



Australian
Competition &
Consumer
Commission

ACCC submission to the ALRC Copyright and the Digital Economy Discussion Paper

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1. Executive Summary

- 1.1 In making this submission in response to the ALRC's *Copyright and the Digital Economy Discussion Paper* (Discussion Paper) the Australian Competition and Consumer Commission (ACCC) has relied on the principles set out in its *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper* (the ACCC's 2012 submission). The ACCC has considered the ALRC's proposed reforms in light of the objectives of copyright and the facilitation of competitive intellectual property (IP) markets.
- 1.2 The ACCC considers that a fundamental objective of copyright is to provide incentives for the creation of copyright material by preventing free riding on intellectual property. However, the ACCC notes that a balance must be struck between providing incentives for the creation of copyright material and providing incentives for the efficient use of that material. The ACCC considers that competition in IP markets will generally maintain incentives for the creation of copyright material and promote fair licensing regimes for the wide dissemination and efficient use of copyright material.
- 1.3 The ACCC notes that the ALRC has cited the role the *Competition and Consumer Act 2010* (CCA) may play in regulating anti-competitive conduct in certain areas of copyright licensing. In this respect, the ACCC has some concerns regarding a reliance on the CCA as a means of addressing the market failure issues that may arise in relation to copyright.
- 1.4 The competition provisions in the CCA do not provide an avenue for dealing with conduct that reflects a mere exercise of unilateral market power, such as monopoly pricing or poor service, that does not either involve an anti-competitive agreement or unilateral conduct that is exclusionary under section 46 of the CCA.
- 1.5 Furthermore, the operation of section 51(3) of the CCA creates uncertainty around the application of certain provisions in Part IV of the CCA to conduct relating to copyright licensing. The ACCC notes that the ALRC has stated that section 51(3) is outside its Terms of Reference for the Copyright Inquiry. However, the ACCC notes throughout this submission that the uncertainty created by section 51(3) of the CCA remains a relevant consideration given the underlying role of competition law in addressing anti-competitive conduct in markets for copyright material. As such, the ACCC resubmits that it is appropriate for section 51(3) of the CCA to be repealed and considered by the ALRC in conjunction with its reform proposals.
- 1.6 The ACCC submits that the ALRC's proposed reforms in relation to various sections of the *Copyright Act 1968* (Copyright Act) should be considered in relation to the implications these amendments may have on the efficient operation of and competition in markets for copyright material and their interaction with current competition laws. As such, the ACCC supports the following proposals for reform:
 - addition of a fair use exception, including its applicability to third party use;
 - prohibition of contracting out in all instances of 'fair use';

- repeal of certain statutory licences; and
- proposed reforms to the retransmission scheme.

Fair use

- 1.7 The ACCC broadly supports the introduction of a fair use exception, as proposed by the ALRC, and considers that such an exception is likely to promote an appropriate balance between socially beneficial incentives to create and incentives to disseminate and use copyright material. The ACCC considers that an appropriate fair use exception may allow for uses that involve either very limited free riding or detrimental effect on the value of the rights and where the transactions costs of otherwise contracting for that use may be prohibitive. Where a use results in a limited effect on the value of a right, it is also likely to have a limited effect on the incentives to create copyright material that flow from the initial granting of rights.
- 1.8 The ACCC agrees with the ALRC’s proposition that standards-based legislation has the ability to provide the degree of flexibility required for meeting the demands of users and rights holders as changes occur in the digital economy. The ACCC notes that, in order to achieve this, the fair use framework should be drafted to provide some stability and certainty for industry participants, as well as guidance to the courts that ensures the focus is on striking the appropriate balance between creation of incentives for production and efficient use of copyright material. In this respect, the ACCC considers that the fairness factors and illustrative purposes will be critical in providing guidance as to what may be considered fair use.
- 1.9 In addition, the ACCC considers that it would be useful to develop more detailed illustrative purposes that are able to reflect the value of ensuring the efficient operation of markets for copyright material and which encourage a careful consideration of relevant factors to ensure that copyright rights are not extended in a manner which creates monopoly characteristics in ancillary markets. The ACCC has made submissions in sections 4 and 5 in relation to the fairness factors and illustrative purposes.

Third party use

- 1.10 The ACCC submits that certain types of third party use of copyright material—where the use does not involve significant free riding on the value of the copyright itself—should fall within the fair use exception.
- 1.11 The ACCC has specifically considered examples of third party use that merely facilitate legitimate use by others, that is, use that is either arranged via licence, purchase or permitted under the Copyright Act. The ACCC considers that such third party uses are likely to be key to innovation and the development of emerging markets and services. For example, a third party use that the ACCC considers should fall within a fair use exception is the provision of cloud services, where a third party makes a copy of copyright material on behalf of an end user who has legitimately obtained that material from the copyright holder.
- 1.12 The ACCC notes that such services do not necessarily harm the value of the underlying right. This issue is something the ACCC submits should be considered as part of a cost-benefit analysis regarding whether use is fair. Further, the ACCC submits that whether the third party

is benefitting commercially from these types of third party use should not be a central or determinative factor in establishing whether the use is fair.

Contracting out

- 1.13 The ACCC submits that the Copyright Act should be amended to limit the ability of parties to contract out of all fair use of copyright material.
- 1.14 A fair use exception should properly reflect a cost-benefit framework for copyright protection and seek to address inefficient transaction costs and the potential for the *extent* and *use* of the rights conferred by copyright to restrict competition and create market power. In such circumstances, the ACCC considers that it necessarily follows that contracting out is more likely to be economically detrimental than beneficial.
- 1.15 The ACCC considers that a prohibition on contracting out in all instances of fair use is likely to be in the best interests of consumers and competition, particularly where there is an imbalance of power between parties to a negotiation. The ACCC notes that, absent a prohibition on contracting out, it is not clear whether either the Australian Consumer Law (ACL) or Part IV of the CCA would be able to operate to protect consumers or businesses in such circumstances.

Statutory licences

- 1.16 The ACCC does not oppose any repeal of statutory licence schemes. However, the ACCC submits that, in making any final recommendations, the ALRC should be cognisant of the potential for competition concerns to arise in a voluntary licensing environment, particularly with respect to the ability of collecting societies to exercise their market power.
- 1.17 The ACCC reiterates its view that, should voluntary licensing result in an exercise of market power, the ACCC's ability to take action under Part IV of the CCA may be limited by the scope of conduct captured by the CCA and the operation of section 51(3).

Retransmission of free-to-air broadcasts

- 1.18 The ACCC broadly supports the ALRC's Option Two in relation to the retransmission of free-to-air (FTA) broadcasts, which proposes to retain a statutory licensing scheme with amendments to include a remunerated exception for broadcast copyright and to apply to retransmission by any method, including via the internet.
- 1.19 The ACCC considers that Option Two mitigates the potential for FTA broadcasters to exercise their market power. However, the ACCC considers that prior to forming a final view on the proposed changes, it will be important to consider the value and costs of retransmission to various parties.
- 1.20 The ACCC does not have a view, at this stage, on the merits of the ALRC's proposal to provide for FTA broadcasters to be remunerated for the retransmission of their services under Option Two.

Efficient licensing in the digital economy

- 1.21 In addition to the submissions outlined above in response to the ALRC's Discussion Paper, the ACCC notes that where transaction costs of gaining lawful access to copyright materials are too high, some potentially valuable uses of these materials will not occur, to the detriment of efficiency and welfare.
- 1.22 The ACCC submits that in certain circumstances, digital technologies and digital licensing systems can be used to lower the transactions costs for some types of 'low value' uses. The ACCC submits again that the ALRC should explore whether a version of the digital copyright exchange (DCE) should be introduced, as proposed in a 2011 UK report, *Digital Opportunity, A Review of Intellectual Property and Growth* (the Hargreaves Report).¹ This issue is discussed further in section 9 of this submission.

2. Competition law and copyright

- 2.1 The CCA is Australia's national competition and consumer law. The ACCC is the independent Australian Government agency responsible for administering and taking enforcement action under the CCA. The object of the CCA as specified in section 2 is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."
- 2.2 The object of the CCA reflects the view, which is shared by the ACCC, that absent market failure, open and competitive markets will generally promote efficiency. The ACCC considers that competition in markets for copyright material will generally maintain incentives for the creation of works and other subject matter, and promote licensing regimes for the wide dissemination and efficient use of copyright material.²
- 2.3 The ACCC considers that competition in markets ultimately benefits consumers, businesses and the community. As a result of competition, Australians benefit from continuing innovation in products and services, increased choice of products and services, prices reflective of costs and resultant economic growth.
- 2.4 As previously submitted, the ACCC considers that it is important that, where the exploitation of copyright may result in anti-competitive conduct, there are appropriate mechanisms in place to address this conduct. Given the importance of competition laws in responding to anti-competitive behaviour, particularly in relation to copyright licensing, the ACCC remains of the view that section 51(3) of the CCA should be repealed.³ The ACCC notes that the House of Representatives Standing Committee on Infrastructure and Communications recently recommended that section 51(3) of the CCA be repealed as part of a suite of

¹ See generally *Hargreaves Report*, ch 4; ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p20

² ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, pp.26-32.

³ ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p.35.

recommendations in the *Inquiry into IT Pricing*.⁴ The ACCC's views in relation to section 51(3) of the CCA were detailed in the ACCC's initial submission to the ALRC Copyright Inquiry.⁵ The prevailing issues associated with the operation of section 51(3) are commented on below in relation to each of the specific proposals for reform.

- 2.5 The ACCC notes that regardless of whether section 51(3) of the CCA is repealed, reliance on the CCA to address competition concerns may be problematic. Part IV of the CCA covers specific types of anti-competitive conduct and as such may not necessarily be applicable to certain conduct in copyright markets. Where an exercise of market power does not involve either an anti-competitive agreement or exclusionary conduct captured by section 46 of the CCA, Part IV of the CCA will not be the appropriate avenue for redress. In particular, there may be no general competition law remedy for conduct that simply reflects an exercise of unilateral market power, such as monopoly pricing or poor service (other than through the prevention of anti-competitive mergers that are expected to give rise to such conduct).
- 2.6 Although section 51(3) does not affect the operation of section 46 of the CCA, bringing proceedings under section 46 is not necessarily a practical or pragmatic solution, as demonstrated by *Universal Music Pty Ltd and Ors v ACCC*, which related to a refusal to supply retailers who engaged in parallel importing.⁶ This case illustrates the uncertainty and timeliness issues that can be associated with Part IV proceedings, as it took over four years from the time proceedings were commenced to judgment by the Full Federal Court.

3. Copyright law: a cost-benefit framework

- 3.1 The ACCC considers that open competitive markets are generally the best way to ensure that the resources of an economy are put to their most efficient use so as to maximise the welfare of society. However, various forms of 'market failure' or imperfections may mean that markets may fail to promote efficiency and welfare in some circumstances, including in the provision of so-called 'public goods.'
- 3.2 As noted in the ACCC's 2012 submission, copyright material is a form of public good. Public goods are products that are both non-excludable and non-rivalrous in consumption.⁷ As consumers will be unwilling to pay for a good that they can otherwise obtain for free, there will inevitably be significant free riding on the copyright material by consumers. Consequently, in the absence of regulation to address the free riding problem, producers may have little or no incentive to invest in creative material. The existence of copyright legislation seeks to overcome this market failure by providing creators of copyright material with protections that

⁴ See recommendation 8 of the Final Report, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/report.htm.

⁵ ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, pp.31-6.

⁶ [2003] FCAFC 193.

⁷ Further explanation of the characteristics of a public good are discussed in section 3 of the ACCC 2012 submission: ACCC, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012.

allow them to exclude others from the use of their material within a framework of certain exceptions.

3.3 While copyright laws may deal with the free riding problem to an extent, other types of market failure may be created or exacerbated as a result of the operation of these laws. The non-rivalrous nature of consumption of copyright materials means that the direct costs of each use of that material is near zero. Economic efficiency, at least in the short run, will generally be promoted by maximising the use of such materials. There may be significant costs for economic efficiency and consumer welfare if protections for IP rights are too extensive and not balanced by appropriate exceptions. The ACCC noted in its 2012 submission that there are two potential sources of market failure that are relevant to the consideration of the appropriate extent of copyright protection and whether exceptions and statutory licences are adequate and appropriate in the digital environment.⁸ These are:

- *transaction costs* associated with the licensing of copyright materials; and
- the potential for the *extent* and *use* of the rights conferred by copyright to restrict competition and create market power.⁹

3.4 The ACCC considers that the benefits of improving incentives to creators and distributors of copyright material need to be balanced against any disincentives to users of copyright material and the consequent costs.¹⁰ The ACCC considers that maintaining an appropriate balance between the incentive to create copyright material and the ability of users to licence copyright material should be a key consideration when considering proposals for reform. The ACCC notes that when commenting on the ALRC's proposals for reform, it has done so in the context of the cost-benefit framework as outlined above.

4. Fair use

Introduction

4.1 The ACCC broadly supports the introduction of a fair use exception, as proposed by the ALRC, and considers that standards-based legislation has the ability to provide a desirable degree of flexibility, provided that the framework is drafted to provide some stability and certainty for industry participants.

4.2 In the ACCC's 2012 submission it noted that copyright law needs to strike a balance between providing incentives for investment in, and restricting access to, copyright material.¹¹ That is, copyright laws should reflect the application of the cost-benefit framework outlined in the preceding section. The proposed fair use exception should be underpinned by these cost-

⁸ ACCC, ACCC, ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper, November 2012, p.2.

⁹ ACCC, ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper, November 2012, pp.2, 12-14.

¹⁰ Intermediate users are users who use pre-existing copyright materials to create further copyright material for commercial and private use.

¹¹ ACCC, ACCC submission to the ALRC Copyright and Digital Economy Issues Paper, November 2012, p.3.

benefit considerations. In particular, where a use does not involve significant free riding on copyright material and where that use would involve significant transactions costs, this should be reflected in the illustrative purposes proposed in relation to fair use.

- 4.3 This issue has become more complex in the digital economy due to the rise of intermediate usage for both commercial and non-commercial purposes. The ACCC has previously stated that

...copyright law needs to be able to respond to changes in technology, consumer demand and markets. The ACCC considers that copyright law as it currently stands does not provide the flexibility required to be able to respond quickly and predictably to the changes in the way copyright material is consumed and used. The ACCC broadly considers that a technology-neutral approach is appropriate...¹²

- 4.4 In particular, the ACCC considers that introducing more flexible copyright laws should be able to accommodate and foster technological advances and innovations that might otherwise be curtailed by prescriptive and/or narrow exceptions.
- 4.5 The ACCC notes that some submissions in response to the ALRC's *Copyright and Digital Economy Issues Paper* (Issues Paper) raised concerns that a broad fair use exception could distort the intended balance of the Copyright Act.¹³ The ACCC suggests that, as discussed below, further development of the non-exclusive list of illustrative purposes could be used to address the concerns regarding the potential breadth of the fairness factors and reduce uncertainty.

Standards-based legislation

- 4.6 The ACCC agrees with the ALRC's stated rationale for principles or standards-based legislation¹⁴ and considers that this is a pragmatic approach to meeting the demands on copyright law in the context of a fast-developing digital economy. The ability of the law to adapt to developments in technology, changing business models and shifting consumer practices and expectations is important to ensure that the law does not unnecessarily hinder business in Australia.
- 4.7 The ACCC notes that there can be significant delays between developments in the market and legislative change to accommodate those developments, and considers that such delays can have a dampening effect on business practices and innovation.
- 4.8 While the ACCC acknowledges that a shift away from more prescriptive legislation may, in some instances, be at the expense of certainty, the ACCC notes that the current, more prescriptive, copyright exceptions do not necessarily provide certainty in their application. The ACCC does not consider that flexibility in legislation necessarily amounts to uncertainty, and agrees with the ALRC's proposition that there are other ways in which certainty can be added to the framework.

¹² ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p.37.

¹³ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.73.

¹⁴ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, pp.65-70.

- 4.9 In particular, the ACCC notes that some submissions in response to the Discussion Paper indicate a degree of concern that the uncertainty created by a fair-use exception may destabilise current licensing practices.¹⁵ In this respect, the ACCC notes that current licensing practices may not necessarily be efficient and, while it is desirable to cause minimal disruption to established practices, this should not be at the expense of ensuring that market participants have appropriate incentives and that markets are as efficient as possible.
- 4.10 The ACCC notes that any uncertainty created by having a fair use exception is potentially ameliorated given that the purposive illustrations provided are, in many cases, derived from current exceptions. Established legal principles in Australia are likely to provide further guidance.
- 4.11 The ACCC notes the suggestion that industry codes and agreements may be able to provide some certainty and stability for parties regarding fair use. The ACCC considers that, while there may be a role for industry development of acceptable practices, there is a risk that industry objectives might be subject to dominant influences and might not reflect the policy objectives of the law. The ACCC suggests that if the ALRC proposes a self or co-regulatory scheme, as suggested by the ACMA in their submission to the Issues Paper, consideration should be given to whether the appropriate conditions exist for this approach.¹⁶ The ACCC notes that in some instances guidelines created by relevant regulators can be more effective than industry codes in providing regulatory clarity to legislation.

Fairness factors and illustrative purposes

- 4.12 The ACCC acknowledges that it is important to provide a degree of certainty and stability to creators and users of copyright material. The ACCC considers that the framework for a fair use exception should be drafted with this aim. The ACCC supports the ALRC's statement that the fairness factors should not create a presumption that the use is fair and that the list of fairness factors and illustrative purposes should be non-exhaustive.¹⁷
- 4.13 The ACCC considers that the fairness factors and illustrative purposes are a critical element of providing assistance to a court in interpreting what is fair and are important concepts that may help provide some certainty for parties in interpreting a fair use exception. The ACCC's 2012 submission stated that
- ...the aim of reducing complexity must be balanced with ensuring that copyright law does not distort some copyright markets with a 'one size fits all' approach given the differences in the ways products and services are created, sold and distributed within these markets.¹⁸
- 4.14 The ACCC acknowledges that the fairness factors identified by the ALRC largely mirror accepted fairness factors in other jurisdictions.¹⁹ The ACCC notes that use of similar factors to those used in other jurisdictions may help to provide certainty to users and owners of copyright material.

¹⁵ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.73.

¹⁶ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.85.

¹⁷ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.90.

¹⁸ ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p.38.

¹⁹ See for example s107 of the US *Copyright Act*.

- 4.15 The ACCC considers that the fairness factors should be considered in light of the cost-benefit framework identified above by the ACCC in section 3 of this submission. In relation to a broad and flexible fair use exception, the ACCC considers that the economic rationale for such an exception is twofold:
- firstly, a use is likely to be considered fair where the use of that copyright material has a very limited, or no, impact on the incentives of the copyright owner to create copyright material; and
 - secondly, where the use is considered fair using the fairness factors, providing an exception for a particular use will likely address the transaction cost issues associated with licensing that material, especially where these costs may be disproportionately high when compared to the value of access to that piece of copyright material by an individual user.
- 4.16 The ACCC considers that an appropriate fair use exception may allow for use that involves limited free riding or use that has a detrimental effect on the value of the rights. Where a use has a limited effect on the value of a right, it is also likely to have a limited effect on the incentives to create copyright material that flow from the initial granting of rights.
- 4.17 As noted previously by the ACCC, where transaction costs exceed the value of entering into the arrangement so that licensing will not take place even though it is socially beneficial to do so, the ACCC submits that exceptions to copyright laws provide one mechanism for resolving this issue.
- 4.18 The ACCC notes and agrees that the fairness factors need to be considered as a whole, that is, if there is a 'fairness' issue when considering one factor, it will not necessarily mean the use is not fair when viewed in totality.
- 4.19 The ACCC submits that development of a more detailed list of illustrative purposes may also be beneficial in providing guidance to owners and users of copyright material as to what types of use may be considered fair. The ACCC considers that the illustrative purposes could be more comprehensive than those currently proposed by the ALRC, so that issues that have arisen in the application of similar fairness factors in other jurisdictions are not necessarily repeated in Australia.
- 4.20 The ACCC considers that providing additional guidance to copyright holders, users of copyright material and courts through additional and more detailed illustrative purposes may alleviate some of the concerns raised by stakeholders regarding certainty. In particular, the ACCC considers that an enhanced, non-exhaustive list of illustrative purposes which reference common practices and scenarios, rather than listing very high-level categories of use, may provide further certainty and clarity to copyright users and owners. To that end, the ACCC notes that some guidance in terms of drafting may be drawn from the drafting of the non-exhaustive list of matters the court may have regard to (contained in section 22 of the ACL) for the purposes of considering unconscionable conduct under section 21 of the ACL.
- 4.21 The ACCC acknowledges that it will be impossible to draft legislation that provides complete clarity and certainty to owners and users of copyright material given the intended flexibility of

a fair use exception. However, the ACCC considers that while there may be a degree of uncertainty, it is likely to be at the margins or in new(er) areas of copyright use, where the flexibility and adaptability of the law is arguably most necessary.

- 4.22 The ACCC considers that it is important that the illustrative purposes reflect the value to the Australian people and economy of ensuring the efficient operation of the markets for copyright material. The ACCC makes further comments on the fairness factors specifically in relation to third party use in section 5 of this submission. In particular, the illustrative purposes should be detailed in such a way as to ensure the fairness factors are interpreted in a manner that reflects the likely cost-benefit trade-off as outlined above.
- 4.23 In its 2012 submission, the ACCC stated that balancing incentives between the creator and the user included an assessment of the value of the rights and any harm that the use caused to the value of those rights. The ACCC considers that these are important considerations in assessing whether a use of copyright material is fair. The ACCC submits that the proposed fairness factors could be expanded to more clearly state some of the economic considerations that may be indicative as to whether a particular use is fair. This may be particularly relevant to assessing the purpose and character of the use (proposed fairness factor (a)) and the effect of the use upon the potential market for, or value of, the copyright material (proposed fairness factor (d)).
- 4.24 In relation to 'the effect of the use upon the potential market for, or value of, the copyright material' (proposed fairness factor (d)), the ACCC submits the ALRC should consider developing illustrative purposes that may assist the court in defining the 'market' in a manner that is not overly broad. That is, courts could be provided with illustrative purposes that encourage them to give careful consideration to ensuring copyright rights are not extended in ways where they effectively create monopoly-type characteristics in markets that are ancillary to the primary market for the copyright materials. The conceptual problem with a definition of markets that captures all ancillary markets is likely to be most evident in the consideration of 'potential markets,' where copyright holders may not be best placed, skilled or incentivised to innovate and create potential markets. The ACCC considers that the illustrative purposes should be clearly drafted to indicate that markets for copyright material should not be defined in ways that would enable foreclosure of markets ancillary to the core purpose and nature of these rights.

5. Third party use of copyright material

Introduction

- 5.1 The ACCC considers that certain types of third party use may fall under the proposed fair use exception. In accordance with its submissions above, the ACCC considers that the fair use exception should be drafted to include an illustrative purpose which clearly encompasses the concept of third party use that facilitates private and domestic, or consumer, use. In particular, the ACCC agrees with the ALRC's statement that a use might be considered fair

“when a third party appears merely to be facilitating an otherwise fair use, such as some types of private and domestic use.”²⁰

5.2 The ACCC noted in its 2012 submission that

... if a customer is able to make a copy of copyright material for their own private use (such as recording a FTA television program on a Personal Video Recorder), in terms of the economic objectives of copyright law, there seems to be little rationale for preventing a consumer from engaging a third party service provider to perform the same function.²¹

5.3 The ACCC notes the ALRC’s position that other factors may be more important than merely whether the third party is facilitating an otherwise fair use. The ACCC has made submissions below regarding what it considers are other relevant factors.

Innovation in related markets

5.4 The ACCC submits that a principle rationale for taking a flexible approach to third party use, with reference to the value of the underlying rights, is that third party use may be central to stimulating innovation in other markets. Caution should be exercised when considering the degree to which copyright can limit the development of new services, which in turn risks reducing the incentives to innovate and meet consumer demands.

5.5 The ACCC agrees with the ALRC’s statement that

some copying by third parties is unlikely to harm the rights holders’ market, and may help develop new markets for rights holders to exploit. Prohibiting such unlicensed copying through overly confined exceptions, even if technology neutral, may inhibit the development of the digital economy.²²

5.6 The ACCC considers that there is potential for growth in products and services that enable consumers to use copyright material for personal use. The ACCC notes that third party services appear to be playing an increasing role in facilitating consumer consumption of copyright material. The ACCC’s 2012 submission stated that

...consumers are increasingly expecting to be able to store and consume copyright material at times and locations convenient to them. A number of services have developed in tandem with this trend.²³

5.7 The ACCC notes that a key consumer service that has emerged in the digital economy is cloud computing. Cloud computing is essentially an internet-based service, where digital content (such as emails, television programs or music) can be stored in remote servers and delivered to end-users on demand. This content in the cloud may be owned or licensed by the cloud service provider, or end users may store copies of material which they own in the cloud, such as music files.

²⁰ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.99.

²¹ ACCC, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p.26.

²² ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.107.

²³ ACCC, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p.26.

- 5.8 The ACCC notes there is potential for growth in development of services and products that assist consumers in the legitimate use of copyright material. However, the ACCC suggests that where there is a market for such services—for example services that are related purely to copying, as opposed to transforming or value-adding to the content itself—these markets should be opened to parties other than copyright owners. Limiting the development of such services risks reducing the incentives to innovate to meet consumer demands.
- 5.9 The ACCC submits that copyright law and enforcement of copyright is only one part of the overall framework of providing incentives for the creation and use of copyright material and ensuring competitive markets. As such, the ACCC considers caution should be exercised when imposing further restrictions on the use of copyright material. The ACCC considers that certain types of fair use may stimulate innovation in ancillary or related markets.
- 5.10 The now discontinued Optus TV Now service is an example of a cloud service that was unable to operate due to Australia’s current copyright laws. The ACCC notes that the current law allows certain types of consumer copying for private purposes where the end-user makes the copy. In a number of examples, such as cloud storage, it is the service provider which actually makes the copy of the material. Following the Optus TV Now case, Telstra, the incumbent owner of the AFL rights, has made available (for a fee) the AFL live app to any user of a mobile device, when this service was previously only available to Telstra customers.²⁴ The ACCC considers this is an example of how an investment by a third party appears to have stimulated a competitive response from a rights holder.

Fair third party use

- 5.11 The ACCC notes that many submissions from rights holders to the ALRC objected to third parties benefitting commercially from making copies for consumers and considered that commercial gain should be reserved exclusively for rights holders.²⁵ The ACCC notes the ALRC’s statement that “the finding of a commercial purpose in a particular use, though by no means determinative, will tend not to favour a finding of fair use.”²⁶
- 5.12 The ACCC reiterates the view that a fundamental objective of copyright is to provide incentives for the creation of copyright material by preventing free riding by users of copyright material. However, the ACCC does not consider that it follows that third party use, which is commercial, is necessarily detrimental to the incentives of the rights holder. Services offered by third parties should not be prohibited simply because a third party may profit from offering a new and innovative service to facilitate otherwise legitimate consumer use. By increasing the value of such use, third party commercial activities may in fact increase the returns to, and incentives for, investment in copyright material. The ACCC submits that the illustrative purposes should explicitly demonstrate that mere commercial use is not determinative of whether the use is fair.

²⁴ See Telstra, *AFL Live Official App*, <http://www.telstra.com.au/latest-offers/afl/>.

²⁵ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.101.

²⁶ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.107.

Effect on value of the rights

- 5.13 The ACCC considers that the effect of the third party use on the value of the rights is a key consideration that should be taken into account when making an assessment of whether the use is fair. That said, the ACCC considers that any assessment of fair use by a third party should also take into account the manner in which the copyright material is being used by the third party. In particular, the ACCC submits that if a certain type of use is allowed for public policy reasons, for example domestic use, third parties should not be prevented from competing in the markets that facilitate fair use. The ACCC notes that some rights holders have submitted that it should still only be the end-user who is allowed to use the material, stating that otherwise the value of the rights are reduced.²⁷ However, the ACCC does not consider that third party use is necessarily detrimental to the value of copyright material, nor that it should be presumed to be.
- 5.14 The ACCC notes that innovation in services, such as cloud services, are important to the emergence and sustainability of competitive digital services industries. In certain circumstances, third party service providers might be exploiting a commercial opportunity which relies, in part, on the copying and storing of copyright material for users. The ACCC submits that third party service providers that do not manipulate the underlying copyright material, but rather facilitate the use of copyright material by consumers in a manner not dissimilar to those uses allowed for under existing exceptions in the Copyright Act (for example format shifting) should be distinguished. The ACCC considers that allowing room for the innovation of certain third party use of copyright material can be beneficial to both third party users, consumers, and ultimately, copyright holders.
- 5.15 The ACCC submits that the illustrative purposes should be drafted to include a reference to consumer use of third party services. The rights to further use or manipulate the copyright material would then continue to remain exclusively with the rights holder, who would in turn retain a certain competitive advantage over parties who are merely facilitating allowable fair use by consumers. For example, in the Optus TV Now case, Telstra had acquired a bundle of exclusive digital rights to certain AFL games and had the licence to use these copyright materials to create new programs and products to attract customer to its fee-based service. In contrast, the Optus service was limited to facilitating the copying of Channel Seven's free-to-air broadcast of AFL games. The ACCC submits that the illustrative purposes should be further developed to ensure that the distinction between these types of uses is made clear.

6. Contracting out

- 6.1 In the ACCC's 2012 submission, it was noted, among other things, that

...the ability of owners of IP to use contracts to set terms and conditions on access to, and use of, copyright materials secures the efficient use of IP and supports the competitive process.²⁸

²⁷ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, chapter 5.

²⁸ ACCC, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p. 50.

- 6.2 While this is generally the case, as discussed elsewhere in this submission, the ACCC considers that where market failure or imperfections arise, the efficiencies that would normally flow (in the absence of these conditions) from the ability of parties to set the licence terms and conditions regarding access to, and use of, copyright material may not always follow. As the ACCC considers that the fair use exception should be designed to reflect the likely cost-benefit trade-off associated with balancing various market failures, the ACCC considers that prohibiting parties from contracting out of the proposed fair use exception is unlikely to significantly reduce incentives to create copyright materials and may improve incentives to innovate and create new copyright materials and new markets for their uses.
- 6.3 As discussed above, the ACCC considers that the introduction of an appropriate fair use exception would also have a key role in promoting the competitive process and providing public benefits. The ACCC supports considering amendments to the Copyright Act to prohibit agreements that seek to exclude or limit the effect of the operation of certain copyright exceptions. The ACCC agrees, for the reasons outlined below, that this will provide greater certainty to users of copyright materials and ensure that public benefits of fair use exceptions are not compromised by contracts seeking to exclude them.
- 6.4 As recognised by the ALRC, fair use exceptions in the Copyright Act have the potential to be undermined by contract terms, to the detriment of both competition and consumers.²⁹ The ACCC considers that the most effective mechanism for dealing with these specific issues is direct regulation. In the absence of direct regulation, material transactions costs could be involved when relying on the CCA to resolve issues arising in contracts, even if such conduct was captured by the CCA. As discussed above, the CCA does not prohibit the simple exercise of unilateral market power, which may include removing fair use rights through contract. Further, the ACCC notes that it is not clear that the ACL protections against unfair contract terms in standard form consumer contracts would apply, although this would be assessed on a case by case basis.
- 6.5 Additionally, while the operation of section 51(3) of the CCA remains unclear, the ACCC notes that the ability of parties, including the ACCC, to rely upon the CCA to address contracting out may be further inhibited by the operation of this provision. The ACCC submits that if the ALRC concludes that contracting out should be prevented in certain circumstances, amendments to the Copyright Act, as proposed, rather than reliance on competition laws alone, are preferable.

The scope of fair use exceptions and contracting out

- 6.6 The ACCC submits that the ALRC should reconsider the proposed parameters of its contracting out limitations by extending the limitations to all fair use exceptions. The ACCC submits that extending the prohibition on contracting out to cover all instances where the use of copyright material would be considered fair use would likely be in the best interests of consumers and competition. This should follow if the proposed fair use exception is grounded in a proper cost-benefit framework.

²⁹ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.353.

- 6.7 It is well recognised that in contract negotiations there can be an imbalance of power between parties. In the context of the ALRC's proposals, fair use exceptions, other than those identified, may be overridden by these contracts.³⁰ As noted above, it is unclear whether the CCA, in part due to the operation of section 51(3) of the CCA, is able to operate to protect consumers and small businesses in these circumstances.
- 6.8 The ACCC notes that contracting out can result in both consumer protection and competition concerns. Accordingly, consideration of the ability to rely on either the ACL or Part IV of the CCA when considering contracting out is important.
- 6.9 In relation to consumers, a common example of contracting out is where a consumer enters into a contract with a copyright holder to purchase and download a music file. The consumer's fair use of that music file may be inhibited by a contract provision which, for example, prevents the consumer from copying that file onto more than one playing device. Consumers are often presented with lengthy terms and conditions that must be accepted prior to use of the service. In these circumstances, there is a clear imbalance of power between the user and owner of the copyright material, which adds to the difficulty, or practical impossibility, consumers may have in negotiating contractual terms for access to copyright material. In addition, consumers may not be aware that they have limited their use in a way that is protected by the Copyright Act.
- 6.10 Contracting out also occurs in the context of business to business transactions. For example, the Australian Broadcasting Corporation (ABC) submitted to the ALRC that it is 'often placed in a worse position for having entered into a contract with a rights holder, where that contract restricts fair dealing, compared with its competitors for those rights, who have no such contract and who can fair deal with that content across platforms.'³¹ That is, entering into a contract can explicitly prevent the fair use of copyright material for a party such as the ABC, whereas other parties, such as rival broadcasters who have not entered into a similar contractual relationship with a copyright owner, can continue to rely on fair use provisions to use the content more flexibly (for example, for fair uses such as news reporting and parody).

Contracting out and competition laws

- 6.11 The ACCC notes that in many cases, weaker parties may lack the knowledge or resources to resist attempts by copyright holders to impose contractual obligations that limit the users' ability to rely on fair-use exceptions. Further, the ACCC is of the view that requiring parties to research and take action under the ACL³² or CCA where a copyright holder imposes contractual terms that are anti-competitive, unfair or unconscionable would undermine the benefits intended to flow from the exceptions. In many cases the transactions costs involved will far exceed the value of the use.
- 6.12 The ACCC also notes that contracting out can lead to a situation where parties who are subject to a contract have their rights, and competitive position, curtailed when compared to parties

³⁰ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.375 [Proposal 17-1].

³¹ Australian Broadcasting Corporation, Submission 210 to the ALRC's *Copyright and the Digital Economy Issues Paper*, November 2012.

³² Schedule 2 of the *Competition & Consumer Act 2010*.

not subject to a contract. Some, but not all, of these circumstances would be addressed under the ALRC's proposal which is limited to a core set of exceptions with 'defined public purposes'.³³ Again, the ACCC notes the limitations of the CCA, including through the operation of section 51(3), and in particular the ability of parties to rely on the CCA to remedy anti-competitive conduct.

The rationale for a broader prohibition on contracting out

6.13 The ACCC considers that extending the prohibition on contracting out to cover all instances where the use of copyright material would be considered fair use may be the best way to ensure that the classes of user and the types of use whom the prohibition is designed to protect are actually protected. In particular, the ACCC would be concerned if the prohibition on contracting out did not protect those users of copyright material, typically consumers and small businesses, who have limited negotiating power with owners of copyright material. The ACCC notes that a blanket prohibition on contracting out in all instances where use is deemed as fair use would protect users from copyright owners who seek to exercise their market power by restricting the ability of users to access copyright material and use it in a manner which would otherwise be considered a legitimate legal use of copyright material.

ACCC recommendation

6.14 The ACCC considers that extending the prohibition to all users and all types of fair use, where fair use is grounded in principles based on a proper cost-benefit framework, will best promote certainty and ensure that no class of user is unfairly disadvantaged by limiting the scope of the prohibition.

7. Statutory licences

7.1 The ALRC Discussion Paper proposes the repeal of statutory licences for the use of copyright material by the Crown, educational institutions and institutions assisting persons with disabilities.³⁴

7.2 While the ACCC does not oppose any repeal of statutory licence schemes, the ACCC submits that the ALRC, in making any final recommendations, should be cognisant of the potential for competition concerns to arise in a voluntary licensing environment. In particular, the ACCC notes that a movement from a statutory licensing scheme to a voluntary licensing scheme has the potential to allow collecting societies to exercise their market power in a way that they are currently unable to under the existing statutory schemes.

7.3 As noted previously, the ACCC considers one of the objectives of copyright laws should be to protect a copyright holder's interests to the extent that they promote, as far as possible, the overriding objective of economic efficiency.³⁵ As previously submitted, the ACCC considers that where high transaction costs are prevalent in direct voluntary licensing arrangements, there may be a rationale for the introduction of statutory licensing schemes to ensure users

³³ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.373 [17.115].

³⁴ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, pp.115.

³⁵ ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p.2.

can licence copyright materials.³⁶ Statutory licences provide access for parties who want to obtain copyright material but may be unable to effectively negotiate a voluntary licence.

- 7.4 As relevant collecting societies have been established, some of the transaction costs of direct voluntary licensing are likely to have decreased through the licence arrangements established through collective licensing schemes, potentially reducing the need for the range of statutory licences that currently exist. As discussed in the ACCC's 2012 submission, collecting societies can be a solution to potential market failure arising from high transaction costs.³⁷ Copyright collecting societies act on behalf of copyright owners to facilitate the administration of copyright licences, which in turn reduces licensing costs.
- 7.5 The ACCC notes that a number of submissions from both copyright holders and licensees favour repeal of statutory licences. In particular, various educational institutions advocated that existing statutory licensing provisions may give rise to disincentives for the use of new technologies given the prescriptive nature of statutory licensing.³⁸ These submissions suggest that copyright holders and licensees may be able to identify and negotiate arrangements for the use of copyright material that is industry appropriate without the need for what users claim is a very prescriptive and inflexible statutory licensing scheme. In addition, some rights holders have therefore suggested that the need for statutory licensing schemes are obviated where access to works are available on a commercial basis. In addition, they note that there is an existing market for licensing of relevant materials beyond the limits of statutory licensing.³⁹
- 7.6 As noted above, the ACCC does not have an in principle objection to voluntary licensing of copyright materials. However, the ACCC considers that the ALRC should consider the ramifications that may arise if statutory licensing schemes are repealed. This is further discussed below.

Voluntary licensing

- 7.7 The ACCC considers that the ability of market participants to set terms and conditions on the use of copyright material supports the competitive process. The ACCC therefore agrees that voluntary licensing may be a viable alternative to statutory licensing, especially in the digital environment.
- 7.8 As noted above, the existence of collecting societies has created efficiencies by providing a single point of access to copyright material. For example, collecting societies for musical works offer a joint licensing scheme for educational institutions.⁴⁰ This licensing scheme, involving the Australian Recording Industry Association (ARIA), the Phonographic Performance Company of Australia (PPCA), the Australasian Performing Right Association Limited (APRA)

³⁶ ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p.13.

³⁷ ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p.15.

³⁸ For example: Australian Digital Alliance (ADA) and Australian Libraries Copyright Committee (ALCC), *ADA and ALCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, pp.62-65.

³⁹ For example, the APRA and AMCOS, *APRA/AMCOS submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p.61; ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.117.

⁴⁰ APRA/AMCOS, *APRA/AMCOS webpage – music in universities*, viewed 1 July 2013, <http://www.apra-amcos.com.au/MusicConsumers/MusicinEducation/Universities.aspx>.

and the Australasian Mechanical Copyright Owners Society (AMCOS), is an example of cooperation between collecting societies to simplify the licensing of copyright materials by confining the various uses of the material to a single contract negotiated between the parties.

Collecting societies and market power

- 7.9 While collective licensing can improve efficiency in the licensing of copyright material, the operations of collecting societies may have monopolistic characteristics that raise competition concerns. Collecting societies involve a group of rights holders, who might otherwise be in competition with one another, acting collectively. One way in which collecting societies may exercise their market power is through the setting of excessive fees, or the imposition of otherwise restrictive terms and conditions in the blanket licensing of their repertoire to users. The exclusive assignment of rights to collecting societies may remove the ability of licensees and rights holders to negotiate terms and conditions directly, which may, in some cases, be more efficient than collective licensing. Furthermore, the use of blanket licences by collecting societies can reduce the incentive to do so.
- 7.10 The ACCC acknowledges that different collecting societies, both voluntary and statutory, operate in different markets. As a result, the ability to exercise market power is not necessarily a common feature to all collecting societies. That said, the ACCC notes that the collecting societies that have been established to administer the Crown and education statutory licence schemes may share some of the same risks that have been noted above in relation to voluntary collecting societies. While the rights of certain types of use may be guaranteed under the Copyright Act by statutory licences, the issue of how fees are set, negotiated and challenged are the same. The establishment of collecting societies in the Copyright Act may have had the effect of conferring market power on those licensors. Under the Copyright Act, only one organisation can be declared as a statutory licensor at any one stage.⁴¹ This has helped establish the declared collecting societies, Screenrights and Copyright Agency Limited, as monopoly licensors in their respective markets.
- 7.11 The establishment of collecting societies appears to lead to network effects in the markets in which these collecting societies operate. Network effects arise when a product becomes more valuable as the number of customers consuming it increases, thus providing an advantage to firms that have an existing customer base over rivals and prospective entrants that do not. For example, users of copyright material such as music will be more likely to use the collecting society which has the greatest repertoire of copyright material they desire. Similarly, creators and owners of musical works will be drawn to licensing their copyright material to the collecting society with the greatest number of users.
- 7.12 Due to the network effects enjoyed by established collecting societies, the ACCC envisages that any repeal of the relevant statutory licence schemes and a subsequent move to voluntary licence schemes is unlikely to result in new entry or high levels of competition. The ACCC notes that any new entrant is likely to face the difficulty of achieving a membership base that is comparable to the established collecting societies. Therefore, the market power of the

⁴¹ For the copying and communication of broadcasts: section 135P(2) of the Copyright Act; for the reproduction and communicating of works: section 135ZZB of the Copyright Act.

established collecting societies is unlikely to change even after the abolition of the statutory licensing schemes and licensees will have little option than to deal with existing collecting societies if they want to access copyright material.

- 7.13 The ACCC acknowledges the views of licensors and licensees who have advocated for the repeal of statutory licenses, and recognises that voluntary licences for copyright materials outside of the existing statutory licensing schemes are already being negotiated. However, while the existence of statutory licensing schemes does not play a role in improving competition in the licensing of copyright materials, the ALRC's proposed changes will remove certain safeguards provided for users under a statutory licensing scheme. For example, certainty of access to copyright materials and an established understanding of the terms and conditions for licensing certain uses of copyright material.
- 7.14 The ACCC notes that while there may be aspects of the statutory licensing schemes that can be adopted by voluntary collecting societies, commercial negotiations, especially where there is an imbalance in market power, may give rise to a level of uncertainty as to the efficiency and fairness of the terms and conditions negotiated. Therefore, while a voluntary licensing scheme may be more suitable in a digital environment, the ACCC submits that the ALRC should consider further the potential implications of a move from a statutory licensing regime to voluntary licensing and any potential solutions to these concerns.
- 7.15 To that end, the ACCC notes that the ALRC has identified some policy measures that may be implemented to address access to copyright issues.⁴² The ACCC supports further investigation of the 'license it or lose it' or 'extended collective licensing' remedies identified by the ALRC to resolve access issues that may occur where statutory licenses are repealed.

Section 51(3)

- 7.16 Should voluntary licensing result in anti-competitive behaviour, the ACCC notes that the relevant conduct may be prohibited by Part IV of the CCA. However, the ACCC's ability to take action under Part IV may be limited by the operation of section 51(3) of the CCA.
- 7.17 Section 51(3) exempts the operation of certain anti-competitive conduct provisions of the CCA, other than in relation to section 46 (misuse of market power provision) and section 48 (resale price maintenance provision), with respect to certain conditions in copyright licences. The ACCC considers that a blanket exemption for conditions imposed in the licensing or assignment of IP is not justified. Intellectual property rights such as copyright should be subject to the same treatment under the CCA as any other property rights. The ACCC notes that repeal of section 51(3) would not lead to an erosion of the rights created under IP laws. For example, in the United States, the application of competition laws to IP rights has not eroded the nature of those rights.
- 7.18 Moreover, the ACCC notes that the application of section 51(3) in other contexts is inherently uncertain. This uncertainty arises chiefly in relation to interpretation of the term 'to the extent that the condition *relates to*' which is contained in section 51(3)(a). As discussed in the ACCC's 2012 submission, the term can be interpreted broadly or narrowly. A broad interpretation

⁴² ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, pp.128-129.

would be that almost any condition may *relate* to the copyright work or other subject matter and would therefore be exempt by the application of section 51(3)(a). On the other hand, a narrow interpretation is that the condition must relate directly to the work itself (for example specifying the form of a performance). It is therefore likely that in the absence of clear judicial guidance, section 51(3) limits any benefit that may otherwise have been afforded to rights holders seeking to rely on the provision.

- 7.19 The imprecise scope of section 51(3) and the fundamental concerns about the exemption of IP licences and assignments from generally applicable competition laws, has led the ACCC to conclude, as raised in section 1 of this submission, that section 51(3) should be repealed. Absent repeal, the ACCC recommends that caution should be exercised in relying upon the ACCC's powers under the CCA to prevent anti-competitive behaviour between collecting societies and licensees in the negotiation of voluntary licenses.

Voluntary licensing and the fair use exception

- 7.20 In the circumstances that statutory licensing provisions for the use of copyright material by the Crown and relevant institutions are repealed, the ACCC considers that the possible increase in negotiations relating to voluntary licences may be relevant to consideration of the proposed fair use exception.
- 7.21 If a fair use exception is enacted, uses of copyright material that are considered 'fair' under the exception should not require a licence for that particular use.⁴³ Therefore, with reference to section 3 of this submission, the ACCC reiterates the need for the fair use exception (by way of the illustrative purposes) to provide guidance and clarity on some matters, while maintaining the flexibility of the law to develop and respond to the digital environment. If what is 'fair' is unclear, licensees may negotiate licences for uses that may not infringe copyright if establishing scope of the exception is a more costly exercise than paying a licence fee.

Crown Use

- 7.22 In relation to Crown use of copyright material, the ACCC reiterates its view as set out in its 2012 submission.⁴⁴ As noted in the ACCC's 2012 submission, in the circumstances where a statutory licensing scheme continues to apply in relation to the use of copyright materials by the Crown, the ACCC proposes

...that a provision similar to that which is in sections 2A and 2B of the CCA could improve the application of the scheme... Such a provision would make it clear that the statutory licensing scheme concerning Crown use of copyright material applies only to the extent that governments are not carrying on a business. The inclusion of such a provision may address the concerns around the privilege of the Crown with respect to the use of copyright material.⁴⁵

⁴³ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.127.

⁴⁴ ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p.47.

⁴⁵ ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p.47.

8. Retransmission of free-to-air broadcasts

- 8.1 The ACCC notes the ALRC's two alternative options for reforming the existing retransmission scheme. The ACCC noted in its previous submission to the ALRC that, as the technology used to deliver content to consumers continues to develop, the existing retransmission scheme is likely to become more limited in its effect and usability by the wide variety of content suppliers.⁴⁶ In addition, as technology develops, so does competition in the audiovisual content sector. The proliferation of new devices and services now allows consumers to access content from a wide variety of sources, including content that is ordinarily shown on free-to-air networks.
- 8.2 The ACCC considers that, in proposing any reform of the retransmission scheme the ALRC should be mindful of creating impediments to the development of new or innovative services and increasing barriers to entry. In addition, the ACCC submits that when considering reforms to the retransmission scheme, the ALRC should ensure that ample evidence is provided by various stakeholders, including but not limited to the FTA broadcasters and users of the retransmission scheme, regarding the value of the retransmission of content on free-to-air networks.
- 8.3 The ACCC has dealt with the two options proposed by the ALRC separately below.

Option One

- 8.4 Under this option, the ACCC understands that the broadcast exception and the retransmission scheme would be repealed. In proposing this option, the ALRC has made certain assumptions, including that in the current converging media environment, the retransmission of FTA broadcasts can be determined effectively by market mechanisms, for example commercial negotiations between FTA broadcasters and potential retransmitters of that content.⁴⁷ In effect, the ALRC is proposing that retransmission is governed by the use of voluntary licences.⁴⁸
- 8.5 As noted in the ACCC's 2012 submission, the use of voluntary licensing can be an efficient means of ensuring that parties are able to access particular copyright material. However, the ACCC reiterates its views that while there are benefits of voluntary licensing, reliance on the ability of parties to commercially negotiate for retransmission services may raise some competition concerns. In particular, the ACCC notes that there are a relatively small number of FTA broadcasters, particularly in relation to television broadcasters. As such, this may provide these parties with a degree of market power which could be exercised to the detriment of users wishing to retransmit the content in any voluntary licensing arrangement.
- 8.6 As submitted above, while the ACCC could potentially investigate complaints regarding anti-competitive conduct by FTA broadcasters (should they arise), section 51(3) of the CCA may limit the extent to which the ACCC could take enforcement action. The ACCC therefore

⁴⁶ ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p.48.

⁴⁷ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.307.

⁴⁸ ALRC, *Copyright and the Digital Economy Discussion Paper*, May 2013, p.307.

recommends caution when considering any potential changes to existing frameworks where those changes rely upon the ACCC's ability to regulate anti-competitive behaviour.

The US experience

- 8.7 In considering Option One, and in particular how reliant such a reform would be on the ability of parties to negotiate privately for the purpose of retransmission. The ACCC notes that in the United States retransmitters are prohibited from retransmitting FTA broadcasts unless they are either required to do so by FTA broadcasters exercising their 'must carry' rights or where they have negotiated a retransmission consent arrangement with FTA broadcasters.⁴⁹ While the ACCC notes that there are significant differences between the US and Australian markets, the experience of US FTA broadcasters and cable operators is illustrative of some of the issues that may arise when parties can no longer rely on the existing retransmission scheme.
- 8.8 In the US, where FTA broadcasters have not exercised their 'must carry' right, failure to reach a commercial agreement via a retransmission consent arrangement has occasionally resulted in FTA 'blackouts' on cable networks.⁵⁰ These situations arise when FTA signals are pulled from the cable network, due to FTA broadcasters and cable operators being unable to resolve disputes on existing retransmission consent agreements, or failing to negotiate new agreements.⁵¹ The ACCC submits that in further developing any proposal to repeal the statutory regime for retransmission and moving to reliance on the ability of parties to commercially negotiate retransmission of FTA broadcasts, the ALRC should consider whether there is likely to be any issue for parties in accessing FTA content or reaching timely commercial agreement.

Option Two

- 8.9 This option assumes a continuing need to facilitate FTA broadcasts, either to ensure access to FTA broadcasting or to facilitate market entry by new content service providers. This option therefore proposes the retention of a statutory licensing scheme with amendments to include a remunerated exception for broadcast copyright, and the repeal of the provision excluding internet retransmission and amending it to apply retransmission by any method, subject to geographic limits on reception.
- 8.10 With reference to the ACCC's comments on the role of statutory licensing in section 7 of this submission, the ACCC notes that there may be a continuing rationale for the retention of certain statutory licences. The voluntary negotiation of licences could involve high transaction costs given the complex nature of retransmission. For example, to retransmit an FTA broadcast, retransmitters will need to negotiate with not only the broadcast copyright holder but also the underlying rights holders in a broadcast.

⁴⁹ Federal Communication Commission (US), *Retransmission Consent*, <http://in.reuters.com/article/2011/03/08/us-fcc-retransmission-idINTRE72765U20110308>.

⁵⁰ Federal Communication Commission, *FCC takes a fresh look at its Retransmission Consent Rules in light of recent consumer television disruptions*, Media Release, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305001A1.doc.

⁵¹ Reuters, *Analysis: Broadcasters stay strong in retransmission spat*, 9 March 2011, viewed 29 July 2011, <http://in.reuters.com/article/2011/03/08/us-fcc-retransmission-idINTRE72765U20110308>.

- 8.11 Given the potential for competition concerns under Option One, the ACCC notes that the development of new services in the digital environment may mean that a statutory retransmission scheme may be the most appropriate means of allowing access to copyright material in FTA broadcasts in markets dominated by small number of established FTA broadcasters.
- 8.12 In relation to the ALRC's proposed repeal of the provision excluding internet retransmission, the ACCC supports repeal and the proposed amendments to allow retransmission using any technology. The ACCC consider that this will provide a technological neutral approach that recognises the continuing developments in the digital economy.

Conclusion on retransmission

- 8.13 The ACCC is broadly supportive of the ALRC's Option Two. In particular, Option Two mitigates some of the risks outlined above in relation to Option One and the potential for FTA broadcasters to exercise their market power. The ACCC does however consider that prior to forming a final view on the proposed changes, it is important to consider the views of users of the retransmission scheme in addition to the FTA broadcasters. In particular, ascertaining the value and costs these parties place on retransmission is likely to be instructive in determining whether either option is preferable. The ACCC does not have a view at this stage on the merits of the ALRC's proposal to provide for FTA broadcasters to be remunerated for the retransmission of their services under Option Two.

9. Efficient licensing in the digital economy

- 9.1 As noted in the ACCC's 2012 submission, digital technologies are having divergent effects on transaction costs.⁵² On the one hand, these technologies may reduce transaction costs and increase the scope for direct licensing and competition between copyright holders to meet the needs of users. On the other hand, the costs of accessing copyright materials for some uses that are valued by consumers in the digital economy may be prohibitive, such that the costs of licensing exceed the benefits and such valuable use will be deterred.
- 9.2 The market may create mechanisms for efficient licensing for some uses (such as iTunes for personal use), however, not all uses are covered by market licensing mechanism and high transaction costs may continue to prevent many forms of efficient use (for example, the use of a song in a low budget film or an image for a small online store). As noted in the ACCC's 2012 submission, there is some risk that the combined difficulties associated with licensing, finding copyright owners and the associated transaction costs for numerous individual low value works, could hinder the development of new and innovative business models in the digital economy.⁵³
- 9.3 As noted in the ACCC's 2012 submission, digital technologies and digital licensing systems can be used to lower the transactions costs for some types of 'low value' uses. The ACCC submits again that the ALRC should explore whether a version of the digital copyright exchange (DCE)

⁵² ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p3.

⁵³ ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p3.

should be introduced, as proposed in a 2011 UK report, *Digital Opportunity, A Review of Intellectual Property and Growth* (the Hargreaves Report).⁵⁴ The key benefits identified for this model include the potential for reduced transaction costs, increased transparency in the marketplace as to the relative price of copyright materials and easier facilitation of audit by users and regulatory authorities. In considering this approach, the ACCC submits the ALRC should contemplate how rights holders could be incentivised to join voluntary digital licensing arrangements and thereby lower transaction costs for both copyright holders and users of copyright. The ACCC considers that the benefits of improving incentives to creators and distributors of copyright material need to be balanced against any disincentives to users of copyright material and the consequent costs.⁵⁵

⁵⁴ See generally *Hargreaves Report*, ch 4; ACCC, *ACCC submission to the ALRC Copyright and Digital Economy Issues Paper*, November 2012, p20

⁵⁵ Intermediate users are users who use pre-existing copyright materials to create further copyright material for commercial and private use.