

ALRC Inquiry into Copyright and the Digital Economy

Submission in response to Issues Paper No. 42

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Part 1: Introduction

1.1 Scope of this submission

This submission argues that the time has come for Australia to introduce a fair use defence. As such this submission is directed foremost to the questions (1) whether a flexible or fair use exception would be a desirable addition to Australian copyright law, (2) the practical steps that might be required to ensure the suggested benefits of flexibility are attained, and (3) how a flexible exception would interact with existing exceptions and other parts of the *Copyright Act 1968* (Cth). It is therefore directed chiefly to **Questions 52 and 53** of the Issues Paper.

1.2 The starting point of the enquiry

In the debates around the ALRC's Issues Paper, some who are sceptical as to the need for any further exceptions have suggested that advocates for new copyright exceptions, or, indeed, for any law reform, should first identify exactly what it is that the current law prevents them from doing. We have two concerns about this starting point. The first of our concerns goes to the question of the burden of proof. As an abstract matter we have no difficulty with the proposition that the burden of proof must fall on those advocating reform – in the course of our submission we demonstrate that the existing exceptions are seriously deficient. However, experience suggests that vested interests are adept at blocking reform. Anyone who has studied the historical development of copyright exceptions in British Commonwealth jurisdictions cannot fail to be struck by an historical pattern that can be traced back many decades, whereby official bodies

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charged with reviewing the state of copyright law become convinced of the need to liberalise the exceptions, only to find many of their recommendations watered down or ignored entirely. When considering whether advocates of reform have discharged the burden of proof that falls upon them we would ask the Commission to take cognisance of the fact that the Copyright Law Review Committee was convinced of the need for reform in its 1998 Simplification Report:

The Committee is strongly of the view that an approach that seeks to deal with each specific case is undesirable. First, it cannot be comprehensive in its coverage because it is not possible to predict new uses to which the technological developments may give rise (or how they will affect copyright owners and users). Second, each new circumstance that needs to be dealt with simply adds to the complexity of the existing legislation...The Committee's recommended model simplifies the existing plethora of fair dealing provisions and addresses the real limitations of the current provisions, which are that they are inflexibly linked to specific purposes and are difficult to apply to new technologies.¹

We would also ask the ALRC to bear in mind that broadly similar recommendations have emanated from reform bodies in other British Commonwealth jurisdictions that share a similar approach to the provision of exceptions. As long ago as 1977 the Whitford Committee in the UK recognised the need for fundamental reform:

Any sort of work is likely to be of public interest, and the freedom to comment and criticise, to discuss and to debate, ought not, in principle, to be restricted to particular forms ('criticism' or 'review' or 'reporting current events') or particular media (newspapers, magazines, periodicals, broadcasting or cinematograph films)...We recommend a general exception in respect of 'fair dealing'...²

A broadly similar recommendation was made in a 1984 Canadian White Paper.³ More recently, both the Gowers Review (2006)⁴ and the Hargreaves Report (2011)⁵ in the UK concluded that a

¹ Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Right of Copyright Owners* (AGPS, 1998) [6.07]-[6.08] ('CLRC Simplification Report Part 1').

² *Report of the Committee to Consider the Law on Copyright and Designs*, Cmnd 6732 (1977) [676]-[677].

³ *From Gutenberg to Telidon: A White Paper on Copyright* (Department of Consumer and Corporate Affairs / Department of Communications, 1984) 35-49, for example, at 39: 'The new Act will...provide both a definition of

significant liberalisation of the existing exceptions is required. For example, the Gowers Review noted that UK copyright law suffers from a:

lack of flexibility to accommodate certain uses of protected material that a large proportion of the population regards as legitimate and which do not damage the interests of rights holders.⁶

A cynic might be forgiven for wondering how many times users must succeed in making the case for reform before it is accepted that the burden of proof has shifted to those who wish to maintain the very restrictive approach to copyright exceptions that has typified the law in British Commonwealth countries.

Our second concern with the ‘users must demonstrate what they need’ approach is that it tends to structure the enquiry in such a way as to suggest that the changes that are required are likely, at most, to be the introduction of new narrowly tailored exceptions. The structure of the ALRC’s Issues Paper embeds much the same logic, by asking upfront a series of questions about particular uses and whether they should be allowed. This reflects the current structure of Australia’s copyright law and the approach adopted in previous reform processes, including in 2006.⁷ We do not think that this ‘more of the same’ approach is helpful. It tends to encourage a focus on the particular wording of existing exceptions or how new, specific exceptions might be drafted, at the expense of more systemic thinking. We think that the question for the ALRC is whether the whole regime of exceptions in copyright law is working satisfactorily, particularly in the digital environment.

In our view, the Australian approach to copyright exceptions is simply not working. As we demonstrate in Part 2 of this submission, the current copyright legislation is inadequate. For example, each of the existing ‘fair dealing’ defences, including those introduced in late 2006, is drafted in such a way that a significant quantity of socially desirable conduct involving

fair dealing (to be termed “fair use”) and a prioritized list of factors to be considered in determining whether a particular use of a work is a fair use’.

⁴ *Gowers Review of Intellectual Property* (HMSO, 2006).

⁵ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) (‘Hargreaves Report’).

⁶ Above n 4, [3.26].

⁷ See Attorney-General’s Department, *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age, Issues Paper* (2005) (‘Fair Use Issues Paper 2005’), which purported to ask the question whether a ‘fair use’ exception should be introduced. The focus of the Issues Paper was, however, on particular uses – specifically, the kinds of things allowed in the US under fair use, such as personal copying and parody.

‘research’, ‘criticism’, etc, is not excluded from liability. Technologically-specific exceptions have been drafted in an inflexible manner to deal with particular uses of copyright material that the legislature had become convinced, at the time the amending legislation was enacted, needed to be exempted from liability, but such exceptions have either not worked as intended or have simply failed to keep up with changes in technology and the new uses of copyright material that these developments have facilitated.⁸ And, notwithstanding the existence of over seventy specific exceptions, it is still possible to point to a large number of activities that users of copyright material ought to be able to undertake but that are not covered by any existing exception.

The problems with the legislation have been compounded by the interpretative approach of Australian courts. For example, in the context of the ‘fair dealing’ defences an overly narrow focus has made the operation of the ‘fairness’ test wholly uncertain. In addition, there are problems at the level of practice. Empirical research focused on institutional users suggests an unwillingness to litigate or use such flexibility as exists, in particular in relation to the supposedly ‘flexible dealing’ exception in s 200AB. Given the past approach of the courts, such caution is hardly surprising.

At a more fundamental level the current approach is not consistent with the role we say exceptions ought to play in copyright law. Demanding the identification of particular uses that are impeded by copyright law, in a context where copyright confers broad, technology-neutral exclusive rights, assumes a default of copyright owner control over any and every use of copyright material. This is based on the neoclassical, law-and-economics account of copyright,⁹

⁸ Although we concentrate on the backwards-looking nature of the technologically-driven exceptions in Part 2, the problem is by no means limited to such exceptions. For instance, s 44BA was introduced in 2011 to provide an exception to allow a producer of generic pharmaceuticals to reproduce product information accompanying the original medication to satisfy requirements of the *Therapeutic Goods Act 1989* (Cth). An interlocutory injunction had been granted in then-pending proceedings restraining a generic producer from reproducing an originator’s product information: *Sanofi-Aventis Australia Pty Ltd v Apotex Pty Ltd (No 3)* (2011) 196 FCR 1, 84 [284]. The exception was thought to be needed because copyright was being used to defeat public policies reflected in patent and pharmaceutical product approval laws in favour of generic pharmaceuticals. As an aside, we would note that the fact that an exception drafted to deal with such an extraordinarily limited circumstance was immediately held by the Federal Court to be ‘ambiguous and obscure’, and requiring a painstaking judgment of over 5,000 words to ascertain its meaning (*Sanofi-Aventis Australia Pty Ltd v Apotex Pty Ltd (No 4)* (2011) 202 FCR 56, 59-69 [9]-[44]), further supports the argument we develop in Part 2 that the current Australian approach to copyright exceptions is unsustainable.

⁹ The argument for control of each and every use is hard to justify under other theories of copyright such as the justification based on the ‘natural rights’ of the author. An author’s natural rights cannot be absolute in the context of the rights of others, including subsequent generations of creators and users with their own rights to participate in cultural life and to have access to cultural and educational material (see Universal Declaration of Human Rights, Art 27).

which assumes that copyright should be as ‘perfect’ a property right as possible so as to enable the full operation of a market for copyright works. On a pure neoclassical approach, exceptions are justified only in the case of ‘market failure’ – where a user cannot purchase the desired use through the market, particularly where transaction costs for negotiating an appropriate licence are too high.¹⁰ According to such views a default of broad rights of control should be favoured because digital technology can reduce the transaction costs both of finding copyright owners and negotiating or obtaining licences. On this view, exceptions should play a limited, secondary, and diminishing role in copyright.

Copyright is much more, and more complex, than this neoclassical model would suggest. There are many, well-documented problems with such models, both generally and as applied to copyright in particular.¹¹ The idea that digital technology will lower transaction costs and hence that the default should be licensing in the digital environment is also questionable. Almost twenty years after Paul Goldstein predicted the ‘celestial jukebox’ with unlimited and instant access to the world’s musical and copyright content,¹² access across the range of copyright subject matter remains patchy according to the type of subject matter and who owns it, geographically determined, and priced very differently across jurisdictions.¹³ It is also highly questionable whether we would even have the degree of access we have without considerable pressure from infringing or arguably infringing activity.

In any event, the market-oriented, absolutist approach has never been adopted by policymakers in Australia. According to review after report after second reading speech, Australian copyright law exists to serve the public interest in both the creation and the dissemination of new works of knowledge and culture. To fulfil its public policy role, copyright

¹⁰ Wendy Gordon, ‘Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors’ (1982) 82 *Columbia Law Review* 1600. Gordon has qualified her view somewhat in later writings: see Wendy Gordon, ‘Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story’ (2003) 50 *Journal of the Copyright Society of the USA* 149. In particular, Gordon’s later writings emphasise that market failure occurs not only where the transaction costs of negotiating a licence are too high (for example, where a person wishes to use a short quote from a copyright item but the costs of finding the copyright owner and negotiating a licence outweigh the benefit of including the quote), but also where the copyright owner would not licence the use at any price (which might arise, for example, in relation to criticism of the copyright work or parody).

¹¹ See generally Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 170-8.

¹² Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (Hill and Wang, 1994).

¹³ On this point, note the arguments made to the House of Representatives’ Standing Committee on Infrastructure and Communications, *Inquiry into IT Pricing*, which has been conducting hearings and taking evidence through 2012.

needs to be consistent with, and promote, relevant individual rights, in particular the right to freedom of expression, as well as the public interest in ensuring the importance of education and research, and in safeguarding the functioning of public institutions which promote preservation of and public access to knowledge and culture, such as libraries, museums, galleries and archives. Promoting these rights and interests is not only important for its own sake – it also serves the goals of the copyright system of encouraging the creation of new works. Creation depends on access to existing cultural material, education, and freedom to express ourselves creatively.

Governments have consistently emphasised the importance of exceptions in recognising other important interests. As the IPCRC pointed out in 2000:

It is ... a fallacy to suggest that policies conferring more income on copyright owners are in and of themselves socially desirable relative to those that confer less. Rather, the goal of the intellectual property system is to provide a sufficient incentive for socially useful investment in creative effort. This requires that compensation flowing to rights owners be enough to encourage investments whose social benefits exceed their costs.

Over-compensating rights owners is as harmful, and perhaps even more harmful, than under-compensating them. ...

From the introduction of the *Copyright Act*, and with all subsequent amendments, the Government has been keenly aware of the need, on grounds of public policy, to balance the competing interests of creators and users. Reflecting this intention, existing copyright laws contain a variety of exemptions, statutory licenses and other mechanisms, which place limits on the rights to ensure availability of protected materials to certain classes of user. Although technological change alters the protection needed, it does not undermine the vital nature of these limits. Rather, the limits must be maintained, within the changes imposed by technological developments.¹⁴

¹⁴ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000) 34 ('IPCRC Report').

Similar emphasis on the importance of exceptions and the interests of users and the concept of balance can be found throughout Australian copyright law's legislative history, and in international instruments.¹⁵

Although there are problems with the concept of a 'balance' in copyright law,¹⁶ it at least suggests one important point: that the public interest and the interests of users in copyright are of equal weight and importance in the copyright system. Copyright must equally promote the public interest in dissemination of, and access to, copyright material.

We need a significant break with past approaches. The limited, specific approach to drafting exceptions and their crabbed interpretation by Australian courts is not working and does not give appropriate weight to the public interest in access to and dissemination of copyright material. We need to stop repeating an approach that has demonstrably not worked. Moreover, any solution must not only address the weaknesses in legislation, but also give us the best chance of changing the Australian courts' interpretative approach and tackling the practical difficulties and the institutional barriers to use of exceptions. Any proposal should also avoid introducing excessive uncertainty. While any reform will lead to a measure of uncertainty in the short to medium term, we should avoid a situation where courts have nothing at all to guide the application of the new law.

We believe that at a very general level, one way to signal a shift in approach is to conceptualise exceptions as users' rights which promote important rights and public interests and

¹⁵ The Berne Convention itself does not have any preamble explaining expected priorities or operation of the copyright system. However, the preamble to the WIPO Copyright Treaty recognises that copyright law must 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*.' Note too the Agreed Statement to Art 10 of the Treaty, which rejects a limited role for exceptions in the digital environment, stating that the parties may 'carry forward and appropriate extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention' and may 'devise new exceptions'. The TRIPS Agreement preamble, like the WIPO Copyright Treaty preamble, reflects the recognition of broader interests, including the 'underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives'. In short, there is no obligation, at an international level, to place authors' rights above public policies in the copyright system, and indeed the indications from existing international instruments suggest that the interests of users are of equal weight. It is interesting to note too that in the Universal Declaration of Human Rights, the 'the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' sits alongside the 'right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits' in Art 27.

¹⁶ Burrell and Coleman, above n 11, 188-9.

which sit beside authors' and producers' exclusive rights as an equally important part of the copyright system.¹⁷

As regards the broad legislative approach that should be adopted we outline three possibilities:

1. Maintaining the current framework of having a lengthy list of exceptions for specific conduct, but re-writing the current exceptions from scratch to address the problems raised in Part 2. This would involve broadening the language of existing exceptions, plus adding exceptions to address newly-identified issues.
2. Creating a home-grown, 'Australian' flexible exception. This could take a number of forms, and we consider three possibilities: first, adopting an open-ended 'fair dealing' defence; second, expanding s 200AB to make it available to all users; and third, using the moral rights 'reasonableness' provisions (contained in ss 195AR and 195AS of the *Copyright Act*) as a template, operating over and above the existing exceptions.
3. Adopting a fair use defence closely modelled on that contained in the US *Copyright Act 1976*, accompanied by a strong signal to the courts (most likely in the explanatory memorandum) indicating Parliament's intention that Australian courts refer to US case law when interpreting the new provision. This option would also involve removing swathes of current exceptions provisions on the basis that the situations envisaged in those provisions can be dealt with as fair use and that guidance as to the application of the law can be gleaned from the US case law.

The merits of these three approaches are discussed in Part 3. In summary, however, we do not think that Option 1 is feasible. Option 1 has been tried and found wanting. As between Options 2

¹⁷ See generally *ibid* 279-82. We do not, however, argue that all exceptions fall into this category. Some provisions are designed to adjust general copyright law to the particular nature of certain copyright subject matter, such as the provisions of Part III Div 4A relating to computer programs which adjust copyright to the different nature of software and ensure that copyright owners do not abuse their monopoly where general principles of copyright might allow such abuse. Other provisions are best seen as part of a general regime for regulation of the broadcasting industry, and are intertwined with other related laws such as the *Broadcasting Services Act 1992* (Cth) (see, eg, ss 107, 109 and 110C of the *Copyright Act*). The provisions of Part III Div 8 are concerned with demarcating the boundary between the copyright and designs regimes. The many provisions relating to parallel importation may be seen as being concerned with the scope of the importation right in copyright (ss 44A, 44D, 44E, 44F, 112A, 112D and 112DA) and other intellectual property regimes (ss 44C and 112C). Complex and incoherent as the parallel importation provisions are, and much as we would like to see their reform, we leave them to one side in this submission as being tied up with economic policy (as reflected in Productivity Commission research into the issues) and broader political battles (as witnessed in recent debates over the book industry).

and 3, both ideas have strengths and weaknesses, but on balance we recommend the adoption of the third approach.

Finally, we point out that law reform will be insufficient to effect significant change without adjustments at the level of culture and practice, particularly in public institutions. Based on empirical research conducted by Dr Emily Hudson in public sector institutions across the US, Canada and Australia, we would suggest that the adoption of a fair use defence will need to be accompanied by legal and practical initiatives to enable users both to take advantage of the exception and, where necessary, litigate to clarify the scope of the exception. Such initiatives could include limiting remedies in cases where a party believes on reasonable grounds that a use fell within a flexible exception; hiring legally trained and experienced staff in larger user institutions to manage copyright issues and disputes, and the formation of joint specialist copyright units to assist in creating guidelines for discrete sectors (for example, with shared staff across the library sector).

Part 2: Problems with the current provisions

2.1 Setting the scene

Our aim in Part 2 of this submission is to demonstrate why we believe the current approach to copyright exceptions in Australia is unsustainable. In a sentence, this is because in their current form the exceptions are much too inflexible. In part the problem stems from technological redundancy – that exceptions have generally been drafted with particular technologies for reproducing and disseminating works in mind. As technology changes they can easily become redundant, even within a short timeframe: for instance, we now find that provisions that were introduced into the Act in late 2006 are no longer fit for purpose. However, the problem goes much further than this. Indeed, we would argue that the problem of technological redundancy is merely symptomatic of a more general problem with the way the exceptions are drafted. Whereas the rights of copyright owners are set out using broad and open-ended language, the exceptions are characterised by a highly restrictive style of drafting. As Justice Laddie memorably described the similar approach adopted in the UK:

It is as if every tiny exception to the grasp of the copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls. This approach also assumes that Parliament can foresee, and therefore legislate for, all possible circumstances in which allowing copyright to be enforced would be unjustified.¹⁸

In the course of our analysis we will provide numerous examples of exceptions that have a much more limited sphere of operation than was intended (including examples of exceptions that are, in practice, virtually useless). These problems can be presented as stemming from drafting mishaps, but we are of the view that such ‘mishaps’ are inevitable so long as we approach the exceptions as if they are only to be made available in the most carefully defined circumstances.

Providing a more workable system will therefore inevitably require a shift towards a looser, more open-ended style of drafting. In Part 3 of this submission we present various options as to how this shift might be achieved. We canvass, but do not support, the possibility of

¹⁸ Hugh Laddie, ‘Copyright: Over-Strength, Over-Regulated, Over-Rated?’ [1996] *European Intellectual Property Review* 253, 258.

persevering with something like the current approach. In other words, we accept that one possible response to the problem of inflexibility would be for the Act to continue to provide a very large number of specific exceptions, but to draft these exceptions using looser and more open textured language. Should the Government decide to pursue this option it should do so having a clear understanding of the scale of the task – careful attention would have to be given to the redrafting of the vast majority of the existing exceptions. In order to demonstrate this point we have included in the case studies set out below an analysis of a number of provisions that are only rarely discussed, our aim being to demonstrate that problems with the existing exceptions extend well beyond those provisions that are most frequently litigated and debated.

In the course of our analysis we also set out to challenge the claim that that the principal advantage of the current approach is that it provides certainty to users. We demonstrate that significant uncertainty often surrounds the question of whether an exception might apply. The failure of the current provisions to create certainty is again partly a result of poor drafting, but it also stems from the fact that the availability of an exception will sometimes depend on the application of tests whose results may be hard to predict. For example, while the question of whether a particular type of use can fall within the fair dealing provisions is *relatively* predictable, the question of whether any given act will fall under the aegis of one of the fair dealing exceptions will still ultimately depend upon the way in which a court chooses to apply the inherently unpredictable test of ‘fairness’.

The final point that we would make by way of setting the scene for our substantive analysis goes to the ‘realism’ of the problems we identify. We believe that our analysis ought to be sufficient to convince any truly objective reader of the need for reform. Sadly, however, in the field of copyright policy objective readers appear to be few and far between. Some copyright owner interests seem determined to resist all reform of the exceptions and adopt the kneejerk response that any liberalisation would be unwelcome, without ever engaging with the problems of the existing provisions. For some owner interests it appears that reform is to be resisted even in cases where there is no prospect of them being able to generate a significant revenue flow and in cases where copyright protection unquestionably has the potential to produce socially undesirable consequences. In the latter type of case in particular industry representatives are often quick to dismiss hypothetical situations in which copyright would conflict with other important rights and interests. For example, it is often said that an owner would never sue in

these cases because of the political backlash that such an action would cause. However, advocates of strong rights might do well to reconsider whether even theoretical liability in such cases provides outright opponents of the copyright system with an important propaganda tool.

2.2 The fair dealing provisions

The most open-ended of the existing exceptions are the fair dealing provisions found in ss 40-42, 43(2) and 103A-103C of the 1968 Act. One immediate thing to note about these provisions is that it makes little sense for there to be a statutory list of factors that must be taken into account in assessing whether the defendant's dealing is 'fair' only where the dealing is for the purpose of research or study (see ss 40(2) and 103C(2)).¹⁹ In addition, Australian fair dealing case law provides remarkably little useful guidance as to how the 'fairness' of a dealing for the purposes of criticism, review, news reporting, etc is to be determined. Although there is a body of English case law on the issue, the attempted distillation in *The Panel* of a set of 'principles' by which the fairness of a dealing is to be assessed²⁰ was highly problematic.²¹ As a consequence, users and their legal representatives are forced to look to old English precedents to try to determine what factors a court would be likely to look to when deciding whether a use would be fair. This is unsatisfactory and any overhaul of the existing fair dealing provisions would have to be accompanied by the introduction of statutory lists of fair dealing factors for all of the existing fair dealing defences.

(a) Problems specific to ss 40 and 103C: fair dealing for the purpose of research or study

Our concern with these exceptions relates not so much to the complexity of their drafting²² but rather to the more fundamental issue of how the Federal Court has interpreted 'research' and 'study' and how the relationship between these exceptions and the Parts VA and VB statutory licensing schemes has been structured.

¹⁹ A problem that has long been recognised: see, eg, CLRC Simplification Report Part 1, above n 1, [6.36].

²⁰ *TCN Channel Nine v Network Ten* (2001) 108 FCR 235, 285 [66]; adopted on appeal *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417, 438-9 [98] (Hely J).

²¹ Michael Handler and David Rolph, "'A Real Pea Souper": *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27 *Melbourne University Law Review* 381, 396-8, 402-8.

²² Although we have concerns about the imprecise relationship between s 40(1) and (1A), discussed below.

As enacted, the defence covered ‘research or private study’. In 1976 the Franki Committee recommended the deletion of the word ‘private’, so that the defence would be broad enough to cover fair dealings for ‘classroom instruction’ and for ‘educational purposes’.²³ This strongly suggests that it was thought that the amended defence would allow for teachers to copy material for the benefit of their students’ research or study. However, the Committee separately recommended a statutory licensing scheme for the multiple copying of works by educational institutions and in doing so failed to explain the relationship between this scheme and the amended fair dealing defence. The scope of the defence became more uncertain following *Haines v Copyright Agency Ltd*,²⁴ the outcome of which was to prevent a government agency from notifying schools as to how the fair dealing defence could be relied on as an alternative to the then-new statutory licensing scheme. The Full Federal Court considered that the Act required that ‘a distinction be recognised between an institution making copies for teaching purposes and the activities of individuals concerned with research or study’ without explaining the nature of the overlap, if any, between the two.²⁵ More significantly, in *De Garis v Neville Jeffress Pidler Pty Ltd* it was held that the fair dealing defence applies only where the research or study is being conducted by the person engaged in the act of reproduction, copying, etc.²⁶ This decision has a number of consequences. In the educational context, it means that a teacher can never rely on the defence if her dealing is done for the purpose of her students’ research or study²⁷ (thus further expanding the role of the statutory licensing scheme). More broadly, it means that:

- an intermediary such as a librarian or copying service cannot rely on the defence if it is fairly dealing with a work, copying an audio-visual item, etc on behalf of another party who is engaged in the act of research or study; and

²³ Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (‘Franki Report’) [2.64].

²⁴ (1982) 64 FLR 184.

²⁵ Ibid 191 (Fox J). See also the comments at 191 as to how an assessment of the ‘fairness’ of the dealing would need to take into account the existence and effect of the statutory licensing schemes.

²⁶ (1990) 37 FCR 99, 105-6.

²⁷ Arguably, this would be qualified by s 40(1A), which provides that ‘A fair dealing with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external student of an educational institution’. The reference to ‘associated with’ might mean the defence is broad enough to cover copying by a member of the educational institution for the benefit of an enrolled external student’s research or study. This strikes us a perverse outcome, when s 40(1A) was intended, at most, to put external students on the same footing as other students: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1989, 2226 (N Brown).

- a party other than the researcher (such as a publisher or conference organiser) cannot publish the product of the research (such as a book or research paper) that reproduces more than a substantial part of copyright material in reliance on the defence.²⁸

The distinction drawn in *De Garis* between acts by the researcher and the acts of a facilitator was based on the Court's reliance on English cases on the narrower notion of 'private study'.²⁹ It is not required by the Act, and is unnecessarily restrictive. It is entirely artificial to privilege acts of reproduction or copying that can be done by a researcher themselves over acts that require the involvement of a third party, such as an intermediary to assist with the copying or a publisher to disseminate the research output. It is also a distinction that has not found favour in the Supreme Court of Canada. In *CCH Canadian Ltd v Law Society of Upper Canada* the Court held that "[r]esearch" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained',³⁰ and found that a library making copies on behalf of researchers was entitled to take advantage of the equivalent fair dealing defence. More recently, in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, a majority of the Court held that the photocopying of short extracts by teachers to distribute to students as part of class instruction constituted fair dealing for the purpose of research or private study. It held:

Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of "instruction"; they are there to facilitate the students' research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.³¹

²⁸ See further Burrell and Coleman, above n 11, 117-8.

²⁹ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601; *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545.

³⁰ [2004] 1 SCR 339, [51].

³¹ 2012 SCC 37 (12 July 2012), [21] (McLachlin CJ, LeBel, Abella, Moldaver and Karakatsanis JJ).

As an aside, we recognise that if the Canadian approach were taken in Australia this would impact on the operation of the statutory licensing schemes under Parts VA and VB. Rather than seeing this as a justification for the ongoing, and artificial, limitation of the scope of the fair dealing defence, we would suggest that it is the operation of the statutory licensing schemes that needs to be scrutinised. Indeed, it is not apparent to us why educational institutions should not be able to negotiate voluntary licences with copyright owners, with the starting point of these negotiations being that educational institutions have the ability to take advantage of a strong ‘fairness’ defence that can cover their use of copyright material for educational purposes.

A separate problem with *De Garis* relates to the narrowness of the definition of ‘research’. The Court considered that the term should have its dictionary definition of ‘diligent and systematic enquiry or investigation into a subject in order to discover facts or principles’.³² This definition seems apt to describe scholarly research. However, it does not comport with a less formal, but no less valid, view of ‘research’ that extends to the undertaking of inquiries to satisfy personal curiosity, without the need for some new discovery or insight to be made as a result. The narrowness of the Australian interpretation³³ can be again contrasted with the much broader approach taken in Canada. In its recent decision in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*³⁴ the Supreme Court of Canada held that providers of online music retail services that offered 30 to 90 second previews of sound recordings could take advantage of the fair dealing defence given that consumers would be playing the previews for their ‘research’ before deciding whether or not to purchase the full recording. It noted that research:

can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest. It is true that research can be for the purpose of reaching new conclusions, but this should be seen as only one, not the primary component of the definitional framework.³⁵

³² (1990) 37 FCR 99, 105.

³³ There is also ongoing uncertainty as to whether the Australian defence would apply to commercial research: see CLRC Simplification Report Part 1, above n 1, [4.18].

³⁴ 2012 SCC 36 (12 July 2012).

³⁵ *Ibid* [22].

(b) Problems specific to ss 41 and 103A: fair dealing for the purposes of criticism or review

The problems with these provisions only become apparent if one pays careful attention to the wording of the relevant sections. It is therefore worth setting out these provisions in full. Section 41 provides:

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made.

Section 103A provides:

A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of criticism or review, whether of the first-mentioned audio-visual item, another audio-visual item or a work, and a sufficient acknowledgement of the first-mentioned audio-visual item is made.

The wording of these provisions unjustifiably limits the applicability of the exception. The most significant problem lies in the requirement that the criticism or review be ‘of that work or of another work’ (s 41) or of ‘the first-mentioned audio-visual item, another audio-visual item or a work’ (s 103A). A casual reading of these sections may suggest that this language is innocuous, but in fact it creates a significant and unnecessary limitation on the availability of the criticism and review exceptions.

By providing that the user can copy from ‘that work or another work’ s 41 makes it clear that the work copied need not be the work criticised. It is therefore permissible to quote from other works on the same topic in the course of reviewing a work, and much the same can be said of the effect of the equivalent language employed in s 103A. The UK legislation has long contained a similar restriction and cases from that jurisdiction suggest that the requirement that the criticism or review be *of a work* does not limit the availability of the exception to criticism or review aimed at the surface of the work, that is, to the way the work is written, filmed, etc. Rather, the cases indicate that criticism aimed at underlying thoughts, ideas, principles,

philosophy or theology may still fall within the scope of the exception.³⁶ Moreover, provided the defendant can show that there has been a criticism or review of the work, the fact that the criticism or review is only intended as a springboard to facilitate some other criticism will not prevent the exception from applying. Thus in *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation plc*³⁷ it was held that taking substantial extracts from the plaintiff's film was a fair dealing for the purposes of criticism and review, even though the main thrust of the defendant's TV program was criticism of the decision to withdraw the film from circulation. In the course of the program there was a review of the film that focused, in particular, on the level of violence in the film. The English cases also suggest that the requirement that the criticism or review be *of a work* does not mean that the defendant is placed under an obligation to review the whole of a work in such a way as to 'do the work justice'. A reviewer is therefore permitted to focus on those aspects of a work that she finds particularly laudable or objectionable. Criticism of a single aspect of a work is therefore capable of constituting fair dealing.³⁸

Thus, in the UK at least, the requirement that the criticism or review be *of a work* has not had all of the consequences that might have been attributed to this wording and the Australian cases that touch on this issue give us reason to believe that a similar approach would be adopted here.³⁹ Nevertheless, despite the judiciary's efforts to read these words expansively there are a number of uses that are almost certainly excluded by these words:

- First, it is not possible to rely on the criticism and review provisions to reproduce an extract from a book in the course of reviewing a film. For example, a newspaper or blogger could not set out a passage from Tolkien's *The Hobbit* in the course of a review of the Peter Jackson film. The extract would be taken from a literary work and, as such, s 41 would be the operative provision (s 103A only applying where there is a dealing with an audio-visual item). Section 41 only applies where the criticism or review is *of that work or of another work*, and 'work' is defined in s 10(1) to mean 'a literary, dramatic, musical or artistic work', with 'dramatic work' defined so that it specifically

³⁶ This point was established by *Hubbard v Vosper* [1972] 2 QB 84, 94 and now seems to be universally accepted.

³⁷ [1994] EMLR 1. The case concerned Stanley Kubrick's *A Clockwork Orange*, which had been withdrawn from circulation in the UK at Kubrick's request.

³⁸ *Ibid.*

³⁹ See *TCN Channel Nine v Network Ten* (2001) 108 FCR 235, 285 [66] (adopting the idea at the level of principle). But see Handler and Rolph, above n 21, 408-13 (suggesting that in applying the defence the judge at first instance and the Full Court interpreted the exception far more narrowly).

does *not* include a ‘cinematograph film’.⁴⁰ We regard this outcome as clearly preposterous and it is notable that even other countries such as the UK and New Zealand that adopt a broadly similar approach to the exceptions manage to avoid this problem because of the different way in which their fair dealing provisions are drafted.⁴¹

- Secondly, it is not possible to rely on the criticism and review provisions to reproduce an extract from a play in the course of reviewing a performance of a play. Again because the review would be aimed at something other than a ‘work’ s 41 could have no application. It is notable that this problem was recognised in the UK, where the wording of the exception was amended so that the criticism or review may be of ‘that or another work or ... a performance of a work’.⁴²

The above two problems with s 41 are the result of a drafting error that can be traced directly to the way in which the relevant provision of the *Copyright Act 1956* (UK) was enacted.⁴³

- Thirdly, it is not possible to rely on the criticism and review provisions to criticise the actions of individuals, including public figures. The UK case of *Ashdown v Telegraph Group Ltd* illustrates some of the potential problems.⁴⁴ One of the questions that arose in that case was whether the defendants’ copying of portions of a confidential minute of a meeting between Tony Blair and Paddy Ashdown⁴⁵ was a fair dealing for the purpose of criticism or review. The accompanying article argued that the public and Labour MPs had been misled about Blair and Ashdown’s intention to form a coalition government. In rejecting the argument that this brought the use within the criticism and review exception, Sir Andrew Morritt VC said at first instance:

what is required is that the copying shall take place as part of and for the purpose of criticising and reviewing the work. The work is the minute. But the articles are not criticising or reviewing the minute: they are criticising or reviewing the actions of the Prime Minister and the claimant in October 1997. It was not necessary for that purpose to copy the minute at all. In my judgment the articles do not come

⁴⁰ A film is only ever treated as a ‘work’ under the Act for moral rights purposes: see s 189.

⁴¹ This is because all types of copyright subject matter are considered to be ‘works’: see *Copyright, Designs and Patents Act 1988* (UK), s 1(1); *Copyright Act 1994* (NZ), s 14(1).

⁴² *Copyright, Designs and Patents Act 1988* (UK), s 30(1).

⁴³ See *Copyright Act 1956* (UK), s 6(2).

⁴⁴ [2001] Ch 685; aff’d [2002] Ch 149.

⁴⁵ Then leader of the Liberal Democrats, the third largest party in Parliament.

within section 30(1) because the purpose of copying the work was not its criticism or review.⁴⁶

It is therefore clear that the requirement that the criticism or review be *of a work* or of *an audio-visual item* imposes unjustifiable restrictions on the ability of users to cite works in support of an argument, analysis or review. Moreover, it must be borne in mind that we have been concerned thus far only with the problems that are unique to ss 41 and 103A. These problems must be viewed alongside a further set of problems that are shared by the criticism and review and the news reporting exceptions. These are considered in (d) below.

(c) Problems specific to ss 42 and 103B: fair dealing for the purpose of reporting news

Unlike its UK equivalent, the Australian provision is not confined to the reporting of ‘current events,’ but rather applies to news more generally. It therefore seems that the defence can apply to the reporting of newsworthy matters of history.⁴⁷ It has also been indicated that the notion of ‘news’ is itself to be interpreted fairly broadly. For example, it was said that the reporting of New Year’s Eve celebrations was at least arguably ‘newsworthy’,⁴⁸ and the mere fact that news was being reported in a humorous way would not prevent the exception from applying.⁴⁹ It is important to emphasise, however, that it is not any news-related use that gains the benefit of the exception – the exception only applies in cases where the use is for the purpose of or associated with the *reporting* of news. The problem is that ‘reporting’ may well not extend to include commentary on events that are well known or the expression of opinion. If this is the position then a range of news-related media activities, including some types of newspaper opinion piece and humorous topical news programmes, will not fall within the scope of the exception – these activities are unlikely to be for the purpose of news reporting, and it might be difficult to categorise such activities as being associated with the act of *reporting* the news.⁵⁰ Although this

⁴⁶ [2001] Ch 685, 697-8. This reasoning was endorsed on appeal: [2002] Ch 149, 171.

⁴⁷ *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 56; *Wigginton v Brisbane TV Ltd* (1992) 25 IPR 58, 62; *TCN Channel Nine v Network Ten* (2002) 108 FCR 235, 285 [66].

⁴⁸ *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 333.

⁴⁹ *Ibid*; *TCN Channel Nine v Network Ten* (2002) 108 FCR 235, 285 [66]. But see Handler and Rolph, above n 21, 414-7 on the narrow understandings of ‘news’ exhibited by the judge at first instance and the Full Court in applying the defence.

⁵⁰ The extension of the Australian defence to cover dealings ‘associated with’ the reporting of news more comfortably covers the activities of parties that reproduce or copy material for supply to third party publishers or ‘reporters’ of the news: see, eg, *Telstra Corporation Pty Ltd v Premier Media Group Pty Ltd* (2007) 72 IPR 89.

point has not been fully developed in Australia,⁵¹ the cases do show a marked reluctance to apply the defence in cases where the defendant's use is not immediately recognisable as being for the purpose of or associated with news 'reporting'. It is noticeable, for example, that in *The Panel* case only two of seven extracts were held to fall within the exception.⁵² Although the reasoning in this case is often difficult to follow, one possible explanation for this outcome is that the judges were reluctant to treat general discussion of newsworthy topics as falling within an exception that allows for news *reporting*.

(d) Problems common to the criticism and review and the news reporting defences

In addition to the problems with these exceptions outlined in (b) and (c) above, these provisions suffer from two further defects that they share in common.

The first of these defects lies in the way the test of fairness has been applied to unpublished works. UK case law indicates that any use that results in the publication of a substantial part of a previously unpublished work will not be 'fair'.⁵³ There is some authority to suggest that even if a work has not been published to the world at large it may have been circulated to a sufficiently wide audience that it becomes fair to publish sections of it. For example, it has been said that it might be enough that a work has been widely distributed within a religious community or has been sent to all of the shareholders of a public company.⁵⁴ However, in the UK it has been reiterated that such examples do not replace the general rule that it will not be fair for the purpose of reporting current events to publish extracts from a previously unpublished work.⁵⁵ Justice Mason's decision in *Commonwealth v John Fairfax & Sons Ltd* leaves open the question of whether a more relaxed approach should be taken to unpublished 'government documents', but it should be remembered that this case does not provide any positive support for the existence of such a rule and seems to confirm the general applicability of the UK rule.⁵⁶ This exclusion of unpublished works might be thought to be necessary in order to protect authors from having extracts of their works placed into the public domain before the work has been completed, such premature disclosure representing a serious threat to the creative

⁵¹ Cf. *Copyright Licensing Ltd v University of Auckland* (2002) 53 IPR 618, 626; *Media Works NZ Ltd v Sky Television Network Ltd* (2007) 74 IPR 205, 217-8.

⁵² Handler and Rolph, above n 21, 421-2.

⁵³ *British Oxygen Co Ltd v Liquid Air Ltd* [1925] 1 Ch 383; *Hyde Park Residence Ltd v Yelland* [2001] Ch 143.

⁵⁴ *Hubbard v Vosper* [1972] 2 QB 84, 94-5.

⁵⁵ *Hyde Park Residence Ltd v Yelland* [2001] Ch 143, 158-9.

⁵⁶ (1980) 147 CLR 39, 55.

process.⁵⁷ However, it is important to bear in mind that the exclusion is not confined to ‘unfinished’ works, but rather applies to all unpublished works, irrespective of how important the content of work is for public debate.

The second defect lies in the inflexibility of the requirement that certain types of use be accompanied by a ‘sufficient acknowledgement’.⁵⁸ A requirement that the user acknowledge the source of material will ordinarily be unobjectionable. It is a matter of some concern, however, that the absence of a sufficient acknowledgement can automatically prevent an exception applying irrespective of whether the defendant acted in good faith and in accordance with ordinary industry practices, although it is arguable that the requirement is designed to overcome any doubts as to the possibility of non-compliance with Arts 10(3) and 10bis(1) of the Berne Convention.⁵⁹ Particular problems are likely to arise in relation to ‘audio-visual items’ because although the Act imposes a sufficient acknowledgement requirement in relation to the use of such subject matter, the definition of ‘sufficient acknowledgement’ in s 10(1) only applies to ‘works’. This is manifestly unsatisfactory and creates real uncertainty as to the form any acknowledgement should take. In *The Panel* at first instance the Court interpreted the requirement liberally in considering dealings with television broadcasts, finding that the use of the broadcaster’s watermarked logo on the rebroadcast footage was sufficient.⁶⁰ This was a somewhat surprising outcome given that for works the s 10(1) definition requires the identification of both the title and the author. More difficult, however, is a television review of a film that incorporates clips or stills from that film.⁶¹ A reviewer might be forgiven for believing that providing the title of the film and the name of the film production company would be sufficient: although the Explanatory Memorandum to the Bill that introduced s 103A into the Act

⁵⁷ See William Fisher, ‘Reconstructing the Fair Use Doctrine’ (1988) 101 Harvard Law Review 1659, 1773-4.

⁵⁸ See ss 41, 42(1)(a), 103A and 103B(1)(a).

⁵⁹ Art 10(3) provides that where use of a work is made in accordance with Art 10(1) (quotations) or 10(2) (illustrations for teaching), then ‘mention shall be made of the source, and of the name of the author if it appears thereon’. Similarly, Art 10bis(1) provides that Members may permit the free dissemination of newspaper articles or newsworthy material, provided that ‘the source must always be clearly indicated’. It is, however, arguable that the Australian ‘criticism and review’ and ‘news reporting’ exceptions are separately justified by Art 9(2), as extended by Art 13 of the TRIPS Agreement, which do not require sufficient acknowledgement. The fact that Anglo-Australian legislatures have sought to impose strong ‘sufficient acknowledgement’ requirements, going further than the text of Arts 10(3) and 10bis(1), but at the same time without providing a generally-worded, robust ‘quotation’ exception as contemplated by Art 10(1), or a generally-worded, robust ‘illustration for teaching’ exception, as allowed by Art 10(2), is a further illustration of the begrudging approach to exceptions in these jurisdictions, noted by Laddie, above n 18.

⁶⁰ *TCN Channel Nine v Network Ten* (2001) 108 FCR 235, 279 [54], 292 [72(ii)].

⁶¹ The issue was not canvassed in *The Panel*, as the action for infringement was only brought in respect of the television broadcasts, not the underlying cinematograph films.

affords no guidance as to how the ‘sufficient acknowledgement’ requirement was meant to operate, it can be argued that it was intended to recognise the requirement in the Berne Convention that owners of copyright in films be afforded the same rights as those afforded to authors of works.⁶² The reviewer’s actions may or may not, however, be sufficient, given that the ‘owner’ of the film is likely to be its ‘maker’,⁶³ which is defined to be ‘the person by whom the arrangements necessary for the making of the film were undertaken’. This is an obscure definition that is likely to cover the production company but, following the Federal Court’s decision in *Seven Network (Operations) Ltd v TCN Channel Nine Pty Ltd*, might also include others who make creative or other contributions to the film-making process.⁶⁴ Given that the law on film copyright ownership is so unclear, and given the absence of legislative guidance as to what constitutes a ‘sufficient acknowledgement’ in relation to a dealing with a film, the operation of the s 103A and 103C defences is made highly uncertain in this context.⁶⁵

(e) Problems specific to ss 41A and 103AA: fair dealing for the purpose of parody or satire

We are strongly supportive of the existence of an exception that permits the use of copyright material for these purposes, but there is perhaps something problematic about a defence limited to the practices of ‘parody’ and ‘satire’. Both of these concepts are capable of being defined narrowly, in accordance with their literary origins,⁶⁶ and cases like *De Garis* and *The Panel* suggest that the Courts may reach for the *Macquarie Dictionary* when interpreting such concepts. This runs the risk of the provisions not exempting the full range of contemporary cultural practices that might be thought of as ‘parodies’ or as being ‘satirical’, broadly

⁶² Berne Convention, Art 14bis(1).

⁶³ *Copyright Act 1968* (Cth), s 98(2).

⁶⁴ *Seven Network (Operations) Ltd v TCN Channel Nine Pty Ltd* (2005) 65 IPR 29, 41-2 [59] (finding that the organiser of an expedition to be filmed by the Seven Network, who had also paid for some of the expenses of Seven’s camera operator and sound engineer, and made occasional suggestions about what should be filmed, was a joint ‘maker’ of the resulting film of the expedition. This finding was not challenged by Seven on appeal in *Seven Network (Operations) Ltd v TCN Channel Nine Pty Ltd* (2005) 146 FCR 183. It was supported by Lindgren J (at 186-8 [10]-[19]) but thought by Finkelstein J to be ‘probably incorrect’ (at 200 [89])).

⁶⁵ A further complication is that for moral rights purposes, the ‘authors’ of the film are the director, human producer and screenwriter of the film (see *Copyright Act 1968* (Cth), ss 189 (definitions of ‘author’ and ‘maker’) and 190), all of whom have a right to be identified when a substantial part of the film is dealt with (see ss 193 and 194(3)). The tension between the operation of this moral right and the ‘sufficient acknowledgement’ requirement in ss 103A and 103B is one of the many problems resulting from the way that films are classified under Australian law: see generally Michael Handler, ‘Continuing Problems with Film Copyright’ in Fiona Macmillan (ed), *New Directions in Copyright Law: Volume 6* (Edward Elgar, 2007).

⁶⁶ See generally Conal Condren et al, ‘Defining Parody and Satire: Australian Copyright Law and Its New Exception: Part 1 (2008) 13 *Media & Arts Law Review* 273.

understood. Thought therefore needs to be given to whether related practices such as ‘pastiche’ or ‘caricature’ ought to be explicitly recognised,⁶⁷ or whether broader, more general wording is needed.

Still more seriously, however, there is a good case that the existing exceptions do not apply to downstream users of parodic or satirical material. For example, s 41A might allow a user to create a parody of a musical work. It is far from clear, however, that s 41A would provide any warrant for a broadcaster to include such a parody in a television or radio program. This is because s 41A only applies where the dealing is ‘for the purpose of parody or satire’. There would be a strong argument that broadcaster would not be using the underlying work for the purpose of parody or satire – the broadcaster’s purpose is merely to communicate the new derivative work to the public. There is therefore a very real danger that if the owner of the underlying work elected to pursue the broadcaster rather than the parodist s 41A would not apply. Identical issues arise in relation to s 103AA. The conclusion that the parody exceptions do not apply to downstream uses would make a mockery of these provisions and it might be objected that a court could avoid this result by somehow deeming that downstream uses are themselves for the ‘purpose’ of parody or satire. However, this would require the court to adopt an expansive construction of the provisions, something that Australian courts have demonstrated a marked reluctance to do when dealing with the exceptions. Moreover, in the absence of a judicial determination of this issue, informed users are likely to be very reluctant to rely on the parody exceptions such that the cultural dissemination of culturally valuable derivative works is likely to be impeded.

(f) Problems with s 43(2) and 104: use of works/other subject matter and professional advice
Amendments to the Act introduced in 1980 provided new defences covering the use of copyright material in association with the provision of professional advice by a legal practitioner or a patent attorney (with further amendments in 1998 extending this to trade marks attorneys). Bizarrely, the defences operate very differently depending on whether the copyright material in question is a work or is subject matter other than a work. For works, the defence in s 43(2) reads: ‘A fair dealing with a literary, dramatic, musical or artistic work does not constitute an

⁶⁷ Cf. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, Art 5(3)(b) (‘InfoSoc Directive’).

infringement of the copyright in the work if it is for the purpose of the giving of professional advice' by a legal practitioner, etc. That is, the professional's use is subject to the overarching requirement of 'fairness', which might limit how much of the work can be used, amongst other things. For sound recordings, films, broadcasts and published editions of works, however, s 104(c) provides that copyright is not infringed 'by *anything* done ... for the purpose of, or in the course of, the giving of professional advice' by the legal practitioner, etc. That is, there is no requirement that the dealing be fair, and the use can be 'in the course' of the giving of the professional advice even if the use is not for that purpose. This gives rise to the potential for anomalous outcomes in cases where the copyright material being dealt with contains both works and non-works (for example, a film that includes a pre-existing sound recording of a musical and literary work). In addition, s 104(b) provides that copyright in subject matter other than works is not infringed 'by anything done ... for the purpose of *seeking* professional advice' from a legal practitioner, etc. The lack of an equivalent defence for works leads to the possibility that a person's dealing with material containing both works and non-works for the purpose of seeking professional advice might infringe under Part III of the Act but not Part IV.

The fact that what should be a straightforward and uncontroversial defence has been implemented in such an incoherent manner should give us serious pause for thought about the ability of the legislature to adequately draft provisions that exempt specific practices from infringement. And this is before we have even started to consider the problems involved in drafting defences to deal with technological issues, the issue to which we next turn.

4.3 Technological exceptions

(a) Temporary copies (ss 43A, 111A and ss 43B and 111B)

Australian copyright law contains a number of 'temporary copy' exceptions. These recognise that most uses of copyright material in digital form involve the making of temporary reproductions or copies, even where analogous uses in the analogue environment would not – thus reading an ebook may involve the making of temporary copies into computer memory and thus implicate copyright while reading a physical book will not.

These exceptions contain unnecessarily restrictive limitations, out of step with approaches to the same issue taken internationally⁶⁸ and to some extent defeating the stated purposes of the exceptions or copyright policy embodied elsewhere in the Act. For example, although ss 43A and 111A were originally envisaged to cover ‘certain caching’⁶⁹ the limitation to non-infringing communications (ss 43A(2), 111A(2)) makes these exceptions unworkable for any caching of any significance. Any entity that sets up their system to cache all (or all popular) communications is likely, at some point, to capture copies from both infringing and non-infringing communications without any knowledge on their part.

Another example is contained in ss 43B and 111B. These exceptions provide that while, in general, temporary copies generated through the mere technical process of using a copy of a work will not infringe, this does not apply where the copy ‘is made in another country and would be an infringing copy of the work if the person who made the copy had done so in Australia’ (ss 43B(2)(a)(ii) and 111B(2)(a)(ii)). The intention of this limitation was that the exception should not apply to ‘temporary reproductions ... made from infringing copies of works outside Australia that are accessed online by a person in Australia’.⁷⁰ It would, however, also have the effect of excluding use of parallel-imported films where the person with permission to make the reproduction overseas has no similar rights in Australia (that is, the exception does not apply to films) and may have a similar impact for other parallel-imported material,⁷¹ making that consumer – who bought copyright-owner-approved material – an infringer. This makes no sense. It may also conflict with policies embodied elsewhere in the Act, such as the policy in favour of

⁶⁸ See, eg, InfoSoc Directive, Art 5(1), which creates an exception for ‘[t]emporary acts of reproduction ... which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance’. Unlike ss 43A and 43B, there is no restriction here that any communication should be non-infringing, and presumably a ‘lawful use’ would include an act such as viewing content (which is not, apart from any technological copies made, an infringing act). See also s 31.1 of the Canadian *Copyright Act* (RSC 1985, c C-42), which provides an exception for caching that has no similar restriction (and no requirement, as seen in Part V Div 2AA of the Australian Act, for notice and takedown or similar).

⁶⁹ Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth) [63].

⁷⁰ Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [12.11]-[12.22].

⁷¹ We use ‘may’ here because it is difficult to understand the interaction between the restrictions in ss 43B(2) and 111B(2), the definition of ‘infringing copy’ in s 10(1) and the exclusions from that definition for non-infringing parallel imported material. If a sound recording, for example, were made in the US legitimately by A, but in circumstances where if A were to make it in Australia it would be infringement of copyright, then prima facie s 111B does not apply. But then the s 10(1) definition of ‘infringing copy’ seems to talk about imported material and exclude legitimately parallel imported content; the effect of all these qualifications and exclusions from exclusions and limitations is difficult to ascertain with any confidence. In relation to film, there is no exclusion for legitimately manufactured but parallel-imported material.

allowing consumers to circumvent region coding on DVDs embodied in the s 10(1) definition of ‘access control technological protection measure’ (a definition which suggests that the government does not object to people purchasing and using DVDs produced and sold for use overseas).⁷² A further effect is to convert acts that would not normally be infringement under Australian law – such as possession and use of a pirate DVD or pirate CD – into infringements. We express no view as to whether such possession and use *ought* to be infringement, but if these activities are going to be actionable this must be clearly legislated by Parliament rather than introduced by force of technology and obscure limitations to exceptions.

(b) Private copying exceptions (ss 43C, 47J, 109A, 110AA and 111)

A number of ‘personal copying’ provisions were either added to the Act or amended in late 2006, with the goal of ensuring that copyright law was ‘sensible and defensible’ and did not treat as pirates ordinary consumers undertaking ordinary, common acts.⁷³ Nevertheless, the private copying exceptions are so closely tied to particular uses of early 21st century technology that they are already becoming redundant,⁷⁴ and will fail to provide ongoing protection for consumers seeking to engage in similar practices using different technology.

First, both the kinds of copyright material and the kinds of media that may be copied are limited in ways that are increasingly anachronistic and certainly very confusing to the consumers whose rights are defined by the provisions. Section 110AA is limited to the making of a digital copy of a ‘videotape’ film, limiting it to a very particular technological window in time: it does not allow people to copy films in other old formats (such as Super 8 film), nor current formats (such as DVDs). Section 43C allows the making of copies of text or artistic works but only as ‘contained in a book, newspaper or periodical publication’ and only where there is some shift of format. This means that you can print, but not save, material in one of these kinds of publications online (but not, say, material in a blog or other personal website), or scan, but not later reprint, physical material of these kinds (although reprinting later might well have been the reason for scanning in the first place).

⁷² When a consumer plays a DVD a copy of the computer program embodied on the DVD is made in the temporary memory of the DVD player. In *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 these copies did not count as reproductions in material form because they could not be reproduced from that memory; however, this was under a previous definition of ‘material form’.

⁷³ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2006, 1 (Philip Ruddock).

⁷⁴ See, eg, Catherine Bond, “‘There’s Nothing Worse Than a Muddle in All the World’: Copyright Complexity and Law Reform in Australia” (2011) 34 *University of New South Wales Law Journal* 1145, 1158.

Secondly, sections 43C, 47J and 110AA are limited to the making of a single copy – making the exceptions largely useless in a technological world where people access content across multiple devices such as desktop computers, laptops, and portable devices. Section 109A (sound recordings) seems to allow the making of multiple copies (or rather, it is not explicitly limited in the way that, say, s 43C is limited to the making of a single copy in any given form).⁷⁵ It is not, however, clear that the drafting of s 109A in fact achieves this goal.⁷⁶

Thirdly, it is not uncommon for consumers today to use remote backup services in order securely to store digital content in off-site server locations, protecting against theft of local hard drives or damage to premises (for example fire or flood),⁷⁷ and also to ensure that files are available across multiple devices. Consumers who engage in this eminently sensible behaviour – and quite possibly the commercial providers who host such storage, if they do so in Australia⁷⁸ – infringe copyright. Not only are they likely to be backing up content not covered by one of the specific private copying provisions,⁷⁹ but none of the private copying provisions allow for such

⁷⁵ Section 109A as originally drafted was limited in a similar way to s 43C and the other private copying provisions. It was amended to respond to ‘concerns that, as originally introduced, this provision was too restrictive in several ways, including in not recognising that a person using a digital music player to listen to his or her music collection may need to make and keep more than one copy of a sound recording’ (Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [28]) – that is, that an owner of a CD wanting to listen to a recording on an mp3 player would first need to make a copy on the hard drive of a computer, from which the further copy on the mp3 player is made.

⁷⁶ Section 109A(1)(a) requires that a ‘later copy’ (to be used on a ‘device that can be used to cause sound recordings to be heard’) be made *using an earlier copy owned by the individual*. For s 109A to excuse the act of making the copy on the device, we must read s 109A so that the copy on the computer is a copy owned by the individual and thus one capable of being characterised as an ‘earlier copy’. This is not intuitive. Further, for the copy on the computer to be excused by s 109A, it must (also) be a ‘later copy’. But s 109A(1)(b) requires that the *sole* purpose of the excused ‘later copy’ must be for use with a device that can be used to cause sound recordings to be heard. The problem here is that even though it can be argued that the computer is such a device, the fact that most consumers will also have the intention to make a further copy to their mp3 players (a different device) means that the ‘sole purpose’ test will arguably not be satisfied.

⁷⁷ Remote backup services available to the consumer market include SugarSync, IDrive, CrashPlan, and Carbonite.

⁷⁸ This may follow from the recent ruling in *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 and, in particular, the ruling in that case that in providing servers and an automated software and hardware system for recording and playback of free to air television, Optus was itself ‘making copies’ of the relevant broadcasts without any exception. Whether this ruling would extend to a provider like Dropbox who is less ‘pervasively involved’ in the activity of copying (in that Dropbox would not do any act equivalent to Optus’ provision of an electronic program guide or the automatic deletion of copies) might depend on all the facts. It cannot, however, be ruled out. In *NRL v Optus* the Full Court placed emphasis on facts – such as the making of multiple copies – that would be likely to be found also in the case of a cloud storage provider. Clearly none of the private copying provisions would protect a commercial storage provider, although the online safe harbours in Part V Div 2AA would apply if extended to parties other than carriage service providers.

⁷⁹ For example, a consumer who saves a text work other than a book, newspaper or periodical publication, or who saves to their hard drive a book, newspaper or periodical publication already in electronic form (since the exception in s 43C only allows the making of a copy ‘in a form different from the form in which the work is embodied in the book, newspaper or periodical publication’ (s 43C(1)(c))).

remote copying.⁸⁰ Sections 43C, 47J and 110AA, as noted, only allow for the making of a single copy (not the multiple copies involved in remote backup). Section 109A requires that any exempted copy (the ‘later copy’ in the parlance of s 109A) must be made for the sole purpose of the owner’s private and domestic use *of that later copy* with a device that the consumer owns and is a device that can be used to cause sound recordings to be heard. It would be difficult to argue that any ‘later copy’ made on a remote server owned by a commercial company (like the company that runs Dropbox) fits those requirements.

Similarly, the time-shifting provision in s 111 was drafted on the basis that a clear distinction could be drawn between the human maker of a copy of a broadcast and the provider of hardware on which the copy would be made. This distinction has become substantially more complex in recent years, with the result that s 111, when read with s 87, is unlikely to afford protection for the makers of technology that relies on sophisticated software to make copies of broadcasts as directed by users.⁸¹

These sections are symptomatic of the failure of backwards-looking drafting that merely reacts to past practices involving particular uses of specific types of technology. Instead, what is needed is the identification of the sort of private conduct that should be exempted from liability and drafting that can provide ongoing protection, notwithstanding changes in technology.

(c) Reproduction of computer programs to make interoperable products (s 47D)

As the IPCRC and CLRC have pointed out, interoperability is important to competition in the software industry, and a goal that has been promoted by policymakers here in Australia and overseas.⁸² Acts necessary to create interoperable software that would otherwise constitute infringements of copyright are addressed by s 47D. This defence covers the reproduction or adaptation of a computer program in order to obtain the information necessary to make an interoperable program, as well as the reproduction of code ‘to the extent necessary to enable the new program to connect to and be used together with, or otherwise to interoperate with, the

⁸⁰ As to the impact of the exception for back up copying in s 47C, see below.

⁸¹ See Rebecca Giblin, ‘Stranded in the Technological Dark Ages: Implications of the Full Federal Court’s Decision in *NRL v Optus*’ [2012] *European Intellectual Property Review* 632 on the potential impact of *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 for a supplier of recording technology such as TiVo.

⁸² See Copyright Law Review Committee, *Computer Software Protection* (1995); IPCRC Report, above n 14, 103-5; regarding overseas see Pamela Samuelson, ‘The Past, Present and Future of Software Copyright: Interoperability Rules in the European Union and United States’ [2012] 34 *European Intellectual Property Review* 229.

original program or the other program’. As a result of s 47AB, introduced in 2000 in response to the High Court’s decision in *Data Access Corporation v Powerflex Services Pty Ltd*,⁸³ s 47D also allows for the reproduction of literary works incorporated into a computer program and essential to the effective operation of one of its functions.⁸⁴

Although the provision is not as restrictively drafted as, say, the UK provision,⁸⁵ there are a number of problems with s 47D. First, it does not allow the reproduction of non-literary works or other subject matter. Not only would computer programs be likely to include other works such as musical or artistic works which would be reproduced as part of a process of decompilation to create an interoperable product, but in *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* the Full Federal Court interpreted computer games as constituting cinematograph films as well as computer programs.⁸⁶ It would seem, therefore, that s 47D does not allow the reproduction of computer games for the purposes of creating interoperable products. A second potential issue is that identified by the IPCRC in 2000 – the exception is limited to acts to create software that interoperates with the copied program or another program. It does not appear to extend to copying necessary to make software work with hardware.⁸⁷ Thirdly, the restriction to reproducing only ‘to the extent reasonably necessary to obtain the information’ required to enable the independent creation of an interoperable program is potentially problematic. As has been pointed out, a software engineer may inadvertently copy other parts of the program; indeed, in some cases ‘the engineer will only be able to isolate those parts of the program that are *not* relevant to his investigations *after* the decompilation and analysis of the information extracted’.⁸⁸

The Federal Court’s decision in *CA Inc v ISI Pty Ltd*⁸⁹ emphasises other aspects of s 47D that make it ‘a very limited exception’.⁹⁰ The facts of the case are complex. In brief, CA was the owner of Datacom database management system software. It provided certain ‘CA macros’ (a quantitatively insignificant proportion of the Datacom system, but collectively meeting the definition of ‘computer program’ under the Act) to its clients to make it easier for them to write

⁸³ (1999) 202 CLR 1.

⁸⁴ Section 47AB defines ‘computer program’ for the purposes of Part III Div 4A as including such literary works.

⁸⁵ *Copyright, Designs and Patents Act 1988* (UK), s 50B. Note also in the UK the impact of s 29(4), which ensures that decompilation cannot be fair dealing for the purpose of research or private study.

⁸⁶ (1997) 75 FCR 8.

⁸⁷ See, eg, *Sony Computer Entertainment v Connectix Corporation*, 203 F 3d 596 (9th Cir 2000).

⁸⁸ Daniel Seng, ‘Reverse Engineering the New Reverse Engineering Provisions of the Copyright Amendment Act 2004’ [2005] *Singapore Journal of Legal Studies* 234, 238.

⁸⁹ (2012) 201 FCR 23.

⁹⁰ *Ibid* 84 [351].

applications that communicated with a Datacom database. ISI produced a third party product, 2BDB2, designed to facilitate the migration of data from the Datacom system to IBM's competing database management system DB2, an otherwise difficult and expensive task. To do so, ISI had to create macros to replace the CA macros, which required ISI to reproduce some parts of the CA macros to fulfil the function of enabling client-written applications that had previously worked with the Datacom system to work with DB2. The Court held that two versions of ISI's macros infringed copyright in the CA macros. Prima facie, what ISI copied was analogous to a programming interface – it was a tool for writing software to exchange information with DB2, and to enable programs designed to communicate with Datacom to communicate with DB2. However, the s 47D exception did not apply, in part because:

- First, to fall within the exception a reproduction must be made by or on behalf of an owner or licensee of a copy of the program (s 47D(1)(a)).⁹¹ ISI, being a third party, was not an owner or licensee of a copy of the Datacom system. Although it had originally obtained access to a licensed copy of the Datacom system through work for a licensee, once it developed the 2BDB2 program ISI was working on its own behalf.⁹² This limitation would seem to be aimed at ensuring that the maker of an interoperable product is a legitimate user of the program. It has a broader impact, however, in particular making the exception less available in the case of large enterprise software where it may not be feasible for the developer of an interoperable product to be a licensee, and in preventing or limiting any market from developing in interoperable tools.⁹³ It may also present a challenge in the open source context, where it may be unlikely that every independent open source developer who might

⁹¹ Cf. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, Art 6(1)(a) (requiring that acts be performed by 'the licensee *or by another person having a right to use a copy of a program*, or on their behalf by a person authorized to do so'); *Copyright Act 1994* (NZ), s 80A(1) (referring to the 'lawful user of a copy of a computer program'); *Copyright, Designs and Patents Act 1988* (UK), s 50B(1) (also referring to a 'lawful user of a copy').

⁹² *CA Inc v ISI Pty Ltd* (2012) 201 FCR 23, 82 [341]-[343].

⁹³ *Ibid* 82 [342]. Bennett J appears to have interpreted 'owner' here as meaning copyright owner or owner holding permission from the copyright owner, since insofar as a 'copy' is merely a physical thing in computer memory, literally speaking, ISI would 'own' any electronic copies it made, as owner of any physical medium on which such copies were made – it is just not either the owner or licensee of the copyright. Note that another impact of this interpretation seems to be to prohibit serial copying by a person acting 'on behalf of' an owner or licensee – s 47D(1)(a) appears to require the reproduction be made from a copy held by an owner or licensee.

become involved in a project and who might therefore be making reproductions would be a licensee or employee of a licensee.⁹⁴

- Secondly, s 47D(1)(b) requires that reproductions be made ‘for the purpose of obtaining information necessary to enable the owner or licensee ... to make independently another program to connect to and be used together with ... the original program’. The purpose of ISI’s reproductions was not, however, to obtain information but to enable the removal of the original CA macros (and the Datacom system as a whole) from a client’s computer system.⁹⁵

The problem with the outcome of the case is that in assisting the transition of data from one complex enterprise system to another, ISI’s product sounds like one that promotes interoperability and facilitates competition in the software market. It seems anomalous that CA was able to use copyright in a quantitatively tiny proportion of its database management system to prevent the distribution of a tool that enabled clients to extract and migrate their own data and use their own client-developed applications in conjunction with a competing database management system – and that ISI received no assistance from the exception designed to protect interoperability. Judges and policymakers in Australia and overseas have striven to ensure that copyright could not be used in this way.⁹⁶

In summary, s 47D as drafted cannot operate as an effective exception for the creation of interoperable programs.

(d) Back up copies of computer programs (s 47C)

Section 47C allows owners and licensees to make backup copies of computer programs. One might well ask why it was deemed necessary to set out in excruciating detail all the kinds of activities that one might undertake with a ‘back-up’ copy (s 47C(1)(c)) rather than simply allow,

⁹⁴ The interoperability provisions are meant to allow A to decompile B’s program in order to get the necessary information to allow A’s program to communicate with B’s program or some other computer program – and if necessary make reproductions to the extent necessary to enable A’s program to communicate with B’s program or some other program. Where A is an open source project but B is a company with proprietary software, and the participants in the A project are A1, A2, A3, etc, then A1 might be a licensee of B, but s 47D would seem to demand that all of A1, A2, A3, etc (at least if they have to reproduce a substantial part of B’s program in the whole process) all be licensees

⁹⁵ *CA Inc v ISI Pty Ltd* (2012) 201 FCR 23, 84 [351]-[352].

⁹⁶ See for example the introduction of s 47AB in response to *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 202 CLR 1. See also *Lotus Development Corp v Borland International, Inc*, 49 F 3d 807 (1st Cir 1995); *SAS Institute Inc v World Programming Ltd* [2012] 3 CMLR 4; Samuelson, ‘The Past, Present and Future’, above n 82.

as the UK legislation does, a person to make ‘any back-up copy ... which it is necessary for him to have for the purposes of his lawful use’.⁹⁷

The scope of s 47C is also strangely opaque. It allows the reproduction of computer programs for the purpose of use in lieu (of either the original or the reproduction), to allow storage of a copy (s 47C(1)(c)(i)) or use in the event of destruction, loss, or if the other copy is rendered unusable (s 47C(1)(c)(ii) and (iii)). It also allows the making of reproductions of other works and other subject matter ‘held together with the program on the same computer system’, provided that the copying ‘is part of the normal back-up copying of data for security purposes’ (s 47C(2)). Section 47C(2) is most obviously designed to allow individuals or companies who back up their entire system to do so without fear of infringing non-program content. It is less clear that it would allow a consumer, say, to set out to back-up her entire CD collection by copying her CDs to a hard drive and then to a remote server (since such activity might not be considered ‘part of the normal back-up copying of data for security purposes’). It appears clear that s 47C(2) would *not* protect a consumer who, for example, uses a cloud service like Dropbox for the twin purposes of ‘normal back-up copying of data for security purposes’ and also to provide convenient access to content via multiple hardware devices. We imagine, however, that few consumers who use a service like Dropbox in this way would draw a clear distinction between ‘back-up’ and ‘storage for access’. More generally, it might be asked why the making of a back-up copy of a program is permitted (for example, in case the program is ‘lost, destroyed or rendered unusable’), but that this does not extend to other, equally vulnerable, digital content.⁹⁸

2.4 Artistic works exceptions

The final set of provisions we intend to examine are the provisions that allow for certain types of dealing with artistic works. These provisions tend to receive relatively little attention. Indeed, we have chosen them for precisely this reason – to demonstrate that the problems with the existing provisions go far beyond those difficulties that are most commonly identified and discussed.

Looking at these provisions, and their problems, in detail:

⁹⁷ *Copyright, Designs and Patents Act 1988* (UK), s 50A(1). Having said this, in certain respects the UK legislation is too limited (in particular, in that it only covers computer programs and not any other subject matter).

⁹⁸ See, eg, *Copyright Act* (RSC 1985, c C-42), s 29.24 (allowing for backup of any work or other subject matter provided certain conditions are met).

- Section 65 is intended to allow for the representation of certain types of artistic work that are on public display. The section applies to sculptures and to works of artistic craftsmanship situated, otherwise than temporarily, in a public place, or in premises open to the public. Section 65(2) provides that copyright in ‘a *work to which this section applies* ... is not infringed by the making of a painting, drawing, engraving or photograph of the work or by the inclusion of the work in a cinematograph film or in a television broadcast’. The difficulty with this wording is that it may make this exception almost redundant. This is because the italicised words would seem to have the effect of limiting the scope of this exception so as render it inapplicable to preliminary drawings and plans. Thus, for example, someone who takes a photograph of a sculpture or stained glass window on public display might still infringe copyright in the sculptor or craftsman’s preliminary drawings, since drawings are not works ‘to which this section applies’.⁹⁹
- Much the same problem arises in relation to section 66, which is intended to allow for the representation of buildings in paintings, drawings, films and the like. Again, because of the way this section is worded the exception seemingly does not apply to protect against a claim for infringement of copyright in architectural drawings.
- Section 67 of the Act allows for the incidental filming or televising of artistic works. It seems that this provision means that no special permission would be needed to film in an art gallery, provided that the inclusion of, say, an image of a painting in a film is only ‘incidental to the principal matters represented in the film’.¹⁰⁰ There are a number of aspects of this provision that are unsatisfactory. For example, it is not clear why this applies only to the use of an artistic work in a film or television broadcast, but not to the use of such a work in a photograph. More generally, it is unclear why the incidental inclusion defence does not apply to all works and other subject matters, as incidental inclusion defences do in other jurisdictions, including the UK and New Zealand.¹⁰¹
- Section 68 provides that the copyright in an artistic work is not infringed by the *publication* of a painting, drawing, engraving, photograph or film if by virtue of s 65, 66

⁹⁹ See also Ian Macdonald, ‘When Is an Exception Not an Exception? Two-dimensional Reproductions of Public Art’ (2002) 20 *Copyright Reporter* 24.

¹⁰⁰ Kevin Garnett, Jonathan Rayner James and Gillian Davies (eds), *Copinger and Skone James on Copyright* (Sweet & Maxwell, 14th ed, 1999) [9.26].

¹⁰¹ *Copyright, Designs and Patents Act 1988* (UK), s 31; *Copyright Act 1994* (NZ), s 41. See also InfoSoc Directive, Arts 5(3)(h) and (i).

or 67 the making of that painting, etc did not constitute an infringement of the copyright. The problem is that s 68 does not apply to other dealings with that painting, drawing, etc, such as a communication to the public.

The fact that each one of these seemingly straightforward and innocuous exceptions leaves significant gaps in protection is yet another indication of the inherent weakness of a copyright exceptions model that seeks to define the scope of permitted conduct in advance.

2.5 Beyond the existing exceptions

Thus far we have demonstrated that the majority of the existing provisions are not fit for purpose: the *De Garis* interpretation of the scope of the research and study exception is unacceptably narrow; there are types of criticism and review that are unjustifiably excluded from the scope of the relevant exceptions; the parody and satire defence may not extend to downstream uses; the ‘professional advice’ provisions are a mess; the private copying exceptions are already technologically redundant; the interoperability provisions are far too limited in their scope, etc. These problems all need to be addressed, as would comparable problems in other provisions that we have not explored here. We imagine that some of the problems we have identified may come as a surprise even to seasoned practitioners. In performing this analysis we have been surprised by the number of drafting inconsistencies and the degree of incoherence. This further underlines, to us, the impossibility of drafting sensible specific exceptions.

Fixing the shortcomings of the existing provisions would not, however, be sufficient. To this point we have focused only on those areas where the existing exceptions fail to achieve their purpose. But there are other types of use that ought to be privileged for which the Act does not make allowance at all. Many of these are noted in the Issues Paper. For example, we believe that far more could be done to exempt from liability certain private or personal uses of copyright material, the use of copyright material in the generation of new output, and the making of fair ‘quotations’.¹⁰² On the technology front, strong arguments can be made for the law to provide clearer exemptions for system-level caching and indexation, for the storage of material by cloud computing services, and for data mining. There are also many other types of use of copyright subject matter not mentioned in the Issues Paper that ought to be exempted from liability. These include certain uses by government bodies (for example, to allow the reproduction of trade

¹⁰² Cf. Berne Convention, Art 10(1).

marks that are artistic works on the Register of Trade Marks), the ‘incidental inclusion’ of copyright material in a subsequent work or production, and the use of copyright subject matter for ‘illustration ... for teaching’.¹⁰³ Consequently, if the exceptions are to be made fit for purpose then on the current model a number of new additional exceptions dealing with these and other issues would also be required.

We have not, however, attempted to provide a comprehensive list of the additional uses that would need to be privileged. As we explain in detail in Part 3, this is because although one reform option might be to identify all such uses and to draft new exceptions to cover them, we are of the view that the time has come to abandon the existing paradigm. Policymakers simply cannot be expected to identify and define *ex ante* all of the precise circumstances in which an exception should be available. The time has come to adopt a flexible exception in Australian law.

¹⁰³ Cf. Berne Convention, Art 10(2).

Part 3: Options for Reform

3.1 Outline

In Part 2 we identified the entrenched problems with the current Australian approach to copyright exceptions. We argued that these problems are not simply the result of the law not having kept pace with technological developments over recent years. Rather, they reflect more fundamental problems resulting from the legislature's desire to try to define the scope of permitted conduct *ex ante*, from narrow judicial interpretations of the exceptions, and from the marginalisation of the idea of exceptions as users' rights. In Part 3 we turn to consider how the law might be reformed, both in the sense of the changes that should be made to the text of the *Copyright Act* as well as how a shift in the interpretative practices of judges and copyright stakeholders might be fostered.

There are two broad approaches that Parliament could take to improve the law of copyright exceptions in Australia in light of the problems we have identified. The first approach (Option 1) is to retain the familiar model of having a large number of defences for specifically defined conduct, but to engage in wholesale review of the text of those defences, adding new ones where necessary. We consider this in Part 3.2. The second approach is to enact a 'flexible' exception, not limited to the re-use of copyright material for any specific purpose. This could be done in a number of ways, although for the purposes of this submission, we consider in Part 3.3 two possibilities: the introduction of an autochthonous 'flexible' exception (Option 2), and introduction of an exception following the US 'fair use' provision contained in s 107 of the *Copyright Act 1976* (US) (Option 3).

We argue that although Option 1 could produce some improvements to the status quo, there are profound and on-going difficulties in undertaking reform solely within the existing paradigm. As such, we argue in favour of the introduction of a general exception not limited to activities undertaken for a specific purpose, favouring Option 3 over Option 2. In Part 3.4 we identify some additional steps that may support the emergence of this general exception as a meaningful rather than marginal part of Australian copyright law.

3.2 Revision within the existing paradigm (Option 1)

(a) Overview

Given the problems discussed in Part 2, one obvious way forward would be to go through the exceptions, one by one, with a view to liberalising the language of the overly narrow provisions, reconsidering whether certain limitations on exceptions remain relevant or justified, streamlining drafting through the removal of unnecessary detail and ambiguous language, and adding new provisions where gaps in coverage are identified. This Option has the key advantage of retaining a familiar framework. Such familiarity can be relevant in a number of ways. Most obviously, it is relevant where people already have a good working knowledge of the Act, such that they have an understanding of what can and cannot be done under existing exceptions. More broadly, however, it is relevant where people have developed decision-making strategies that are predicated on certain forms of drafting. For instance, if a particular user constituency has grown accustomed to the ‘certainty’ of specific provisions, then it may be necessary for them to revisit existing attitudes, risk preferences and workflow practices in order to take advantage of an open-ended provision. Where these existing norms are strongly ingrained, this may result in a reluctance to embrace new provisions or interpretations, even amongst those who might welcome an expanded role for the exceptions.

Empirical research with libraries, archives, museums and galleries bears out these propositions. Interviews undertaken in 2012 with staff of leading Australian cultural institutions indicates that very few are invoking s 200AB, and that a common explanation for this situation was the lack of comfort in relying on an ‘uncertain’ provision.¹⁰⁴ Similarly, research with Canadian institutions in 2008-09 suggests that their response to the landmark *CCH Canadian Ltd v Law Society of Upper Canada*¹⁰⁵ decision was extremely muted, being confined largely to changes to document delivery services offered by academic libraries.¹⁰⁶ Despite the Canadian Supreme Court articulating the vision that fair dealing and other exceptions constitute users’ rights – a vision sustained in the recent *Society of Composers, Authors and Music Publishers of*

¹⁰⁴ To be described in full in Emily Hudson, *Copyright Exceptions: An Empirical Study* (Cambridge University Press, forthcoming 2014).

¹⁰⁵ [2004] 1 SCR 339.

¹⁰⁶ Emily Hudson, *Copyright Exceptions: The Experiences of Cultural Institutions in the United States, Canada and Australia* (PhD thesis, Law, University of Melbourne, 2011) ch 6.

*Canada v Bell Canada*¹⁰⁷ decision – institutional users have been cautious in their invocation of (newly liberalised) fair dealing defences.

Similar caution might also be observed in the judiciary. For instance, analysis of decisions of UK courts suggests that throughout the 20th century judges tended to read the ambit of the fair dealing defences in a much narrower way than what was strictly required by the text of the provisions. As we observed in Part 2, similar criticisms can be made of Australian cases considering fair dealing, for instance, in that judges have read the fair dealing purposes narrowly and rejected agency-style arguments. This raises the question of whether a different approach would be taken under an open-ended provision in this country, and whether judges can and should be trusted to act as champions of users’ rights. This question arises irrespective of whether a decision is made to move to a fair use model or to an autochthonous ‘flexible’ exception.

Option 1 therefore retains the broad structure of the existing provisions, but seeks to reform the content and reach of those exceptions. Some possible reforms are included in Table 1, although we emphasise that this table is intended to be illustrative and not at all comprehensive.

Table 1: Reform within the existing paradigm

Provision(s)	Concerns	Possible reforms
All	Inadequate weight given to the various public interests supported by exceptions.	Introduction of terminology such as ‘users’ rights’ into the <i>Copyright Act 1968</i> , perhaps through an ‘objects clause’. ¹⁰⁸
	Parties are able to contract out of exceptions.	Consider a prohibition on contracting out of specified exceptions. ¹⁰⁹
Fair dealing: ss 40-42, 43(2), 103A-103C	Inadequate statutory and judicial guidance regarding the meaning of ‘fairness’.	Inclusion of statutory fairness factors for <i>all</i> fair dealing provisions.
	Uncertainty regarding the application of fair dealing to	Clarification that fair dealing can apply to unpublished material. ¹¹⁰

¹⁰⁷ 2012 SCC 36 (12 July 2012), [11], [15].

¹⁰⁸ Cf. *Copyright Amendment (Digital Agenda) Act 2000* (Cth), s 3.

¹⁰⁹ Cf. Copyright Law Review Committee, *Copyright and Contract* (2002) [7.49].

¹¹⁰ Cf. Copyright Act 1976 (US), s 107.

	unpublished content.	
	Judicial statements that the relevant purpose is that of the copyist only.	Clarification that agency-style arguments are available for fair dealing.
	Judicial interpretations in which the various fair dealing purposes have been defined narrowly.	New, expansive legislative definitions of each permitted purpose, and add terms such as ‘caricature’ and ‘pastiche’ to the parody/satire exception.
	Criticism or review must be of that or another work/audio-visual item.	Delete this requirement.
	Parody and satire may not apply to downstream uses.	Broaden the defence so that it applies to downstream users.
	An inflexible requirement for a sufficient acknowledgement can be unjust.	This factor should be considered when assessing the fairness of the dealing.
Professional advice: ss 43(2), 104	Section 104(b) and (c) ‘professional advice’ defences not subject to a fairness test.	Make ss 43(2), 104(b) and 104(c) consistent with each other.
Private use exceptions: ss 43C, 47J, 109A, 110AA, 111	Unjustifiable limitations on the medium from which, or onto which, copies can be made.	Revise and broaden so that more technology-neutral language is used.
	Provisions mostly prevent the copying of content across multiple devices.	
	Provisions do not allow for remote storage.	
	Difficulties in applying the time-shifting exceptions outside copies made on hardware owned by the consumer.	
Reproductions of computer programs:	Interoperability defence in s 47D too limited in its operation (does	Broaden the language of s 47D to cover the reproduction/copying of

eg, ss 47C, 47D	not cover copying of non literary works; restrictive requirement that the reproduction be by the owner/licensee of the program and be for the purposes of obtaining information).	any work/subject matter, and remove other restrictions that limit a user's ability to take advantage of the exception in making an interoperable program.
	Lack of provisions other than s 47C that permit the making of back-up copies of other digital works and subject-matter.	Introduce a broad back-up copying exception.
Libraries and archives provisions: ss 48-53, 110A-110BA, 112AA (note also s 200AB) ¹¹¹	Preservation copying covered by five separate provisions, each containing numerous limitations.	Streamline by replacing these provisions with a single preservation copying provision covering all collection items (irrespective of type or publication status), and permitting a reasonable number of preservation copies of (say) rare or unpublished works to be made.
	Limits on circumstances in which copies of collection items can be viewed or accessed onsite by members of the public: ss 51A(3A) and (3B) apply only to original artistic works, and ss 51A(1)(a) and 110B(1)(a) and (2)(a) to research being carried out at the institution.	Streamline by permitting copies of collection items to be made for the purpose of onsite consultation if the original cannot be viewed, listened to or handled because of its condition or because of the atmospheric conditions in which it must be kept.
	No specific exception permitting copying to deal with technological obsolescence.	Add an exception permitting libraries and archives to make a copy of a collection item in an alternative format if the original (or a copy made under this provision) is held in a format that is obsolete or at risk of

¹¹¹ Our possible reforms are based on the Canadian *Copyright Act* (RSC 1985, c C-42), s 30.1.

		becoming obsolete, or is accessed and used on technology that is obsolete or at risk of becoming obsolete.
	No exception permitting Part IV subject matter to be reproduced for administrative purposes.	Introduce an exception permitting administrative copying of Pt IV subject matter.
Dealings with artworks: ss 65-68	Seemingly of limited relevance given numerous restrictions – eg, ss 65 and 66 will be redundant if there are underlying design drawings; s 67 does not cover incidental inclusion in photos.	Reconsider rationale for defences; replace with an ‘incidental inclusion’ defence that applies to all works and subject matter, and subsume other acts within an expanded fair dealing defence.
N/A	No exceptions that specifically cover: <ul style="list-style-type: none"> • Private / personal use, particularly in social media contexts. • Productive use / use to generate new works and other materials. • System-level caching. • Indexing. • Quotation. • Illustration for teaching. • Use by Government bodies in fulfilling legislative functions. 	Introduce specific exceptions permitting each of these.

(b) Concerns with Option 1

Although some progress could be made by amending exceptions within the existing paradigm, we have strong concerns regarding the viability of Option 1 as the sole initiative to reform Australian exceptions. We have already indicated at a number of points that we are not

convinced that it is realistic to expect the legislature to continue to set out in advance the precise acts to which copyright exceptions will apply. We explain this conclusion in more detail below.

(i) *Standards, rules and the uncertainty of the current Australian approach*

Discussion of the drafting options for exceptions is often framed around the respective merits of open-ended general provisions (standards) and closed-ended detailed provisions (rules).¹¹² Rules utilise far more detailed and prescriptive language than standards, because the legislature has identified in advance the legal consequences that will result in the event of specific circumstances or behaviour. This is sometimes referred to as legislative rulemaking, and has the effect of reducing judicial discretion. In contrast, standards serve to guide judicial decision-making, and the court will have far greater capacity to craft the content of the law.

Certain advantages and disadvantages tend to be associated with each style of drafting. In debates about copyright exceptions, open-ended provisions such as ‘fair use’ are invariably described as flexible and responsive but lacking in certainty, whilst detailed exceptions are considered to be predictable but usually under-inclusive. There is some truth in the characterisation of general and specific exceptions as reflecting a choice between flexibility and certainty. However, as we indicated in Part 2, this discussion is incomplete. An understanding of the complexities of standards and rules analysis suggests that claims that specific exceptions can offer a high degree of certainty to those regulated by copyright law are likely to be overstated.

Standards and rules exist on a spectrum rather than occupying binary positions. In addition, rules can have one or many limbs, and standards can utilise a single overarching criterion (such as ‘reasonableness’) or require a multi-factorial analysis (such as the ‘fairness’ factors in s 107 of the *Copyright Act 1976* (US)). The respective merits of standards and rules can differ depending on these qualities; for instance, a complex rule with many subparts and qualifications (eg, the user request provisions for libraries and archives in s 49 of the *Copyright*

¹¹² Key contributions to the standards and rules literature include Isaac Ehrlich and Richard A Posner, ‘An Economic Analysis of Legal Rulemaking’ (1974) 3 *Journal of Legal Studies* 257; Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon, 1991); Louis Kaplow, ‘Rules Versus Standards: An Economic Analysis’ (1992) 42 *Duke Law Journal* 557; and Kathleen M Sullivan, ‘The Justices of Rules and Standards’ (1992) 106 *Harvard Law Review* 22.

Act 1968 (Cth)) may require more effort to understand than a simpler rule with more liberal language (eg, the administrative purposes provision in s 51(2)).¹¹³

Less obviously, the classification of legal regulation as a standard or rule requires us to look beyond the legislative drafting to the interpretative practices of those who apply or who are regulated by the provision.¹¹⁴ This is because these practices can mean that a legal provision apparently drafted as a standard can operate in very rule-like ways, and vice versa. For example:

- A body of judge-made rules can give a standard-like provision a more rule-like operation. For instance, understandings of fair use in the US appear to be influenced strongly by the case law, giving fair use some rule-like qualities, in terms of certainty. This has been observed by academics undertaking systematic analysis of US case law¹¹⁵ and in empirical work with leading US cultural institutions, in which interviewees described how their reliance on fair use was influenced strongly by findings in key cases.¹¹⁶
- Non-literal readings of exceptions can transform rules into standards. Specific language is not always read as requiring strict observance. In both US and Australian law, for example, there are preservation copying provisions that expressly limit the permissible number of copies to three. However it seems that such a limitation is routinely ignored, particularly for digital preservation, where it is particularly difficult to adhere to a strict quantitative limit for the number of copies. Institutions instead seem to make whatever number of copies is necessary to ensure the content of the work is preserved.¹¹⁷

With the above in mind, it is worth addressing the major justification that tends to be put forward for retaining the current Australian system of detailed exceptions: that such a model provides certainty for copyright owners and users. In short, we believe that such claims are

¹¹³ Although note that norms of best practice are extremely strong in relation to collection management, such that many institutions undertake acts of administrative copying – eg, inclusion of images of artworks on staff-only databases – without any in-depth analysis of copyright law.

¹¹⁴ Cass R Sunstein, ‘Problems with Rules’ (1995) 83 *California Law Review* 953, 959-60.

¹¹⁵ See, eg, Barton Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions, 1978-2005’ (2008) 156 *University of Pennsylvania Law Review* 549; Pamela Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537.

¹¹⁶ Hudson, above n 106, ch 5.

¹¹⁷ In the US, the Section 108 Study Group recommended that this quantitative requirement be abolished, and that libraries and archives be allowed to make ‘a limited number of copies of unpublished works as reasonably necessary to create and maintain a copy for preservation and security purposes’: *The Section 108 Study Group Report: An Independent Report sponsored by the United States Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress* (2008) 61.

frequently at odds with the very language of Australian exceptions and the reported experiences of those whose conduct is regulated by the law.

We accept that the application of a well-drafted rule will be predictable.¹¹⁸ By ‘well-drafted’ we mean a legal provision whose language is capable of a clear meaning to those whose behaviour is regulated by the law, either upon their own reading of the provision or with the assistance of someone with specialist training. However, the existing Australian exceptions, notwithstanding the countless times these have been revisited by the legislature, are simply not well-drafted. As we took great pains to show in Part 2, many of the Australian exceptions have significant drafting problems such that their operation is highly uncertain. Extraordinary detail has not translated into precision, for instance where key terminology is vague or not properly defined, does not reflect terms of art, or has become redundant with changes in technology. In the Australian context, the multiple rounds of ad hoc law reform have only exacerbated this problem. Thus to our mind the strongest argument for the current approach rests on an illusory foundation.¹¹⁹ This raises the question of why we should persist with the same approach, thinking that will lead to anything other than further complexity and uncertainty.

To illustrate the above point that the Australian approach invariably results in poorly drafted and inadequate exceptions, we have chosen to use as a case study a set of provisions that we did not raise in Part 2: the preservation copying provisions for libraries and archives.

(ii) *Preservation copying: a case study in uncertainty*

The first preservation copying provision, s 51A, was introduced in 1980, permitting the making of a copy of a work held in manuscript form or an original artistic work ‘for the purpose of preserving the manuscript or original artistic work ... against loss or deterioration’.¹²⁰ This reform was recommended by the Franki Committee, which had been ‘greatly impressed by the need, which the present Act does not fulfil, for provisions permitting, without infringement of copyright, copying for preservation purposes.’¹²¹ An equivalent provision, s 110B, was later added for sound recordings ‘held in the collection in the form of a first record’ and

¹¹⁸ Although as noted above, interpretative practices may be such that the contents of a rule are displaced or its ambit read more or less broadly than the plain meaning of its words.

¹¹⁹ Similar observations have been made in relation to the UK system: Burrell and Coleman, above n 11, 252.

¹²⁰ *Copyright Amendment Act 1980* (Cth), s 12.

¹²¹ Franki Report, above n 23, [5.01].

cinematograph films ‘held in the collection in the form of a first copy’.¹²² The terms ‘first record’ and ‘first copy’ were not defined. It may be that this aspect of s 110B was intended to capture master recordings, although the addition words ‘in the form of a’ hints at something broader (such as the institution’s own master recording). A further area of uncertainty is the number of copies that can be made under each provision: whether the reference to ‘a reproduction’ or ‘a copy’ imports the requirement that only a single copy is permitted.¹²³

Although they have each been the subject of amendment over the years, neither s 51A nor s 110B has been reformed to capture *all* at-risk collection items, or to remove any suggestion that only single copies are permitted (a situation that is entirely incompatible not only with accepted standards in digital preservation, but even that undertaken in analogue form). For instance, a fragile edition of an old book will undoubtedly fall outside the works to which the preservation aspects of s 51A apply,¹²⁴ as might a print of a photograph.¹²⁵ Similarly a print of a published sound recording or film will not be able to be preservation copied under s 110B, even if it is rare and at risk of deterioration.¹²⁶ It may be that the focus of s 51A on manuscripts and original artistic works reflected the concerns of those with whom the Franki Committee consulted.¹²⁷ However it is not clear that this sort of distinction between original works and published forms is desirable or – given growth of digital technologies – tenable.

There has been some change to the treatment of preservation copying following passage of the *Copyright Amendment Act 2006* (Cth). However, rather than attempting to rationalise ss 51A and 110B, Parliament instead introduced three new preservation copying provisions: ss 51B, 110BA and 112AA. Unlike the existing provisions, these provisions apply to original

¹²² See s 110B, added by the *Copyright Amendment Act 1986* (Cth), s 12.

¹²³ See, eg, Sam Ricketson and Chris Creswell, *Law of Intellectual Property: Copyright, Design and Confidential Information* (at June 2012) [11.320].

¹²⁴ Published works may be the subject of the *replacement* copying provisions, although these only apply where the work has been damaged or deteriorated, or has been lost or stolen: *Copyright Act 1968* (Cth), s 51A(1)(b)-(c).

¹²⁵ For instance, if the negative is construed as the ‘original’ work.

¹²⁶ Again, recordings and films held in published form may be copied for the purposes of replacement, but this requires that there already be damage or deterioration, or that the recording or film be lost or stolen: s 110B(1)(b)-(c), (2)(b)-(c). These requirements may be particularly problematic for audio-visual items recorded on unstable media, for which deterioration can occur extremely rapidly. Some film (such as cellulose nitrate) is prone to explosion.

¹²⁷ Compare Franki Report, above n 23, [5.03] (‘We were told that very often *letters and other unpublished documents of valuable historical interest* are written on paper which will deteriorate in the course of time, even without undue handling, and if they are made available to researchers they will deteriorate even more rapidly with consequential loss to the nation.’) with [5.09] (‘We have also received evidence of problems with respect to published material which has been damaged and which cannot be replaced.’).

works *and* those held in published form.¹²⁸ Although such an expansion is desirable, it would have been clearer for the provision to have applied to all works in the institution's permanent collection, whether published or unpublished, with preservation copying permitted for works that are 'rare or unpublished' and either deteriorating or at risk of deterioration.¹²⁹ Furthermore, these provisions can only be invoked by 'key cultural institutions' in relation to works 'of historical or cultural significance to Australia', and only permit three reproductions to be made. The Explanatory Memorandum did not explain why these provisions should not be available as a matter of course to all cultural institutions,¹³⁰ and it would be difficult to argue that only key cultural institutions are the repositories of significant works. However the Supplementary Explanatory Memorandum hinted at another possibility:

The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation.¹³¹

It may be that key institutions are better resourced to follow international best practices in relation to preservation, but it is not obvious to us that this should be a matter of cultural institution policy (in terms of funding, facilitating cooperation between institutions, etc) than copyright policy. And if best practices are important, then one might ask whether a three copy limit is consistent with such international standards, and indeed other limitations.¹³²

It may be that some aspects of the preservation copying provisions will be displaced by these very norms of best practice. Empirical evidence suggests that cultural institution staff are

¹²⁸ Although in some cases, an officer of the library or archives must be satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

¹²⁹ Following the Canadian statute: *Copyright Act* (RSC 1985, c C-42), s 30.1(1)(a). Paragraph (a) does not apply 'where an appropriate copy is commercially available in a medium and of a quality that is appropriate for the purposes of subsection (1)': s 30.1(2).

¹³⁰ Cultural institutions are automatically deemed to be a 'key' institution if they have a statutory function of developing and maintain the collection, whilst other bodies can be prescribed by regulation as 'key cultural institutions'.

¹³¹ Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [76].

¹³² For instance, the Supplementary Explanatory Memorandum also stated at [75] that preservation copies 'must not be used for any other purpose. For example, they must not be made available to patrons, nor may they be used for copying to fulfill requests from other libraries or archives'. However this seems to overlook that the ultimate mandate for cultural institutions is to facilitate (appropriate) public access to works. If the authors of this statement are suggesting that all acts of public access are prohibited, the one might ask why the institution is bothering to make the copy in the first place.

more concerned about the copyright implications of public access than preservation and administration. However the analysis above demonstrates not only that the preservation copying provisions are, on their face, uncertain, but that issues with their application seem to be connected to the particular, piecemeal law reform process that has been preferred in Australia. In such a situation, it is hardly desirable to point to institutional norms to ‘correct’ drafting issues in the text of the *Copyright Act*.

This case study illustrates that even in the case of a self-evidently appropriate purpose, and where an exception is to be used by institutions that can in general be trusted to be observant of copyright rules, and despite many attempts to clarify the exception and make it effective, we *still* have copyright exceptions that are uncertain and not fit for purpose. This underlines our belief that the legislature cannot be expected to fix all the problems of the copyright world *ex ante*.

(iii) *Efficiency considerations*

A further concern we have with Option 1 relates to the assumption that a more rule-based approach to copyright exceptions is somehow more efficient than a standards-based model.

A key insight of the legal rulemaking literature is to make predictions about when it is better to draft law as a rule, and when it is better to draft it as a standard. This is generally assessed on various indicia of efficiency, such as the costs to the legislature in drafting the law (and having to reform the law to deal with new problems and behaviours), compliance costs for users, the knowledge and risk preferences of those regulated by the law, and the costs to the parties and the state when litigation is run to enforce the law. The interaction of these factors depends on the circumstances, and it should not be thought that one drafting style is inherently superior to the other, or that terms such as ‘flexibility’ or ‘certainty’ should be seen as implying some value judgment. But one key issue that is particularly relevant for present purposes relates to the level of variation in the behaviour to be regulated. It has been said that where such behaviour is relatively homogenous, it may be more efficient for the state to allocate resources for the legislature to draft detailed rules. Whilst the one-off costs to promulgate rules may be high, it is theorised that downstream costs will be lower on account of such things as reduced

need for litigation to test the parameters of the law, and lower costs of legal advice.¹³³ In contrast, the more diverse the behaviour to be regulated, the stronger the argument that a standard is appropriate, because of the costs and impossibility of drafting a suite of rules to cover every contingency.

Applying this to the copyright context, the longer the list of things that we believe should be covered by an exception, and the greater the diversity within each class, the more it seems to make sense not to persist with a rule-based model, but instead to introduce an open-ended exception that can be applied in fact-specific ways.¹³⁴ This may lead to increases in the quantity of litigation (as standards inevitably show a preference for judicial rather than legislative decision-making), but whether this leads to greater costs in legal advice will depend very much on the standard under consideration. While some standards may require great expertise to interpret because of the need to consult a range of specialist legal resources, others may have ‘large intuitive element[s] which [make] them comprehensible without special training’, perhaps even more so than rules, many of which ‘are not understood unless studied.’¹³⁵

(iv) Impact on interpretative practices

A final concern with Option 1 is that it is unlikely to do much to change judicial culture and attitudes of those regulated by the law. For instance, it is arguable that within Australian law, there are already under-exploited pockets of flexibility, particularly as regards fair dealing (which is perhaps the most standard-like of Australia’s closed-ended exceptions) and s 200AB (which was introduced with the very benefit of capturing some of the benefits of fair use¹³⁶). As discussed further below, we believe that it is possible for Australian judges and users to recalibrate their views on exceptions. However we fear that reform of the Act that merely adds more detail and more qualifications to the already overburdened exceptions will just reinforce the view that exceptions are something to be ‘prized out of the unwilling hand of the legislature

¹³³ There is an obvious weakness to this claim for legislation that is highly technical, such that it nevertheless requires specialist training to be understood.

¹³⁴ To be clear, we are not saying that the heterogeneity of behaviour should be determinative, but it can point strongly towards regulation being drafted using either rule-like or standard-like language.

¹³⁵ Ehrlich and Posner, above n 112, 270-1.

¹³⁶ As articulated by the Attorney-General in his Second Reading Speech for the Copyright Amendment Bill 2006: see Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2006, 1 (Philip Ruddock).

and, once conceded, defined precisely and confined within high and immutable walls'.¹³⁷ A quite different approach is needed to change the prevailing judicial culture to the exceptions.

(c) Summation

In short, we have argued that reliance on rules places a great deal of trust in the ability of the legislature – both intellectually, and as a matter of time and resources – to draft clear, detailed and appropriate exceptions to cover heterogeneous conduct. Little in the history of the drafting of the exceptions currently contained in the *Copyright Act* should give us much confidence in the legislature's ability to continue to perform this task. At best, reform within the existing paradigm seems merely to kick the copyright can down the road. Even if the current exceptions are redrafted, and new detailed exceptions are formulated to address gaps in protection that have been impressed on the legislature, specific carve-outs will invariably be inadequate in their ability to address new technologies, new markets, new uses and changing cultural practices.

3.3 A flexible exception (Options 2 and 3)

Given the problems with retaining the existing framework for dealing with copyright exceptions in Australia, we believe that the best way forward is to adopt a more flexible, forward-looking approach to drafting. There are a number of ways this could be done, and we address two of these in this submission: developing an autochthonous 'flexible' exception (Option 2), and introduction of an exception following the US fair use doctrine (Option 3). Before doing so, we first set out arguments in favour of flexible exceptions and respond to some criticisms and concerns that tend to be raised by those advocating the maintenance of the current framework. We do so because these problems are often set up as insuperable obstacles to reform, and are presented in a way that is designed to foreclose serious consideration of whether Australian law ought to change its approach to exceptions. We wish to show that while criticisms of flexible exceptions need to be taken seriously, such criticisms are not nearly as strong or convincing as those seeking to rely on them would like to think.

¹³⁷ Laddie, above n 18, 258.

(a) In favour of flexible exceptions

(i) *A well-drafted standard is responsive to changing conditions*

One of the key benefits offered by a more open-ended approach to drafting is that it makes the law more responsive to new developments *without* having to refer every detail back to the legislature. In the copyright context, such developments might include the emergence of new technologies for creating and disseminating copyright material, changes in economic conditions and markets for such works, the development of institutions that are different from the traditional (such as libraries and archives with an exclusively online presence), and the identification of new ways to exploit copyright. Given the pace of these developments, detailed exceptions can quickly become out-of-date. For instance, the introduction of cloud technology has already challenged the ambit of ‘private copying’, as consumers become less likely to own and control directly the hardware onto which copies are made.¹³⁸ Retaining the status quo of specific defences therefore runs the risk of committing the legislature to endless rounds of law reform to catch up with new technologies and uses. Inclusion of a flexible exception would still allow the legislature to intervene in response to particular developments, but would also permit the law to self-update through changes to the interpretative practices of copyright owners, users and the courts.

Responsiveness, or the ability to accommodate new developments, does not make the law unpredictable. If the application of an exception to new circumstances is assessed according to well-understood and reasonably predictable factors,¹³⁹ and can be connected to an identifiable policy consideration (such as promoting access to information),¹⁴⁰ it will not create uncertainty. Rather, the law is uncertain where the availability of an exception depends on the application of language whose meaning is unclear, or tests whose results are hard to predict. As outlined in Part 2 and noted in Section 3.2, the current state of Australian copyright exceptions is highly uncertain in this sense. In some cases, such as the computer program exceptions in Part III Div 4A, this is because the language is unclear or unacceptably limited. In other cases, most notably as regards the fair dealing defences, uncertainty arises because courts construe the statutory language in ways that are unpredictable and unprincipled. The real question is therefore whether

¹³⁸ See our discussion of *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* (2012) 201 FCR 147, above n 78.

¹³⁹ See, eg, Beebe, above n 115 (noting correlations in US case law between the outcomes for individual fair use factors and the overall conclusion of whether the use is fair).

¹⁴⁰ See, eg, Samuelson, ‘Unbundling Fair Uses’, above n 115 (dividing fair use cases into ‘policy-relevant clusters’, and noting that if one ‘analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair’: at 2542).

Australian copyright law would be *more* uncertain if an open-ended exception were introduced. We argue that if the Parliament thinks carefully about how to make such a provision workable, a new flexible exception may in fact make Australian law *less* uncertain when compared with the status quo.

Arguments that a flexible exception would create uncertainty often seem to be predicated on the assumption that reforming the law in this way would serve to jettison a century of copyright history and jurisprudence, replacing it with a blank slate on which the Australian courts will write completely new law. We would agree that if that were the proposal, it might be so unpredictable as to be unworkable. However this outcome is not inevitable, and indeed we would suggest that any serious proposal for reform must be situated within existing copyright principles, and explain the sources that would be open to Australian courts and users to help give content to a flexible standard.¹⁴¹ In our view this is one of the difficulties with s 200AB, which purported to (but did not) import well-established concepts from international copyright law. To the extent that the reception given to s 200AB has been underwhelming (which certainly appears to be the case for cultural institutions), part of the problem appears to stem from disagreement about the meaning of the three-step test language in that provision.

Similarly, some arguments against open-ended drafting seem to assume that users would suddenly need to change all their copyright management practices, or incur vast additional expenses for legal advice and defending themselves in costly litigation. Whilst we acknowledge that a shift away from rules may require Australian users to revisit their attitudes and practices, we would caution against any assumption that such a change would be so profound as to be unworkable and unwelcome.

Consider, for instance, the cultural institution sector, which was one of the three targets of s 200AB. This sector is frequently seen (and describes itself) as being conservative. Empirical work conducted at leading Australian institutions in 2012 suggests that amongst those participants, reliance on s 200AB has been extremely limited. Many interviewees could not refer to *any* conduct undertaken by reference to s 200AB, whilst amongst those whose institutions had relied on the provision, this was often limited to one-off and small-scale uses of orphaned works. Some explanation for the muted reception of s 200AB can be found in the decision-making

¹⁴¹ For instance, this might be through a list of fairness or reasonableness factors, a list of indicative purposes to which the exception might apply, the use of language that follows an existing open-ended exception from another country (such as s 107 from US law), or statements of legislative intent in the *travaux préparatoires*.

practices of participating institutions. For instance, interviewees described a litigation-aversion mindset in which institutions did not wish to be the ‘test case’ for s 200AB. Some interviewees also doubted their own competence to apply s 200AB, feeling hampered by a lack of expertise and ready access to expert legal advice. And yet the interviews also revealed attitudes and behaviours that sounded eminently suited to a flexible exception. For instance:

- Overall, interviewees had a solid general knowledge of the workings of copyright, and were interested to learn more about the law. Where they struggled was with the sheer volume and complexity of specific rules, and the challenges in applying those rules to particular facts. Their struggles were uncertainty were therefore both substantive and evidentiary.
- Despite the muted reception afforded to s 200AB, numerous participating institutions nevertheless made material available under a ‘risk analysis’, including in onsite exhibitions and online. To be clear, under this approach, institutions understood an activity as infringing or a possible infringement of copyright, but nevertheless elected to proceed because the risk of potential adverse consequences was perceived to be very low. Relevant factors that informed their analysis included the nature and age of the copied work, whether the copyright owner could be ascertained and located or, if not, the likelihood that there existed an active copyright owner, and the accessibility and commerciality of the institution’s use. This raises the question of why the considerations that informed this risk analysis did not also lead to a conclusion that s 200AB might apply.¹⁴² It would seem that one reason is that institutions found it difficult to connect these considerations to the TRIPS-based language that appears in s 200AB, and had internalised the view that the ‘special case’ requirement permitted only discrete uses of copyright works.¹⁴³ To the extent there was uncertainty with s 200AB, this related not to the underlying concepts, but the particular language used in that provision.
- There was recognition of an attitudinal shift in cultural institutions as they become staffed by a greater number of people used to the creative and communicative capacities of digital and online technologies. Many activities that were once considered ‘pioneering’ in

¹⁴² As many of these considerations would seem to go to the question of whether there was an extant copyright market that might be adversely affected by the institution’s use, plus other economic and non-economic considerations.

¹⁴³ Numerous interviewees expressed the view that s 200AB would not be useful for large-scale digitisation as each work would need to be assessed individually.

the world of Web 2.0 (such as blogs and user-generated content) are now becoming a routine and unremarkable part of cultural institution practices. These practices frequently demand innovative ways of thinking about copyright, whether through licensing practices or reliance on exceptions. They also reflect an attitude to copyright that departs from a 'pay per use' attitude to rights.

- Although numerous interviewees spoke of the desirability of certainty, it must be remembered that such a quality does not need to come directly from the *Copyright Act* itself. For instance, librarians responsible for managing request-based copying services often seemed to assess requests by reference to the information required on institution-produced paperwork. Although these documents may have been prepared in accordance with the requirements in ss 49 and 50, it could not be assumed that those administering the paperwork had ever read these provisions themselves. Certainty can therefore come from such things as internal procedures and documentation, industry protocols, and guidelines developed by peak bodies.

The analysis above is based on systematic empirical research with cultural institutions. We cannot speak with the same degree of confidence for other user constituencies, but believe that the reported experiences of cultural institutions – bodies that are often seen as particularly conservative – demonstrate the potential workability of an open-ended exception.

(ii) *Standards can achieve better justice between the parties than rules*

The responsiveness of standards is also connected with a further benefit: that they have the potential to afford better justice between the parties than rules, particularly where the behaviour to be regulated tends to be diverse rather than homogenous. This is because rules risk being over- and under-inclusive, that is, capturing behaviour that should not lead to a particular legal consequence and excluding behaviour that should, whereas standards can be applied in a way that takes account of individual circumstances.

In Part 2 we highlighted numerous ways in which the current Australian exceptions are under-inclusive. However this is not to suggest that over-inclusiveness is not also an issue. For instance, one criticism that has been levelled at ss 65 and 68 (reproduction of publicly-located artworks and publication of those images) is that they contain no fairness requirement. The concern is that commercial uses are treated in the same way as an art student making a sketch of

a statue in a gallery, or a tourist taking a photograph of an outdoor landscape that includes some installation art.¹⁴⁴

A flexible exception may be better equipped than a series of rules to deal with fact patterns that coalesce around the same basic act, such as reproducing a publicly-located artistic work, but which differ in relation to the quality and use of that reproduction, whether the copied artwork was feature prominently or incidentally, and so forth. Importantly, too, flexible exceptions will not always lead to expansions of users' rights. An activity that might be 'fair' or 'reasonable' in one set of economic and technological conditions could be unfair if those conditions change. For example, we noted above the challenges posed by cloud technology in relation to private copying exceptions. If the time-shifting exception invoked by Optus in relation to its TV Now service had included a requirement that activities be fair, some features of the service might have satisfied this aspect (such as recording television to watch later) while others might have been unfair as interfering too much with the copyright owner's market (such as the 'almost live' viewing).

Of course, any shift to open-ended drafting must be considered by reference to the prevailing judicial culture, and whether it is likely to simply recreate the same issues of unduly narrow interpretations that existed previously.¹⁴⁵ We described in Part 2 our observations that Australian judges have in the past interpreted fair dealing in a manner that reads away potential flexibility. However we are very much open to the view that with appropriate guidance and signals from the legislature, Australian judges could apply a flexible exception in a responsive and balanced way.

We are fortified in this view by the Canadian experience, which illustrates how quickly judicial attitudes to exceptions can change. For many years, the prevailing attitude in Canada was

¹⁴⁴ See Emily Hudson, 'Copyright and Publicly Located Artistic Works: The End of an Exception?' (2006) 19 *Australian Intellectual Property Law Bulletin* 106.

¹⁴⁵ See, eg, Robert Burrell, 'Reining in Copyright Law: Is Fair Use the Answer' [2001] *Intellectual Property Quarterly* 361. In this article Burrell makes the point that judges in the UK have long tended towards a restrictive reading of the exceptions such that legislative reform alone may achieve little. However, this article also considers the possibility that the fair use defence has now acquired totemic status, such that its introduction would, in and of itself, lead to a transformation in judicial attitudes. It is this latter idea that helps inform this submission. At this point it may also be worth adding a brief comment on the relationship between the position we argue for in this submission and Burrell's previous work in the field. This submission takes the view, consistent with Burrell's previous work, that the introduction of a fair use defence will not by itself be sufficient to solve the problems of Australian copyright law. This submission also takes the view, again consistent with Burrell's previous work, that fair use is merely one of a number of options that might help solve the problems of the current law. Where Burrell has changed his position is in relation to the relative merits of introducing a fair use defence rather than relying on one of these other mechanisms.

that exceptions should be interpreted narrowly, and that mechanisms for voluntary licensing should be facilitated where possible.¹⁴⁶ Statements to this effect were found in law reform reports¹⁴⁷ and copyright texts,¹⁴⁸ and underpinned numerous copyright cases handed down during the 1990s and early 2000s.¹⁴⁹ In its 1990 decision in *Bishops v Stevens*, the Supreme Court of Canada quoted with approval a statement from a UK case in the early 1930s in stating that the *Copyright Act* ‘was passed with a single object, namely, the benefit of authors of all kinds, whether the works were literary, dramatic or musical.’¹⁵⁰ Although *Bishop v Stevens* did not relate to fair dealing, it is not difficult to see how this particular author-focussed understanding of copyright would bolster the proposition that exceptions should be read narrowly.¹⁵¹

However in *CCH Canadian Ltd v Law Society of Upper Canada*, the Supreme Court came to a very different set of conclusions regarding the role of exceptions, describing them as users’ rights and finding that the term research in fair dealing ‘must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.’¹⁵² The Court also cited with approval statements made by Binnie J in *Théberge v Galerie d’Art du Petit Champlain* that:

¹⁴⁶ See, eg, Hudson, *Experiences of Cultural Institutions*, above n 106, ch 7.

¹⁴⁷ See, eg, A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Consumer and Corporate Affairs Canada, 1977) (repeatedly stating that the rights of copyright owners should be maintained wherever possible and that the legislature should support mechanisms to facilitate voluntary licensing); Federal Cultural Policy Review Committee, *Report of the Federal Cultural Policy Review Committee* (Information Services, Department of Communications, Government of Canada, 1982) (emphasising the right of authors to control and receive remuneration for public uses of their works, and arguing that any limitations on such rights ‘should be applied with caution and sensitivity’: at 99); and House of Commons Sub-Committee of the Standing Committee on Communications and Culture on the Revision of Copyright, Parliament of Canada, *A Charter of Rights for Creators* (1985) (resisting calls for fair use to be introduced into the Canadian *Copyright Act* (RSC 1985, c C-42) because it would imply ‘that rights in intellectual property are definitely second class rights, very different from rights in physical property’: at 9).

¹⁴⁸ For instance in successive annual editions of Normand Tamaro’s *Annotated Copyright Act* (Carswell), the analysis of exceptions was introduced by the statement that ‘jurisprudence has established that these exceptions should be interpreted restrictively’.

¹⁴⁹ See, eg, the Federal Court of Canada decisions in *Cie Generale des Etablissements Michelin-Michelin & Cie v CAW-Canada* (1996) 71 CPR (3d) 348, *Hager v ECW Press Ltd* [1999] 2 FC 287 and *CCH Canadian Ltd v Law Society of Upper Canada* [2000] 2 FC 451.

¹⁵⁰ *Bishop v Stevens* (1990) 72 DLR (4th) 97, 105, citing *Performing Right Society, Ltd v Hammond’s Bradford Brewery Co, Ltd* [1934] Ch 121, 127 (Maugham J).

¹⁵¹ Although there are other understandings of authorship: see, eg, Lionel Bently, ‘*R v The Author: From Death Penalty to Community Service*’ (2008) 32 *Columbia Journal of Law and the Arts* 1 (arguing that scholars have overstated the degree to which romantic conceptions of authorship have led to expansion of copyright and that authorship may in fact serve as a useful measure by which to judge the appropriateness of legal regulation, including, at 99, that ‘authorship ideology ... seems to offer real potential to those interested in limiting copyright and increasing user flexibilities’).

¹⁵² [2004] 1 SCR 339, [51].

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator ...

The proper balance among these and other public policy objectives lies not only in recognising the creator's rights but in giving due weight to their limited nature.¹⁵³

The Supreme Court's vision for the exceptions has been continued in other cases, most notably the *Tariff 22A* litigation in relation to musical snippets.¹⁵⁴ The Canadian Parliament has also reformed the *Copyright Act* through the passage of amendments that will extend fair dealing to include parody and satire, and introduce new specific exceptions for things including mash-ups, time-shifting and the generation of back-up copies.¹⁵⁵ Indeed, the challenge in Canada appears to be to encourage *users* to embrace new understandings of exceptions, given the history of extremely narrow interpretations.¹⁵⁶ There is much that Australia can learn from the Canadian experience in this regard, and later we set out some suggestions as to additional steps that the Australian Parliament may wish to consider if it decides to enact an open-ended exception.

(iii) *Efficiency considerations may support a move to open-ended drafting*

As noted in Section 3.2, the longer the list of things that ought to be covered by an exception, and the greater the diversity of conduct within each class, the more it may make sense to introduce an open-ended exception rather than a series of rules. This is due not only to considerations of responsiveness and justice, but also as a matter of efficiency. Adopting an open-ended exception helps avoid a seemingly never-ending program of law reform and a misallocation of resources that goes with having to revisit the same legal issue. Under the present regime, organisations first need to devote resources to persuading the government of the day that specific problems have emerged that need fixing. The government, once persuaded of the need to consider reform, will often hold inquiries, where interested parties will again expend resources in making detailed submissions on whether and how the law ought to be reformed, and where

¹⁵³ Ibid [10], quoting from *Théberge v Galerie d'Art du Petit Champlain* [2002] 2 SCR 336, [5].

¹⁵⁴ *Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works*, Tariff No 22A (Internet – Online Music Services) 1996-2006, Copyright Board of Canada, 18 October 2007 ('*Tariff No 22A*'); aspects in relation to fair dealing affirmed in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2012] SCC 36 (12 July 2012).

¹⁵⁵ See *Copyright Modernization Act* (SC 2012, c 20).

¹⁵⁶ See above nn 105-6 and accompanying text.

members of Parliament will be required to develop expertise in a highly specialised area of the law in order to update and modify detailed legislative provisions. This process takes a huge toll: for example, following the signing of the Australia-US Free Trade Agreement in 2004 and up to the passage of the *Copyright Amendment Act 2006* (Cth), more than 40 members of the House and Senate were required, often on truncated timetables, to be part of various treaty committees and inquiries considering technical issues of copyright reform, with around 300 public submissions made to such committees and inquiries.¹⁵⁷ Many of the outcomes of that reform process are up for grabs again, less than six years later. Such inefficiency was not lost on Nicola Roxon MP who, in the Third Reading Speech for the Copyright Amendment Bill 2006 (Cth), stated:

I am conscious that we are creating a much more complex copyright system rather than a more simple one, and I am ... worried that some of the impacts in the new technology area are going to make things more difficult for the future and will require us to be back here again balancing these issues in a very short time, when the technology develops in a way that we are seeing happen already around the rest of the world.¹⁵⁸

(iv) *Open-ended drafting is consistent with the three-step test*

We turn now to the most prominent argument that tends to be made against the introduction of an open-ended exception, namely that such a provision would likely be contrary to the three-step test set out in the Berne Convention and the TRIPS Agreement.¹⁵⁹ This belief is predicated on a particular understanding of the ‘test’ (and especially the ‘certain special cases’ requirement) that tends to demand that exceptions be limited in scope and be fully particularised *ex ante*. Support for this position is sometimes said to come from the decision of the WTO Panel in relation to the so-called ‘home-style’ exception in s 110(5) of the *Copyright Act 1976* (US).¹⁶⁰ For instance, the

¹⁵⁷ Kimberlee Weatherall, ‘Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia’s Recent Copyright Reforms’ (2007) 31 *Melbourne University Law Review* 967, 988, 990.

¹⁵⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 2006, 29.

¹⁵⁹ There has been some writing that has questioned whether the US doctrine of fair use is compliant with the international copyright law: see, eg, Ruth Okediji, ‘Toward an International Fair Use Doctrine’ (2000) 39 *Columbia Journal of Transnational Law* 75, 116-30; Gerald Dworkin, ‘Exceptions to Copyright Exclusivity: Is Fair Use Consistent with Article 9(2) Berne and the New International Order?’ in Hugh Hansen (ed), *International Intellectual Property Law and Policy, Vol 4* (Juris Publishing, 2000); Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (WIPO, 2003) 69.

¹⁶⁰ World Trade Organization, *United States – Section 110(5) of the US Copyright Act: Report of the Panel* (15 June 2000, WT/DS160/R).

Panel's decision stated that each of the three 'conditions' of the test must be given a 'distinct meaning' (and not one that would reduce it to 'redundancy'), and that the 'tenor' of Art 13 of the TRIPS Agreement, as with Art 9(2) of the Berne Convention, 'discloses that it was not intended to provide for exceptions or limitations except for those of a limited nature.'¹⁶¹

However there is much work that challenges this interpretation of Article 13, and which instead prefers an open-textured understanding of the three-step test.¹⁶² Many leading copyright scholars, such as Lionel Bently, William Cornish, Graeme Dinwoodie, Josef Drexl, Christophe Geiger, Jonathan Griffiths, Reto Hilty, Bernt Hugenholtz, Annette Kur, Martin Senftleben and Uma Suthersanen support such a view, and the compatibility of open-ended drafting with the three-step test.¹⁶³ The arguments in favour of this position are both historical and normative. In terms of history, it has been observed that Art 9(2) of the Berne Convention was created to ensure that parties would agree to revision of the Berne Convention to include a right of reproduction, and was drafted with sufficiently broad language to cover diverse national exceptions. The original purpose of the three-step test was therefore as a flexible gauge by which exceptions could be judged. In terms of normative considerations, concern has been expressed that, *inter alia*, the three-step test has been interpreted with insufficient weight given to the legitimate interests of third parties. In the Declaration on a Balanced Interpretation of the Three-Step Test, these interests are stated to include 'interests deriving from human rights and fundamental freedoms; interests in competition, notably on secondary markets; and other public interests, notably in scientific progress and cultural, social, or economic development.'¹⁶⁴ We would observe that third parties can include new creators, who may wish to access, learn and borrow from existing works of authorship.

This is not to suggest that the three-step test contains no substantive content. On the contrary, it would seem to us to require that exceptions are to some extent predictable and imbued with content, rather than representing the ad hoc decisions of judges on a proverbial

¹⁶¹ Ibid [6.97].

¹⁶² Of particular note is the comprehensive analysis in Martin Senftleben, *Copyright, Limitations, and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer International, 2004).

¹⁶³ P Bernt Hugenholtz and Martin Senftleben, *Fair Use in Europe: In Search of Flexibilities* (IVIR, 2011) 21-4; Christophe Geiger et al, 'Declaration: A Balanced Interpretation of the 'Three-Step Test' in Copyright Law', 17 July 2008, available at http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf. For a list of supporters of the Declaration, see http://www.ip.mpg.de/de/pub/aktuelles/declaration-threestep/test/list_of_supporters.cfm#i34948.

¹⁶⁴ 'Declaration', above n 163, cl 6.

frolic of their own. In our view, a well-drafted standard can provide an acceptable level of guidance, and all the more so as judicial precedent accumulates. In fact, when compared with a poorly-drafted detailed rule, a standard may provide *greater* certainty for users, and in a sense be ‘more compliant’ with the three-step test. We have demonstrated in Part 2 that many of the current specific exceptions in Australian copyright law are unpredictable and use language the meaning of which is unclear. In our view, well-understood legal concepts like ‘fairness’ or ‘reasonableness’ may in fact make the application of exceptions more predictable than they have been in the past. However there is another reason why flexible drafting may sit more comfortably with the three-step test than detailed rules, and this is the very responsiveness of standards to changed conditions. Certainty is *not* the only criterion in the three-step test; for instance, it is equally important that uses not conflict with normal exploitation of copyright. Seeking certainty at the expense of all else risks setting in stone certain exceptions that risk harming the interests of copyright owner or user, both now and in the future.

To illustrate: we assume that if the ALRC wishes to address current issues in relation to the digital economy and the gap between consumer practices and copyright law, it will consider anomalies in Australian copyright law in the area of private copying, back-up and use of cloud service providers for these purposes. Closing the gap between practice and law in the area of private copying – in a world where common consumer practice involves the use of multiple devices, use of content both in and outside the home, and remote storage and backup – requires an exception with (a) no limit on the number of copies to be made, (b) no requirement that devices on which copies are made be in domestic premises, and (c) no requirement that devices on which copies are made be owned by the consumer. These are, of course, the chief ways in which the government previously sought to limit the private copying exceptions so as to ensure compliance with the three-step test and to limit harm to the copyright owner. We think it arguable that the *only* way to write one or more exception(s) to cover these kinds of activities *and* to avoid the present anomalies *without* gutting the rights of the copyright owner is to predicate the exception on fairness or reasonableness, allowing a court to take into account on a case-by-case basis particular technologies and market conditions, licences offered by copyright owners, and, importantly, the behaviour and needs of consumers. There are a variety of ways in which this flexibility could be introduced, which we consider in the sections to follow.

Finally, and lest the Australian Government be concerned that it is stepping out on a limb, we would also point to significant international precedents for the adoption of flexibility in copyright law. Apart from the long-established fair use exception in s 107 of the US *Copyright Act*, Israel,¹⁶⁵ the Philippines,¹⁶⁶ Singapore,¹⁶⁷ Taiwan¹⁶⁸ and the Republic of Korea¹⁶⁹ have all adopted fair use-style provisions in recent times.

(b) Option 2: an autochthonous ‘flexible’ exception?

We now turn to consider some of the various possibilities for drafting an open-ended exception. One possibility (which is Option 2 in our list of potential reforms) is to insert into the *Copyright Act* a bespoke Australian open-ended exception. There are a number of ways this could be done, although for the purpose of this section, we confine ourselves to three possibilities.

One possibility, recommended by the CLRC in 1998, is to consolidate and liberalise fair dealing, resulting in a single provision applying to purposes *such as* research, study, criticism, review, and so forth.¹⁷⁰ This option was intended by the CLRC ‘to achieve a model that is structurally simpler than the existing provisions and is also sufficiently flexible to accommodate the challenges posed by technological developments’.¹⁷¹ Such a reform may well be conservative, to the extent it seeks (in the CLRC’s words) to ‘build on existing jurisprudence that has developed around the current fair dealing provisions’.¹⁷² It would therefore need to be weighed up against the restrictive interpretations of fair dealing that have emerged in Australian case law – would judges be encouraged or required to rethink these existing understandings? Would the language of ‘fair dealing’ bring to mind a closed-off provision, resulting in confusion or diminished rhetorical impact?

A second option for an autochthonous exception would be to use the language of the three-step test. This would, in effect, broaden the availability of s 200AB to all users. However we would not recommend that Australia adopt this approach. Inclusion of three-step test

¹⁶⁵ *Copyright Act 2007* (Israel), Art 19.

¹⁶⁶ Intellectual Property Code of the Philippines, Art 185.

¹⁶⁷ *Copyright Act 1987* (Singapore), s 35(1).

¹⁶⁸ *Copyright Act 2007* (Taiwan), Art 65.

¹⁶⁹ *Copyright Act 1957* (Republic of Korea), Art 35-3 (effective 15 March 2012).

¹⁷⁰ CLRC Simplification Report Part 1, above n 1, ch 6. The CLRC also recommended that numerous specific exceptions be repealed.

¹⁷¹ *Ibid* [6.02].

¹⁷² *Ibid* [6.12].

language as a standalone exception takes the provision too far away from its original purpose and context (namely, a flexible treaty provision directed to member states when drafting exceptions, not judges and users when applying them). Given the lack of international consensus regarding the content of the test, it is difficult to know how to interpret each of its limbs, for instance in relation to the authorities on which courts can rely and how those authorities should be weighted. As already seen in relation to cultural institutions and s 200AB, this uncertainty can be stultifying for users, who may respond by adopting the most conservative interpretations possible.

If the Government is to go down the path of developing a new home-grown exception the best alternative would be to base a new open-ended exception on the reasonableness defence from the moral rights provisions.¹⁷³ An advantage of using the language of ‘reasonableness’ is that this is a familiar concept that common law courts have shown themselves to be relatively comfortable and generally well-equipped to handle. Moreover, ss 195AR and 195AS could provide a template for the sorts of factors that should be taken into account when reasonableness is being assessed, with additional items being added to reflect concerns associated with economic rights, such as market effect. This approach would also produce symmetry between the economic and moral rights in the Act, which are currently subject to a very different suite of exceptions and defences.

A drawback of the reasonableness defence, however, is that it would be new in both Australian and international terms in the copyright context. No Australian court has considered the ‘reasonableness’ defences in the moral rights context in any meaningful detail,¹⁷⁴ which may raise concerns that such a defence would be excessively uncertain. Given this backdrop, a reasonableness defence would likely need to be introduced *in addition to* the existing exceptions. This would, however, raise questions regarding the interaction between reasonableness and specific defences (particularly the ‘fair dealing’ defences) and the statutory licences, and such interaction would need to be dealt with explicitly in the statute.

¹⁷³ *Copyright Act 1968* (Cth), ss 195AR and 195AS.

¹⁷⁴ While the defences were raised in *Meskenas v ACP Publishing Pty Ltd* (2006) 70 IPR 172 and *Perez v Fernandez* (2012) 260 FLR 1, in neither case did the respondent put forward any evidence as to why its conduct was reasonable, and in both cases the magistrate considered that the respondent’s conduct was clearly unreasonable. In *Adams v Quasar Management Services Pty Ltd* (2002) 56 IPR 385 the defendant raised more detailed arguments in support of the s 195AR defence, but the defence was held to be inapplicable since the defendant’s lack of attribution had occurred before the commencement of the moral rights provisions.

(c) Option 3: fair use

Our third (and preferred) option is for Australia to implement a ‘fair use’ defence into domestic law. For reasons we explain below, we believe that it is fundamentally important that if Australia adopts fair use, it does so in the *exact* language of s 107 of the *Copyright Act 1976* (US), accompanied by a statement in the Explanatory Memorandum to the Bill amending the *Copyright Act 1968* (Cth) that the interpretation of the Australian fair use provision is to be shaped by the approach taken under US law. We believe that this would send the strongest possible signal that Australian courts are to refer to US case law in understanding the provision, which we would hope would result in a shift in judicial attitudes as to the nature and importance of copyright exceptions, and provide assistance for Australian owners, users and their advisers in understanding the scope of the new provision.

Fair use is frequently identified as a possible antidote to the ills caused by detailed drafting, and indeed was the impetus for the 2005 exceptions review run by the Attorney-General’s Department.¹⁷⁵ Nevertheless, it is not obvious to us that the option of introducing a fair use defence has been given a sufficiently thorough examination in Australian law reform processes. Rather, certain propositions as to why fair use would be undesirable appear to have been readily accepted, without detailed analysis. For instance, suggestions that the open-ended exceptions are excessively uncertain, that the fair use defence is connected intimately to local conditions in the US (such that transplantation into Australian law would be difficult or impossible), and that an open-ended exception may be inconsistent with the three-step test appear to have been influential despite the absence of rigorous analysis. We have tried to provide a detailed response to the broad policy concerns on which these objections to fair use rest in Part 3.3(a). In addition, we set out below our response to arguments that are tailored to the narrow issue of whether a US-style fair use defence would be desirable. In particular, we consider the

¹⁷⁵ The 2005 Review can most immediately be traced back to the implementation of copyright-related aspects of the Australia-US Free Trade Agreement. Whilst Parliament was considering those changes, concerns were expressed that AUSFTA was aimed at increasing Australian levels of protection in line with US law, but without requiring Australia to adopt more liberal aspects of US law, thus changing the copyright ‘balance’ in favor of copyright owners. This led to fresh calls for Australia to adopt a fair use-style exception, which was supported by the parliamentary committees that had been charged with analysing the AUSFTA: see Joint Standing Committee on Treaties, Parliament of Australia, *Report 61: Australia-United States Free Trade Agreement* (23 June 2004), Recommendation 17; and Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Parliament of Australia, *Final Report on the Free Trade Agreement between Australia and the United States of America* (5 August 2004), [3.117]. See generally Robert Burrell and Kimberlee Weatherall, ‘Exporting Controversy? Reactions to the Copyright Provisions of the US-Australia Free Trade Agreement: Lessons for US Trade Policy’ [2008] *University of Illinois Journal of Law, Technology and Policy* 259.

arguments that the US case law lacks certainty, and that the fair use doctrine is crafted indelibly to US conditions.

Before turning to objections specific to fair use, it is worth noting a number of advantages that would flow from adopting a provision closely modeled on the US defence. One such advantage is that numerous existing exceptions, whose drafting problems and crabbed judicial interpretations were addressed in Part 2, could be repealed, on the understanding that the conduct permitted by these sections would be assessed under a ‘fair use’ analysis.¹⁷⁶ We have gone through the exceptions contained in Parts III and IV of the Act and identified in Table 2 provisions that might be candidates for removal if Option 3 were adopted. Under this model, s 200AB would also be repealed. We would also recommend that the needlessly complicated definition of ‘exempt recording’ in Part XIA of the Act should be aligned with any new ‘fair use’ defence to copyright infringement, and that the new definition should cover direct and indirect sound recordings and cinematograph films of performances where the making of the recording and/or film constitutes a fair use of the performance.

Table 2: Provisions that could be repealed if ‘fair use’ were implemented

ss 40, 41, 41A, 42, 103A, 103AA, 103B, 103C	Fair dealing defences
ss 43(2), 104(b), 104(c)	‘Professional advice’ exceptions
ss 43(1), 104(a)	Judicial reporting exceptions
ss 43A, 43B, 111A, 111B	Temporary reproduction/copy exceptions
ss 43C, 47J, 109A, 110AA, 111	Private use exceptions
s 44	Exception for inclusion of works in collections for use by places of education
ss 44B, 44BA	Exceptions relating to material on approved labels for containers for chemical products / product information relating to medicines

¹⁷⁶ This would not mean that existing Australian jurisprudence would be irrelevant – whilst the US case law would provide guidance, its themes and principles would nevertheless need to be considered in the light of Australian circumstances.

s 45	Exception for reading/recitation in public or for a broadcast
ss 47AB, 47A, 47B, 47C, 47D, 47E, 47F, 47G, 47H	Computer program exceptions
ss 48A, 104A	Exceptions for Parliamentary libraries
ss 51AA, 51A, 51B, 52, 110B, 110BA and 112AA	Some of the libraries and archives provisions
ss 65, 66, 67, 68	Exceptions for uses of artistic works
s 104(b)-(c)	Pt IV professional advice exception
s 110	Special provisions for films
s 112	Reproductions of editions of work
s 200AB	'Flexible' dealing

Table 3 below sets out the exceptions that would likely stay, although perhaps in amended form:¹⁷⁷

Table 3: Provisions that would remain if 'fair use' were implemented

ss 44A, 44C, 44D, 44E, 44F, 112A, 112B, 112C, 112D, 112DA	Parallel importation provisions
ss 46, 106	Conduct at premises where persons reside or sleep, etc
ss 47, 47AA, 47A, 70, 107, 108, 109, 110C	Special broadcasting/simulcasting provisions, including equitable remuneration
ss 49, 50, 51, 110A	Libraries and archives provisions that relate to request-based copying services
ss 54, 55, 57, 59, 60, 61, 64	Compulsory licences for cover versions
ss 72, 73	Specific provisions dealing with artistic works
ss 74, 75, 76, 77, 77A	Copyright/design overlap provisions

¹⁷⁷ See above n 17 for further discussion of some of these exceptions.

s 104B	Prescribed notice provision (similar to s 39A): deeming provision for ‘authorisation’
s 105	Special provision for s 89(3) sound recordings

Another advantage of fair use is that it compensates for the lower levels of litigation in Australia when compared with the US. This is important, as one argument that can be made against an Australian fair use doctrine is that it would take a long time for a body of local case law to emerge. If, however, Australians have the imprimatur of the legislature to look to the US for guidance, this may help give them greater confidence in the arguments that might be made to an Australian court, and how those arguments might be treated. This would not be an entirely novel development. For instance, in *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* Bennett J in obiter used concepts from US law in an analysis of Reed’s fair dealing defence, stating that the inclusion in the newspaper abstract of information prepared by Reed was a ‘transformative use’,¹⁷⁸ and the commercial nature of the service was not inconsistent with a successful defence. Her Honour observed:

The use of titles of articles and books for the purposes of identification is well-known and routine, even more so today for the purposes of internet searches. For example, a Google search frequently elicits what could be described as a headline of the article.¹⁷⁹

This characterisation of the role of titles also conjures up some of the reasoning in US cases such as *Kelly v Arriba Soft Corporation*¹⁸⁰ and *Perfect 10, Inc v Amazon.com, Inc*¹⁸¹ in relation to the placeholder function of small-scale images in Internet searches. These cases have been extremely influential in the US, for instance amongst cultural institutions that rely on fair use for certain content appearing on public collection databases.¹⁸²

A further advantage of adopting fair use is that it can create one of the conditions for innovation in the digital economy, giving technology developers and entrepreneurs some

¹⁷⁸ (2010) 189 FCR 109, 143 [142] quoting *American Geophysical Union v Texaco Inc*, 60 F 3d 913 (2nd Cir 1994).

¹⁷⁹ *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109, 143 [143].

¹⁸⁰ 336 F 3d 811 (9th Cir 2003).

¹⁸¹ 487 F 3d 701 (9th Cir 2007).

¹⁸² Hudson, *The Experiences of Cultural Institutions*, above n 106, ch 5.

freedom to operate even where *prima facie* there might be a risk of copyright liability. In an environment where there is a flexible exception, an entrepreneur who must make some use of copyright material can at least have an argument that their activity is allowed, assuming it is ‘fair’, taking into account factors such as the impact on the copyright owner’s market. This contrasts with a closed list approach where any unauthorised use of copyright material is automatically outlawed pending permission from the copyright owner – or the legislature. This ‘permission to innovate’ culture must necessarily act as a disincentive for technological development in Australia, especially when compared to the US or other countries that have a more open approach to exceptions.

A significant pro-technology body of case law has developed in the US through a series of fair use decisions over the last thirty years. *Sony Corporation of America v Universal City Studios*,¹⁸³ for example, concerned the use of video recorders to tape television in the home to watch later. The US Supreme Court held that this activity was at least likely to be fair use, finding an absence of proven commercial harm to the copyright owners arising from home time-shifting. In *Sega Enterprises Ltd v Accolade, Inc*,¹⁸⁴ the 9th Circuit Court of Appeals held the intermediate copying of video games and firmware in a game console to be fair use where software engineers were attempting to understand the interface and make games compatible with the plaintiff’s console. *Kelly v Arriba Soft Corporation* concerned the reproduction of ‘thumbnail’ images as part of providing a service of internet image search, a use which was judged to be fair use:¹⁸⁵ an internet search engine needs to engage in wholesale copying in order to provide any meaningful responses to search queries.¹⁸⁶ In *Perfect 10, Inc v Amazon.com, Inc*, thumbnails of artistic works were considered to be ‘significantly transformative’, potentially even more transformative than parody, because ‘a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work’.¹⁸⁷ Similarly, the purposes of creating searchable databases for use in quantitative analysis (tracking the change in use of a particular term over time – for example, revealing when American authors came to a consensus that ‘the United States is’ instead of ‘the United States

¹⁸³ 464 US 417 (1984).

¹⁸⁴ 977 F 2d 1510 (9th Cir 1992).

¹⁸⁵ 280 F 3d 934 (9th Cir 2002). A further use by Arriba Soft, which involved the display of full size images, was judged by the court not to be fair use.

¹⁸⁶ Samuelson, ‘Unbundling Fair Use’, above n 114, 2554.

¹⁸⁷ 487 F 3d 701, 721-2 (9th Cir 2007).

are,’ reflecting a newfound sense of national unity) and of making works available to visually impaired users have been considered transformative and fair.¹⁸⁸ New technologies can also use copies to detect and defend against plagiarism, which a US court considered a transformative purpose from the original communicative purpose of each individual work (being the meeting of course requirements).¹⁸⁹ All of these uses would infringe under current Australian law. None of these technologies could legally be developed or based here.

We would not contend, of course, that introduction of a fair use exception in Australia would lead ineluctably to a flowering of technological innovation in Australia. Clearly the conditions for innovation depend on much more than the details of copyright law, including everything from tax law to the availability of an educated workforce to matters of business culture. Nevertheless, current copyright law represents one barrier to the location of certain kinds of innovation in Australia. More to the point, it is difficult to see how one would draft a specific exception to allow for the multifarious innovations described above. The closest proposal of which we are aware would be that contained in the Hargreaves Report for an exception to allow ‘uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work’¹⁹⁰ or ‘non-consumptive’ uses. We are not, however, convinced that this language would capture all the activities supported by fair use: the display of thumbnails, for example, could well be considered to involve ‘consumption’ of the relevant artistic works for their expressive value. In any event, the attempt to draw an exception by reference to language of this kind seems likely, without more, to lead to similar dictionary-led disputes to those we have seen in the past.

In the remainder of this section, we wish to engage with some of the key criticisms that have been made of the fair use defence. One criticism that has been raised time and time again, is that the defence is uncertain in its operation. We have already shown that this view tends to be based on a false dichotomy between standards and rule based regulation. It also assumes that a move to an open-ended ‘fair use’ defence would create a void in the law that would only be filled by years of local case law, something that would take decades given litigation rates in Australia. This argument breaks down if the US defence is adopted verbatim. Australian institutions, users and advisers might need to become more familiar with a foreign body of case law, but it is a

¹⁸⁸ *Authors’ Guild, Inc v HathiTrust*, 2012 WL 4808939 (SDNY, 10 October 2012).

¹⁸⁹ *AV ex rel Vanderhye v iParadigms, LLC*, 562 F 3d 630, 640 (4th Cir 2009).

¹⁹⁰ Hargreaves Report, above n 5, 47 [5.24].

mistake to equate lack of familiarity with lack of certainty in the law – the existence of an extensive body of law on which to base assessments of ‘fair use’ means that the doctrine would be anything but a blank slate in Australia.¹⁹¹ Having said this, it is important to note that within the US the doctrine has been criticised as being unpredictable, with outcomes resulting from seemingly ad hoc decision-making.¹⁹² In response, we would point to recent doctrinal and empirical analysis of the operation of the US defence that suggests that the doctrine is far more predictable in operation than has previously been thought. Systematic analysis of the post-1976 US case law by Barton Beebe, for example, suggests that clear trends can be discerned in the ways that courts interpret and apply fair use.¹⁹³ Pamela Samuelson has also argued that when cases are divided into policy clusters, it becomes much easier to predict whether a given fact scenario will be considered as fair or unfair.¹⁹⁴ Matthew Sag’s recent empirical work has demonstrated that certain factors (such as transformative use and partial copying) are strong determinants of fair use, whereas factors often thought to be crucial (such as the commercial nature of the use) are far less important in practice, thus affording ‘considerable evidence against the oft-repeated assertion that fair use adjudication is blighted by unpredictability and doctrinal incoherence’.¹⁹⁵ Empirical research with leading US cultural institutions also reveals that institutions invoke fair use for a range of internal and public activities:

[T]he fieldwork suggests that at least in participating institutions, fair use is flexible and responsive, as suggested by its open-ended drafting style. Fair use is relied upon in a fairly broad range of circumstances, and these circumstances have changed over time. The degree of comfort with fair use varies, and while many interviewees described forward-leaning interpretations of the doctrine, especially for public activities, others described a more cautious approach. That said, even amongst institutions with more limited fair use practices, the experiences described by US interviewees suggest that fair use can and does play a meaningful role in copyright management

¹⁹¹ In a similar vein, to the extent that the adoption of a fair use defence would mean the existing jurisprudence on fair dealing and other repealed exceptions would be open to reinterpretation, while this might be inconvenient, our analysis in Part 2 suggests that this is no bad thing.

¹⁹² See, eg, Fisher, above n 57 (criticising the fair use analysis presented by the US Supreme Court in the 1980s as uncertain and not resting on a coherent foundation); David Nimmer, “‘Fairest of Them All’ and Other Fairy Tales of Fair Use” (2003) 66 *Law and Contemporary Problems* 263 (studying how the four fairness factors were analysed in 60 fair use cases and suggesting that courts ‘tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can’: at 281).

¹⁹³ Beebe, above n 114.

¹⁹⁴ Samuelson, ‘Unbundling Fair Use’, above n 114.

¹⁹⁵ Matthew Sag, ‘Predicting Fair Use’ (2012) 73 *Ohio State Law Journal* 47, 85.

and, crucially, has far greater relevance to the gamut of public activities than the free exceptions of Australian and Canadian law.¹⁹⁶

Importantly, whilst interviewees sometimes described frustration at areas of uncertainty in relation to fair use, they also recognised that its malleability was a key strength of the doctrine.

A related argument that is sometimes made is that a shift to a fair use defence would significantly increase the transaction costs of both copyright owners and users. In the ALRC Issues Paper, this is framed as a problem for both copyright owners, for whom it is said that the licensing of subject matter will become more difficult, and users, for whom compliance with the law will become harder to determine in advance, leading to a greater need for legal advice and a greater threat of being sued for infringement. The problem with this argument is that it paints an unrealistic picture of the status quo for both owners and users. For example, we strongly doubt whether the existing fair dealing defences afford much guidance for parties seeking to license copyright material as to the precise scope of their rights, as the 2007 litigation between Telstra and Premier Media over sports broadcast rights and the scope of the ‘news reporting’ exception revealed.¹⁹⁷ We would also be surprised if a user, sufficiently secure in its belief that its current dealings are both fair and for a permitted purpose that it would not think of seeking legal advice, would suddenly change its legal compliance strategies in the event of a shift to a fair use defence. And although the risk of being sued for infringement is clearly a serious matter, we query why these risks are likely to be any greater under a fair use defence, or indeed whether the move to fair use will encourage ‘over-claiming’ by copyright owners and lead to more conservative practices by users. To the extent that over-claiming and higher rates of litigation are thought to be a problem in the US, this is not necessarily a function of the fact that fair use operates as a

¹⁹⁶ Hudson, *The Experiences of Cultural Institutions*, above n 106, 147.

¹⁹⁷ *Telstra Corporation Pty Ltd v Premier Media Group Pty Ltd* (2007) 72 IPR 89. Telstra, in negotiating a licence with the AFL for the exclusive right to communicate highlights of AFL matches, recognised that the licence fee and the length of the highlights package would need to take into account that others could communicate the footage for fair dealing purposes. Telstra asserted in these negotiations that an appropriate amount that others could use as a fair dealing would be one minute per quarter and two minutes at the end of the game (at 95 [34]-[35]). While these negotiations were taken into account by the judge in refusing to grant an interlocutory injunction to restrain Premier Media from communicating approximately two minutes of highlights of rugby league matches (where Telstra had the exclusive communication rights), the question of whether Telstra and the AFL had agreed on an appropriate ‘fair dealing’ figure in their negotiations was left uncertain.

standard. Rather this can be put down to factors such as the lack of a ‘groundless threats’ actions under US law,¹⁹⁸ and the different fee structures that encourage more speculative litigation.

The final argument that we wish to address in this section is that fair use depends for its effective operation on a broader set of attitudes in American jurisprudence, in particular, the First Amendment and the value placed in American jurisprudence on protection and promotion of free speech.¹⁹⁹

We suspect that the First Amendment’s role in the success of fair use in the US has been overstated. Some of the leading US commentaries, from Nimmer²⁰⁰ and Denicola²⁰¹ through, more recently, to Netanel²⁰² suggest that First Amendment jurisprudence has had a limited direct impact. Netanel points out that US courts have recognised that copyright can abridge speech and thus that it raises First Amendment concerns, but they have almost never actually imposed First Amendment limitations on copyright. In the courts, although the First Amendment is frequently discussed in fair use cases,²⁰³ it has in fact made little express impact on US jurisprudence in this area.²⁰⁴

Nevertheless, there is no doubt some truth to the fact that the existence of the First Amendment will incline US courts to be protective of free speech interests. In any event, the more important point is there are differences between the legal and judicial cultures in Australia

¹⁹⁸ Cf. *Copyright Act 1968* (Cth), s 202.

¹⁹⁹ Brian Fitzgerald, ‘Underlying Rationales of Fair Use: Simplifying the Copyright Act’ (1998) 2 *Southern Cross University Law Review* 153. Similar scepticism about the ability of Australian law to reflect free speech values underlying fair use may be found in Melissa de Zwart, ‘The Future of Fair Dealing in Australia: Protecting Freedom of Communication’ (2007) 4 *SCRIPTed* 95.

²⁰⁰ Melville B Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 *UCLA Law Review* 1180.

²⁰¹ Robert C Denicola, ‘Copyright and Free Speech: Constitutional Limitations on the Protection of Expression’ (1979) 67 *California Law Review* 283. While noting the free speech-protective aspects of fair use, Denicola denies that ‘the doctrine is in essence a constitutional one, with its contours determined by the first amendment’. Rather, fair use is better seen as ‘merely a substantive rule of copyright law that can on occasion reduce the inherent tension between free speech and property rights in expression’: at 299.

²⁰² Neil Netanel, *Copyright’s Paradox* (Oxford University Press, 2008).

²⁰³ Beebe, above n 114, 573, noting that 25% of opinions invoked the First Amendment or more general free speech concerns through the course of the opinion.

²⁰⁴ *Harper & Row, Publishers, Inc v Nation Enterprises*, 471 US 539 (1985); *Eldred v Ashcroft*, 537 US 186 (2003). There are some rare cases where the First Amendment is front and centre of a court’s fair use analysis. See, eg, *Suntrust Bank v Houghton Mifflin Co*, 268 F 3d 244 (2nd Cir 2006), which concerned an African-American author who re-wrote aspects of the story of *Gone with the Wind* from the perspective of a mulatto slave on Scarlett’s plantation. The 11th Circuit Court of Appeals commenced its fair use analysis with a discussion of the relationship between the First Amendment and copyright, so as ‘[t]o approach these issues in the proper framework’: at 1260. Nevertheless, even in this case the actual analysis of fair use was focused on the four statutory factors, and the First Amendment was not mentioned beyond the initial introductory material.

and the US, and we could not assume that Australian courts would reach similar results to US courts when confronted with a fair use exception.²⁰⁵

This is why we would recommend the adoption of the *exact* terminology of section 107 of the US *Copyright Act*, in order to send the strongest and clearest possible message to the Australian courts that the approaches of the past are to be avoided. To avoid any doubt, we would also recommend that a statement be included in extrinsic materials to the effect that the purpose of adopting the same language as the US Act is so that the scope of the Australian provision can be informed by US case law. This would enliven s 15AA of the *Acts Interpretation Act*, which states that ‘[i]n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation’. It is not necessary for Australia to have a Bill of Rights or First Amendment in order for the legislature to make clear its purpose in adopting fair use of broadening exceptions to copyright and promoting freedom of expression.

(d) Summation

As noted at the outset of this submission, we need a significant break from the existing approach to drafting copyright exceptions in Australia. For reasons including responsiveness, justice and efficiency, we believe that it is time for the *Copyright Act* to be amended to include an open-ended exception. Our preferred option is for this new provision to follow the drafting of s 107 of the US *Copyright Act*. We believe that the large body of US case law has given depth and meaning to fair use analysis, and that the doctrine is not so tied to US conditions that it is incapable of application in Australia. We also believe that incorporation of fair use into Australian law would not conflict with the three-step test in international copyright law. If this approach were taken, it may also be possible to repeal many of the existing specific exceptions, on the basis that they cover activity that would instead be considered by reference to fair use.

3.4 Additional measures

In this submission we have argued that the *Copyright Act* should be amended to include a new open-ended exception. In this final section we consider some of the additional steps that might

²⁰⁵ To similar effect see Graeme Austin, ‘The Two Faces of Fair Use’ (2012) 25 *New Zealand Universities Law Review* 285, 309-10.

help ensure that any new flexible exception operates as a meaningful part of Australian copyright law.

(a) Why might additional measures be desirable?

We believe that there are a range of legal and non-legal factors that impact on the way in which exceptions operate in practice. This observation is consistent with propositions from the legal rulemaking literature, in which it has been noted that whether a statutory provision operates as a standard or as a rule can be influenced by external factors, such as the accumulation of judicial precedent and the interpretative practices of those to whom the law is directed.²⁰⁶

It is also supported by the empirical work with North American cultural institutions described at numerous points in this submission.²⁰⁷ To summarise, this work revealed that whilst many participating US institutions described forward-leaning approaches to fair use, the response of Canadian institutions to *CCH Canadian Ltd v Law Society of Upper Canada* has been extremely muted. This led to the question of why such stark differences in practices were observed. Although some explanation could come from the purpose-based limitations of Canadian fair dealing, this did not seem to offer a complete explanation, as the significance of *CCH* was to give users the imprimatur of the Supreme Court that they can and should seek out pockets of flexibility that inhere in fair dealing. Why was it, then, that Canadian institutions had not been willing or able to avail themselves of this flexibility? This research identified various legal, institutional and historical explanations, only one of which was the legislative drafting of fair dealing and fair use.

These lessons are crucial as they suggest that a new drafting paradigm may not be readily embraced by certain user constituencies, at least in the short to medium term. To put a different (and more positive) spin on it, they also point to additional steps that the legislature and copyright stakeholders can take to give content to a flexible exception and to encourage its utilisation. We note some possible measures below.

The inclusion of this analysis should not be taken to suggest that we are pessimistic about the ability of fair use (or an autochthonous flexible exception) to emerge as an important doctrine in Australian law. On the contrary, we believe there are strong indications that attitudes and

²⁰⁶ See discussion in Part 3.2, above.

²⁰⁷ This work is described in full in Hudson, *The Experiences of Cultural Institutions*, above n 106.

practices in Australia can be adapted to accommodate the sort of reasoning that a flexible exception requires. For instance, although Australian fieldwork conducted in 2012 disclosed an underwhelming level of reliance on s 200AB amongst cultural institutions,²⁰⁸ this can be explained by two factors that should *not* be repeated in any new flexible exception. The first is the utilisation of terminology from the three-step test, which we have already discussed. The second is the limitation of the exception to discrete user constituencies. This is significant because the accumulation of case law can do a lot to provide litigation-averse users with a body of precedent from which they can reason by analogy. Whilst cultural institutions self-describe as conservative, in the recent Australian fieldwork, numerous participants reported practices which suggest some comfort with a reasonable level of risk, most particularly (but not exclusively) with orphaned works. What interviewees repeatedly described, however, was a profound reluctance to litigate or be the test case in relation to s 200AB. However if no-one is willing to be the test case, it makes it difficult for industry practice to emerge, not just because of an absence of case law, but because the muted practices themselves can end up justifying the interpretation of the exception as limited in scope, even if such an interpretation was never intended.

Our support for fair use comes in large part from a desire to introduce into Australian law a provision with some *ex ante* meaning. However we also believe that if such an exception is available to *all* users, it is much more likely to generate Australian case law, which in turn will provide crucial guidance on the scope of an Australian provision. This will be particularly useful for those who rely on exceptions, but who do not tend to be defendants in litigation (of which cultural institutions are but one example).

(b) Possible measures

The following are other steps that may help facilitate the emergence of fair use (or an autochthonous exception) as a meaningful, rather than vestigial, part of Australian law.

(i) Remedies limitations

It is crucial that the ALRC consider the impact of other statutory provisions on the operation of an open-ended exception. One such example is remedies limitations. In the US, for example, there are limitations on the availability of statutory damages, including that registration of the

²⁰⁸ To be described in full in Hudson, *Copyright Exceptions: An Empirical Study*, above n 104.

copyright work is required before such damages will be awarded,²⁰⁹ they can be reduced for infringements by innocent defendants,²¹⁰ and must be remitted in circumstances where an employee or agent of a library or archives ‘believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107’.²¹¹ These limitations were reported by US interviewees to be significant for institutions, particularly where activities were not profit-making and actual damages were likely to be low.

One response to this suggestion might be that statutory damages are not available in Australian copyright law, and there is already some limitation on remedies for innocent defendants.²¹² However the Australian Act does permit the award of additional damages, and the carve-out in s 115 for innocent defendants requires that ‘the defendant was not aware, and had no reasonable grounds for suspecting, that the act constituting the infringement was an infringement of the copyright’. This would seem to be quite different to holding, on reasonable grounds, the belief that a use constitutes a fair use.

Inclusion of a remedies limitation in relation to any new flexible exception might also be desirable as it sends a strong signal from Parliament that it wants user constituencies to rely on that provision.

(ii) *Resources directed to copyright management*

A matter for both government and users themselves is to ask whether sufficient resources are being directed to copyright management, and whether those resources are being allocated in the most efficient ways.

Directing financial and human resources to copyright compliance is sometimes seen as a necessary evil – an inevitable part of a broader enterprise, whether that be the creation of new creative works, providing educational or broadcasting services, or running a library or museum. In many institutions and organisations, budgetary constraints are such that copyright is often under the spotlight as a target for rationalisation and cut-backs. It is common that the staff who

²⁰⁹ *Copyright Act 1976* (US), s 412.

²¹⁰ *Copyright Act 1976* (US), s 504(c)(2) (‘[i]n a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200’).

²¹¹ *Copyright Act 1976* (US), s 504(c)(2). This exception only relates to infringements by ‘reproducing the work in copies or phonorecords’.

²¹² *Copyright Act 1968* (Cth), ss 115(3), 116(2).

manage copyright are not legally trained and do so as part of a suite of duties. This can lead to difficulties because of the prominence that copyright has assumed in modern commercial and creative life.

One observation that emerged from fieldwork conducted with leading North American cultural institutions was abroad correlation between the level of resources directed to copyright management and the degree to which institutions were comfortable in relying on general exceptions. The US institutions that adopted the most forward-leaning fair use interpretations were also those with one or more of:

(1) a centralised unit for managing copyright; (2) what we might term ‘copyright experts’ on staff, including but not limited to attorneys and rights officers; (3) a willingness to dedicate resources to copyright management and policy development; (4) a more ‘commercial’ perspective about utilising fair use arguments, for instance through their approach to risk management or through using the doctrine to negotiate more favourable terms in licences; and (5) a management structure in which copyright experts either had the authority to direct institutional decision-making, or whose recommendations are acted upon by decision-makers.²¹³

The impact of these resourcing and management decisions were felt not just in relation to exceptions policy, but elsewhere, for instance in the conduct of licence negotiations, and in whether copyright agreements had been drafted or reviewed by a lawyer. That is, US institutions who thought seriously about reliance on fair use also tended to think seriously about licensing.

We would encourage the Australian government to bear these matters in mind when considering the funding of public institutions. Copyright is now central to many of the activities of such entities, and it is important that it be properly resourced.

In terms of users themselves, we would likewise encourage them to consider whether adequate resources are currently directed to copyright, and – very importantly – whether those resources are being used to optimal effect. Some users may be able to improve their position through changes in staffing arrangements, whether through employing in-house lawyers or copyright officers, or changing the responsibilities of existing staff so that greater attention can be given to copyright. Industry co-operation may also help this process, for instance through

²¹³ Hudson, *The Experiences of Cultural Institutions*, above n 106, 148.

copyright guidelines and protocols prepared by user associations and peak bodies. Instead of each institution employing its own lawyer or lawyers, there could be some discussion of sharing this expense. Here the existence of bodies such as the Australian Digital Alliance and the National & State Libraries Australasia illustrate a desire to coordinate efforts.

If these recommendations are followed then there is a real prospect that a fair use defence would effect the sort of fundamental transformation that is required to make Australian copyright law fit for purpose in the twenty-first century.