

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



# Australian Law Reform Commission

## Copyright and the Digital Economy Discussion Paper

### July 2013

To:  
The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
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## About ALPSP

1. The Association of Learned and Professional Society Publishers (ALPSP) the international membership organisation which works to support and represent not-for-profit organisations and institutions that publish scholarly and professional content around the world. Its membership also encompasses those that partner with and provide services to not-for-profit publishers. ALPSP has a broad and diverse membership includes over 320 organisations in 40 countries, who collectively publish over half of the world's total active journals as well as books, databases and other products.
2. ALPSP welcomes the opportunity to respond to the Discussion Paper on Copyright in the Digital Economy on behalf of ALPSP members.

## Key points

3. The fair use exceptions that are being proposed by ALRC do not appear to address the differences in opinions that have been expressed in submissions by users and rights owners as to what is 'fair' use. If these differences are apparent in the current legislation, then they will be amplified by the introduction of fair use exceptions, based on principles, rather than legislative certainty. Many of the differences expressed appear to be due to a misunderstanding of the current legal position, rather than a failure of the legislation.
4. The overriding impression provided by the Discussion Paper is that ALRC does not want to tackle these challenging differences and instead throws out a fair use exception, leaving it for the judiciary, through costly legal cases, to resolve what is fair and what is not fair use of rights holders' copyright material.
5. We remind the ALRC again that copyright industries are a significant part of Australia's economy, generating 6.6% of GDP<sup>1</sup>. The digital age has presented some significant challenges to this industry, not least the ease by which copyright works can now be duplicated and redistributed. This is vastly different from the analogue era and growth in this sector has been put under considerable strain because of this unauthorised use. Some of that use is felt to be 'fair' by some users, who unwittingly or deliberately break copyright legislation, having no knowledge of the damage they cause to the individual rights holders.
6. Existing rights owners and those keen to generate intellectual property in new start-ups need certainty and clarity with regards their intellectual property, not a foreseeable future of risk taking, loss of potential earnings or legal challenges. Indeed the ALRC's proposals threaten "*one of the best regulatory environments for entrepreneurship*" that is attributed to Australia by PricewaterhouseCoopers in their 2013 report on supporting start-ups and innovation<sup>2</sup>.
7. Although ALRC make note that statutory licences are a type of compulsory licence which means that rights owners are "compelled to licence their material", this is quite a weak argument for removing them, particularly when it does not take into account that rights owners are not asking for a repeal of the licences and in fact many rely on the income they provide. In response to the Issues Paper and in some early responses to the Discussion Paper, rights owners, particularly smaller and independent rights owners, have clearly stated the importance of the income from

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<sup>1</sup> <http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>

<sup>2</sup> <http://www.digitpulse.pwc.com.au/wp-content/uploads/2013/04/PwC-Google-The-startup-economy-2013.pdf>

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such licences to them, which allows them to continue to create content that is so important to the public sector. The ALRC appears to have either misunderstood or chosen to ignore this key piece of information supplied to them in consultation responses from creators.

8. Removal of statutory licences will lead to a greater administrative, and thus cost, burden in dealing with negotiating new licences. It is also highly likely that the content available under such 'voluntary' licensing arrangements will be much less as it will simply not be possible to reach agreement with each and every right owner. Smaller and independent rights owners do not have the resources to negotiate licences for their work with many different institutions and governments and having to try to address this will impede their ability to create and maintain a sustainable income.
9. We urge the ALRC to read, understand and engage with the many submissions both to the Issues Paper and to the Discussion paper from all stakeholders that this will affect. From our reading of the submissions to the Discussion Paper so far, there are very clear feelings against the repeal of statutory licensing from creators within academic and involved in supplying its carefully defined requirements.

## The Case for Fair Use in Australia

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

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

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

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

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

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

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

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

10. We do not consider that the case has yet been made for fair use exceptions in Australia, as detailed below (Comments on the case for fair use in Australia).
11. We request that definition is given to 'private and domestic' usage. This means different things in different legislations from an individual use to sharing within a 'domestic sphere'. Despite assurances that there would be no challenge to a fair use exception from the Berne 3 step test (as other jurisdictions have not seen a challenge), there remains the issue that what some might see as fair in a private and domestic sphere may conflict with the normal exploitation of a work. For example, students sharing a house (domestic situation) might feel that purchasing a single copy of a digital textbook and sharing it would be fair use; particularly with digital books, sharing might mean one copy can be used by several people at the same time. However a creator and publisher would be justified to expect individual students would purchase individual copies for their own use (as would be the case with physical copy books), thereby such an exception would interfere with the normal exploitation of the work.
12. It also needs to be made clear that exceptions cannot be used in conjunction with one another. For example, receiving a legal copy of a work for research or private study, does not mean that the same copy could be used to format shift under the private and domestic exception.

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

13. No further comment.

#### Comments on the case for fair use in Australia

14. We are surprised that the ALRC feels the case for the introduction of fair use exceptions is so strong, particularly as it is apparent from the Discussion Paper that the ‘evidence’ actually merely comprises opinion and assertions. We are very concerned that the fair use exception is being seen as a relatively simple way to update the legislation without due consideration of the implications it will have across all copyright-dependent sectors of the economy.
15. Any legislative change of this magnitude will have considerable effects on the economy, particularly as the legislation would be moving from an area of certainty, backed up with many years of case law, to one of much uncertainty, with case law requiring to be established. ALRC state that they now consider the “*potential benefits of introducing fair use now outweigh the transaction costs*” (emphasis added). However no Impact Assessment(s), nor any other substantial evidence has been provided to explain why this position has been reached, so we are unable to comment on the benefits and costs that have been established to allow the ALRC to claim this.
16. It seems quite an unusual step, particularly in the current economic climate, to introduce copyright legislation that *will* result in an increase in the number of litigations required to establish what the boundaries of that legislation are. The whole premise of introducing such legislation relies on the judiciary to establish what the legislation means, as evidenced in the Discussion Paper’s section entitled *interpreting fair use* (4.175-4.183). It is irrelevant whether there are other jurisdictions’ case law to draw from, the fact remains that both users and rights holders will be forced to establish just what fair use in Australia means via many court cases.
17. Where court cases are involved, the damage to rights holders will have already taken place, regardless of the outcome of the case, else there would be no need to raise the case in the first place.
18. In addition, how can such legislation be judged to be ‘fair’ for all citizens and businesses in Australia, when only those with pockets deep enough will be able to legally challenge or defend a ‘fair use’? The Discussion Paper itself notes Pearson Australia/Penguin’s submission that the average cost for *each* party in resolving such a legal challenge is US \$1 million. This appears to be generating (at least in the short to medium term, until larger, wealthier claimants develop the case law), a climate to support large corporations with deep pockets and but a few wealthy start-ups, or very high risk takers.
19. We fail to see how this would “*foster an entrepreneurial culture which contributes to productivity*” (4.97) and would welcome further detail on this. It also contrasts with PricewaterhouseCooper’s consideration that Australia already has “*one of the best regulatory environments for entrepreneurship*” - see paragraph 6.
20. Fair use makes using copyright works less, not more, certain. One person’s idea of ‘fair’ is not necessarily the same as another’s. Individuals and small (perhaps entrepreneurial) companies wishing to comply with copyright law are less likely to take a chance on using copyright material.

Indeed the U.S. Copyright Office's Information Sheet on Fair Use<sup>3</sup>, advises that in cases of doubt, the "*safest course of action is to get permission from the copyright owner before using copyrighted material*". If Australia were to adopt fair use, it would therefore appear to be a move away from the current permissive exceptions, towards a necessity (for the avoidance of doubt) to pay for legal advice and/or ask for permission, increasing, not decreasing the burden on both users and rights holders.

21. The U.S. Copyright Office's Information Sheet on Fair Use also notes the "*substantial number of court decisions over the years*" which are now part of the copyright legislation itself. It appears that this detail of what is considered 'fair use' is actually similar to that already seen in the fair dealing exceptions in Australian copyright legislation. Does Australia really want to go through the many rounds of court decisions only to put what is considered fair back into the copyright legislation (as users and rights holders are demanding certainty)?
22. It is a red herring to consider that making use of the legal decisions made in another jurisdiction would make 'fair use' easier to administer. The law of Australia would need to make that decision on what is fair or not, regardless what another jurisdiction has proclaimed.
23. It is argued on the one hand that the current fair dealing exceptions are too rigid and inflexible, but on the other they are still described in the Discussion Paper as being "uncertain". Uncertainty is a complaint which fair use will only exacerbate.

## Statutory Licences

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

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

24. We are very concerned at the degree of ALRC's misunderstanding of how statutory licensing is actually employed and that they base a considerable degree of opinion on why statutory licences should be repealed on these misunderstandings. We strongly urge the ALRC to carefully examine the explanations made in the Copyright Agency's submission, and to talk further with both the Copyright Agency and representatives from education and government to properly understand the issues. We do not believe that the ALRC's proposal to repeal statutory licensing has been considered from a fully informed position and we support the Copyright Agency's assertions that solutions to the *real* issues can be found without the need to make considerable and far reaching changes to the legislation.
25. There are arguments that the existing statutory licences are derogatory to rights holders' rights. However, the benefits of statutory licensing to small, independent authors, creators, societies and publishers cannot be underestimated. This can be very clearly seen in the submissions to the Issues Paper and already in some submissions made to the Discussion Paper. Income from licensing via the Copyright Agency underpins the businesses of many individuals and small

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<sup>3</sup> <http://www.copyright.gov/fls/fl102.html>

organisations; taking this away will put those creators and publishers in jeopardy and remove a thriving portion of the digital economy, many of whom support the requirements of the education system. This is a major concern to ALPSP and its members.

26. Repealing statutory licences will introduce considerably more work and administration costs for users and rights owners in negotiating licences with individual schools (or their representatives), further and higher education institutions.
27. Repealing statutory licences will also introduce considerably more uncertainty for teachers as to whether they are now appropriately licenced for a particular use and for using a particular work. Teachers already work long hours and we would argue that they would not welcome another task to deal with when preparing their teaching plans.
28. To answer the question posed (Q6-1), it would certainly be recommended that use under exceptions be subject only in cases where the use cannot otherwise be licensed, whether voluntarily or by statute.

## Fair Dealing

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

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

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

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

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

29. We are supportive of the position that fair dealing exceptions are widely understood and can provide a good degree of certainty to those wishing to use copyright material free of charge under the special cases indicated. It is perhaps the wording of the legislation that needs to be addressed to provide further clarity and certainty, rather than a dramatic change to the legislation itself.

## Non-consumptive Use

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

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

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

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

30. We do not consider text and data mining to be a non-consumptive use and this completely misunderstands what technology, software and data formatting needs to be employed before such mining can happen. Whilst the copying that is required to create an index or database is perhaps non-consumptive, the subsequent mining of that indexed content is not. Placing the overall practice of what is referred to as ‘text and data mining’ as a non-consumptive use is misleading. ‘Text and data mining’, as it is being referred to throughout the world is not the same as the non-consumptive purpose of caching.
31. There is also the question of to what purpose such an index can be put and how the actual copyright content can be accessed from such an index. It would certainly not be permissible for the actual content that was used to create the index or database for mining to be hosted and made available without specific licensing agreement with the rights holder.
32. Text mining is also not the same as data mining. A recent paper for the Publishing Research Consortium clearly differentiates the two<sup>4</sup>. Text mining aims to “*extract the meaning of a passage of text and store it as a database of facts about the content, not simply a list of words.*” This goes beyond simple indexing. Data mining, on the other hand, is “*an analytical process that looks for trends and patterns in datasets that reveal new insights.*”
33. Both text and data mining go beyond non-consumptive use and also require that the user has appropriate, legal access to the content in question. This requires licensing on behalf of the rights owner, particularly to protect against server overload and piracy. The UK Government agree with this and although they are considering the introduction of a specific exception to copyright for text and data mining, they are grappling with the wording of such an exception to provide the necessary requirements for users but appropriate protection for rights holders. It is interesting to note that the scholarly publishing community is providing its own solution to this issue, via licensing (mainly existing subscriptions), which has the potential to provide greater access and use of content than the exception will be able. This service is likely to be live by the end of 2013.
34. It should also be noted that the UK is intending to introduce this as part of the European Copyright Directive Article 5(3)(a), which allows for an exception “*for the sole purpose of illustration for*

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<sup>4</sup> <http://www.publishingresearch.net/documents/PRCTextMiningandScholarlyPublishinFeb2013.pdf>

*teaching or scientific research*” (emphasis added), therefore it would not be applicable to all types of copyright content.

35. This is a new market for rights owners and is developing according to the needs of users. The market should be allowed to develop before legislation imposes restrictions, or worse, on rights owners.

## Private and domestic use

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

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

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

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

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

36. We feel that the definition of “private and domestic use” in the Copyright Act is not adequate to consider the many different social situations, and is inadequate to protect the normal exploitation of a work by the rights holder in all circumstances.
37. The current definition “*private and domestic use on or off domestic premises*” does not indicate if this use is for the individual who legally owns a copy of a copyright work, or for a much wider sphere. Whilst it is certainly expected that time-shifting of televised programmes will likely be viewed by more than one member of a ‘family’, at what stage does that become rebroadcasting when in a shared housing situation with many members of different families? As previously referred (paragraph 11), a creator of a text book might reasonably expect several students to purchase a copy, as part of the normal exploitation of the work, but if private and domestic extends to all types of social situation, then one copy per ‘household’ would permit sharing that would conflict with the normal exploitation of the work.
38. If ‘private and domestic’ use is intended to be an illustrative use for the proposed fair use exception (which we oppose) or in a fair dealing exception, then ‘private and domestic’ needs to be more tightly defined. We would suggest that this sort of use should be for sole personal private use, rather than extending to a domestic sphere for all copyright works, which could harm some markets.

## Transformative Use and Quotation

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

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

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

### Transformative use

39. We agree that there is no requirement to provide for any new ‘transformative use’ exception. At paragraph 10.25, the Discussion Paper makes note that uses which do not currently fall within the scope of parody, satire, criticism or review “*will constitute infringement when a substantial part of the work or other copyright subject matter is used*” and implies that is a problem for transformative use. It is correct that use of a *substantial* part of copyright material, without permission from the rights owner will constitute infringement.
40. One argument might be that it is difficult to figure out who to ask for permission to use the work. However, there are now several international industry-led initiatives aiming to solve this issue, such as the Copyright Hub<sup>5</sup> and the Linked Content Coalition<sup>6</sup>.
41. The ALRC is reminded that the exceptions permitted by the Berne 3-step test have to be for a ‘special case’. General transformative use by all sectors of the community can hardly be argued to be a ‘special case’ and should be licensed as appropriate from the rights owner.

### Quotation

42. We question the need for a quotation exception for academic uses. In the case of scholarly journals, there has long been agreement and normal practice in the scholarly research community that academic authors are free to “*note and comment about research developments by criticizing and quoting published articles (without the necessity of obtaining consent)*”<sup>7</sup>. Such quotation is standard practice in academia and the extent is recognized as being “*just enough of the original to convey the critical point, and proper citation and crediting*”<sup>8</sup>.
43. We also seek to clarify how potential users of such a general “quotation exception”, are likely to know whether there is “*little or no effect on the potential market for, or value of, the copyright material*” (Discussion Paper, 10.111).
44. The Discussion Paper is still unclear as to what would be covered under such a proposed exception, for example how is “quotation” defined, are some/all copyright materials expected to be involved, how it might affect existing agreements and how can it be justified to be a ‘special case’, as per Australia’s obligations under the 3-step test?

## Libraries, Archives and Digitisation

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

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

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

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<sup>5</sup> <http://www.copyrightclub.co.uk/>

<sup>6</sup> <http://www.linkedcontentcoalition.org/>

<sup>7</sup> [http://www.stm-assoc.org/2007\\_05\\_01\\_Author\\_Publisher\\_Rights\\_for\\_Academic\\_Uses.pdf](http://www.stm-assoc.org/2007_05_01_Author_Publisher_Rights_for_Academic_Uses.pdf)

<sup>8</sup> *ibid*

45. We support a new fair dealing exception for libraries and archives, which would provide greater clarity and certainty for these institutions. We would recommend that there are provisions for uses such as copying for non-commercial research and private study, supply of copies to other libraries, replacement of copies of works, and for unpublished works.

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

46. One of the biggest issues with mass digitisation projects is the identification and clearance of relevant rights. Extended collective licensing (ECL) may solve the problem to some extent. As referred to in our response to the Issues Paper, the Arrow Project<sup>9</sup> (Accessible Registries of Rights Information and Orphan Works) has been set up to address text and image based works, though the Arrow Plus<sup>10</sup> project is now working on developing the types of works included.
47. Mass digitisation projects should be the subject of appropriate licensing and Collective Management Organisations, such as the Copyright Agency and Screenrights, would be the most appropriate organisations to facilitate voluntary extended licensing. Each CMO is already likely to represent a considerable proportion of the rights holders in their sector.
48. ECL should require that the collecting society be representative of the sector it operates in and obtain the consent of the majority of its members to launch such a licence. It should also allow for specific opt-outs for its members.
49. ECL should not act as a substitute for statutory licensing.

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

50. We do not feel that unlimited copying should be permitted. The copy or copies made should be made for the express purpose of preservation and should be limited to the absolute minimum necessary for the purpose of preservation. Security of the copies should also be paramount.

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

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

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<sup>9</sup> <http://www.arrow-net.eu/>

<sup>10</sup> <http://www.arrow-net.eu/what-arrow-plus>

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

51. We support the recommendation that copying for the purpose of preservation should only be permitted when it is not reasonably impractical to obtain a commercially available replacement.

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

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

52. We support this provision. To help educate those receiving the copies for research and private study it would be useful to require the user to make a declaration that the use is to be only as stated under the exception.

## Orphan Works

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

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

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

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

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

53. We recommend a specific scheme to deal with the use of orphan works fairly.
54. We recommend that the scheme or the Copyright Act itself provide some guidance as to when a work could be considered orphan and what should be included in a diligent search. This provides every opportunity for the work to be reunited with its legal owner prior to the desired usage.
55. We would like to understand how the use of orphan works under a fair use exception would be managed. Who will be tasked with noting that the diligent search has been appropriately conducted? Will anyone be able to state that a work is orphan and use it as they think fair once they’ve done so? What does fair in this context mean? Are any considerations being given towards commercial versus non-commercial usage? This proposal appears to point to a very open, potentially chaotic and unsatisfactory landscape for works that potential users might *consider* to be orphan.

56. Why are collecting societies, who have considerable experience in tracking down rights holders not being considered to help facilitate the usage of orphan works?
57. We consider that licensing schemes, such as those being adopted in Europe, are the fairest way to treat works that have been deemed to be orphan, without triggering in an imbalance in the marketplace in favour of orphan works. Such licensing schemes have the benefit of recording the works that have been deemed orphan, thereby preventing another potential user needlessly carrying out the same diligent search for the same work.
58. The British Copyright Council (BCC) provided guidance<sup>11</sup> to the UK Government when it was considering its Orphan Works scheme. The guidance is not so detailed that it would quickly become out of date or irrelevant as technology evolves and we would recommend that the guidance be considered when the Australian Government considers how to implement an orphan works scheme.

## Educational Use

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

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

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

59. There is likely to be little argument that for *illustration* purposes, teachers may make copies of works for use on teaching tools, such as interactive whiteboards – in fact this is already allowed under the current statutory licence. However, permitting teachers to make copies of copyright works (small or substantial portions thereof) and distribute them to students appears to strongly conflict with normal exploitation of works.
60. There are already coursepack licensing schemes, such as Kopinor’s Bolk service<sup>12</sup>, which are ensuring a healthy, vibrant and viable market for creators which produce work(s) specifically with educational institutions and their specific requirements. This income stream is particularly important for individual and small creators, as was evidenced in several responses to the Issues Paper and to the Discussion Paper.
61. Fair use may introduce unacceptable delay for teachers in establishing what is and is not fair use, and what uses and works are included in the voluntary licences that might be negotiated. Will avoidance of risk mean that teachers prefer to avoid using works that are specifically created to support the curriculum and their needs?
62. Whatever copying rights educational institutions are subsequently granted, each should have a responsibility to ensure the security of works that have been copied.

## Government Use

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<sup>11</sup> <http://www.britishcopyright.org/page/225/licensing-of-orphan-works/>

<sup>12</sup> <http://www.kopinor.no/en/rightsholders/publishers-coursepack-delivery/bolk-kopinors-coursepack-delivery-service>

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

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

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

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

63. The ALRC has not yet made the case for why a public administration exception should be introduced, so we cannot comment on why it might be needed, what such an exception would involve or in what context it would be used.

64. As a point of note, the UK Government has recently proposed an update of its Public Administration exception, as referred to in the Discussion Paper (14.11-14.14). With regards opening material to public inspection, the proposed exception is now format-neutral and only applies when a work is *not* commercially available.

## Contracting Out

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

65. We do not believe that the Government should impose restrictions on what a rights owner and licensee wish to agree under a licencing agreement.

66. Introducing such restrictions may put Australia in the position of being in conflict with the Berne 3-step test as rights owners would not be able resolve by contract any exceptions which may conflict with the normal exploitation of their work.