



Australian  
Competition &  
Consumer  
Commission

# **ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper**

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## PART A: GENERAL SUBMISSION

### 1. Executive Summary

- 1.1 The *Competition and Consumer Act 2010* (Cth) (the CCA) is Australia’s national competition and consumer law. The Australian Competition and Consumer Commission (ACCC) is the independent Australian Government agency responsible for administering and taking enforcement action under the CCA.
- 1.2 The object of the CCA is “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”<sup>1</sup> This reflects the well accepted proposition that competition is generally the best way to enhance community welfare by promoting economic efficiency. To achieve this objective, there are prohibitions in the CCA against misuse of market power (unilateral conduct) and contracts, arrangements or understandings that substantially lessen competition (SLC). Similarly, mergers are prohibited if they would have the effect or likely effect of SLC.
- 1.3 The object of the CCA reflects the view, shared by the ACCC, that absent market failure, open and competitive markets will generally promote efficiency in all its dimensions – allocative, productive and dynamic.<sup>2</sup> In particular, competitive markets will generally ensure that society’s scarce resources are directed to produce the goods and services that consumers want (allocative efficiency) at the lowest possible cost (cost or productive efficiency). Similarly, competitive markets generally promote timely investment in new technologies, products and services (dynamic efficiency).
- 1.4 However, real world markets may be characterised by ‘market failure’ (such as public goods and economies of scale) or imperfections (such as high transaction costs).<sup>3</sup> The presence of such conditions means that sometimes competitive markets fail to achieve the most efficient outcomes and to maximise welfare.
- 1.5 Sometimes in the presence of market failure, market intervention – including through legislation – may be appropriate to address the source of the market failure and seek to improve efficiency and welfare. However, such intervention brings costs as well as benefits. In seeking to address one source of market failure, other problems may be created or exacerbated. Copyright laws are an example of such interventions and it is appropriate that the extent of that intervention be kept under review in the light of other market developments. Accordingly, the ACCC welcomes the opportunity to make this submission to the ALRC Inquiry into Copyright and the Digital Economy (the Copyright Inquiry).

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<sup>1</sup> See section 2 of the CCA.

<sup>2</sup> The economics of copyright is discussed further in section 3 of this submission.

<sup>3</sup> Public goods are further discussed in section 3 of this submission, while transaction costs are discussed in section 4.

## Competition and copyright laws

- 1.6 Copyright laws, by providing creators of copyright material with the ability to exclude others from using their material, seek to address potential market failures that may occur in the absence of statutory protections. Copyright material has the characteristics of a public good, namely non-rivalrous consumption and in particular non-excludability.<sup>4</sup> Absent copyright laws, it is possible for users to ‘free-ride’ on copyright materials by using them without payment. Consequently, there may be inadequate incentives for investment in the creation of copyright materials that consumers value.
- 1.7 Seen in this way, competition and copyright laws are for the most part complementary, as both seek to promote efficiency and ensure markets operate more effectively in the long term interests of consumers. Although copyright confers a degree of market power, the mere grant of copyright will seldom confer significant market power that raises concern under the CCA, as there will be competition from substitute products to constrain the pricing and other market conduct of copyright owners. In particular, because copyright only protects the particular expression of an idea and not the idea itself, there will generally be many competing copyright materials.
- 1.8 When intervening in markets to address an identified market failure it is important that the costs of intervention are also considered. As noted above, it is possible that by addressing one market failure, the law may create or exacerbate another. These market failures, in turn, can impose costs in terms of reduced allocative, productive and dynamic efficiencies. These costs must be balanced against the benefits of addressing the initial market failure. Although it may be debateable where the appropriate balance lies, it is essential that the outcome delivers a net benefit (that is, the benefits of intervening exceed the costs). Such an outcome would be consistent with an overriding objective of promoting efficiency.
- 1.9 The ACCC considers that there are at least two potential sources of market failure which are relevant to the consideration of the appropriate extent of copyright protection (and intellectual property (IP) rights more generally) and whether exceptions and statutory licences are adequate and appropriate in the digital environment. These are:
- increased *transaction costs* associated with the licensing of copyright materials<sup>5</sup>
  - the potential for the *extent* and *use* of the rights conferred by copyright to restrict competition and create market power.
- 1.10 The non-rivalrous nature of consumption of copyright materials, whereby one person’s consumption of a good does not reduce the consumption of the good available to others, means that the direct costs of each use of that material is near zero. Economic efficiency, at least in the short run, will generally be promoted by maximising the use of such materials. The

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<sup>4</sup> The characteristics of public goods are further discussed in section 3 of this submission.

<sup>5</sup> Transaction costs include the cost of finding a trading partner, negotiating and enforcing licensing arrangements.

costs for economic efficiency and consumer welfare associated with too high or too extensive protections for IP rights may be significant.

- 1.11 The trade-off between providing incentives for investment and restricting access has become more complex in the digital economy because of the rise of intermediate usage of copyright material for both commercial and non-commercial purposes. Ensuring adequate incentives remain for the creation of new copyright material from intermediate use (i.e. creation of a work that in some way uses pre-existing copyright material) and consumption of existing copyright material will be beneficial to society and help to create and sustain markets for particular types of copyright material.

## **Transaction costs**

- 1.12 If the transaction costs of gaining lawful access to copyright materials are too high, some potentially valuable uses of these materials will not occur, to the detriment of efficiency and welfare.
- 1.13 The ACCC notes that sometimes the transaction costs associated with copyright may be overcome by market arrangements, such as collective licensing. Although delivering benefits and promoting efficiencies, these arrangements are often associated with competition concerns that may offset some of the benefits these arrangements bring by reducing transaction costs.<sup>6</sup> It is imperative that these offsetting benefits and costs are considered and addressed to ensure that the solutions to high transaction costs are in the public interest. An example of this is the Copyright Tribunal's role, in the determination of royalty rates under collective licensing arrangements, and the ACCC role in assisting the Copyright Tribunal with their assessment.
- 1.14 Digital technologies are having divergent effects on transaction costs. On the one hand, these technologies may reduce transaction costs and increase the scope for direct licensing and competition between copyright holders to meet the needs of users. On the other hand, the costs of accessing copyright materials for some uses that are valued by consumers in the digital economy may be prohibitive, such that the costs of licensing exceed the benefits and such valuable use will be deterred.
- 1.15 The increase in the volume of, and types of use for, copyright material in the digital economy has made individual licensing more challenging in some cases. For example, many bloggers and users of social media seek to utilise numerous copyright materials quickly, each of which has a low individual value to them. This type of use can be of fundamental importance to many online business models. There is some risk that the combined difficulties associated with licensing, finding copyright owners and the associated transaction costs for numerous individual low value works, could hinder the development of new and innovative business models in the digital economy. Where the costs of licensing exceed the benefits of licensing, this may affect overall production of copyright material, particularly as users of digital

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<sup>6</sup> Specifically, collective licensing brings together copyright holders who may otherwise be in competition with one another. Collecting societies may be able to exercise market power when negotiating licensing arrangements or in dealings with members.

copyright material are increasingly also creators of both new copyright material and intermediate copyright material (i.e. a work that in some way uses existing copyright material). In such circumstances, it may be appropriate to consider introducing compulsory licensing or broadening exceptions to copyright infringement.

### **Incidental use, personal use and copying**

- 1.16 In the digital environment there has been an increase in the use and copying of copyright material, in ways that appear to be quite incidental to the production of the primary good or service being produced. For example, copyright material copied by internet intermediaries for caching purposes. Similarly, some use and copying of copyright material may currently be 'unauthorised' in circumstances where this use has little, if any, detrimental impact on incentives for copyright creation.
- 1.17 It is not evident that such uses extract additional value from the underlying work (however, where they do it may be appropriate for users to pay). Instead, incidental usage may simply involve the provision of a technological service that facilitates consumers' use of licensed copyright materials. Similarly, currently 'unauthorised' personal use and copying may simply facilitate users' enjoyment of licensed copyright material without substantively detracting from the copyright holder's rights.
- 1.18 There appears to be uncertainty about whether such incidental and personal use and copying currently breaches the *Copyright Act 1968* (Cth) (Copyright Act). There are also substantial transaction costs associated with the enforcement of rights in these areas. These uncertainties and costs mean that some beneficial incidental and private copying is likely to be deterred.

### **Competition and the extent and use of copyright**

- 1.19 Although the mere grant of copyright seldom conflicts with competition laws, the extent and use of those rights may give rise to competition concerns and be detrimental to efficiency and welfare. Careful consideration needs to be given to whether the extent and use of rights is detrimental to efficiency and whether exceptions should be created and/or expanded. The issue that is particularly relevant in the digital economy is the extent to which current copyright law may hinder the potential economic benefits and efficiencies that have arisen as a result of developments in technology, along with changes in the use and distribution of copyright material. This issue includes the extent to which copyright arrangements have the potential to be used for anti-competitive purposes (see, for example, discussion regarding s51(3) of the CCA below).
- 1.20 Convergence of communications technologies has raised issues associated with the extent of rights, highlighting problems with how copyright law (including copyright exceptions) are framed. Increasingly, the same content is being widely and rapidly delivered to consumers on different platforms and in diverse formats. Technological developments have raised anomalies in copyright law where the law is technology or platform specific, particularly in relation to personal use of protected material.

- 1.21 The ACCC considers that, to the extent possible, copyright protection and exceptions should operate on a technology neutral basis. This simple proposition raises questions about copyright protection that is tied to particular communications technologies, rather than particular uses. For example, while a consumer may be able to copy a legitimately purchased CD to create another physical CD for private use without infringing copyright, the copying of a legitimately purchased physical CD to a cloud computing service owned and operated by a third party for private use by the purchaser may infringe copyright. Existing exceptions in the Copyright Act, such as those relating to format or time shifting for personal use, do not cater for the technology used by, nor the habits of, consumers. The ACCC submits that in private use circumstances, a focus on the use of material may be preferable to a focus on who ‘makes’ the copy.
- 1.22 While in general there will be no conflict between the operation of copyright and competition law, where such conflicts do arise, for example collective or cross-licensing which restricts competition between the parties, there is the potential for significant detriment to economic efficiency and consumers. The potential for the use of copyright (and other IP rights), including solutions to high transaction costs, to be anticompetitive and undermine efficiency makes it imperative that the use of IP rights is subject to the CCA in the same way that the use of other private property rights are.

### **Section 51(3) of the CCA**

- 1.23 Currently, section 51(3) of the CCA provides a limited exception for certain licence conditions from the competition provisions of the CCA (misuse of market power and resale price maintenance are not excepted). While the extent of the exception is unclear, it potentially excludes significant anti-competitive conduct, with substantial detrimental effects on efficiency and welfare, from the application of the CCA. Arrangements which are considered to be potentially within the ambit of the exception include cross-licensing in *Golden West*<sup>7</sup> and collective licensing in *APRA*.<sup>8</sup>
- 1.24 The ACCC submits that section 51(3) of the CCA should be repealed. The ACCC notes that in other jurisdictions, such as the United States, IP rights are subject to the same competition laws as all other property rights. The ACCC further notes that in these jurisdictions, there has been neither an erosion of IP rights for creators nor any apparent impact on the incentives for the production of copyright material.
- 1.25 Licensing arrangements that are at risk of breaching Part IV of the CCA but which are likely to produce offsetting public benefits, can be granted an exemption from the relevant provisions of the CCA through the usual notification or authorisation processes. The ACCC can grant protection from legal action under both processes for conduct that risks breaching the Part IV provisions of the CCA (with the exception of misuse of market power) if it is satisfied that the

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<sup>7</sup> Nine Network Australia Pty. Limited entered into an exclusive licence agreement on 31 October 1995 with Golden West Network Pty and Seven entered into an exclusive supply agreement with Territory Television (a Nine subsidiary), and while the matter was ultimately settled out of Court, s51(3) of the CCA was raised as a defence.

<sup>8</sup> *Re Australasian Performing Right Association Ltd* (1999) 151 FLR 1.

likely public benefit (which predominantly relates to efficiency considerations) from the conduct outweighs any likely public detriment.

- 1.26 The digital environment is creating the opportunity for new ways of creating, using and distributing copyright materials with commensurate opportunities to improve efficiency and welfare. Increasingly, copyright materials are being used as intermediate inputs. This increases the potential for the use of copyright to have anticompetitive effects. Similarly, the solutions that are capable of addressing new market failures in the digital environment (including potentially new forms of collective licensing or copyright exchanges) may raise competition concerns. 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.

## **2. Introduction**

- 2.1 The views of the ACCC, as set out in this submission, are informed by the ACCC's expertise in examining issues regarding copyright and the digital economy within the context of its role as the competition regulator. In particular, the ACCC considers that absent market failure, competition will generally deliver the best outcomes for economic efficiency and consumer welfare. While copyright protection is designed to overcome a market failure in the form of 'free riding' and will not generally conflict with the objectives of competition law, it may bring costs as well as benefits for competition and efficiency. Where the line should be drawn in relation to copyright, to maximise benefits and minimise costs, is likely to be changing in the digital environment.
- 2.2 In addition, the ACCC has a specific role in relation to the Copyright Tribunal of Australia (Copyright Tribunal) and collective licensing under the Copyright Act, which is relevant to a number of matters raised in the Copyright Inquiry. This is discussed further in sections 2 and 5 of this submission.
- 2.3 The ACCC has expertise in relation to a number of industries where the use of copyright material is a significant market feature and that are particularly affected by developments in the digital economy, through the ACCC's role in regulating media and communications markets. The ACCC has technological and economic expertise in relation to how copyright industries function within these markets. Copyright industries are those industries related to the creation, manufacture, production, broadcast and distribution, performance and communication of copyright material.
- 2.4 The ACCC submits the digital economy poses a number of significant challenges to effective and efficient operation of copyright law. The ACCC suggest that changes in the way copyright materials are created, used and distributed in the digital environment means that copyright law should to be re-examined in order to deliver competition dividends within the digital economy.

2.5 The ACCC submission is divided into two parts:

- Part A – General submission: considers a range of issues that are relevant to competition, copyright and the digital economy and sets up an analytical framework to examine the issues raised in the Copyright Inquiry.
- Part B – Responses to the specific questions posed in the Issues Paper: sets out the ACCC's responses to the specific questions raised in the ALRC's Issues Paper released in August 2012 (Issue Paper) and is based on the general analysis outlined in Part A.

## **The ACCC's role in relation to copyright**

2.6 The ACCC administers the CCA. The CCA's object is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection.<sup>9</sup> This reflects the well accepted proposition that, absent market failure, competition is generally the best way to enhance community welfare by promoting economic efficiency.

2.7 Intellectual property rights, including copyright, are of particular relevance to the ACCC's functions under Part IV of the CCA, which contains provisions that prohibit various types of conduct that are anti-competitive in purpose and/or effect. Section 51(3) of the CCA exempts the imposition of or giving effect to certain conditions of IP licences or assignments of patents, registered designs, copyright or eligible layout rights (EL rights) from the operation of the anti-competitive conduct provisions contained in Part IV of the CCA (other than the prohibitions relating to misuse of market power and resale price maintenance). Consequently, certain arrangements for the licence or sale of copyright material could be exempt from the restrictive trade practices provisions of the CCA, even if they have an anti-competitive purpose or effect or amount to cartel conduct.

2.8 The ACCC considers it important that the competition framework is appropriately equipped to deal with emerging issues in the digital economy and to ensure that market forces drive innovation and growth rather than anti-competitive conduct by market participants. As such, the ACCC considers that IP arrangements should be assessed under the CCA like all other arrangements. Given this, the ACCC considers that section 51(3) should be repealed. The ACCC has set out its views in relation to section 51(3) in section 8 of this submission.

2.9 The Copyright Act sets out functions for the ACCC in relation to proceedings before the Copyright Tribunal.<sup>10</sup> The Copyright Tribunal has jurisdiction over, among other things, certain aspects of collective copyright licensing schemes. The Copyright Act gives the Copyright

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<sup>9</sup> See section 2 of the CCA.

<sup>10</sup> The Copyright Tribunal has jurisdiction with respect to statutory licences and voluntary licences. Its functions include making orders in relation to the charges and conditions the Tribunal considers applicable under a licence scheme or in relation to the granting of a particular licence. For further information see: [www.copyrighttribunal.gov.au](http://www.copyrighttribunal.gov.au).

Tribunal power to make the ACCC a party to proceedings if the ACCC applies and the Tribunal is satisfied that it is appropriate.<sup>11</sup>

- 2.10 The Copyright Act also requires the Copyright Tribunal, if asked to do so by a party to a proceeding, to have regard to any relevant guidelines issued by the ACCC.<sup>12</sup> The ACCC is currently drafting guidelines for consultation. These guidelines will outline matters the ACCC considers to be relevant to the determination of reasonable remuneration and other conditions of licences that are the subject of determinations by the Copyright Tribunal.<sup>13</sup>
- 2.11 The functions of the Copyright Tribunal, insofar as they are relevant to the Copyright Inquiry, are discussed further in section 5 of this submission.

## **The digital economy**

- 2.12 The growth of the digital economy is prompting significant shifts in the way in which Australians consume products (goods and services) produced by the copyright industries. A greater proportion of Australians are engaging with the digital economy and taking advantage of emerging services and platforms. These trends are driven by increasingly fast and pervasive internet connectivity, which supports the consumer trend for increased audiovisual consumption.<sup>14</sup>
- 2.13 In addition, the reach of both fixed and wireless broadband connections is continuing to grow, as evidenced by the deployment of 4G mobile broadband services and the National Broadband Network. Device manufacturers are increasingly developing set top boxes, smart phones, tablets and recently, internet-enabled televisions with increased functionality which can utilise this connectivity.
- 2.14 Some recent trends that illustrate the effect of the digital economy on the copyright industries are outlined in section 6 of this submission.
- 2.15 While copyright industries have traditionally largely served end-users, copyright materials created by these industries are also increasingly used by intermediate users, who use pre-existing copyright materials to create further copyright material for commercial and private use.
- 2.16 The effects of the digital economy have implications for competition in certain industries. The ACCC made a number of observations as to how the digital economy is providing an increasing array of emerging services and innovations to consumers in its submission to the Convergence Review Framing Paper.<sup>15</sup> In its submission, the ACCC noted that these changes give rise to a

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<sup>11</sup> Copyright Act, s.157B.

<sup>12</sup> Copyright Act, s.157A.

<sup>13</sup> For scope of the guidelines see: Attorney General's Department, *Government's Response to the IP and Competition Review recommendations – information package*, August 2001.

<sup>14</sup> See eg. ACMA, *Australians embracing the digital economy*, available at <http://engage.acma.gov.au/australians-embracing-the-digital-economy/>, accessed 29 October 2012.

<sup>15</sup> Australian Competition and Consumer Commission, *Submission to the Convergence Review Framing Paper*, June 2011 available at [www.dbcde.gov.au](http://www.dbcde.gov.au).

significant opportunity to achieve a much greater degree of competition in emerging services, both in relation to underlying infrastructure used for distribution of copyright materials and the actual copyright materials, than has existed in the past:

[C]ompetition will be particularly beneficial in industries characterised by significant and rapid change. The media and communications industry has experienced continuous advances in technology and improvements in infrastructure, which make it possible for businesses not only to enhance their existing offerings but also to innovate to provide radically new types of services. Competition encourages businesses to actively seek out these opportunities, even if it means fundamentally changing the way in which things have been done in the past.<sup>16</sup>

- 2.17 Amendments to copyright laws may be one mechanism for promoting and achieving the competition dividends contemplated in the ACCC's Convergence Review submission. The ACCC considers that copyright laws should not hinder the emergence of new products and services in the digital economy. It is important that copyright laws encourage the use of existing material as an input to the development of new products and services, while ensuring that new uses of copyright material do not adversely affect the rights of copyright owners to exploit their material.

### **3. The economics of copyright**

#### **Copyright material as public goods**

- 3.1 The ACCC considers that open competitive markets are generally the best way to ensure that the resources of an economy are put to their most efficient use so as to maximise society's welfare. However, markets may fail to promote efficiency and welfare in some circumstances, including in the provision of so-called 'public goods.'
- 3.2 Public goods are products (goods and services) that are both non-excludable and non-rivalrous in consumption. If a product is non-excludable, once the product has been made available, users who have not paid for it cannot easily be prevented from consuming it. An inability to exclude non-payers means that users of the material can benefit whether or not they make any contribution to covering the costs of production of the material. Non-rivalry in consumption refers to the situation where one person's consumption of a good does not reduce the consumption of the good available to others. Consumption of information is generally perceived as non-rivalrous.<sup>17</sup>
- 3.3 It is unlikely that an unregulated market will result in production of the socially optimal amount of a public good because consumers will be unwilling to pay for a good that they can

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<sup>16</sup> Australian Competition and Consumer Commission, *Submission to the Convergence Review Framing Paper*, June 2011, p. 4.

<sup>17</sup> Individual physical assets that embody information may be rivalrous in consumption. For example an individual CD of music may be rivalrous in the sense that while one consumer is enjoying that CD some other consumers are unable to also enjoy it. However, the consumption of the music itself is not rivalrous. If a consumer has a copy of the music expression then that does not mean that other consumers are unable to separately enjoy the music expression.

otherwise obtain for free.<sup>18</sup> Due to the non-excludable nature of public goods the price of public goods is likely to be very low and possibly zero – too low to induce the private production of the socially optimal amount of the public good. This will create an incentive for producers to switch their efforts to other, more profitable areas, even though greater investment in creative material would be valued by consumers.

- 3.4 The non-rivalrous nature of consumption of copyright materials means that economic efficiency, at least in the short run, will generally be promoted by maximising the use of those materials, since the marginal cost associated with an additional user will generally be minimal. The costs associated with the initial creation of copyright material are largely fixed, involving the creator's time and effort. By contrast, the cost of reproducing and distributing copies of the material are mainly variable and low in comparison to the fixed creation costs. In the case of digital material, the variable costs of copying and distributing copyright material may be close to zero. Economic efficiency is achieved if the cost of the last (the marginal) unit produced is equal to society's valuation of that last unit (as represented by the price paid for that unit). For copyright material with low marginal cost, economic efficiency requires a price close to zero. However, this would not enable the creator to recover the fixed costs of creation and consequently there would be insufficient incentives to invest in such material.
- 3.5 The ACCC submits that when incentives for copyright production are considered, this should include analysis of the incentives for intermediate use, while having regard to the need to provide incentives for the creation of the initial copyright work.
- 3.6 The Copyright Act confers a bundle of exclusive economic rights to do certain acts with copyright materials, including the right to copy, publish, communicate and publicly perform the copyright material. The grant of these proprietary rights to producers of creative material partially addresses the market failure in relation to the production of copyright material by enabling copyright owners to exclude users from consuming a copy of the creative material for the duration of the copyright term. A right to exclude users enhances creators' ability to receive remuneration for their creative efforts that better reflects society's valuation of that effort. This may have the effect of enhancing the incentives for investment in such material.
- 3.7 However, copyright legislation can bring costs as well as benefits. In seeking to address one source of market failure, other problems may be created or exacerbated as a result of copyright legislation. It is therefore appropriate that the extent of that intervention be kept under review in the light of other market developments. Accordingly, the ACCC supports a review of the extent and use of copyright across the digital economy to ensure that the benefits continue to exceed the costs.

## **Copyright and competition**

- 3.8 Copyright law, as a subset of IP law, and competition law can both promote competitive markets by encouraging innovation and dynamism in the economy. Competition law

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<sup>18</sup> Production is socially optimal if the cost of producing the last unit of the good (the marginal cost) is equal to the value that society places on that last unit of the good.

addresses restrictions on the effective functioning of markets to promote efficiency and consumer welfare. Competition drives producers to supply the goods and services that consumers want cost effectively. Copyright law encourages innovation by recognising and granting exclusive statutory proprietary rights to certain creative and inventive efforts, as outlined above. In this respect, competition laws and IP laws are essentially complementary and promote societal welfare.

- 3.9 Copyright confers on the owners of copyright the exclusive statutory right to exploit their copyright and to exclude others from using it. At times, the granting of copyright has been characterised as giving owners of the copyright a legal or economic ‘monopoly’.
- 3.10 The ACCC considers however that the mere grant of these exclusive rights rarely raises competition concerns because it seldom confers significant market power on the copyright owner. This is because there are usually close substitutes for the material that is covered by the copyright. For example, the owner of the copyright in a musical work has various exclusive rights to exploit that particular work. However, that individual musical work will generally compete with other musical material with similar attributes. This is particularly the case with copyright, which only protects the expression of ideas and not the underlying ideas themselves. This will typically constrain the ability of the owner of exclusive rights in a particular work from acting as a monopolist when seeking to exploit those exclusive rights.
- 3.11 In most instances, the mere granting of an copyright right does not conflict with the CCA. Even if granting an IP right does confer market power this will not, of itself, conflict with the CCA. Firms are entitled to legitimately acquire or extend their market power by developing a superior product to their rivals. Competition law, like copyright laws, encourages innovation.
- 3.12 Similarly, the exercise of various rights conferred by copyright laws will not generally conflict with competition and consumer laws. This is because the licensing or assignment of copyright material is often pro-competitive as it enables copyright to be exploited to a greater extent than would occur if the rights were not licensed or assigned at all. In these instances, licensing or assigning copyright material can increase production, geographic distribution and the rate of introducing new products.
- 3.13 Although the mere grant and use of copyright seldom conflicts with competition laws, in some circumstances, the *extent* and *use* of those rights may give rise to competition concerns and be detrimental to efficiency and welfare.
- 3.14 Although not directly related to the Copyright Inquiry, the ACCC notes that it has consistently held the view that parallel import restrictions extend rights to copyright owners beyond what is necessary to address the ‘free-rider’ problem. At the time, the ACCC noted that granting a monopoly right to import creates the potential for market power to be conferred on copyright owners.<sup>19</sup> The exercise of such market power has demonstrably manifested in restricted supply and higher prices for books to the detriment of Australian consumers.<sup>20</sup> In addition, it is

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<sup>19</sup> ACCC, *Submission to the Productivity Commission’s study into Copyright Restrictions on the Parallel Importation of Books*, January 2009

<sup>20</sup> *Ibid*, p. 23

arguable that the intent of the restrictions is now being undermined by developments in the digital economy, including the ability for consumers to purchase books online from other jurisdictions, where Australian retailers cannot.

- 3.15 In addition, the ACCC notes that technological developments have raised anomalies in copyright law where the law is technology or platform specific, particularly in relation to personal use of protected material. The ACCC considers that, to the extent possible, copyright protection and exceptions should operate on a technology neutral basis. This simple proposition raises questions about copyright protection that is tied to particular communications technologies, rather than particular uses. Existing exceptions in the Copyright Act, such as those relating to format or time shifting for personal use, do not cater for the technology used by, nor the habits of, consumers. The ACCC submits that focus on the use of material may be preferable to focus on who ‘makes’ the copy in private use circumstances.
- 3.16 The ACCC considers that competition law should complement IP laws, including copyright laws, in providing incentives to invest in creative material. The ACCC submits that it is important that the rights created through IP laws should be subject to competition laws to ensure they are pro-competitive rather than anti-competitive in effect or purpose, which would be detrimental to innovation and welfare. This issue is discussed further below in section 8, in relation to the effect of section 51(3) of the CCA.

## 4. Costs of copyright law

- 4.1 Copyright laws go some way to addressing the market failure arising from the potential for ‘free riding’ on creative materials. However, in doing so, other types of market failure may be created or exacerbated, which can create costs. The benefits of improving incentives to creators and distributors of copyright material needs to be balanced against any disincentives to intermediate users and final consumers of copyright material and the consequent costs.
- 4.2 The ACCC considers that there are at least two potential sources of market failure which are relevant to the consideration of the appropriate extent of copyright protection (and intellectual property (IP) rights more generally) and whether exceptions and statutory licences are adequate and appropriate in the digital environment. These are:
- *transaction costs* associated with the licensing of copyright materials<sup>21</sup>
  - the potential for the *extent* and *use* of the rights conferred by copyright to restrict competition and create market power.
- 4.3 The non-rivalrous nature of consumption of copyright materials, whereby one person’s consumption of a good does not reduce the consumption of the good available to others, means that the direct costs of each use of that material is near zero. Economic efficiency, at least in the short run, will generally be promoted by maximising the use of such materials. The

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<sup>21</sup> Transaction costs include the cost of finding a trading partner, negotiating and enforcing licensing arrangements.

costs for economic efficiency and consumer welfare associated with too high or too extensive protections for IP rights may be significant.

- 4.4 The trade-off between providing incentives for investment and restricting access has become more complex in the digital economy because of the rise of intermediate usage for both commercial and non-commercial purposes. Ensuring adequate incentives remain for the creation of new copyright material from intermediate use and consumption of existing copyright material will be beneficial to society and help to create and sustain markets for particular types of copyright material. The ACCC considers that the objective should be to strike the right balance in order to promote, as far as possible, the overriding objective of economic efficiency.

## Transaction costs

- 4.5 The potential for the grant of property rights through copyright to address the market failure arising from the potential for 'free riding' on creative material rests on the assumption that transaction costs are low. If this is the case, then an efficient outcome will be reached by bargaining between copyright holders and potential users of the copyright material.<sup>22</sup>
- 4.6 In reality however transaction costs of bargaining over the terms of access to copyright materials are often high, and as a consequence, market failure may also arise in relation to licensing of copyright material. This has the potential to undermine the ability for copyright to improve incentives for investment in copyright material in those markets.
- 4.7 For copyright holders, transaction costs include the costs of administering copyright. This includes the costs of negotiating licences, monitoring compliance and taking infringement action if necessary. Users also incur transaction costs in locating copyright holders, negotiating licences and ensuring compliance with copyright laws. Licensing will occur if the benefits of entering into a licensing arrangement exceed the costs of the arrangement, including transaction costs. If transaction costs are high, there is likely to be less licensing than is socially desirable.
- 4.8 Transaction costs are particularly problematic where copyright materials have a relatively small value to many users. In those circumstances, it is possible for transaction costs to exceed the value of entering into the arrangement so that licensing will not take place even though it is socially beneficial to do so.<sup>23</sup> This may provide a rationale for a copyright exception or statutory licensing arrangement to ensure that users are able to access material.
- 4.9 Transaction costs can also arise as a result of uncertainty regarding whether certain incidental uses currently breach the Copyright Act, as resolving uncertainties can be expensive and in some instances, require litigation. These uncertainties could cause third parties to avoid

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<sup>22</sup> This is an application of the so-called Coase theorem. See Coase, RH, (1960), 'The Problem of Social Cost,' *Journal of Law and Economics*, Vol. 3, October, pp. 1-44.

<sup>23</sup> Gordon, WJ, 1982, Fair use as market failure: A structural and economic analysis of the *Betamax* case and its predecessors, *Journal of Copyright Society USA*, vol. 30, pp. 253-326.

developing products that involve beneficial incidental copying, which can in turn limit product innovation and competition.

## **New and increased transaction costs**

- 4.10 Digital technologies, and the innovation that is facilitated by such technologies, are increasing the production and distribution of copyright materials. As a result, in some cases, new sources of transaction costs have been created or existing transaction costs have increased. For example, the explosion in the volume of copyright material in the digital economy is likely to have made individual licensing more difficult in some cases, such as difficulties associated with identifying and locating the copyright owner and the terms on which licensing may be available.
- 4.11 Developments in the way copyright materials are used in the digital environment have arguably not been matched by commensurate developments in the market for buying, selling and licensing rights to use copyright material. There may be a role for collecting societies to reduce transaction costs and facilitate licensing between users and creators in some circumstances, providing both aggregated and individual licences and some standardisation of licensing terms.
- 4.12 Collecting societies are a practical way for small users to attempt to contact copyright holders and can also be useful for owners to make their copyright material available to many prospective users. However, these collecting societies are not comprehensive in scope across categories of creative material or within a category of creative material. Furthermore, as noted in section 5 below, there are potential competition issues associated with collective licensing that would need to be taken into account if new collective licensing arrangements are considered.

## **Market power and effect on competition**

- 4.13 As noted above, the ACCC does not consider that copyright itself generally raises competition concerns. However, if copyright owners limit competition and extend market power through agreements with rivals and/or through practices designed to exclude rivals and/or leverage market power, unrelated to the creation of new products, then competition and consumer welfare may well be harmed. For example, there may be some circumstances in which a condition of a copyright licence or assignment may have a detrimental impact on competition.
- 4.14 In 2000, the Intellectual Property and Competition Review Committee (Ergas Committee) noted in its *Review of intellectual property legislation under the Competition Principles Agreement* Final report (Ergas Report) that, although IP laws and competition policy are largely complementary, there are some tensions between competition and IP laws:<sup>24</sup>

...the rights granted by the intellectual property laws can be used for anti-competitive ends. This occurs when the rights are used to claim for the creator not merely a share of the

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<sup>24</sup> IP and Competition Review Committee, *Review of IP legislation under the Competition Principles Agreement*, September 2000, p. 127

efficiency gains society obtains from the creation, but also super-normal profits that arise from market power unrelated to the creation...Where rights are thus used for purposes beyond the intention of the original grant, significant competition policy issues arise that need to be addressed.<sup>25</sup>

- 4.15 Certain licence terms and conditions may have an anti-competitive purpose or effect. For example, collective or cross-licensing arrangements which restrict competition between competitors have the potential to give rise to significant detriment to economic efficiency and consumers. In addition, copyright licences may restrict the extent to which a licensee is able to compete with the owner or rights holder. The form of such restrictions could include price or quota restrictions and non-competition clauses. However, the competitive effects of these restrictions depend on the characteristics of the market in which the licensing occurs and/or has an effect.
- 4.16 The ACCC notes that in certain circumstances “(p)aradoxically, too much copyright protection can reduce the number of new works created.”<sup>26</sup> For example, copyright holders are able to exclude existing material from the public domain for the duration of the copyright term, which can in turn lead to higher prices for copyright material through restriction in supply. This can have an effect on overall production of copyright material, as users of copyright material are increasingly also creators of both new copyright material and intermediate copyright material (i.e. a work that in some way uses existing copyright material).
- 4.17 Increasingly in the digital economy, users may wish to access a copyrighted work for use as an intermediate product. If the cost of using existing copyright material is raised for such users, incentives to develop new services or markets could be reduced. The licensing or assignment of copyright can be pro-competitive if it enables the licensee to engage in commercial activity that would otherwise be closed to it, or which could only be engaged in by duplicating or ‘inventing around’ the existing copyright materials. The value of licensing arrangements and the facilitation of efficient licensing are discussed in this submission in section 5.
- 4.18 Where copyright licensing or assignment is used to restrict or deter competition, for example by collective or cross-licensing, or other practices designed to exclude competition or leverage market power, a conflict may arise with the promotion of competition and efficiency (collective licensing is discussed below).

## **5. Collective licensing of copyright material**

- 5.1 The collective management of licensing arrangements by copyright collecting societies is proffered as a solution to the potential market failure arising from high licensing transaction

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<sup>25</sup> Ergas Report, p.7.

<sup>26</sup> Landes, William M., Copyright, Borrowed Images and Appropriation Art: An Economic Approach (December 2000). U Chicago Law & Economics, Olin Working Paper No. 113, p.5. Available at SSRN: <http://ssrn.com/abstract=253332> or <http://dx.doi.org/10.2139/ssrn.253332>

costs. Collective licensing can be an efficient way to overcome the high transaction costs of licensing copyright in some markets.

- 5.2 Collecting societies act on behalf of their members who are owners of certain copyrights. The societies grant user licences, collect royalties from those users and then distribute royalty revenues back to members.
- 5.3 The Copyright Act sets up a number of compulsory statutory licensing schemes, under which the relevant copyright owner must permit certain uses of copyright material in return for a licence fee. Statutory licences limit the use of certain copyright material to particular circumstances and/or by certain institutions. For example, there is a statutory licensing scheme for the copying and communication of broadcasts by educational and other institutions.<sup>27</sup>
- 5.4 Collective licensing schemes can also be entered into voluntarily by copyright owners. There is no compulsion to enter into a voluntary licensing scheme, however, copyright owners may be incentivised to do so for efficiency reasons outlined below. Key collective licensing schemes in Australia include the Australasian Performing Right Association (APRA) and the Phonographic Performance Company of Australia Limited (PPCA).

### **Benefits of collective licensing**

- 5.5 By providing a single point of access to copyright material, it is argued that collecting societies are able to reduce transaction costs for both copyright holders and potential users and, consequently, facilitate licensing. Collective licensing offers benefits of lower costs of access for users, as well as improved incentives for creators. By allowing for the collective administration of copyright, collecting societies provide the creators of copyright material with the opportunity to more readily be remunerated for use of their copyright material by a large number of users.
- 5.6 Collective licensing can also deliver substantial transaction cost savings to users. This can be particularly desirable where entering into direct licences would either be prohibitively expensive or impossible in practice. For example, licensing each song that is played on a radio in a gymnasium, restaurant or cafe would be costly and practically impossible.
- 5.7 As well as reducing transaction costs, the use of collecting rights management also enables rights holders to pool the fixed costs of managing and enforcing copyrights and enjoy economies of scale. The extent of cost efficiencies associated with collective licensing is such that it is usually most efficient for a single collecting society to administer a particular collective licensing scheme.
- 5.8 The efficiency of the collecting society itself can influence the extent to which the potential benefits of lower transaction costs of licensing are realised. For licensees, potential problems may include a lack of transparency over the rights that are included in particular licences and difficulties in negotiating licences for new business models. For copyright holders, there may

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<sup>27</sup>See Part VA of the Copyright Act.

be a lack of transparency over the arrangements used by collecting societies to distribute licence fees collected on their behalf (distribution agreements) and concern that payments do not accurately reflect the value of the work to users.<sup>28</sup>

- 5.9 There is little empirical evidence on the magnitude of transaction costs associated with licensing of copyright. However, Pricewaterhouse Coopers (PwC) has estimated the benefits of the existing collective licensing scheme in the UK higher education sector by comparing the transaction costs of the current collective licensing system with the transaction costs likely to be incurred in a system of individual negotiations between copyright owners and users. PwC estimated higher potential transaction costs would arise under the individual model and considers that, in the absence of collective licensing, it is highly likely that the market for those material that is currently licensed would fail.<sup>29</sup>

### **Costs of collective licensing**

- 5.10 Although collective licensing can improve efficiency by reducing transaction costs, it also raises some potential competition issues. Specifically, collective licensing is done by collecting societies who represent licensors who might otherwise be in competition with one another, enabling copyright owners to act collectively rather than individually. 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.
- 5.11 The arrangements between collecting societies and creators may limit the degree to which users are willing or able to deal directly with the creators of copyright material. Furthermore, collecting societies typically offer blanket licences which permit use of the society's entire repertoire. Blanket licences reduce transaction costs as licensees only need to obtain a single licence for all their copyright needs. This can be particularly valuable for those users who do not know in advance which material they will use and have little control over this usage, such as a cafe which plays music over the radio. However, blanket licensing may dampen the incentives for direct licensing between the copyright owner and user, which may, in some cases, be more efficient than collective licensing.
- 5.12 These factors combined may 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.

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<sup>28</sup> The ACCC has considered these issues in relation to applications by APRA for authorisation of its 'input arrangements' and made authorisation subject to conditions intended to improve APRA's efficiency.

<sup>29</sup> PwC Report, March 2011, p.40.

## Balancing the interests

- 5.13 As noted above, the balancing of costs and benefits in the copyright system should be in the pursuit of economic efficiency. In the case of collective licensing, 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.
- 5.14 These trade-offs create potential tension between copyright law and competition policy. In particular, the exercise of market power by a collecting society may enable it to negotiate licence fees that are higher than necessary to provide adequate incentives for investment in creative materials. In this situation, the collecting society's market power may enable it to tilt the balance between copyright holders and potential users in favour of copyright holders, contrary to the balance intended by the Copyright Act and detrimental to the objective of promoting innovation and welfare.
- 5.15 Concerns about the possible exercise of market power by copyright collecting societies creates the need for measures to control that market power. The ACCC has an active role in two of these measures— the Copyright Tribunal and the CCA.

### The Copyright Tribunal

- 5.16 The Copyright Tribunal was established in response to a perceived need to control the exercise by collecting societies of the rights given to them by copyright owners in respect of the public performance and broadcast of musical material and sound recordings.<sup>30</sup> In making determinations as to remuneration and other licence conditions, the Copyright Tribunal acts as an important constraint on the exercise of market power.
- 5.17 As outlined in section 2 above, the Copyright Act makes specific reference to the ACCC in relation to Copyright Tribunal proceedings. The Copyright Act:
- requires the Copyright Tribunal, if asked to do so by a party to a proceeding, to have regard to any relevant guidelines issued by the ACCC (section 157A); and
  - gives the Copyright Tribunal a specific power to make the ACCC party to proceedings if the ACCC applies and the Copyright Tribunal is satisfied that it is appropriate (section 157B).
- 5.18 The ACCC's role under the Copyright Act arose out of the recommendations of the Ergas Committee.<sup>31</sup> The Ergas Committee considered the effects on competition of Australia's IP laws and the appropriate balance between competition policy and IP. In considering the role of copyright collecting societies and their impact on competition, the Ergas Committee indicated that collecting societies would continue to remain pivotal to, and retain considerable power in, the copyright system. Given this, the Ergas Committee considered there needed to

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<sup>30</sup> Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal*, December 2000.

<sup>31</sup> Ergas Report, p. 127

be an effective means in place to ensure collecting societies do not abuse any market power they may have.

- 5.19 The ACCC has been a party to two proceedings before the Copyright Tribunal; the 'Fitness Classes matter' and the 'Digital Downloads matter'. In the 'Fitness Classes matter,' the Phonographic Performance Company of Australia issued proceedings in the Copyright Tribunal in order for the Tribunal to conduct a review of the rate it charged for the right to play copyright sound recordings in fitness classes.<sup>32</sup> In the 'Digital Downloads matter,' the music collecting societies APRA and the Australasian Mechanical Copyright Owners Society Limited sought an increase in the rate that it charged digital music providers per digital music download. Both matters were settled commercially.<sup>33</sup>
- 5.20 As noted in section 2 above, the ACCC is currently drafting guidelines for consultation, which will relate to matters the ACCC considers relevant to the determination of reasonable remuneration and other conditions of licences which are the subject of determination by the Copyright Tribunal.

### **The CCA**

- 5.21 Part IV of the CCA prohibits anti-competitive agreements, mergers and other practices that substantially lessen, prevent or hinder competition. As collecting societies bring together the rights of copyright owners that might otherwise compete in the supply of such material, in some circumstances their arrangements may also risk breaching the competition provisions of the CCA. The ACCC may investigate complaints against copyright collecting societies where there is an alleged breach of Part IV. There is also scope for complainants to take private action under the CCA.
- 5.22 Where a collecting society's arrangements may fall within the ambit of Part IV of the CCA, the society can apply for authorisation under Part VII of the CCA. Under the authorisation process, the ACCC can grant protection from legal action for conduct that risks breaching the Part IV provisions of the CCA (with the exception of misuse of market power) if it is satisfied that the likely public benefit (which predominantly relates to efficiency considerations) from the conduct outweighs any likely public detriment.
- 5.23 Section 51(3) exempts the imposition of or giving effect to certain conditions of IP licences or assignments of patents, registered designs, copyright or EL rights from the operation of the anti-competitive conduct provisions contained in Part IV of the CCA (other than the prohibitions relating to misuse of market power and resale price maintenance). However, the lack of certainty about the extent of the exemption provide by section 51(3), which is described in section 9 of this submission, undermines the potential controls on copyright collecting societies' market power.

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<sup>32</sup> *Phonographic Performance Co of Australia Ltd under Section 154(1) of the Copyright Act 1968* (2010) 87 IPR 148.

<sup>33</sup> *Australasian Performing Right Association Ltd v Australasian Mechanical Copyright Owners Society Ltd* (2009) 84 IPR 402

## Rights management in the digital economy

- 5.24 Digital technologies also potentially reduce the transaction costs of administering copyright and give copyright holders technical control over access to and use of copyright material which may, in certain circumstances, provide an alternative to collective administration. Digital technologies may lower the search costs of users by providing a means to easily locate relevant copyright material and identify the copyright holder. This may facilitate direct licensing and potentially reduce the role of collecting societies.
- 5.25 The ACCC submits that the ALRC should explore whether a version of the digital copyright exchange (DCE) should be introduced, as proposed in a 2011 UK report, *Digital Opportunity, A Review of Intellectual Property and Growth* (the Hargreaves Report).<sup>34</sup> The key benefits identified for this model include the potential for reduced transaction costs, increased transparency in the marketplace as to the relative price of copyright materials and easier facilitation of audit by users and regulatory authorities.
- 5.26 The ACCC notes that the effectiveness of a DCE may be limited as it would need to be voluntary in order to comply with international obligations, which may result in limited usage of a DCE by copyright holders and users.
- 5.27 Joining and utilising a DCE is likely to be more attractive to a user the more comprehensive the coverage of copyright materials in the DCE. Similarly, the more users utilise the DCE, the more attractive it is likely to be to an owner of copyright material to join. If uptake of the DCE is slow by either party, this may inhibit the usefulness of a DCE in overcoming some of the issues associated with exceptions that do not keep pace with the digital economy.
- 5.28 Accordingly, the establishment of a DCE would require a consideration of incentives for copyright holders to join, including the benefits listed above. Other incentives for copyright creators identified in the Hargreaves Report include:
- a means to record the ownership of rights and the terms on which they are available;
  - increased options to license an individual creator's material directly; and
  - a single point of access to collecting societies and eventually to competitor societies internationally.<sup>35</sup>
- 5.29 In addition, the ACCC notes a DCE would not solve issues with orphan material of the past, or deal with materials that are permanently orphaned (such as when the creator is deceased).<sup>36</sup> This means there is likely to always be a set of copyright material which may never be administered in a DCE, regardless of the incentives.

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<sup>34</sup> See generally *Hargreaves Report*, ch 4.

<sup>35</sup> *Hargreaves Report*, p. 31.

<sup>36</sup> When owners of copyright material either cannot be identified, cannot be found or do not respond to requests by users to licence the copyright material this material is often referred to as 'orphan material.'

- 5.30 While the ACCC does not consider that the introduction of a DCE would negate the need for amendments of existing exceptions or inclusion of new exceptions, it could potentially go some way in assisting copyright law maintain relevance in the digital economy as technology continues to develop and consumer behaviour evolves.
- 5.31 The ACCC notes however, that such a digital licensing solution could give rise to competition issues arising from co-operation between rights holders and collecting societies in implementing such a regime. Consequently, it would be important for the ACCC to have the ability to address any competition issues that may emerge.

## **6. Recent trends affecting the copyright industries**

- 6.1 The ACCC has identified a number of trends that illustrate the impact the digital economy is having on consumers, copyright holders and creators and those that manufacture and provide devices, platforms and services that form part of, or are interdependent with, the copyright industries. The ACCC notes the trends identified below appear to be affecting competition, and the potential for growth in competition, in these and related industries.

### **Change in distribution of copyright material**

- 6.2 The digitisation of copyright content has meant that copyright material is increasingly available in a number of electronic formats across a number of devices and platforms, such as smart-phones, tablets, internet-enabled televisions and PCs. This has also led to the convergence of previously distinct supply chains and distribution platforms for copyright material, to a point where different types of content can often be consumed on the same device. For example, books, music, television shows and movies are increasingly available over the same platforms, such as tablet computers.
- 6.3 Developments in technology have also led to a substantial reduction in the cost of, and timeframe for, copying and distributing copyright materials and has, in some cases, meant that the quality of a reproduction is indistinguishable from the original.

### **Consumer empowerment over consumption**

- 6.4 New platforms, devices and services are permitting consumers to organise consumption around their own preferences in terms of time, location and method of consumption. This trend is linked to the consumer's desire to copy content (such as music and television programs) into alternative formats to enable consumption on different devices, in different locations and at times that suit the consumer. This type of use is sometimes categorised as 'private use'. There are specific exceptions for private use relating to time shifting and format shifting, which were introduced to the Copyright Act in 2006 to better reflect consumer attitudes and behaviour at the time.<sup>37</sup>

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<sup>37</sup> Explanatory Memorandum, Copyright Amendment Bill 2006, p.6.

- 6.5 The ACCC notes that the nature of consumer empowerment over consumption has not remained static and consumer attitudes and behaviour have evolved since 2006. This has raised some issues relating to the private use exceptions, which are discussed in section 7 of this submission. In particular, consumers are increasingly using different technological solutions, such as a virtual cloud, to store copies of copyright material for their own personal use. These technological changes were not necessarily envisaged in 2006, and it is unclear whether the current exceptions in the Copyright Act provide consumers with the flexibility that was intended in relation to storing and copying copyright material for their own private use.

### **Unauthorised copying**

- 6.6 The emergence and development of the digital economy has significantly increased access to a wide range of content, in addition to the ability to copy and distribute high quality copies, almost instantly and at minimal cost.
- 6.7 These developments have also arguably increased the opportunities to infringe copyright through unauthorised copying and distribution. Copyright infringement occurs where consumers make and/or distribute unauthorised copies either deliberately or inadvertently, through what might be considered by consumers to be a normal manner in which to use copyright material. For example, a deliberate but common way in which consumers are infringing copyright is by downloading television series or movies from file sharing websites. An inadvertent manner in which consumers potentially infringe copyright is by copying or format shifting content purchased legally from one device to another. The ACCC notes that there are also circumstances where unauthorised copying may occur incidentally in commercial circumstances, for example when material is cached by a website.
- 6.8 However, the ACCC notes distinctions can be drawn when considering the issue of unauthorised copying, namely the differences between private copying of material for personal use that is purchased legally (which may be unauthorised where it does not fit within the format or time shifting exceptions), copying of material downloaded illegally for personal use and the illegal copying of material for commercial purposes.
- 6.9 This submission addresses some of the implications of increased unauthorised copying and distribution further in section 7.

### **Increased legitimate sources of digital copyright material**

- 6.10 In order to satisfy consumer demand for digital copyright material across a range of platforms and to address the costs of unauthorised copying, an increasing number of market participants have expanded their presence vertically and horizontally from the physical to the digital supply chains. For example, Apple, a device manufacturer, expanded into digital content distribution through its iTunes service. iTunes provides content ranging from movies, television shows and songs. Similarly, music retailer JB-HiFi has expanded into the provision of digital audio from its traditional business of physical retail.

## Increase in the volume of copyright materials

- 6.11 Changes in the digital economy have also substantially increased the opportunities for the creation of user-generated ‘non-commercial’ copyright materials. In some instances this has been facilitated by reductions in the cost of equipment needed to produce the material. For example, the cost of digital cameras has fallen considerably, particularly at the consumer end of the market. This has significantly increased the opportunity for users to create their own digital still images and videos.
- 6.12 Similarly, the cost of creating some more complex creations has been greatly reduced or, for the first time, become accessible to the broader community. For example, creation of private user-generated music ‘mash-ups’ is now possible on a home computer using software that once might have been restricted to recording studios. Furthermore, 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.
- 6.13 For many copyright creators, these materials are not directly used for commercial purposes. The incentives for creating and distributing these materials may be very different from those operating in core copyright industries.
- 6.14 It is worth noting, however, that while the creators and owners of these ‘non-commercial’ copyright materials may seek to exploit these materials in different ways to those with a commercial focus, the sharing and distribution of such material may involve other commercial entities. For example, many users of Facebook publish photos and written copyright material for non-commercial purposes, however, the business of Facebook (an advertising-funded business model) is dependent on its members producing these materials.
- 6.15 In addition, while some copyright material may be created without an intention to commercialise the work, digital platforms provide an opportunity for creators to subsequently 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>38</sup> Accordingly, as will be discussed below, the distinction between ‘non-commercial’ and ‘commercial’ uses of copyright material has become increasingly complex in the context of the digital economy.
- 6.16 In addition to the lowering costs and increasing opportunities for parties creating ‘non-commercial’ copyright materials, these changes are also affecting the creation of copyright materials by small and medium enterprises. By substantially increasing the opportunities for creation and distribution of copyright materials, the number of small and medium enterprises operating in the online environment has also increased.

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<sup>38</sup>The official YouTube partners & creators blog, *Being a YouTube Creator Just Got Even More Rewarding*, available at <http://youtubecreator.blogspot.com.au/2012/04/being-youtube-creator-just-got-even.html>, accessed 30 October 2012.

## **New services**

- 6.17 As noted above, developments in digital technology are creating opportunities for creation of new types of creative content. Similarly, the demand by consumers for services which facilitate the production and consumption of such material is driving further developments in digital technologies.
- 6.18 A key consumer service that has emerged in the digital economy is cloud computing. Cloud computing is essentially an internet-based service, where digital content (such as emails, television programs and music) is stored in remote servers and then delivered to end-users on demand. This content may be owned or licensed by the cloud service provider, or end users may store copies of material which they own in the cloud, such as music files.
- 6.19 Storing information remotely has a number of advantages for consumers. Firstly, the content is not stored on their physical device and therefore does not take up data storage space on their physical device. Secondly, the content can be accessed by logging into the cloud service, and as such it can be accessed on multiple devices and in multiple locations.
- 6.20 Additionally, as internet access and the range of activities on the internet increases, a number of internet-related services have emerged and/or grown in prominence. These services are frequently performed by what the Issues Paper refers to as 'internet intermediaries,' such as internet service providers, search engines, web hosts and online platforms such as YouTube and Facebook.

## **7. Scope of copyright protection and competition**

- 7.1 As discussed in section 3, copyright in general will not confer significant market power. However, in some circumstances, prohibiting certain use of copyright material or the extent of copyright protection may give rise to inefficiencies and hinder competition.
- 7.2 Broadly, the ACCC considers that there are certain uses of copyright, outlined below, that are prohibited by copyright law that do not necessarily result in the extraction of additional value from the underlying copyright material. In addition, such uses may conversely fail to recognise the benefits that may be flowing to the copyright owner or rights holder. In certain circumstances, these uses may even present opportunities for exploiting further value in the copyright material and provide some additional value to the underlying owner of the copyright material.
- 7.3 In these circumstances, prohibiting use of the copyright material can create risks for the user due to possible infringement proceedings and/or increased transaction costs, without any associated efficiency benefits. The ACCC submits that in such circumstances, the ALRC should consider whether the extent of copyright protection and exceptions is having an unintended effect on efficiency in the digital economy.

## Incidental use

- 7.4 In some circumstances, third parties may use copyright materials that they do not own or have not licensed in a manner that is incidental to the creation and use of another good or service. There may be uncertainty as to whether that use is in breach of the Copyright Act.
- 7.5 For example the Issues Paper notes that there are certain internet-related technical functions, such as caching and indexing, which might require copying of copyright material in order to operate efficiently.<sup>39</sup> These technical functions are frequently performed by what the Issues Paper refers to as internet intermediaries.<sup>40</sup> Internet intermediaries are described by the OECD as firms and individuals which
- ..provide the Internet's basic infrastructure and platforms by enabling communications and transactions between third parties as well as applications and services. 'Internet Intermediaries' give access to, host, transmit and index content originated by third parties or provide Internet-based services to third parties.<sup>41</sup>
- 7.6 Internet intermediaries constitute a diverse group of services. In performing their various functions, many of them make copies of, and transmit, copyright material. Such copying and communicating is likely to be an infringement of Australian copyright law unless it is covered by an exception or a licence has been obtained from the copyright owner. However, as noted above, the transaction costs associated with licensing may reduce the extent to which licensing is feasible.
- 7.7 For example, a search engine is a type of internet intermediary, which looks for information on the internet and presents search results to the user. In order to provide users with search results, search engines use automated web crawlers<sup>42</sup> to create copies of the visited pages which are then stored in a cache for later indexing.<sup>43</sup> Search engines index data from stored web pages using a variety of methods such as by key words, headings or other metadata. When a user makes a search query the search engine examines its index and provides a list of web pages that best match the search.
- 7.8 Caching is a particularly common function used by internet intermediaries. Caching involves copying web pages and storing them locally on a hard drive which may belong to an end-user or to a service provider such as a search engine. Caching allows the web page to be quickly retrieved the next time the page is requested (either by the same user or a different user). The copy is temporary in the sense that it may be refreshed after the website is visited again. The copy stored in the cache may infringe a copyright owner's right to reproduce. Additionally, any

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<sup>39</sup> Issues Paper, p.23.

<sup>40</sup> Issues paper, p.22.

<sup>41</sup> OECD, *The economic and social role of internet intermediaries*, April 2010, p. 6.

<sup>42</sup> A 'web crawler' is a computer programs that browse the internet and create copies of the visited pages

<sup>43</sup> Issues paper, p.22-3.

transmission of information from the cache may infringe a copyright owner's right of communication.

- 7.9 In these circumstances, the good or service being provided by an internet intermediary does not harm the value of the copyright material, but is rather providing a technological service to facilitate their customers' use of copyright material.
- 7.10 Additionally, the ACCC considers that internet intermediaries are vital to a broad range of industries, enabling innovation and competition in an increasingly digital environment. Further, as the volume of internet intermediaries grow, competition between these intermediaries could provide significant economic and social benefits.
- 7.11 Accordingly, the ACCC has commented on the scope for extending exceptions for this type of use in Part B of this submission. These views are based on the concept that significant transaction costs and risk for users should not be incurred where there is only minimal, if any, efficiency benefit.

## **Private use**

- 7.12 Convergence of communications technologies and platforms have raised some anomalies in copyright law, where the law is technology or platform specific the ACCC submits that, to the extent possible, copyright protection and exceptions should operate on a technology neutral basis. This simple proposition raises questions about copyright protection that is tied to particular communications technologies, rather on particular uses.
- 7.13 As noted in section 6, consumers are increasingly expecting to be able to store and consume copyright material at times and locations convenient to them. A number of services have developed in tandem with this trend.
- 7.14 For example, a key consumer service that has emerged in the digital economy is cloud computing. Cloud computing is essentially an internet-based service, where digital content (such as emails, television programs and music) is stored in remote servers and then delivered to end-users on demand. This content may be owned or licensed by the service provider, or end users may store copies of material which they own in the cloud, such as music files.
- 7.15 The Optus TV Now service is one example of a cloud service that cannot operate given Australia's current copyright laws. The Optus TV Now service allowed certain Optus customers to view recorded copies of free-to-air (FTA) broadcast television programs, including AFL and NRL matches, and play them back at a later time on a compatible mobile device or personal computer. Optus was held to be in breach of copyright, as rather than the consumer making copies for their own private use, the Full Federal Court held that Optus made the copies of the relevant television programs, in order to store them and provide them to consumers at a later time. Optus has since ceased to provide the TV Now service.
- 7.16 The ACCC considers that there is a legitimate issue to be considered in light of the Optus TV Now case. In particular, if a customer is able to make a copy of copyright material for their own private use (such as recording a FTA television program on a Personal Video Recorder), in

terms of the economic objectives of copyright law, there seems to be little rationale for preventing a consumer from engaging a third party service provider to perform the same function.

- 7.17 Innovation in services, such as cloud services, are important to the emergence and sustainability of competitive digital services industries. While cloud service providers might be exploiting a commercial opportunity which relies, in part, on the copying and communicating of copyright material the ACCC considers that careful consideration needs to be given to whether and, if so, how this operates to the detriment of copyright owners, particularly in terms of the value of the copyright material.
- 7.18 More specifically, the ACCC notes that copyright can, in some circumstances, act as a disincentive to copyright owners to innovate. The ACCC submits that copyright law and enforcement of copyright is only one part of the overall framework of providing incentives for the creation and use of copyright material and ensuring competitive markets. Copyright owners have, in some circumstances been slow to adopt market based solutions in favour of enforcement of copyright, where consumer expectations and practices have shifted and have, led to breaches of copyright.
- 7.19 The ACCC does not propose that copyright holders should not seek to enforce their legal rights. Rather, the ACCC considers that there are instances where innovation by the copyright owner have led to solutions that offer consumers a competitive solution in a manner that is more efficient than enforcement action. In this respect, strengthening copyright protections or failing to create exceptions that reflect changes to copyright use, distribution and creation, has the potential to reduce incentives for innovation.

## **Unauthorised copying**

- 7.20 As discussed in section 6 of this submission, technological developments and trends in the use and distribution of copyright materials have resulted in copying of digital content becoming cheaper, simpler and faster. The quality of non-professional copying has also substantially improved. As a consequence, copies of original copyright materials, including unauthorised copies, have become a far closer substitute for an original than was the case prior to digitisation.
- 7.21 These developments have been accompanied by changes in consumer expectations. Changes in the capacity and desire of consumers to copy material have potentially led to increased opportunities for private unauthorised copying of copyright materials. This has the potential to undermine copyright holders' remuneration and may undermine the incentives to invest in creative material.

7.22 The effect that unauthorised copying has on the incentives to invest in creative material and potential affect on efficiency is important.<sup>44</sup> The key effects of unauthorised copying on both copyright holders and users is outlined below.

### **Effects of unauthorised copying**

7.23 There is considerable empirical economic literature that examines the impact of digital technologies on unauthorised copying of copyright material and associated copyright industries. However, these studies mainly focus on the overseas music industry, in particular, the impact of peer-to-peer and MP3 technologies on sales of recorded music. The findings of this body of literature are inconclusive. The effect of these technologies on sales ranges from zero to substantial reductions in sales.<sup>45</sup> The middle ground suggests that file sharing has displaced some demand for legitimate copies but that other factors, such as changes in the macroeconomic environment and consumer tastes, have also contributed to reductions in sales.

7.24 The ACCC notes that even where markets for copyright material have become more similar in terms of supply and consumption characteristics as a result of the trends arising in the digital economy, the effect of unauthorised copying may, nevertheless, be significantly different between these markets. This is particularly likely where investment risks and means for exploiting copyright material vary. For example, certain types of films may be the result of considerable monetary investment and risk, whereas other types of films or the production of other copyright material (such as a collection of photos or a music album) may, in some circumstances, involve a lower level investment and risk. In relation to the first category of films, significant unauthorised distribution of a film may have a particularly detrimental effect given the distribution model for films, which is based on limited and staggered release in different formats at different times and does not involve a number of associated revenue streams. If a film has been widely copied and distributed prior to its official release, large revenue streams are potentially reduced. As this example demonstrates, the incentives to create new copyright materials may differ between various copyright industries and even within certain industries.

7.25 While unauthorised copying and distribution can reduce the incentives to invest in creative material to the extent that it displaces legitimate sales, this may be partially offset by any benefits that might be gained from increased exposure for the copyright holder. For example, a musician may benefit from greater interest in their materials, including from live

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<sup>44</sup> For example, Kim Williams Chief Executive Officer of News Limited in keynote address to the Australian International Movie Convention, 21 August 2012.

<sup>45</sup> Zentner, A, 2005, File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries, *Topics in Economic Analysis & Policy*, Volume 5, Issue 1, Liebowitz S, 2005, File Sharing: Creative Destruction or Just Plain Destruction?, *Journal of Law and Economics*, Vol. 49, No. 1. pp. 1-28. Oberholzer-Gee F and K Strumpf, 2010, File sharing and copyright, *Policy and Economy*, Vol. 10, pp. 19-55.

performances.<sup>46</sup> Again, the magnitude of such a benefit is likely to vary between and within copyright industries.

- 7.26 Additionally, a central issue is the extent to which consumers who engage in unauthorised copying of digital material would have purchased a legal copy in the absence of an ability to make an unauthorised copy. It is arguable that there is no harm to incentives for investment in creative materials if the illegal copy does not displace the sale of a legitimate copy.
- 7.27 To the extent that unauthorised copying and distribution reduces incentives for further investment in commercial copyright materials, then over the longer term, availability of such material could decline. This would offset some of the short term 'benefits' to the economy of unauthorised copying. Some empirical studies suggest that consumers benefit considerably in the short term from the availability of low cost copies. However, these studies do not consider the longer term dynamic effects of a potential reduction in incentives for investment in creative materials.<sup>47</sup>
- 7.28 The ACCC notes that it is not clear whether some of the types of copying that are currently likely to infringe copyright have a negative impact on overall efficiency and welfare. The UK Strategic Advisory Board for Intellectual Property (now part of the Intellectual Property Office) stated in its 2010 paper, *The economics of copyright and digitisation: a report on the literature and need for further research*, that "unauthorised copying may lead to a welfare loss [for the copyright holder and the core industries]" but states that "ICT firms are likely to benefit where unrestricted copying boosts the demand for their products."<sup>48</sup> The ACCC considers these issues require further research and consideration before any amendments to copyright laws are made.
- 7.29 The ACCC notes that available literature mainly focuses on the impact of digital technologies on copyright holders and submits that such analysis is incomplete, as the interests of consumers and intermediate users must also be considered.
- 7.30 The available literature identifies several reasons why consumers might make unauthorised copies of copyright material.<sup>49</sup> These include an unwillingness to pay the price of a legal copy, a desire to 'try before you buy,' only wanting a selection of the copyright material (e.g. a song from a music album), and being unable to obtain a legitimate copy (especially within a desired timeframe).

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<sup>46</sup> For example, in Australia, declining record sales have been accompanied by increasing attendances at concerts and music festivals, see PwC, *Outlook: Australian Entertainment and Media 2012-2016*, 2012, p.147.

<sup>47</sup> Zentner, A, 2005, 'File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries,' *Topics in Economic Analysis & Policy*, Volume 5, Issue 1; Liebowitz S, 2005, 'File Sharing: Creative Destruction or Just Plain Destruction?,' *Journal of Law and Economics*, Vol. 49, No. 1. pp. 1-28; Oberholzer-Gee F and K Strumpf, 2010, 'File sharing and copyright,' *Policy and Economy*, Vol. 10, pp. 19-55.

<sup>48</sup> SABIP, p.31.

<sup>49</sup> Oxera, *Competing with 'free'? The damages of music piracy*, 2011, available at <http://www.oxera.com/Publications/Agenda/2011/Competing-with-%E2%80%98free%E2%80%99--The-damages-of-music-piracy.aspx>.

7.31 These incentives may have been weakened over time as the market has found solutions to some of these issues. For example, many online music sites now allow consumers to sample part of a music track before purchase and to download individual songs rather than an entire album.

### **Responses to unauthorised copying**

7.32 There are some key risks to strengthening copyright protections as a response to unauthorised copying without further evidence of the economic impact, which could include: increased costs of enforcement and monitoring; changing the law in a manner that is further divergent from consumer practices and views; and failing to incentivise firms to adopt new technologies and business models and encouraging them to rely on enforcement. Conversely, a key risk of allowing some practices that are currently unauthorised may be a failure to allow a market-based solution to emerge, and potentially undermine incentives for creation.

7.33 There have been some market based responses to unauthorised copying in the provision of new services and content offerings to meet consumer practices and expectations. For example, services such as *Spotify* and *JBiFi Now* permit consumers to listen to songs from a library stored in the 'cloud' on a range of broadband connected devices for a subscription. This is arguably a strong strategy from content rights owners to combat piracy by innovating and offering legal alternatives.

7.34 The ACCC notes that these market based solutions do not rely on seeking to increase enforcement of breaches of copyright, but rather seek to provide consumers with lower cost and/or easier access to the content consumers desire when they desire it. The ACCC is not advocating the legitimisation of copyright infringement or an economic analysis that places greater value on end-users and industries that benefit from copyright infringement over those that gain most of their value from the legal exploitation of copyright. Rather, the ACCC is concerned that the rights of copyright holders should be able to be preserved and protected commensurate with the objectives of providing incentives to create copyright material, but suggests this be balanced against the potential for innovative business practices to meet and develop consumer expectations and practices.

7.35 Where unauthorised copying has little, if any, detrimental impact on incentives for creation, but is consistent with reasonable consumer practices, expectations or incidental usage, the ACCC submits that careful consideration should be given to whether exceptions should be extended to minimise transaction costs and risks for users.

7.36 The ACCC considers a more holistic regulatory and policy approach may be appropriate. There may be alternative ways to decrease any inefficiencies resulting from current practices. For example, a regulatory regime that more easily permits other parties to exploit copyright where such exploitation is innovative, and the rights are not being exploited by the copyright holder, is preferable to the introduction of a strict enforcement regime that inhibits innovation.

## 8. Intellectual property and the CCA

- 8.1 As noted throughout Part A of this submission, competition law is fundamentally intertwined with copyright law and it is important that where the exploitation of copyright may result in anti-competitive conduct, there are appropriate mechanisms in place.
- 8.2 As discussed in section 5 of this submission, the Copyright Tribunal provides one avenue for dealing with the exercises of market power by collecting societies. The CCA provides another means for addressing some market power or competition issues that arise from conduct relating to licensing copyright material, including a refusal to license.
- 8.3 The CCA takes specific account of IP rights and establishes an interface between those rights and the prohibitions relating to anti-competitive conduct which are contained in Part IV the CCA.
- 8.4 Section 51(1)(a) makes it clear that legislation relating to patents, trade marks, designs or copyrights does not amount to specific authorisation for the purposes of the general exemption in that sub-section for conduct that is specifically authorised by legislation. However, section 51(3) has the effect of exempting the imposing, or giving effect to, conditions of IP licences and assignments from the competition provisions of Part IV of the CCA (except sections 46, 46A and 48) to the extent that the condition *relates to* the subject matter of the IP.<sup>50</sup>
- 8.5 In addition, IP is exempt from the essential services access regime in Part IIIA and partially exempt from the telecommunications access regime in Part XIC of the CCA: see section 44B (definition of *service*) and section 152AL(6) of the CCA. As a result, these access regimes are not available to address situations where the owner of an IP right refuses to license or assign those rights.
- 8.6 The ACCC considers the ability of the owners of IP to use licences and assignments to set terms and conditions about access to and use of copyright materials generally facilitates the efficient use of IP and supports the competitive process. However, the ACCC is concerned that some such arrangements may result in anti-competitive outcomes and, as discussed below regarding section 51(3), considers that it is no longer appropriate to exempt conditions imposed by IP licensing and assignment arrangements from the application of the competition provisions of the CCA.

### The application of section 51(3)

- 8.7 The original objectives of section 51(3) are unclear. In a review of section 51(3) in 1999, the National Competition Council (NCC) considered that section 51(3) was most likely enacted to prevent a perceived clash between the interests of IP owners and competition law.<sup>51</sup> At the time the then *Trade Practices Act 1974* (TPA) (now the CCA) was enacted in 1974, it was likely

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<sup>50</sup> In the case of trade marks, such conditions are exempt to the extent that they relate to the kinds, qualities and standards of goods bearing the trade mark.

<sup>51</sup> NCC, *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974 - Final Report*, March 1999 ('NCC Report').

that IP laws were believed to confer on the owners of IP a limited economic monopoly. This led to a concern that the unrestrained application of competition law to IP could undermine IP rights.

- 8.8 This original rationale is no longer relevant. It is now accepted that, generally, IP laws do not create legal or economic monopolies. IP laws create property rights and the goods and services produced using IP rights compete in the marketplace with other goods and services. Only in special cases will IP owners be in a position to exert substantial market power or engage in anticompetitive conduct.<sup>52</sup> However, in those circumstances it is appropriate that the use of IP should be subject to the CCA to promote economic efficiency and the long term interests of consumers. Accordingly, there is a strong argument for review of the exemption provided by section 51(3).
- 8.9 Further, there is considerable uncertainty about the scope of section 51(3), arising chiefly in relation to interpretation of the term ‘to the extent that the condition *relates to*’ which is contained in section 51(3)(a). Only one judicial decision *Transfield v Arlo* has touched on the issue and this has been used to support a range of interpretations.<sup>53</sup> On one view, almost any condition may *relate* to the copyright work or other subject matter and would be exempt by the application of section 51(3)(a). By contrast, a narrow interpretation is that the condition must relate directly to the work itself (for example specifying the form of a performance), while conditions such as exclusive use would be considered to be collateral arrangements and therefore not covered by the exemption. On this narrow view, section 51(3)(a) would have limited, if any, effect as the type of conduct which would be within the narrow ambit would be unlikely to contravene Part IV of the CCA.
- 8.10 If the broad view of section 51(3)(a) is taken, the provision could operate to remove the following conduct from any assessment under Part IV of the CCA (other than the misuse of market power and resale price maintenance provisions):
- A software licence which not only requires the user to exclusively use the software, but also prevents the user from developing and supplying its own competing software in Australia (which may otherwise potentially amount to a cartel provision – market sharing – and/or an exclusionary provision);
  - A licence to use specialist software which includes a condition requiring the user to use only the supplier’s software for all its requirements, for example where the specialist software is an essential patient management tool for hospitals, and the hospitals are being forced to also acquire accounting and other software as part of the bundle from the licensor for which there are a range of substitutes (this is exclusive dealing and would contravene section 47 if it had the purpose or effect of substantially lessening competition in a market);

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<sup>52</sup> NCC Report, p.149.

<sup>53</sup> *Transfield Pty Ltd v Arlo International Ltd (1980)* 144 CLR 83.

- A software licence which contains a condition that if the user resupplies the software to other customers in competition with the licensor, the user must discuss and agree on the price with the licensor (which may otherwise amount to a cartel provision – price fixing);
- A licence which contains a condition that the licensee must not acquire IP rights from any other IP supplier (again, this is exclusive dealing and would contravene section 47 if it had the purpose or effect of substantially lessening competition in a market).

- 8.11 Section 51(3)(a) has been raised in the following two cases, although these cases do not provide clear guidance on the interpretation of section 51(3). The first is the proceedings brought by the ACCC in 1996 against Seven, Nine, and Golden West television networks and others for alleged breaches of sections 45 and 47 of the CCA. The proceedings concerned an alleged agreement under which Nine and Seven each agreed not to pursue interest in acquiring a second commercial television licence in a region where a company associated with the other party held a sole commercial television licence, and exclusive program supply agreements between Nine and Seven and companies associated with them. Nine raised section 51(3) as a defence. The matter was eventually settled out of the court.
- 8.12 The second is *APRA*, where the Australian Competition Tribunal reviewed the ACCC’s decisions on APRA’s applications for authorisation in respect of its collective licensing arrangement.<sup>54</sup> The Competition Tribunal noted that for the purposes of authorisation it was irrelevant that an application for authorisation may be unnecessary because of the operation of section 51(3). The Competition Tribunal observed that section 51(3) by its terms would not cover future IP and would not apply to the granting or assignment of licences or refusal to grant a licence.
- 8.13 It is likely that, in the absence of clear judicial guidance, the uncertainty in relation to the extent of the protection provided by section 51(3)(a) has limited any benefit that may otherwise have been afforded by it to IP rights holders seeking to rely on this provision to exempt IP licences and assignments from the operation of the competition law provisions in Part IV of the CCA.
- 8.14 Section 51(3)(b) and (c) also provide exemptions relating to the use of a certified trade mark and arrangements between registered proprietors of a trade mark and a registered user of the mark. However, as both these paragraphs refer to the now repealed *Trade Marks Act 1955*, rather than the current *Trade Marks Act 1995*, it appears likely that they have not had any practical effect since the repeal of the 1955 legislation in 1995. As currently drafted, neither can be relied on to exempt conduct involving trade marks from Part IV of the CCA.

### **Previous reviews of section 51(3)**

- 8.15 Section 51(3) has been reviewed on a number of occasions and various recommendations to amend it have been made. As noted above, in 1999, it was reviewed by the NCC as part of the

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<sup>54</sup> (1999) 151 FLR 1. APRA applied for authorisation after the Federation of Australian Commercial Television Stations challenged APRA’s conduct under the then TPA. APRA had previously considered that the conduct alleged to be in breach of the TPA was exempt from the TPA due to the operation of section 51(3) of the TPA.

Commonwealth Government's review of legislation that may restrict competition under the Competition Principles Agreement. After initially supporting repeal, the NCC recommended that the scope of section 51(3) be narrowed so that it no longer exempted horizontal arrangements or price and quantity restrictions.<sup>55</sup> Specifically, the NCC considered that section 51(3) should no longer apply to arrangements between competitors or arrangements that impose price and/or quantity restrictions. However, the NCC recommended that exemptions should remain under section 51(3) where the granting of a licence does not restrict how a licensee can deal with an exclusive right granted under the licence. The NCC's proposed amendments were not implemented by the Government.

- 8.16 Section 51(3) was reviewed again in 2000 by the Ergas Committee.<sup>56</sup> The Ergas Committee found that in achieving an appropriate balance between the needs of the IP system and the wider goals of competition policy, section 51(3) should be reframed. At the time, the ACCC reiterated its submission to the NCC inquiry, submitting that IP rights should be accorded the same treatment as all other property rights, and the protection provided by section 51(3) should be removed.<sup>57</sup>
- 8.17 The Ergas Committee considered that IP rights are sufficiently different from other property rights to warrant special treatment under the TPA. However, the committee also considered that the existing IP exemptions under section 51(3) were seriously flawed, as the extent and breadth of the exemptions were unclear, and may well be too broad. The Ergas Committee found that these exemptions do not provide an appropriate balance between the needs of the IP system and the wider goals of competition policy.<sup>58</sup>
- 8.18 As a result, the Ergas Committee recommended several changes to s51(3), including that:
- section 51(3) be repealed;
  - the then TPA be amended to ensure that a contravention of Part IV, or of section 4D, shall not be taken to have been committed by reason of the imposing of conditions in a licence, or the inclusion of conditions in a contract, arrangement or understanding, that relate to the subject matter of that IP statute, so long as those conditions do not result, or are not likely to result, in a substantial lessening of competition; and
  - the ACCC issue guidelines to provide sufficient direction to IP right owners, clarifying the types of behaviour likely to result in a breach of the then TPA's provisions. Provisions should exist within the guidelines for parties to seek a written clearance from the ACCC.<sup>59</sup>

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<sup>55</sup> NCC report, Review of Sections 51(2) And 51(3) of the *Trade Practices Act 1974* - Final Report, March 1999.

<sup>56</sup> Ergas Report.

<sup>57</sup> ACCC submission to the Ergas Review, 16-7.

<sup>58</sup> IPCRC, 2000, *op. cit.* p.11.

<sup>59</sup> Ergas Report, p. 215.

8.19 The ACCC understands that these recommendations were largely accepted in the Government Response to the Ergas Review.<sup>60</sup> However, to date the recommendations have not been implemented.

### **Current ACCC view regarding s51(3)**

8.20 Given the uncertainty of the application of section 51(3), and more fundamental concerns about the exemption of IP licences and assignments from the generally applicable competition laws, the ACCC remains of the view that section 51(3) of the CCA should be repealed. The ACCC considers that a blanket exemption for conditions imposed in IP licensing and assignment arrangements is not justified and that the repeal of section 51(3) will not lead to an erosion of the rights created through IP laws. For example, owners of copyright in literary material will still have the rights to reproduce the work (including by photocopying, copying by hand, recording and scanning). Repeal of section 51(3) would, however, 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. The ACCC recognises the importance of granting and protecting exclusive IP rights to provide incentives for investment in copyright materials. However, the ACCC considers that the subsequent licensing or assignment of those IP rights should be subject to the same treatment under the CCA as any other property rights.

8.21 The ACCC recognises that repeal of section 51(3) may give rise to some initial uncertainty for some owners of IP rights as to whether their licensing and assignment arrangements may fall within the ambit of Part IV of the CCA. The ACCC considers that providing guidelines which clarify the types of behaviour likely to result in a breach of the CCA's provisions will assist in resolving this transitional issue. The ACCC notes that the US Department of Justice and Federal Trade Commission has issued similar guidelines to provide guidance to owners of IP rights in relation to antitrust issues relating to the licensing of IP.<sup>61</sup> The ACCC notes that while IP rights are subject to competition laws in the United States, the nature of those rights has not been eroded.

8.22 Where conditions imposed by IP licensing or assignment arrangements may fall within the ambit of Part IV of the CCA, the ACCC considers that the authorisation and notification processes contained in the CCA provide a flexible means for IP rights holders to obtain statutory protection from Part IV of the CCA where public benefits resulting from the conduct outweighs any detriment from the lessening of competition. In relation to IP licensing and assignments, the use of the authorisation process could facilitate efficiency enhancing arrangements (such as the input and licensing arrangements of copyright collecting societies) that may otherwise raise concerns under Part IV of the CCA.

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<sup>60</sup> Government Response To The Advisory Council On IP Recommendations - Part 1, 28 August 2001. Available at <http://www.arts.gov.au/resources-publications/publications/government-response-advisory-council-intellectual-property-rec-0>.

<sup>61</sup> U.S. Department of Justice and the Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*, issued April 1995, available at <http://www.justice.gov/atr/public/guidelines/0558.pdf>.

## PART B: RESPONSE TO QUESTIONS

### 9. Introduction

- 9.1 The ACCC has responded below to a number of questions posed by the ALRC in its Issues Paper that are particularly relevant to the remit of the ACCC and can be assessed at this stage of the Inquiry; or which are not addressed by the general response to issues provided in Part A of this submission.
- 9.2 In addition, there are a number of issues addressed in Part A of this submission about which the ACCC anticipates further information and evidence may be provided by key stakeholders. The ACCC may seek to make a subsequent submission to the Inquiry based on these submissions that addresses questions not answered below.

### 10. The Inquiry

#### Question 1.

*The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:*

- (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;*
- (b) affects the introduction of new or innovative business models;*
- (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or*
- (d) places Australia at a competitive disadvantage internationally.*

#### **ACCC Response**

- 10.1 The ACCC supports the ALRC's view that evidence of the economic impact of copyright law on the digital economy is of fundamental importance to reviewing the law. As the ALRC has noted, there is already some economic evidence regarding the economic contribution of Australia's copyright industries, such as the PricewaterhouseCoopers (PwC) report - *The Economic Contribution of Australia's Copyright Industries* (commissioned by the Australian Copyright Council) and the report by Lateral Economics - *Excepting the Future and Exceptional Industries* (commissioned by Australian Digital Alliance).<sup>62</sup>
- 10.2 The ACCC notes 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. However, the ACCC notes that this Inquiry may result in the submission of valuable evidence regarding transaction costs and inefficiencies for both

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<sup>62</sup> See <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy>.

creators and users from those who participate in the assignment or licensing of copyright material. The ACCC considers 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.

- 10.3 Further, the ACCC refers to Part A of this submission, which sets out the principles that promote competition and innovation in the digital economy and the important role that copyright law plays in establishing the incentives for creation of copyright material. The ACCC notes the costs associated with an inefficient copyright system (as outlined in section 4 of this submission) could place Australia at an economic disadvantage in relation to the copyright industries as compared to countries that have a more efficient system (for example countries that have exceptions that better encourage creative innovation, and more efficiently protect the rights of copyright owners).

## **11. Guiding principles for reform**

### **Question 2.**

*What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?*

#### **ACCC Response**

- 11.1 The ACCC supports the proposed guiding principles identified by the ALRC and agrees that they will assist the ALRC in evaluating whether exceptions and statutory licences in the Copyright Act are adequate.
- 11.2 The ACCC, in its role administering the CCA, is concerned with ensuring that the welfare of Australians is enhanced through the promotion of competition, fair trading and consumer protection. As a result, the ACCC strongly supports the ALRC's Principle 2 (Encouraging innovation and competition) and, in particular, agrees that any reforms to copyright law should seek to balance the interests of creators and users of copyright material so that reforms deliver a net benefit.
- 11.3 In addition to Principle 2, the ACCC considers that Principle 5 (Responding to technological change) is a fundamental consideration for reform. As noted in the Issues Paper, copyright law needs to be able to respond to changes in technology, consumer demand and markets. The ACCC considers that copyright law as it currently stands does not provide the flexibility required to be able to respond quickly and predictably to the changes in the way copyright material is consumed and used. The ACCC broadly considers that a technology-neutral approach is appropriate, however it acknowledges that such an approach raises complexities in certain circumstances, as the products and markets for different copyright materials are not identical, despite the convergence created through digitisation.

- 11.4 In relation to Principle 7 (Reducing the complexity of copyright law), the ACCC agrees that reduced complexity could possibly assist both copyright holders and users of copyright material to understand their rights and obligations in a manner that could potentially reduce transaction costs and facilitate more efficient licensing.
- 11.5 However, the ACCC notes that the aim of reducing complexity must be balanced with ensuring that copyright law does not distort some copyright markets with a 'one size fits all' approach given differences in the ways products and services are created, sold and distributed within these markets. It is important to consider the key features of the different markets for copyright materials in order to be able to consider how copyright law, and changes to it, may impact these markets. Accordingly, the ACCC submits that proposals to strengthen copyright protection or broaden the exceptions should be considered carefully and on a per market basis. For example, the incentives to create and exploit music (e.g. a return on investment can be earned through live performances as well as sales of recorded music) are quite different from the incentives to create movies and exploit movies (which are currently released for viewing in a series of time windows). Accordingly, reducing the complexity of copyright law should not come at the cost of allowing the law the flexibility to reflect the key differences between how copyright materials are used and how the markets for these materials operate.

***Reform should be evidence-based***

- 11.6 In the context of the ACCC's overall submission that reforms should be in the pursuit of economic efficiency, the ACCC acknowledges that gathering evidence in relation to the economic effects of copyright, and other economic considerations, can be difficult in some respects due to the lack of publicly available data. However, the ACCC considers that it is important that the ALRC take into account available economic evidence when considering reform. By doing this, the ALRC will ensure that balanced reforms are recommended to Government that take into account not only stakeholder views, but are based on evidence regarding efficiencies and the economic rationales for copyright.
- 11.7 However, the ACCC acknowledges that economic evidence is only one facet of the broader policy and legal copyright framework and that there are broader policy implications, such as Australia's international obligations, that may need to be taken into account. For example, from an economic perspective, the duration of the term of copyright (50-70 years plus life for most copyright materials in most countries) might be inefficiently long if the rationale for this is to provide an incentive for further copyright creation, however, other factors such as Australia's international obligations need to be taken into account.
- 11.8 The ACCC submits that the costs and benefits of proposals for reform should be fully tested through the evidence provided as part of this Inquiry and broader economics research. For example, where reforms are proposed on the basis that they will provide enhanced incentives for creation of copyright material or investment in intermediary products or services.

## 12. Caching, indexing and other internet functions

### Question 3

*What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?*

#### ACCC Response

- 12.1 The ACCC considers that Australian copyright laws are currently unclear in their application to several internet-related functions.
- 12.2 As internet access and the range of activities on the internet increases, the role of internet intermediaries has grown in both scale and importance. A 2011 Policy Paper, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (Internet Intermediaries Policy Paper) developed for the Australian Digital Alliance notes that internet intermediaries are “not only direct participants in the Digital Economy, but enablers – they build the platforms and infrastructure that can enable other companies to innovate and to take advantages of the efficiencies of the online environment.”<sup>63</sup>
- 12.3 The ACCC considers that, to the extent that the copying and communicating of copyright material is part of the technical process of providing efficient internet related services, exceptions should be considered that exclude these services from the remit of copyright protections.
- 12.4 Search engines risk infringing Australian copyright law in the following ways:
- *caching and indexing* - the caching of web pages for indexing involves making copies of copyright material;
  - *search results* – where search engine results contain text extracts or thumbnail images, this display might also constitute unauthorised copying; and
  - *authorising infringement* – where search engine results contain links to sites that contain infringing copyright material.

#### ***Internet functions in the digital economy***

- 12.5 The ACCC considers that there are legal and financial risks faced by internet intermediaries for potential copyright infringement when performing certain functions that enhance the technical operation or efficiency of the particular service. The ACCC notes the Internet Intermediaries Policy Paper compared liability for internet intermediaries in overseas jurisdictions and Australia, concluding that “Australian Internet Intermediaries face higher

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<sup>63</sup> Kimberlee Weatherall, *Internet Intermediaries and copyright: an Australian Agenda for Reform*, April 2011, pp.1-2.

risks of both direct and indirect liability for copyright infringement in circumstances where liability would not be imposed in comparable countries.”<sup>64</sup>

- 12.6 Without amendments to the Copyright Act, discussed in the response to Question 4, to address this issue, there is a risk that the development of those services will be hampered in a manner which may have a flow-on effect on the competitiveness of the Australian digital economy.

### **Authorising infringement**

- 12.7 As noted above, there is some risk that an internet intermediary may be liable for authorising copyright infringement of end users, by copying or communicating infringing material. In 2006, the Copyright Act was amended to provide the ‘safe harbour scheme.’ The safe harbour scheme limits the remedies available against CSPs for certain copyright infringements that occur using their systems and networks which the CSP does not control, initiate or direct.
- 12.8 The ACCC notes that in relation to services that may or may not fall within safe harbour legislation, as evidenced in the recent case of *Roadshow Films Pty Ltd v iiNet Ltd*<sup>65</sup> the question of whether third parties are authorising copyright infringement in the context of providing services in the digital economy is likely to become an increasingly important issue. The majority in High Court decision stated:

“the concept and the principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing, as occurs with the BitTorrent system. The difficulties of enforcement which such infringements pose for copyright owners have been addressed elsewhere, in constitutional settings different from our own, by specially targeted legislative schemes, some of which incorporate co-operative industry protocols, some of which require judicial involvement in the termination of internet accounts, and some of which provide for the sharing of enforcement costs between ISPs and copyright owners”

- 12.9 The ACCC acknowledges that the Terms of Reference to the Copyright Inquiry states that the ALRC should not duplicate work currently being undertaken by the Attorney-General’s Department on the scope of the safe harbour scheme for ISPs.<sup>66</sup> Accordingly, the ACCC does not seek to engage in the merits of any arguments regarding extending the safe harbour scheme, but notes that the scope of the safe harbour scheme and the approach taken to addressing internet-related issues should likely be developed using similar principles.

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<sup>64</sup> Kimberlee Weatherall, *Internet Intermediaries and copyright: an Australian Agenda for Reform*, April 2011, p. 10.

<sup>65</sup> [2012] HCA 16.

<sup>66</sup> Attorney Generals Department, *Revising the Scope of the Copyright Safe Harbour Scheme*, <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/RevisingtheScopeoftheCopyrightSafeHarbourScheme.aspx>.

## Question 4

*Should the Copyright Act 1968 (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?*

### **ACCC Response**

12.10 As a result of the specificity of the exceptions outlined below, various internet related functions of a large number of internet intermediaries are not covered by the exceptions. As a result, internet intermediaries currently risk infringing copyright by performing functions which are integral to the efficient operation of the broader, public internet.

#### *Relevant exceptions*

12.11 The ACCC notes that elements of certain internet services and functions performed by internet intermediaries may be covered by an exception in the Copyright Act, however, the ACCC notes that scope of coverage of these exceptions is narrow.

12.12 Sections 43 and 111A of the Copyright Act provide a limited exception 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.’ It is not clear, however, that these exceptions capture the full scope of copying and communication that may be undertaken in the performance of their functions. For example:

- it is not clear what constitutes a ‘temporary’ reproduction—there are circumstances in which, for example, cached material may be stored for periods of time that may be considered longer than temporary;
- copyright infringement issues may arise where a reproduction or of copyright material might not be considered part of the ‘technical process of making or receiving a communication,’ and
- the sections do not exempt communication of copyright material, such as when cached material is transmitted to a user.

12.13 The ACCC notes that there is a broader exception in section 116AB of the Copyright Act, which may cover some of the abovementioned types of copying used by search engines and other internet intermediaries. However, this exception applies only to the reproduction of copyright material on a system or network controlled or operated by or for a ‘carriage service provider’ (CSP) in response to an action by a user in order to facilitate efficient access to that material by that user or other users.

12.14 The ACCC further notes that section 200AAA of the Copyright Act allows automated caching by computers operated by or on behalf of an educational institution in certain circumstances and for educational purposes.

12.15 Given that certain types of copying are permitted in particular circumstances and by particular entities, the ACCC submits that it is appropriate that the economic and policy rationale for those exceptions be considered in light of whether they also apply to technical copying and communication of copyright material by internet intermediaries.

#### *Potential reform*

12.16 The ACCC submits that the ALRC should consider the introduction of a broader exception to eliminate the risks faced by existing internet intermediaries and new entrants seeking to innovate. The ACCC considers that the costs and benefits of any introduction of such an exception should be carefully considered to ensure that the introduction does not create unnecessary uncertainty for internet intermediaries as to the type of internet functions that would be covered by the exception. Further, given the pace of technological changes and developments in the digital economy, any exception relating to these internet functions must be flexible enough to cater to developments in the digital economy.

12.17 The ACCC considers that exceptions, along the lines of those enacted in the United Kingdom and Canada, would provide more certainty to participants developing and innovating in this area. These exceptions permit relevant parties to cache with some protections from copyright infringement, providing they comply with a number of conditions.<sup>67</sup>

## **13. Cloud Computing**

### **Questions 5 & 6**

*Is Australian copyright law impeding the development or delivery of cloud computing services?*

*Should exceptions in the Copyright Act 1968 (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?*

#### **ACCC Response**

##### *Relevant exceptions*

13.1 The Copyright Amendment Bill 2006 introduced two types of exceptions for private copying—time shifting and format shifting—in recognition that failure to recognise this common consumer behaviour “diminishes respect for copyright and undermines the credibility of the Act.”<sup>68</sup>

13.2 The manner in which both the time-shifting and format-shifting exceptions are drafted largely confine them to private use based on technologies and consumer practices that are out of date, the implications of which were clarified in the Optus TV Now decision.

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<sup>67</sup> Australian Law Reform Commission, *Copyright and the Digital Economy, Issues Paper*, August 2012, p. 25.

<sup>68</sup> Explanatory Memorandum, Copyright Amendment Bill 2006, (Cth) 6.

- 13.3 The decision in relation to the Optus TV Now service made it clear that consumers who wish to time-shift broadcasts of television programs, although able to do so outside of their own premises, must be personally involved in ‘making’ the copy and cannot engage a third party service provider to make copies for them (as the exception does not protect the third party).<sup>69</sup> It is now clearer that there are limitations on people using third party services to make recordings for private use (such as cloud services). That is, while a person can buy a third party product to make a recording themselves (e.g. a personal video recorder), they may not be able to use a service where that third party makes the copy for them. It appears the personal use exceptions may be failing to achieve the purpose for which they were introduced.
- 13.4 As noted above in Part A of this submission, the ACCC supports adopting a technology neutral approach to copyright law reform where possible, and notes that a failure to keep up with technological developments risks copyright law returning to the pre-2006 position, where the laws did not appear to reflect the policy intent of the exception, nor consumer attitudes and behaviours. The ACCC considers that the scope of any exceptions should be carefully examined in relation to the effect on the copyright owner and incentives for future copy right creation. In particular, the ACCC submits that the right to make and store a copy of copyright materials in the provision of a cloud service is distinguishable from the right to use or manipulate copyright materials.
- 13.5 In this respect, the ACCC notes that the rights accorded by copyright protection may be characterised as a bundle of rights to deal with copyright material in a number of ways. Where certain types of use, such as private use, are concerned, there may be potential for providing an exception for some, but not all, of the rights. For example, it may be practicable to have an exception that allows cloud service providers to copy and communicate certain copyright material for private use. However, this exception might limit the service provider to time-shifting and format-shifting. This means that the rights to further use or manipulate the copyright material remain exclusively with the rights holder.
- 13.6 For example, in the Optus TV Now case, Telstra had acquired a bundle of exclusive digital rights to certain AFL games (depending of the terms of the licensing agreement). In addition, Telstra had the flexibility to use these copyright materials to create new programs and products to attract customer to its fee-based service. Unlike the Optus service, it had the ability and incentive to distinguish its services from the FTA service.

## **14. Copying for private use**

### **Questions 7, 8 & 9**

*Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?*

*The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (e.g., electronic) form, for their own private or domestic use. Should*

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<sup>69</sup> See *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCACF 59 (27 April 2012).

*these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?*

*The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:*

- *should it matter who makes the recording, if the recording is only for private or domestic use; and*
- *should the exception apply to content made available using the internet or internet protocol television?*

### **ACCC Response**

14.1 In accordance with the above comments relating to cloud computing, the ACCC considers that in the absence of persuasive economic evidence of harm to incentives to copyright holders, the copying of legally acquired copyright material for private and domestic use should be more freely permitted.

14.2 The ACCC reiterates that broadening the private use exceptions would take into account current consumer preferences and practices, which are consistent with the initial objectives of the private use exceptions. The Explanatory Memorandum to the Copyright Amendment Bill 2006 noted that the lack of provision for copying for private or personal use did not reflect consumer attitudes and behaviour and stated:

Legal action has not been taken by copyright owners in Australia to stop such private copying. Nevertheless, such acts usually infringe copyright. Many ordinary Australians do not believe that 'format-shifting' music they have purchased or 'time-shifting' a broadcast for personal use should be legally wrong with a risk of civil legal action, however unlikely. Failure to recognise such common practices diminishes respect for copyright and undermines the credibility of the Act.<sup>70</sup>

14.3 Further, the ACCC notes that the Government's review of format shifting exceptions in 2008 stated 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>71</sup>

14.4 The ACCC notes there is potential for growth in development of services and products that assist consumers in using copyright material for excepted personal use. However, the ACCC suggests that where there is a market for such services—for example services that are related

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<sup>70</sup> Explanatory Memorandum, Copyright Amendment Bill 2006, p.6.

<sup>71</sup> Attorney Generals Department, *Copyright Exceptions for Private Copying of Photographs and Films - Review of Sections 47J and 110AA of the Copyright Act 1968*, 2008, paras 3.16, 3.17.

purely to copying, as opposed to transforming or value-adding to the content itself—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.

14.5 The ACCC suggests a focus on the use of material may be preferable to focus on who ‘makes’ the copy in private use circumstances. Broadly, the ACCC submits that the private use exceptions should not:

- specify the types of copyright material that is covered by the exception;
- limit how many copies can be made in each format; or
- limit copying between specific formats (i.e. the format shifting exception currently does not provide an exception for digital to digital copying, such as copying a film from a DVD to a file that can be viewed on a PC).

14.6 The ACCC considers that broadening the exceptions on the basis of the above considerations should minimise the risk that consumers may infringe copyright for one type of private use which is, for all intents and purposes, substantially similar to a type of private use that currently falls within the exception. This type of consistency may also enable both copyright owners and copyright users to have a clearer understanding of what is a breach of copyright.

#### ***Time shifting of a ‘broadcast’***

14.7 The ACCC considers that insofar as the time shifting exception in s.111 of the Copyright Act is confined to recordings of a ‘broadcast’ within the meaning of the *Broadcasting Services Act 1992*, the ALRC should consider broadening the scope of this exception to include content made available over the internet. The ACCC considers that there is no persuasive argument in favour of confining recording of material that can be legally accessed over one platform, in circumstances where recording of similar material is not restricted over a different platform.

### **Question 10**

*Should the Copyright Act 1968 (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?*

#### **ACCC Response**

14.8 The ACCC considers that, to the extent that s.47C of the Copyright Act may not cover the copying of a consumer’s legitimately acquired copyright material solely for back-up purposes, the exception should be extended.

## 15. Online use for social, private or domestic purposes

### Questions 12 & 13

*Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?*

*How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?*

#### **ACCC Response**

- 15.1 The ACCC suggests that considerable amounts of copyright use in the digital environment does not remain purely private or domestic in its purpose. This is generally because digital economy related goods and services often ultimately involve distribution activities that use commercial internet-based services. For example, photos and videos are distributed via websites that may be free to access, but which use the content created by users to create an ad-based business model.
- 15.2 Accordingly, domestic or private use can transform into social ‘use’, where there is increasing crossover between non-commercial and commercial activities. The ACCC submits that the question of whether social, private or domestic use should be permitted more freely should be considered using the economic rationale for copyright outlined in section 3 of Part A, particularly whether any proposed exceptions damage the incentive to create copyright materials now or in the future.

### Question 17

*Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?*

#### **ACCC Response**

- 15.3 As outlined in Sections 7 and 8 of Part A relating to the licensing of copyright material, there appear to be market failures associated with the licensing, which have been made more complex by the digital economy. The ACCC supports considering measures that create incentives for more efficient licensing, especially in relation to intermediate use (see ‘Incentives to create copyright material’ in Part A).
- 15.4 The ACCC notes there is likely to be some difficulty in creating a definition of ‘transformative use’ that will remain relevant as the digital economy continues to develop. It may be preferable for the ALRC to consider an approach that reflects an economic rationale for

exceptions and protections – for example by looking for ways to incentivise licensing, deal with orphaned materials, encourage new use of material while maintaining protection of the rights of those who are already commercialising their work. This may also help avoid uncertainty about what use has reached the ‘transformative’ threshold.

## **16. Crown use of copyright material**

### **Question 32**

*Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?*

#### **ACCC Response**

- 16.1 While the ACCC has not formed a final view on whether the statutory licensing scheme in relation to the use of copyright material for the Crown is adequate, the ACCC considers that a provision similar to that which is in sections 2A and 2B of the CCA could improve the application of the statutory licensing scheme concerning Crown use of copyright material in the *Copyright Act 1968*. Such a provision would make it clear that the statutory licensing scheme concerning Crown use of copyright material applies only to the extent that governments are not carrying on a business. The inclusion of such a provision may address the concerns around the privilege of the Crown with respect to the use of copyright material.
- 16.2 Section 2A of the CCA states that, in so far as they carry on a business, the Commonwealth and Commonwealth authorities, are subject to the CCA. Similarly, section 2B of the CCA states that the Crown in the right of the State or Territory is bound by the CCA, insofar as the Crown carries on a business either directly or through an authority.

## **17. Retransmission of free-to-air broadcasts**

### **Question 35**

*Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?*

#### **ACCC Response**

- 17.1 As competition in the audiovisual content sector has grown, particularly with the availability of new devices that allow consumers to access content in different forms, the FTA broadcasters have adapted by changing their traditional broadcasting models. The ACCC considers this to be an important benefit from competition and would encourage a broader copyright framework that promotes such competition and does not create obstacles for new entrants to the market.

## Question 36

*Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?*

### ACCC Response

- 17.2 Retransmission of FTA broadcasts is provided for in the Copyright Act and the Broadcasting Services Act. However, as per section 135ZZJA of the Copyright Act, retransmission of FTA broadcasts over the internet can infringe copyright where retransmission of FTA broadcasts on other platforms, such as subscription television, do not.
- 17.3 The ACCC considers that as technology continues to develop, and the capabilities for consumers to view many different forms of broadcast on different platforms continue to increase, it is likely that the current statutory licensing scheme will become even more restrictive as new services are developed. As such, the ACCC considers that amendments to the existing statutory licensing scheme for the retransmission of FTA broadcasts should be considered further in order to allow for changes in the way content is retransmitted to consumers. The ACCC has not considered the mechanics of any amendment and considers that other parties may be better placed to comment on this aspect.

## Question 39

*What implications for copyright law reform arise from recommendations of the Convergence Review?*

### ACCC Response

- 17.4 The ACCC notes the Convergence Review's recommendation that the policy framework for communications in the converged environment should, where suitable, take a technology-neutral approach that can adapt to new services, platforms and technologies. The ACCC considers that a similar approach should be adopted by the ALRC in considering reform to existing copyright laws. Further, as recommended by the Convergence Review, the ACCC agrees that reform should avoid favouring or disadvantaging any particular communications technology, business model or delivery method for content services.

## 18. Other free-use exceptions

### Question 52 & 53

*Should the Copyright Act 1968 (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?*

*Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?*

## ACCC Response

- 18.1 The ACCC considers that in determining the merits of introducing a broad, flexible exception the ALRC should seek to balance the need for flexibility in this area with a desire to provide certainty and stability to creators and users of copyright material. The ACCC submits a mixture of both specific and broad exceptions is most likely to achieve the economic rationale of copyright. However, the ACCC supports simplification where possible.
- 18.2 The ACCC notes that open-ended, broad, flexible exceptions can create uncertainty regarding how they will be applied. This uncertainty can create costs, such as requiring parties to litigate in order to determine the scope of permitted fair use or conversely given the costs of litigation, fail to use the exception where appropriate. For example, only sufficiently well-resourced users and creators of copyright are likely to be in a position to commence litigation. On the other hand, the benefits that such an exception would provide include accommodating and fostering technological advances and innovations that might otherwise be curtailed by prescriptive and narrow exceptions.
- 18.3 The ACCC considers that there is a need to ensure that any proposed reforms do not destabilise the regulatory environment. Businesses, in order to ensure that they remain viable, must be able to rely on a system of regulation for copyright that is sufficiently stable so as to enable businesses to make investment decisions with some certainty as to how their rights will be impacted by legislation.
- 18.4 While the ACCC considers that any proposed reforms should provide flexibility to creators and users of copyright material, there is a need for a degree of predictability and stability in relation to regulation in order to ensure that incentives remain for creators of copyright materials. 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.
- 18.5 However, the ACCC considers that stability is not necessarily achieved by strengthening copyright protection or making more specific exceptions. 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. The ACCC considers that flexibility does not necessarily equate to instability. The ACCC notes that providing stability through reforms does not necessarily mean providing additional protection to creators of copyright material and/or users of copyright material by protecting them from new entrants or disruptive technological changes, particularly where these developmental will provide better outcomes for consumers and the broader economy as a whole.
- 18.6 The ACCC suggests that one way to achieve the balance between flexibility and certainty may be to have both specific exceptions to deal with known or foreseeable circumstances, and to have a broad, general exception to deal with future technological developments.

## 19. Contracting out

### Questions 55

*Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?*

#### ACCC Response

- 19.1 The ACCC understands that the Copyright Act provides that agreements may exclude or modify the fair dealing exceptions, the statutory licence schemes for educational and other institutions and the exception for the use of copying materials for the services of the Crown. The ACCC considers that the ability of the owners of IP to use contracts to set terms and conditions on access to and use of copyright materials secures the efficient use of IP and supports the competitive process. The ACCC is concerned only where such contracts go beyond the scope of IP rights and are used to achieve anti-competitive purposes.
- 19.2 The ALRC states in its Issues Paper that the existing provisions of the CCA may be sufficient to deal with issues arising from contractual terms excluding the operation of exceptions. Part IV of the CCA protects and enhances competition by prohibiting anti-competitive conduct. However, the ACCC may be inhibited in its ability to take enforcement action where it considers that certain IP dealings are anti-competitive because of the exemption provided by section 51(3) of the CCA. Section 51(3) of the CCA exempts certain IP dealings from some of the provisions that prohibit anti-competitive conduct.