and incentives for, publishers to produce the kinds of innovative and educational materials which are relied on by teachers, lecturers and educators.<sup>45</sup>

13.51 The APA also considered that it is only fair that publishers share in the value that educational institutions have in accessing copyright material, rather than have to subsidise educational institutions. Different uses have different value, but the APA submitted that this can be considered when determining the equitable remuneration the education sector should pay—it should not simply be made free.<sup>46</sup>

13.52 Music publishing was said to have been ‘severely affected by the distribution of unauthorised copies on the internet’, and any ‘further undercutting of the financial viability of these specialist publishers by the broadening of statutory licences or free-use exceptions may see the unintended consequence of closing this market down entirely’.<sup>47</sup>

13.53 Under a fair use exception, if a use of copyright material can be licensed, this will generally weigh against a finding of fair use. The availability of a licence is a relevant consideration in determining whether a use is fair. It would be considered under the fourth fairness factor, ‘the effect of the use upon the potential market for, or value of, the copyright material’. This is a very important factor to consider, and should ensure that a fair use exception does not unreasonably damage educational publishing and other markets for educational resources.

13.54 However, the availability of a licence does not settle the question of fairness; it is not determinative. All of the fairness factors must be considered under the ALRC model.

13.55 Some argue that any exceptions to copyright should be specific and confined, to avoid harming rights holders’ interests. Exceptions can also be crafted to explicitly exclude the use of material when that use may be licensed. Currently, the free-use

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44 Australian Publishers Association, *Submission 225*.

45 John Wiley & Sons, *Submission 239*.

46 Australian Publishers Association, *Submission 225*.

47 AMPAL, *Submission 189*.

exception in s 200AB of the *Copyright Act* does not apply to uses of copyright material that may be purchased under a statutory licence.<sup>48</sup> These licences are very broad, and so this may mean educational institutions can rarely rely on s 200AB.<sup>49</sup>

13.56 One argument in support of this policy is that if users can licence copyright material, they should not be able to make use of it for free. Free-use exemptions should only be available when there is market failure, some argue. This argument appears to be inconsistent with the purpose of Australian copyright law. International copyright agreements also do not mandate such a principle. The three-step test provides that free-use exceptions should not ‘unreasonably prejudice the legitimate interests of the author’.<sup>50</sup> It does not say an exception must never prejudice any interest of an author.

13.57 In the ALRC’s view, the *Copyright Act* should not provide that free-use exceptions do not apply to copyright material that can be licensed. Instead, the availability of a licence should be an important consideration in determining whether a particular use is fair.

13.58 Justice Nelson of the US District Court discussed this question in *Princeton University Press v Michigan Document Services Inc*. The judge stated that ‘Congress has implicitly suggested that licensing fees should be recognized in appropriate cases as part of the potential market for or value of the copyrighted work’:

It is true ... that ‘a copyright holder can always assert some degree of adverse [e]ffect on its potential licensing revenues as a consequence of [the defendant’s use] ... simply because the copyright holder has not been paid a fee to permit that particular use’.... But such an assertion will not carry much weight if the defendant has ‘filled a market niche that the [copyright owner] simply had no interest in occupying’ .... Where, on the other hand, the copyright holder clearly does have an interest in exploiting a licensing market—and especially where the copyright holder has actually succeeded in doing so—‘it is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis’... Only ‘traditional, reasonable, or likely to be developed markets’ are to be considered in this connection, and even the availability of an existing system for collecting licensing fees will not be conclusive.<sup>51</sup>

13.59 The availability of a licence should be a relevant, but not determinative, consideration when determining whether a use of copyright material infringes copyright.

### An illustrative purpose

13.60 The ALRC proposes that ‘education’ be one of the illustrative purposes listed in the fair use provision, just as it is an illustrative purpose in the US fair use provision. This will signal that a particular use that falls within the broader category of

<sup>48</sup> See *Copyright Act 1968* (Cth) s 200AB(6).

<sup>49</sup> D Browne, ‘Educational Use and the Internet – Does Australian Copyright Law Work in the Web Environment?’ (2009) 6(2) *SCRIPT-ed* 450, 454.

<sup>50</sup> *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972) art 9(2) (emphasis added).

<sup>51</sup> *Princeton University Press v Michigan Document Services, Inc* 99 F.3d 1381 (6th Cir. 1996), (citations omitted).

‘educational use’ is more likely to be fair than a use which does not fall into this or any other illustrative purpose category.

13.61 However, in deciding whether the particular use is fair, the fairness factors must be considered. The fact that a particular use falls into, or partly falls into, one of the categories of illustrative purpose, does not necessarily mean the use is fair. In fact, it does not even create a presumption that the use is fair. A consideration of the fairness factors is crucial.

### **Fair dealing for education**

13.62 If Australia does not adopt a fair use exception, then the *Copyright Act* should be amended to include a new ‘fair dealing for education’ exception. Like fair use, the exception should be flexible and able to adapt to new technologies and teaching practices. Like fair use, it would only cover uses which are fair, having regard to the fairness factors. This is a second best option, but it is more likely to enable educational institutions to make use of new digital technologies and opportunities than the existing or amended specific exceptions.

13.63 Some have argued that the existing exceptions for fair dealing for research or study should extend to copying by educational institutions.<sup>52</sup> Sections 40 and 103C of the Act provide for exceptions for fair dealing for the purpose of research or study.<sup>53</sup> These exceptions do not extend to uses by educational institutions, but only to private research and study by individuals. In *Haines v Copyright Agency Ltd*, the Full Federal Court drew a distinction ‘between an institution making copies for teaching purposes and the activities of individuals concerned with research or study’.<sup>54</sup> In *De Garis v Neville Jeffress Pidler Pty Ltd*, it was held that the exception only applies if the person who does the copying is the person who does the research or study.<sup>55</sup> This distinction was criticised in some submissions. For example:

The distinction drawn in *De Garis* between acts by the researcher and the acts of a facilitator was based on the Court’s reliance on English cases on the narrower notion of ‘private study’. It is not required by the Act, and is unnecessarily restrictive. It is entirely artificial to privilege acts of reproduction or copying that can be done by a researcher themselves over acts that require the involvement of a third party, such as an intermediary to assist with the copying or a publisher to disseminate the research output. It is also a distinction that has not found favour in the Supreme Court of Canada.<sup>56</sup>

13.64 In 2012, the Supreme Court of Canada considered ‘whether photocopies made by teachers to distribute to students as part of class instruction can qualify as fair dealing’ under Canadian copyright legislation—and concluded that they could.<sup>57</sup> The

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52 See also, Ch 5.

53 *Copyright Act 1968* (Cth) ss 40, 103C, 248(1)(aa). See also Ch 7, ‘Fair Dealing’.

54 See *Haines v Copyright Agency Ltd* (1982) 64 FLR 185, 191.

55 (1990) 37 FCR 99, 105–6.

56 R Burrell and others, *Submission 278*.

57 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada), [1].

Court stated that photocopies made by a teacher and given to students are ‘an essential element in the research and private study undertaken by those students’.<sup>58</sup> The Court held that teachers

have no ulterior motive when providing copies to students. Nor can teachers be characterised as having the completely separate purpose of ‘instruction’; they are there to facilitate the students’ research and private study ... The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.<sup>59</sup>

13.65 Since this case, Canada has introduced an exception for fair dealing for the purpose of education.<sup>60</sup>

13.66 The extension of the fair dealing for research and study exception to educational institutions was arguably countenanced by the Franki Committee in 1976. The exception then applied to ‘research or private study’. The Committee recommended the word ‘private’ be deleted. Australian copyright scholars submitted that this:

strongly suggests that it was thought that the amended defence would allow for teachers to copy material for the benefit of their students’ research or study. However, the Committee separately recommended a statutory licensing scheme for the multiple copying of works by educational institutions and in doing so failed to explain the relationship between this scheme and the amended fair dealing defence.<sup>61</sup>

13.67 One of the key benefits of the fair use exception is that it is not confined to dealings that fall into one of the prescribed categories of purpose. A use for prescribed purposes may more often be fair than other types of use, but these other uses should not be presumed unfair. It seems preferable at least to consider whether any given use is fair, rather than automatically prohibit the use. Copyright law that is conducive to new and innovative services and technologies should at least allow for the question of fairness to be raised.

## Repeal of existing exceptions

13.68 If either fair use or a fair dealing for education exception is enacted, then the existing specific exceptions in the *Copyright Act* for educational institutions should be repealed— ss 28, 44, 200, 200AAA and 200AB.<sup>62</sup>

13.69 The ALRC would expect that many uses within the scope of these exceptions are likely to be fair under the fair use exception—although this would depend on the application of the fairness factors in the particular circumstances. Some may not be fair, perhaps where rights holders can now offer licences they were once thought unlikely to be able to offer.

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58 Ibid, [25].

59 Ibid, [23].

60 ‘Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright’: *Copyright Modernization Act, C-11 2012* (Canada), s 29.

61 R Burrell and others, *Submission 278*.

62 The repeal of s 200AB is also proposed in Ch 11, ‘Libraries, Archives and Digitisation’. Section 200AB also covers certain uses by or for persons with disability.

13.70 In any event, the ALRC considers that to increase innovation and efficiency in a digital age, copyright exceptions should be flexible and refer to principles. Confined and specific exceptions should therefore only be necessary to remove any doubt with respect to uses which have a particularly important public interest.

**Proposal 13–1** The fair use exception should be applied when determining whether an educational use infringes copyright. ‘Education’ should be an illustrative purpose in the fair use exception.

**Proposal 13–2** If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.

**Proposal 13–3** The exceptions for education in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed.

## 14. Government Use

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### Summary

14.1 Government uses of copyright material are currently the subject of a statutory licence in pt VII div 2 of the *Copyright Act 1968* (Cth). The ALRC proposes the repeal of the statutory licence in Chapter 6, in favour of voluntary licensing. Governments should continue to pay for many uses of copyright material.

14.2 However, there are certain uses that are essential for the proper conduct of the administrative, judicial and parliamentary work of government. The fair use exception proposed in Chapter 4 should be applied when determining whether a government use infringes copyright; and ‘public administration’ should be an illustrative purpose in the fair use exception.

14.3 This chapter considers some government uses that have caused disagreement and uncertainty under the existing legal arrangements: use required by statute — especially under freedom of information and planning and environment laws—and use where there may be an implied licence—including use of incoming correspondence, material on free websites, and other government material. The ALRC proposes that these uses should be considered under a fair use exception, and anticipates that many of these uses are likely to be fair. However, the fairness factors will ensure that uses that cause unwarranted harm to copyright owners will not be fair use.

## Current arrangements

14.4 The *Copyright Act* contains a statutory licensing scheme for government use in pt VII div 2. Under this licence, government use of copyright material does not infringe copyright if the acts are done ‘for the services of the Commonwealth or State’.<sup>1</sup> When a government uses copyright material, it must inform the owner of the copyright and agree on terms for the use.<sup>2</sup> However, if a collecting society has been declared in relation to a government copy, the government must pay the collecting society equitable remuneration for the copy.<sup>3</sup>

14.5 Two collecting societies have been appointed, Copyright Agency for text, artworks and music (other than material included in sound recordings or films) and Screenrights for the copying of audio-visual material, including sound recordings, film, television and radio broadcasts.<sup>4</sup> Equitable remuneration is worked out by using a sampling system to estimate the number of copies made.<sup>5</sup>

14.6 The *Copyright Act* also includes some specific exceptions that are relevant to government use of copyright material: reproduction for the purposes of judicial proceedings;<sup>6</sup> and copying in Parliamentary libraries for members of Parliament.<sup>7</sup>

14.7 It is unclear whether the fair dealing exceptions in pt III div 3 of the *Copyright Act* are available to governments in Australia, or whether a government can rely on an implied licence to use copyright material. These matters are discussed further below.

## Changing patterns of government use

14.8 Government use of copyright material has changed significantly in response to the emergence of digital technologies. Governments now receive large amounts of copyright material via email and online, scan and digitally store documents sent to them, email documents internally and publish material on intranets and external websites. They are much more likely to rely on subscriptions to online libraries and media portals than on hardcopy newspapers, books, journals and looseleaf services.

14.9 Digital technology is also an intrinsic part of the open government agenda. The Australian Government has declared that ‘it is committed to open government based on a culture of engagement, built on better access to and use of government held information, and sustained by the innovative use of technology’.<sup>8</sup> Reforms associated with open government include the amendment of the *Freedom of Information Act 1982* (Cth) (the FOI Act) and the establishment of the Office of the Australian

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1 *Copyright Act 1968* (Cth) s 183(1).

2 *Ibid* s 183(5).

3 *Ibid* s 183A(2).

4 Australian Government Attorney-General's Department, *Australian Government Intellectual Property Manual* <[www.ag.gov.au](http://www.ag.gov.au)> at 9 August 2012.

5 *Copyright Act 1968* (Cth) s 183A(3).

6 *Ibid* ss 43(1), 104.

7 *Ibid* ss 48A, 104A.

8 Australian Government Information Management Office, *Declaration of Open Government* <<http://agimo.gov.au/2010/07/16/declaration-of-open-government/>> at 30 April 2013.



Information Commissioner and the Information Publication Scheme. This scheme requires agencies to publish certain information, including information released under freedom of information requests, on their websites.<sup>9</sup> There are similar schemes at the state and territory level.<sup>10</sup>

14.10 These developments challenge the existing statutory arrangements for government use of copyright. There are particular concerns about whether the uses required by open government statutes are free or remunerable; and whether the increased numbers of copies made as a result of digital procedures are remunerable. Disagreements about which uses are remunerable have led to difficult and protracted negotiations over the amounts payable under the statutory licence.<sup>11</sup>

14.11 In Chapter 6, the ALRC proposes the abolition of the statutory licence for government use, on the basis that voluntary licensing is more suitable in the digital environment. Negotiations for voluntary licences will also be conducted in light of the availability of exceptions. The ALRC has considered whether specific exceptions should be available for certain government uses, as was suggested by several government agencies.<sup>12</sup> For example, both the United Kingdom and New Zealand copyright statutes include a list of exceptions under the heading ‘public administration’ that includes the following:

- parliamentary and judicial proceedings;
- royal commissions and statutory inquiries;
- material open to public inspection or on official registers;
- material communicated to the Crown in the course of public business; and
- acts done under statutory authority.<sup>13</sup>

14.12 The ALRC considers that specific exceptions are insufficiently flexible in the digital environment. They do not adapt to changing patterns of use. For example, neither the UK nor the NZ statute provides for online access to material open for public inspection.<sup>14</sup>

14.13 It is difficult to predict the type of government uses that will become vital for democratic processes in the future. As the Spicer Committee commented in 1959,

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9 Ibid.

10 For example, *Government Information (Public Access) Act 2009* (NSW); *Right to Information Act 2009* (Qld); *Right to Information Act 2009* (Tas).

11 Discussed in Ch 6.

12 NSW Government, *Submission 294*; Victorian Government, *Submission 282*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

13 *Copyright, Designs and Patents Act 1988* (UK) ss 45–50; *Copyright Act 1994* (NZ) ss 58–66.

14 The United Kingdom government has indicated its intention to amend the *Copyright, Designs and Patents Act 1988* (UK) with regard to online access (UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 47, but this has not yet occurred.

‘most of us think that it is not possible to list those matters which might be said to be more vital to the public interest than others’.<sup>15</sup>

14.14 Further, specific exceptions offer inadequate protection to copyright owners. In the UK and NZ, a government use that falls within one of the above exceptions could be permitted even where it had a significant impact on the market value of the copyright material.<sup>16</sup> In Australia, the specific exception for judicial proceedings has been described as:

potentially broad: it is not qualified by any requirement of fair dealing and extends to any use that would otherwise infringe copyright. Accordingly, this will permit such acts as the making of multiple hard copies of documents, the making of electronic versions, public performance or exhibition, communication to the public ... so long as they are for the purposes specified in the subsection.<sup>17</sup>

14.15 Instead, the ALRC proposes that government uses should be considered under a general fair use exception, and that ‘public administration’ should be one of the illustrative purposes listed in the fair use provision. ‘Public administration’ is used in a broad sense, to encompass the activities of all three branches of government: the executive, the legislature and the judiciary. It is in the public interest for governments to use copyright material in ways that encourage open government, contribute to effective administration, and facilitate parliamentary and judicial processes. These uses are, largely, not part of the normal market for copyright material and do not affect the incentives for the creation of works.

14.16 However, not all uses of copyright material for the purpose of public administration would be fair use. All uses would be considered in light of the fairness factors: the purpose and character of the use, the nature of the material used, the amount and substantiality of the part dealt with, and the effect of the use upon the market for the material. The ‘purpose and character of the use’ will be particularly relevant when considering government uses which are non-commercial and intended to serve the public interest. Uses that contribute to efficient and open government are more likely to be fair use. Uses that are engaged in for a commercial purpose or that have a significant impact on the market for the copyright material are less likely to be fair use.

14.17 The approach proposed is similar to the US approach, where the US Department of Justice, Office of Legal Counsel has said that:

while government reproduction of copyrighted material for governmental use would in many contexts be non-infringing because it would be a ‘fair use’ under

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15 Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959), 77.

16 The UK and NZ exceptions contain some qualifications, such as allowing copying only ‘for the purpose of enabling the material to be inspected at a more convenient time or place’: *Copyright, Designs and Patents Act 1988* (UK) s 47(2); or for the purpose of a member of Parliament performing his or her duties as a member: *Copyright Act 1994* (NZ) s 58(3)(b), but do not refer to the impact of the use on the value of the material.

17 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.70].

17 USC § 107, there is no 'per se' rule under which such government reproduction of copyrighted material invariably qualifies as a fair use.<sup>18</sup>

14.18 The approach is also consistent with the European Directive on Copyright in the Information Society, which allows member states to make an exception for

use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.<sup>19</sup>

**Proposal 14-1** The fair use exception should be applied when determining whether a government use infringes copyright. 'Public administration' should be an illustrative purpose in the fair use exception.

14.19 The remainder of this chapter will consider some particular government uses, some problems that have arisen under the current statutory arrangements, and how these uses might be treated under a fair use exception.

## Fair dealing exceptions

14.20 There is currently disagreement and uncertainty about whether governments can rely on the exceptions in the *Copyright Act*.<sup>20</sup> For government, perhaps the most important exception is the fair dealing exception for the purpose of research or study.<sup>21</sup> The Tasmanian Government told this Inquiry that 'a large part of government copying of third party works is undoubtedly for the purpose of research for policy development and good governance'.<sup>22</sup> Government agencies indicated that there are other exceptions of importance to governments, such as: labels for containers of chemicals (s 44B) and back-up copies of computer programs (s 47C). Clarification is required as to their availability.<sup>23</sup>

14.21 John Gilchrist has explained that two views are possible.<sup>24</sup> One construction of the statutory licence scheme in pt VII div 2 is that governments cannot rely upon fair dealing exceptions and must instead adhere to the requirements of the licence.<sup>25</sup> Governments have advised that the declared collecting societies have taken this view,<sup>26</sup>

18 US Department of Justice, Office of Legal Counsel, *Whether Government Reproduction of Copyrighted Materials Invariably is a "Fair Use" under Section 107 of the Copyright Act of 1976* <[www.loc.gov/flicc/gc/fairuse.html](http://www.loc.gov/flicc/gc/fairuse.html)> at 16 April 2013.

19 Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, (entered into force on 22 June 2001) art 5(3)(e).

20 *Copyright Act 1968* (Cth) pt III, divs 3, 4, 5 and 7; pt IV, div 6.

21 *Ibid* s 40.

22 Tasmanian Government, *Submission 196*. While *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99 contains repeated references to 'private study', all of the references are quotes from United Kingdom judgments citing the English statute which then referred to 'private study, research' and so on. The *Copyright Act 1968* (Cth) does not refer to 'private study'.

23 DSITIA (Qld), *Submission 277*, Table 1; State Records South Australia, *Submission 255*, Table 1.

24 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1.

25 *Ibid*, 7–9.

26 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

and that government arrangements with collecting societies do not exclude payment for copying that could be fair dealing under pt III div 3.<sup>27</sup>

14.22 The Victorian Government said that this approach ‘puts the State at a disadvantage compared to most non-government copyright users, such as corporations and individuals, who are entitled to rely on the exceptions to infringement by not remunerating copyright owners for specified copyright acts’.<sup>28</sup>

14.23 An alternative construction is that governments, like individuals and corporations, can rely on the fair dealing exceptions. In this case the statutory provisions only come into play when government use goes beyond that permitted by the fair dealing exceptions.<sup>29</sup> Gilchrist suggested that this is ‘the better view’ of the relationship between the fair dealing and the government statutory licensing provisions.<sup>30</sup> This approach is supported by Professors Enid Campbell and Ann Monotti, by government agencies and by rights holder SAI Global.<sup>31</sup>

14.24 Copyright Agency/Viscopy submitted that all government copying is covered by the statutory licence, but some of it is ‘zero rated’ or not remunerable. It said that when considering whether governments should be able to rely on the fair dealing exceptions, compliance costs should be taken into account: ‘reliance on “free” exceptions necessarily requires closer attention to the requirements of the exception, with associated compliance costs’.<sup>32</sup> Copyright Agency/Viscopy appears to consider that uses that would be free to a non-government user are remunerable for government, but that, overall, the statutory licence is a less expensive option. It also proposes that fair dealing exceptions should not be available to government (other institutional and corporate users) unless the use is ‘for a socially desirable purpose’ that is ‘not covered by a licensing solution’.<sup>33</sup>

14.25 Gilchrist points out that the Australian Government’s 2003 agreement with Copyright Agency Limited exempted material copied for judicial proceedings and giving professional advice, but expressly excluded reliance on the other exemptions, such as research or study.<sup>34</sup>

14.26 The *Copyright Act* should be clear on whether governments can rely on the same fair dealing exceptions as individuals and non-government organisations. The

27 Victorian Government, *Submission 282*; J Gilchrist, ‘Crown Use of Copyright Material’ (2010) *Canberra Law Review* 1, 15–16.

28 Victorian Government, *Submission 282*.

29 J Gilchrist, ‘Crown Use of Copyright Material’ (2010) *Canberra Law Review* 1, 7. See also E Campbell and A Monotti, ‘Immunities of Agents of Government from Liability for Infringement of Copyright’ (2002) 30 *Federal Law Review* 459, 464.

30 *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279, [11] cited in J Gilchrist, ‘Crown Use of Copyright Material’ (2010) *Canberra Law Review* 1, 8.

31 E Campbell and A Monotti, ‘Immunities of Agents of Government from Liability for Infringement of Copyright’ (2002) 30 *Federal Law Review* 459, 464; Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*; SAI Global, *Submission 193*.

32 Copyright Agency/Viscopy, *Submission 287*.

33 Copyright Agency/Viscopy, *Submission 249*.

34 J Gilchrist, ‘Crown Use of Copyright Material’ (2010) *Canberra Law Review* 1, 15.

disagreement between governments and the collecting agencies about reliance on fair dealing exceptions has been a major barrier to an agreement on a survey method and equitable remuneration, as is discussed in Chapter 7.

14.27 The fair dealing exceptions are intended to serve the public interest by ensuring that socially beneficial uses, such as research and study, are not impeded. It can be argued that this reasoning applies to government in the same way as it does to individuals. While governments are seen as having ‘deep pockets’, requiring remuneration for all uses could result in governments limiting their uses in a way that would not be in the public interest.

14.28 The Franki Committee said that governments ‘should be entitled to copy a work in the circumstances where a private individual would be entitled to copy it without obligation to the copyright owners’.<sup>35</sup> The ALRC agrees that governments should not be required to pay for uses that are free to others. If the statutory licence for government use is abolished, as proposed in Chapter 6, there should be no doubt that any exceptions in the *Copyright Act* that are available to individuals are also available to governments.

### Uses required by freedom of information laws

14.29 Freedom of information (FOI) legislation is intended to promote democracy by contributing to increasing public participation in government processes, promoting better decision making, and increasing scrutiny, discussion, comment and review of the government’s activities.<sup>36</sup> The ‘second generation’ of FOI law treats government information as a national resource that has been invested in by the public and so belongs to the public.<sup>37</sup> Access to these resources in the digital environment means online access, which poses some significant challenges when the information is made up, in part, of copyright material that is not owned by the government. For example, the Office of the Australian Information Commissioner’s freedom of information disclosure log includes a document where the copyright is not owned by the Australian Government.<sup>38</sup> As discussed below, this will not pose a problem for the Australian Government, but a similar use by a state, territory or local government could create difficulties.

### Australian Government

14.30 The FOI Act provides immunity from proceedings for copyright infringement to Australian Government agencies and officers who give access to a document as required by the FOI Act.<sup>39</sup> The Australian Government’s FOI reforms introduced in

35 Copyright Law Committee, *Report on Reprographic Reproduction* (1976), 7.10, cited in J Gilchrist, ‘Crown Use of Copyright Material’ (2010) *Canberra Law Review* 1, 7.

36 *Freedom of Information Act 1982* (Cth) s 3.

37 J Bannister, ‘Open Government: From Crown Copyright to the Creative Commons and Culture Change’ (2011) 34 *UNSW Law Journal* 1080, 1090–1091.

38 Australian Government, Office of the Information Commissioner, *Freedom of Information Disclosure Log* <[www.oaic.gov.au/about/foi/disclosure-log.html](http://www.oaic.gov.au/about/foi/disclosure-log.html)> at 15 May 2013. The log includes an email from the Canadian Information Commissioner.

39 *Freedom of Information Act 1982* (Cth) s 90.

2010 extended this immunity to cover the publication on a website of information released to an FOI applicant.<sup>40</sup>

14.31 Both Copyright Agency/Viscopy<sup>41</sup> and Gilchrist<sup>42</sup> consider that Commonwealth uses under the FOI Act are free. However, the Office of the Australian Information Commissioner raised concerns that some publication of material under the FOI Act could have an undesirable impact on the copyright owner's revenue or market. The Office indicated that it is considering whether to except certain information from the Information Publication Scheme 'in circumstances where publication on a website would be unreasonable, such as if the document is an artistic work or publication would clearly impact on the copyright owner's revenue or market'.<sup>43</sup>

14.32 Copyright Agency/Viscopy submitted that the existence of exceptions to copyright infringement in other legislation such as FOI laws 'is confusing and can lead to inconsistencies'.<sup>44</sup> It argued that the better approach is for all of a government's uses of third party copyright material to be covered by the government statutory licence.<sup>45</sup> It explained that it is possible for the collecting society and a government to agree that certain classes of use will be allowed but will not be remunerated—that is, not taken into account in the provisions for payment.<sup>46</sup> The ALRC has concerns about this approach. Past negotiations have been unsuccessful,<sup>47</sup> in part because the statute is not specific about the types of uses that are remunerable and does not provide any principles to guide the parties in their negotiations.

### State and territory governments

14.33 The immunity in the FOI Act only applies to the acts of federal government agencies subject to the FOI Act. For state and territories, providing immunity from copyright infringement for government officials may not be possible. It is arguable that such a state or territory statutory provision would be inconsistent with the *Copyright Act*, and would, to the extent of the inconsistency, be invalid.<sup>48</sup>

14.34 The existence of the statutory licence means that a government use of copyright material in compliance with FOI laws could be encompassed by the statutory licence.<sup>49</sup> The notification requirements of s 183 would apply or, if the material was covered by a declared collecting society, the special arrangements in s 183A would apply.

40 *Freedom of Information (Amendment) Reform Act 2010* (Cth) sch 4 pt 1 item 50. See *Freedom of Information Act 1982* (Cth) s 90.

41 Copyright Agency/Viscopy, *Submission 249*.

42 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1.

43 Office of the Australian Information Commissioner, *Submission 145*.

44 Copyright Agency/Viscopy, *Submission 249*.

45 *Ibid.*

46 *Ibid.*

47 State Records South Australia, *Submission 255*; Copyright Agency/Viscopy, *Submission 249*; Tasmanian Government, *Submission 196*.

48 *Constitution* s 109, see further E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 471–472; and Victorian Government, *Submission 282*.

49 J Bannister, 'Open Government: From Crown Copyright to the Creative Commons and Culture Change' (2011) 34 *UNSW Law Journal* 1080, 1097–1098.

14.35 The situation regarding remuneration for these uses at state and territory level is unclear. Copyright Agency/Viscopy has indicated that it does not seek payment for every use and that remuneration for disclosure under FOI laws is a matter for negotiation.<sup>50</sup> The Victorian Government indicated that payment is required for providing documents under the *Freedom of Information Act 1982* (Vic)<sup>51</sup> and the NSW Government raised concerns about ‘the risk of facing unpredictable, potentially large claims for payment’.<sup>52</sup> The Law Council submitted that:

the exercise of these obligations should not carry a penalty of having to remunerate the copyright owner. If such a requirement were made, it is likely that the public authority would wish to pass on such costs. The Committee believes the public interest in disclosure outweighs any detriment to the copyright owner.<sup>53</sup>

### Local government

14.36 Local governments are subject to state and territory FOI laws, and they are not covered by the statutory licence in the *Copyright Act*. The effect is that they risk copyright infringement when using copyright material in a way that is required by an FOI law.<sup>54</sup> It has been necessary to make special provision in FOI laws so that, if access to a document in the form requested would breach copyright, then access in that form may be refused and access given in another form.<sup>55</sup> Limits on laws requiring governments to make information available proactively have also been enacted—for example, the *Government Information (Public Access) Act 2009* (NSW) was amended to provide that an agency is not required to make ‘open access information’ available if this would infringe copyright.<sup>56</sup> This approach gives blanket and inflexible protection for copyright material, and does not further the aim of open government. The NSW Information and Privacy Commission (NSW) stated that the risk of infringing copyright ‘undercuts the transparency and effectiveness of the GIPA Act by limiting councils’ ability to provide public access to documents that inform the basis of their decisions’.<sup>57</sup>

### Disclosure under FOI laws and fair use

14.37 The current situation regarding FOI laws and government use of copyright material is complex, uncertain and is different for each level of government.

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<sup>50</sup> Copyright Agency/Viscopy, *Submission 249*.

<sup>51</sup> Victorian Government, *Submission 282*.

<sup>52</sup> NSW Government, *Submission 294*.

<sup>53</sup> Law Council of Australia, *Submission 263*.

<sup>54</sup> Information and Privacy Commission NSW, *Submission 209*.

<sup>55</sup> See, eg, *Freedom of Information Act 1982* (Cth) s 23(3)(c); *Government Information (Public Access) Act 2009* (NSW) s 72. These provisions are expressed generally, but are only relevant to local governments because Commonwealth or State government uses ‘for the services of the Commonwealth or State’ do not infringe copyright: s 183(1).

<sup>56</sup> *Government Information (Public Access) Amendment Act 2012* (NSW) sch 1(1). See *Government Information (Public Access) Act 2009* (NSW).

<sup>57</sup> Information and Privacy Commission NSW, *Submission 209*.

14.38 One option for reform would be to extend the statutory licence to local government. This options was favoured by some stakeholders, as enabling ‘more comprehensive use of material by local governments on fair terms’.<sup>58</sup> However other stakeholders argued that voluntary licensing was working satisfactorily and that there should be no extension.<sup>59</sup> The ALRC notes that such an extension would mean that local governments would potentially be subject to claims for remuneration for material used, as required by FOI laws.

14.39 Another option might be to amend the *Copyright Act* to provide an exception for government (including local government) uses of copyright material as required by FOI laws. However such a broad exception could be problematic if it allowed widespread dissemination of material that is also commercially available. In response to a similar challenge, the UK government plans to allow public bodies to make copyright material available online, with the proviso that ‘material that is available commercially to buy or licence (such as academic articles) would not fall within the scope’ of the exception.<sup>60</sup>

14.40 The ALRC considers that the proposed exception for fair use, with public administration as an illustrative purpose, is a simpler and more flexible solution. It would apply equally to all levels of government. It would still be necessary for FOI laws to provide that governments must not release material where that would infringe copyright. The question of infringement would be answered by reference to the fairness factors—the purpose and character of the use, the nature of the material used, the amount and substantiality of the part dealt with, and the effect of the use upon the market for the material. According to Copyright Agency/Viscopy, negotiations already take place with governments regarding their use of copyright material as required by FOI laws. The fair use exception would provide principles on which to base the negotiations.

14.41 This approach should address the concerns raised by the Office of the Australian Information Commissioner concerning unwarranted harm to copyright owners. Copyright material would be protected when the circumstances require it, but the public interest and the goal of open government would also be taken into account.

### **Use under an implied licence**

14.42 Government use of material open to public inspection or on official registers, incoming correspondence, free websites and of other governments’ material are all uses where it might have been thought that a licence for government use could be implied. However, in *Copyright Agency Limited v New South Wales* (‘*CAL v NSW*’), concerning the registration and dissemination of surveyors’ plans, the High Court held that no implied licence to use the plans existed. A licence ‘will only be implied where there is a necessity to do so ... such necessity does not arise in the circumstances that

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<sup>58</sup> Copyright Agency/Viscopy, *Submission* 287. See also Screenrights, *Submission* 215.

<sup>59</sup> APRA/AMCOS, *Submission* 247; ARIA, *Submission* 241; PPCA, *Submission* 240; SAI Global, *Submission* 193.

<sup>60</sup> UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 47.



the statutory licence scheme excepts the State from infringement'.<sup>61</sup> It is not clear how far this judgment affects uses beyond the particular uses discussed in the case. Gilchrist has commented

It is dangerous to generalize from the circumstances surrounding the lodgement of these survey plans ... more broadly to copyright works received by government in other circumstances, although the decision of the High Court has wider implications for the digitalisation of registration systems and the wider needs of government to disseminate such information.<sup>62</sup>

14.43 The following discussion considers government uses of material open to public inspection, incoming correspondence, free websites and other government material, and how these uses might be treated under a fair use exception.

### **Material open to public inspection**

14.44 Some statutes require the registration or deposit of documents with the purpose of making those documents publicly available. For example, planning and environmental protection laws often require the proponent of a development to submit a development application, which may include plans by surveyors and architects and environmental impact statements.<sup>63</sup> The purpose of the laws is to facilitate public participation in planning processes,<sup>64</sup> with the expectation that this will improve decision making.

14.45 Material open to public inspection often contains third party copyright material, and copying this material or making it available online raises similar issues to disclosure under FOI laws. Commonwealth statutes requiring documents to be made available can create immunity for Australian Government agencies. However, state and territory governments cannot take advantage of immunity and may be liable for payment under the statutory licence. Local governments have no immunity and no statutory licence, and risk copyright infringement when providing public access to documents.<sup>65</sup>

14.46 Several government agencies submitted that government agencies should not have to remunerate copyright owners when using material as required by a statute.<sup>66</sup> The Department of Defence was particularly concerned about 'the potential for the Commonwealth to incur significant costs in performing its legislated or regulation required tasks'. It suggested that there should be an exception to allow governments to use material 'for the purpose for which it was provided', but should exclude any

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<sup>61</sup> *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279, [93].

<sup>62</sup> J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 36.

<sup>63</sup> For a useful example, see NSW Government, *Submission 294*.

<sup>64</sup> For example, *Environmental Planning and Assessment Act 1979* (Cth) s 5.

<sup>65</sup> A voluntary licence is available to local councils, but this licence does not cover placing third party material online: Copyright Agency, *Local Government* <[www.copyright.com.au/licences/not-for-profit-sector/local-government](http://www.copyright.com.au/licences/not-for-profit-sector/local-government)> at 9 May 2013. Town planner Tony Proust described the extraordinary difficulties he had in obtaining a copy of a 20 year old building plan because of local government's copyright obligations: T Proust, *Submission 264*.

<sup>66</sup> DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*.

commercial uses of the material.<sup>67</sup> IP Australia called for an exception that would allow it to publish the literature relied upon in its patent decisions (including journal articles, books and other technical material) on eDossier. This use is not required by statute, but IP Australia suggested that this would enhance transparency as ‘the documents help explain the reasons for IP Australia’s decisions, and contain the evidence on which decisions to grant or refuse rights are based’.<sup>68</sup>

14.47 Copyright Agency/Viscopy took a slightly different approach, suggesting that all government uses of copyright material should be by way of the government statutory licence (rather than by way of an exception). The extent to which remuneration is required for government uses of material open to public inspection would be a matter for negotiation between the parties.<sup>69</sup>

14.48 The guiding principle identified for this Inquiry regarding wide dissemination of material has particular weight regarding government activities that are intended to serve the public benefit. However, the principle regarding maintaining incentives to the creation of works appears to have less application in relation to material open to public inspection. Ordinarily, the owner of the copyright in the plan or report has been remunerated by the client, and is not motivated by remuneration for government use. Requiring payment for government use does not seem likely to have any impact on the creation of these materials.<sup>70</sup>

14.49 The ALRC considers that the proposed exception for fair use is the appropriate way of dealing with government uses of copyright material pursuant to a statutory obligation. Uses that are not fair should be dealt with by way of voluntary licensing arrangements. The fairness factors would assist governments and copyright owners in determining whether the particular use is fair. This approach creates a flexible and principled framework that can properly balance the interests of open government and the rights of copyright owners.

### Use of incoming correspondence

14.50 Correspondence to government may be scanned into an electronic file for efficient storage and to provide access to government officers at distant locations. These copies are treated as remunerable by collecting societies, despite the likelihood that the author of the letter has given implied consent for the copying.<sup>71</sup> The Victorian and Tasmanian Governments suggested that such uses should fall within a fair dealing or fair use exception or otherwise be excluded from payment.<sup>72</sup> Other government

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<sup>67</sup> Department of Defence, *Submission 267*.

<sup>68</sup> IP Australia, *Submission 176*.

<sup>69</sup> Copyright Agency/Viscopy, *Submission 249*.

<sup>70</sup> The situation described by IP Australia, above, is somewhat different as the use is not required by statute and the copyright materials used are ordinarily available to the public for a price. IP Australia indicated that the proposed use would not affect the commercial value of the material as eDossier does not facilitate searching for journal articles on a topic: IP Australia, *Submission 176*. The ALRC does not make any comment as to whether this type of use is likely to be fair use.

<sup>71</sup> Victorian Government, *Submission 282*; State Records South Australia, *Submission 255*; Queensland Department of Natural Resources and Mines, *Submission 233*; Tasmanian Government, *Submission 196*.

<sup>72</sup> Victorian Government, *Submission 282*; Tasmanian Government, *Submission 196*.

submissions said the *Copyright Act* should be amended to reverse *CAL v NSW* by including a definition of an implied licence,<sup>73</sup> or clearly indicating that the existence of the statutory licence should not be taken into account when determining whether an implied licence exists.

14.51 The ALRC considers that government use of incoming correspondence would be likely to fall under a fair use exception.

### **Freely available content**

14.52 Some material is made available on websites with a Creative Commons licence (a licence allowing copying and distribution on liberal terms) or with an invitation to print the material. In these cases, the owner's purpose is to share the material and no remuneration is expected.<sup>74</sup> A number of government submissions were concerned that the effect of *CAL v NSW* is that the Crown cannot rely on the implied licence to use material that is evident on some websites.<sup>75</sup>

14.53 Governments argued that 'use of copyright material ... offered freely by copyright owners, particularly on websites, should not be remunerated under the statutory licensing scheme'.<sup>76</sup> The Tasmanian Government suggested that the Act should be amended to clarify that there is an implied licence for use of freely available material on websites 'to be used for personal, non-commercial purposes, or for use by government for the public benefit'.<sup>77</sup>

14.54 Copyright Agency/Viscopy acknowledges exclusions for 'government material made available under licences such as Creative Commons licences'.<sup>78</sup> Copyright Agency's *Distribution Rules* indicate that payment will not be made to rightsholders where 'an "open" licence such as a Creative Commons licence' has been used.<sup>79</sup> As payment is not required from the education sector for this material,<sup>80</sup> it may be that payment is not required from governments.

14.55 The ALRC considers that governments should be able to freely use material placed on websites where the owner has no commercial purpose. This would place governments in the same situation as individuals and businesses, and would respect the intentions of the copyright owner.

14.56 However, Screenrights pointed out that audio-visual material made freely available on the internet is often there for a commercial purpose, for example, in order to attract advertising or for cross promotional reasons.<sup>81</sup>

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73 State Records South Australia, *Submission 255*.

74 Ibid.

75 For example, DSITIA (Qld), *Submission 277*.

76 Victorian Government, *Submission 282*. See, also, DSITIA (Qld), *Submission 277*; Tasmanian Government, *Submission 196*.

77 Tasmanian Government, *Submission 196*.

78 Copyright Agency/Viscopy, *Submission 249*.

79 Copyright Agency, *Distribution Rules: How licensing fees are allocated to rightsholders* (2013).

80 Copyright Agency/Viscopy, *Submission 249*.

81 Screenrights, *Submission 215*.

14.57 If governments are to use free material without remuneration, it will be necessary to distinguish between material that is made freely available for a commercial purpose and material that is made available purely for communication and dissemination. Where there is a Creative Commons licence or other express statement that remuneration is not required, then this distinction will be more easily drawn. In other cases, implications are necessary. These distinctions would be best made via a fair use exception and consideration of fairness factors, rather than by attempting to define in the statute what ‘free’ material may be used.

### **Government use of government material**

14.58 A final form of use that may be affected by *CAL v NSW* is government use of other government content. The Tasmanian Government has advised, for example, that:

fees have been collected from the Tasmanian Department of Education for copying brochures from the Tasmanian Department of Health in relation to control of head lice.<sup>82</sup>

14.59 This is unsatisfactory as the government owner of the copyright did not expect or require remuneration for the use of the material, and the transaction costs of moving money from one arm of the government to another do not appear to be warranted. In the absence of the statutory licence, an implied licence for a government agency to use another government agency’s material might be recognised, but *CAL v NSW* may exclude this approach.

14.60 The Tasmanian Government called for legislative change to ensure that these fees are not levied. Alternatively, government material could be published under Creative Commons licences, which would mean that they would be excluded from the calculation of licence fees.<sup>83</sup>

14.61 If the *Copyright Act* contained a fair use exception, most government use of other government material would fall within these exceptions.

### **Fair dealing for public administration**

14.62 If fair use is not enacted, the *Copyright Act* should provide a new exception for fair dealing for public administration. Like fair use, the fair dealing exception would be flexible and able to respond to changing technology and government practices. Like fair use, fair dealing for public administration would be subject to the fairness factors. The fairness factors would protect the interests of copyright owners while ensuring that uses that do not interfere with the market for copyright material are not subject to undue restrictions.

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<sup>82</sup> Tasmanian Government, *Submission 196*.

<sup>83</sup> Copyright Agency/Viscopy, *Submission 249*.

**Proposal 14–2** If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered.

### Use for judicial proceedings and for members of Parliament

14.63 There are two specific exceptions in the *Copyright Act* that are of particular relevance to public administration:

- reproduction for the purpose of judicial proceedings or a report of judicial proceedings;<sup>84</sup> and
- copying by Parliamentary libraries for members of Parliament.<sup>85</sup>

14.64 The ALRC proposes that these specific exceptions should be repealed, in the expectation that such uses would generally fall within the proposed fair use exception. These uses have a purpose and character that is non-commercial, are necessary for activities that are central to the operation of democratic government, and are not likely to have an impact on the market for the material.

14.65 Government submissions to this Inquiry called for further specific exceptions for use in parliamentary proceedings and state commissions and inquiries.<sup>86</sup> The ALRC considers that these uses should be considered under a fair use exception.

**Proposal 14–3** The following exceptions in the *Copyright Act* should be repealed:

- (a) ss 43(1), 104—judicial proceedings; and
- (b) ss 48A, 104A—copying for members of Parliament.

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<sup>84</sup> *Copyright Act 1968* (Cth) ss 43(1), 104.

<sup>85</sup> *Ibid* ss 48A, 104A.

<sup>86</sup> Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; Department of Defence, *Submission 267*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.



## 15. Retransmission of Free-to-air Broadcasts

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### Summary

15.1 Subscription television companies and other media content providers may wish to retransmit free-to-air television and radio broadcasts to their own customers—that is, to provide the content contained in broadcasts by other means, such as cable or satellite transmission, in a simultaneous and unaltered manner.

15.2 The *Copyright Act 1968* (Cth) and the *Broadcasting Services Act 1992* (Cth) effectively operate to provide, in relation to the retransmission of free-to-air broadcasts:

- a free-use exception in relation to broadcast copyright;
- a free-use exception in relation to copyright in the underlying works or other subject matter (underlying rights), applying to retransmission by self-help providers; and

- a remunerated exception in relation to underlying rights, which does not apply to retransmission that ‘takes place over the internet’.

15.3 This chapter examines these exceptions (the retransmission scheme) and whether they are adequate and appropriate in the digital environment. This raises complex questions at the intersection of copyright and communications and media policy. The options for reform are largely dependent on assumptions about matters not within the ALRC’s remit, including:

- the exclusive rights covered by broadcast copyright, or other protection of broadcast signals;
- the extent to which retransmission of free-to-air television and radio broadcasts still needs to be facilitated in a converging media environment; and
- the extent to which it remains important to maintain geographical limits on the communication of free-to-air broadcasts.

15.4 For this reason, the chapter presents alternative sets of proposals. The first option would involve the repeal of both the free-use exception applying to broadcast copyright and the remunerated exception in relation to underlying rights (Option 1). This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

15.5 The second option would be to replace the free-use exception for broadcast copyright with a remunerated exception, similar to that which would continue to apply to the underlying rights (Option 2). This would continue the existing retransmission scheme while providing some recognition for broadcast copyright.

15.6 If Option 2 is chosen, or the existing retransmission scheme is retained, the ALRC proposes that retransmission ‘over the internet’ should no longer be excluded from the scheme, which should apply to retransmission by any technique, subject to geographical limits on reception. However, if the internet exclusion is to remain, its scope and application should be clarified.

15.7 Finally, the chapter examines ‘must carry’ obligations and concludes that the ALRC should make no proposal on whether free-to-air broadcasters should have the option of requiring that free-to-air broadcasts be retransmitted on subscription cable or other platforms.

### **The current retransmission scheme**

15.8 A retransmission is defined in the *Copyright Act* as a retransmission of a broadcast, where the content of the broadcast is unaltered and either simultaneous with the original transmission or delayed until no later than the equivalent local time.<sup>1</sup> Retransmission without the permission of the original broadcaster does not infringe

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1 *Copyright Act 1968* (Cth) s 10.



copyright in broadcasts, by virtue of provisions contained in the *Broadcasting Services Act*.

15.9 The *Broadcasting Services Act* states that no ‘action, suit or proceeding lies against a person’ in respect of the retransmission by the person of certain television and radio programs.<sup>2</sup> The retransmission must, however, be within the licence area of the broadcaster or, if outside the licence area, with the permission of the Australian Communications and Media Authority (ACMA).<sup>3</sup>

15.10 In this way, the *Broadcasting Services Act* provides immunity against any action for infringement of copyright that might otherwise be able to be brought by the original broadcaster for retransmission of a free-to-air broadcast.

15.11 The immunity does not extend to copyright subsisting in a work, sound recording or cinematograph film included in a free-to-air broadcast (the ‘underlying rights’) unless the retransmission is provided by a ‘self-help provider’.<sup>4</sup>

15.12 A self-help provider is defined to cover entities that provide transmission ‘for the sole or principal purpose of obtaining or improving reception’ in particular places.<sup>5</sup> Briefly, self-help providers include non-profit bodies, local government bodies or mining companies, which provide retransmission to improve reception in communities; or other persons providing retransmission by in-building cabling of apartment buildings and hotels.

15.13 For retransmitters, other than self-help providers, the *Copyright Act* provides a statutory licensing scheme for the underlying works. That is, the Act provides that the copyright in a work, sound recording or cinematograph film included in a free-to-air broadcast is not infringed by retransmission of the broadcast, if equitable remuneration is paid.<sup>6</sup> Retransmission of a free-to-air broadcast that ‘takes place over the internet’ is excluded from this remunerated exception by virtue of s 135ZZJA of the *Copyright Act*.

15.14 Essentially, the current retransmission scheme allows the retransmission of free-to-air broadcasts, without the permission or remuneration of the broadcaster, and for equitable remuneration to be paid to the underlying rights holders.<sup>7</sup>

## History of the retransmission scheme

15.15 The *Broadcasting Services Act*, as originally enacted, contained special provisions for retransmission of programs, which provided an immunity against

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2 *Broadcasting Services Act 1992* (Cth) s 212.

3 *Ibid* s 212(1)(b)—except in the case of programs transmitted by a national broadcasting service or program material supplied by National Indigenous TV Limited: s 212(1)(a), (c).

4 *Ibid* s 212(2A).

5 *Ibid* s 212A.

6 *Copyright Act 1968* (Cth) s 135ZZK.

7 *Ibid* pt VC.

actions, suits or proceedings in respect of such retransmission, for persons other than broadcasting licensees.<sup>8</sup>

15.16 In 1999, amendments to the *Broadcasting Services Act*<sup>9</sup> changed the operation of the immunity so that it no longer applied to underlying rights, except where retransmission was provided by a 'self-help provider'.<sup>10</sup> This meant that anybody retransmitting programs, other than a self-help provider, would infringe these rights unless retransmission was with the permission and remuneration of the underlying copyright holders.

15.17 The amending Bill in its original form would also have required retransmitters to seek the permission of the owners of copyright in broadcasts before retransmitting.<sup>11</sup> In 1998, the Australian Government announced that 'new rules' would be introduced to 'correct an anomaly ... which allowed pay TV operators to retransmit free-to-air television or radio signals without seeking the consent of the originating broadcaster'.<sup>12</sup> However, in the face of opposition to this requirement from the non-Government parties in the Parliament, the Government introduced an amendment that had the effect of overriding the requirement 'while the Government resolves the outstanding issues through further consultation with industry'.<sup>13</sup>

15.18 The *Berne Convention* specifically allows signatories to implement a statutory licence applying to rebroadcast and retransmission of copyright works.<sup>14</sup> The *Copyright Amendment (Digital Agenda) Act 2000* (Cth) introduced the pt VC statutory licensing scheme applying to underlying works.<sup>15</sup> The stated reason for implementing the licensing scheme was that 'it would be impractical for retransmitters to negotiate with individual copyright owners in underlying copyright material to enable the retransmission of free-to-air broadcasts'.<sup>16</sup>

15.19 These provisions were inserted at the same time as the introduction of a new technology-neutral right of communication to the public.<sup>17</sup> This replaced and extended

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8 *Broadcasting Services Act 1992* (Cth) s 212(2) as enacted.

9 *Broadcasting Services Amendment Act (No.1) 1999* (Cth).

10 *Broadcasting Services Act 1992* (Cth) s 212(2A).

11 Explanatory Memorandum, *Broadcasting Services Amendment Bill 1998* (Cth).

12 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.350], quoting a joint media release of then Minister for Communications, the Information Economy and the Arts (the Hon Senator Richard Alston) and then Attorney-General (the Hon Daryl Williams AM QC MP), dated 10 March 1998.

13 Ibid, [9.530], citing Attorney-General's Department, *AGD e-News on Copyright*, No 11 (1999). See, also, the history of the retransmission exception set out in Free TV Australia, *Submission 270*: the retransmission exception 'has long been recognised by industry and government as an unintended anomaly of broadcasting and copyright law'.

14 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 11(bis)(2). Also *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002) art 8.

15 *Copyright Amendment (Digital Agenda) Act 2000* (Cth); *Copyright Act 1968* (Cth) pt VC.

16 Explanatory Memorandum, *Copyright Amendment (Digital Agenda) Bill 1999* (Cth), 6.

17 *Copyright Act 1968* (Cth) s 87.

an existing re-broadcasting right, which only applied to ‘wireless’ broadcasts and not, for example, to cable or online communication.<sup>18</sup>

## Scope of broadcast copyright

15.20 The grant of a separate copyright in broadcasts did not occur until the passage of the *Copyright Act* in 1968, and followed Australia’s accession to the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention)*.<sup>19</sup> The *Rome Convention* established a regime for protecting rights neighbouring on copyright, including minimum rights for broadcasting organisations.

15.21 These rights can be protected by copyright law, as in Australia, or by other measures. Under the Convention, broadcasting organisations enjoy, among other things, the right to authorise or prohibit the ‘rebroadcasting of their broadcasts’.<sup>20</sup> Broadcasting is defined under the *Rome Convention* as ‘transmission by wireless means’<sup>21</sup> and re-broadcasting as the ‘simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation’.<sup>22</sup> The *Rome Convention* does not require that broadcasters have an exclusive right to retransmission of their signal by cable.

15.22 In Australia, however, the *Copyright Act* provides that copyright in relation to a broadcast includes the right to ‘re-broadcast it or communicate it to the public otherwise than by broadcasting it’.<sup>23</sup> This applies to both wireless and wired transmissions and, therefore, provides broadcasters with broader rights than required internationally. In this regard, the Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 (Cth) explained that the amendment to broadcast copyright was

intended to extend the current re-broadcasting right which only applies to wireless telegraphy to include the cable transmission of broadcasts and the making available online of broadcasts. The new right will therefore allow broadcasters to control the retransmission of their broadcasts irrespective of the means of delivery of the service.<sup>24</sup>

## Copyright and communications policy

15.23 The ALRC observed, in the Issues Paper, that reviewing the retransmission exceptions raises significant communications and competition policy questions, as well

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18 Ibid s 87(c), as enacted.

19 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964).

20 Ibid art 13(a).

21 Ibid art 3(f).

22 Ibid art 3(g).

23 *Copyright Act 1968* (Cth) s 87(c).

24 Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), [116].

as copyright policy questions, and asked whether this Inquiry was the appropriate forum for considering these.<sup>25</sup>

15.24 Stakeholder opinion was divided on this. Some stakeholders felt that the central importance of communications policy issues in the design of the retransmission regime meant that the incidental copyright issues should be left to other policy-making processes.<sup>26</sup> ASTRA, for example, submitted that the operation of the retransmission regime would be ‘best addressed directly by Government in the context of communications and competition policy’ and observed that retransmission does not raise the type of ‘fair use’ concerns that are at the core of the Terms of Reference.<sup>27</sup>

15.25 Other stakeholders considered that, while retransmission has implications for communications and competition policy, there is no reason the ALRC should not consider these issues.<sup>28</sup>

15.26 Free TV Australia (Free TV) stated that retransmission is ‘primarily a copyright law issue’.<sup>29</sup> Screenrights distinguished between the issues and submitted that while ‘must carry’ (discussed below) is a communications issue, the exclusion of broadcast copyright from pt VC of the *Copyright Act* is a copyright issue that should be considered by the ALRC.<sup>30</sup>

15.27 The Terms of Reference specifically request the ALRC take into account the recommendations of the Australian Government’s Convergence Review.<sup>31</sup> In particular, the Convergence Review suggested, in light of its recommendation that geographically-based licences no longer be required to provide content services,<sup>32</sup> the retransmission provisions be reviewed as part of the ALRC Inquiry.<sup>33</sup>

15.28 In the light of this, and stakeholder feedback received on the operation of the retransmission exceptions, the ALRC considers that it should make proposals on retransmission issues.

## **Assumptions and options for reform**

15.29 Options for reform are, however, largely dependent on assumptions about matters not within the scope of the ALRC’s Inquiry.

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25 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [228], Question 38.

26 NRL, *Submission 257*; Foxtel, *Submission 245*; SBS, *Submission 237*; ASTRA, *Submission 227*; News Limited, *Submission 224*; Australian Film/TV Bodies, *Submission 205*; Australian Industry Group, *Submission 179*.

27 ASTRA, *Submission 227*.

28 Free TV Australia, *Submission 270*; Music Council of Australia, *Submission 269*; ARIA, *Submission 241*; Australian Copyright Council, *Submission 219*; Australian Broadcasting Corporation, *Submission 210*; NSW Young Lawyers, *Submission 195*.

29 Free TV Australia, *Submission 270*.

30 Screenrights, *Submission 215*.

31 Australian Government Convergence Review, *Convergence Review Final Report* (2012).

32 See *Ibid*, ch 1, rec 2.

33 *Ibid*, 33.

15.30 First, reform of the retransmission scheme raises threshold questions about what exclusive rights should be covered by broadcast copyright. That is, what copyright or other protection should be extended to broadcasts in the first place?

15.31 As discussed above, in Australia, broadcasters are provided with broader protection than required internationally, as the *Rome Convention* does not require copyright protection, as such, for broadcasts.

15.32 The *Rome Convention* provides permitted exceptions to broadcast protection, which include: private use; the use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research.<sup>34</sup> Signatories may also provide for the same kinds of limitations with regard to the protection of broadcasting organisations as domestic law provides ‘in connection with the protection of copyright in literary and artistic works’.<sup>35</sup>

15.33 From this perspective, options for reform can be seen as relatively unconstrained, in copyright policy terms, because the *Rome Convention* does not require broadcast copyright, and allows a series of exceptions not found in the *Berne Convention*.<sup>36</sup> Arguably, the nature of broadcast rights can justify anomalous exceptions—that is, exceptions that do not apply to other subject matter.

15.34 On the other hand, having extended copyright to broadcasts, there are arguments that the exclusive rights applying to broadcasts should be similar to those applying to other subject matter. Arguably, the free-use exception for retransmission would not comply with the ‘three-step test’ under the *Berne Convention* and other international copyright conventions,<sup>37</sup> if this test applied to broadcast, because it removes broadcast copyright protection without permission or remuneration, conflicting with normal exploitation of the work and unreasonably prejudicing the legitimate interests of the broadcaster.

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34 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964) art 15. International protection of broadcasting organisations has been discussed at length at the World Intellectual Property Organization, by the Standing Committee on Copyright and Related Rights (SCCR). The issue of providing legal protection for broadcasting organisations against unauthorised use of broadcasts, including by retransmission on the internet has been retained on the Agenda of the SCCR for its regular sessions: World Intellectual Property Organization, *Program Activities, Broadcasting Organizations* <[www.wipo.int/copyright/en/activities/broadcast.html](http://www.wipo.int/copyright/en/activities/broadcast.html)> at 24 April 2013.

35 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964) art 15(2).

36 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

37 *Ibid* art 9(2), as incorporated in: *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, ATS 38 (entered into force on 1 January 1995), art 13; *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002) art 10; *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, ATS 27 (entered into force on 20 May 2002) art 16; *Australia-US Free Trade Agreement*, 18 May 2004, [2005], ATS 1 (entered into force on 1 January 2005) art 17.4.10(a).

15.35 The scope of broadcast copyright has long been tied up with debates regarding communications policy, including:

the facilitation of the subscription television industry, ensuring access to broadcasts in remote areas, and the introduction of digital and high-definition technologies. The desire to promote these goals of broadcast policy has led to broadcasters being denied certain rights they might, as copyright owners, expect to have.<sup>38</sup>

15.36 Copyright law has longstanding links with communications regulation, which has tended to emphasise the ‘special’ place of broadcasting in the media landscape. The *Copyright Act* contains, for example, many free-use and remunerated exceptions that take the circumstances of the broadcasting industry into account, including the statutory licensing scheme for radio broadcast of sound recordings and other exceptions discussed in Chapter 16.

15.37 Historically, regulators have pursued a range of public policy goals in relation to broadcasting, such as ensuring universal public access, minimum content standards (including classification and local content rules), diversity of ownership, competition and technological innovation.<sup>39</sup>

15.38 The retransmission scheme, in facilitating access to free-to-air broadcasts across media platforms, was intended to serve at least some of these public policy goals. The extent to which retransmission remains important may, however, be questioned in light of the convergence of media content and communications technologies. For example, if television audiences fragment across a multiplicity of broadcast, cable and online programming, or there is a move away from licensing media content providers, the case for a retransmission scheme that qualifies ordinary copyright principles may be weaker.

15.39 The retransmission scheme can be seen as favouring certain commercial interests in the communications and media markets. At present, subscription television providers do not need to license broadcast copyright when retransmitting free-to-air broadcasts, which advantages them by removing the need to negotiate rights with broadcasters. Similarly, cable and satellite subscription television providers have an advantage over internet content providers in being able to access the pt VC statutory licensing scheme for the underlying rights.

15.40 Whether the existing retransmission scheme produces good outcomes in terms of communications and competition policy is a matter beyond the scope of the ALRC’s Inquiry. Further, many aspects of communications and media regulation are under review, including as a response to the Convergence Review<sup>40</sup> and against the backdrop

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38 K Weatherall, ‘The Impact of Copyright Treaties on Broadcast Policy’ in A Kenyon (ed) *TV Futures: Digital Television Policy in Australia* (2007) 242, 254.

39 Ibid, 244.

40 The Convergence Review Committee was established to examine the operation of communications and media regulation in Australia and assess its effectiveness in view of the convergence of media content and communications technologies. The Review covered a broad range of issues, including media ownership laws, media content standards, the ongoing production and distribution of Australian and local content, and the allocation of radiocommunications spectrum: see Australian Government Convergence Review, *Convergence Review Final Report* (2012).

of the rollout of the National Broadband Network (NBN). In this context, the ALRC presents two options for reform. These options are based on two different sets of assumptions about the desirable scope of broadcast protection and the importance of retransmission.

### Option 1: Repeal of the retransmission scheme

15.41 Option 1 assumes that the retransmission of free-to-air television and radio broadcasts no longer needs to be facilitated in a converging media environment, and the extent to which retransmission occurs should be left to be determined by market mechanisms. In terms of the framing principles, this option would assume that the interest in promoting fair access to and wide dissemination of content (Principle 3) is no longer best served by the retransmission scheme.<sup>41</sup>

15.42 There are some indications suggesting that the retransmission scheme is no longer necessary. The scheme was originally intended to provide for the distribution of free-to-air broadcasts to areas which did not receive adequate reception. The regime facilitated self-help arrangements to enable individuals and communities to access free-to-air broadcasting services where the location or other reception difficulties meant that signal quality was not adequate or the signal was not available.<sup>42</sup>

15.43 With the introduction of subscription television into Australia in 1995, subscription television operators also began retransmitting the national and commercial television services as ‘free additions’ to their channels, without the permission or remuneration of either broadcasters or underlying rights holders.<sup>43</sup> While underlying rights holders are now remunerated under a statutory licensing scheme, the agreement or remuneration of the broadcaster is still not required, despite the extension of broadcast copyright in 2000.

15.44 To the extent that the purpose is to facilitate community access to free-to-air broadcasts, the retransmission scheme may no longer play a significant role apart from retransmission performed by organisations defined, since 1999, as self-help providers under the *Broadcasting Services Act*. Self-help providers do not have to remunerate either the free-to-air broadcaster or the underlying rights holders. The ALRC does not propose any change to the operation of free-use exceptions applying to retransmission by self-help providers. These exceptions appear to retain relevance<sup>44</sup> and there has been no indication that they require review.

15.45 In addition, since 2010, re-broadcast by ‘satellite BSA licensees’<sup>45</sup> has been authorised, subject to a separate statutory licensing scheme under the *Copyright Act*.<sup>46</sup>

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41 See Ch 2.

42 Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth).

43 Ibid.

44 The ACMA, in 2011–12, issued 417 broadcasting retransmission licences to regional councils and other self-help providers, mainly for television broadcasts: Australian Communications and Media Authority, *Annual Report 2011–12* (2012).

45 A ‘satellite BSA licensee’ means the licensee of a commercial television broadcasting licence allocated under *Broadcasting Services Act 1992* (Cth) s 38C: *Copyright Act 1968* (Cth) s 10.

46 *Copyright Act 1968* (Cth) pt VD.

Under this scheme, the Australian Government-funded Viewer Access Satellite Television service provides free-to-air digital television channels to viewers with inadequate terrestrial reception.

15.46 A possible second purpose for the retransmission scheme may have been to assist in the early development of subscription television and to ensure competition in content provision across media platforms. If so, this rationale may no longer be relevant, given the market penetration of established subscription television services.

15.47 The retransmission scheme may simply provide subscription television platforms with additional content for their offerings at a lower cost than might be the case if a commercial agreement were required. Subscription television providers benefit commercially because they are able to provide free-to-air channels as part of their subscription packages without having to negotiate a commercial fee, or conditions, with broadcasters.<sup>47</sup>

### **Repeal of the free-use exception for broadcast copyright**

15.48 The ALRC asked, in the Issues Paper, whether the retransmission of free-to-air broadcasts should continue to be allowed without the permission or remuneration of the broadcaster.<sup>48</sup>

15.49 Free-to-air broadcasters submitted that retransmission should be allowed to continue only with broadcasters' permission. Reform to implement this position was seen as justified for a number of reasons.

15.50 First, stakeholders asserted that the rationale for the retransmission free-use exception for broadcast copyright no longer exists, except in the case of self-help providers.<sup>49</sup> Free TV, for example, submitted that s 212 of the *Broadcasting Services Act* was introduced specifically to allow retransmission by self-help providers and was never intended to allow new services to retransmit free-to-air broadcasts without authorisation.<sup>50</sup> Commercial Radio Australia (CRA) stated that, while a provision allowing retransmission to remote communities that would not otherwise receive the broadcast may be justified, in the digital era, a 'blanket right for third parties to retransmit broadcasts' is not.<sup>51</sup>

15.51 Secondly, stakeholders questioned the justification for recognising underlying rights but, effectively, not copyright in the broadcast itself.<sup>52</sup> CRA, for example, submitted that both the broadcast and the underlying works or other subject matter are creative products and there is no 'reasonable basis for the current distinction between

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47 Free TV Australia, *Submission 270*.

48 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 35.

49 Free TV Australia, *Submission 270*; Commercial Radio Australia, *Submission 132*; TVB (Australia) Pty Ltd, *Submission 124*.

50 Free TV Australia, *Submission 270*.

51 Commercial Radio Australia, *Submission 132*.

52 Free TV Australia, *Submission 270*; Australian Writers' Guild & Australian Writers' Guild Authorship Collecting Society, *Submission 265*; Commercial Radio Australia, *Submission 132*.



the protection of the underlying content and the broadcast'.<sup>53</sup> Free TV stated that broadcast copyright acknowledges the 'creative and economic value of broadcasts' and the 'endeavours of a broadcaster in promoting, arranging and scheduling programming in a competitive commercial environment'. It also said that the retransmission free-use exception conflicts with the 'three-step test' under the *Berne Convention*.<sup>54</sup>

15.52 More generally, broadcasters had concerns about being unable to control the distribution of their broadcasts by competing platforms.<sup>55</sup> The Special Broadcasting Service (SBS), for example, referred to the need to 'strengthen protections against uses of SBS's broadcast signal by third parties which may affect the integrity of its presentation to viewers'.<sup>56</sup>

15.53 Allowing retransmission to be determined by consent would provide for the value to broadcasters and subscription television services of free-to-air broadcasts to be established through normal commercial negotiations between the two parties. This would give free-to-air broadcasters control over the commercial use of their signal, while allowing subscription television services the choice of which broadcasts they wish to retransmit, subject to the permission of the broadcaster.

15.54 At the same time, it would provide for the remuneration of free-to-air broadcasters where subscription television services were willing to pay for retransmission, while allowing them to decline to carry free-to-air broadcasts where the price is considered to be too high. In some cases, 'it is possible that carriage of the signals themselves could become the established market price for retransmission'—that is, no remuneration would need to be paid in either direction.<sup>57</sup>

### Repeal of the remunerated exception

15.55 If the free-use exception for broadcast copyright were repealed, so that the permission of the broadcaster is required for retransmission, this has implications for the operation of the remunerated exception—the statutory licensing scheme in pt VC of the *Copyright Act*.

15.56 If the free-use exception for broadcast copyright were repealed, this statutory licensing scheme would only come into effect if a market-based agreement were to be reached between a free-to-air broadcaster and a retransmitter. That is, if there is no agreement, there can be no retransmission and the need to remunerate underlying rights holders will not arise.

15.57 Further, if the free-use exception were repealed, while underlying rights holders would not directly determine whether retransmission is allowed, in practice, they may be able to prevent it, despite the existence of the pt VC licence. An underlying rights holder may condition licensing of their content for free-to-air broadcast on the basis

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53 Commercial Radio Australia, *Submission 132*.

54 Free TV Australia, *Submission 270*.

55 Ibid.

56 SBS, *Submission 237*.

57 See Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth), 13.

that retransmission will not occur, or that retransmission only occur on, for example, linear subscription television but not other technologies, such as 3G or 4G mobile networks.

15.58 Significant content owners, such as major professional sports bodies, could impose such conditions in negotiations around the sale of exclusive broadcasting rights. Therefore, although retaining the pt VC statutory licence would mean that the retransmitter would not have to negotiate with all the underlying rights holders over retransmission, the broadcaster may have to negotiate in order for retransmission to be able to occur.

15.59 In practice, it is questionable whether a broadcaster would have any incentive to undertake those negotiations—particularly in relation to any retransmitter other than established subscription television, such as Foxtel. Further, free-to-air broadcasters might decide to permit retransmission of only some of their channels and, for example, exclude sports channels from retransmission. The situation could also become more complex over time—a broadcaster might agree to retransmission at one point in time, and be placed in difficult position later when subsequent underlying rights holders refuse to licence retransmission.

15.60 Rather than facilitating retransmission, retaining pt VC may simply make negotiating retransmission more complicated. These problems mean that, in the ALRC's view, if the free-use exception is repealed, the remunerated exception for underlying rights should also be repealed, and retransmission left to be determined entirely by market mechanisms.

## **Option 2: Retention of the retransmission scheme**

15.61 Option 2 assumes a continuing need to facilitate the retransmission of free-to-air television and radio broadcasts, either to ensure access to free-to-air broadcasting or to facilitate market entry by new content service providers.

15.62 This means that a mechanism to ensure broadcasters are obliged to allow retransmission is still required; along with a statutory licensing scheme for the underlying rights, on the basis that it would be impracticable for retransmitters to negotiate the retransmission of free-to-air broadcasts.

## **A remunerated exception for broadcast copyright**

15.63 The ALRC asked, in the Issues Paper, whether the retransmission of free-to-air broadcasts should continue to be allowed without the permission or remuneration of the broadcaster.<sup>58</sup>

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58 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 35.

15.64 Perhaps unsurprisingly, subscription television interests considered that the existing retransmission exception should continue to operate,<sup>59</sup> while free-to-air broadcasters generally submitted that the permission of the broadcaster should be required.<sup>60</sup>

15.65 A central argument for retaining the current arrangements is that they benefit consumers through competition in the market, by ensuring that free-to-air broadcasts are available across platforms, so consumers may access these services terrestrially, or via cable or satellite.<sup>61</sup> ASTRA and Foxtel submitted that the existing retransmission regime works well for the benefit of consumers, has ensured access to free-to-air broadcast through commercial negotiation and that there is no justification for legislative reform.<sup>62</sup>

15.66 Screenrights stated that, from a commercial perspective, ‘access to the free to air broadcast channels is very important for a new entrant into the television market in Australia’.<sup>63</sup> In its view, retransmission has fostered competition in the broadcast market and has ‘encouraged new and diverse services, that probably were not considered at the time the scheme was created’.<sup>64</sup>

15.67 While requiring the permission of broadcasters for retransmission would provide broadcasters with an opportunity to negotiate remuneration directly, stakeholders considered that broadcasters already receive remuneration in other ways. That is, commercial broadcasters are ultimately remunerated for retransmission through higher ratings, which have a role in determining advertising revenue. In addition, broadcasters are often the underlying rights holders and receive remuneration under pt VC.<sup>65</sup>

15.68 ASTRA submitted that no evidence has been provided to show any loss of advertising revenue or potential audience reach as a result of retransmission of commercial television services on subscription platforms. Rather, commercial broadcasters were seen as effectively seeking an additional revenue stream from subscription television consumers ‘for television services that are required to be both freely available and usually funded by advertising, and where those customers can already receive those services without payment’.<sup>66</sup>

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59 ASTRA, *Submission 227*; Foxtel, *Submission 245*. News Ltd endorsed Foxtel’s submission in relation to retransmission: News Limited, *Submission 224*.

60 Free TV Australia, *Submission 270*; Commercial Radio Australia, *Submission 132*.

61 ASTRA, *Submission 227*; Screenrights, *Submission 215*.

62 Foxtel, *Submission 245*; ASTRA, *Submission 227*.

63 Screenrights, *Submission 215*. A number of other stakeholders expressly supported Screenrights’ submission in relation to retransmission: Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; Australian Directors Guild, *Submission 226*; Australian Copyright Council, *Submission 219*; Arts Law Centre of Australia, *Submission 171*.

64 Screenrights stated that these services include ‘satellite and cable residential subscription television, mobile television, fibre to the premises services, hospital communication systems and IPTV’ and that, in 2010–2011 more than 2.25 million households received retransmission: Screenrights, *Submission 215*.

65 Foxtel, *Submission 245*. ASTRA stated that free-to-air broadcasters currently receive a ‘substantial proportion of the remuneration payments made under Part VC’: ASTRA, *Submission 227*.

66 ASTRA, *Submission 227*.

15.69 Foxtel highlighted that retransmission is ‘an extremely limited right’, which only enables it to retransmit free-to-air broadcasts simultaneously with the terrestrial broadcast, in the licence area and in an unaltered fashion. Foxtel retransmits free-to-air broadcasts only for the convenience of its subscribers being able to access those channels through the one service.<sup>67</sup>

15.70 As discussed above, in the ALRC’s view, a scheme that allowed broadcasters to control whether or not broadcasts are retransmitted would be problematic for the operation of any statutory licensing scheme for the underlying rights. For this reason, if Option 2 is preferred, the ALRC proposes that broadcast copyright should also be subject to a statutory licence. This would ensure that retransmission can continue to operate, and provide some recognition for broadcast copyright.

15.71 A model for the new scheme is provided by pt VD of the *Copyright Act*. Part VD was introduced in 2010 as part of the changeover from analogue to digital television broadcasts.<sup>68</sup> A new service was implemented to transmit television by satellite to remote reception areas. As the new satellite service would mainly re-broadcast, pt VD provided a statutory licence to allow this without infringing copyright.

15.72 Unlike the pt VC licence, the pt VD licence extends to the copyright in the broadcast itself. For the satellite BSA licensee to be able to rely on the statutory licence of that copyright there must be an agreement, Copyright Tribunal order or undertaking covering payment to the broadcast copyright owner.<sup>69</sup> A similar scheme could apply to broadcast copyright in relation to retransmission.

15.73 Screenrights stated that the exclusion of broadcast copyright from pt VC is anomalous and, if pt VC were amended to include broadcasts within a statutory licence, it could ‘foresee no difficulties with administering this’.<sup>70</sup>

15.74 From the perspective of broadcasters, however, control of the broadcast rather than remuneration for retransmission may be the primary issue. Broadcasters would like to have the ability to refuse permission for retransmission in certain situations and the flexibility to negotiate remuneration, if appropriate.<sup>71</sup>

15.75 Free-to-air broadcasters would not necessarily ask to be remunerated in order for subscription television companies to retransmit their programs, because retransmission may increase their market penetration. At present, free-to-air broadcasters may, for example, pay for the costs of satellite transponder space in order to facilitate retransmission by subscription television services.

15.76 CRA stated that, in many cases, radio broadcasters would be willing to ‘authorise retransmission free of charge, so the imposition of a statutory licensing

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67 Foxtel, *Submission 245*.

68 *Broadcasting Legislation Amendment (Digital Television) Act 2010* (Cth).

69 *Copyright Act 1968* (Cth) s 135ZZZI. See Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.225].

70 Screenrights, *Submission 215*.

71 Commercial Radio Australia, *Submission 132*.

scheme may not be appropriate'. However, there are also 'situations where compensation would be appropriate, for example, if a third party were making a significant amount of revenue from the retransmission, or if the service competed directly with one offered by the broadcaster'.<sup>72</sup>

15.77 CRA also submitted that the industry should have the right to refuse permission for the retransmission of a broadcast, for a range of reasons—for example, where the broadcast licence area is 'so well serviced by traditional analogue and digital radio, and station simulcasts, that further fragmentation of the listenership through retransmission is unnecessary, and certainly outside the spirit of the original legislative drafters' intention'.<sup>73</sup>

15.78 The ALRC understands that, even under the current retransmission regime, free-to-air broadcasters already enter retransmission agreements with Foxtel. These agreements cover matters such as paying for satellite capacity, a channel's position on the electronic program guide, and the quality and reliability of reception. The small number of free-to-air broadcasters means that whether, and on what terms, retransmission takes place can generally be left to negotiation in the marketplace.

### **Remuneration for underlying rights**

15.79 The *Copyright Act* provides that the copyright in underlying works and other subject matter is not infringed by retransmission, if remuneration is paid under the pt VC statutory licensing scheme. Screenrights collects the licence fees, identifies the programs that are retransmitted and pays royalties to the rights holders. Royalties are generated when free-to-air broadcasts are simultaneously retransmitted by another service.

15.80 Questions may be raised about the retention of the pt VC scheme because, in other contexts, the ALRC has proposed that statutory licensing schemes should be repealed and licences for such uses negotiated voluntarily.<sup>74</sup>

15.81 However, pt VC appears to remain necessary for facilitating retransmission because, even where the broadcast is retransmitted with the consent of the broadcaster, the broadcaster may not have a licence from underlying copyright holders to authorise retransmission.

15.82 Further, because retransmission must be simultaneous with the free-to-air broadcast (the programming of which can change at any moment), it would be impractical for the retransmitter to seek licences to underlying rights, even if problems with the multiplicity of copyright holders could be overcome. Importantly, the retransmitter may have limited, or no prior notice of the broadcast content and would not necessarily be able to identify all the copyright holders.

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> See Chs 14 and 15, in relation to the pts VA and VB licensing schemes, as they apply to educational and government uses of copyright material.

15.83 The retention of pt VC would also retain the only statutory source of remuneration for directors because, under s 98 of the *Copyright Act*, directors are entitled to licence fees for retransmission.<sup>75</sup>

15.84 As discussed above, the ALRC presents alternative sets of proposals. Option 1 assumes that the retransmission of free-to-air television and radio broadcasts no longer needs to be facilitated in a converging media environment, and the extent to which retransmission occurs should be left to be determined by market mechanisms. Reform would involve the repeal of both the free-use exception applying to broadcast copyright and the remunerated exception in relation to copyright in the underlying rights.

15.85 Option 2 assumes a continuing need to facilitate the retransmission of free-to-air television and radio broadcasts, and that it would be impracticable for retransmitters to negotiate the retransmission of free-to-air broadcasts. Reform would involve replacing the free-use exception for broadcast copyright with a remunerated exception, similar to that applying to the underlying rights, which would be retained.

#### **Proposal 15–1**

**Option 1:** The exception to broadcast copyright provided by the *Broadcasting Services Act 1992* (Cth), and applying to the retransmission of free-to-air broadcasts; and the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of the *Copyright Act*, should be repealed. This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

**Option 2:** The exception to broadcast copyright provided by the *Broadcasting Services Act*, and applying to the retransmission of free-to-air broadcasts, should be repealed and replaced with a statutory licence.

### **Internet retransmission**

15.86 Section 135ZZJA of the *Copyright Act* provides that the pt VC statutory licensing scheme ‘does not apply in relation to a retransmission of a free-to-air broadcast if the retransmission takes place over the internet’ (the internet exclusion).

15.87 The following section discusses the internet exclusion and its underlying rationale. In a converging media environment, arguments may be advanced that the internet exclusion from the remunerated retransmission exception should be removed and replaced so that retransmission platforms are treated in a more technology-neutral way.

<sup>75</sup> The Australian Directors Guild expressed concern about the limited scope of directors’ copyright in films: Australian Directors Guild, *Submission 226*.

15.88 The ALRC proposes that the remunerated exception in relation to underlying rights should be amended by removing the internet exclusion and replacing it with provisions that require that any retransmission be subject to technological measures that limit communication to within Australia.

15.89 The discussion proceeds on the basis that either the existing retransmission scheme is to remain in place, or is to be modified by repealing the free-use exception for broadcast copyright and replacing it with a statutory licence (that is, Option 2 above).

15.90 In contrast, if Option 1 were implemented, the extent to which internet retransmission occurs would be entirely determined by market mechanisms. If a broadcaster wished to enter agreements to permit internet retransmission, the broadcaster would have to acquire the relevant rights from all the underlying right holders. If the underlying rights holders only have rights that are defined territorially, then the broadcaster would not be able to confer rights to broader communication. Any retransmission would have to be confined to territories in relation to which the retransmitter can obtain rights. Geoblocking (discussed below) would be a matter for negotiations between the parties.

### History of the internet exclusion

15.91 Professor David Brennan has stated that one government objective of the reforms leading to the retransmission scheme was ‘technological neutrality insofar as retransmission was not confined to any particular means’.<sup>76</sup> He stated that, in the face of concerns about the potential harm caused to copyright owners by internet retransmission,<sup>77</sup> the Government retained the technologically-neutral language in pt VC, but introduced the ‘over the internet’ exclusion in s 135ZZJA.<sup>78</sup>

15.92 These concerns about internet retransmission included fallout from controversy involving a Canadian company, iCraveTV, which had commenced internet retransmission of US television signals, resulting in successful litigation by US film studios and broadcasters to prevent it.<sup>79</sup> This highlighted the possible consequences of extra-territorial internet retransmission.

15.93 Concerns about internet retransmission were also reflected in art 17.4.10(b) of the Australia–US Free Trade Agreement (AUSFTA). This provides that ‘neither Party may permit the retransmission of television signals (whether terrestrial, cable, or

76 D Brennan, ‘Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?’ (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8.

77 See, eg, Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Copyright Amendment (Digital Agenda) Bill 1999* (1999).

78 See the legislative history summarised in D Brennan, ‘Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?’ (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8.

79 See *Ibid*, 26.8.

satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal'.<sup>80</sup>

15.94 The need for future re-negotiation of this provision was, however, anticipated. By mutual side letters, the Australian and US representatives agreed that if, at any time, 'it is the considered opinion of either party that there has been a significant change in the reliability, robustness, implementability and practical availability of technology to effectively limit the reception of Internet retransmissions to users located in a specific geographical market area', the parties would negotiate in good faith to amend the agreement.<sup>81</sup>

### Retransmission and the internet

15.95 The ALRC noted, in the Issues Paper, that the reason for excluding internet retransmission from the scheme appears to have been to avoid retransmitted content intended for Australian audiences being disseminated globally without the authorisation of the copyright holders.<sup>82</sup>

15.96 Given media convergence and other developments such as the NBN, the ALRC asked whether the pt VC scheme should apply in relation to retransmission over the internet and, if so, subject to what conditions.<sup>83</sup>

15.97 Many stakeholders favoured reform in this direction.<sup>84</sup> Media convergence was seen to have rendered the internet exclusion 'increasingly absurd from a consumer's perspective, as television services over the internet are often indistinguishable from those not over the internet'.<sup>85</sup> The Australian Directors Guild observed that with 'the advent of IPTV, Apple TV and the like it is almost impossible to distinguish signals transmitted over the Internet with those using broadcast spectrum'.<sup>86</sup>

15.98 The Australian Competition and Consumer Commission (ACCC) noted that, as technology continues to develop and consumers become increasingly able to view

80 No such restriction applies to radio, and the US has established a statutory licence for internet retransmission of radio broadcasts: *Copyright Act 1976* (US) 17 USC ss 112, 114. The ability to do so was preserved by *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005) art 17.6.3(c). See also K Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in A Kenyon (ed) *TV Futures: Digital Television Policy in Australia* (2007) 242.

81 *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005), side letter dated 18 May 2004, [2].

82 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [226]. See, D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8, 26.9.

83 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 36.

84 See, eg, SPAA, *Submission 281*; Music Council of Australia, *Submission 269*; Internet Industry Association, *Submission 253*; SBS, *Submission 237*; Australian Directors Guild, *Submission 226*; Telstra Corporation Limited, *Submission 222*; Australian Copyright Council, *Submission 219*; Australian Broadcasting Corporation, *Submission 210*; NSW Young Lawyers, *Submission 195*; Optus, *Submission 183*; Commercial Radio Australia, *Submission 132*. Some stakeholders stated that they were not opposed in principle to such reform, but considered it a matter of broadcast rather than copyright policy: Foxtel, *Submission 245*; News Limited, *Submission 224*.

85 Screenrights, *Submission 215*.

86 Australian Directors Guild, *Submission 226*.



many ‘different forms of broadcast on different platforms’, it is likely that the pt VC scheme will become even more restrictive. Therefore, the ACCC submitted, amendments to the retransmission scheme need to be considered.<sup>87</sup>

15.99 CRA stated that the commercial radio industry believes that any retransmission scheme should be extended to include the internet because exclusion ‘would lead to the internet being either unregulated, or would make it subject to a different set of regulations’, creating another layer of regulation that would further complicate the copyright licensing system.<sup>88</sup>

15.100 Optus stated that the internet exclusion in relation to free-to-air television broadcasts has created ‘significant legal uncertainty around transmission technologies such as IPTV and mobile devices using WiFi’ and that this has an adverse impact on the provision of content services:

Without the protection afforded to retransmissions under Part VC, it is not commercially feasible to offer FTA broadcasts over the internet including over WiFi—and because Optus is unable to re-transmit over WiFi, it is not commercially feasible to re-transmit the full suite of FTA channels over Mobile TV.<sup>89</sup>

15.101 Optus supported the extension of the pt VC scheme to apply to ‘all rebroadcasting, regardless of the delivery platform or viewing device’, and stated that it was fundamental to the success of such a regime that rights holders are prevented from obtaining ‘separate royalties for the same content for each delivery method or means of viewing the content’.<sup>90</sup>

15.102 Other stakeholders opposed any extension of pt VC to internet retransmission.<sup>91</sup> One reason was the perceived need to maintain territorial exclusivity in licensing. The Motion Picture Association of America (MPAA) noted that internet retransmission, unlike broadcast and subscription cable television, is ‘inherently global in nature’:

The resulting demise of the system of territorial exclusivity would decimate the value of broadcast programming and create chaos in the marketplace.<sup>92</sup>

15.103 Similar concerns about territorial licensing were also expressed by stakeholders who did not necessarily oppose reform of the internet exclusion, and are discussed below in relation to the ‘geoblocking’ of internet transmissions.

15.104 More generally, stakeholders expressed concern that removing the internet exclusion would undermine their commercial interests. The Australian Football League (AFL) stated that to permit unauthorised third parties ‘to retransmit on or via the internet and pay nothing or a statutory licence fee would undermine the exclusive

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87 ACCC, *Submission 165*.

88 Commercial Radio Australia, *Submission 132*.

89 Optus, *Submission 183*.

90 Ibid.

91 COMPPS, *Submission 266*; NRL, *Submission 257*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; Australian Film/TV Bodies, *Submission 205*; Motion Picture Association of America Inc, *Submission 197*.

92 Motion Picture Association of America Inc, *Submission 197*.

granting of rights and inevitably result in a significant financial detriment of copyright owners such as AFL'.<sup>93</sup>

15.105 The National Rugby League (NRL) compared the resulting situation to the problems for copyright owners caused by the Optus TV Now technology. In particular, the NRL submitted that, given the purpose of the retransmission right, there 'seems to be little justification in the scheme permitting the retransmission of copyright content over mobile telephone networks'.<sup>94</sup> The AFL also expressed concern that where content is broadcast on a delay into a particular market internet retransmission using an earlier free-to-air broadcast in another market 'would allow for earlier communication into delayed markets despite, and in breach of, agreements with local broadcasters'.<sup>95</sup>

### **Geoblocking**

15.106 While broadcasts are generally geographically limited in scope, the internet is a global system for the communication of copyright materials. Geoblocking refers to the practice of preventing internet users from viewing websites and downloading applications and media based on location, and is accomplished by excluding targeted internet addresses.<sup>96</sup>

15.107 Some stakeholders considered that the expansion of the pt VC scheme should take place on the basis that retransmissions are available only within Australia.<sup>97</sup> That is, expanding statutory licensing of retransmission to the internet may require technological means to limit communication, such as 'via a closed or managed IPTV environment, or necessitating the use of geoblocking to limit distribution within a licensed geography'.<sup>98</sup>

15.108 Many stakeholders submitted that that internet retransmission should be required to be subject to geoblocking.<sup>99</sup> Telstra observed that it should not be necessary to introduce a 'specific geoblocking condition for internet retransmission' because an organisation would be bound by the requirements of the licence to make 'whatever technical arrangements are necessary to restrict its supply to that licence area'.<sup>100</sup>

15.109 Screenrights identified that one option for maintaining geographical control of retransmission would be to require retransmitters to 'ensure that any retransmission is appropriately geoblocked to the original broadcast territory as a condition of relying on the pt VC licence'. It submitted that geoblocking technologies 'have advanced significantly since 2004, to the extent that television-like services are routinely made

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93 AFL, *Submission 232*.

94 NRL, *Submission 257*.

95 AFL, *Submission 232*.

96 Definition of 'geo-blocked' PC Mag, *E-encyclopedia* <[www.pcmag.com/encyclopedia](http://www.pcmag.com/encyclopedia)> at 25 February 2013.

97 See, eg, ARIA, *Submission 241*; PPCA, *Submission 240*.

98 Ericsson, *Submission 151*.

99 Internet Industry Association, *Submission 253*; ARIA, *Submission 241*; SBS, *Submission 237*; Screenrights, *Submission 215*; Australian Broadcasting Corporation, *Submission 210*.

100 Telstra Corporation Limited, *Submission 222*.

available over the internet in reliance on these technologies including ABC's iView service, Hulu, iTunes and Netflix'.<sup>101</sup>

15.110 The MPAA cautioned that geoblocking may not be the solution to problems resulting from internet retransmission. Although copyright holders who license copyright materials for internet retransmission commonly impose access controls, which may include a geographic component:

there is a world of difference between requiring geoblocking in the context of comprehensive access control obligations that the licensor can require its contract partner to enforce, and reliance upon geoblocking alone as carried out by a statutory licensee over which the copyright owner has, as a practical matter, far more limited leverage.<sup>102</sup>

### *Existing licensing practices*

15.111 There were also concerns that any expansion of the pt VC scheme should not trespass on existing licensing practices. ARIA, for example, noted that the music industry already licences websites that communicate audiovisual material containing sound recordings over the internet, and 'believes that such voluntary licensing schemes are the optimal and preferred model'.<sup>103</sup>

15.112 Screenrights noted that broadcasting services commonly simulcast their free-to-air channels over the internet and that this is 'currently managed effectively through voluntary licence arrangements, with broadcasters acquiring additional rights from underlying rights holders to enable web transmission of their broadcasts'.<sup>104</sup> Screenrights also expressed concern about internet retransmitters 'cherry picking' broadcasts of certain major events (such as the Olympics) for the statutory licence fee, which could be significantly lower than a commercial fee.<sup>105</sup>

15.113 Screenrights concluded that, while it believed the internet exclusion to be an anomaly, 'including internet retransmissions in Part VC (subject to geoblocking) would only create more problematic issues for rightsholders by seriously undermining their capacity to enter voluntary arrangements for internet retransmission'.<sup>106</sup>

15.114 The existing retransmission scheme covers only the retransmission of broadcasts in an unaltered and simultaneous manner,<sup>107</sup> which would appear to rule out 'cherry picking' the retransmission of certain events; and does not cover simulcast.

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101 Screenrights, *Submission 215*. However, Screenrights opposed including internet retransmissions in pt VC: Screenrights, *Submission 288*. ARIA also acknowledged that it may 'now be technically possible to restrict access to internet retransmission services to users located within Australia': ARIA, *Submission 241*.

102 Motion Picture Association of America Inc, *Submission 197*.

103 ARIA, *Submission 241*. See also PPCA, *Submission 240*.

104 Screenrights, *Submission 215*.

105 Screenrights, *Submission 288*.

106 Ibid.

107 *Copyright Act 1968* (Cth) s 10, definition of 'retransmission'.

### Removing the internet exclusion

15.115 The starting point for reform of the internet exclusion is whether geographically limiting retransmission of broadcasts remains an aim of communications policy and, if so, whether there is a better way to frame the scheme to facilitate that goal. As discussed above, Option 2 assumes that there is a continuing need to facilitate the retransmission of free-to-air television and radio broadcasts, either to ensure access to free-to-air broadcasting or to facilitate market entry by new content service providers.

15.116 Technological change, including that brought about by the NBN, may make forms of internet retransmission of broadcasts more feasible. However, at present, cable and satellite subscription television providers have an advantage over internet content providers in being able to access the pt VC statutory licensing scheme for underlying rights. If communications policy makers decide that it is important to facilitate the availability of online television, then it would be logical to consider extending the pt VC statutory licence to internet retransmission, so that broadcasters cannot block the provision of new content services.

15.117 Issues then arise about the need to limit retransmission geographically, including because of the territorial nature of underlying rights and to comply with obligations under the AUSFTA, assuming that this is to be renegotiated. These issues would include whether to restrict retransmissions:

- to broadcasting licence areas, as is the case with retransmission and broadcast copyright,<sup>108</sup> or to ‘Australia’ or some other formulation;
- by geographic location where the retransmission is received, or by where the subscriber is ordinarily resident—that is, should a person who becomes a subscriber to an internet television service be able to receive retransmissions when they are overseas?

15.118 In relation to broadcast generally, the Convergence Review concluded, with the increasing availability of broadband, content services can be delivered over the internet across Australia and the world, and that it is ‘no longer efficient or appropriate for the regulator to plan for the categories of broadcasting service for different areas and issue licences to provide those services’.<sup>109</sup>

15.119 Assuming the way is made open to remove the internet exclusion, determining exactly how reform should be implemented would require further detailed consideration. For example, repeal of s 135ZZJA might be ‘subject to ensuring any retransmission is appropriately geoblocked, and subject to the exclusion of retransmissions that can and should fall within voluntary licensing regimes’.<sup>110</sup>

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108 *Broadcasting Services Act 1992* (Cth) s 212(1)(b).

109 Australian Government Convergence Review, *Convergence Review Final Report* (2012), viii.

110 Screenrights, *Submission 215*.

15.120 The removal of the internet exclusion may also mean new Copyright Tribunal cases on appropriate levels of remuneration under pt VC. In relation to remuneration, the Copyright Tribunal has concluded that the benefits to subscription television consumers of the retransmissions, and therefore the value of those retransmissions to subscription television companies, are best described under the heading of ‘convenience’—the advantage to consumers of only having to use one remote control to access subscription and free-to-air channels.<sup>111</sup> While assessment of remuneration has been based on the value to retransmitters—which has been equated with the convenience to consumers—with online retransmission there is more potential for mobile access and the value to consumers may be very different.

15.121 The ALRC proposes that retransmission ‘over the internet’ should no longer be excluded from the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of the *Copyright Act*. Rather, the retransmission scheme should be amended to apply to retransmission by any technique, subject to geographical limits on reception.

15.122 Exactly how these geographical limits should be defined is yet to be determined. At present, the *Copyright Act* does not place geographical limits on the statutory licence for retransmission.<sup>112</sup> At the least, it should be a condition of the statutory licence that retransmission be limited to Australia. Such a provision should, however, not prescribe the technological or other measures by which such limits are effectively imposed.

15.123 Extending the pt VC scheme to retransmission over the internet would involve Australia negotiating amendments to the AUSFTA.<sup>113</sup> However, arguments may be made that excluding the internet from the retransmission scheme is no longer the best means of controlling the reach of retransmission, and that the conditions precedent in this side letter have been met.<sup>114</sup> The ALRC’s final Report may suggest that the Australian Government seek to negotiate an amendment to remove art 17.4.10(b) from the AUSFTA.

15.124 More generally, the ALRC is interested in comment on the ramifications of removing the internet exclusion and any consequential amendments to the retransmission scheme that may be necessary. For example, existing provisions require that retransmission in relation to a broadcast means ‘the content of the broadcast is unaltered (even if the technique used to achieve retransmission is different to the technique used to achieve the original transmission)’.<sup>115</sup> Where retransmission takes place over the internet there may need to be some room for minor alterations in the content of the broadcast, if only to take account of different formats. For example, if

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111 *Audio-Visual Copyright Society Limited v Foxtel Management Pty Limited* [2012] ACopyT 1 (1 June 2012), [188].

112 The *Broadcasting Services Act* provides, in relation to the free-use exception, that retransmission must be within the relevant broadcasting licence area: *Broadcasting Services Act 1992* (Cth) s 212(1)(b).

113 *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005).

114 Screenrights, *Submission 215*.

115 *Copyright Act 1968* (Cth) s 10, definition of ‘retransmission’.

free-to-air broadcasts are viewed through a web browser there may be some unavoidable alteration in content.

15.125 In making its proposal, the ALRC recognises that it can be argued the internet exclusion is primarily a matter of communications and media policy, rather than copyright. The Convergence Review noted that emerging platforms, including internet protocol television (IPTV), are not covered comprehensively by existing content regulation and the availability of internet content on smart televisions means that viewers can move easily between ‘regulated broadcast content’ and ‘unregulated internet content’.<sup>116</sup>

15.126 There are unresolved questions about how IPTV and other television-like online content should be regulated under the *Broadcasting Services Act* or successor legislation for the purposes of, among other things, imposing content standards and obligations with regard to Australian content. The Convergence Review recommended that new content services legislation should replace the *Broadcasting Services Act*; and communications legislation should be reformed to provide a technology-neutral framework for the regulation of communications infrastructure, platforms, devices and services.<sup>117</sup>

15.127 The current retransmission provisions may be seen as favouring some players in the subscription television market, depending on the technological platform used (that is, cable and satellite over internet). Removing these provisions may favour the internet as a content platform and raise general regulatory issues, including the future of broadcast licensing, which cannot and should not be solely resolved the context of reform of copyright laws.

**Proposal 15–2** If Option 2 is enacted, or the existing retransmission scheme is retained, retransmission ‘over the internet’ should no longer be excluded from the statutory licensing scheme applying to the retransmission of free-to-air broadcasts. The internet exclusion contained in s 135ZZJA of the *Copyright Act* should be repealed and the retransmission scheme amended to apply to retransmission by any technique, subject to geographical limits on reception.

**Question 15–1** If the internet exclusion contained in s 135ZZJA of the *Copyright Act* is repealed, what consequential amendments to pt VC, or other provisions of the *Copyright Act*, would be required to ensure the proper operation of the retransmission scheme?

## Clarifying the internet exclusion

15.128 As discussed above, retransmission of a free-to-air broadcast that ‘takes place over the internet’ is excluded from the remunerated exception by virtue of

<sup>116</sup> Australian Government Convergence Review, *Convergence Review Final Report* (2012), 40.

<sup>117</sup> *Ibid.*, 106–107.

s 135ZZJA of the *Copyright Act*. There is currently considerable uncertainty over the meaning of this phrase and, in particular, its application to IPTV.<sup>118</sup>

15.129 While the ALRC considers that the internet exclusion from the remunerated exception for retransmission should be repealed, in view of the need to renegotiate provisions of the AUSFTA and for further Government consideration of the complex issues that such a reform may raise, this is unlikely to happen in the short term. In the meantime, or if the Government determines that the internet exclusion should remain, the scope of the exclusion and its application to IPTV, in particular, should be clarified.

### Interpretation of ‘over the internet’

15.130 The application of the internet exclusion to IPTV is not entirely clear. In particular, whether retransmission by an IPTV service ‘takes place over the internet’ may depend on the functional characteristics of the service.<sup>119</sup> For example, it seems to be accepted that some IPTV retransmission may fall within the operation of the pt VC scheme because ‘while the retransmission occurs over infrastructure shared by an Internet connection, as a direct feed from [internet service provider] to customer at no point is connection to the Internet by either ISP or customer necessitated’.<sup>120</sup>

15.131 Other IPTV retransmission may not fall within the scheme—for example, where the retransmission is ‘over the top’ of existing infrastructure and does not require business or technology affiliations with the host internet service provider or network operator.

15.132 ‘Over the top’ television (OTT TV), in this context, means a television-like service where content is delivered over an unmanaged network such as broadband internet, for example, through Telstra T-Box.<sup>121</sup> As a result, some current subscription IPTV services are able to offer access to free-to-air broadcasts only because they include built-in digital TV tuners in their set top boxes.

15.133 Other questions that arise in interpreting the internet exclusion include whether it includes retransmissions that use internet protocol networks only in part. For example, if a retransmission uses the internet to ‘transmit’ to a transmitter, which then uses radio frequency spectrum to communicate content to mobile devices is this ‘over the internet’? Or must the entire retransmission both originate and terminate on the internet?

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118 For the purposes of this discussion, the term IPTV includes TV-like services where content is delivered by internet protocol, whether over the content provider’s own network or ‘over the top’ of existing infrastructure; and only includes streamed and not on demand content.

119 See, eg, D Brennan, ‘Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?’ (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.1.

120 Ibid, 26.9.

121 Adapting language used by Broadcast Australia: Broadcast Australia, *Submission 133*.

15.134 In the Issues Paper, the ALRC asked whether the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to IPTV needs to be clarified, and if so, how.<sup>122</sup>

15.135 A number of stakeholders agreed that some clarification is desirable.<sup>123</sup> Screenrights observed that, for example:

Foxtel is not provided over the internet to a Foxtel set top box but it is provided over the internet to the Foxtel X-box service. But to a consumer, they are more or less the same. Similarly, IPTV services such as Fetch TV and Telstra T-Box are also impossible to distinguish but one happens to be over the internet, while the other is not.<sup>124</sup>

15.136 The ABC observed that the term IPTV has ‘no commonly accepted definition in the industry’ and the current legal position of some operators under the retransmission scheme ‘is not clear as it might be argued that they are not able to access pt VC legally because they are retransmitting via the internet’.<sup>125</sup>

### **Amending the internet exclusion**

15.137 If the internet exclusion is to remain, its scope should be clarified. At present, the internet exclusion may give some providers of IPTV services a competitive advantage over others, in being able to rely on the pt VC scheme to carry free-to-air broadcasts, despite services being identical to the end consumer.<sup>126</sup>

15.138 While there are differing interpretations, it seems widely accepted that some forms of IPTV are not considered to take place ‘over the internet’, for the purposes of the internet exclusion. On the other hand, it seems that OTT TV is considered excluded. While the ALRC understands that OTT TV retransmission of high rating free-to-air broadcasts is unlikely to be offered because it would be likely to overload most internet delivery networks, it is possible that small audience free-to-air channels might be retransmitted in such a way.

15.139 In copyright law terms, the current interpretation may lead to arbitrary distinctions between retransmission platforms that are not based on the underlying purpose of the exclusion.

15.140 For example, the ACMA distinguishes, for communications policy purposes, between IPTV ‘delivered over managed IP-based networks’ and ‘over-the-top’ content, which is delivered ‘direct to the consumer without the internet service provider being involved in the control or distribution of the content’.<sup>127</sup> The extent of an ISP’s

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<sup>122</sup> Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 37.

<sup>123</sup> APRA/AMCOS, *Submission 247*; Screenrights, *Submission 215*; Australian Broadcasting Corporation, *Submission 210*; Optus, *Submission 183*.

<sup>124</sup> Screenrights, *Submission 215*.

<sup>125</sup> Australian Broadcasting Corporation, *Submission 210*.

<sup>126</sup> Screenrights, *Submission 288*.

<sup>127</sup> Australian Communications and Media Authority, *Online Video Content Services in Australia: Latest Developments in the Supply and Use of Professionally Produced Online Video Services*, Communications report 2011–12 series: Report 1 (2012), 6.



involvement does not, however, seem relevant in copyright policy terms, even if it is relevant for the purposes of regulation under the *Broadcasting Services Act*.

15.141 The development of the NBN makes it important to clarify the position. The intention is that the NBN will enable content providers to retransmit using internet protocol multicasting, in reliance on the pt VC licence.<sup>128</sup> The NBN Co's Multicast feature is being marketed as 'particularly suitable' for IPTV service delivery.<sup>129</sup> There may be difficulties, and cost implications, in enforcing restrictions on the retransmission of free-to-air broadcasts using the NBN.

15.142 The rationale for excluding retransmission 'over the internet' from the retransmission scheme appears to have been to avoid retransmitted content intended for Australian audiences being disseminated globally without the authorisation of the copyright holders.

15.143 The ALRC's proposal to remove the internet exclusion, subject to geographical limits on retransmission, would mean that it would not be necessary to deal with the problem of applying the terms of the exclusion to various forms of internet retransmission, including IPTV, and all the possible technological configurations.

15.144 However, if the internet exclusion is to remain, it should be redrafted to reflect its purpose of ensuring that internet retransmission does not lead to retransmission that is geographically unlimited. That is, it should be redrafted to reflect the fact that internet protocol technology can be 'employed in closed, secure distribution systems that offer complete protection against copying and redistribution of programming over the Internet, and that respect the principle of territorial exclusivity'.<sup>130</sup>

15.145 The ALRC is interested in comment on how this might be done. For example, should the exclusion be expressed so as to allow retransmission using internet protocol to identifiable subscribers within Australia and subject to access control technological protection measures?

**Proposal 15-3** If it is retained, the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* should be clarified.

**Question 15-2** How should the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* be clarified and, in particular, its application to internet protocol television?

128 Screenrights, *Submission 215*.

129 NBN Co, *Multicast—Broadcasting the Future* <[www.nbnco.com.au/getting-connected/service-providers/multicast.html](http://www.nbnco.com.au/getting-connected/service-providers/multicast.html)> at 2 March 2013. NBN multicasts 'will be accessible from the same physical port on the NBN Co network termination equipment as the accompanying broadband internet connection': Broadcast Australia, *Submission 133*.

130 Motion Picture Association of America Inc, *Submission 197*.

## Must carry obligations

15.146 The ALRC, in the Issues Paper, noted that calls to strengthen broadcasters' rights in relation to retransmission have included suggestions that a US-style 'must carry' regime should be implemented.<sup>131</sup> Under such a regime, free-to-air broadcasters have the option of either requiring that free-to-air broadcasts be carried on cable or another platform, or requiring that the free-to-air broadcaster is remunerated where the other platform chooses to retransmit the signal.<sup>132</sup>

15.147 Many jurisdictions have must carry regimes. These were designed primarily to ensure that locally-licensed television stations must be carried on cable providers' systems, mainly to protect local broadcasters from distant competitors and, in Europe, to protect local language channels. For example, in the absence of must carry obligations cable providers might only carry major capital city channels.

15.148 In Australia, the apparent purpose of a must carry regime would be to provide a framework for commercial negotiations between free-to-air broadcasters and subscription television companies about payments for broadcasts retransmitted by the latter. A must carry regime would also ensure that, in future, free-to-air broadcasters are not forced to pay for carriage on subscription platforms—particularly if IPTV becomes a primary platform with the advent of the NBN.

15.149 A number of stakeholders addressed the issue of must carry regimes in submissions to this Inquiry. Free TV was emphatically in favour of the introduction of such a regime—a view that was opposed by other stakeholders.<sup>133</sup>

15.150 Free TV submitted that a US-style 'must carry/retransmission consent' regime should be introduced in Australia to ensure certainty of carriage and provide broadcasters with the ability to withhold consent and negotiate fees and terms of retransmission. This, it was said, would ensure that broadcasters are fairly compensated, while viewers can continue to access free-to-air services. The rollout of the NBN and the 'likely proliferation of new entertainment platforms' were said to highlight the need for urgent action.<sup>134</sup>

15.151 In contrast, Screenrights submitted that a must carry regime is not necessary in Australia and that such a regime would be both 'unworkable and anti-competitive' and contrary to the interest of underlying copyright owners.<sup>135</sup>

15.152 Screenrights considered that the context of retransmission in Australia is significantly different from that in overseas jurisdictions that have must carry regimes. First, the Australian retransmission rules effectively limit retransmission of commercial channels to local signals only—removing concerns about retransmission of distant

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131 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [221]–[222].

132 Australian Government Convergence Review, *Convergence Review Final Report* (2012), 33.

133 SPAA, *Submission 281*; Foxtel, *Submission 245*; ASTRA, *Submission 227*; Australian Directors Guild, *Submission 226*; News Limited, *Submission 224*; Screenrights, *Submission 215*.

134 Free TV Australia, *Submission 270*.

135 Screenrights, *Submission 215*.

signals.<sup>136</sup> Secondly, for a must carry regime to be applied in Australia, it would have to include existing satellite based television service providers such as Foxtel and Austar. Screenrights submitted that it would not be ‘commercially viable to retransmit local signals via satellite due to the large number of small licence areas’.<sup>137</sup>

15.153 Foxtel also contrasted the US position with that in Australia, suggesting that it would be inappropriate to implement must carry in Australia. It stated that, while the key objective in the US was to ensure that consumers could continue to receive signals in circumstances where cable television penetration was high and consumers did not have access to television signals via aerials, in Australia, almost 99% of the population has access to free-to-air television and cable and satellite penetration is significantly lower.<sup>138</sup>

15.154 ASTRA highlighted the fact that successive Australian Governments have ‘invested many hundreds of millions of dollars since 2001 to ensure universal access to digital FTA television by terrestrial means, or by satellite where terrestrial reception is not feasible’.<sup>139</sup>

15.155 Free-to-air broadcasters not only want the free-use exception removed but also favour the imposition of must carry obligations on subscription television services. The ALRC has concluded, however, that it should make no proposal on whether reform of the retransmission exception applying to broadcast copyright should involve the imposition of must carry obligations on subscription television service providers.

15.156 Essentially, must carry provisions would operate to impose obligations to communicate copyright materials (broadcasts), at the behest of the copyright holder. This issue does not directly concern the operation of copyright exceptions, which are the subject of the Terms of Reference. Further, the policy rationales for must carry regimes are clearly based primarily on communications and media policy and are not issues that can, or should, be driven by the ALRC in the context of reform of copyright laws.

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136 That is, retransmission generally must be within the licence area of the transmitter: *Broadcasting Services Act 1992* (Cth) s 212(1)(b).

137 Screenrights, *Submission 215*.

138 Foxtel, *Submission 245*.

139 ASTRA, *Submission 227*.



## 16. Broadcasting

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### Summary

16.1 This chapter examines the operation of exceptions in the *Copyright Act 1968* (Cth) that refer to the concept of a ‘broadcast’ and ‘broadcasting’. There are more than a dozen of these exceptions, which are referred to in this chapter as the ‘broadcast exceptions’.

16.2 Some of the broadcast exceptions operate to provide exceptions for persons engaged in making broadcasts—in effect, the definitions of ‘broadcast’ and ‘broadcasting’ in these sections serve to limit the availability of these exceptions to content providers that are broadcasting services for the purposes of the *Broadcasting Services Act 1992* (Cth).

16.3 Other exceptions operate to provide exceptions for persons receiving, communicating or making copies of broadcasts. The references to ‘broadcast’ in these sections serve to limit the application of these sections to broadcasts made by content providers that are broadcasting services for the purposes of the *Broadcasting Services Act*.

16.4 The ALRC concludes that, in a context of media convergence, and given the general desirability of a technology-neutral approach to copyright law reform,<sup>1</sup> the concept of a ‘broadcast’ should generally extend to similar content made available using the internet.

16.5 The ALRC proposes that the *Copyright Act* be amended to ensure that some broadcast exceptions also apply to transmissions of television programs or radio programs using the internet, removing any unnecessary link between the scope of copyright exceptions and regulation under the *Broadcasting Services Act*. In addition, some broadcast exceptions might be repealed if a new fair use exception, or new exception for quotation, is enacted.

16.6 The chapter also examines the scope of the statutory licensing scheme for the broadcasting of published sound recordings and asks whether caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings should be repealed, or the scheme replaced by voluntary licensing.

### **The definition of ‘broadcast’**

16.7 The *Copyright Act* defines the term ‘broadcast’ to mean ‘a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act*’.<sup>2</sup>

16.8 The *Broadcasting Services Act* defines a ‘broadcasting service’ to mean ‘a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means’. A broadcasting service does not include:

- (a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or
- (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.<sup>3</sup>

16.9 A ministerial determination, made in 2000 under the *Broadcasting Services Act*, excludes a ‘service that makes available television and radio programs using the internet’ from the definition of a broadcasting service.<sup>4</sup>

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1 See Ch 2.

2 *Copyright Act 1968* (Cth) s 10.

3 *Broadcasting Services Act 1992* (Cth) s 6.

4 *Commonwealth of Australia Gazette—Determination under Paragraph (c) of the Definition of ‘Broadcasting Service’*, (No 1 of 2000), Commonwealth of Australia Gazette No GN 38, 27 September 2000.

16.10 The primary reasons for the ministerial determination were to ensure that developing internet audio and video streaming services were not regulated as broadcasting services under the *Broadcasting Services Act* and to clarify the regulatory position of datacasting over broadcasting services bands.<sup>5</sup>

16.11 However, it also has a significant effect on the scope of the broadcast exceptions under the *Copyright Act*, as discussed below. Among other things, it means that while free-to-air and subscription cable and satellite television transmissions are covered, transmissions of television programs using the internet are not.<sup>6</sup>

### **Broadcast exceptions and the *Rome Convention***

16.12 As discussed in Chapter 15, the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (*Rome Convention*) established a regime for protecting rights neighbouring on copyright, including minimum rights for broadcasting organisations.<sup>7</sup> These rights can be protected by copyright law, as in Australia, or by other measures. Broadcasting and re-broadcasting are defined under the *Rome Convention* as ‘the transmission by wireless means for public reception of sounds or of images and sounds’.<sup>8</sup>

16.13 The Convention provides for permitted exceptions, which include private use; the use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research.<sup>9</sup>

16.14 In addition, signatories may provide for the same kinds of limitations with regard to the protection of broadcasting organisations as domestic law provides ‘in connection with the protection of copyright in literary and artistic works’.<sup>10</sup>

### **Use of ‘broadcast’ in copyright exceptions**

16.15 A range of exceptions in the *Copyright Act* use the terms ‘broadcast’, ‘broadcasting’ or ‘broadcaster’. These exceptions include those concerning time shifting and retransmission of free-to-air broadcasts, which are discussed separately elsewhere.<sup>11</sup> Other exceptions that refer to the concept of a broadcast include those

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5 See *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013] FCAFC 11, [52]–[46].

6 While some forms of internet protocol television (IPTV) and internet radio are treated as broadcasting services under the *Broadcasting Services Act*, others are not—for example, where television-like content is delivered over an unmanaged network, such as broadband internet (‘over the top’). This is discussed in more detail in Ch 15.

7 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964).

8 *Ibid.*, art 3(f).

9 *Ibid.*, art 15.

10 *Ibid.*, art 15(2).

11 See Chs 9, 15.

providing for free-use exceptions<sup>12</sup> and for remunerated use, subject to statutory licensing.<sup>13</sup>

16.16 Distinctions currently made in copyright law between broadcast and other platforms may be increasingly difficult to understand in a changing media environment. Similar content includes, increasingly, television content made available on the internet and internet radio.

16.17 The Australian Communications and Media Authority (ACMA) advised that an online research survey, conducted in 2011, showed that almost four in 10 respondents watched television or video content both offline and online (38%); less than a third watched this material solely offline (31%); and some were solely online viewers (12%).<sup>14</sup>

16.18 A recent ACMA report highlights growth in the availability of commercially-developed video content over the internet. This includes: catch-up television offered by free-to-air broadcasters on an 'over the top' basis, enabling viewers to access recently aired shows via the internet; high-end internet protocol television (IPTV) services providing users with access to video content in return for a subscription, or fee-per-view provided by internet service providers; and 'over the top' content services offered direct from the content provider to the consumer.<sup>15</sup>

16.19 The ACMA notes that 'the supply of IPTV services has continued to expand over the 2011–12 period, encouraged by increased competition between ISPs and higher available bandwidth'. The ways in which consumers can access video content, including IPTV services, are expanding and the rollout of the National Broadband

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12 Relevant free-use exceptions are provided by: *Copyright Act 1968* (Cth) ss 45, 47(1), 70(1), 107(1), 67, 199, 200(2). In addition: s 28(6) provides a free-use exception for the communication of television and sound broadcasts, in class, in the course of educational instruction. However, because the performance and communication of works or other subject-matter contained in the broadcast is covered by s 28(1), (4) and there is no copyright in an internet transmission itself, internet transmission is effectively covered. Similarly, s 135ZT provides a free-use exception. The exception is part of the statutory licence under pt VB for institutions for making copies or communications of television broadcasts solely for persons with an intellectual disability. Because the copying and communication of 'eligible items' contained in the broadcast is covered by s 135ZT, internet transmission is effectively covered. Sections 47AA and 110C provide free-use exceptions for the reproduction of broadcasts for the purpose of simulcasting them in digital form. These provisions relate specifically to the switchover from analog to digital broadcasting in Australia. Section 105 provides a free-use exception for the broadcasting of certain sound recordings that originate overseas. The purpose of the exception is to prevent performing and broadcasting rights being extended to some foreign-origin sound recordings that were first published in Australia. These broadcast exceptions are not discussed in this chapter.

13 Relevant exceptions that provide for remunerated use under statutory licensing schemes are provided by: *Ibid* ss 47(3), 70(3), 107(3), 47A, 109; pt VA.

14 ACMA, *Submission 214*.

15 Australian Communications and Media Authority, *Online Video Content Services in Australia: Latest Developments in the Supply and Use of Professionally Produced Online Video Services*, Communications report 2011–12 series: Report 1 (2012), 1. 'Over the top' refers to communications over existing infrastructure that does not require business or technology affiliations with the host internet service provider or network operator: see Ch 15.



Network is likely to provide significant additional stimulus to the supply and take up of online content.<sup>16</sup>

16.20 Stakeholders identified the existing definition of broadcast, for copyright law purposes, as increasingly problematic in this environment.<sup>17</sup> The Australian Broadcasting Corporation (ABC) noted that, due to technological change, statutory licences under ss 47, 70, 107 and 109 of the *Copyright Act* provide only part of the rights necessary for the ABC to deliver content. The ABC stated that when content is broadcast relying on one of these statutory licences, it is ‘administratively burdensome, complex and costly’ to then have to seek licences when the content moves online, for example, for catch-up television. This, the ABC said, ‘renders the statutory licence ineffective in the digital economy’.<sup>18</sup> The ABC suggested that these provisions ‘need to be rephrased in a technology-neutral way in order to support broadcasters as technologies converge’.<sup>19</sup>

### The link with communications regulation

16.21 Extending the scope of the broadcast exceptions to take account of new technologies is not a new phenomenon. Prior to the *Copyright Amendment (Digital Agenda) Act 2000* (Cth), ‘broadcast’ was defined as to ‘transmit by wireless telegraphy to the public’. The digital agenda legislation substituted an extended technology-neutral definition, mainly in order to cover cable transmissions.

16.22 This extension occurred in the context of the enactment of a new right of communication to the public, replacing and extending the existing broadcasting and cable diffusion rights.<sup>20</sup> A definition of ‘broadcast’ was retained, however, because the Government ‘decided to retain most of the existing statutory licences and exceptions in the Act in relation to broadcasting and not extend these licences to apply in relation to communication’.<sup>21</sup>

16.23 The distinction between broadcasts by broadcasting services and other electronic communication to the public in the *Copyright Act* comes about indirectly, by virtue of a ministerial determination made under the *Broadcasting Services Act*—for purposes that include the coverage of licence fee requirements, local content requirements, programming standards and advertising restrictions.

16.24 The Government decision not to extend the scope of exceptions was consistent with earlier conclusions of the Copyright Law Review Committee (CLRC). The CLRC had considered how the Government’s proposed digital agenda reforms should address

16 Ibid, 2.

17 For example, Copyright Advisory Group—Schools, *Submission 231*; Australian Broadcasting Corporation, *Submission 210*; Pandora Media Inc, *Submission 104*.

18 Australian Broadcasting Corporation, *Submission 210*.

19 Ibid.

20 *Copyright Act 1968* (Cth) s 31(1)(a)(iv), (b)(iii) inserted by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

21 Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), Notes on clauses, [7].

whether exceptions should extend beyond communications to the public delivered by a broadcasting service.<sup>22</sup>

16.25 The CLRC recommended specifically that the ephemeral rights provisions<sup>23</sup> should not be further extended (beyond cable transmission). In reaching this conclusion, the CLRC noted that these exceptions operate for the benefit of those broadcasters ‘who have paid for the right to broadcast the copyright materials used in their broadcast programs’.<sup>24</sup> As the makers of other transmissions to the public were ‘not technically broadcasters’, the CLRC stated that

A consequence of this is that there is presently no obligation for them to obtain a licence for the transmission of the copyright materials they use. Accordingly, the Committee is of the view that extending the ephemeral copying provisions to the makers of such transmissions is not justified.<sup>25</sup>

16.26 Similarly, in relation to s 199, the CLRC contrasted broadcasters licensed under the *Broadcasting Services Act* and other content providers, stating that the latter are

presently not required to obtain a licence from copyright owners. Accordingly, no fee is paid that can be characterised as compensating copyright owners for the subsequent public performance of their materials by persons who receive those transmissions. For this reason, the scope of s 199(1), (2) and (3) should continue to be confined to licensed broadcasts.<sup>26</sup>

16.27 Since the digital agenda reforms, however, internet transmission is clearly an exclusive right covered by copyright. A continuing link between the scope of some copyright exceptions and the regulatory definition of a broadcasting service under the *Broadcasting Services Act* may be unnecessary. While a broadcasting service may have additional obligations to comply with copyright law—for example, under broadcasting licence conditions—this does not mean that other content providers are not obliged by copyright law to obtain licences to communicate copyright materials over the internet.<sup>27</sup>

16.28 The reasons for excluding internet transmission from the definition of broadcasting services included that the business models for internet content providers might be significantly different from those of traditional broadcasters; and that licensing would lead to a competitive disadvantage for Australian content providers and might impede the growth of alternatives to traditional broadcasting.<sup>28</sup>

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22 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999), [7.103]–[7.105].

23 *Copyright Act 1968* (Cth) ss 47, 70, 107.

24 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999), [7.105].

25 *Ibid.*, [7.105].

26 *Ibid.*, [7.72].

27 While internet-only media are not regulated as broadcasting services, they are subject to content regulation under *Broadcasting Services Act 1992* (Cth) schs 5, 7.

28 See D Brennan, ‘Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?’ (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.6–26.7; Department of Communications, Information Technology and the Arts, *Report to Parliament: Review of Audio and Video Streaming over the Internet* (2000).

16.29 While the exclusion of internet content services from *Broadcasting Services Act* regulation may promote competition and innovation in broadcasting, it may have had an unintended and opposite effect in the copyright context—privileging traditional broadcast over internet transmission.

16.30 Another reason to remove the link with the *Broadcasting Services Act* is that media and communications regulation is itself undergoing significant review. This is the case most notably in relation to broadcast licensing, where the Convergence Review has recommended that geographically-based licences no longer be required to provide content services.<sup>29</sup> At the least, this seems to indicate that the ‘licensed broadcaster’ criteria in ss 47A, 109 and 152 may require review.

### Exceptions for broadcasters

16.31 Sections 45, 47A, 47, 70, 107, 67 and 109 operate to provide exceptions for persons engaged in making broadcasts. In effect, the definitions of ‘broadcast’ and ‘broadcasting’ in these sections serve to limit the availability of these exceptions to broadcasting services, as defined by the *Broadcasting Services Act*. They provide broadcasting services with advantages as compared with other content providers who provide content over the internet. The provisions may also operate as a barrier to broadcasters using the internet as an alternative platform for communicating their own content.

16.32 In considering exceptions for broadcasters, the issues include whether:

- a justification remains for an exception currently applying to broadcasters; and
- media content providers other than licensed broadcasters should have a ‘level copyright playing field’.

16.33 As discussed in Chapter 15, copyright law has longstanding links with communications regulation, which has tended to emphasise the ‘special’ place of broadcasting in the media landscape. To some extent, the scope of some broadcast exceptions may reflect the special characteristics of broadcasts, particularly free-to-air broadcasts, in terms of their ubiquity and market or cultural penetration.

### Broadcast of extracts of works

**Example:** A radio interview with an author from the Melbourne Writers Festival is interspersed with a reading of an extract from the writer’s book.

16.34 Section 45 provides a free-use exception for reading or recitation of a literary or dramatic work in public or for a broadcast, of a reasonable length, with sufficient acknowledgement. The Spicer Committee’s original justification for the s 45 exception was that:

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29 See Australian Government Convergence Review, *Convergence Review Final Report* (2012), ch 1, rec 2.

Recitations of reasonable extracts of works in public halls have for many years been regarded as a legitimate exception to copyright protection and it seems to us that the broadcasting of such recitations is the modern successor to that form of entertainment.<sup>30</sup>

16.35 Obviously, it is equally possible to see other forms of communication to the public, including on the internet, as the ‘modern successor’ to recitations in public halls.

16.36 However, many uses covered by s 45 would be covered by fair dealing for the purposes of criticism or review, and reporting news;<sup>31</sup> and by the proposed new fair use or quotation exceptions<sup>32</sup>—although this would depend on the application of the fairness factors in the particular circumstances. The ALRC proposes that s 45 be repealed, if fair use is enacted.

### Reproduction for broadcasting

**Example:** A television station makes a recording of a variety show it has produced, because a pre-recorded version of the program is to be broadcast.

16.37 Section 47(1) provides a free-use exception that applies where, in order for a work to be broadcast, a copy of the work needs to be made in the form of a record or film to facilitate the broadcasting. Sections 70(1) and 107(1) provide similar exceptions, in relation to films of artistic works and sound recordings, respectively.

16.38 The exceptions cover copying ‘to make the actual broadcast technically easier, or to enable the making of repeat or subsequent broadcasts’<sup>33</sup> and can be seen as promoting efficiency in broadcast programming.<sup>34</sup>

16.39 These exceptions are expressly permitted by the *Rome Convention*, which states that domestic laws and regulations may provide for exceptions as regards ‘ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts’.<sup>35</sup>

**Example:** A television station makes a recording of a televised play made by an outside producer, in order to broadcast the play at a later time.

30 Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959), [111].

31 Copyright Act 1968 (Cth) ss 41, 42.

32 See Chs 4, 10.

33 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.225].

34 Australian Copyright Council, *Exceptions to Copyright, Information Sheet G121v01* (2012), 7.

35 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964), art 15(1)(c).

16.40 Sections 47(3), 70(3) and 107(3) provide similar exceptions, subject to a statutory licensing scheme, for the temporary copying of works, films of artistic works and sound recordings by a broadcaster, other than the maker of the work, film or recording, for the purpose of broadcasting.

16.41 The licences do not apply unless all the records embodying the recording or all copies are, within 12 months of the day on which the work, film or sound recording is first used for broadcasting, destroyed or transferred to the National Archives of Australia.<sup>36</sup>

16.42 There seems no reason, however, why these exceptions should not apply, for example, to temporary copying to facilitate the streaming of content over the internet, especially where the user is a broadcasting service that also provides content over the internet. The ALRC proposes that ss 47, 70 and 107 should be amended to apply to the transmission of television or radio programs using the internet.

### Sound broadcasting by holders of a print disability radio licence

**Example:** A book is read aloud on a print disability radio station.

16.43 Section 47A provides exceptions, subject to a statutory licensing scheme, for sound broadcasting by holders of a print disability radio licence.

16.44 The exception covers the making of sound broadcasts of a published literary or dramatic work, or of an adaptation of such a work, where this is done by the holder of a print disability radio licence, in force under the *Broadcasting Services Act* or the *Radiocommunications Act 1992* (Cth).<sup>37</sup>

16.45 Print disability radio licences are granted for the purpose of authorising the making of sound broadcasts to persons who by reason of old age, disability or literacy problems are unable to handle books or newspapers or to read or comprehend written material.<sup>38</sup> In practice, this requirement is met by the granting of community radio licences with these conditions, and Radio for the Print Handicapped broadcasts from stations in most capital cities.<sup>39</sup>

16.46 There may be no reason not to facilitate the provision of radio programs for the print disabled over the internet as well, through access to a statutory licence, and perhaps subject to appropriate geographical limits on reception.<sup>40</sup> The ALRC proposes that s 47A should be amended to apply to the transmission of radio programs using the internet, if this statutory licensing scheme remains.

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<sup>36</sup> *Copyright Act 1968* (Cth) ss 47(5), 70(5), 107(5).

<sup>37</sup> See *Ibid* s 47A(11).

<sup>38</sup> See *Ibid*.

<sup>39</sup> Australian Copyright Council, *Disabilities: Copyright Provisions Information Sheet G060v08* (2012).

<sup>40</sup> In relation to the 'geoblocking' of internet transmissions, see Ch 15.

### Incidental broadcast of artistic works

**Example:** A television documentary about an art gallery shows paintings and sculptures in the background of a person being interviewed.

16.47 Section 67 provides a free-use exception for the inclusion of an artistic work in a film or television broadcast where its inclusion is only incidental to the principal matters represented in the film or broadcast.

16.48 The policy behind the exception appears to be that it is reasonable to allow the incidental inclusion of these works in a broadcast, as it would be impractical to control this form of copying. This rationale seems to apply equally to the incidental inclusion of works in internet transmission or other forms of communication to the public.

16.49 The ALRC would expect that most incidental uses covered by s 67 would be covered by the proposed new fair use exception<sup>41</sup>—although this would depend on the application of the fairness factors in the particular circumstances. An industry practice of licensing incidentally captured music for documentary films, for example, may weigh against fair use. The ALRC proposes that s 67 be repealed, if fair use is enacted.

### Broadcasting of sound recordings

**Example:** A radio station broadcasts recordings of popular music.

16.50 Section 109 provides an exception, subject to a statutory licensing scheme, for the broadcasting of published sound recordings, to facilitate access by broadcasters to published sound recording repertoire. It provides that copyright in a published sound recording is not infringed by the making of a broadcast (other than a broadcast transmitted for a fee), if remuneration is paid by the maker of the broadcast to the copyright owners in accordance with the scheme.<sup>42</sup> The Phonographic Performance Company of Australia Limited (PPCA) is the organisation that administers the licensing of the broadcast rights in sound recordings.

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41 See Ch 4. For example, in the US, fair use was found where a television film crew covering an Italian festival in Manhattan recorded a band playing a portion of a song, which was replayed during a news broadcast. In concluding that this activity was a fair use, the court considered that only a portion of the song was used, it was incidental to the news event, and it did not result in any actual damage to the composer or to the market for the work: *Italian Book Corp v American Broadcasting Co*, 458 F Supp 65 (SDNY, 1978).

42 The statutory licensing scheme does not apply to a broadcast transmitted for a fee payable to the broadcaster: *Copyright Act 1968* (Cth) s 109(1). Ricketson and Creswell state that it 'was evidently felt that subscription broadcasters did not need the same help in accessing and making use of sound recordings as free-to-air broadcasters': Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.245].

16.51 The owner of the copyright in a published sound recording or a broadcaster may apply to the Copyright Tribunal for an order determining the amount payable by the broadcaster to the copyright owner in respect of the broadcasting of the recordings.<sup>43</sup>

16.52 Broadcast radio stations are able to use the s 109 statutory licensing scheme to obtain rights to broadcast music and other sound recordings, but internet radio services are not—at least where they are not broadcasting services for the purposes of the *Broadcasting Services Act*. Rather, internet radio services must negotiate rights to transmit sound recordings outside the scheme.

16.53 A further complexity arises in relation to internet simulcasts, where radio stations, which are broadcasting services, commonly stream content simultaneously on the internet that is identical to their terrestrial broadcasts. In *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* (*PPCA v CRA*), the Full Court of the Federal Court held that, in doing so, a radio station was acting outside the terms of its statutory licence, as internet streaming is not a ‘broadcast’.<sup>44</sup>

16.54 While the case concerned the interpretation of a licensing agreement to broadcast sound recordings, it was agreed between the parties that the term ‘broadcast’ in the agreement was to be understood as having the meaning specified in the *Copyright Act*. The Court held that ‘the delivery of the radio program by transmission from a terrestrial transmitter is a different broadcasting service from the delivery of the same radio program using the internet’.<sup>45</sup>

16.55 Broadcast radio stations, like internet radio services, will now have to negotiate separate agreements with the relevant collecting society (the PPCA) to stream the same content for which they have already obtained a statutory licence to broadcast. The implications of this case have to be considered in the context of the s 152 ‘one per cent cap’, which makes access to statutory licensing under s 109 more desirable for radio stations. The one per cent cap is discussed further below.

16.56 After the decision in *PPCA v CRA*, the Senate Environment and Communications References Committee was asked to examine the effectiveness of current regulatory arrangements (under the *Broadcasting Services Act* and the *Copyright Act*) in dealing with simulcasts, including the impact of current regulation on broadcasters and copyright holders. The Committee was due to report by 1 June 2013.

16.57 Pandora Media submitted that the absence of a statutory licensing scheme covering all forms of ‘online radio’ may create an ‘unnecessary and unjustified barrier to market entry for those creating and launching new innovative online services’. It suggested that either the existing statutory licensing scheme for broadcasters should be

43 For these purposes, a ‘broadcaster’ is defined as meaning the ABC, the SBS, the holder of a licence or a person making a broadcast under the authority of a class licence under the *Broadcasting Services Act: Copyright Act 1968* (Cth) s 152(1).

44 *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013] FCAFC 11. An application for special leave to appeal this decision to the High Court was filed in March 2013.

45 *Ibid.*, [69].

extended to include online licences, or a new scheme created for such services.<sup>46</sup> In Pandora's view, direct licensing is not a practical alternative because of the breadth of licensing required, the costs involved in negotiating separate licensing agreements, limitations on the rights granted to the PPCA by record companies and unsatisfactory dispute resolution procedures.<sup>47</sup>

16.58 The Australian position was compared with that in the United States, where internet radio services operate pursuant to statutory licences under the *Copyright Act 1976* (US). The United States statutory licensing scheme covers the performance of sound recordings publicly by means of a 'digital audio transmission', including by subscription services.<sup>48</sup>

16.59 Pandora submitted that the differences in these legal frameworks with respect to internet radio, works to

impede the introduction into Australia of new and innovative business models, imposes unnecessary costs and inefficiencies upon those wanting to access or make use of copyright material and places Australia at a competitive disadvantage internationally.<sup>49</sup>

16.60 Commercial Radio Australia (CRA) stated that 'an increasing proportion of listeners choose to access commercial radio through an online platform' and submitted that, in an 'era of convergence, it no longer makes sense to require different copyright clearances for different platforms'.<sup>50</sup> However, the concerns of CRA related more to the position of existing broadcasters simulcasting online, and the implications of the *PPCA v CRA* case, than to barriers to new internet-only radio services. CRA observed that if, as a result of the case, the same radio program were to be 'subject to different regulation, depending on the platform of transmission, then this would be a huge barrier to innovation and use of the internet as a means of reaching a wider audience'.<sup>51</sup>

16.61 The ABC also considered that statutory licences generally should 'cover online communications at least by way of streaming'. The ABC submitted, in particular, that it should be made clear in the drafting of statutory licences that they extend to online simulcasts.<sup>52</sup>

16.62 Reform to broaden the communication technologies covered by the broadcast exceptions may be justified in order to encourage innovation and competition, and respond to technological change. The availability of the statutory licensing scheme for radio broadcasters seems to provide them with a competitive advantage over internet radio services.

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46 Pandora Media Inc, *Submission 104*.

47 Ibid.

48 *Copyright Act 1976* (US) s 114(d)(1), (2). US law does not, however, recognise a terrestrial broadcast performance right for sound recordings, so has no equivalent to *Copyright Act 1968* (Cth) s 109. That is, in the US, broadcast radio is the only medium that transmits music but does not compensate artists or labels for the performance.

49 Pandora Media Inc, *Submission 104*.

50 Commercial Radio Australia, *Submission 132*.

51 Ibid.

52 Australian Broadcasting Corporation, *Submission 210*.



16.63 In the context of media convergence, the continuing distinction between broadcasts and other electronic communications to the public in relation to copyright exceptions seems difficult to justify. There may be no reason, in copyright policy terms, why radio broadcasters should have access to a statutory licensing scheme under s 109, while internet radio services are required to negotiate licences with collecting societies to transmit sound recordings.

16.64 The ALRC proposes that the s 109 statutory licensing scheme should be amended to apply to the transmission of television or radio programs using the internet.

### Exceptions for persons using broadcasts

16.65 Sections 135ZT, 199, 200 and pt VA operate to provide exceptions for the benefit of persons receiving, communicating or making a record of a broadcast. The references to ‘broadcast’ in these sections serve to limit the application of these sections to broadcasts made by content providers that are broadcasting services for the purposes of the *Broadcasting Services Act*.

16.66 This means that people are sometimes required to draw distinctions between broadcasts and other audiovisual content, including internet content—or infringe copyright laws by inadvertently treating broadcast and other content in the same manner. Justifications for the continuing existence of exceptions for persons using broadcasts are most likely to centre on assumptions that broadcast retains a special place in the media landscape.

### Reception of broadcasts

**Example:** A supermarket plays radio broadcasts for the entertainment of its customers.

16.67 Section 199 provides free-use exceptions in relation to the reception of broadcasts of works, sound recordings and films. Essentially, the effect of these provisions is that enterprises such as pubs, supermarkets and other shops are permitted to play radio or television broadcasts without infringing copyright.

16.68 Under s 199(1), where an extract from a literary or dramatic work is broadcast, a person who, by receiving the broadcast causes the work to be performed in public, does not infringe copyright in the work.

16.69 Section 199(2) provides that where a person, by receiving a television or sound broadcast, causes a sound recording to be heard in public, there is no infringement of copyright in the sound recording. However, while the supermarket (in the example above) need not license the right to play the sound recording, it must still obtain a licence to use the underlying musical works.

16.70 Section 199(3) provides that where a person, by receiving an authorised television broadcast, causes a film to be seen in public, the person is to be treated as if the holder of a licence granted by the owner of the copyright to show the film.

16.71 The meaning of the term ‘broadcast’ in s 199 is narrower than in the case of some of the other exceptions, being restricted to broadcasts made by the ABC, SBS, holders of broadcasting licences, or persons authorised by class licences, under the *Broadcasting Services Act*.<sup>53</sup>

16.72 The policy behind the exception appears to be that it is reasonable to allow the reception of broadcasts in public, as it would be impractical to control this form of communication. This rationale seems to apply equally to similar content that is transmitted using the internet. The ALRC proposes that s 199 should be amended to apply to the transmission of television or radio programs using the internet.

### Use of broadcasts for educational purposes

**Example:** A high school records a public radio broadcast for schools in order to replay the broadcast in the classroom at a later time.

16.73 Section 200(2) provides a free-use exception in relation to making a record of a sound broadcast, for educational purposes, being a broadcast intended to be used for educational purposes.

16.74 This exception is expressly permitted by the *Rome Convention*, which states that domestic laws and regulations may provide for exceptions as regards ‘use solely for the purposes of teaching or scientific research’.<sup>54</sup>

16.75 The rationale for allowing free use of educational radio broadcasts, under s 200(2), but not in relation to internet radio is not clear. However, the ALRC would expect that the use of a recording of a radio broadcast for educational purposes would be covered by the proposed new fair use exception.<sup>55</sup> In Chapter 13, the ALRC proposes that s 200 be repealed, if fair use is enacted.

### Copying of broadcasts by educational institutions

**Example:** A university records a television broadcast of a film for use in film studies classes.

16.76 Part VA provides a statutory licensing scheme<sup>56</sup> applying to the copying and communication of broadcasts by educational institutions and institutions assisting persons with an intellectual disability, as long as this is for one of the authorised statutory purposes.

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<sup>53</sup> *Copyright Act 1968* (Cth) s 199(7).

<sup>54</sup> *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964), art 15(1)(d).

<sup>55</sup> See Ch 4.

<sup>56</sup> Screenrights is the declared collecting society administering the pt VA statutory licensing scheme.

16.77 The *Copyright Amendment Act 2006* (Cth) extended the pt VA licensing scheme, pursuant to s 135C(1), to apply to ‘a communication of the content of a free-to-air broadcast, by the broadcaster making the content available online at or after the time of the broadcast’.

16.78 The Explanatory Memorandum explained that this provision responded to ‘the increasing trend of broadcasters making the content of their broadcast material available online, either simultaneously or at a later time (eg, through services commonly referred to as webcasting or podcasting)’.<sup>57</sup> Ricketson and Creswell state:

This extension caters for the possibility that the owners of copyright in the content of a broadcast, in agreeing to its being made available online as a podcast, may not have agreed to license more than downloading for the private listening/viewing by the downloader; that is they may not have expressly or impliedly licensed the downloader to communicate the content to the public or play/show it in public.<sup>58</sup>

16.79 Given that the copyright owners have authorised downloading for consumption by the downloader, who could be a student watching or listening to the podcast in connection with his or her studies, s 135C ‘sensibly allows educational institutions to facilitate that activity’.<sup>59</sup>

16.80 Part VA is often referred to in schools as the ‘statutory broadcast licence’ and permits educational institutions to copy radio and television programs, including programs from free-to-air broadcasters and satellite and subscription radio and television. Educational institutions can also copy and communicate podcasts and webcasts that originated as free-to-air broadcasts and which are available on the broadcaster’s website.<sup>60</sup>

16.81 A number of stakeholders expressly identified the existing definition of broadcast as being problematic in the context of the pt VA scheme.<sup>61</sup> The Copyright Advisory Group—Schools (the Schools), for example, observed that the concept of a broadcast ‘underpins the entire operation of the Part VA statutory licence’ and highlighted the implications for the pt VA scheme of media convergence, and possible future changes in media and communications regulation resulting from the Australian Government’s Convergence Review.<sup>62</sup>

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57 Explanatory Memorandum, *Copyright Amendment Bill 2006* (Cth), [8.5].

58 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.210].

59 Ibid, [12.210].

60 Copyright Advisory Group—Schools, *Submission 231*.

61 Ibid; Screenrights, *Submission 215*; Arts Law Centre of Australia, *Submission 171*; R Wright, *Submission 167*; Society of University Lawyers, *Submission 158*.

62 The Convergence Review Committee was established to examine the operation of media and communications regulation in Australia and assess its effectiveness in view of the convergence of media content and communications technologies. The Review covered a broad range of issues, including media ownership laws, media content standards, the ongoing production and distribution of Australian and local content, and the allocation of radiocommunications spectrum: Australian Government Convergence Review, *Convergence Review Final Report* (2012), vii.

16.82 The Schools stated that, while pt VA applies to broadcasts and to some free-to-air broadcasts made available online, under the current *Copyright Act* definition of broadcast

many types of content such as communications delivered via internet protocol television (IPTV), the majority of online content such as ‘made for internet’ content, YouTube videos etc are currently excluded from the Part VA licence.<sup>63</sup>

16.83 The Schools observed that changes to the definition of broadcast resulting from the Convergence Review could potentially expand the scope of the statutory licence, for example, to all forms of audiovisual content ‘irrespective of the mode or delivery or original point of distribution’; extinguish the pt VA licence completely; or require ‘a complete re-examination of the need for, and appropriate scope of, the Part VA licence in a converged media environment’.<sup>64</sup>

16.84 Screenrights stated that the exclusion of transmissions over the internet from the definition of broadcast creates ‘an unnecessarily complicated distinction for educators’ and submitted that the scheme should be amended to ‘enable the copying of linear television and radio transmissions over the internet’. This, it was suggested, might be done by inserting an expanded definition of ‘broadcast’ into s 135A or by amending s 135C, which already gives pt VA an extended operation.<sup>65</sup>

16.85 The Society of University Lawyers submitted that pt VA is not adequate or appropriate in the digital environment because it excludes ‘internet transmissions or internet-only content uploaded by television or radio broadcasters’, despite the fact that such content, and the use of tablets rather than television, are becoming more common.<sup>66</sup>

16.86 The ALRC proposes the repeal of the pt VA statutory licensing scheme, because voluntary licences appear to be more efficient and better suited to a digital age.<sup>67</sup> However, if pt VA is not repealed, the ALRC proposes that, like other exceptions discussed above, the scheme should be amended to apply to the transmission of television or radio programs using the internet.

## Overseas models

16.87 Copyright laws in some other jurisdictions recognise free-use and remunerated exceptions that apply to internet transmissions. As discussed above, the United States operates a statutory licensing scheme covering internet radio services.

16.88 In New Zealand, under the *Copyright Act 1994* (NZ), a number of copyright exceptions, similar to the broadcast exceptions, refer to ‘communication’ or a ‘communications work’. This is defined as ‘a transmission of sounds, visual images, or other information, or a combination of any of these, for reception by members of the

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<sup>63</sup> Copyright Advisory Group—Schools, *Submission 231*.

<sup>64</sup> Ibid. See also Copyright Advisory Group—TAFE, *Submission 230*.

<sup>65</sup> Screenrights, *Submission 215*.

<sup>66</sup> Society of University Lawyers, *Submission 158*.

<sup>67</sup> See Ch 6. In Ch 13, the ALRC also proposes the repeal of s 200.

public, and includes a broadcast or a cable programme'.<sup>68</sup> A communications work, unlike the concept of a broadcast in Australian copyright law, appears to apply to transmissions using the internet.

16.89 For example, the New Zealand Act provides an exception in relation to the incidental recording of works, sound recordings or films for purposes of communication.<sup>69</sup> This is the equivalent of the reproduction for broadcasting provisions contained in ss 47, 70 and 107 of the Australian Act, but extends to facilitating internet transmission. The New Zealand Act also provides an exception in relation to the copying and communication of 'communication works' for educational purposes,<sup>70</sup> an equivalent of the pt VA scheme under the Australian Act,<sup>71</sup> but which extends to internet transmission more broadly.

16.90 However, some other exceptions in the New Zealand Act remain restricted in their application to broadcast and cable transmission. For example, the New Zealand Act provides an exception for the free public playing or showing of a broadcast or cable program, which does not extend to internet transmissions.<sup>72</sup>

16.91 In the United Kingdom, under the *Copyright, Designs and Patents Act 1988* (UK), copyright exceptions similar to those discussed in this chapter, still apply only to broadcasts—defined as including only 'wireless telegraphy'—or 'cable programmes'.<sup>73</sup>

## The scope of amended exceptions

16.92 The ALRC proposes that the broadcast exceptions should be extended to apply to other forms of communication to the public, including internet transmissions. The intention of such a reform would be to promote fair access to and wide dissemination of content (Principle 3) through providing rules that are technologically neutral (Principle 4).<sup>74</sup>

16.93 The way in which reform should be implemented in practice, without unintended consequences, is a matter of some complexity. The ALRC would welcome further comment.

16.94 If the definition of broadcast is to be changed for the purposes of copyright exceptions, one obvious starting point seems to be the concept of 'communication to

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68 *Copyright Act 1994* (NZ) s 2 definition of 'communication work', introduced by the *Copyright (New Technologies) Amendment Act 2008* (NZ).

69 *Ibid* s 85.

70 *Ibid* s 48.

71 Although it provides a free-use exception where voluntary licensing is not available, rather than for a statutory licensing scheme.

72 *Copyright Act 1994* (NZ) s 87.

73 *Copyright, Designs and Patents Act 1988* (UK) s 6. See, eg, *Copyright, Designs and Patents Act 1988* (UK) s 31 (Incidental inclusion of copyright material); s 32 (Things done for purposes of instruction or examination); s 34 (Performing, playing or showing work in course of activities of educational establishment).

74 See Ch 2.

the public'.<sup>75</sup> Copyright in relation to original works includes the exclusive right to 'communicate the work to the public',<sup>76</sup> and, in relation to television and sound broadcasts, includes the exclusive right to 're-broadcast it or communicate it to the public otherwise than by broadcasting it'.<sup>77</sup>

16.95 'Communicate' is defined as to '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 including a performance or live performance within the meaning of this Act'.<sup>78</sup> Ricketson and Creswell describe this definition as having two branches:

passive and active, that reflect both 'pull' (interactive) and 'push' technologies: making available online (passive); and transmitting electronically by wire and/or wireless media (active).<sup>79</sup>

16.96 The broadcast exceptions are not, however, intended to extend to all content communicated to the public, such as content simply made available on demand. The existing scope of a broadcasting service excludes not only a service that makes available television and radio programs using the internet, but also 'a service that makes programs available on demand on a point-to-point basis'.<sup>80</sup>

16.97 As discussed above, the scope of some broadcast exceptions may reflect the special characteristics of broadcasts. Some exceptions may, therefore, need to be extended only to the online equivalent of television programs or radio programs.<sup>81</sup> That may also mean that the scope of some exceptions—for example, s 199(1)—may need to be restricted to internet transmissions that are 'streamed' or in the traditional 'linear' form of broadcasting, rather than provided 'on demand'. Such a restriction may not be appropriate, however, for the pt VA statutory licensing scheme (should it remain) as a broader range of online content may need to be included. Another alternative is to extend some broadcast exceptions only to content made available online by a free-to-air broadcaster, as is presently the case under pt VA.

16.98 The distinctions between linear and on-demand transmissions is a matter of some complexity, given changing business models. For example, one of the reasons for distinguishing between linear and on-demand internet transmission is that the linear communications are more like broadcasting to a mass public, and on-demand communications are more of a substitute for the purchase of personal copies of content. However, some services, including internet 'radio' services like Pandora, can be personalised to reflect the musical preferences of an individual. This kind of service,

<sup>75</sup> For example, in setting out the nature of copyright in broadcasts: *Copyright Act 1968* (Cth) s 87.

<sup>76</sup> *Ibid* s 31(1)(a)(iv), (b)(iii).

<sup>77</sup> *Ibid* s 87(c).

<sup>78</sup> *Ibid* s 10.

<sup>79</sup> Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [9.415]

<sup>80</sup> *Broadcasting Services Act 1992* (Cth) s 6, definition of 'broadcasting service', para (b).

<sup>81</sup> The ALRC uses the phrases 'television program' and 'radio program' in the absence of popularly understood, media-neutral alternative phrases.

although linear in a sense, is also personalised and able to act as a substitute for a personal music collection.

16.99 The ALRC's proposals will require further iteration in the final Report of this Inquiry in response to stakeholder feedback, and to be consistent with recommendations made in other areas.

16.100 Some of the broadcast exceptions, notably ss 45, 67 and 200(2), may be repealed as unnecessary—if a fair use exception is introduced. If the pt VA licensing scheme is removed, issues raised in relation to the definition of broadcast in that context would no longer be relevant.

16.101 The broadcast exceptions also raise issues that are not directly related to broadcasting but might be dealt with as part of the reform process. For example, it is not clear, in relation to s 199, why copyright in sound recordings, films and literary or dramatic works is covered, but not other subject matter, such as the script of a film. Arguably, s 199(2) and (3) should be amalgamated and the coverage of s 199 extended to all underlying copyright.

**Proposal 16–1** The *Copyright Act* should be amended to ensure that the following exceptions (the 'broadcast exceptions'), to the extent these exceptions are retained, also apply to the transmission of television or radio programs using the internet:

- (a) s 45—broadcast of extracts of works;
- (b) ss 47, 70 and 107—reproduction for broadcasting;
- (c) s 47A—sound broadcasting by holders of a print disability radio licence;
- (d) s 67—incidental broadcast of artistic works;
- (e) s 109—broadcasting of sound recordings;
- (f) s 135ZT—broadcasts for persons with an intellectual disability;
- (g) s 199—reception of broadcasts;
- (h) s 200—use of broadcasts for educational purposes; and
- (i) pt VA—copying of broadcasts by educational institutions.

**Question 16–1** How should such amendments be framed, generally, or in relation to specific broadcast exceptions? For example, should:

- (a) the scope of the broadcast exceptions be extended only to the internet equivalent of television and radio programs?
- (b) 'on demand' programs continue to be excluded from the scope of the broadcast exceptions, or only in the case of some exceptions?
- (c) the scope of some broadcast exceptions be extended only to content made available by free-to-air broadcasters using the internet?

**Proposal 16–2** If fair use is enacted, the broadcast exceptions in ss 45 and 67 of the *Copyright Act* should be repealed.

## The remuneration caps

16.102 A related issue concerning the operation of the s 109 statutory licensing scheme for the broadcasting of published sound recordings concerns remuneration caps. Section 152 of the *Copyright Act* provides caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings.

16.103 Section 152(8) provides that, in making orders for equitable remuneration the Copyright Tribunal may not award more than one per cent of the gross earnings of a commercial or community radio broadcaster (the one per cent cap).<sup>82</sup> The one per cent cap has been controversial and subject to court challenge.<sup>83</sup>

16.104 The ABC is subject to a different cap under s 152(11), which provides that remuneration is limited to the sum of 0.5 cents per head of the Australian population (the ABC cap).

16.105 In 2000, the Intellectual Property and Competition Review Committee (Ergas Committee), chaired by Mr Henry Ergas, recommended that the one per cent cap be abolished ‘to achieve competitive neutrality and remove unnecessary impediments to the functioning of markets on a commercial basis’.<sup>84</sup> This recommendation was supported by arguments that the one per cent cap lacks policy justification and distorts the sound recordings market.<sup>85</sup> A previous review reached similar conclusions.<sup>86</sup>

16.106 The Ergas Committee accepted that the cap was originally implemented, in 1969, to ease the burden imposed on the radio broadcasting industry by payments for the broadcasting of sound recordings. It noted that, since then, the economic circumstances of the commercial radio industry had evolved, and concluded:

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<sup>82</sup> *Copyright Act 1968* (Cth) s 152(8).

<sup>83</sup> See, eg, Australian Government Attorney-General’s Department, *Review of the One per cent Cap on Licence Fees Paid to Copyright Owners for Playing Sound Recordings on the Radio*, Discussion Paper (2005); *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* (2012) 286 ALR 61.

<sup>84</sup> Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 14, 114–116.

<sup>85</sup> *Ibid.*, 14, 114–116.

<sup>86</sup> S Simpson, *Review of Australian Copyright Collecting Societies—A Report to a Working Group of the Australian Cultural Development Office and the Attorney General’s Department* (1995), 119. See also Australian Government Attorney-General’s Department, *Review of the One per cent Cap on Licence Fees Paid to Copyright Owners for Playing Sound Recordings on the Radio*, Discussion Paper (2005).



No public policy purpose is served by this preference, which may distort competition (for example, between commercial radio and diffusion over 'Internet radios' of sound recordings), resource use, and income distribution.<sup>87</sup>

16.107 The Ergas Committee recommended the retention of s 152(11), on the basis that the ABC is not a commercial competitor in the relevant markets, and there is a clear public interest in its operation as a budget-funded national broadcaster.<sup>88</sup>

16.108 In 2001, the Government rejected the Ergas Committee's recommendation to repeal the one per cent cap. Ricketson and Creswell state that it can be assumed that the one per cent cap issue:

became a bargaining chip in the extensive review and negotiations that the government was undertaking at the time with regard to a whole range of policy issues concerning the regulation of the broadcasting industry, including cross-media ownership, digital broadcasting and the like.<sup>89</sup>

16.109 In 2006, the then Attorney-General, the Hon Philip Ruddock MP, indicated that repeal of the cap had been approved, as part of what became the *Copyright Amendment Act*, but this did not eventuate.<sup>90</sup>

16.110 In response to this Inquiry, the PPCA submitted that both caps should be repealed because the caps:

- distort the market in various ways—including by subsidising the radio industry;
- are out of date—given that the financial and other circumstances of the radio industry are very different from the late 1960s;
- reduce economic efficiency and lack equity—including by creating non market-based incentives for broadcasters in relation to increasing music use at the expense of non-music formats;
- are not necessary—given that the Copyright Tribunal independently assesses fees for statutory licence schemes;
- are inflexible and arbitrary—as the levels at which the caps are set are not linked to an economic assessment of the value of the licence;
- are anomalous—because the *Copyright Act* contains no other statutory caps, other jurisdictions do not cap licence fees, and the cap is inconsistent with Australian competition policy;

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87 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 115.

88 Ibid, 116.

89 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.258].

90 Ricketson and Creswell state: 'One is left with the impression that effective lobbying by the radio broadcasters may have weakened the government's resolve to go through with its announced decision': Ibid, [12.258].

- may not comply with Australia's international treaty obligations—in particular, the requirement under the *Rome Convention* for equitable remuneration to be paid.<sup>91</sup>

16.111 The PPCA argued that removing the caps would bring benefits to the sound recording industry and Australian recording artists, through increased income and, in turn, provide a greater economic incentive for creativity and investment and enhance cultural opportunities.<sup>92</sup>

16.112 The remuneration caps are an important element of the statutory licensing scheme provided by s 109 and clearly fall within the Terms of Reference of this Inquiry. There appears to be a strong case for repeal of the one per cent cap. Further, the ABC cap may not be the most appropriate way to support the funding of the national broadcaster.

16.113 While these issues were not raised explicitly in the Issues Paper, the ALRC is interested in further comment on whether either or both of the remuneration caps in s 152 of the *Copyright Act* should be repealed.

### **Voluntary licensing of sound recordings**

16.114 The ALRC proposes the repeal of the statutory licences for educational and other institutions in pts VA and VB of the *Copyright Act*. If these proposals were implemented, issues raised in relation to the definition of broadcast in the context of pt VA would no longer be relevant, to the extent that such uses are involved.

16.115 A similar possibility arises in relation to the s 109 licensing scheme for the broadcasting of sound recordings—that is, to repeal the scheme and leave licences to be negotiated voluntarily. While this issue was not raised explicitly in the Issues Paper, the ALRC is interested in comment on whether there is any reason to retain a compulsory licensing scheme for the broadcast of published sound recordings.

16.116 Broadcasters usually require licences from two sources to broadcast a sound recording—one relating to copyright in the sound recording (available under s 109); and another relating to copyright in the work recorded. Voluntary licensing appears to operate effectively in respect of the latter. Broadcasting and public performance rights of composers, lyricists and music publishers are administered by the Australasian Performing Right Association, outside s 109.

16.117 In New Zealand, music licensing is conducted without any recourse to a statutory licensing scheme. If this approach were taken, issues concerning the application of the licensing scheme to internet transmission of television or radio programs, and concerns about remuneration caps, would no longer be relevant.

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91 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964), art 12.

92 PPCA, *Submission 240*.

**Question 16–2** Section 152 of the *Copyright Act* provides caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings. Should the *Copyright Act* be amended to repeal the one per cent cap under s 152(8) or the ABC cap under s 152(11), or both?

**Question 16–3** Should the compulsory licensing scheme for the broadcasting of published sound recordings in s 109 of the *Copyright Act* be repealed and licences negotiated voluntarily?



## 17. Contracting Out

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### Summary

17.1 Owners and users of copyright may agree that some or all of the statutory exceptions to copyright are not to apply—so that, for example, the user will remunerate the copyright owner for uses that would otherwise be covered by a free-use exception. This is referred to as ‘contracting out’ and raises fundamental questions about the objectives of copyright law, the nature of copyright owners’ exclusive rights and exceptions, and the respective roles of the *Copyright Act 1968* (Cth), contract, and competition and consumer law and policy.

17.2 This chapter considers whether the *Copyright Act* should limit the extent to which parties may effectively contract out of the operation of existing, and proposed new, exceptions to copyright.

17.3 The ALRC proposes that the *Copyright Act* should be amended to provide that contractual terms excluding or limiting the operation of the libraries and archives exceptions and the proposed fair use exception—in relation to fair uses for purposes of research or study; criticism or review; parody or satire; reporting news; and quotation—are unenforceable.

17.4 The primary reason for this proposal is to ensure that the public interests protected by copyright exceptions, including the proposed fair use exception, are not prejudiced by private arrangements. However, any broader limitation on contracting

out—for example, extending to all free-use exceptions, or to all fair uses—would not be practical or beneficial.

### **What is contracting out?**

17.5 In this chapter, the term ‘contracting out’ refers to the practice of parties entering agreements that exclude or limit the operation of exceptions to copyright provided by the *Copyright Act*.

17.6 Such agreements may be in writing, or entered online in the form of a ‘clickwrap licence’ or other electronic contract. To enter a ‘clickwrap licence’, for example, the terms of the licence are presented to the user electronically, and the user agrees to the terms of the licence by clicking on a button or ticking a box labelled ‘I agree’ or by some other electronic action.<sup>1</sup>

17.7 Contractual terms in licensing and other agreements may require copyright users to contract out of exceptions—purporting to prevent users from relying on statutory exceptions and, for example, engaging in fair dealing with copyright materials.

17.8 Copyright owners may also limit permissible uses of copyright materials by imposing technological protection measures (TPMs) which prevent, inhibit or restrict certain acts comprised in the copyright. The use and circumvention of TPMs raises similar policy issues to those raised by contracting out, and TPMs can be used to enforce the terms of licences and other agreements.<sup>2</sup>

17.9 Legislative limitations on contracting out of statutory provisions are not uncommon, at least in consumer protection law. For example, under the Australian Consumer Law (ACL), a term of a contract is void to the extent that the term purports to exclude, restrict or modify legislative consumer guarantees, such as guarantees as to the fitness for purpose of goods or services.<sup>3</sup>

### **Contracting out in practice**

17.10 In its 2002 report, *Copyright and Contract*,<sup>4</sup> the Copyright Law Review Committee (CLRC) gathered information about the extent to which contracting out was being used, with a particular emphasis on e-commerce.<sup>5</sup> Information was gathered through submissions in response to the CLRC inquiry, and from a survey of online licence agreements.

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1 D Clapperton and S Corones, ‘Unfair Terms in Clickwrap and Other Electronic Contracts’ (2007) 35 *Australian Business Law Review* 152, 154.

2 The ALRC is directed not to duplicate work on TPMs being undertaken at international level and by the Attorney-General’s Department. See Australian Government Attorney-General’s Department, *Review of Technological Protection Measure Exceptions made under the Copyright Act 1968* (2012).

3 *Competition and Consumer Act 2010* (Cth) sch 1, s 64.

4 Copyright Law Review Committee, *Copyright and Contract* (2002).

5 *Ibid*, ch 4.

17.11 Submissions to the CLRC from copyright owner interests generally argued that there was no conflict between the operation of agreements and the copyright exceptions.<sup>6</sup> In contrast, copyright user interests claimed that agreements that exclude or limit the copyright exceptions were not uncommon, particularly in online trade in copyright materials.<sup>7</sup>

17.12 For example, agreements with online publishing companies may contain clauses that prevent libraries and archives from reproducing and communicating extracts of works as would otherwise be permitted by the library and archives exceptions. Agreements may exclude or limit the fair dealing exceptions, the statutory licence scheme for educational and other institutions, and the exception for the use of copyright materials for the services of the Crown.<sup>8</sup>

17.13 The CLRC confirmed that many of the online licences it had surveyed contained such terms. It noted that uses that were prohibited by the licences included ‘reproducing, making derivative works from, or commercially exploiting the material and communicating, distributing or publishing the material’.<sup>9</sup> Exceptions that were explicitly excluded included the computer programs exceptions and (in one case) exceptions allowing copying for satire or parody under the fair dealing doctrine. Further, many of the agreements examined prohibit the use of even insubstantial portions of material.<sup>10</sup>

17.14 A review of user contracts conducted for the UK Strategic Advisory Board for Intellectual Property Policy in 2010 looked at empirical evidence from the UK and several other countries. It found that the ‘market for electronic services is growing rapidly, and users’ access to copyright content is increasingly governed by contract’ and that there was ‘robust evidence that licence agreements for software, digital consumer services and educational content routinely conflict with statutory copyright exceptions (for example regarding back-up copies and archiving)’.<sup>11</sup>

17.15 Bargaining outcomes, the review found, are tilted towards rights owners, because ‘fragmented end-users (such as consumers) typically are not in a position to contest the terms of licences offered’.

Even where users should be in position to negotiate, for example in the education, archive and library sectors, there is evidence that statutory limitations and exceptions under copyright law are becoming irrelevant. The reasons are not well understood but competition issues may play a part (with large bundles of rights controlled by few companies).<sup>12</sup>

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6 Ibid, 116.

7 Ibid, 118.

8 Ibid, ch 4.

9 Ibid, 129.

10 Ibid.

11 M Kretschmer, E Derclaye, F Favale and R Watt, *A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy* (2010), 4. Similarly, consumer protection legislation is often ignored or hard to enforce—for example, because ‘many online licence agreements are not easily understood, and contain excessive exclusions of liability’.

12 Ibid, 4.

17.16 In Australia, it has been contended that the ‘majority of electronic contracts involving material protected by copyright purport to restrict the uses of that material in ways that conflict with applicable exceptions to copyright, such as fair dealing’.<sup>13</sup> Many stakeholders submitted that contracting out has continued—and perhaps become more common—since the CLRC reported.<sup>14</sup> The shift to online distribution of copyright materials was identified as a key driver of this trend.<sup>15</sup>

17.17 Recent research funded by the Australian Research Council is said to indicate that the practice of excluding or limiting exceptions by contract is ‘just as (if not more) prevalent now as it was 10 years ago’.<sup>16</sup> The study, by Robin Wright, found that common contract terms may hinder the ability of libraries to deliver interlibrary loans, reproduce and communicate materials for educational purposes, and prevent researchers or students relying on the fair dealing exceptions.<sup>17</sup>

17.18 In a submission to this Inquiry, Wright confirmed that an examination of excerpts from publisher agreements demonstrates that licence agreements include terms that ‘purport to exclude or limit a library’s ability to use the existing Australian copyright exceptions with licensed digital material’.<sup>18</sup>

17.19 Consistently, the National Library of Australia stated that only 21% of its licence agreements for subscription databases permit supply of copies to Australian users through the Australian interlibrary loan network, and 57% prohibit access by users outside the Library’s premises. Further, none of the agreements permit the Library to supply copies in response to requests from individuals and, therefore, prohibit it from supplying copies that would otherwise be permitted by fair dealing exceptions.<sup>19</sup>

17.20 Other stakeholders also provided examples of contractual terms encountered by Australian libraries that potentially affect the availability of document supply and interlibrary loans.<sup>20</sup>

17.21 Universities Australia stated that the most common forms of contractual limitations on commercially-published journal content were prohibitions on: use of content in course packs (otherwise permitted by pt VB of the *Copyright Act*); use of material for interlibrary loans (otherwise permitted by ss 49 and 50); electronic transmission of content between authorised users (otherwise permitted by ss 40 and

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13 D Clapperton and S Coronas, ‘Unfair Terms in Clickwrap and Other Electronic Contracts’ (2007) 35 *Australian Business Law Review* 152, 175.

14 See, eg, ADA and ALCC, *Submission 213*; Parliamentary Library, *Submission 107*.

15 Copyright Advisory Group—Schools, *Submission 231*; Society of University Lawyers, *Submission 158*; R Xavier, *Submission 146*.

16 ADA and ALCC, *Submission 213*, citing R Wright, ‘Libraries and Licensing: the eFuture will Need Legal as well as Technical Skills’ (Paper presented at VALA 2012, Melbourne, 9 February 2012).

17 ADA and ALCC, *Submission 213*.

18 R Wright, *Submission 167*.

19 National Library of Australia, *Submission 218*.

20 ADA and ALCC, *Submission 213*.



41); use of content for the purpose of data mining or text mining; and use other than ‘personal use’ of online broadcast material (otherwise permitted by pt VA).<sup>21</sup>

17.22 Stakeholders expressed specific concerns about the effect of contractual restrictions on fair dealing with copyright materials. The Australian Broadcasting Corporation (ABC), for example, stated that it is ‘often placed in a worse position for having entered into a contract with a rights holder, where that contract restricts fair dealing, compared with its competitors for those rights, who have no such contract and who can fair deal with that content across platforms’.<sup>22</sup>

## Current law

### Contracting out and the *Copyright Act*

17.23 The *Copyright Act* generally contains no provisions that prevent agreements from excluding or limiting the operation of exceptions, except in relation to the reproduction of computer programs. Therefore, for example:

- copyright owners of filmed recordings of sporting events may make it a condition that their customers do not provide the film to others who might exercise a fair dealing exception (for example, news reporting) or make use of the film other than as specified by contract; but
- software licensees cannot contract out of provisions allowing reverse engineering to make interoperable products or back-ups, and licensors, therefore, make these uses an exception to the restrictions in licences.

17.24 In relation to computer programs, s 47H of the *Copyright Act* expressly provides that ‘an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting’ the operation of certain exceptions permitting the reproduction of computer programs for technical study, back-up, security testing and error correction ‘has no effect’.<sup>23</sup>

17.25 These limitations on contracting out were inserted by the *Copyright Amendment (Computer Programs) Act 1999* (Cth), which resulted from the Government’s consideration of a CLRC report on computer software protection. In that report, the CLRC stated that provisions regarding interoperability, back-up copying and de-compilation of locked programs would have little practical effect if parties could rely on contractual provisions to prevent these acts. It recommended that the *Copyright Act* be amended to ensure that these exceptions could not be avoided by contractual means.<sup>24</sup>

17.26 The existence of an express provision against contracting out in s 47H arguably helps to confirm that exceptions elsewhere in the *Copyright Act* can be overridden by

21 Universities Australia, *Submission 246*.

22 Australian Broadcasting Corporation, *Submission 210*.

23 *Copyright Act 1968* (Cth) s 47H relating to agreements that exclude or limit exceptions provided under ss 47B(3), 47C–47F.

24 Copyright Law Review Committee, *Computer Software Protection* (1995), [10.106].

contract.<sup>25</sup> After considering the legislative history, however, the CLRC concluded that the effect of s 47H on agreements which exclude or limit other exceptions is ‘ultimately unclear’.<sup>26</sup>

17.27 The CLRC and other legal commentators have, however, identified several reasons why Parliament enacted an express provision only in relation to computer programs. These include that:

- s 47H applies expressly to specific exceptions implemented by the same amending legislation, so it is not possible to imply an intention on the part of Parliament that all pre-existing exceptions be subject to contract, no matter when they became part of the Act; and
- the relevant provisions of the *Copyright Amendment (Computer Programs) Act 1999* (Cth) were based on a model provided by a European Directive<sup>27</sup> on the protection of computer programs.<sup>28</sup>

### Enforceability of contracts

17.28 Leaving aside provisions of the *Copyright Act* itself, the CLRC *Copyright and Contract* report observed that the enforceability of contractual terms excluding or limiting exceptions may also be affected by:<sup>29</sup>

- consumer protection legislation—for example, provisions of the ACL, which proscribe misleading or deceptive conduct and unconscionable conduct in trade or commerce, and unfair contract terms in consumer contracts;<sup>30</sup>
- competition legislation—notably provisions of the *Competition and Consumer Act 2010* (Cth), which prohibit misuse of market power;<sup>31</sup>
- the ordinary principles of contract law concerning the formation of contracts—for example, where there is insufficient notice of, and assent to, the terms of online licences;<sup>32</sup>
- the equitable doctrine of unconscionable conduct—for example, where one party is known by the other to be at a special disadvantage and unfair or unconscientious advantage is taken;<sup>33</sup>

25 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

26 Copyright Law Review Committee, *Copyright and Contract* (2002), 179.

27 Council of the European Communities, *Council Directive on the Legal Protection of Computer Programs* (1991).

28 See Copyright Law Review Committee, *Copyright and Contract* (2002), 174–179; J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 45.

29 See Copyright Law Review Committee, *Copyright and Contract* (2002), ch 5.

30 *Competition and Consumer Act 2010* (Cth) sch 2, ch 2, pts 2–2, 2–3.

31 *Ibid* s 46.

32 The Australian Government Attorney-General’s Department is currently conducting a review of Australian contract law, which includes consideration of ‘challenges relating to internet contracting’: Australian Government Attorney-General’s Department, *Improving Australia’s Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (2012), 9.

- the law relating to contracts that are contrary to public policy—where a contract term defeats or circumvents a statutory public purpose or policy.

17.29 As discussed below, there are differing views on whether, and in what circumstances, contractual terms excluding or limiting exceptions to copyright may be unenforceable. Depending on the circumstances, and where agreements are governed by Australian law, contractual terms that exclude or limit the operation of exceptions may be unenforceable due to legislative provisions outside the *Copyright Act* or the operation of the general law (common law and equity).

### ***Competition and consumer law***

17.30 The ACL provides that a court may determine that a term of a standard form consumer contract is unfair and therefore void, including in response to proceedings taken by the Australian Competition and Consumer Commission (ACCC).<sup>34</sup>

17.31 Under the ACL, a ‘consumer contract’ includes a contract for the supply of goods and services to an individual who acquires them wholly or predominantly for personal, domestic or household use or consumption.<sup>35</sup> The ACL outlines a number of factors that the court must take into account in determining whether a contract is a ‘standard form contract’. Such contracts will typically be those that have been prepared by one party to the contract and are not subject to negotiation between the parties—that is, offered on a ‘take it, or leave it’ basis, as is typically the case with consumer contracts involving copyright.

17.32 The ACL provides that a contractual term is unfair if it:

- would cause a significant imbalance in the parties’ rights and obligations under the contract;
- is not reasonably necessary to protect the legitimate interest of a party to the contract; and
- would cause detriment to a party to the contract if it were to be applied or relied upon.<sup>36</sup>

17.33 In relation to competition law, there are questions about the operation of s 51(3) of the *Competition and Consumer Act*. This section provides a limited exemption from some prohibitions on restrictive trade practices for contraventions resulting from copyright licensing. Depending on how the scope of the exemption is interpreted, the exemption may, for example, permit conditions in copyright licences providing that the licensee must not acquire similar rights from any other copyright owner. This constitutes exclusive dealing and would otherwise contravene s 47 of the *Competition*

33 The CLRC concluded that this doctrine was unlikely to apply to most contracts the subject of its review: Copyright Law Review Committee, *Copyright and Contract* (2002), 151.

34 *Competition and Consumer Act 2010* (Cth) sch 2. The ACCC has been active in reviewing standard form consumer contracts in a number of industries, including in the airline, telecommunications, fitness and vehicle rental industries but has not, to date, focused on copyright licensing agreements. See Australian Competition and Consumer Commission, *Unfair Contract Terms: Industry Review Outcomes* (2013).

35 Australian Consumer Law s 23(3).

36 Ibid s 24(1).

and Consumer Act (provided it had the purpose or effect of substantially lessening competition in a market).<sup>37</sup>

17.34 The ACCC submitted that, while the extent of the s 51(3) exception is ‘unclear’, it ‘potentially excludes significant anti-competitive conduct, with substantial detrimental effects on efficiency and welfare’ from the application of the *Competition and Consumer Act*.<sup>38</sup>

### **Contract and public policy**

17.35 It has been argued that many contractual provisions purporting to exclude or limit a licensee’s rights under the *Copyright Act* are ineffective to do so, as such terms are void or unenforceable on public policy grounds. This view is based on the general principle of contract law that, except where permitted by legislation, ‘a contract which purports to oust the jurisdiction of the courts is contrary to public policy and therefore void or unenforceable, but probably not an illegal contract’.<sup>39</sup>

17.36 In relation to the *Copyright Act*, it may be sufficient that a court has jurisdiction to make orders in respect of rights conferred by the Act and that the rights conferred are of a public, rather than private, nature. The rights conferred by the *Copyright Act* may be characterised as public rights, because ‘at least some of the relevant provisions confer positive rights, in effect as statutory licences, which may be enforced by action against an owner’; and exceptions may be relied on as a defence in proceedings for infringement.<sup>40</sup>

17.37 The case law on contracting out of legislative rights establishes that, ‘if the operation of a contractual provision defeats or circumvents the statutory purpose or policy, then the provision is inconsistent in the relevant sense and falls within the injunction against contracting out’.<sup>41</sup>

17.38 Applying the above legal principles to contracting out under the *Copyright Act*, Professor J W Carter, Professor Elisabeth Peden and Kristin Stammer have argued that:

- Contractual terms that purport to exclude or limit the fair dealing exceptions are unenforceable, because to ‘permit an owner to sue for breach of contract in relation to conduct amounting to a fair dealing would circumvent the scheme of the Act under which fair dealing is permitted’.<sup>42</sup>

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37 ACCC, *Submission 165*.

38 Ibid.

39 J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 41, citing J Carter, *Carter on Contract*.

40 Ibid, 41–42.

41 Ibid, 42, citing *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516, 522.

42 That is, a contractual provision cannot convert fair dealing into an infringement of copyright and the Act ‘also impliedly prohibits a contractual claim in relation to conduct amounting to a fair dealing’: J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 46.

- Contractual terms that purport to exclude or limit the exceptions that provide for the copying of copyright materials in libraries or archives are unenforceable. These exceptions are based on, and give effect to, important policy concerns and the ‘real beneficiaries’ of the exceptions are the users of libraries and archives.<sup>43</sup>

17.39 Some stakeholders expressed views on the extent to which current law permits contracting out. The Australasian Performing Right Association and the Australasian Mechanical Copyright Owners Society (APRA/AMCOS) submitted that ‘as a matter of law it is not possible to contract out of the existing fair dealing exceptions or statutory licences in the Act’, because ‘licences derogate at source from the rights of the copyright owner’. Therefore, the copyright owner is not in a position to ‘limit rights that it does not control’.<sup>44</sup>

17.40 Another stakeholder observed that it would be ‘wrong to generalise what exceptions are really over-ridden by licensing terms and/or relevant to users’, because contract terms differ greatly, depending on the form of copyright material and the applicable law.<sup>45</sup> Copyright Agency/Viscopy submitted that the extent to which contracting out provisions are ‘problematic in practice’ is unclear, and noted arguments that, in at least some cases, ‘contracts can be interpreted to allow for the operation of copyright exceptions’.<sup>46</sup>

### US copyright pre-emption and misuse doctrines

17.41 Some comparison with United States law may be useful, given the existence in the US of a general fair use exception. US law has developed copyright-specific constraints on the freedom of parties to contract out of copyright exceptions, based on doctrines of copyright pre-emption and copyright misuse. There remains, however, considerable uncertainty and academic debate about the application of these doctrines.<sup>47</sup>

17.42 Section 301(a) of the US *Copyright Act* provides that ‘all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright ... are governed exclusively by this title’.<sup>48</sup> This provision can be interpreted as meaning that, where a contract entered into under state contract law is inconsistent with federal copyright law, the contract may be found to be ‘pre-empted’.

17.43 However, the practical effect of this aspect of the copyright pre-emption doctrine has been limited, because courts have generally held that rights created by contract are not ‘equivalent’ to exclusive rights—that is, a copyright is a right against the world, while contracts, by contrast, ‘generally affect only their parties’.<sup>49</sup> Courts

43 Ibid, 47.

44 APRA/AMCOS, *Submission 247*.

45 IASTMP, *Submission 200*.

46 Copyright Agency/Viscopy, *Submission 249*.

47 See, eg, V Moffat, ‘Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking’ (2007) 14(1) *University of California Davis Law Review* 45.

48 *Copyright Act 1976* (US) s 301(a).

49 *ProCD Inc v Zeidenberg*, 86 F 3d 1447 (7th Cir, 2006), 1454.

have generally held that the US *Copyright Act* does not pre-empt contractual terms, including those that exclude fair use.<sup>50</sup>

17.44 A contract may also be ‘constitutionally’ pre-empted if there is a conflict between state enforcement of a contract and federal copyright law or policy. The US courts, however, have failed to develop consistent criteria for determining whether contract terms are pre-empted in this way.<sup>51</sup>

17.45 In addition, under the doctrine of copyright misuse, US courts may refuse to enforce agreements that attempt to extend protection of copyright material beyond the limits set by copyright law, including limits on the duration of copyright protection. In *Lasercomb America v Reynolds*,<sup>52</sup> a licensee had agreed not to develop a competitive computer-aided design program for 99 years—beyond the period of protection by copyright laws. The Court found that the copyright owner was trying to effectively extend the term and scope of its copyright beyond the permitted limits of copyright law, and that would prevent people from legitimately developing competitive software.

17.46 The underlying policy rationale for the copyright misuse doctrine is the copyright and patent clause of the *US Constitution*, which states an intention ‘to promote the Progress of Science and useful Arts’. The application of the doctrine depends on ‘whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright’.<sup>53</sup> Courts have suggested that anti-competitive licensing agreements and agreements that exclude fair use may conflict with the public purposes of copyright.<sup>54</sup>

17.47 However, there seem to be no clear instances of the copyright pre-emption or misuse doctrines having been applied, for example, to the multitude of online contracts that exclude otherwise fair use of copyright materials. Rather, courts have ‘toed the “freedom of contract” line’.<sup>55</sup>

### Should contracting out be enforceable?

17.48 One rationale for placing statutory limitations on contracting out is that it changes the copyright ‘balance’:

As the copyright interest is constituted by the exclusive rights of copyright, as defined within the framework of the exceptions to the rights set out in the *Copyright Act*, then any attempt to exclude or modify the exceptions by contract brings about a

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50 See, V Moffat, ‘Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking’ (2007) 14(1) *University of California Davis Law Review* 45, 74–75.

51 See, D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd. While the possibility of copyright pre-emption remains, ‘the extent to which this is likely is quite uncertain’: 42.

52 *Lasercomb America v Reynolds*, 911 F 2d 970 (4th Cir, 1990).

53 *Ibid*, 978.

54 *Video Pipeline Inc v Buena Vista Home Entertainment Inc*, 342 F 3d 191 (3rd Cir, 2003), 204–205.

55 V Moffat, ‘Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking’ (2007) 14(1) *University of California Davis Law Review* 45, 50.

fundamental imbalance of these rights. It follows that it should not be possible to alter that balance by means of contract.<sup>56</sup>

17.49 This perspective was echoed in many submissions to the Inquiry.<sup>57</sup> Google, for example, stated that copyright laws ‘contain a complex balance between the rights of copyright owners to protect their works and the public interest in ensuring access to knowledge and the creation of new works’. This balance, being ‘sensitively and carefully constructed’, should not be able to be ‘altered or replaced by private arrangements’.<sup>58</sup>

17.50 The public interest is also be invoked in arguing against contracting out.<sup>59</sup> That is, the public interest in the preservation of the copyright balance should take precedence over the public interest in freedom of contract.<sup>60</sup> In reaching its recommendations, the CLRC specifically referred to exceptions that ‘embody the public interest in education, the free flow of information and freedom of expression’.<sup>61</sup> Stakeholders in this Inquiry also referred specifically to the public interest in access to information and freedom of expression.<sup>62</sup>

17.51 In contrast, other stakeholders suggested that the idea of the *Copyright Act* representing a balance that must be preserved, whatever the contractual relationship of parties, is erroneous.<sup>63</sup> The Australian Publishers Association (APA), for example, stated that arguments in favour of limitations on contracting out assume that the Act ‘captures an optimal balance’ between user and owners of copyright material that is ‘inviolable and must be preserved at all costs and in all situations’; and that exceptions operate as limitations on copyright defining the scope of a copyright owner’s rights, rather than as defences.

17.52 The APA observed that the legislative history of any specific copyright exception shows how the exceptions are ‘shaped by circumstances applying at a particular point in time’, and the way in which exceptions ‘may well remain in the Act even though the circumstances that led to their introduction have changed’.<sup>64</sup>

17.53 The structure and language of the *Copyright Act* were said to clearly indicate that exceptions are, in almost all cases, defences—for example, the Act provides that ‘it is not an infringement’ to do certain things, even though those things are within the scope of the copyright owner’s exclusive rights—and the exceptions are, in many cases, ‘highly conditional and highly fact-specific’.<sup>65</sup>

56 Copyright Law Review Committee, *Copyright and Contract* (2002), 262.

57 For example, SBS, *Submission 237*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; Ericsson, *Submission 151*; K Bowrey, *Submission 94*.

58 Google, *Submission 217*.

59 Copyright Advisory Group—Schools, *Submission 231*; National Library of Australia, *Submission 218*; R Wright, *Submission 167*; K Bowrey, *Submission 94*.

60 Copyright Law Review Committee, *Copyright and Contract* (2002), 263.

61 Ibid, 266.

62 Arts Law Centre of Australia, *Submission 171*; R Xavier, *Submission 146*.

63 Australian Publishers Association, *Submission 225*; ALPSP, *Submission 199*.

64 Australian Publishers Association, *Submission 225*.

65 Ibid.

17.54 Stakeholders also emphasised the important role that freedom of contract plays in facilitating the efficient use of copyright materials,<sup>66</sup> and supporting competition, especially in relation to licensing.<sup>67</sup> For example, Australian Film and TV Bodies stated that, in ‘guaranteeing freedom of contract, the *Copyright Act* promotes distribution and use of copyright material particularly in online and multi-jurisdictional environments’.<sup>68</sup> The Australian Recording Industry Association (ARIA) observed that, in the digital environment, music services use licences to ‘set the boundaries for the use of content by consumers’. Consumers typically pay higher prices for greater access so that different delivery models ‘provide varied consumer offerings and services which benefit both consumers and creators’ and are also ‘the business models of third party suppliers’.<sup>69</sup>

17.55 Contracting out was seen as important in allowing copyright owners to design licence terms that are appropriate to the material being licensed and are able to be ‘reviewed by businesses on an ongoing basis to respond to changing business and client needs’.<sup>70</sup>

17.56 Contract was seen as having an important role in protecting the legitimate interests of copyright holders.<sup>71</sup> For example, an artist who releases music for children may not wish to see their sound recordings used in contexts which, although they may be considered as a ‘fair dealing’, are ‘distinctly adult or perverse’, and should be able to contract out.<sup>72</sup>

17.57 It was also suggested that there may be problems in relation to international competitiveness, if contracting out were to be further restricted.<sup>73</sup> A possible consequence of limitations on contracting out in Australian law may be to make Australia ‘less attractive as a hub for business’.<sup>74</sup> The Interactive Games and Entertainment Association stated that

it is critical that international creators or owners, which includes Australian creators, are able to develop new and innovative business models without the risk of such business models being undermined by local copyright exceptions.<sup>75</sup>

17.58 Possible legal uncertainty in contracts and business models was a particular concern of stakeholders<sup>76</sup>—in particular, due to uncertainty about the scope and reach of exceptions. That is, if contractual terms limiting exceptions were to be made

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66 See, eg, Department of Defence, *Submission 267*; ARIA, *Submission 241*; News Limited, *Submission 224*; Australian Film/TV Bodies, *Submission 205*; ACCC, *Submission 165*.

67 For example, ARIA, *Submission 241*; Australian Film/TV Bodies, *Submission 205*; IASTMP, *Submission 200*; ACCC, *Submission 165*.

68 Australian Film/TV Bodies, *Submission 205*.

69 ARIA, *Submission 241*.

70 AAP, *Submission 206*.

71 CSIRO, *Submission 242*; ARIA, *Submission 241*.

72 ARIA, *Submission 241*.

73 Ibid; IASTMP, *Submission 200*; iGEA, *Submission 192*; Thomson Reuters, *Submission 187*.

74 IASTMP, *Submission 200*.

75 iGEA, *Submission 192*.

76 For example, APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; AAP, *Submission 206*; IASTMP, *Submission 200*.



unenforceable, ‘some users may feel that a contractual provision limits an exception, when the rights holder believes the use does not fall within the scope of an exception’.<sup>77</sup>

17.59 ARIA suggested that, rather than overriding competitive market offerings, it would be more appropriate to ‘respect and uphold agreed licence terms and leave exceptions to work as a reasonable default when usage terms have not been defined in contract’.<sup>78</sup> John Wiley & Sons submitted that

Commercial licensing, by its nature, generally grants greater rights to users than those already granted under statute. In cases, fortunately rare, when parties may disagree on the scope and reach of a copyright exception, then agreeing the scope of a use under licence can provide a pragmatic business solution satisfactory to both parties and thus increase legal certainty and mitigate risk, both essential elements of a robust policy for innovation.<sup>79</sup>

17.60 Existing contractual terms may, however, also prejudice the competitive position of copyright users who are subject to them, if others are not.<sup>80</sup> SBS referred to the need to create ‘certainty and a level playing field in relation to use of copyright material in the public interest’.<sup>81</sup>

### Is there a need for reform?

17.61 There are differing views on the extent to which the general law and legislation outside the *Copyright Act* are adequate to constrain contracting out, at least where agreements are governed by Australian law.

17.62 Some stakeholders suggested that existing competition and consumer protection laws are adequate to address any problems for copyright users attributable to contracting out.<sup>82</sup> The APA, for example, submitted that, ‘to the extent that an imbalance in negotiating power leads to undesirable outcomes, then competition and consumer laws are the appropriate means of redressing any contractual imbalance—not blanket prohibitions on such contracts under the Act’.<sup>83</sup>

17.63 There remain concerns, however, that copyright users are not generally in a good position to negotiate the terms on which copyright materials are licensed. Even large institutions may argue that negotiation is ‘so resource-intensive as to be effectively impossible as a general rule’; and there may be no choice of supplier.<sup>84</sup>

17.64 Different considerations may apply to mass-market licences as opposed to negotiated contracts.<sup>85</sup> The Parliamentary Library noted that, ‘in the current

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<sup>77</sup> IASTMP, *Submission 200*.

<sup>78</sup> ARIA, *Submission 241*.

<sup>79</sup> John Wiley & Sons, *Submission 239*.

<sup>80</sup> Australian Broadcasting Corporation, *Submission 210*.

<sup>81</sup> SBS, *Submission 237*.

<sup>82</sup> John Wiley & Sons, *Submission 239*; Australian Publishers Association, *Submission 225*; AAP, *Submission 206*; IASTMP, *Submission 200*.

<sup>83</sup> Australian Publishers Association, *Submission 225*.

<sup>84</sup> UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 17.

<sup>85</sup> Australian Copyright Council, *Submission 219*.

environment of online mass-market agreements, such negotiations are often not practically possible'.<sup>86</sup>

17.65 Stakeholders also referred to legal uncertainty about contracting out and its effects. The Parliamentary Library noted that uncertainty about whether contracts may 'limit or exclude the operation of the parliamentary library exceptions in the Act' meant that the best option is to negotiate contract terms that specifically permit the Library to exercise its full rights under the *Copyright Act*.<sup>87</sup>

17.66 Civil Liberties Australia observed that, while doubts remain about the enforceability of contracting out, this legal uncertainty does not prevent 'deployment and uptake in practice' of such terms or their ability to regulate industry behaviour.<sup>88</sup>

17.67 The UK Hargreaves Review provided one illustration of this effect in observing that it becomes very difficult to give clear guidance to users where an institution has different contracts with a number of providers, which override different exceptions. The report stated that often 'the result will be that, for legal certainty, the institution will restrict access to the most restrictive set of terms, significantly reducing the provisions for use established by law'.<sup>89</sup>

17.68 In addition to suggesting that contracting out should be unenforceable,<sup>90</sup> or generally unenforceable,<sup>91</sup> stakeholders who favoured limitations on contracting out proposed a range of approaches to reform.

17.69 Some expressly supported the CLRC's recommendations<sup>92</sup> or reform that, in effect, follows the CLRC approach. For example, the Arts Law Centre submitted that the *Copyright Act* should be amended to prevent contracting out of copyright exceptions that have 'a strong public policy basis: research or study; criticism or review; parody or satire; and reporting news'.<sup>93</sup>

17.70 Wright suggested that contracting out of the educational instruction exception, the statutory educational licences, the libraries and archives exceptions and 'any fair dealing or fair use exceptions or any future exceptions intended to provide similar public benefits', should be prohibited.<sup>94</sup>

17.71 The Australian Digital Alliance and Australian Libraries Copyright Committee (ADA/ALCC) highlighted the importance of protecting exceptions allowing personal

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86 Parliamentary Library, *Submission 107*.

87 Ibid.

88 Civil Liberties Australia, *Submission 139*.

89 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 51.

90 Copyright Advisory Group—Schools, *Submission 231*; Pirate Party Australia, *Submission 223*; Australian Broadcasting Corporation, *Submission 210*; R Xavier, *Submission 146*.

91 K Bowrey, *Submission 94*.

92 Universities Australia, *Submission 246*; Pirate Party Australia, *Submission 223*; ADA and ALCC, *Submission 213*; Civil Liberties Australia, *Submission 139*.

93 Arts Law Centre of Australia, *Submission 171*.

94 R Wright, *Submission 167*.

or social online use, transformative use, use of orphan works, and uses which ‘do not trade on the underlying creative and expressive purpose of the work’.<sup>95</sup>

17.72 The ADA and ALCC noted that the CLRC review did not recommend that any educational exceptions be mandated. They submitted that, given the use of digital materials in schools has expanded since the CLRC report, which makes educational copying exceptions crucial for educational services, ‘any existing or proposed educational copying exceptions should also be protected from override by contract’.<sup>96</sup>

17.73 In addition, some stakeholders submitted specifically that, if the ALRC were to recommend a new general fair use exception, contracting out from that exception should also be prohibited.<sup>97</sup> Stakeholders, including those who did not favour legislative limitations on contracting out, also made suggestions on the desirable scope of such limitations.

17.74 The Australian Copyright Council referred to the need to distinguish between contractual terms designed to protect the integrity of the work or the owner’s commercial interests from other types of restrictions—such as a restriction purporting to exclude fair dealing for judicial proceedings.<sup>98</sup> This distinction, it suggested, could provide ‘a helpful paradigm for looking at freedom to contract and copyright policy in the digital economy’. That is, prohibitions on contracting out should only be considered where ‘the exception in question serves a broad, public policy purpose’.<sup>99</sup>

17.75 The APA submitted that the ALRC should only recommend limitations on contracting out if there is empirical evidence that ‘a fundamental societal interest is in practice being eroded or removed through contract’ and that this has become an ‘entrenched problem’.<sup>100</sup> ARIA cautioned that, should evidence establish abuse of contract terms, any prohibition on contracting out should be ‘drafted very narrowly to address that issue only to avoid any chilling effect on the development of new business models’.<sup>101</sup>

17.76 Civil Liberties Australia suggested that a prohibition could apply initially to consumers, sole traders and small businesses engaged in trade or commerce.<sup>102</sup> Similarly, Copyright Agency/Viscopy suggested that any prohibition should only apply to private uses by individuals.<sup>103</sup>

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95 ADA and ALCC, *Submission 213*.

96 Ibid.

97 EFA, *Submission 258*; ADA and ALCC, *Submission 213*.

98 Referring to J Carter, E Peden, K Stammer ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 34.

99 Australian Copyright Council, *Submission 219*.

100 Australian Publishers Association, *Submission 225*.

101 ARIA, *Submission 241*. Also CSIRO, *Submission 242*.

102 Civil Liberties Australia, *Submission 139*.

103 Copyright Agency/Viscopy, *Submission 249*.

17.77 The ACCC stated that the exemption for copyright licensing from prohibitions on restrictive trade practices in s 51(3) of the *Competition and Consumer Act* should be repealed. In its view, such a repeal would ‘not lead to an erosion of the rights created through IP laws’.<sup>104</sup>

### Approaches to reform

17.78 Copyright owners generally oppose limitations on contracting out because this challenges freedom of contract, with possible unintended consequences. Contractual terms are said to provide clarity and certainty for copyright users about how they may deal with copyright materials. In particular, if a new general fair use exception were introduced, contractual terms may be able to ‘reduce the risk of misunderstanding and provide legal certainty where an exception cannot’.<sup>105</sup>

17.79 From this perspective, copyright users should be able to effectively agree that they will pay for uses covered by free-use exceptions in the *Copyright Act*, for example, under the libraries and archives exceptions. Any restrictions on permissible uses should, in theory, be reflected in the price paid to the copyright owner.

17.80 At the same time, copyright users may gain benefits under the contract that they might otherwise not have, for example, access to the whole of the work for the making of copies or for the purposes of communication or adaptation. A contractual term is not ‘necessarily unfair’ if it prohibits something allowed under a copyright exception irrespective of the context of the provision, which includes the benefits of the contract as a whole and the circumstances in which the contract was made.<sup>106</sup>

17.81 In contrast, copyright users considered that contracting out has the potential to render exceptions under the *Copyright Act* meaningless. Copyright users, it was argued, are often not in a good position to negotiate the terms on which copyright materials are licensed. Contracting out puts at risk the public benefit that exceptions are intended to provide.

17.82 New limitations on contracting out might apply to all exceptions, or only some exceptions—for example, those that serve certain important public interests, or which are fundamental to the copyright balance.

17.83 In *Copyright and Contract*, the CLRC concluded that agreements were being used to exclude or limit copyright exceptions and that this practice ‘undermines the copyright balance established by the *Copyright Act*’.<sup>107</sup> The CLRC recommended that the

traditional fair dealing defences and the provisions relating to libraries and archives which permit uncompensated copying and communication to the public within

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104 ACCC, *Submission 165*.

105 IASTMP, *Submission 200*.

106 See Copyright Council, *Response to report of Copyright Law Review Committee on Copyright and Contracts* (2003).

107 Copyright Law Review Committee, *Copyright and Contract* (2002), 142.

specified limits, and which embody the public interest in education, the free flow of information and freedom of expression, should be made mandatory.<sup>108</sup>

17.84 The CLRC also considered that ‘exceptions introduced in recent years relating to technological developments should also be made mandatory’—specifically provisions allowing for temporary reproductions in the course of a communication.<sup>109</sup>

17.85 The UK Hargreaves Review recommended, in 2011, that the UK Government should change the law to make it clear that no exception to copyright can be overridden by contract.<sup>110</sup> In its response to the Hargreaves Review, the UK Government noted that the recommendation on contracting out reflected ‘longstanding concerns that contracts may in some circumstances undesirably restrict the uses permitted by copyright law’.<sup>111</sup>

17.86 The general principle that contracts should not be allowed to erode the benefits of permitted acts was accepted. The UK Government stated, however, that because European law provides that some permitted acts may not override contract terms,<sup>112</sup> ‘a blanket ban on contract overriding copyright’ was not possible.<sup>113</sup>

17.87 The UK Government announced that, ‘to the extent that is legally allowed, the Government will provide for each permitted act considered in this document that it cannot be undermined or waived by contract’. This, it was said, may include a prohibition on licensing override of permitted acts, or restricting the terms on which licensing may affect permitted acts.<sup>114</sup>

## Limitations on contracting out

17.88 Contracting out raises fundamental questions about the objectives of copyright law; the nature of copyright owners’ exclusive rights and exceptions; and the respective roles of the *Copyright Act*, contract and competition law and policy in governing licensing practices.

17.89 The issue has been characterised as involving a collision between two important legal principles: statutory rights reflecting public policy, on the one hand; and freedom of contract, on the other<sup>115</sup>—or public versus private ordering of rights.

108 Ibid, 266, 274, referring to *Copyright Act 1968* (Cth) ss 40, 41, 42, 43, 43A, 48A, 49, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, 111A.

109 Referring to *Copyright Act 1968* (Cth) ss 43A, 111A. The Australian Government has not responded to the CLRC report.

110 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 51.

111 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 17.

112 For example, exceptions permitting libraries, educational institutions and archives to make copyright material available, for the purpose of research or private study, through dedicated terminals on their premises must be ‘subject to purchase or licensing terms’: *Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (entered into force on 22 June 2001).

113 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 19.

114 Ibid.

115 See Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

17.90 The ALRC considers that the *Copyright Act* should provide expressly that contractual terms that limit the operation of the fair dealing and libraries and archives exceptions should be unenforceable. The following discussion explains the reasons for this proposal. Briefly, these are that:

- there is doubt about the extent to which contractual terms excluding or limiting exceptions are enforceable and more certainty is desirable, in relation to some exceptions; and
- important public interests promoted by the fair dealing and libraries and archives exceptions may be compromised if these exceptions are rendered inoperative by contract.

17.91 It is apparent from information provided in submissions to this Inquiry that contractual terms excluding or limiting copyright exceptions under the *Copyright Act* remain common. While contracts may create clarity and provide copyright users with permission to use materials in ways that would otherwise be an infringement, some contractual terms can also be seen as eroding ‘socially and economically important uses of copyright works’.<sup>116</sup>

17.92 The problem is how to address any negative effects of contracting out without restricting innovation and flexibility in licensing practices. The economic value of freedom of contract is an important factor. Arguably, most contractual restrictions imposed on licensees ‘are designed either to protect the integrity of the work or the owner’s financial interests’. Both these interests are ‘legitimate concerns of anyone seeking to maximise the benefit of commercialisation of intellectual property rights, including copyright’.<sup>117</sup>

17.93 Where copyright owners are in a strong bargaining position, they may ‘overreach and circumvent the provisions of the Act to an unacceptable extent’—so that ‘private ordering may lead to a different balancing of parties’ rights than is contemplated in the many complex and carefully structured statutory provisions’ of the *Copyright Act*.<sup>118</sup>

17.94 Ricketson and Creswell note, however, that what is ‘unacceptable’ will depend on the commentator’s perspective.<sup>119</sup> In this context, it seems necessary to differentiate between different types of exceptions and the purposes exceptions are intended to serve.

17.95 Before considering how exceptions might be distinguished for the purpose of introducing limitations on contracting out, questions arise about whether statutory limitations are necessary, given existing law relating to public policy and contracts, and competition law.

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116 See UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 19.

117 J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 34.

118 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

119 Ibid.

**Public policy**

17.96 In particular, Carter, Peden and Stammer have argued that many contractual terms that restrict user rights under the *Copyright Act* may be invalid as ‘a result of application of the public policy rule relating to the ouster of the jurisdiction of the courts’.<sup>120</sup>

17.97 Carter, Peden and Stammer consider that, as the rights conferred by the *Copyright Act* include positive rights—for example, statutory licences that may be enforced by action against an owner; and rights that may be relied upon by way of defence in proceedings for infringement, this is sufficient to bring the public policy rule into operation.<sup>121</sup>

17.98 They argue, therefore, that prohibiting contracting out by legislation, as recommended by the CLRC, is not necessary:

Unless the purpose is to identify those rights which may be the subject of contractual restrictions, we see no pressing need for legislation to declare contractual restrictions invalid because the common law already provides for invalidity in cases where the public interest requires it.<sup>122</sup>

17.99 This view on contracting out does not seem to be universally accepted. Ricketson and Creswell, for example, state that there is nothing in the *Copyright Act* to suggest that exceptions ‘cannot be pre-empted contractually and the very existence of s 47H serves to confirm this’. They state that, in any event, ‘at general law the waiver of rights and entitlements is readily accepted, in the absence of express legislative prohibition so that little, if anything, will turn on the correct characterization of the statutory exceptions and limitations under the Act’.<sup>123</sup>

17.100 In the context of arguments that rights of fair dealing should be preserved in the face of the increased use of TPMs, Melissa de Zwart suggests that the doctrine of fair dealing might be used to create a shield, on public policy grounds, against the ‘expanding contractual and proprietary claims of copyright owners’.<sup>124</sup>

17.101 One basis for such a development is Kirby J’s reasoning in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* that an interpretation of legislative provisions in the *Copyright Act* that leads to the substitution of contractual obligations interfering with the operation of the fair dealing provisions—the ‘relevant public law—should not be readily accepted’.<sup>125</sup> This reasoning may extend to the interpretation of contractual terms, and the application of a public policy rule.

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120 J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 54.

121 Ibid, citing *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 404–405.

122 J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 54.

123 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640], citing *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394.

124 M De Zwart, ‘Technological Enclosure of Copyright: The End of Fair Dealing?’ (2007) 18 *Australian Intellectual Property Journal* 7, 37.

125 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, [210].

17.102 In the ALRC's view, notwithstanding arguments that the general law in Australia may render some contractual terms unenforceable, there would be benefit in clarifying that parties may not contract out of some copyright exceptions.

***Contract and competition law***

17.103 There are arguments that policy concerns about private arrangements replacing or supplementing copyright protection are best left to be dealt with under principles of contract law and competition law.

17.104 In 2002, Professor David Lindsay prepared a paper examining the relationship between copyright and contract law within a law and economics framework. Lindsay stated that understanding the proper relationship between copyright and contract implicates views regarding 'the respective roles of property and contract in a market economy and, indeed, of the respective roles of the law and of the market'.<sup>126</sup>

17.105 Lindsay concluded that limitations on contracting out of copyright protection are generally undesirable. The view that such restrictions are needed 'overestimates the ability of the law to establish optimal rules for the protection of copyright material, at the expense of the considerable advantages to be derived from private market-based arrangements' and the extent to which copyright owners, operating in a competitive market, are capable of unilaterally imposing terms. He considered that:

Insofar as private agreements may result in less than optimal outcomes, they should be dealt with under established principles of contract law, competition law or consumer protection law.<sup>127</sup>

17.106 Lindsay, however, also accepted that there may be an argument for imposing some limitations on freedom of contract 'to the extent that copyright policy is directed at promoting objectives other than economic objectives'. If so, he stated it is important that non-economic objectives 'be clearly specified and that any prohibitions be narrowly focused on achieving such objectives'.<sup>128</sup>

17.107 Similarly, Ricketson and Creswell note that, while economic considerations provide a useful starting point for analysis, 'ultimately both private and public benefit will need to be weighed in the balance in determining where the dividing lines between exclusive rights, compulsory licences and free use should be drawn'.<sup>129</sup>

***Limiting contracting out***

17.108 There is legal doubt about the extent to which contracting out is enforceable, and more certainty is desirable in relation to some exceptions. The question then arises—to which exceptions should express limitations on contracting out apply?

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126 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 6.

127 Ibid, 8.

128 Ibid.

129 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* [11.10].



17.109 The CLRC's recommendations were based on a view that contracting out may upset the copyright 'balance'<sup>130</sup> and, in the case of the fair dealing exceptions, that these are 'an integral component of the copyright interest'.<sup>131</sup>

17.110 The idea of balance is an underlying theme of those seeking to defend the operation of copyright exceptions from contractual arrangements. The concern is that 'privately enforced arrangements have the potential to upset important public policies embodied in copyright law, which are premised on establishing a balance of interests'.<sup>132</sup>

17.111 Recourse to the idea of a copyright 'balance' that must be maintained in the face of freedom of contract may be criticised.<sup>133</sup> Lindsay notes that simply to invoke the concept of balance says

nothing about why the objective of copyright law should be to balance owner and user interests, what an appropriate balance should be, and whether the balance established by the current complex combination of exclusive rights and exceptions is anywhere near appropriate.<sup>134</sup>

17.112 Similarly, the ALRC is not convinced that limitations on contracting out can be justified simply by recourse to arguments based on a need to maintain a copyright balance. This balance is constantly contested, as legislators and policy makers seek to determine 'how rights should be reformulated or modified, so as to balance the claims of the respective interests of owners and users',<sup>135</sup>—a process illustrated by this Inquiry.

17.113 Other arguments for and against limitations on contracting out derive from different conceptual understandings of copyright exceptions—on whether exceptions are considered to define the scope of the copyright owner's exclusive rights (that is, are integral to those rights), or are simply defences to claims of infringement of those exclusive rights.

17.114 If the former view is taken, it may be easier to justify limiting contracting out—on the basis that the copyright owner is seeking to extend its exclusive rights beyond their statutory limits. Again, however, the ALRC is not convinced that such an analysis is the most useful prism through which to view the issue.

17.115 A better criterion for identifying a core group of exceptions that should be subject to protection from contracting out is the extent to which exceptions are clearly for defined public purposes. These exceptions include: the fair dealing exceptions, which protect public purposes of research and study; criticism and review; parody and

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130 Copyright Law Review Committee, *Copyright and Contract* (2002), 262.

131 Ibid, 266.

132 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 8.

133 See, eg, Australian Publishers Association, *Submission 225*.

134 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 8.

135 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.10].

satire; reporting news; and giving professional advice.<sup>136</sup> In addition, the library and archives exceptions are clearly for public rather than private purposes. As Carter, Peden and Stammer note:

The real beneficiaries of the rights are users of the libraries. For example, under s 48A the copyright in a work is not infringed by anything done by a parliamentary library for the sole purpose of assisting a person who is a member of parliament in the performance of the member's duties. The designated beneficiary is the member of parliament, on whose behalf the act is done.<sup>137</sup>

17.116 The fact that users of libraries and archives benefit from these exceptions, but are not parties to the licensing arrangements entered into by libraries and archives, makes it easier to argue that these exceptions should not be able to be removed by contract. An express limitation on contracting out from these exceptions may help remedy problems being experienced by libraries, in particular. Such an approach would be consistent with the principle of promoting fair access to and wide dissemination of content (Principle 3).<sup>138</sup>

17.117 The most important issue, however, is whether the proposed fair use exception should be subject to express statutory limitations on contracting out. The general fair use exception is more likely to be invoked in situations where the copyright user is not in a direct contractual relationship with the copyright holder. This exception also needs to be drafted to cover a broad range of possible uses. In this context, contractual terms may 'reduce the risk of misunderstanding and provide legal certainty where an exception cannot'.<sup>139</sup>

17.118 However, the ALRC is concerned that the benefits of its proposed fair use exception may be seriously compromised if copyright licensing agreements include terms that exclude fair uses. The ALRC proposes that limitation on contracting out should cover the libraries and archives exceptions and the proposed fair use exception—but only in relation to fair use for most of the existing fair dealing purposes;<sup>140</sup> and quotation, in view of the proposal that 'quotation' should be one of the illustrative purposes listed in the fair use exception.<sup>141</sup>

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136 *Copyright Act 1968* (Cth) ss 41, 103A, 41A, 103AA, 42, 103B, s 43(2). See also ss 43(1), 104(a), 104(b), 104(c), which do not use the term 'fair dealing' but are broader than the fair dealing exceptions. In its 2004 report, *Genes and Ingenuity*, the ALRC recommended that the *Copyright Act* be amended to provide that, in relation to databases protected by copyright, fair dealing for the purpose of research or study cannot be excluded or modified by contract: Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health*, Report 99 (2004), Rec 28–2.

137 See J Carter, E Peden, K Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 46–47.

138 See Ch 2.

139 IASTMP, *Submission 200*.

140 Questions may also be raised about whether use for the purposes of judicial proceedings or giving legal or professional advice (cf *Copyright Act 1968* (Cth) ss 43, 104) should also be covered by limitations on contracting out. However, a contract that sought to prevent copyright material being used for these purposes would be likely to be found contrary to public policy and, therefore, void or unenforceable under the common law doctrine discussed above.

141 See Ch 10.

17.119 In proposing limitations on contracting out, including in relation to fair uses, the ALRC is concerned about the possibility of unintended effects and remains interested in further comment in this regard. One reason policy makers have been reluctant to be prescriptive about limitations on contracting out is the difficulty of predicting future developments in emerging markets and technologies.<sup>142</sup>

17.120 Further, international licensing agreements may specify that the law of another country will apply in determining the rights of the parties, or that a foreign court has exclusive jurisdiction over disputes. The ALRC recognises that the proposal, if implemented, will not affect contracts governed by foreign law.<sup>143</sup>

17.121 In proposing limitations applicable to only some exceptions, the ALRC is not indicating that contractual terms excluding other exceptions should necessarily be enforceable. Rather, this is a matter that should be left to be resolved under the general law or other legislation, including the *Competition and Consumer Act*. If the ALRC's proposal is implemented, explanatory materials should record that Parliament does not intend the existence of an express provision against contracting out of these exceptions to imply that exceptions elsewhere in the *Copyright Act* can necessarily be overridden by contract.<sup>144</sup>

**Proposal 17–1** The *Copyright Act* should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect. These limitations on contracting out should apply to the exceptions for libraries and archives; and the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

## Related issues

### Competition policy

17.122 The 2000 report of the Intellectual Property and Competition Review Committee, chaired by Mr Henry Ergas (Ergas Committee), recommended reform of s 51(3) of the *Trade Practices Act 1974* (Cth)—now s 51(3) of the *Competition and Consumer Act*.

142 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 110.

143 Parties to a contract can choose the proper law by an express provision in their agreement. Where the parties have not chosen the proper law, the contract is, in general, governed by the system of law with which the transaction has its closest and most real connection: Thomson Reuters, *The Laws of Australia*, [5.11.1180].

144 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

17.123 The Ergas Committee recommended that the s 51(3) exemption from prohibitions on restrictive trade practices should apply only where agreements do not result, or are not likely to result in, a substantial lessening of competition.<sup>145</sup> The Ergas Committee's recommendations were largely accepted in the Government's response to the report, but have not been implemented.<sup>146</sup>

17.124 The ALRC observes that amendment of s 51(3) of the *Competition and Consumer Act*, as recommended by the Ergas Committee, would tend to strengthen arguments that express statutory restrictions on contracting out are unnecessary. The implications of s 51(3) in relation to copyright licensing are considered in Chapter 6.

### Technological protection measures

17.125 Concerns about contracts supplanting copyright law are 'commonly coupled with concerns that technological forms of protection, such as encryption, will give copyright owners effective control over access to, and uses of, copyright material in digital form'.<sup>147</sup>

17.126 The use and circumvention of TPMs raises similar policy issues to those raised by contracting out. It has been argued, for example, that if parties are not able to contract out of the fair dealing exceptions, neither should copyright owners be able to make fair dealing irrelevant by means of technological access controls.<sup>148</sup>

17.127 Just as the CLRC recommended that the operation of some copyright exceptions should be preserved by statutory restrictions on contracting out, a number of previous reviews have reached similar conclusions in relation to TPMs.

17.128 In 2004, the Digital Agenda Review concluded that the *Copyright Act* should be amended to provide that 'any attempt to contractually prohibit the use of a circumvention device or service for the purposes of fair dealing is unenforceable'.<sup>149</sup> In 2006, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that an exception for 'fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice' be included in new TPM provisions of the *Copyright Act*.<sup>150</sup>

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145 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 19.

146 ACCC, *Submission 165*.

147 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 5.

148 M De Zwart, 'Technological Enclosure of Copyright: The End of Fair Dealing?' (2007) 18 *Australian Intellectual Property Journal* 7, 38.

149 Phillips Fox, *Digital Agenda Review: Report and Recommendations* (2004), [1.6].

150 Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of Technological Protection Measures Exceptions* (2006), rec 27, [4.169].

17.129 In the event, the new TPM provisions, subsequently enacted by the *Copyright Amendment Act 2006* (Cth) did not contain any such exception, in part because of obligations under the Australia-US Free Trade Agreement.<sup>151</sup>

17.130 In the context of this Inquiry, Universities Australia stated that there is ‘little point discussing how contracts are being used to override copyright exceptions without also discussing how TPMs are being used to achieve the same outcome’, as any legislative solution may be ‘sidestepped’ by rights holders using TPMs to achieve the same purpose.<sup>152</sup>

17.131 Arguably, if limitations on contracting out are implemented, consistent amendments to TPM provisions may be justified. That is, there may be little point in restricting contracting out of exceptions, if TPMs can be used unilaterally by copyright owners to achieve the same effect.

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151 *Australia-US Free Trade Agreement*, 18 May 2004, [2005], ATS 1 (entered into force on 1 January 2005), art 17.4.7(e)(viii). See M De Zwart, ‘Technological Enclosure of Copyright: The End of Fair Dealing?’ 18 *Australian Intellectual Property Journal* 7, 21.

152 Universities Australia, *Submission 246*. See also, Copyright Advisory Group—Schools, *Submission 231*; ADA and ALCC, *Submission 213*; R Xavier, *Submission 146*.



## Abbreviations

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AANA	Australian Association of National Advertisers
AAP	Australian Associated Press
ABC	Australian Broadcasting Corporation
ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
ACIG	Australian Content Industry Group
ACL	Australian Consumer Law
ACMA	Australian Communications and Media Authority
ADA	Australian Digital Alliance
AFL	Australian Football League
AGD Fair Use Review	Attorney-General's Department's Fair Use Review
AGD Orphan Works Review	Attorney-General's Department's Internal Orphan Works Review
AIIA	Australian Information Industry Association
AIMIA Digital Policy Group	Australian Interactive Media Industry Association Digital Policy Group
AIR	Australian Independent Record Labels Association
ALAA	Australian Literary Agents' Association
ALCC	Australian Libraries Copyright Committee
ALIA	Australian Library and Information Association

ALLA	Australian Law Librarians Association
ALPSP	Association of Learned and Professional Society Publishers
AMCOS	Australasian Mechanical Copyright Owners Society
AMPAL	Australasian Music Publishers Association
APA	Australian Publishers Association
APRA	Australasian Performing Right Association
ARIA	Australian Recording Industry Association
ASA	Australian Society of Archivists
ASTRA	Australian Subscription Television and Radio Association
AUSFTA	Australia–United States Free Trade Agreement
ACL	Australian Consumer Law
<i>Berne Convention</i>	<i>Berne Convention for the Protection of Literary and Artistic Works (Paris Act)</i>
<i>Broadcasting Services Act</i>	<i>Broadcasting Services Act 1992 (Cth)</i>
BSA	BSA/The Software Alliance
CAARA	Council of Australasian Archives and Records Authorities
CAL v NSW	<i>Copyright Agency Ltd v New South Wales</i> (2008) 233 CLR 279
CAMD	Council of Australian Museum Directors
CCI	ARC Centre of Excellence for Creative Industries
CLRC	Copyright Law Review Committee
CNMCC	Combined Newspapers and Magazines Copyright Committee
COMPPS	Coalition of Major Professional and Participation Sports



CONFU	Conference on Fair Use
<i>Copyright Act</i>	<i>Copyright Act 1968 (Cth)</i>
CRA	Commercial Radio Australia
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DSITIA (Qld)	Department of Science Information Technology Innovation and the Arts (Qld)
ECL	Extended collective licensing
EFA	Electronic Frontiers Australia Inc
Ergas Committee	Intellectual Property and Competition Review Committee
EU	European Union
FOI	Freedom of information
FOI Act	<i>Freedom of Information Act 1982 (Cth)</i>
FOI law	Freedom of information legislation
Free TV	Free TV Australia
GLAM sector	Galleries, libraries, archives and museums
IASTMP	International Association of Scientific Technical & Medical Publishers
iGEA	Interactive Games and Entertainment Association
IIA	Internet Industry Association
IPTV	Internet protocol television
ISAA	Independent Scholars Association of Australia Inc
JSCOT	Joint Standing Committee on Treaties
LIV	Law Institute of Victoria

MPAA	Motion Picture Association of America
NAVA	National Association for the Visual Arts
NBN	National Broadband Network
NFSAA	National Film and Sound Archive of Australia
NLA	National Library of Australia
NRL	National Rugby League Limited
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Co-operation and Development
PPCA	Phonographic Performance Company of Australia
PwC	PricewaterhouseCoopers
<i>Rome Convention</i>	<i>International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations</i>
SBS	Special Broadcasting Service
Schools	Copyright Advisory Group—Schools
SPAA	Screen Producers Association of Australia
TAFE	Technical and further education
TPMs	Technological protection measures
TRIPs	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
UK	United Kingdom
US	United States
VET	Vocational education and training
WCT	<i>World Intellectual Property Organization Copyright Treaty</i>

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WIPO	World Intellectual Property Organization
WPPT	<i>World Intellectual Property Organization Performances and Phonograms Treaty</i>
WTO	World Trade Organization

