

The review of Copyright and the Digital Economy being undertaken by the Australian Law Reform Commission is a timely and important one. The ALRC recognizes the longstanding conflicts and tensions that have existed within copyright law, including:

1. The most appropriate balance between public good and private benefit criteria for use of, and access to, information, that supports both innovators and original content creators and the effective use of existing information to create new knowledge;
2. The most appropriate balance between individual rights of ownership and forms of social use for common benefit;
3. The nature of knowledge as both a commodity for commercial exploitation and as a public good for common use, as we move towards a knowledge economy;
4. The best ways in which to promote and equitably share the benefits of knowledge and creativity in an age of digital networks, for people, communities, nations, and global humanity.

Copyright law is derived from the principle that neither the creator of a new work nor the general public should be able to appropriate all of the benefits that flow from the creation of a new, original work of authorship. It presumes that original forms of creative expression can belong to individuals, who have both a moral right to ownership and a legitimate economic right to derive material benefit from the use of these works by others as an incentive to create further original works. It also presumes that the use of their original works should be subject to the laws of free and fair exchange, that there should be adequate compensation of use by others, and there should be safeguards against misuse.

At the same time, it recognises that original ideas and works are drawn from an existing pool of knowledge and creativity, and that there is therefore a need to guarantee that such ideas and works exist in the public domain for fair use by others. Moreover, since such information is the lifeblood of democracy, commerce, and the development of future knowledge, broad access by the community to the widest possible pool of information, knowledge, and forms of creative expression is a valuable end in itself, as a condition for participation in public life and the development of new knowledge. In order to balance these competing claims on knowledge, copyright law divides up the possible rights in and uses of a work, giving control over some of these rights to the creators and distributors and control over others to the general public.

Copyright law includes a series of exceptions where it is deemed to be in the public interest to make material more widely available at no cost. These exceptions form a fundamental part of the copyright balance by limiting the extent of the copyright grant.<sup>1</sup> The limitations to copyright should ideally ensure that copyright law does not unnecessarily constrain the ability of people to learn from existing works; to critique or discuss cultural materials and contribute to public discourse; to innovate and compete; and to create new works of authorship.<sup>2</sup> This last category, which includes transformative use, has perhaps been the least well supported in Australian copyright law. The ALRC *Issues Paper* identifies transformative use as a key issue in copyright law reform, defining it as involving ‘works that transform pre-existing works to create something new that is not merely a substitute for the pre-existing work. Works that are considered transformative may include those described as “sampling”, “remixes” and “mashups”’.<sup>3</sup>

Embedded within copyright, then, are two competing normative visions of intellectual property. One is the notion that it that can be privately owned as property, from which its owners can expect a reasonable level of remuneration from its use. The other is that intellectual property consists of ideas, concepts and forms of expression whose public circulation is central to the principles of freedom of speech, equitable access to public information, and economic efficiency. Christian Handke provides a useful matrix for considering at a conceptual level the overall costs and benefits of a copyright system, over both the short run and the long run.<sup>4</sup>

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<sup>1</sup> See Leval, P. (1989) “Toward a Fair Use Standard.” *Harvard Law Review* 103: 1105, p 1110; CCH *Canadian*

<sup>2</sup> Samuelson, P. (2008). “Unbundling Fair Uses.” *Fordham Law Review* 77: 2537; see also Suzor, N (forthcoming). “Access, Progress, and Fairness: Rethinking Exclusivity in Copyright.” *Vanderbilt Journal of Entertainment and Technology Law*.

<sup>3</sup> Australian Law Reform Commission (2012) *Copyright and the Digital Economy: Issues Paper*, IP42, August, p. 36.

<sup>4</sup> Handke, C. (2011) *Economic Effects of Copyright: The Evidence So Far*, Report for the National Academies of the Sciences, April, p. 4. The distinction between short-run and long-run studies of rights holders’ welfare is difficult to make, because the time needed for complete adaptation is not known. In this table, only studies that deliberately address copyright industry adaptation to unauthorized copying are classified as covering long-term effects on rights holder welfare.

<b>Costs and benefits of a copyright system</b>		
	<b>Benefits</b>	<b>Costs</b>
<b>Short run</b>	Greater revenues to rights holders	1. Access costs to users 2. Administration costs 3. Transaction costs in trading rights
<b>Long run</b>	Greater incentives to supply copyright works for rights holders	User innovation is obstructed by the costs of compliance

Of the many issues that render copyright law ever more complex and significant in an age of new media and the Internet, four stand out:

1. The rapid development and mass dissemination of technologies that enable low-cost reproduction of data and information has dramatically changed the issues arising in copyright law;
2. The rise of a knowledge economy, or what is also termed a creative economy, has seen intellectual property rights become a key source of new corporate wealth. The commercial creative industries are characterised by high costs of production of original material, a high failure rate for new commercial product, and near-zero costs of content reproduction. As a result, a very high premium is attached to successful creative product that is likely to accrue economic rents over time;
3. Copyrighted products are now a part of global popular culture to a historically unprecedented degree. When combined with the exponential increase in the amount of content that is easily available through digital technologies, this means a massive proliferation in both commercial uses of copyrighted materials (e.g. pirated versions of CDs, DVDs etc.), and non-commercial uses of copyright material by consumers in their everyday (digital) lives;

4. Copyright and intellectual property law has been progressively globalised over time, particularly with the passing of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, signed by more than one hundred nations in 1994 after agreement by the signatories to the General Agreement on Trade in Services (GATS), and the establishment of the World Intellectual Property Organisation (WIPO) along with the World Trade Organisation (WTO).

The ALRC observes in its *Copyright and the Digital Economy* Issues Paper (ALRC IP 42) that the Terms of Reference for the Inquiry require it to consider:

whether amendments to copyright law are required in order to create greater availability of copyright material in ways that will be socially and economically beneficial ... The context and political economy of copyright law is changing as copyright has a more direct impact on disparate users and producers, extending beyond rights holders and institutional rights users.<sup>5</sup>

This Submission from the ARC Centre of Excellence for Creative Industries and Innovation (CCI) aims to identify practical issues that arise in the applications of copyright law in Australia, in both current contexts and in the context of moves towards a digital economy. We follow the DBCDE definition of the digital economy as ‘the global network of economic and social activities that are enabled by information and communications technologies, such as the Internet, mobile and sensor networks’.<sup>6</sup>

***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;***

It is generally assumed that the existence of copyright and other forms of intellectual property protection is particularly important to artists and others involved in the production of creative

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<sup>5</sup> Australian Law Reform Commission (2012) *Copyright and the Digital Economy – Issues Paper* (IP 42), p. 14.

<sup>6</sup> Department of Broadband, Communications and the Digital Economy (2009) *Australia’s Digital Economy: Future Directions*, quoted in ALRC IP42, p. 11.

works. In *Do You Really Expect to Get Paid: An economic study of professional artists in Australia*, a study commissioned by the Australia Council for the Arts, David Throsby and Anita Zednik observe that:

Awareness of the importance of intellectual property as a means of providing remuneration to creators and of allowing consumers orderly access to creative work has grown in recent years. From the viewpoint of individual artists, if they are to gain the full economic benefit to which their creative endeavour entitles them, their intellectual property in their work must be adequately protected against unauthorised exploitation or appropriation. Indeed the copyright held by writers, visual artists, craft practitioners and composers in the literary, dramatic, artistic and musical works that they create may be essential to their economic survival. Furthermore, performers such as actors, dancers and musicians, as well as stage directors and choreographers, may hold copyright in particular performances that they create.<sup>7</sup>

Given the importance attached to copyright for the income of artists, at least as taken from the above statement, it is a subject around which surprisingly little research has been undertaken in Australia.<sup>8</sup> The literature survey undertaken by the CCI identified only one study of artists' incomes that attempted to calculate the actual contribution of royalties and other copyright-related revenue streams to the incomes of Australian artists. The 2003 study for the Australia Council by David Throsby and Virginia Hollister, *Don't Give Up Your Day Job: An economic study of professional artists in Australia*, found that royalties, advances and other copyright earnings accounted for 6 per cent of the creative income of the over 1,000 artists it surveyed, with Public Lending Right and Educational Lending Right accounting for a further 2 per cent. These sources of creative income were particularly important for writers (27 per cent of total creative income) and composers (23 per cent of creative income): for all other categories of artistic and creative practice surveyed, they accounted for no more than two per cent of total creative income.<sup>9</sup> It also needs to be noted

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<sup>7</sup> Throsby, D. and Zednik, A. (2010) *Do You Really Expect to Get Paid: An economic study of professional artists in Australia*, Australia Council for the Arts, Sydney, p. 60.

<sup>8</sup> There are important core copyright industries excluded from these surveys of those in the arts, including the newspaper and magazine, film, radio and television, and computer games industries, which limits the generalisability of these findings. To the best of our knowledge, no comparable work has been undertaken on the relevance of copyright-based sources of income for those working in these creative industries.

<sup>9</sup> Throsby, C. and Hollister, V. (2003) *Don't Give Up Your Day Job: An economic study of professional artists in Australia*, Australia Council for the Arts, Sydney, p. 103.

that advances are not in themselves a form of copyright-related income, but the survey methodology did not disaggregate royalties and advances.

**Table 1: Sources of creative income by category of artist in Australia, 2003 (per cent)**

	Writers	Visual artists	Craft practitioners	Actors	Dancers	Musicians	Composers	Community cultural development workers	All artists
Salaries, wages, fees	55	34	21	94	90	95	38	78	63
Gross sales of work, including commissions	13	54	68	3	1	2	25	12	22
Royalties, advances	18	2	2	2	1	1	22	-	6
Other copyright earnings	*	*	-	*	1	1	1	-	*
Grants, prizes, fellowships	5	10	7	1	7	1	11	6	6
Public lending right	4	*	-	-	-	*	-	-	1
Educational lending right	5	*	-	-	-	*	-	-	1
Other creative source	*	*	2	-	-	*	3	4	1
Total	100	100	100	100	100	100	100	100	100
Weighted n=	158	202	84	127	23	264	28	57	943
Unweighted n=	203	219	108	138	54	126	58	34	940

\*indicates less than 1%.

- indicates nil in this sample.

Source: Australia Council for the Arts. (2003). *Don't Give Up Your Day Job: An Economic Study of Professional Artists in Australia*.103

The available international evidence finds little support for the proposition that copyright law has a significant impact upon the ability of artists and content creators to earn a living. Ruth Towse has made the point, based upon available international evidence, that ‘research on artists’ total earnings including royalties shows that only a small minority earn an amount comparable to national earnings in other occupations and only “superstars” make huge

amounts'.<sup>10</sup> This is also consistent with the observation that most copyright works are of very little commercial value at the end of their copyright terms, and that few rights holders seek to renew their registration beyond the life of existing copyright provision.<sup>11</sup>

This is not to say that income derived from copyright is unimportant to artists as a group, or that it is not very important to some artists: a minority of works do continue to generate significant revenues for rights holders over time.<sup>12</sup> It is to make the point that available evidence does not support the claim that the current copyright regime is of such importance for the generation of new artistic and creative works that the supply of new works would be significantly inhibited by changes to those laws. There may be a case for undertaking further research into this question, given the limited amount of work undertaken that directly addresses it in Australia at present, but the evidence points to the need for caution in assessing claims that copyright as it currently operates is central to the ability of creators to earn a living from their creative works. Copyright does play a role in the incentives of commercial producers of copyright works, who provide employment for creators, but the extent of this role has not been extensively studied and may be less than is commonly thought.<sup>13</sup>

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

One of the difficulties in addressing the question of whether copyright laws affect the introduction of new or innovative business models is the absence of counter-factual information, or 'a situation comparable to those in which copyright does apply to one in which it does not'.<sup>14</sup> Towse also observes that 'economics does not easily deal with all or

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<sup>10</sup> Towse, R. (2011) What We Know, What We Don't Know, and what Policy Makers Would Like Us to Know about the Economics of Copyright, *Review of Economic Research on Copyright Issues* 8(2), p. 107. Towse refers to a study of 25,000 British and German writers undertaken by Kretschmeyer and Hardwick. See Kretschmer, M. and P. Hardwick (2007), "Authors' Earnings From Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers", available at [www.cippm.org.uk/publications/alcs/ACLS%20Full%20report.pdf](http://www.cippm.org.uk/publications/alcs/ACLS%20Full%20report.pdf), accessed 25 November, 2012.

<sup>11</sup> Handke, *op. cit.*, p. 26.

<sup>12</sup> Caves, R. (2000) *Creative Industries: Contracts Between Art and Commerce*, Cambridge, MA: Harvard University Press. Caves refers to the *ars longa* principle, arising from the the *durability* of many cultural products, and the capacity of their producers to accrue economic rents (e.g. copyright payments) long after the period of production. Caves identifies this ability to accrue economic rents over time from creative works, along with the economics of superstars – or what he terms the "A list"/"B list" phenomenon – as defining features of the creative industries.

<sup>13</sup> See Cohen, J. (2011). "Copyright as Property in the Post-Industrial Economy: A Research Agenda." *Wisconsin Law Review* 2011: 141; Silbey, J. (2011) "Harvesting Intellectual Property." *Notre Dame Law Review* 86 (5): 2091.

<sup>14</sup> Towse. *op. cit.*, p. 110.

nothing states of the type envisaged by the impact of the whole system; its strength is in analyzing marginal changes', and that 'fast moving technical changes also affect production and consumption and it can be very difficult to pin down a "before" and "after" test of the impact of the change to copyright law'.<sup>15</sup>

Existing copyright laws can act as an inhibitor on the development of new and innovative business models. The economist Hal Varian identified that in a world where no copying of content could occur, there would be fewer units of a work produced, and they would be sold at a higher price. In such a world, innovations around copyright content – including modern search engines like Google – could also not develop. To the extent that copying occurs, it can increase overall profitability even if its effect is to drive down the average price of a good. Since "born digital" information is very easy to copy and distribute, and the prospect of eliminating all forms of illegal copying is near zero – particularly as digital goods are much easier to distribute globally – Varian identified a number of possible alternative business models that could be adopted. These included price discrimination (e.g. making the physical copy more attractive to consumers than the downloaded version), delivery of bundled services (e.g. providing free access to a back catalogue for subscribers), and advertising around digital content as an alternative revenue stream to direct sales. Varian's conclusion was that:

All of these business models have their problems, of course, and none is likely to yield any sort of social optimum. On the other hand, copyright is a second-best solution to intellectual property provision, as well. Perhaps the ultimate saving grace is that the same technological advances that are making digital content inexpensive to copy are also helping to reduce the fixed cost of content creation ... The increased availability of content due to the reduction in the cost of creating and distributing it will presumably increase competition and reduce the price consumers pay for legitimate access to content. This trend may serve to counterbalance some of the forces that have led to demands for increased copyright protection.<sup>16</sup>

In his international study of media piracy in emerging economies, Joe Karaganis from the U.S. Social Science Research Council observed that high prices for digital media goods relative to income was a primary driver of piracy in developing countries, that anti-piracy

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<sup>15</sup> *Ibid.*, p. 111.

<sup>16</sup> Varian, H. (2005) 'Copying and Copyright', *Journal of Economic Perspectives* 19(2), p. 136.



measures and copyright education had little impact, and that rising standards of living combined with competition that reduced prices for legitimate product were the key factors in reducing overall levels of piracy.<sup>17</sup> The work of both Varian and Karaganis indicates that it is innovative new business models, rather than strengthened regimes of copyright enforcement, that will ultimately be of most significance in reducing piracy and copyright infringement. In his forthcoming book *Hidden Innovation: Policy, Industry and the Creative Sector*, Stuart Cunningham identifies a number of ways that this has been addressed by Google, including the ContentID and Partnership programs developed for YouTube.<sup>18</sup>

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

The full costs of administering, licensing, and enforcing copyright in Australia have not been examined in sufficient detail. In particular, there has been little empirical examination of the transaction costs of negotiating copyright licences,<sup>19</sup> and the cost structure of copyright licensing has not been examined systematically. Some empirical evidence exists in comparable jurisdictions,<sup>20</sup> but quantitative data on the costs of copyright in Australia is very limited. However, there is evidence that indicates that the complexity of copyright imposes significant inefficiencies on users of copyright material, particularly for creators using existing material in the creation of new works.

For instance, in the film industry, high transaction costs in identifying and negotiating with rights holders often prevents creators and users from reaching mutually beneficial outcomes.<sup>21</sup> In film, as in other industries,<sup>22</sup> the complexity of rights poses a significant problem for efficient licensing. A recent report for Screenrights and AFTRS notes that

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<sup>17</sup> Karaganis, J. (2011) *Media Piracy in Developing Countries*, Washington, D.C.: Social Science Research Council.

<sup>18</sup> Cunningham, S. (2013) *Hidden Innovation: Policy, Industry and the Creative Sector*, Brisbane: University of Queensland Press, Ch. 2.

<sup>19</sup> Handke, C. (2011) *Economic Effects of Copyright: The Empirical Evidence So Far*. Commissioned paper prepared for The Committee on the Impact of Copyright Policy on Innovation in the Digital Era.

<sup>20</sup> See, for example, Aufderheide, P. and Jaszi, P. (2004) *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. Center for Social Media Washington, DC. <http://www.acsil.org/resources/rights-clearances-1/nps240.tmp.pdf>; McLeod, K. and Di Cola, P. (2011) *Creative License: The Law and Culture of Digital Sampling*. Duke University Press.

<sup>21</sup> Wilson, J. (2009) *The Digital Deadlock: How Clearance and Copyright Issues are Keeping Australian Content Offline*. A white paper commissioned by Screenrights and the AFTRS Centre for Screen Business, p. 6.

<sup>22</sup> Intellectual Property Office of UK (2012). *Rights and Wrongs: Is Copyright Licensing Fit for Purpose for the Digital Age? The First Report of Digital Copyright Exchange Feasibility Study*.

“[t]here can be 20 or more rights holders in a screen content product and rarely are there less than six.”<sup>23</sup> Creators of new works face high transaction costs in obtaining licences from all relevant rights holders.<sup>24</sup> Creators also often face insurmountable difficulties with orphan rights, uncooperative right holders, and the lack of clarity that surrounds performance rights.

The practices of documentary filmmakers provide an appropriate example of the limitations of Australian law. A recent example is Cathy Henkel’s<sup>25</sup> new documentary *Show Me the Magic*, a film about the acclaimed Australian cinematographer Don McAlpine. Henkel explains the difficulties in creating the documentary:

In order to tell his story, I had to use a lot of archive material ... that is owned by other people. ... It is like these walled fortresses have gone around material that is owned. To try to get it for a legitimate purpose ... [is difficult] there is just no leeway in those.<sup>26</sup>

In order to create the documentary, Henkel needed to incorporate clips from many of his world famous films. Henkel faced standard licence fees that were prohibitively expensive for her documentary film (around \$300,000), and rights holders were initially not willing to negotiate licence fees that were acceptable to all parties.<sup>27</sup> The difficulties Henkel faced were compounded by overlapping contractual rights that prevent studios from providing licences. Henkel not only needed to licence all copyright material, but had to seek agreements from many of the actors and extras included in each clip:

I have had to clear stunt artists from *Romeo & Juliet* back in 1996 shot in Mexico – I had to find the stunt people, and I’ve had to clear all the dancers [from *Moulin Rouge*]. ... You’re getting to the point where you use a clip and you have to clear every fringe person that appears in that clip.<sup>28</sup>

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<sup>23</sup> Wilson, J. (2009) *The Digital Deadlock op. cit.*, p. 6.

<sup>24</sup> Heller calls this difficulty in obtaining permission from overlapping rights holders a ‘tragedy of the anticommons’: Heller, M. 1997. “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets.” *Harvard Law Review* 111: 621.

<sup>25</sup> Cathy Henkel has worked as a writer, producer and director of documentaries since 1988. She has directed documentary *Heroes Of Our Time Walking Through a Minefield* (1998), *Losing Layla* (2000), *Spike Milligan: I Told You I was Ill* (2005) and *The Man Who Stole My Mother's Face* (2004), *The Burning Season* (2008), *The Rise of the Eco-Warriors* (2012), and *Show me the Magic* (2012). In 2009 Cathy was awarded Documentary Producer of the Year at SPAA for her work on *The Burning Season*.

<sup>26</sup> Interview with Cathy Henkel, Film Producer, Virgo Productions, 15 November 2012.

<sup>27</sup> Interview with Cathy Henkel, Film Producer, Virgo Productions, 15 November 2012.

<sup>28</sup> Interview with Cathy Henkel, Film Producer, Virgo Productions, 15 November 2012.

Henkel was eventually able to negotiate licences for the archival footage in *Show me the Magic*, but in order to do so, she had to bypass conventional licensing channels and instead directly approach upper management in the studios that owned the material. Henkel explains that the manner in which she was able to obtain copyright licences

is not a precedent – I have to be very clear about that, it's not a precedent, it's an exception. Because it's Don McAlpine and he shot it.<sup>29</sup>

While Henkel was ultimately successful, her story demonstrates the great difficulty that creators face in clearing copyright licences:

At the moment, [licensing] is an absolute nightmare. I've just been through it for three months – I locked *Show Me the Magic* off in August, it's now the middle of November, and I've just cleared the last piece of music.<sup>30</sup>

Henkel's experiences are common amongst documentary filmmakers. A US study of documentary filmmakers has found that:

- Rights clearance costs are high, and have escalated dramatically in the last two decades;
- Gatekeepers, such as distributors and insurers, enforce rigid and high-bar rights clearance expectations;
- The rights clearance process is arduous and frustrating, especially around movies and music;
- Rights clearance problems force filmmakers to make changes that adversely affect—and limit the public's access to—their work, and the result is significant change in documentary practice.<sup>31</sup>

The experiences of documentary filmmakers in copyright licensing are likely replicated in the experiences of people engaged in many other creative practices. A US study of sampling practices in the music industry highlights the similar systemic problems that copyright poses

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<sup>29</sup> Interview with Cathy Henkel, Film Producer, Virgo Productions, 15 November 2012.

<sup>30</sup> Interview with Cathy Henkel, Film Producer, Virgo Productions, 15 November 2012.

<sup>31</sup> Aufderheide, P. and Jaszi, P. (2004) *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. Center for Social Media Washington, DC. <http://www.acsil.org/resources/rights-clearances-1/nps240.tmp.pdf>.

for musicians.<sup>32</sup> The complexities of current copyright licensing processes, involving creators, rights owners, rights managers, rights users and consumers across different media types and different industry segments is not fit for purpose.<sup>33</sup> The UK has proposed to greatly simplify licensing practices by creating a digital copyright exchange that promises to facilitate mutually beneficial licensing practices.<sup>34</sup> In Australia, although solid empirical data is lacking, there are good reasons to believe that copyright law and contractual practices impose a great efficiency cost on the use of copyright material.

***(d) places Australia at a competitive disadvantage internationally.***

The scope to apply fair use provisions in Australia is considerably more circumscribed than is the case for the United States, and less than is the case for more legally comparable countries such as Canada. We found it difficult to extrapolate from that finding to any authoritative claim as to whether Australian creative industries are at a competitive disadvantage with other countries as a result.

***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?***

The CCI is in general agreement with the importance of the eight principles outlined in the *Issues Paper* as providing an appropriate foundation from which the ALRC can make recommendations that are suitably evidence-based. One important recommendation, to be discussed below, is that the Review consider a broadened concept of “fair use” that permits unlicensed use of copyright material in transformative and non-transformative but socially beneficial ways. This should be combined with the development of a Digital Copyright Exchange that would reduce transaction costs associated with the legal re-use of copyrighted materials and provide appropriate returns for the creators of copyrighted content, along the lines recommended by the Hargreaves Review in the United Kingdom, and discussed later in this submission. There is particularly strong agreement with the principles that ‘Reform

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<sup>32</sup> McLeod, K. and DiCola, P. (2011) *Creative License: The Law and Culture of Digital Sampling*. Duke University Press.

<sup>33</sup> Intellectual Property Office of UK (2012) *Rights and Wrongs: Is Copyright Licensing Fit for Purpose for the Digital Age? The First Report of Digital Copyright Exchange Feasibility Study*, p 21.

<sup>34</sup> Intellectual Property Office of UK (2012) *Rights and Wrongs: Is Copyright Licensing Fit for Purpose for the Digital Age? The First Report of Digital Copyright Exchange Feasibility Study*, p 12.

should take place in the context of the “real world” range of consumer and user behaviour in the digital environment’ (Principle 6) and ‘Reform should promote clarity and certainty for creators, rights holders and users’ (Principle 7).

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

The recent Optus TV Now litigation<sup>35</sup> highlights a significant degree of uncertainty and restraint for cloud computing service operators under Australian law. The Full Federal Court decision found that Optus was the 'maker' (or 'a maker') of recordings of broadcast television made on behalf of users. Since Optus' purpose was commercial, it was unable to rely on the time-shifting exception that would have applied to its users.<sup>36</sup> The Australian position stands in contrast to the law in the US and other jurisdictions.<sup>37</sup>

The implications of the Optus TV Now case are potentially far-ranging beyond its facts. The crux of the issue is that under Australian law, consumers may not 'outsource' acts they are authorised to do under the Copyright Act to commercial actors. The principle is likely to apply to other lawful acts beyond time-shifting of free-to-air broadcasts; a large range of existing and potential cloud services which involve the unauthorised reproduction and communication of copyright content on behalf of users now face substantial uncertainty about the extent of potential liability. As the Full Federal Court noted, much will depend on the specific design of the cloud service in question,<sup>38</sup> but the decision clearly highlights the significant legal risk for cloud service operators. This level of risk, combined with the relatively limited size of the Australian market, will likely depress investment in the development or delivery of new cloud computing services in Australia.<sup>39</sup>

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<sup>35</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

<sup>36</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59, 89.

<sup>37</sup> See *Cartoon Network LP, LLLP v CSC Holdings Inc.*, 536 F.3d 121 (2nd Cir, 2008). See further Shi, S. X. (2012). Time Shifting in a Networked Digital World: Optus TV Now and Copyright in the Cloud. *European Intellectual Property Review*, 34(8), 519.

<sup>38</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59, 100.

<sup>39</sup> See Giblin, R. (2012) Stranded in the Technological Dark Ages: Implications of the Full Federal Court's Decision in *NRL v. Optus*. *European Intellectual Property Review*, 34(9), Forthcoming.

The question of who does potentially infringing acts and who can rely on the exceptions to copyright is vitally important to the continued provision of commercial cloud computing services.<sup>40</sup> Clearly, the uncertainties in the law should be reduced if possible.

***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?***

Some clarification of the current law is likely necessary to reduce legal uncertainty and risk. The nature of amendments is a more complex policy question, and will require detailed evaluation of two main issues:

- (a) Innovation costs: would increasing the licensing burden on cloud providers stifle innovation in the development of socially valuable cloud services?
- (b) User rights: would the requirement to license potentially fair dealings undesirably inhibit the ability of users to take advantage of the exceptions?

As to the first issue, the cost to innovation will depend greatly on the particular type of cloud service considered and the market in which it operates. Some services, like Google's *YouTube*, are able to develop the technical ability to identify and automatically license potentially infringing content uploaded by users. The size of YouTube's market has allowed Google to develop revenue sharing agreements with rights holders – first the largest rights holders and then, more gradually, smaller rights holders as well.<sup>41</sup> For other cloud service operators, negotiating these types of agreements may be much more difficult. For example, operators of cloud backup services cannot know in advance whether any particular piece of data stored by their users might infringe the copyright of a third party. Without this knowledge, there is no ability to obtain a licence for potential infringement, and no blanket licences are available to cover these types of uses. If Australian law requires cloud service operators to obtain licences for all copyright content that users may choose to store or share, it will impose significant risks to innovation. A broad requirement to licence has the potential to create a 'tragedy of the anticommons',<sup>42</sup> where high transaction costs and the danger of

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<sup>40</sup> See O'Brien, D. & Fitzgerald, B. (2006). Digital Copyright Law in a YouTube World. *Internet Law Bulletin*, 9(6&7), 71.

<sup>41</sup> Cunningham, *Hidden Innovation*, op. cit., Ch. 2.

<sup>42</sup> Heller, M. A. (1998) The Tragedy of the Anticommons: Property in the Transition from Marx to Markets. *Harvard Law Review*, 111(3), p. 621-688.

strategic behaviour prevents efficient licensing of the large number of exclusive rights required for any cloud service to operate.

The clearest case for reform comes from examining the second issue, the rights of users to make non-infringing uses of copyright material. Often, only end users will be in a position to determine whether or not any particular use of copyright material is likely to be permitted under a fair dealing or other exception to copyright. In some cases, as in the *Optus TV Now* case, users have a clear right to reproduce copyright material, and commercial cloud services provide them with a convenient means to do so. Similarly, users have a right to engage in unlicensed parody and satire, and cloud operators like *YouTube* provide them with a platform from which to disseminate their works. In many cases, without the assistance of a commercial provider, only a small proportion of users will have the technical ability to exercise their rights under exceptions in the *Copyright Act*.

Even if licensing is technically possible with relatively low transaction costs, it does not follow that otherwise non-infringing uses ought to be licensed.<sup>43</sup> As the Canadian Supreme Court noted, fair dealing and other exceptions to copyright are “users' rights”, and a fundamental part of the copyright balance.<sup>44</sup> It follows that, if users are to have a technical ability to exercise their rights, commercial operators must not be liable when they facilitate the exercise of those rights for users. We suggest that the Copyright Act ought to be amended to clearly ensure that commercial providers who provide assistance to end users are not liable for acts which, if done by the end user, would not be an infringement of copyright.

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

Historically, copyright law has not regulated private uses; the right to copy was previously understood as the right to publish or copy commercially.<sup>45</sup> In the analogue world, a large range of private uses are non-infringing – including particularly reading and non-commercial sharing. With digital technology, almost all uses of copyright material involve copying to

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<sup>43</sup> Gordon, W., and Bahls, D. (2007) The Public's Right to Fair Use: Amending Section 107 to Avoid the Fared Use Fallacy. *Utah Law Review*, 2007, p.619.

<sup>44</sup> *CCH Canadian Limited v. Law Society of Upper Canada*. (2004). 1 SCR 339, 48.

<sup>45</sup> Patterson, L. R. & Lindberg, S. W. (1991) *The Nature of Copyright: a Law of Users* 1)per Ca. Athens: University of Georgia Press, p. 66. (drawing a distinction between the use of a copyrighted work and the use of the copyright.)

some extent.<sup>46</sup>In general terms, however, individuals are not in the practice of licensing private uses of copyright works. The costs of enforcement against individuals for large-scale, low-value infringement are prohibitive. Moreover, individuals may tend to draw a moral distinction between uses which cause commercial harm and those which are purely private. The result is that formal copyright law is largely ignored in the private sphere, and copyright owners largely tolerate private infringement.<sup>47</sup>

The wide gap between law and norms in terms of private use is not desirable for copyright law. It is possible that widespread, pervasive disregard for copyright rules in terms of private uses may support a broader legitimacy problem in copyright. It seems clear that the gap between social norms and the law should be reduced where possible. The important question becomes whether copyright policy should seek to provide certainty that private uses are non-infringing or, on the other hand, attempt to drive a shift in social norms through education campaigns and more pervasive enforcement procedures.

Whether the law should prohibit private and domestic uses is partly an empirical question. If private and domestic uses cause little harm to copyright owner revenue, it will likely make more sense to exempt those uses from copyright infringement, rather than attempt a costly exercise to change existing social norms. If, on the other hand, the licensing market for private uses is likely to grow to a significant proportion of copyright owner revenues, a private copying exception may not be appropriate. There is little data to be sure. Historically, however, since private uses have been largely unregulated, they have certainly not been a significant source of income for copyright owners. The transaction costs involved in obtaining licences for low value domestic uses and the difficulty of enforcement suggest that a robust licensing market for private or domestic use is unlikely to emerge.

There is also, however, a normative aspect to private copying. Copying, for private and domestic purposes, may largely be understood as morally permissible. It forms an important part of the copyright balance: copyright owners derive little value from licensing private uses, whereas members of the public benefit a great deal from being able to consume, play with, and share copyright material in a private or domestic setting.<sup>48</sup> Allowing copyright owners to

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<sup>46</sup> Lessig, L. (2004) *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin Press, p. 144.

<sup>47</sup> See Tehranian, J. (2007) Infringement Nation: Copyright Reform and the Law/Norm Gap. *Utah Law Review*, 2007, p. 537; Wu, T. (2008). Tolerated Use. *Columbia Journal of Law & the Arts*, 31, p. 617.

<sup>48</sup> See Litman, J. (2006) Lawful Personal Use. *Texas Law Review*. 85, p. 1871.



charge for each private and domestic licence, if it were effective, would be likely to inhibit socially valuable uses.

The guiding principles for reform set out in the issues paper provide appropriate guidance here. There is little evidence that restricting private copying is likely to have an adverse impact on the incentives of producers of copyright material to invest in the creation, maintenance, or distribution of content (Principle 3). Clearly enabling private copying, on the other hand, is likely to drive innovation in technologies and services that assist consumers in accessing copyright material (Principles 1 and 2). It is also likely to better reflect ‘real world’ consumer behaviours (Principle 6), which apparently tend to view private uses as ‘fair’ (Principle 4) and largely outside of the scope of control of copyright owners.

These basic principles suggest that a broad private copying exception should be introduced that is: simple to foster certainty; technologically neutral to enable unforeseen innovation; and not limited to prevent intermediaries from assisting end users to exercise their rights.

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

***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?***

***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?***

The CCI has recently completed a comprehensive survey of *The Internet in Australia 2012*, as part of the World Internet Project (WIP).<sup>49</sup> The WIP involves research teams from 38 countries, and aims to generate insights into how the Internet influences social, political,

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<sup>49</sup> Scott Ewing and Julian Thomas (2012) *CCI Digital Futures 2012: The Internet in Australia*, ARC Centre of Excellence for Creative Industries and Innovation, September  
<http://www.cci.edu.au/sites/default/files/CCI%20Digital%20Futures%202011%20Final%20120912.pdf>

cultural, and economic behaviour and ideas, as measured by the attitudes, values, and perceptions of both Internet users and non-users. Through application of comparable methodologies among all of the participating research teams, it enables data to be generated that is meaningful in making comparisons between countries, and tracking changes in Internet use/non-use over time. The Australian survey involved telephone-based interviews, and drew upon a random sample of 1,001 Australians. More information on the project, and the survey methodology, can be found at <http://www.cci.edu.au/projects/digital-futures>.

The project findings that are most relevant to these questions relate to the use of the Internet for entertainment purposes.<sup>50</sup> Major findings include:

- In 2011 more than half of users downloaded or listened to music online (57.9%) with 13.6% doing so daily;
- Downloading or listening to podcasts has increased over the period of analysis from 17.1% of users in 2007 to 28.4% in 2009 and 31.1% in 2011. Weekly listeners comprised 9.8% of internet users in 2011 (11.6% in 2009 and 6.2% in 2007).
- The use of file-sharing services increased very slightly between 2007 and 2009 (23.6% to 27.8%) but decreased again in 2011 to below the 2007 level (22.6%);
- There was little change in the most important reasons for using file-sharing services: that they are free, and simple and practical to use. While the proportion nominating 'free content' as very important fell slightly in 2011 it was still the most nominated at 44.3%. Just under a third cited 'simple and practical' as very important. Accessing hard to get content (26.8%) was considered very important by a quarter of users while being able to try before you buy was 'very important' for one in five using file sharing services (20.1%);
- In 2007 83.5% of users reported that the opportunity to download did not influence their purchasing of movies, but this fell to 74.3% in 2009 and 70.5% in 2011;
- The proportion of users who felt that they watched less broadcast television due to being able to download television programs has doubled between 2007 and 2009. In 2007 one in ten internet users said that the ability to download television programs had decreased the amount of broadcast television they watched. This increased to

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<sup>50</sup>*The Internet in Australia*, pp. 28-35.

17.7% in 2009 and 19.8% in 2011. The study did not identify whether these were legal or illegal program downloads;

- Copying or downloading movies – both legally and illegally – is still a minority activity and there was only a slight increase in these activities over the period. Around one in five people copy their own DVD with a further quarter copying a friend's DVD. Purchasing digital movies online exhibited the strongest growth, increasing from 3.0% to 9.6% to 13.6% in 2011;
- There has been little change in people's willingness to substitute 'hard-copy' products for digital between 2007 and 2011. Half of the Internet users surveyed (49.9% in 2011 compared to 48.3% in 2007) would not consider downloading music or movies instead of buying hard copy at any price. A further 4.9% would only do so if it were free to download.

The implications that can be drawn from these findings for copyright law are:

1. The demand for content in digital formats continues to grow across the board;
2. Use of file-sharing services is strongly driven by ease of use, convenience to consumers, and the volume of content that can be accessed;
3. There is no clear relationship between the opportunity to download and the preparedness to pay for content;
4. Where the legal downloading of content has been simplified, as with digital music and some digital movies, illegal downloading typically declines;
5. Consumers expect to be able to legally possess the same content in multiple formats, both digital and 'hard copy'.

Extrapolating from these findings, available evidence would suggest that it is business model innovation by digital content providers, rather than the strengthening of prohibitions on the downloading of digital content, which is at the core of adaptation on the part of media and creative industries to the digital environment. In that respect, it would support more freely permitting the use of copyright materials online for non-commercial purposes, particularly social, private or domestic purposes.

***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?***

***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?***

***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?***

Australia's current copyright law poses an unacceptable barrier to innovation and creativity in the reuse of existing copyright material. The law should be amended to more freely permit unlicensed transformative uses in order to limit the stifling effect of copyright on cultural production. While the US approach provides more liberty to users of creative material, fair use remains somewhat problematic in practice;<sup>51</sup> an Australian approach should more clearly exempt transformative uses from the exclusive rights of copyright owners.

The experience of Australian filmmaker Cathy Henkel, above, is indicative of the significant costs, both in terms of transaction costs and licence fees, that creators have in clearing copyright licences for transformative uses. International evidence suggests that these difficulties are generalisable amongst documentary film,<sup>52</sup> music,<sup>53</sup> and other creative practices that rely on reusing existing expression. It is important to recognise that quoting and remixing is an essential part of the creative process in both classical and contemporary literature,<sup>54</sup> painting,<sup>55</sup> and music.<sup>56</sup> The limitations that Australian copyright law imposes on creative practices presents an extraordinary difficulty for creative users of copyright material.

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<sup>51</sup> Aufderheide, P., and P. Jaszi. (2011) *Reclaiming Fair Use: How to Put Balance Back in Copyright*. University of Chicago Press Chicago, IL.

<sup>52</sup> Aufderheide, P., and P. Jaszi. (2004) *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. Center for Social Media Washington, DC. <http://www.acsil.org/resources/rights-clearances-1/nps240.tmp.pdf>.

<sup>53</sup> McLeod, K. And DiCola P. (2011). *Creative License: The Law and Culture of Digital Sampling*. Duke University Press.

<sup>54</sup> Carlin, J. (1988) Culture Vultures: Artistic Appropriation and Intellectual Property Law. *Columbia-VLA Journal of Law & the Arts*, 13, p. 103.

<sup>55</sup> See Madison, M.J. (2010). Beyond Creativity: Copyright as Knowledge Law. *Vanderbilt Journal of Entertainment and Technology Law*, 12, p. 817.

A transformative use exception would greatly reduce the barriers that copyright imposes on creative practices that make use of existing copyright material. In most cases, transformative uses do not ‘conflict with normal exploitation’ of the source material, since the transformative use does not compete with the market for the original.<sup>57</sup> There are some cases, however, such as music synchronization rights, where licensing may form an important part of the market for the material; in such limited cases, a transformative use exception may not be appropriate. In general terms, however, CCI believes that in the interests of promoting innovation and supporting the practices of Australian creators, a general exception should be introduced to allow unlicensed transformative uses.

An Australian transformative use exception should be clearly phrased to avoid the uncertainties that producers in the US face in order to determine whether their use is ‘fair’ on the four-factor test. We suggest that any use of published material in the creation of a new work that is not substitutable for the original be explicitly permitted, subject to the moral rights of attribution, false attribution, and integrity. In the interests of certainty, we also suggest that Australian copyright law clearly assert that such uses do not ‘unreasonably prejudice the legitimate interests’ of the copyright owner, rather than require potential judicial examination of harm for each use. Most importantly, we suggest that the rights of commercial producers to make a living from their work implies that a transformative use exception should not be limited to non-commercial users. Finally, we recommend that in circumstances where transformative use is found to impose a significant degree of direct financial harm on the licensing practices for copyright owners, these circumstances should be clearly but concisely excluded from a general transformative use exception.

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<sup>56</sup> See Arewa, O. B. (2006). From JC Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context. *North Carolina Law Review*, 84 (2), p. 547.

<sup>57</sup> See Bambauer, D.E. (2008). Faulty Math: The Economics of Legalizing The Grey Album. *Alabama Law Review*, 59 (2), p. 345.

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

**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?*

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

**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?*

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

The CCI recommends that Australian copyright law should move beyond statutory licences, and instead introduce a broad “fair use” exception for uses that do not require remuneration, and encourage the development of a simplified licensing process for uses that do. An open-ended “fair use” exception should either subsume or act in addition to the existing fair dealing provisions, but must provide a simplified, flexible, and technology neutral approach that allows unforeseen socially beneficial uses of copyright material. This would be consistent with a number of the Guiding Principles articulated by the ALRC in its *Issues Paper*, including: Promoting the Digital Economy (Principle 1); Promoting Fair Access to and Wide Dissemination of Content (Principle 4); Responding to Technological Change (Principle 5); Acknowledging New Ways of Using Copyright Material (Principle 6); Reducing the Complexity of Copyright Law (Principle 7); and Promoting an Adaptive, Efficient and Flexible Framework (Principle 8).

At the same time, there are a large and growing range of ways in which people are seeking to use copyright materials that may not necessarily be covered by fair use provisions, but are nonetheless legitimate uses of copyright materials. This includes the range of uses identified by the Hargreaves Report and the Hooper Review in the U.K. as those where current arrangements unnecessarily restrict access to copyrighted works, and generate transaction

costs in excess of those appropriate for use of the material in question. It was noted in response to Question 1 that this is also the case for Australia.

A much-cited example would be the use of a piece of music in a recorded wedding video that is subsequently placed on *YouTube*. Outside of the United States, Canada and 11 small nations, Google is currently required to block the distribution of such content as it would be in breach of copyright laws. Both content creators and content users would benefit from rights being able to be established more straightforwardly, and for a low-cost mechanism to exist for the user to fairly reimburse the creator of the copyrighted work and enable its distribution by other means.

The Hargreaves Report recommended that the Government of the United Kingdom address this problem through the establishment of a Digital Copyright Exchange (DCX). It identified the benefits of a DCX as enabling ‘an open, standardised approach to data’ that would be based around ‘a network of interoperable databases to provide a common platform for licensing transactions’.<sup>58</sup> The benefits that the Hargreaves Report identified from the establishment of a DCX included:

**For creators:**

- improved routes to market for creative works;
- a means to clearly record the ownership of rights, and the terms on which they are available for use or re-use;
- a clearer understanding of licensing terms and conditions throughout the market and so more realistic judgments about their own business models;
- increased options to license an individual creator’s works directly;
- a single point of access for collecting societies in Australia and, to the extent that such schemes are being adopted elsewhere, internationally.

**For intermediary rights holders:**

- automated licensing via standard terms if offered by the rights holder;
- ready identification of rights holder’s negotiating agent to facilitate licensing;

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<sup>58</sup> Intellectual Property Office of UK.(2011), *Digital Opportunity: A Review of Intellectual Property and Growth*, an Independent Report by Professor Ian Hargreaves p. 33.

- decreased risk of infringements by providing clarity as to what is licensed and what is not via terms checkable at the click of a mouse;
- a more level playing field for new market entrants and incumbents;
- a better informed market.

**For consumers and other rights users:**

- a readily accessible online site place where those seeking to use copyright works can quickly identify the rights holder and secure a licence;
- more choice, better services and lower prices for consumers from a more open and contestable market for rights to creative re-use of copyrighted works.

**For all:**

- increased transparency in the marketplace as to the relative price for use of copyrighted works;
- facilitation of audit by users and any regulatory authority;
- reduced transaction costs;
- first port of call/first tier of education and information for newcomers to copyright issues;
- low cost resolution of disputes.<sup>59</sup>

A Digital Copyright Exchange has been defined as an automated e-commerce website or network of websites which allows licensors to set out the rights they wish to license and allows licensees to acquire those rights from the licensors.<sup>60</sup> Through such a system, copyright licencees can:

- look for different types of content across the range of media types;
- define and agree what uses they wish to make of the chosen content with the licensors
- be quoted a price by the licensor for those uses of the specified content that the system is programmed to offer;
- pay for the rights online within the normal e-commerce framework;

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<sup>59</sup> *Ibid.*, p. 31.

<sup>60</sup> Intellectual Property Office of UK. (2012) *Rights and Wrongs: Is copyright licensing fit for purpose for the digital age?* The First Report of the Digital Copyright Exchange Feasibility Study, February, p. 12.



- have the content made available to them in the appropriate format;
- account back to the licensor as to what content was actually used so that the rights creators can be paid their shares.

The two-volume Digital Copyright Feasibility Exchange Studies undertaken by Richard Hooper CBE to the U.K. Intellectual Property Office argued that through a DCX, ‘copyright licensing can be made more streamlined, easier and cheaper to use, especially for the small and medium-sized enterprises (SMEs) which make up 90% of the creative industries, without eroding the rights of rights owners’.<sup>61</sup> In particular, a copyright exchange would enable greater legal clarity, combined with greatly reduced transaction costs, for the use of copyrighted works for purposes that are legitimate from the point of view of the content creator, but where it is appropriate that the user should make some financial payment for the right to make use of such works.

The Hooper Report *Rights and Wrongs* identified libraries, archives and museums, educational institutions, the audiovisual industry, the publishing industry, the music industry and images industries (still pictures, photo libraries, art works) as creative industries and related sectors that would be much better served by a more streamlined approach to the handling of copyright licensing in ways that recognized the reasonable expectations of existing copyright owners while better enabling the development of new forms of digital content and digital services, which are at the core of the emergent digital economy. Indeed, by normalising payment arrangements for all forms of copyright works, such a scheme is likely to be of financial benefit to copyright owners themselves.

In their second report, *Copyright Works*, Hooper and Lynch propose the development of a not-for-profit, industry-led Copyright Hub that:

links interoperably and scalably to the growing national and international network of private and public sector digital copyright exchanges, rights registries and other copyright-related databases, using agreed cross-sectoral and cross-border data building blocks and standards, based on voluntary, opt-in, non-exclusive and pro-

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<sup>61</sup> *Ibid.*, p. 6.

competitive principles.<sup>62</sup>

The focus of such a Copyright Hub would not be on ‘the low volume of customised, high monetary value licensing transactions at the top of the market’, for which commercial contract remains the most appropriate mechanism for managing rights. Rather, it would be on ‘the very high volume of automatable, low monetary value transactions coming mostly from the long tail of smaller users’. These may include:

the small digital start-up company wanting to use music and images and text creatively for its customers, the teacher in the classroom, a user posting a video on YouTube. Larger companies have told us that they also have requirements for access to easy to use high volume, low monetary value, low transaction cost copyright licensing systems, for example a broadcaster wanting a particular film clip or a publisher wanting a specific diagram or image.<sup>63</sup>

The main purposes of the proposed Copyright Hub would be to:

- Act as a signposting and navigation mechanism to the complex world of copyright;
- Be the place to go for copyright education;
- Be the place where any copyright owner can choose to register works, the associated rights to those works, permitted uses and licences granted;
- Be the place for potential licensees to go for easy to use, transparent, low transaction cost copyright licensing via, for example, digital copyright exchanges (DCEs), acting in effect as a marketplace for rights;
- Be one of the authoritative places where prospective users of orphan works can go to demonstrate they have done proper, reasonable and due diligent searches for the owners of those works before they digitise them.<sup>64</sup>

It should be noted that a Digital Copyright Exchange, or a Copyright Hub, is not seen in this submission as an alternative to revised fair use provisions. An extended definition of fair use is seen as an essential reform of copyright law to make it more appropriate in the context of the digital economy. Rather, a Digital Copyright Exchange is intended to simplify the process

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<sup>62</sup> Intellectual Property Office of UK (2012). *Copyright Works: Streamlining copyright licensing for the digital age*, An independent report by Richard Hooper CBE and Dr Ros Lynch. July, p. 1.

<sup>63</sup> *Ibid.*, p. 2.

<sup>64</sup> *Ibid.*, p. 2.

of dealing with the large and growing volume of ‘small’ uses of copyrighted works in ways that dramatically reduce transaction costs and greatly simplify processes, while meeting the appropriate rights and expectations of all parties to the process of rights licensing: creators of original works; rights owners/holders; rights managers; rights users/licensees; and consumers.

***Question 45: What problems, if any, are there with [the existing] fair dealing exceptions in the digital environment?***

One issue that CCI is acutely aware of that creates a key problem in the digital environment is the lack of certainty about publication of the results of research. This is most visible in the publication of research outputs and datasets. When a researcher fairly reproduces a substantial part of a copyright work in a research article, for example, her activities will be covered by the research and study exception. This is particularly important in the case of quotations in theses and other research outputs. As part of an increasing imperative to make publicly funded research outputs publicly accessible, higher educational institutions create open digital repositories of theses and other research publications. This drive towards ‘green’ open access is critically important for encouraging innovation and downstream reuse of research. Educational institutions, however, face a significant degree of risk, in that it is not clear that their publication activities fall within the limited definition of ‘research and study’. A similar situation is emerging with respect to datasets; the publication of research results requires the publication of underlying data in order to allow independent verification. Particularly in online qualitative research, where texts are not necessarily fixed or stable, an archive of the data from which conclusions are drawn is epistemologically required in order to validate the research process.<sup>65</sup> Under current law, however, it is not clear that communicating those underlying datasets to the public is permitted by the research and study exception.

Publication and dissemination of results and datasets is a crucial part of the research process. Research and study is excepted from the scope of copyright infringement in order to allow the dissemination of useful knowledge and stimulate innovation. The current legal uncertainty means that publishers of research results and datasets cannot be certain that their

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<sup>65</sup> See Burgess, J. & Bruns, A. (2012) Twitter Archives and the Challenges of "Big Social Data" for Media and Communication Research. *M/C Journal*, 15(5); Rees, J. (2010) Recommendations for Independent Scholarly Publication of Data Sets. Retrieved from <http://neurocommons.org/report/data-publication.pdf>. Accessed on 6 November 2012.

activities fall within the definition of 'research and study'. We suggest again that the approach taken by the Canadian Supreme Court is illuminating – since publication of results and data is an integral part of research and study, these actions should be within the scope of the copyright exception. To the extent that uncertainty currently exists, the fair dealing exceptions should be amended to clearly permit the public dissemination of the results of research and the underlying data that is needed to verify those results.