The Association of Learned and Professional Society Publishers
Shaping the Future of Learned and Professional Publishing

ALPSP
www.alpsp.org

Australian Law Reform Commission
Copyright and the Digital Economy

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Introduction

1. The Association of Learned and Professional Society Publishers (ALPSP) is the international organization for non-profit publishers and those who work with them. It has a broad and diverse membership of over 310 organizations in 37 countries who collectively publish over half of the world's total active journals as well as books, databases and other products. ALPSP's mission is to connect, train and inform the scholarly and professional publishing community and to play an active part in shaping the future of academic and scholarly communication.

2. ALPSP welcomes the opportunity to respond to the consultation on Copyright in the Digital Economy on behalf of ALPSP members. The outcomes of this review have the potential to have considerable impact on the economy, so very careful consideration needs to be given to the consequences of any changes.

3. The copyright industries are a significant part of Australia's economy. A recent study conducted by PricewaterhouseCoopers (PwC) for the Australia Copyright Council[1] established that the copyright industry in Australia employs 8% of the workforce, generating an economic value of 6.6% of GPD (4.8% resulting from the core industries alone). Although this looks healthy, the copyright industries have been under major challenges moving from an analogue to a digital environment, with considerable investment in new technologies being met with increased ease, and much reduced cost of unauthorised copying. This has put the growth of this sector under pressure. Support from appropriate, clear and widely communicated legislation, backed up with adequate measures to tackle piracy and infringement are required to allow these industries to continue to be successful at home and in the global marketplace.

[1] http://www.copyright.org.au/pdf/PwC-Report-2012.pdf

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;

1. Rights owners, of whatever size, depend on copyright legislation to provide income. In addition to the primary licensing of their works, secondary licensing commonly provided collectively, via organisations such as the Copyright Agency, is vitally important. Smaller rights owners in particular can rely quite heavily on this secondary licensing income. Individual publishers will provide the review with evidence of this; any consideration of broad 'free' exceptions need to carefully consider the impact on such smaller rights owners, who make up the majority of the companies in the publishing sector. Damaging this income could have considerable deleterious effects on the creative economy.

2. Smaller rights owners depend on the income from licensing in order to continue to invest in creating new works and in making those works available in new formats for users. Relaxing legislation with a resulting loss of income will crush innovation and creativity.

(b) affects the introduction of new or innovative business models;

3. Rights owners respond to market needs. Business models have been evolving as new routes to market are established. The current legislation allows such models to develop, because appropriate remuneration is returned to the rights owners. Information about the products being licenced allow creators to ensure that the most appropriate products reach the market. Removing this business intelligence, through introduction of free exceptions, will reduce the number of new products available and will naturally reduce the innovation in business models as there is less need for them.

(c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or

4. Care should be taken with regards the 'balance' between creators and users. There is a growing 'assumption' that users have a 'right' to access copyright works and that access to anything online should be free. It is ultimately the decision of the copyright holder whether to share their creation with others and whether to allow them to copy and reuse it.

5. At the same time, rights owners recognise that 'free' use does, in some cases, lead to increased exposure to their works. However, this is not just a case of making works 'freely available'. You need to be discoverable also. Some distribution channels require works to be sold, rather than being made freely available (e.g. Amazon). A free use exception, however unwelcome some may find it, would not solve this discoverability problem.

6. What actual need is the proposed free-use exception addressing? Is it addressing comments that users find it too difficult to obtain reuse rights, or don't want to pay? Are users unaware they are required to ask permission? The answer to these questions is to improve the easy to use systems by which appropriate licences are made available by rights owners and to ensure that users understand their responsibilities. We fail to see why rights owners should be penalised because there is a lack of awareness of the law.

7. The Copyright Agency provides a many to many service, allowing a single point of contact for users to request reuse rights. This reduces complexity and importantly the cost to the user. It provides appropriate remuneration for the re-use, according to the wishes of the

rights owner.

(d) places Australia at a competitive disadvantage internationally.

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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?*

8. Whilst we agree with the overall principles there are some points to note.

ONE – Promoting the digital economy

9. Copyright law does indeed support the development of the digital economy. The protection it affords provides incentives for creators, whilst a balanced set of exceptions allows appropriate use of copyright works, in special circumstances.

10. Whilst it cannot be denied that "open access to appropriate categories of information" may well increase innovation, this cannot be at the expense of those creating or investing in the production of works in the first place. Otherwise, economics dictate that such increased access leads to a reduction in the number of creators and innovators and the result is the reverse of what was intended.

TWO – Encouraging innovation and competition

11. ALPSP welcomes the recognition of the need for an appropriate balance in copyright law. It should also be remembered, however, that legislation may not always be the optimal way to remove obstacles to innovation.

12. Where there is clear evidence that the lack of access to particular copyright works is resulting reduced innovation in certain sectors, discussions and collaborative efforts between stakeholders and rights owners are likely to produce innovative and sustainable solutions to the access issue that do not require changes to copyright law. Such solutions can also be employed on a much shorter timescale.

THREE – Recognising rights holders and international obligations

13. It is recognised that this should be a principle whenever and wherever copyright legislation is reviewed.

FOUR – Promoting fair access to and wide dissemination of content

14. The wishes of those who would like to access copyright materials need to be balanced with the rights of those who have invested in creating and making content accessible. Without appropriate protection and reward for creators, there is no incentive to continue. Without demand for the materials, there is no market for the creators.

15. The boundaries to fair access need to be defined. In special circumstances, as per international law, there are exceptions to allow access to copyright material without infringing copyright. Education, however, is required to dispel the urban myth that every person has a "right" to access and reuse copyright works in any way they wish.

FIVE – Responding to technological change

16. There does not appear to be clear evidence that copyright legislation is hampering technological developments. Not wishing to pay an appropriate fee to access and reuse digital copyright material is not a reason to change copyright legislation.

17. There needs to be very clear evidence before copyright laws are weakened or tightened and the impacts of any such change should be widely researched with all stakeholders.

18. Amending legislation should not be the first resort. Stakeholder consultation and collaboration can, and more often than not does, resolve real and perceived issues with access and reuse rights much more quickly, with high relevance to the issues (rather than broad-brush) and importantly sustainably. Relevance to the issues is key. Digital impacts on different markets in different ways. Sweeping legislation is not necessarily the most appropriate option for all markets or users.

SIX – Acknowledging new ways of using copyright material

19. There may well be 'less willingness to accept copyright as a form of property', but changing copyright law to make it what people 'think it should be', does not result in informed, evidence-based development of legislation. Educating consumers on copyright legislation and why the legislation is in place would be a suggested first step.

20. The most common example of very wide-spread infringement is format shifting of music, e.g. where a user legally owns a copy of an album in one format, but wishes to transform it into another format, in order to play on a different device. The music industry has recognised this requirement of its users and has begun including licensing with products to allow this specific transformative use. This is a positive example of 'contracts' extending usage beyond copyright legislation.

21. Consideration should be given to addressing specific consumer attitudes, rather than blanket legislation changes which could have unforeseen consequences both immediately and as a result of future technological developments.

22. Attempts to 'future proof' copyright legislation could result in fundamental challenges for opportunities for economic growth in the creative industries.

SEVEN – Reducing the complexity of copyright law

23. It would certainly be welcome to have the legislation organised in a more user-friendly way. Online technology should help users identify the legislation most appropriate to their requirements.

EIGHT – Promoting an adaptive, efficient and flexible framework

24. The future cannot be foreseen and therefore it would be impossible to provide legislation for every eventuality. Legislation naturally evolves with the age it is in. Care must be taken that amended legislation does not have the potential to inadvertently affect markets with the advent of new technology.

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?*

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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?*

Cloud computing

Question 5. *Is Australian copyright law impeding the development or delivery of cloud computing services?*

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Question 6. *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?*

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Copying for private use

Question 7. *Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?*

25. Legislation should not utilise the broad language of "copying", but should instead focus on what the user is legally allowed to do, for example, format shifting in certain circumstances. "Copying" is a very broad term, which will lead to confusion about what can and cannot be done. It is not unreasonable to suggest that if users were allowed to 'copy' they would therefore assume they can 'distribute' also. This gives rise to "societal norms", which legislation sometimes tries to address inappropriately.

26. There are clear differences between 'private' use and 'domestic' use. Some copyright works are clearly designed for more than one user at a time, such as television programmes. Copying of such programmes for later viewing (time-shifting) has been permitted for some time. It does not necessarily follow that any type of copying is right for all copyright works.

Question 8*. The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should 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?*

27. The concern here is the definition of "private" and "domestic" use. For example, it would not be acceptable that a digital format textbook, purchased by one student in a 'domestic' student 'household', is copied between those same students. This would directly impinge on the normal exploitation of the work (Berne). A print copy of the same textbook could not be so easily shared and it would be reasonable to expect that more than one student would purchase a particular textbook.

28. Private usage is different as the person who purchased the digital copy would be the same person that *used* the 'copied' work. It would not be expected that the same person would purchase the same work in different formats for each different device used, so such 'copying' would be unlikely to impinge on expected sales.

29. The definition of 'domestic use' needs to be clarified, to distinguish such copying from mixed housing or as the given example, halls of residence.

30. It is difficult to see how a single one-size-fits-all exception could provide appropriate protection to the myriad different digital works that are available. It would be clearer, simple and more user-friendly to define specific allowed uses to different categories of work. Scope for confusion would then be removed.

31. It would be unacceptable for companies to be able to offer a format-shifting service without the licence of rights holders, regardless of the resulting use of such a copy. Such unregulated copying could leave rights owners exposed to fraudulent activities, particularly if such companies were also free to make a profit from such a service. Statutory licensing, however, *could* be considered, but the terms of any such licence would need very careful consideration and would likely need to be sector-specific.

32. Digital technology has been expensive to employ, particularly for small, independent rights owners. Creators recognise that there is a demand for the availability of digital products in different formats and will respond to that market need. If this still *developing* market is taken away from them e.g. for multiple-users as opposed to private use, the ability to innovate new products and business models and to benefit from advances in technology, will also be removed.

33. Exceptions are reserved for *special cases*, which indicates very clearly defined usage. It is difficult to define 'fair' or 'reasonable' use, as evidenced by the extensive and on-going litigation in the US, where judges decide on the extent of 'fair use' in individual use-cases, generally after the alleged infringement has taken place. 'Fair' or 'reasonable use does not equate with a simplified, consolidated copyright system.

Question 9. *The time shifting exception in s111 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:*
(a) should it matter who makes the recording, if the recording is only for private or domestic use; and
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(b) should the exception apply to content made available using the internet or internet protocol television?
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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?*

34. It would be helpful to clarify that making copies of copyright material for the purpose of back-up and data recovery does not infringe copyright, as long as it is clear that such copies could not be used for any other purpose, such as providing another user with a copy.

Online use for social, private or domestic purposes

Question 11*. How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?*

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Question 12. *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?*

35. Again, the definitions of social, private or domestic are not provided and grouping them together suggests that they have similar implications on rights owners. Private is one user,

domestic is ill-defined as stated above, but will involve more than one person, and social could essentially mean the global population that has access to the online site in question. They should not be grouped together for the purposes of defining clear legislation for uses of copyright works.

36. Aligning Australia's copyright legislation with that of the US ('fair use doctrine') would lead to increased litigation and uncertainty, the latter of which at least is clearly not what the purpose of this review is. It should also be noted that in the comment made by Professor Samuelson on US law (as referred to in the issues paper), she discusses *private* and *personal* uses – very different from the additional domestic and social uses suggested in this review.

37. We do not accept that an infringement of rights for entertainment purposes should automatically be acceptable in law, particularly if the evidence of the 'need' of such loosening of copyright is 'public behaviour' in utilising particular subsets of copyright works.

38. There needs to be education with regards copyright. What it is, why it is important, what are the consequences to a creator if their copyright is violated? If users are unclear about their responsibilities, that is the issue which should be addressed.

39. It is clearly important for users to be able to use such copyright works and the consultation itself points out that the market is already addressing such needs, with the licensing of YouTube (and others) to ensure that rights owners receive *appropriate* remuneration for the reuse of their works, or have the opportunity to block such usage, if they do not agree with it. Such agreements can be achieved by larger rights owners, but what about smaller rights owners and individual creators that simply do not have the resources to do this? There perhaps could be a statutory licence, administered by collecting societies, to ensure that the 'long tail' of smaller rights owners were not disadvantaged. It would be preferable to ensure any such statutory legislation was implemented alongside a user-education programme, else users do not understand what their use of copyright materials entails, and the issues being addressed in this review are perpetuated.

40. Allowing the market (and collecting societies) to administer rights in this way, means that user-needs are met much more quickly than amending any legislation could. It provides balance between what users wish to do and what rights owners are prepared to allow, even in times of rapidly developing technology, the implications of which cannot be foreseen.

Question 13. *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?*

41. We do not agree that there is a need for an exception for such use. Copyright works are complex and evolving. Sweeping, one-size-fits all legislation is not appropriate. The individual markets for copyright works should be able to respond to market needs and provide appropriate solutions, encouraging innovation and further creativity.

42. Importantly, rights owners should continue to be allowed to say 'no' to requests for particular uses of their work. It should be remembered that reuse in any way they please is not a right of the user.

43. There is also the issue of how non-commercial is defined. Where is the line drawn when a user wishes to reuse work on, for example, a personal blog that receives income from advertising?

Transformative use

Question 14. *How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?*

44. Scholarly works can already be reused in creative ways, with the permission of the creators and/or right owners if they happen to be different. Scholarly works are recombined into databases, in new and useful combinations, creating new markets for such works. Individual works themselves can be combined in new ways, and this can be useful for teaching creative writing, for example. Again, such uses already happen with the appropriate permissions in place.

Question 15. *Should the use of copyright materials in transformative uses be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?*

45. This suggestion appears to be very focussed in the area of sound recordings, or at a stretch, audio-visual material. Has consideration been given to the myriad other types of copyright works?

46. What would be the effect on literature of such a proposed exception? What would the effect on creators' moral rights be, if 'snippets' of their works (key phrases or concepts, for example) were used alongside materials that the rights owner did not agree with?

47. Indeed, using others' works without due permission and acknowledgement is considered to be plagiarism and not appropriate behaviour in scholarly and professional publishing. It would be unacceptable for an exception to impinge on this important area of scholarly communication. This is a good example of where one sweeping legislative statement will not be appropriate for all types of copyright works and uses.

48. The wider impact of what might be appropriate in one area of copyright works on many others should be scrutinised and understood clearly before any such broad sweeping exception could be considered.

Question 16. *How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?*

49. This is more complex than the review suggests and we don't agree that an exception is going to be acceptable for all types of copyright work.

50. In the example given above (paragraph 44), the transformative work is contains interesting and 'new' ways of combining original works, with little newly created content. However, this was acceptable because the appropriate permissions were in place and the originals acknowledged. Rights owners agreed that this type of transformative work, in the specific instance, was acceptable to them.

51. Other transformative works may use just a small, but recognisable 'snippet' from the original, with newly created content making up the majority of the 'new' work.

52. It would be very difficult to establish a 'threshold' for originality for a work to be considered 'new' and not merely an extension of the original(s).

Question 17. *Should a transformative use exception apply only to: (a) noncommercial 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?

53. We consider that a transformative use exception is too broad to be acceptable for all forms of copyright work. Copyright is complex and necessarily so. It is not always right or appropriate to have a one-size-fits-all approach.

54. There is also the problem, once again, of the definition of non-commercial, as referred to in paragraph 43.

Question 18. *The Copyright Act 1968 (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?*

55. There should be no lessening of moral rights. Removing or weakening moral rights would immediately reduce the incentive for creativity, which is not the goal of this review.

Libraries, archives and digitisation

Question 19. *What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?*

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Question 20. *Is s200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?*

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Question 21. *Should the Copyright Act 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?*

56. There is a vast difference between digitisation and communication. Communication in particular has the potential to introduce direct competition with rights owners and therefore would be incompatible with international legislation.

57. What problem is legislation trying to solve? Without the answer to that question, it is difficult to suggest what potential changes to legislation might be required. Orphan works are covered in the section below, but perhaps this area is trying to address mass digitisation projects?

58. Extended Collective Licencing (ECL) has been in place in the Nordic countries for some time. This model of licensing is administered by collecting societies who have the mandate of the majority of the rights owners in a particular sector to do so. It is not necessarily appropriate for all sectors and all works and should probably only be considered for mass digitisation projects. The question that remains, is such legislation akin to using a sledgehammer to crack a nut?

59. There are other options which cover identifying and clearing appropriate in such large projects, such as the ARROW project (see paragraph 62).

Question 22. *What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?*

Orphan works

Question 23. *How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?*

60. Introducing legislation to allow re-use of orphan works could only be acceptable if the legislation for orphan works matched that for the re-use of non-orphan works. In the absence of such parity, the market for copyright works becomes unbalanced and would disadvantage other rights owners.

61. In the digital environment particularly, there are ways, whether inadvertently or deliberately, to remove metadata and rights owner information from copyright works. This would essentially render such works 'orphan' and remove the moral right to be identified as the creator of the work. This is a particular problem with photographs and illustrations, but they are not the only works affected.

62. In order to properly establish the status of any work, a 'diligent' search needs to be carried out. This may be inconvenient for the prospective user, but should be a basic requirement of any orphan works scheme. Diligent search for multiple works, such as with a library digitization project, can also be seen as a barrier to use. However, there are initiatives facilitating such projects, such as the ARROW Project[2].

63. Much work has already been undertaken in the UK and Europe with regards orphan works and the British Copyright Council has produced an proposal for a scheme to manage licensing[3] of orphan works, which includes procedures for establishing the status of a work as 'orphan', part of which would be a diligent search. The EU Orphan Works Directive, adopted in October 2012, also strongly supports diligent search.

64. The embedding of rights information to digital works should be encouraged. The Linked Content Coalition[4] is a global initiative to allow the management and communication of rights more effectively online. ALPSP is supportive of this initiative.

Question 24. *Should the Copyright Act 1968 (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?*

65. An exception would create an imbalance in the market for copyright works. If any user is permitted to use orphan works under an exception, it would naturally make orphan works more attractive than other copyright works that the same user may have to pay for the use of, photographs being a prime example. This puts other creators at a disadvantage and creates an unfair marketplace.

66. It would be more appropriate to implement a system whereby those wishing to use orphan works, following appropriate diligent search, paid for the use at the standard market rate, upfront as with non-orphan works. Such a scheme would require careful management and administration; collecting societies are in an established position to administer such a scheme (see also the British Copyright Council proposal, paragraph 63).

Data and text mining

Question 25. *Are uses of data and text mining tools being impeded by the Copyright Act 1968 (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?*

[2] http://www.arrow-net.eu/
[3] http://www.britishcopyright.org/page/225/licensing-of-orphan-works/
[4] http://www.linkedcontentcoalition.org

67. Text mining and data mining are not the same. Text mining generally refers to the content of primarily text-based documents and data mining normally refers to the data behind those articles. The rights for mining may be held by two different owners, for example, in scholarly publishing, publishers would be responsible for facilitating access to the final published versions of scholarly articles (the Version of Record[5]), whereas institutions or academics themselves normally hold the data behind those articles.

68. ALPSP regularly hears that publishers are "blocking access to articles for text and data mining". However this is simply not the case. Publishers are reporting that current requests for text and data mining are at a very low level[6]. Where they are being received, they are, in the main, granted[7]. The demand may be building gradually, but in the words of the UK Intellectual Property Office (consultation event held on 13 March 2012), this is a "new area, the final context of which, no-one can yet see".

69. The stakeholders involved in text and data mining have not discussed the requirements, limitations, opportunities and therefore, solutions to perceived problems have not had a chance to evolve.

Question 26. *Should the Copyright Act 1968 (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?*

70. It is dangerous to introduce an exception into an emerging, evolving market, one which has quite definitely not reached anything like maturity.

71. At this stage, an exception is not required. The market has not failed, given that it has not had a chance yet to fully evolve. Technology itself is still evolving and it cannot be certain where this will take us. For example, will such a use of copyright works replace the normal use of a work, as suggested by a recent JISC report[8]? The report points out that with the ever-increasing information available, users will have to rely on ever more sophisticated tools to allow them to navigate to the information they require and may well only need such a snippet of any such information to satisfy their needs. The computer becomes the reader and a clear shift in the primary use of the work results. In such a situation were to be reached this would result in any exception being in contravention of Berne.

72. An exception would also not solve 'access' to copyright material for text and data mining, in terms of the format of the content and technologies required.

73. What any such exception might involve for smaller publishers is an unknown quantity. Larger publishers may well have the resources to increase their bandwidths, provide specific servers for mining or provide specially packaged content. Smaller users do not have such resources and the uncomfortable question for them is: what happens if they cannot comply with such an exception?

Question 27. *Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?*

74. There is much work continuing in this area. Stakeholder collaboration led very quickly to the inclusion of a specific clause to permit text and data mining in the P-D-R model licence for pharmaceutical companies[9,10]. Work is now ongoing to establish the technologies

[5] http://www.niso.org/apps/group_public/document.php?document_id=48&wg_abbrev=jav
[6] http://www.publishingresearch.net/documents/PRCSmitJAMreport20June2011VersionofRecord.pdf
[7] ibid
[8] http://www.jisc.ac.uk/publications/reports/2012/value-and-benefits-of-text-mining.aspx
[9] http://www.p-d-r.com
[10] http://www.alpsp.org/Ebusiness/AboutALPSP/ALPSPStatements/Statementdetails.aspx?ID=422

required to make this happen in a more efficient manner for all parties. This only happened because the stakeholders were willing to come to the table to discuss the issues and to find appropriate solutions for all.

75. Publishers are already talking to users (librarians in particular) regarding their requirements for their users. Publishers are already starting to include clauses in their licences to allow subscribers to mine the content and, for those who have the resources to do so, providing specific mechanisms to assist users in accessing the content in the most appropriate ways.

76. The Publishers Licensing Society (PLS) in the UK are working to produce a portal to facilitate clearance of mining permissions from a range of publishers. Users would have a one-stop shop for permissions, rather than having to contact individual publisher rights owners.

77. The market is responding the needs of its users in this emerging and evolving area and can do so in a much more flexible, appropriate and responsive way than legislation.

Educational institutions

Question 28. *Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?*

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Question 29. *Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?*

78. The Copyright Act 1968 (Cth) already extensively provides statutory education exceptions for works in electronic (digital form), separately from works in hard copy form.

79. In terms of rights owners, it is important that this copying activity be appropriately remunerated and not subject to a free-use exception as reflected below.

Question 30. *Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the Copyright Act 1968 (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?*

80. We do not agree that a wider range of uses should be covered by a free-use exception. Appropriate remuneration for creators is an important aspect of international treaties with the WIPO Copyright Treaty[11] noting "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention". The European Copyright Directive[12] notes that "adequate legal protection of intellectual property rights is necessary in order to guarantee availability of…a reward and provide the opportunity for satisfactory returns on this investment."

[11] WIPO Copyright Treaty 1996
[12] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML, (10)

81. It should also be questioned whether any proposed free exception is permitted under the Berne 3-step test. Rights owners specifically generate works for education, which means that providing a free exception will conflict with the normal exploitation of such works.

82. The rush to make anything that is digital free-to-use completely undermines the creator and will in effect reduce the number of creators that are willing or able to continue to create such important works.

83. Rights owners would be justified in thinking that where an educational institution wishes to copy their work, some value is placed in that work. This value is returned to the rights owner via direct purchases or licensing schemes as administered by collecting societies.

84. In response to the UK Government Consultation on Copyright in 2012, a report prepared by PricewaterHouse Coopers[13] found that in the UK, copyright licensing payments make up less than 0.1% of an educational establishment's expenditure. By comparison, 18% of writing income is earned through collecting society fees. It is highly likely that the situation is broadly similar in Australia, therefore such any move away from remunerated reuse would cause much greater harm to rights owners than the benefits accrued by educational establishments.

85. It is stated in the Issues document that a new exception allowing educational institutions to copy and communicate free and publicly available material on the internet for non-commercial educational purposes be introduced. There is confusion here between "free to read" and "free to reuse".

86. Any responsible website which contains resources it wishes users to *read* will also contain Terms and Conditions (T&Cs) which tell the user what they can subsequently *do* with that material. With such terms and conditions in place, an exception is not required. The T&Cs indicate to the user what rights the rights owner is prepared to allow. Any other use requires specific permissions.

87. There are standards already in place for the digital transmission of rights information for journals and books, which were specifically designed for both academic and corporate libraries, ONIX for Licensing Terms[14]. ALPSP encourages rights all rights owners to consider including digital expression of their rights.

Question 31. *Should the exceptions in the Copyright Act 1968 (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?*

88. Given that the economic evidence of harm to rights owners in widening free-use exceptions far outweighs the benefits to end-users, it would be unwise to widen the free-use exception. This would have a negative effect on rights owners and by extension, the creative economy.

89. It is clear that copyright education is required. Just because a work is free to read on the internet, it does *not* follow that it is also free to reuse. Such reuse rights can, at the decision of the rights owner, be extended. Collecting societies are able to manage these rights, acting as a conduit between the many-to-many relationships between rights owner and users. Alternatively, it is highly likely that the rights owner can be contacted directly via the website in question.

[13] www.cla.co.uk/about/publications_and_submissions/ Report for CLA "An economic analysis of education exceptions in copyright" - Mar 2012
[14] http://www.editeur.org/85/Overview/

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?*

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Question 33. *How does the Copyright Act 1968 (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?*

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Question 34. *Should there be an exception in the Copyright Act 1968 (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?*

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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?*

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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?*

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Question 37. *Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?*

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Question 38. *Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?*

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Question 39. *What implications for copyright law reform arise from recommendations of the Convergence Review?*

Statutory licences in the digital environment

Question 40. *What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?*

90. The digital environment will increasingly make it easier to record actual usage of copyright works and to distribute to rights owners on that basis, rather than on the sampling methodology that was appropriate in the analogue age.

Question 41. *How can the Copyright Act 1968 (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?*

91. It is unclear that anything needs to change in terms of legislation. Collecting societies are already moving towards collecting more granular usage data via digital means, which will provide full reporting for remuneration to rights owners.

Question 42. *Should the Copyright Act 1968 (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?*

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Question 43. *Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?*

92. As mentioned previously, smaller rights owners can depend reasonably heavily on the income provided by statutory licensing. In some instances, direct licences can be made with users, but it should not be assumed that this is the case along the long tail of publishers that make up the vast majority of businesses in scholarly and professional publishing. Such small businesses, many of them micro-businesses of less than 10 employers, simply do not have the resources (staff and systems) to manage very many direct licensing agreements and rely on collective resources to do so.

Question 44. *Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?*

93. No. There is currently not sufficient evidence of the impact such a move would have on rights owners. It would be unwise to enter into any such legislation without full, detailed and accurate impact assessments.

Fair dealing exceptions

Question 45. *The Copyright Act 1968 (Cth) provides fair dealing exceptions for the purposes of:*
(a) research or study;
(b) criticism or review;
(c) parody or satire;
(d) reporting news; and
(e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

94. There is the potential confusion between the fair dealing exception for research and study and the statutory licensing for educational use. Perhaps the confusion could be partly resolved by confirming that the research and study exception is for "private" or "individual" research or study. That would distinguish the making of one copy for a single individual against one or more copies made and perhaps stored digitally for the benefit of more than one student in a teaching environment.

Question 46. *How could the fair dealing exceptions be usefully simplified?*

95. Consolidating into one fair dealing section within the Act would allow a single place for users to consult. Alternatively, there is also the potential opportunity of harnessing online technology to allow users to search the Act and gather together Divisions or Sections of relevance to their query.

Question 47. *Should the Copyright Act 1968 (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?*
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Other free-use exceptions

Question 48. *What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?*

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Question 49. *Should any specific exceptions be removed from the Copyright Act 1968 (Cth)?*

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Question 50. *Should any other specific exceptions be introduced to the Copyright Act 1968 (Cth)?*

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Question 51. *How can the free-use exceptions in the Copyright Act 1968 (Cth) be simplified and better structured?*

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Fair use

Question 52. *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?*

96. Fair dealing is already a recognised instrument in Australian copyright law. Introducing a completely new doctrine based on undefined and differently interpreted terms such as 'fairness' or 'reasonableness' will swiftly lead to more, not less, confusion surrounding copyright and what users are or are not legally permitted to do with a copyright work.

97. What is causing the perceived current confusion? Is it a lack of education and understanding surrounding copyright, why it exists and what are the benefits of it?

98. Introducing a broad, wide-ranging exception, based on the fair use doctrine can only be considered on the basis of sound, accurate and complete data regarding the impact it would have on all stakeholders concerned. At this stage, that data does not exist. Indeed, given the uncertainty of what users could or could not do under a fair use doctrine (which is generally established over time by case law) would make such an exercise almost impossible.

99. In addition, a one-size-fits-all policy for all types of copyright work would be unwise. Whilst it may be certain to say what effect such a broad policy would have on familiar, well-known stakeholders, quite often the effects on the long tail of small publishers and other independent rights owners are not fully considered. Given that small and medium-sized publishers make up the vast majority of companies in the publishing industry, a negative impact on this diverse sector could have serious implications for the creative digital economy in Australia.

Question 53. *Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?*

100. Again, trying to force a one-size-fits-all policy on all types of copyright works with all their myriad uses is not advisable. Simplifying copyright legislation so that more users can understand and engage with this should not mean completely changing the law, particularly where this is little appetite, or evidence of the requirement, for such a change.

101. Legislation clearly needs to be written in legal language for the purposes of avoiding

misinterpretation, but if this complex drafting is causing problems in the understanding of copyright law, then that is the problem that needs to be resolved.

Contracting out

Question 54. *Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?*

102. Contracts are not put in place with the purpose of excluding or limiting exceptions. Contracts are in place because the required use of works greater than that permitted by an exception. If the use were to be limited to the extent of the exception, contracts would not be required.

Question 55. *Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?*

103. Very careful consideration should be given to Contract Law and how it may interact with any proposed exception.