



AUSTRALIAN RECORDING
INDUSTRY ASSOCIATION

**ARIA SUBMISSION IN RESPONSE TO THE LAW REFORM
COMMISSION DISCUSSION PAPER: COPYRIGHT AND THE
DIGITAL ECONOMY**

31 July 2013

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Executive Summary

In this submission, ARIA's position on the various proposals and questions raised in the ALRC Discussion Paper is as follows:

Proposal 4 – The Case for Fair Use in Australia:	ARIA does not support the introduction of a broad and open ended “fair use” exception and does not believe that there is a demonstrated need, nor evidence to support, the introduction of “fair use” into Australian copyright law.
Proposal 6 – Statutory Licences	ARIA has not identified any evidence provided as part of the Inquiry to justify the repeal of these statutory licences, and does not support Proposal 6-1.
Proposal 7- Fair Dealing:	ARIA does not support the introduction of “fair use” so accordingly, ARIA does not support the inclusion of the current fair dealing exceptions as “illustrative purposes” in the fair dealing exceptions.
Proposal 8 – Non Consumptive Use:	ARIA does not support the introduction of fair use and accordingly, does not support the proposals set out in this section. Data mining, caching and other technical processes are linked to the safe harbour provisions in the Copyright Act and should be considered as a part of the separate safe harbour review.
Proposal 9 – Private and Domestic Use:	“Private and domestic use” should not be included within any fair use exception nor should it be introduced as a new fair dealing exception. So called “private and domestic” uses are commonly included in online platforms that are commercial in nature, which belies the concept that such usage is “private and domestic”. The introduction of such an exception would undermine existing licences, business models and current practices.
Proposal 10 – Transformative Use and Quotation:	Fair use should not be applied when determining whether “transformative use” infringes copyright. ARIA does not support the inclusion of “quotation” as an illustrative purpose in any fair use exception or as a fairness factor. The introduction of “transformative use” will harm creators, rights holders and undermine existing licensing models.
Proposal 11 – Libraries, Archives and Digitisation:	ARIA does not support the introduction of a fair use or fair dealing exception for libraries and archives. Commercially available sound recordings should be excluded from any changes made to s49 of the Copyright Act.

Proposal 12 – Orphan Works:	ARIA does not support the introduction of a fair use exception to determine whether a particular use of an orphan work infringes copyright. Instead, ARIA proposes several elements that should be considered in relation to any proposed orphan works licensing scheme.
Proposal 13 – Educational Use:	ARIA does not support the introduction of fair use or “education” as an illustrative purpose for such an exception. A new fair dealing exception for education should not be enacted. Existing voluntary licensing arrangements are in place which provides certainty to users. Any new exception will be to the detriment of creators of educational materials who make a living from the creation of such materials.
Proposal 14 – Government Use:	Public administration is a broad term and it should not be introduced as a new fair use or fair dealing exception. Similar to other sectors of the economy, Government should be required to license the use of copyright material.
Proposal 15 – Retransmission of Free-to-air Broadcasts:	ARIA does not support the extension of the Part VC statutory licences to retransmission of broadcasts over the internet.
Proposal 16 – Broadcasting:	ARIA supports the repeal of the statutory caps set out in s152 of the Copyright Act, the compulsory licence for sound recordings set out in s109 of the Copyright Act and the free use exception under s199(2) of the Copyright Act. ARIA also supports the position that an internet simulcast should not be characterised as a broadcast.
Proposal 17 Contracting out:	In order to foster and protect creative investment and integrity, content owners should have the right to enter into arrangements that are specific to their particular requirements and this should not be undermined by further statutory exceptions which prevent content owners from being able to contract out.

1. Introduction

The Australian Recording Industry Association Ltd (**ARIA**) is of the view that the Australian Law Reform Commission (the **ALRC** or the **Commission**), while well intentioned in its findings, has relied on a flawed analysis both as to the current state of ‘the digital economy’ in Australia and also as to the repercussions of introducing a broad and open ended fair use exception coupled with further proposed changes to the *Copyright Act 1968 (Cth)* (the **Copyright Act**). Instead of “*maintaining incentives for [the] creation of works and other subject matter*” (which is Framing Principle 2 of the ALRC Discussion Paper), many of the key proposals will instead undermine existing business models and negatively impact the ability of content creators to properly participate in the digital economy.

This submission is made on behalf of ARIA’s members. ARIA members may also make separate submissions to the ALRC in respect of specific issues that may be of relevance to them. ARIA also acknowledges that it supports the submission that has been made separately to the ALRC by Phonographic Performance Company of Australia (**PPCA**), particularly in regard to proposals in respect of the broadcasting, simulcasting and retransmission rights and exceptions.

The ALRC Mandate

The terms of reference for this Inquiry direct the ALRC to consider whether existing exceptions in the Copyright Act such as the fair dealing exceptions, are adequate and appropriate and also whether further exceptions should recognise ‘fair use’ of copyright material. The Discussion Paper assures us that the Commission “*has been receptive to concerns [in respect of the terms of reference] and the need to take into account enforcement and other issues faced by stakeholders*”.¹ However receptive the Commission has been to these concerns, the result does not appear to reflect that those concerns have been taken to heart. ARIA believes any attempt to provide a balanced review of the issues set forth in the original ALRC Issues Paper (and now carried through into the Discussion Paper) cannot succeed where it does not take account of the impact that unlicensed use of copyright material online has for creators, owners, authorised licensors and users.

In particular we fail to see how the Commission can give full consideration to the objective of copyright law in providing an “*incentive to create and disseminate original copyright materials*”² where it is precluded (or at least considers itself precluded) from looking at the issues of “*unauthorised distribution of copyright material using peer to peer networks*” and “*the scope of a safe harbour scheme for ISPs*”.³

By way of comparison the *Hargreaves Review* in the United Kingdom carried out an in-depth review of enforcement issues and emphasised that “*IPRs cannot succeed in their core economic function of incentivising innovation if rights are disregarded or are too expensive to enforce*”.⁴ ARIA agrees with this

¹ Discussion Paper at paragraph 1.8.

² ALRC Terms of Reference at page 5 of the Discussion Paper.

³ ALRC Terms of Reference at page 6 of the Discussion Paper.

⁴ Professor Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, May 2011 (*Hargreaves Review*) at page 5.

statement and urges the Commission to consider its terms of reference when making its final recommendations.

In addition to its term of reference, the Commission is, of course, also required to comply with its governing statute and the *Australian Law Reform Commission Act 1996 (Cth)* (**ALRC Act**) requires the ALRC to (when formulating recommendations), take into account the effect that the recommendations may have on “*persons and businesses who would be affected by the recommendations (including the economic effect, for example)*.”⁵

This means that there is an obligation on the Commission to consider the economic impact of its recommendations on those who will be most affected. In the case of the present Inquiry that obviously means creators, copyright owners and users of copyright. We therefore expected to see in the Discussion Paper a thorough analysis of the anticipated economic consequences on these groups of introducing the range of reforms proposed (including a critique of relevant research and commentary). However, this was not the case.

The evidence relied upon by the ALRC

The Committee appears to have undertaken limited, if any, critical analysis of the evidence, whether it be the submissions filed or the research papers referred to by those submissions or referenced directly by the Commission.

This is particularly disappointing because the Issues Paper called for “*evidence of how Australia’s law is affecting participation in the digital economy*” and specifically recognised the importance of ensuring that any reform should be based on evidence-based analysis, which was a “*major concern of stakeholders*”⁶. That such importance is placed on the quality of evidence seems only logical and in keeping with what has happened in the overseas jurisdictions that have recently reviewed their copyright laws and taken steps to implement formal standards for provision of evidence in policy development⁷. The Discussion Paper starts off promisingly with a summary of the formal reviews undertaken to date (both in Australia and elsewhere) that have considered the relative costs and benefits of a broad fair use exception and found against its implementation.⁸ However, having summarised these findings, the Commission goes on to conclude that “*developments in recent years*

⁵ s 24(2)(b) *Australian Law Reform Commission Act 1996 (Cth)*.

⁶ Discussion Paper at paragraph 3.14.

⁷ UK Intellectual Property Office’s Good Evidence for Policy Guidelines (at page 1) which evolved out of the Hargreaves Review and which recommends that “*the evidence used to inform public policy, or intended to inform government, meets the following three criteria: that it be clear, verifiable and able to be peer-reviewed*. The Guidelines states that these criteria are “*not an exhaustive list of how to overcome every eventuality, but a guide to what constitutes good evidence and what that means*”.

⁸ Discussion Paper at paragraphs 4.14 to 4.27. For example in 2006 the Intellectual Property and Competition Review Committee (the **Ergas Committee**) found that the “*transaction costs of changing the Copyright Act [to an open-ended fair dealing exception] could outweigh the benefits.*”

provide further evidence in support of Australia introducing fair use”⁹ and that there is “now more of an appetite for a broad, flexible exception to copyright.”¹⁰

Furthermore, the Commission has heavily relied on submissions provided by academics who have little or no experience in relation to the creation, commercial exploitation and licensing of creative content. These academics operate on a theoretical basis and do not have insight into the impact that some of the proposed reforms will have on the ability of recording artists, and those who invest in their careers, to create sustainable careers and business models. ARIA and a number of other entities representing creators invested a great deal of time and effort in providing information on the development and operation of the digital economy as it applies to music. It is extremely disappointing that this information does not seem to have been properly considered by the Commission. This is evident from a number of the resulting proposals which will disrupt developing and existing licensing models and harm the livelihood of content creators.

In ARIA’s view, a number of the proposals conflict with the Commission’s stated *Framing Principles for Reform*, particularly Principles 1, 2 and 5.

⁹ Discussion Paper at paragraph 4.28.

¹⁰ Discussion Paper at paragraph 4.32.

2. The Case for Fair Use in Australia

ARIA is very disappointed by the Commission's recommendation to introduce a broad US style "fair use" exception into Australian copyright law. While it is obvious that the Commission has spent a great deal of time reviewing and summarising the hundreds of submissions received, it appears not to have subjected these submissions (and the underlying research referenced therein) to any real critical analysis.

ARIA observes that a significant part of the Discussion Paper¹¹ is devoted to discussing the arguments raised against a broad US style "fair use" exception including that:

- it is unnecessary and no case is made out for it;
- there is no evidence that it will assist with innovation in the digital economy;
- a flexible standard has not been shown to be more suitable than the current standard;
- it will create uncertainty and expense;
- it is not suited to the Australian legal environment; and
- adoption will put Australia in breach of its international obligations.

ARIA agrees (and of course advocated for) these viewpoints.

However, having collated and summarised the issues raised, the Commission seemingly jumps immediately into making its conclusions with little (if any) critical analysis, stating that fair use¹²:

- is suitable for the digital economy and will assist innovation;
- provides a flexible standard;
- is coherent and predictable;
- is suitable for the Australian environment; and
- is consistent with the three-step test.

ARIA remains firmly of the view that there was no evidence put to the Commission by way of submission (or otherwise identified by the Commission in the Discussion Paper) that justifies the introduction of a broad US style "fair use" exception into Australian law. To justify any legislative reform, the benefits to society of such reform must outweigh the costs incurred and the onus of establishing that any such justification exists should fall firmly on those who are advocating change. Here, they have not met this burden.

Accordingly, ARIA requests that the Commission reconsider its position on the fair use exception before releasing its Final Report.

¹¹ Discussion Paper at paragraphs 4.57 to 4.91 in particular.

¹² Discussion Paper at paragraph 4.92.

From our analysis of the Discussion Paper and the submissions filed; it seems that a small number of submissions from a small group of related stakeholders and academics were heavily referenced and that the “evidence” therefore essentially relied upon is sourced from those submissions.¹³

Critique of frequently referenced academic papers

The four studies that were frequently cited in submissions to the Issues Paper include:

<p>Rogers, Thomas, Szamosszegi, Andrew and Capital Trade Inc</p>	<p><i>Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use</i> (2010)(the CCIA paper).</p> <p>The CCIA paper was produced for the Computer and Communications Industry Association (CCIA).</p>
<p>Lateral Economics</p>	<p><i>Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe Harbour Provisions</i> (2012)(the LE papers).</p> <p>The LE papers were prepared for the Australian Digital Alliance (ADA).</p>
<p>R Ghafele and B Gibert</p>	<p>The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore (2012)(the Singapore paper).</p> <p>The Singapore Paper was funded by Google.</p>
<p>PricewaterhouseCoopers (PwC)</p>	<p>The Start Up Economy: How to Support Start-Ups and Accelerate Australian Innovation (2013) (the PwC paper).</p> <p>The PwC paper was commissioned and funded by Google.</p>

The studies in question certainly sound impressive at first glance. Between them they claim that:

- The “fair use economy” in 2007 accounted for an average of \$4.7 trillion in revenues and \$2.2 trillion in value added, roughly one-sixth of total U.S. GDP. It employed more than 17 million

13 Proponents of the introduction of a broad fair use concept rely on a number of economic and academic studies to support their positions. Notably these studies fall into a narrow compass being studies either commissioned and/or financed by Google; by the Australian Digital Alliance (ADA) (of which membership includes Google, Yahoo and eBay) or for the Computer and Communications Industry Association (CCIA) (and again Google, Yahoo, eBay are members).

people and supported a payroll of \$1.2 trillion. Over this year, fair use companies generated \$281 billion in exports and fostered rapid productivity growth.¹⁴

- The industries relying on limitations and exceptions to copyright are a sizable part of Australia's economy. In 2010, all the industries relying on limitations and exceptions to copyright contributed 14% to Australia's Gross Domestic Product (**GDP**), or \$182 billion, employed 21% of our paid workforce, almost 2.4 million people, and paid wages and salaries of \$116 billion.¹⁵
- *"The activities of internet intermediaries (e.g. caching, hosting and indexing) are the backbone of the internet. Facilitating and enabling such intermediary activities is clearly worthwhile and we should do so wherever possible, particularly when there are negligible costs to others and potentially significant wider benefits".*¹⁶
- *"If Australia did introduce a flexible copyright exception, then even if there were a temporary increase in litigation as test cases were heard, this would be the price of substantial innovation downstream and would establish the ground rules within which other businesses could have increased certainty for their operations as has occurred in the US".*¹⁷
- Broadening of exceptions will come with *"negligible downsides for rights holders"*¹⁸ and (somewhat inconsistently) copyright industries will *benefit* in light of *"the lack of downside (indeed the overwhelming likelihood of net upsides) for almost all rights holders"*¹⁹ (emphasis added).
- The period following the introduction of fair use in Singapore in 2006 correlated to a period of significant growth for the 'private copying industries' - growth in manufacturers of devices enabling consumers to store, copy, format and time-shift copyrighted material. Prior to the introduction of fair use, private copying industries experienced average annual growth of 1.97%. In the period following the introduction of fair use, these same industries enjoyed a 10.18% average annual growth rate. This resulted in a total increase of € 2.27 billion in value-added for private copying technology industries in that period.²⁰

A first point to note is that none of these papers appear to have been peer reviewed papers and, with the exception of the Singapore paper, none appear to have been published. Furthermore, none of the

¹⁴ Rogers, Thomas, Szamoszegi, Andrew and Capital Trade Inc, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (Computer & Communications Industry Association, 2010), Executive Summary of conclusions at page 9.

¹⁵ Houghton, John and Gruen, Nicholas and Lateral Economics, *Exceptional Industries: The Economic Contribution to Australia of industries relying on limitations and exceptions to copyright* (August 2012), at page 3.

¹⁶ Houghton, John and Gruen, Nicholas and Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe Harbour Provisions* (August 2012), Executive Summary at page 4.

¹⁷ *ibid* at page 6

¹⁸ Australian Digital Alliance, *Potential \$600m Annual Economic Boost From Copyright Reform* (September 2012) at page 2.

¹⁹ Houghton, above n16 at page 16.

²⁰ Ghafele, Roya and Gibert, Benjamin, 'The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore', *The Selected Works of Roya Ghafele* (2012). Available at: <http://mpa.ub.uni-muenchen.de/41664/>

papers constitute independent research as each was funded directly or indirectly by stakeholders or a body whose members include stakeholders.²¹

CCIA and Lateral Economic Studies

The CCIA study reels off some big numbers that again certainly sound impressive. The study is widely promoted and was the catalyst for the home grown Lateral Economic reports listed above. Google, one of the underwriters of the research, promotes a version of the study²² on its blog, saying that “*the results demonstrate that fair use is an important economic driver in the digital age*”.²³

The “study” counts among its “fair use” industries: software, motion picture, sound recording, graphic design, scientific research industries, even independent artists and writers — many of which rely much more heavily on copyright than on exceptions to copyright (such as fair use). While many of CCIA’s other industries do rely on fair use of the works of others, they also profit from their own copyrights. For example, while important exceptions to copyright apply to educational institutions, those institutions also rely on copyright to develop some of the most cutting-edge and valuable original creations of our economy.

CCIA even includes among its so-called “fair use” industries those engaging in activities that do not rely upon fair use at all but that rely on other exceptions from copyright protection or on conduct that is not constrained by copyright protection. It cites provisions from US copyright law that have nothing to do with fair use but rather relate to principles that copyright does not protect facts, ideas (codifying the idea/expression dichotomy) or government works. To ascribe economic value to such non-copyright uses as justification for adopting a fair use exception defies credulity. It also cites provisions from the US copyright law creating exceptions and limitations that fall outside the scope of fair use – for example, the first sale (exhaustion) doctrine, educational exceptions, an exception to the public performance right for sound recordings and the exception for making back-up copies of computer programs – that cannot conceivably be used to justify the adoption of a fair use exception.

The study even includes “copyright term” as one form of “fair use” relied upon by some industries.²⁴ Therefore, in these reports the “fair use” industries include industries that do not actually depend on fair use. Reliance upon other copyright law principles and provisions hardly justifies adoption of fair use. At most, it justifies appropriate, focussed exceptions and limitations.

In respect of the CCIA and LE reports, the “fair use” industries included are mostly copyright industries, plus many others. The fact that copyright owners (or anyone else) may take advantage of copyright

²¹ In the case of the Australian Digital Alliance, a Google representative is a board member of that organisation.

²² Rogers, Thomas, Szamoszegi, Andrew and Capital Trade Inc, *Fair Use in the US Economy; Economic Contribution of Industries Relying on Fair Use* (Computer and Communications Industry Association, 2007).

²³ Google Public: Policy Blog, “The economic value of ‘fair use’”, <http://googlepublicpolicy.blogspot.com/2007/09/economic-value-of-fair-use.html> (visited 25 July 2013).

²⁴ See generally Table I of the report referred to at n22.

exceptions hardly means that all or even a substantial part of their profits or revenues can be attributed to those exceptions – let alone to fair use.

The Lateral Economics paper is part of a two part series prepared for the Australian Digital Alliance (whose directors include a senior Google executive and three other members of the ALRC Advisory Committee and whose membership includes Google, Yahoo, eBay, Facebook and Pandora).²⁵

The LE papers' findings have been strongly criticised by at least one peer reviewed and published economic study.²⁶ The Discussion Paper actually referred to this study but seems to pay no heed to it.²⁷ Criticisms made by that paper include that:²⁸

- First, *“from an economic point of view, to justify reform benefits must exceed the costs”*²⁹. While the LE papers admit and identify that there is a clear cost associated with the proposed flexible copyright regime they do not attempt to quantify it in any way. The cost would include more than the amount by which rights holders' revenue is reduced, which is acknowledged by Lateral Economics, but also includes the dynamic social and economic costs resulting from less creative content over time.
- Second, *“even if the benefits were to exceed costs, the claims made by LE [Lateral Economics] do not necessarily justify reform as one could clearly face a distributional problem”*³⁰. Unless some part of the benefits of “minimised” costs to publishers, intermediaries and users is paid to rights holders to compensate them for the “costs” of the reduction in their revenue, there will be redistribution of wealth to those intermediaries, who profit by copying or otherwise using copyright works without the authorisation of rights holders.
- In addition, there is no acknowledgement *“that the system is working adequately already using automated processes by which content providers can grant permission for intermediaries to handle and thus copy their material”*.³¹

The Singapore Paper

The Singapore paper is also referred to by the Discussion Paper in support of the argument that *“fair use will not necessarily cause economic harm to rights holders”*.³² The Singapore paper does not deal with

²⁵ The other paper is referenced at n16.

²⁶ Dr George R Barker, *Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore* (November 2012) Centre for Law and Economics <<http://ssrn.com/abstract=2180769>>; Dr George R Barker, *Agreed Use and Fair Use; The Economic Effects of Fair Use and Other Copyright Exceptions* (July 2013). Available at: <http://www.serci.org/2013/barker.pdf>

²⁷ Dr G Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore* (2012), Centre for Law and Economics Ltd, referred to in the Discussion Paper at paragraph 4.68.

²⁸ Ibid at page 6 and 12.

²⁹ Ibid at page 6.

³⁰ Ibid at page 6.

³¹ Ibid at page 12.

³² Discussion Paper at paragraph 4.100, citing these studies which are R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), prepared for

Australia but is an analysis of the marketplace in Singapore. The Singapore paper posited three industry groups under the names “Copyright industries”, “Private copying technologies” and a “control group” of other industries and examined growth in these groups over the period prior to and following introduction of the fair use exception into Singapore law. In fact, contrary to what it is purported to show, the Singapore paper actually shows that the growth rate of the “Copyright industries” group *slows* after the introduction of the law.³³

An analysis of the data included in the paper shows that growth in the “Private copying” group is largely attributed to growth in the manufacture and sales of computers (66% of growth). Even putting to one side the validity of including computers in the group of “fair use exception” industries, it seems that a much more plausible explanation that the growth in this group was driven by recent product innovation specific to that industry (such as iPad, iPhone and other smart technology).

Moreover, characterising desktop and laptop computers, or the more recently developed portable devices noted above, as “private copying technologies” mischaracterises the multifunctional nature of such devices. Although such devices may be used by many consumers in part for purposes of format shifting and other forms of private copying that typically fall within the scope of private copying exceptions where such exceptions exist, those devices will rarely be used primarily for that purpose. There is no reason to believe that many consumers purchase a computer *in order to* engage in such private copying, and one could reasonably attribute, at best, only a fraction of the revenues from the sale of computers to a hypothetical market for such private copying.

Dr Barker has had the opportunity to access the underlying data relied upon by Ghafele and Gibert in their paper and as a result he has concluded that the underlying data does not support the claims made³⁴. The Ghafele-Gibert paper asserts that fair use in Singapore increased value added in computers, digital storage media, smart cards, and other electronic devices used in copying. The data used, however, includes value added for both domestic sales and exports, rendering unsound the conclusions made by the paper.³⁵ Over 95% of Singapore's output in these categories is export, and fair use laws in Singapore clearly cannot affect export sales of the electronic devices used in copying. This is, of course, because the sale abroad of a device that engages in what (allegedly but for fair use) would be infringing conduct, cannot be attributed to fair use if the importing country does not have a fair use exception.

Google; and Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe Harbour Provisions* (2012), prepared for the Australian Digital Alliance.

³³ Ghafele, Roya and Gibert, Benjamin, ‘The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore’, *The Selected Works of Roya Ghafele* (2012) and as discussed in G Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*.

³⁴ Dr George R Barker, *Agreed Use and Fair Use: the Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age* (9 July 2013), Law and Economics Consulting Associates Ltd at page 22, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298618

³⁵ *Ibid* at page 23.

The PwC Report

The fourth paper³⁶ is a study by PricewaterhouseCoopers that was commissioned by Google “to identify potential ways to accelerate the growth of the Australian technology start up sector.”³⁷ The PwC report actually paints a very positive picture of the Australian regulatory environment for start-ups, finding that “Australia already has one of the most favourable environments for entrepreneurship”.³⁸

The PwC report suggests some improvements in areas completely unrelated to copyright, such as tax incentives and internet access and download speeds (implementation of the national broadband network).³⁹ It does not address how the current copyright law is affecting participation in the digital economy and does not support the conclusion in the Discussion Paper that with more flexible copyright law the sector has potential to contribute 4% of the nation’s GDP in 20 years’ time.⁴⁰ In fact, it does not even refer to copyright, Australian copyright law or the impact, if any, of the proposed open ended fair use exception on participation in the digital economy.

Conclusion on the studies

The Discussion Paper fails to carry out any assessment of the above studies’ academic value or to seriously test the conclusions arrived at in the studies. ARIA finds it surprising that there is no critical review of these papers, especially as these papers were prepared for organisations represented on the Commission’s own Advisory Committee. In particular, we are surprised that there is no critique of the Lateral Economic papers given they are referenced directly in the Discussion Paper.

From our own critical analysis we are firmly of the view that there is nothing in these studies that demonstrates that there is an economic rationale for copyright reform – and in particular, for adoption of a US-style fair use exception. In actual fact, there is nothing in any of the papers’ economic analyses that suggest that the existing exceptions in Australia are insufficient to permit the industries in question (copyright, digital economy companies) to prosper. And indeed those industries appear to be thriving

³⁶ PricewaterhouseCoopers, *The Start Up Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013), available at <http://www.digitalpulse.pwc.com.au/wp-content/uploads/2013/04/PwC-Google-The-startup-economy-2013.pdf>.

³⁷ Ibid at page 2. The definition of a “tech startup” is defined in the Appendix to the report at page 33 as follows: “The definition is somewhat ‘fuzzy’ but for the purposes of this report, we have defined it as having these characteristics:

- Technology is central to the product/service being provided
- High leverage of the labour input to the product/service so that the business can scale rapidly
- The product/service is a ‘disruptive innovation’ in that it helps create a new market or new supply chain/network which disrupts an existing market
- Revenue under \$5 million per year.

This definition typically excludes companies which are heavily reliant on labour or hardware inputs such as web design, web marketing and ISPs, but includes companies whose final product/service is not technology itself, but is technology dependent, such as Shoes of Prey.

Australian startups that have become established are defined as:

- Growth tech company - startup that has grown to \$5 million to \$50 million in revenue, such as 99 designs
- Late stage tech company - startup that has grown to over \$50 million in revenue, such as Atlassian”

³⁸ Ibid at page 12.

³⁹ Ibid at pages 29-31 and Discussion Paper at page 64, footnote 28.

⁴⁰ Discussion Paper at paragraph 4.30. The Discussion Paper only acknowledges in a footnote that this report does not refer to copyright law.

under the current, non-fair use regime. However, some of these businesses assert that they believe otherwise and we turn to consider one such business now – Google.

Critique of Google submissions

In addition to the above submissions, a number of technology companies are also given prominence in the Discussion Paper for their assertions that they could not have been established under the Australian copyright framework.⁴¹

For example, Google argues that it could not have created and started its search engine in Australia under the current copyright framework as *“innovation depends on a legal regime that allows for new, unforeseen technologies.”*⁴² Google makes many comments of a similar vein including the statements that⁴³ :

- *“It is significant, that as a US headquartered company, Google has been able to innovate in the development of our products and services precisely because of the flexibility offered by the US copyright regime.”*⁴⁴
- *“It is not an overstatement to say that Google could not have started in Australia under the current copyright framework.”*⁴⁵
- *“[T]he legal reality in Australia is that a search engine cannot operate in Australia without a significant business risk created by the current legal uncertainty from a lack of safe harbours and lack of exceptions adequately covering Internet-related functions including caching and indexing.”*⁴⁶

In ARIA’s view, the consideration of safe harbours for search engines that permit such activity should form part of the current safe harbour review, rather than through the enactment of a broad and ambiguous fair use exception. We note that consideration of issues relating to safe harbours is beyond the terms of reference of the Commission’s current review.

As was noted in the Discussion Paper, companies like Google and Facebook have very successfully established their Australian operations within the bounds of the existing regime.⁴⁷ Google may not have started up in Australia but that has not stopped it from establishing a very successful business in Australia since at least 1999 and growing exponentially, with its search function in Australia currently

⁴¹ Discussion Paper at paragraphs 4.46-4.47.

⁴² Discussion Paper at paragraph 4.47.

⁴³ Google, *Submission 217* and Discussion Paper at paragraph 4.47.

⁴⁴ *Ibid* at page 25.

⁴⁵ *Ibid*

⁴⁶ *Ibid*. In this section, Google is referencing the following research paper: Weatherall, Kimberlee, *Copyright and Intermediaries: An Australian Agenda for Reform - A Policy Paper Produced for Discussion by the Australian Digital Alliance* (ADA, April 2011), 3.

⁴⁷ Discussion Paper paragraph 4.65 referencing the Foxtel, *Submission 245* at page 12.

having over 95% of the Australian search market.⁴⁸ Google's own evidence as to the strength of the internet (and internet search) industry in Australia contradicts its assertions that the copyright framework is stifling innovation at least in so far as its own business is concerned. Take this extract from Google's submission:

*"Google has a strong presence in Australia. With over 650 people in our Sydney office and growing, we're a major engineering centre. We work on major Google products such as Google Chrome, Blogger and Google Drive. Australia was the birthplace of Google Maps and we've recently launched (globally) Docs for Android and Dynamic Views in Blogger. Our sales teams have helped tens of thousands of small and medium sized businesses in Australia get online, drive traffic to their website and grow revenue."*⁴⁹

There are no cases we are aware of taken against Google in Australia for breach of copyright. Google offers the same services to users in Australia as it does in the USA and we are not aware of any major litigation suggesting that the IP system, including the Australian copyright system, precludes Google from operating its business successfully in Australia.

ARIA considers it most disingenuous for Google to claim it could not have "started" in Australia, with its allegedly inhospitable copyright laws, when Google is very much present in Australia and, so far as we can ascertain, is offering in Australia all the features and services that it offers in the United States, where it allegedly is bold enough to do so only because of fair use.

So, far from struggling under oppressive copyright laws, the technology companies referenced in the submission appear to have grown rapidly to become some of the most successful and influential in the world, including in Australia, today. We struggle to see how the suggestion that their operations are being stifled here because of the absence of a broad fair use exception in Australia's copyright law can be taken seriously.

The Flawed Analysis

False assumption 1: Fair use necessary for the digital economy's success and a case has been made out for it

No call to arms

One of the two reasons the Government did not enact a fair use exception in 2006 was that "*no significant interest supported fully adopting the US approach*", that is, a broad fair use exception.⁵⁰

⁴⁸ Google launched in the USA in 1998 and Google search has been available in Australia since at least 1999. See Wayback Machine internet archive which has snapshot of Google operating on 5 November 1999.

http://web.archive.org/web/20000401000000*/http://www.google.com.au

⁴⁹ Google, *Submission 217* at page 5.

⁵⁰ Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) at page 10. The second reason was concerns about compliance with the three-step test: see also Discussion Paper at paragraph 4.27.

Today, however, we are told that the situation is different – “the ALRC considers there is now more of an appetite for a broad, flexible exception to copyright”.⁵¹ It is not at all clear to ARIA how the Commission can make this assertion when it does not appear from a review of the submissions that a majority supported introduction of a broad US style exception.

On the contrary a number of rights holders, ARIA among them, submitted that there is no need for a fair use exception to be introduced in Australia because the existing copyright system is effective. A reasonable summary of these arguments is set out in the Discussion Paper⁵². The arguments that ARIA and others have made are based upon observations that: the existing exceptions are adequate and appropriate; the common law is capable of addressing the needs of promoting innovation; and business models, including voluntary licensing solutions, have been developed, or are evolving, to meet legitimate consumer expectations.⁵³ Australian copyright legislation (like legislation in the UK and New Zealand– and for that matter in a large number of non-common law countries) has long provided for a closed list of exceptions which apply in prescribed circumstances.⁵⁴ Indeed Australia has implemented specific provisions which match many of the major policy areas resolved by fair use litigation in the United States:

	Issue	Representative US fair use case	Australian Equivalent
1.	parody or satire	<u>Campbell v. Acuff-Rose Music, Inc.</u> , 510 U.S. 569 (1994)	ss.41A, 103AA
2.	photo with a news story	<i>Núñez v. Caribbean Int'l News Corp.</i> , 235 F.3d 18 (1st Cir. 2000)	ss 42, 103B
3.	time-shifted copy of TV show	<u>Sony Corp. of Am. v. Universal City Studios, Inc.</u> , 464 U.S. 417 (1984)	s 111
4.	copying a document for litigation	<i>Bond v. Blum</i> , 317 F.3d 385 (4th Cir. Md. 2003)	s 43(1), 104
5.	reverse engineering to access interface	<u>Sega Enters. Ltd. v. Accolade, Inc.</u> , 977 F.2d 1510 (9th Cir. 1992)	s 47D
6.	fair dealing for the purpose of research or study	<u>Williams & Wilkins Co. v. United States</u> , 203 Ct. Cl. 74 (Ct. Cl. 1973)	s 40

⁵¹ Discussion Paper at paragraph 4.32.

⁵² Discussion Paper at paragraph 4.58.

⁵³ Discussion Paper paragraph 4.58 referencing submissions filed by Australian Publishers Association, *Submission 225*; BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; ARIA, *Submission 241*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Film/TV Bodies, *Submission 205*; TVB (Australia) Pty Ltd, *Submission 124*; and iGEA, *Submission 192*.

⁵⁴ UK: *Copyright Designs and Patents Act 1988* (UK) ss 29(1), 30; Canada: *Copyright Act*, RSC 1985, c C-42, s 29; New Zealand: *Copyright Act 1994* (NZ) ss 42, 43.

	Issue	Representative US fair use case	Australian Equivalent
7.	fair dealing for the purpose of criticism or review	<u>Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. Cal. 1986); Belmore v. City Pages, 880 F. Supp. 673 (D. Minn. 1995)</u>	s 41
8.	Incidental filming or televising of artistic works	<u>Amsinck v. Columbia Pictures Indus., 862 F. Supp. 1044 (S.D.N.Y. 1994)</u>	s 67

Moreover, Australian copyright law has a number of specific statutory exceptions that have no counterparts in the US statute and that have not been adjudicated in the US courts as constituting fair use. Some examples include:

	Issue	Australian Provision
1.	Acts done by Parliamentary libraries for members of Parliament	s 104A
2.	Reproducing photograph in different format for private use	s 47J
3.	Copying cinematograph film in different format for private use	s 110AA
4.	Reproducing works in books, newspapers and periodic publications in different form for private use	s 43C

While fair use is ambiguous and potentially broad in scope, it's far from certain how a court will rule and the US teaches us that some uses that might well warrant exception as a matter of sound public policy won't necessarily qualify for fair use.

The Discussion Paper takes the position that copyright exceptions should be based on flexible, open-ended "principles-based" legislation rather than "rule-directed" legislation. Such legislation would identify a number of "illustrative" purposes, but permit the courts to find additional purposes that justify an exception. *"In theory, a use for any purpose may be considered under the fair use exceptions."*⁵⁵

⁵⁵ Discussion Paper at paragraph 4.161.

With respect, ARIA submits that such an approach would turn judges into legislators. The role of the courts is to interpret the law and to apply the law to the facts in particular disputes. The role of Parliament is to enact the laws and as part and parcel of that process it is Parliament's task to determine what purposes are worthy of exceptions from the exclusive rights of authors and copyright owners and what purposes are not.

The current fair dealing regime generally follows that approach, but not in the way suggested by the Discussion Paper. The Discussion Paper observes that its recommended approach would “*save the legislature from constant law reform to ‘catch up’ with new technologies and uses.*”⁵⁶ However that proposal is based upon the flawed premise that whenever a new technology arises that could have copyright implications, either a new exception would need to be created or the courts would need to be empowered to carve out a new judicial exception (or, put another way, to apply the flexible fair use principles to include the new use within the scope of fair use).

However the existing fair dealing exceptions are not tied to particular technologies. Rather, they address particular purposes: research or study, criticism or review, parody or satire, and reporting news. Such broad categorical purposes are as relevant in the digital age as they were decades ago, and new technological uses that warrant immunity from liability for copyright infringement are likely to fall within one of those existing provisions.

To the extent that a new technological use that ought to be subject to an exception does not fall within one of the existing fair dealing purposes (or within the scope of some other existing exception), it is not asking too much to let Parliament do its job and determine whether the new purpose justifies a new fair dealing exception. ARIA submits that this would hardly require continuous amendments to the Copyright Act. The existing fair dealing provisions cover relatively broad general purposes and while new purposes warranting additions to the fair dealing provisions could conceivably arise from time to time, there is no reason to believe that they would arise very frequently.

Retaining the existing fair dealing model would preserve Parliament's proper role in determining what kinds of activities ought to be excepted from copyright liability while leaving the specific application of the fair dealing exceptions to the courts, which would have broad authority to apply those exceptions to new technologies so long as the uses of those technologies were engaged in were for a purpose to which Parliament has given its approval. ARIA is firmly of the view that specific defences and exceptions such as those that are currently found in the Copyright Act are better suited to responding to technological change than an unpredictable fair use doctrine imported from overseas. Critical and fundamental policy decisions should not to be left to the judiciary to resolve.

No case made out

The assumption that flows through the Discussion Paper is that there is a problem with the digital environment in Australia and that the absence of a broad open ended exception to copyright

⁵⁶ Discussion Paper at paragraph 4.118.

infringement is the reason for this. However, the absence of an evidence-based analysis calls strongly into question the proposition that the existing obstacles to development and growth are what they are said to be and equally dubious is that fair use is the panacea to solve these alleged problems.

From what we know, the technology sector is thriving in Australia under the current copyright framework.⁵⁷ There are a large number of new licensed content distribution platforms.⁵⁸ A number of highly successful digital content management and distribution systems have developed within this framework relying on copyright law to protect their walled ecosystems.⁵⁹ The list of innovative online platforms that have successfully launched in Australia, and which operate free of any active threats of litigation, is extensive and continuing to grow while the Inquiry is taking place.⁶⁰

False assumption 2: Fair use will assist innovation

The Commission found that a broad fair use exception “will assist innovation”. It also concluded that the proposals “are likely to enhance adjustment to the digital environment” and that it would “*foster an entrepreneurial culture which contributes to productivity*”.⁶¹

We are not convinced. We find no such evidence and have already set out the weaknesses in the papers relied on by the Commission above. Instead we see numerous emotive statements made by submitters who would benefit from being able to avoid payment for use of copyright works.

Fair use has played, at best, a minor role in supporting innovation in the USA

From reading the submissions of proponents for fair use, one would imagine that there have been scores of US cases in which courts have relied upon fair use to permit innovative new technological uses of copyright works. In fact, however, there have been only a handful of such cases,⁶² and those cases have dealt only with three different technological innovations:

- **Time-shifting of broadcast television programs:** In the only fair use case involving technology to reach the Supreme Court, the court held that the non-commercial use of a video recording device by an individual to make a copy of an over-the-air broadcast television program for purposes of time-shifting (i.e., to watch the program at a time after the actual broadcast transmission of the program) is a fair use. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (U.S. 1984). A very recent appellate decision applied *Sony* to a similar situation

⁵⁷ Australian Film/TV Bodies *Submission 205* at paragraph 59.

⁵⁸ *Ibid* at paragraphs 38-39 and Annexure A, “*New and Emerging Digital Business Models*”. This was supported by, for example, the ARIA *Submission 241* at page 51.

⁵⁹ Australian Film/TV Bodies *Submission 205* at Annexure A.

⁶⁰ In addition to those listed in Annexure A of the Australian Film/TV Bodies *Submission 205* and recognised at paragraphs 9.48 – 9.50 of the Discussion Paper, these include Google, Facebook, YouTube, Twitter, Spotify, Pandora, Rdio, iTunes Match, Instagram and Pinterest. See also the Australian Film/TV Bodies *Submission 205* at page 60, which explains the absence of precedent in Australian copyright law in this area.

⁶¹ Discussion Paper at paragraphs 4.94 and 4.97.

⁶² We address only cases in the appellate courts because, as the US Supreme Court recently said, “*A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.*” *Camreta v. Greene*, 563 US ___, 131 S.Ct. 2020, 179 L. Ed. 2d 1118 (2011) (quoting 18 J. Moore et al., *Moore’s Federal Practice § 134.02[1][d]*, pages.134-26 (3d ed. 2011)). In any event, district court decisions applying fair use to situations involving new technologies are rare as well.

involving more advanced home television recording technology. *Fox Broadcasting Co. v. Dish Network LLC*, 2013 U.S. App. LEXIS 15075, No. 12-57048 (9th Cir., 24 July 2013).

- **Decompilation of computer programs:** One court of appeals has concluded that decompilation of a computer program for purposes of reverse engineering in order to understand the computer program's functionality may, under some circumstances, be a fair use. *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. Cal. 1992). See also *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. Cal. 2000).
- **Online plagiarism detection service:** A service used by high school teachers who required their student to submit their essays to the service in order to compare the text of those essays to content available on the Internet, student papers previously submitted to the service, and commercial databases of journal articles and periodicals, was held by one court to be engaging in fair use since the purpose was to prevent plagiarism. *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. Va. 2009).
- **Internet image-search engine:** In two cases involving Internet search engines that stored "thumbnails" of images found on the Internet in order to facilitate searches for images which would (1) display the thumbnails images to the searcher and (2) direct the searcher to the locations on the Internet where those images could be found, one court of appeals has concluded that the reproduction and display of those images for that purpose constituted fair use. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. Cal. 2007); see also *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. Cal. 2003).

Therefore, fair use has rarely been invoked successfully in United States courts to justify the use of technological innovations to engage in activities that implicate the rights of authors and copyright owners. Proponents of fair use overstate its utility in providing incentives for technological innovation.

It is noteworthy that the first two situations addressed above are, of course, already subject to statutory exceptions in Australia, as well as in a number of other legal systems. Section 111 of the Copyright Act permits the recording of broadcasts for playing at a more convenient time,⁶³ and section 47D permits the reproduction of computer programs to make interoperable products.⁶⁴ Importing a fair use provision into Australia's copyright law would not make any difference with respect to those activities. Moreover, a fair use provision is far from the optimal means to address the other two fact situations addressed above. If Parliament were to determine that such situations should not give rise to infringement, it could provide for properly crafted fair dealing exceptions (or, in the case of Internet image searches, a properly crafted safe harbour) that are drafted sufficiently broadly to address future

⁶³ Provisions permitting recording of broadcasts for purposes of time-shifting include s. 70 of the United Kingdom's Copyright Designs and Patents Act 1988, section 101 of Ireland's Copyright and Related Rights Act, 2000, and section 114 of the Singapore Copyright Act.

⁶⁴ The European Union has directed that all of its Member States permit reverse engineering "to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs." Council Directive 91/250 on the Legal Protection of Computer Programs. Art. 6. Canadian copyright law also has such an exception. Copyright Law s. 30.61.

technologies but sufficiently narrowly to confine the exceptions to acts done for the purposes that Parliament concludes justify the exceptions.

The evidence submitted by proponents fails to establish that fair use would assist innovation

It seems that perhaps those relying on the PwC report to make their case for fair use have not properly considered this report. As noted earlier in this submission, the PwC report relied on by many of the proponents of fair use identifies the real factors standing in the way of start-ups in the internet environment, and they do not include Australia's copyright laws. ARIA notes that the Commission acknowledges in a footnote that in respect of the PwC report: "*The report did not suggest any particular changes to copyright law.*"⁶⁵

This is hardly surprising. Factors contributing to growth in developing the economy, including technological and business development, are too varied and complex to be ascribed to one sole factor. In fact, the PwC report suggests there are numerous relevant factors which do not necessarily include the US IP framework such as⁶⁶:

- Access to venture capital
- Labour laws
- Different attitude to investment risk
- Internet penetration and broadband speeds
- Strength of relationships between leading universities and business
- Cluster effects
- Tax regimes / incentives

The PwC report found that one of the most important factors in the environment for innovation is the culture and that culture 'is the key to accelerating growth of a tech community'⁶⁷. As noted earlier in this submission, the PwC report also noted that that Australia has 'one of the best regulatory environments for entrepreneurship'⁶⁸.

There are ample studies that mention the factors referenced above, and indeed few studies even mention IP law specifically. In fact as observed by Professor Austin: "*Compared to any single, or*

⁶⁵ Discussion Paper paragraph 4.30 at footnote 28.

⁶⁶ PricewaterhouseCoopers, *The Start Up Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013), at pages 36 to 38, available at <http://www.digitalpulse.pwc.com.au/wp-content/uploads/2013/04/PwC-Google-The-startup-economy-2013.pdf>.

⁶⁷ Ibid at page 14

⁶⁸ Ibid at page 13

*combination of the above factors, it is unlikely that adjustments to the copyright regime (such as the introduction of a 'fair use' copying exception) would result in the anticipated spur to innovation ..."*⁶⁹

Contrary to what is said by pro fair use submissions the long term effects of a fair use exception, rather than increasing consumer access to copyright material, would likely lead to a reduction in the amount of copyright material available to consumers. In his critique of the Lateral Economic reports referenced above Dr Barker concludes that:

*"[T]he unintended consequences of broadening exemptions is that by limiting the growth of copyright it will in turn limit the growth of the internet intermediary services market which relies on demand for new copyright content like new music, films, games and books to fuel its growth."*⁷⁰

In the UK the *Hargreaves Review* has also thoroughly canvassed this issue. In his report, *Digital Opportunity A review of Intellectual Property and Growth*,⁷¹ Professor Hargreaves found that *"the economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated"*.⁷² His review dismissed the suggestion that implementation of a fair use exception into the UK would be a quick fix to stimulate innovation, noting that other factors such as attitudes towards business risk and investor culture were more significant. His actual words were:

*"Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law."*⁷³

US technological innovation pioneers operate around the world, despite the absence of fair use in most other countries. The *WIPO Global Innovation Index 2013* demonstrates that the regulatory environment is not the key factor in how entrepreneurial/innovative a country is. This report shows that most highly innovative economies exist in countries without fair use. The WIPO Index has the US at only number 5 and ahead of it are a number of countries that do not have the fair use exception, namely Switzerland (1), Sweden (2), UK (3), Netherlands (4). Australia (notwithstanding the absence of a fair use exception) sits at 19 (and this is from over 140 countries).

The reality is that Silicon Valley is the result of a large number of cultural and economic factors (as described in more detail above and in the PwC and WIPO reports amongst others) that are not easily replicated elsewhere.

⁶⁹ BPI Response to the Independent Review of Intellectual Property and Growth, March 2011, at page 20, available at <http://www.ipo.gov.uk/ipreview-c4e-sub-bpi.pdf>

⁷⁰ Barker above n27 at page 10.

⁷¹ Hargreaves above n.4 at page 45

⁷² Ibid.

⁷³ Ibid.

There simply is no evidence presented in the Discussion Paper to support the argument that a change to a fair use exception will overcome these structural differences.

False assumption 3: Fair Use is coherent and predictable

The ALRC comes to the conclusion in the Discussion Paper that the adoption of a US-style fair use exception would be coherent and predictable.⁷⁴ ARIA considers this belief to be one of the major misconceptions repeated throughout the Discussion Paper. We consider that quite to the contrary it is inevitable that the adoption of a flexible fair use standard will cause uncertainty.

Australian courts will struggle to determine how to give context to an open ended defence. Even proponents are counting on the fact that the context of what is considered a fair use will need to be determined by a court and that it may not be dealt with consistently. The suggestion of industry guidelines reflects the practical need for some guidance if an open ended exception is adopted.

We only need to consider our *Competition and Consumer Act 2010 (Cth)* and the cause of action available against “misleading and deceptive conduct” which is one of the most heavily litigated provisions in Australian legislation. It is certainly not what one would call predictable. Courts are inconsistent in constructing and interpreting of provisions. It is often the case that litigants find one result in the lower courts only to have the decision reversed on appeal. Regulation by litigation appears to ARIA a highly inefficient manner in which to resolve disputes.

US case law will be of limited assistance. Of course Australian courts are entitled to look to the US for guidance but there is no binding precedent from that jurisdiction. There are good reasons why an Australian court would not usually look at US case law including that the laws will have a different background and have arisen and developed in a different legal context from the US.

In any case, there surely cannot be any serious dispute that fair use is a controversial concept under US law. The criticism levelled even inside the US against its own open ended standard has been widespread. For example one US court characterised fair use as “so flexible as virtually to defy definition”⁷⁵ while another described it as “the most troublesome in the whole law of copyright”.⁷⁶ Judge Pierre Leval has noted that US judges themselves “do not share a consensus on the meaning of fair use.”⁷⁷ Those comments were all made at a time before the elusive, difficult-to-define and difficult-to-apply transformative use doctrine supplanted more traditional fair use analyses.

⁷⁴ Discussion Paper, at paragraphs 4.119 – 4.130.

⁷⁵ *Time, Inc. v. Bernard Geis Assocs*, 293 F Supp 130, 144 (SDNY 1968).

⁷⁶ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir 1939).

⁷⁷ eg *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir 1939); *Time, Inc. v. Bernard Geis Assocs*, 293 F Supp 130, 144 (SDNY 1968); Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L Rev 1105, 1106 (1990)

Leading scholars have been the most critical with comments that:

- *the idea that the statutory test determines the outcome of fair use cases is “largely a fairy tale”.*⁷⁸
- *the “facial emptiness of the statutory language means that ... it is almost entirely useless analytically, except to the extent that it structures the collection of evidence.....”*⁷⁹
- *the statutory test is “unpredictable and uncertain in many settings”*⁸⁰.

If those assertions are accurate, then fair use runs contrary to well-accepted principles of legal theory positing that the law must be predictable and that it must be clear in that it allows a knowledgeable party to anticipate the manner in which it will be applied in a given case.⁸¹ A rule of law that offers little or no guidance as to what the outcome will be in a case involving a given set of facts fails to meet those basic requirements and, rather than spur innovative activity, will cause potential innovators to shy away from conduct that might cross the murky line between what is lawful and what is unlawful.

The US fair use statute is riddled with ambiguity. The preamble of section 107 of the US Copyright Act, which states that fair use “includes” uses “for purposes such as” criticism, comment, news reporting, etc., offers some guidance as to what kinds of purposes will be favoured in a fair use analysis – if one is engaging in criticism or comment, for example, one can take comfort in the fact that those purposes are more likely to result in a finding of fair use. However one who is acting for some other purpose – not mentioned in the statute but not excluded because the list of favoured purposes is only a nonexclusive list of examples.

Similarly, the four “fair use factors” set forth in the second paragraph of section 107 are not exclusive; they are preceded by the introductory language that “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include..” those four factors and the US Supreme Court has stated that they are “non-exclusive.”⁸²

In fact, the Congress that codified fair use in the US Copyright Act of 1976 observed that “[a]lthough the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”⁸³

That same Congress concluded:

“The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of

⁷⁸ David Nimmer, “Fairest of them All” and Other Fairy Tales of Fair Use, 66 Law and Comtemp. Probs 263, 282 (2003)

⁷⁹ Michael J Madison, A Pattern-Oriented Approach to Fair Use, 45 Wm. & Mary L Rev 1525, 1564 (2004).

⁸⁰ Thomas F. Cotter, Fair Use and Copyright Overenforcement, 93 Iowa L. Rev. 1271, 1284 (2008)

⁸¹ See R. Cass, The Rule of Law in America 7-8 (2001).

⁸² [Stewart v. Abend, 495 U.S. 207, 236-37 \(U.S. 1990\)](#)

⁸³ H.R. Rep. No. 94-1476 at 65 (1976)

*circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis*⁸⁴

Thus, by its own terms the fair use provision that the Commission proposes to interpret virtually *in haec verba* is simply a recitation of a number of (but not all of) factors that courts should consider in determining whether a use is fair and therefore not actionable, but those factors offer, at best, “some guidance” as to how a fair use determination is to be made. The result is neither clear nor predictable.

To see how unpredictable that language is, one need only look at the case law in the US Supreme Court since the enactment into statutory law of the fair use provision. In the court’s first fair use decision, the court pronounced that if a use of a copyright work is for commercial purposes, “*such use would be presumptively unfair.*”⁸⁵ For two decades, lower courts faithfully followed that rule.⁸⁶ However then the Supreme Court repudiated (or at least reinterpreted) its earlier pronouncement, stating that the previous decision “called for no hard evidentiary presumption” and relegating the commercial purpose to the status of a fact to be weighed along with others in fair use decisions.⁸⁷

In the court’s second fair use decision, the court declared that the fourth fair use factor – “*the effect of the use upon the potential market for or value of the copyrighted work [is] undoubtedly the single most important element of fair use.*”⁸⁸ Again, lower court faithfully followed the Supreme Court’s explication of the law,⁸⁹ but in 1994, in the same decision that repudiated the presumption flowing from the commercial nature of the use, the court retreated from its earlier statement and, in the words of the United States Court of Appeals for the Second Circuit, “*Rather than accord the fourth factor primacy, the Court explicitly noted that “the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.*”⁹⁰

The courts’ difficulties in determining how to evaluate the fair use factors can be explained, at least in part, by the ambiguous text of the fair use provision, which offers no guidance as to how one is to weigh the factors or as to what else is to be considered determining whether a use is fair. That ambiguity has, in turn, led to inconsistent results in a number of fair use cases. Is it fair use to use a photograph without permission in the context of reporting the news? Maybe yes, but maybe not.⁹¹ Is it a fair use for an

⁸⁴ Ibid at 66.

⁸⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (U.S. 1984). See also *id.* at 451.

⁸⁶ See, e.g., *Los Angeles News Service v. Tullio*, 973 F.2d 791, 798 (9th Cir. 1992); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970 (9th Cir. 1992); *Rogers v. Koons*, 960 F.2d 301, 309, 312 (2d Cir. 1992); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984)

⁸⁷ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 584-85 (U.S. 1994).

⁸⁸ *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 566 (U.S. 1985)

⁸⁹ See, e.g., *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. N.Y. 1993); *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. Cal. 1989); ; *Arica Inst. v. Helen Palmer*, 970 F.2d 1067, 1078 (2d Cir. N.Y. 1992)

⁹⁰ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. N.Y. 1998)(quoting *Campbell*, 510 U.S. at 590 n.21.

⁹¹ Compare *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. P.R. 2000)(fair use) and *Mathieson v. Associated Press*, 1992 U.S. Dist.

LEXIS 9269 (S.D.N.Y. June 24, 1992) (fair use), with *Fitzgerald v. CBS Broadcasting, Inc.*, 491 F. Supp. 2d 177 (D. Mass. 2007) (not a fair use because television station’s use of photograph without permission deprived photographer of licensing income); and *Monge v. Maya Magazines*,

appropriation artist to take a photograph, alter it somewhat and incorporate it into a painting? Perhaps, but perhaps not.⁹²

Even a single case will arrive at inconsistent results as it makes its way up the appellate ladder. As one commentator has observed, “*Tellingly, in three relatively recent Supreme Court cases dealing with fair use, the Court reversed the appellate court, and the appellate court reversed the district court. See Campbell, 510 U.S. at 569, reversing 972 F.2d 1429 (6th Cir. 1992), reversing 754 F. Supp. 1150 (D. Tenn. 1991); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985), reversing 723 F.2d 195 (2d Cir. 1983), reversing 557 F. Supp. 1067 (S.D.N.Y. 1983); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984), reversing 659 F.2d 963 (9th Cir. 1981), reversing in part, affirming in part 480 F. Supp. 429 (C.D. Cal. 1977).*”⁹³

Of course there are those academics (which are referred to in the Discussion Paper, for example at paragraphs 4.123 to 4.126) who have said that criticism of fair use decisions in the US is unfair and that it is possible to predict outcomes.

It surely illustrates in fact how unpredictable and disjointed the cases are when scholars have resorted to introduction of ‘policy clusters’⁹⁴ and ‘regression analysis modelling’⁹⁵ to identify any discernible pattern to fair use jurisprudence. These patterns have not, however, been apparent, nor have judges themselves been able to recognise consistent patterns.⁹⁶ It will be a big ask for the entrepreneurial business sector to predict the outcome of legal disputes relating to fair use if copyright experts and even the judiciary are having difficulty doing the same.

We see that the Commission suggests that “*certainty can come from things such as guidelines developed by peak bodies, industry protocols, and internal procedures and documentation*”⁹⁷ or that [assistance can be found] “*in industry co-regulation and self regulation in setting standards*”⁹⁸. However this only serves to demonstrate the lack of predictability and complexity that implementation of an open ended US style

688 F.3d 1164 (9th Cir. 2012) (not a fair use because defendant used more photos than necessary to report the story and harmed the potential market even though copyright owner had no desire to exploit that market).

⁹² Compare *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (fair use to use a number of plaintiff’s photographs, in a number of paintings and collages, notwithstanding defendant’s failure to offer any justification for using plaintiff’s photographs), and *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (fair use to use slightly altered portion of plaintiff’s fashion photograph in a painting for purpose of commenting on mass media, with *Morris v. Guetta*, 2013 U.S. Dist. LEXIS 15556, Copy. L. Rep. (CCH) P30,381 (No. LA CV12-00684 JAK (RZx)C.D. Cal. Feb. 4, 2013) (not a fair use to use plaintiff’s photographs of Sid Vicious in altered form in defendant’s works of pop art), and *Morris v. Young*, 2013 U.S. Dist. LEXIS 29330; Copy. L. Rep. (CCH) P30,377 (No. Case No. CV 12-00687 DMG (FMOx). C.D. Cal. 2013) (no fair use in case involving similar fact to those in *Morris v. Guetta*). See also *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (not a fair use to make sculpture based on plaintiff’s photograph of a “string of puppies”).

⁹³ N. Snow, “*Proving Fair Use: Burden Of Proof As Burden Of Speech*,” 31 Cardozo L. Rev. 1781. 1821 n. 255 (2010)

⁹⁴ P Samuelson, “*Unbundling Fair Uses*” (2009) 77 Fordham Law Review 2537, 2618

⁹⁵ B Beebe, “*An Empirical Study of US Copyright Fair Use Opinions, 1978–2005*” (2008) 156 University of Pennsylvania Law Review 549; M Sag, “*Predicting Fair Use*” (2012) 73 Ohio State Law Journal 47.

⁹⁶ Graeme Austin, *Fair Use Paper Prepared for the BPI*, March 2011 at page 73.

⁹⁷ Discussion Paper at paragraph 4.129.

⁹⁸ *ibid*

fair use would be in practice.⁹⁹ The current fair dealing regime does not suffer from these structural difficulties.

In its 2006 amendments to the Copyright Act, the Australian Government recognised there was a risk of uncertainty when rejecting the fair use model in favour of enacting targeted exceptions. It noted that *“the present system of exceptions and statutory licences ...has been maintained for many years because it gives copyright owners and copyright users reasonable certainty as to the scope of acts that do not infringe copyright”*.¹⁰⁰ An open fair use model was considered less desirable with the Government concluding that:

*“this approach may add to the complexity of the Act. There would be some uncertainty for copyright owners until case law developed. Until the scope was interpreted by the courts, there may be disruption to existing licensing arrangements. Similarly, a user considering relying on this exception would need to weigh the legal risk of possible litigation.”*¹⁰¹

We do not consider that the evidence put forward by proponents of the fair use exception would justify a change to government policy from what was found to be the case in 2006.

Commercial development is not assisted by structural impediments to careful risk / benefit analyses. As a recent US study in relation to investors’ attitudes towards copyright regulation demonstrated, 80% of investors felt uncomfortable investing in business models beset by regulatory ambiguity.¹⁰²

A broad flexible exception to copyright infringement is heralded as the key driver or indeed the key to turning Australia from a risk adverse culture to a leader of entrepreneurship. Barely a mention is made that the US fair use principle reduces business and investor certainty because it *“sweeps with too broad a brush”*¹⁰³ and relates to the courts complex questions of policy which are unsuitable for determination through fact-specific and unpredictable litigation.

All of the leading US fair use cases are characterised by divergent, often conflicting, conclusions on fair use.¹⁰⁴ If they can afford it, losing parties have an incentive to pursue appeals. As Professor Austin has

⁹⁹ Moreover, to the extent that “Fair Use Guidelines” are crafted by communities of users, who have every interest in an expansive interpretation of fair use, and without the participation of rightholders, those guidelines would deserve little credibility in a court being asked to determine whether an act committed by a member of such a user community constituted a fair use.

¹⁰⁰ Explanatory Memorandum, *Copyright Amendment Act 2006* (Cth) at page 7.

¹⁰¹ *Ibid* at page 10.

¹⁰² La Merle, Matthew, Sarma, Raju, Ahmed, Tashfeen and Pencavel, Christopher, *The Impact of US Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study*, (Booz & Co, 25 Oct 2011) at page 16 available at <http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>

¹⁰³ Graeme Austin, *Fair Use Paper Prepared for the BPI*, March 2011, at page 59.

¹⁰⁴ *Sony v. Universal City Studios, Inc.*, 464 US 417 (1984) District Court: 1 judge in favour of fair use; Court of Appeals: 3 judges against fair use; Supreme Court: 5 judges in favour of fair use and 4 judges against fair use; *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 US 539 (1985); the trial judge found against fair use; in the Court of Appeals 2 judges were in favour and 1 judge was against; in the US Supreme Court 6 judges against fair use and 3 judges in favour of fair use; *Campbell v. Acuff-Rose Music, Inc.* 510 US 569 (1994) the trial judge found in favour of fair use; in the Court of Appeals 2 judges against fair use and 1 judge in favour of fair use; in the Supreme Court 9 judges generally found in favour of fair use – but no final decision (case remanded for further evidence).

observed “lower courts’ fair use decisions [in the US] are usually reviewed *de novo*. As a result, appellate courts are seldom deferential to the conclusions reached by first-instance courts.”¹⁰⁵

Transformative Use

In the past twenty years, the fair use doctrine in the United States has undergone a sea-change with the adoption of the concept of “transformative use.” First announced by the Supreme Court in ***Campbell v. Acuff-Rose Music, Inc.***,¹⁰⁶ the transformative use doctrine asks:

“whether the new work merely “supersede[s] the objects” of the original creation, Folsom v. Marsh, supra, at 348; accord, Harper & Row, supra, at 562 (“supplanting” the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.”¹⁰⁷

In *Campbell*, the work in question was a parody. The court had little difficulty concluding that (and devoted little time to explaining why) a parody is transformative.

“Suffice it to say now that parody has an obvious claim to transformative value, as the Campbell case itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We consequently line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107”¹⁰⁸.

Apparently it did not occur to the court that its very explanation as to why a parody is “transformative” revealed why the court did not need to introduce the concept of “transformative use” in that case: since parody is a form of criticism of the original work, it fits comfortably within two of the purposes expressly set forth as a favoured purpose in the fair use provision: criticism and comment.

On its face, the transformative use doctrine appears to conflict with the author’s exclusive right, under US law, “to prepare derivative works based upon the copyrighted work,”¹⁰⁹ the equivalent of Australia’s right to make an adaptation of a work.¹¹⁰ The tension between the transformative use doctrine and the derivative work right becomes starker when one reads the US Copyright Act’s definition of a derivative work: “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”¹¹¹

¹⁰⁵ Austin, above n103 at page 74.

¹⁰⁶ 510 U.S. at 569 (1994)

¹⁰⁷ *ibid.* at 579.

¹⁰⁸ *Ibid.*

¹⁰⁹ 17 U.S.C. § 106(2).

¹¹⁰ Copyright Act 1968, s. 31(1)(a)(vi).

¹¹¹ 17 U.S.C. § 101 (emphasis added).

However, lower courts soon tried to sort out the problem. For example, in 1998 a court of appeals “note[d] a potential source of confusion in our copyright jurisprudence over the use of the term ‘transformative’. Although derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation, such works--unlike works of fair use--take expression for purposes that are not ‘transformative.’”¹¹²

Similarly, Professor Netanel, building upon work by Professor Reese, explains that “appellate courts have in fact been almost universally consistent in defining transformative use as a use that is for a new, different purpose, not a use that entails new expressive contributions per se.”¹¹³

As discussed later in this submission, it is not so clear that Professor Netanel’s observation is accurate. However even if it were accurate, one must ask whether a transformative use doctrine that focuses on whether the alleged infringer’s use of the copyright work is for a different purpose than that of the author is a doctrine that serves the purposes of copyright.

Traditionally, a copyright owner’s right to control the use of a work did not depend on whether the infringer was copying for a purpose different than that of the author, unless the purpose was one that was recognised as a basis for an exception – whether that exception was fair use (criticism and comment, research, etc.) or a more specific purpose-based exception such as ss. 40-43. The transformative use doctrine apparently provides a defence for anyone who (1) uses the copyright work for any purpose, so long as it is not the original author’s purpose, and (2) adds some new expression of his or her own. The scope of such an exception is breathtaking, and we have seen no attempt to offer a rationale that would justify such a radical development.

Professor Netanel points out the transformative use doctrine “is susceptible of incoherence and judicial manipulation as applied in practice.”¹¹⁴ The test gives no guidance as to how broad the categories of expressive purposes that the courts are called on to compare should be, nor does it explain how different the defendant’s purpose must be from the author’s. Moreover, courts have broad discretion in characterising those two purposes. The author of the leading US copyright treatise agrees, observing that the analyses in many fair use cases “are conclusory--they appear to label a use ‘not transformative’ as a shorthand for ‘not fair’; and correlatively ‘transformative’ for ‘fair.’ Such a strategy empties the term of meaning-for the “transformative” label to guide, rather than follow, the fair use analysis, it must amount to more than a conclusory label. One should perform the transformative inquiry on its own merits, bearing in mind that just because a given use qualifies as ‘transformative’ does not even mean that defendants prevail under the first factor, much less that they prevail altogether on the fair use defence.”¹¹⁵

¹¹² *Castle Rock Entertainment v. Carol Publ'g Group*, 150 F.3d 132, 143 (2d Cir. N.Y. 1998)

¹¹³ N. Netanel, “*Making Sense of Fair Use*,” 15 *Lewis & Clark L. Rev.* 715, 747 (2011). See also R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 *Colum. J.L. & Arts* 467, 485 (2008).

¹¹⁴ *ibid* at page 750.

¹¹⁵ M. & D. Nimmer, *Nimmer on Copyright* § 13.05[A][1] [B], At 13-168 - 13-169 (2012).

Transformative Use Case Study: Cariou v. Prince

The poster child for ad hoc, unprincipled transformative use analysis is the recent case of *Cariou v. Prince*.¹¹⁶ Appropriation artist Richard Prince copied 35 photographs of Rastafarians in Jamaica taken by photographer Patrick Cariou and incorporated them into 30 paintings, some of which consisted of little more than slightly altered versions of Cariou's images, such as the image to the left below, and others of which placed altered versions next to images of nude women, such as the image on the right.¹¹⁷



Graduation



The Ocean Club

Until *Cariou*, the cases addressing wholesale copying of one work into a new, transformative work appeared to “*impos[e] a requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works.*”¹¹⁸ Such a requirement is apparent in *Campbell* itself, where the court emphasized that it was the fact that the parody in question was commenting on the original work that made it transformative.¹¹⁹ But when offered an opportunity to explain what comment he was making on Cariou's photographs, Prince replied that he did not intend to comment on any aspects of the original works or even on the broader culture. With respect to “*Graduation*,” the work in which he placed a guitar on the hands of the Rastafarian photographed by Cariou, Prince said that his message simply related to the fact that the men had become guitar players. (“[H]e's playing the guitar now, it looks like he's playing the guitar, it looks as if he's always played the guitar, that's what my message was.”).¹²⁰

Although the district court concluded that Prince, by using the photographs for their intrinsic aesthetic value, was not making transformative uses of the photos, the court of appeals reached a different conclusion: the use was transformative, and therefore a fair use. Because, in the view of the court of appeals, 25 of the 30 Prince paintings “*manifest an entirely different aesthetic from Cariou's photographs*” – because his “*composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs*” – Prince's use of the photographs in those paintings (including “*The Ocean Club*,” above), was transformative. The court reasoned that “*Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so.*” It all depends on the perception of the reasonable observer. In the court's view, the reasonable observer could conclude that Prince's paintings “*have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's*” – and therefore that they are “*transformative.*”¹²¹

¹¹⁶ 714 F.3d 694 (2d Cir. 2013)

¹¹⁷ All of the images may be viewed at <http://www.ca2.uscourts.gov/11-1197apx.htm>.

¹¹⁸ *LaChapelle v. Fenty*, 812 F.Supp.2d 434 (2011), quoting the district court decision in *Cariou v. Prince*, 784 F.Supp.2d 337, 348 (S.D.N.Y.2011).

¹¹⁹ *Campbell*, 510 U.S. at 580-81, 583.

¹²⁰ *Cariou v. Prince*, 784 F. Supp. 2d 337,(S.D.N.Y. 2011), reversed, 714 F.3d 694 (2d Cir. 2013). See transcript at:

<http://www.aphotoeditor.com/wp-content/uploads/2011/03/cariou-prince.pdf>

¹²¹ *Cariou*, 714 F.3d. While the court reversed the district court and held as a matter of law that 25 of Prince's paintings were fair uses, it found triable issues of fact with respect to five of the paintings, including “*Graduation.*” However, the court strongly suggested that even those five paintings were sufficiently transformative to be fair uses.

It is difficult to reconcile *Cariou* with Professor Netanel's conclusion that courts define transformative use as a use that is for a new, different purpose, not a use that entails new expressive contributions per se. To be fair, Professor Netanel was analysing cases from 2006 through 2010, before *Cariou* was decided. But as he acknowledged, even then many courts took advantage of the ambiguity inherent in the transformative use doctrine to give their blessing to takings that one would have expected to require a licence from the author.¹²²

In fact, the analysis of transformative use in the *Cariou* case eschews any attempt to attribute a different purpose to Prince; instead, in effect it does little more than make clear that Prince created derivative works based on Cariou's photographs – the very sort of analysis that the courts are said to have shied away from as they have attempted to apply the transformative use doctrine.¹²³

Cariou's analysis of the fourth fair use factor – effect on the potential market for or value of the work – reads like a parody of fair use analysis. The court concluded that Prince was simply out of Cariou's league and was marketing to a much wealthier, more up-scale clientele than Cariou, selling eight of the artworks for an average well above \$1 million each and inviting luminaries such as Jay Z and Beyonce, Brad Pitt and Angelina Jolie, Robert DeNiro, Anna Wintour, and Damien Hirst to the opening of his art show.¹²⁴ The lesson appears to be that a successful artist need not worry about infringing the work of an uncelebrated photographer, because the photographer would have had no hope of reaching the artist's wealthy audience in any event.

One might respond that at most, the foregoing analysis simply proves that in a single case, a single court reached the wrong result. However the Second Circuit has historically been considered the most important court in the United States on copyright matters,¹²⁵ and it is also the court of appeals that renders the most decisions regarding fair use.¹²⁶ When it speaks about fair use, other courts listen. Perhaps more to the point for the purposes of this inquiry, the court's analysis in *Cariou* demonstrates the risks in adopting the open-ended fair use doctrine, especially at a time when, in its country of origin, that doctrine has been in effect reduced to an inquiry into whether the defendant's use is "transformative" and when the notion of what uses are "transformative" is so elusive. If a prominent US court can go so far afield in determining what is a fair use (despite 170 years of precedents that supposedly constrain the courts' discretion), how can one be assured that Australian courts will not go in a similar direction?

¹²² See, e.g., *Blanch v. Koons*, 467 F.3d 244 (2d Cir.2006) (use of plaintiff's fashion photograph in painting by appropriation artist Jeff Koons was fair use because Koons was "using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media"); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. N.Y. 2006)(use of Grateful Dead concert posters in an "Illustrated History of the Grateful Dead" was fair use because posters were "historical artifacts to document and represent the actual occurrence of Grateful Dead concert events").

¹²³ Under US law, a derivative work "is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101. The analysis in *Cariou* concluded essentially that Prince took Cariou's preexisting photographs and "recast, transformed, or adapted" them.

¹²⁴ *Cariou*, 714 F.3d 694 (2d Cir 2013).

¹²⁵ James H. Carter, *They Know it when They See it: Copyright and Aesthetics in the Second Circuit*, 65 St. John's L. Rev. at page 773 (1991)

¹²⁶ B Beebe, 'An Empirical Study of US Copyright Fair Use Opinions, 1978–2005' (2008) 156 University of Pennsylvania Law Review 549, 567.

One might also ask whether we are drawing too much attention to the transformative use doctrine, which after all is only a subfactor of the first fair use factor: the purpose and character of the use. But an examination of post-*Campbell* fair use case law easily reveals that it has become the single most important issue in virtually every fair use case since *Campbell*. The figures appear to back that up: Professor Netanel's survey of reported fair use cases from 2006-2010 reveals that in almost all cases, the courts considered whether the defendant's use was transformative. Moreover in 100% of the unreversed district court rulings in which the courts found that the use was transformative, the courts concluded that the use was fair, leading Professor Netanel to conclude that "*the transformative use paradigm, as adopted in Campbell v. Acuff-Rose overwhelmingly drives fair use analysis in the courts today*".¹²⁷

It is also worth noting that, as Professor Netanel has said, "*in fundamental ways, fair use is a different doctrine today than it was ten or twenty years ago.*"¹²⁸ Moreover, he notes that the "*dramatic shift in fair use doctrine*" that began with *Campbell v. Acuff-Rose Music* "*has only come to fruition since 2005.*" Thus, the fair use doctrine that the Commission proposes to adopt is not exactly the doctrine that the Attorney General was considering in 2005. One must ask whether proponents of fair use know *which* fair use doctrine they are asking for. Regardless of which doctrine that may be, the malleability of the doctrine and the ability of the courts to transform it so dramatically should sound a note of caution.

False Assumption 4: Fair Use is suitable for the Australian environment

The very problem of a US style fair use exception is that it is US law and the US is a different legal environment from Australia.¹²⁹ Specific difficulties that would come with a transplant of the broad open ended US fair use model into Australia have been identified in the submissions and are set out in the Discussion Paper.¹³⁰

One of the inevitable consequences is that that litigation will ultimately be required to establish the scope and application of the fair use defence. Indeed the Discussion Paper refers on more than one occasion to court determinations¹³¹ and to the balancing of different facts under the 'fairness factors'.¹³² Litigation is not something that many would see as a desirable or as preferable to legislative reform. Australia is not a litigious society to the extent of the US and an increase in litigation will cause significant disruption as well as a financial burden to both established and emerging businesses.¹³³

¹²⁷ Netanel, at pages 734, 754. See also B. Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005," 156 U. Pa. L. Rev. 549, 605 (2008) ("*in those opinions in which transformativeness did play a role, it exerted nearly dispositive force not simply on the outcome of factor one but on the overall outcome of the fair use test. More specifically, the data suggest that while a finding of transformativeness is not necessary to trigger an overall finding of fair use, it is sufficient to do so*").

¹²⁸ Netanel, above n127 at page 719.

¹²⁹ The US has, of course, a Bill of Rights which expressly protects freedom of speech, express articulation in the US Constitution of the purpose of copyright, statutory damages for copyright infringement, a higher volume of litigation than in Australia generally and extensive case law on fair use - with over 170 years of US jurisprudence on the doctrine of "fair use" over 35 years of which follow the codification of the provision.

¹³⁰ Discussion Paper at paragraphs 4.82 - 4.83.

¹³¹ Discussion Paper at paragraph 4.162 and paragraph 4.182.

¹³² Discussion Paper at paragraphs 9.58-9.59.

¹³³ This concern has previously been expressed: see the Australian Film/TV Bodies *Submission 205* at paragraph 153.

It is no answer to say that US case law can be simply and easily transplanted into Australian law because the very different constitutional frameworks of the two countries mean that it cannot be assumed (and nor should it) that Australian Courts will follow their US counterparts.¹³⁴

Litigation, or the threat of litigation, is likely to stifle development in the technology sector and slow down development of new digital business as a result of lack of confidence among entrepreneurs and capital investors.

Australia would not be the first country to consider and reject the adoption of a wholesale open ended US style fair use exception, in particular other Commonwealth countries:

- **United Kingdom:** In the UK the *Hargreaves Review* examined the relative merits of open and closed standards in the digital environment and determined that it should keep the fair dealing exceptions. This followed the earlier *Gower Review of Intellectual Property: Proposed Changes to Copyright Exceptions* which also decided against a fair use model for reasons including its uncertainty and the fact that it would not comply with the UK's international obligations.
- **New Zealand:** In New Zealand a fair use regime was rejected in favour of specified exceptions similar to that which exists in Australia and the UK.¹³⁵
- **Canada:** Canada also has considered fair use and preferred to use specific fair dealing provisions for the purposes of parody, satire and education, in its recent review of copyright laws.¹³⁶

False assumption 5: Fair use is compliant with international obligations

The terms of reference for the present Inquiry oblige the ALRC to take into account the “consistency” of proposed legislative solutions “with Australia’s international obligations.”¹³⁷ Also, the ALRC Act requires the Commission to “aim at ensuring that the laws, proposals and recommendations it reviews, considers or makes: ... (b) are, as far as practicable, consistent with Australia’s international obligations that are relevant to the matter.”¹³⁸

Australia is a signatory to at least 14 international treaties that constrain its law-making authority in relation to copyright¹³⁹. The treaties require Australia to protect exclusive rights including the rights of

¹³⁴ See Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations* (15 September 2009) <http://www.scribd.com/doc/22267044/Why-Canada-should-not-adopt-fair-use> at pages 19 – 20.

¹³⁵ Digital Technology and the Copyright Act 1994 Position Paper, at paragraphs 160-161.

¹³⁶ Copyright Modernization Act S.C. 2012 c.20

¹³⁷ Australian Law Reform Commission, Terms of Reference. Australia is a signatory to at least 14 international treaties that constrain its law-making authority in relation to copyright. These include the *Berne Convention for the Protection of Literary and Artistic Works* (“Berne”), the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (“Rome”), the *Universal Copyright Convention* (“UCC”), the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS”), the *World Intellectual Property Organization Copyright Treaty* (“WCT”) and the *World Intellectual Property Organization Performances and Phonograms Treaty* (“WPPT”). Also, the Australian Law Reform Commission Act 1996 s24(1)(b) requires the Commission to “aim at ensuring that the laws, proposals and recommendations it reviews, considers or makes: ... (b) are, as far as practicable, consistent with Australia’s international obligations that are relevant to the matter.”

¹³⁸ s24 Australian Law Reform Commission Act 1996

¹³⁹ See n137 above.

reproduction, adaptation, performance, distribution and communication including making available to the public, as well as the exclusive right to authorise these actions.

The treaties also permit Australia to create exceptions in certain circumstances to these rights as long as they conform to the “Three-Step Test”. Contrary to what is asserted in the Discussion Paper,¹⁴⁰ ARIA considers that the interpretation of the three-step test is clear and unambiguous¹⁴¹ and that the open ended nature of the fair use exception is in tension with at least the first limb of the three-step test which requires exceptions to be limited to certain special cases.¹⁴²

One justification offered by academics in defence of the proposition that US fair use complies with the three step test is that many years of accumulated case law provides a sufficient degree of legal certainty to satisfy the first prong of that test.¹⁴³ However, even accounting for over 150 years of fair use precedent, the compliance or otherwise of the US provision with the three-step test remains controversial.

In fact, one leading proponent of adoption of fair use on an international scale has written at length on the reasons why the US fair use doctrine cannot be easily reconciled with the three step test¹⁴⁴. While ultimately concluding that some version of a fair use doctrine can survive under TRIPS agreement (although it is not so clear that the American fair use doctrine, as constrained by TRIPS, will survive in its present form)¹⁴⁵, she summarized those reasons as follows: “*First, the indeterminacy of the fair use doctrine violates the Berne Convention. Second, the breadth of the fair use doctrine violates the Berne Convention standard for permissible exceptions to authors' rights. Third, with particular reference to the TRIPS Agreement, the fair use doctrine may be challenged as a nullification and impairment of the expected benefits that trading partners reasonably should expect under the TRIPS Agreement*”¹⁴⁶.” She has also pointed out that the Australian government has, in the context of a TRIPS Council review of US copyright legislation, asked the United States to justify how the exceptions to the reproduction right afforded under copyright law, including the fair use doctrine, are consistent with Article 9(2) of the Berne Convention and Article 13 of TRIPS.¹⁴⁷

¹⁴⁰ Discussion Paper at paragraph 4.139.

¹⁴¹ Leading academics treat each step separately and cumulatively. If any one step is not satisfied, the exception will not comply with the treaty obligations. See for example: Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford: Oxford University Press, 2nd ed, 2006) 763 ; Panel Report on *United States – Section 110(5) of the US Copyright Act*, WTO Doc. WT/DS160/R (15 June 2000) , para. 6.74; Panel Report on *Canada – Patent Protection of Pharmaceutical Products* (7 April 2000) WTO Doc. WT/DS114/R, para. 7.20; Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: commentary and legal analysis* (Butterworths Lexis Nexis, 2002) at 124; Martin R. F. Senftleben, *Copyright, Limitations, and the Three-step Test* (Kluwer Law International, 2004) 125, 127.

¹⁴² ARIA refers the Commission to ARIA Submission 241 at pages 42-47.

¹⁴³ For example Martin Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*, 1 (2010) JIPITEC 67, [52].

¹⁴⁴ Ruth Okediji, *Toward an International Fair Use Doctrine*, volume 39 Colum. J. Transnat'l L. 75, 105-136 (2000).

¹⁴⁵ *Ibid* at 173

¹⁴⁶ *Ibid* at 117

¹⁴⁷ *Ibid* at 116-117

Reliance on the absence of a WTO challenge to the United States' fair use exception is the weakest argument in favour of an open-ended exception complying with the three-step test.¹⁴⁸ Presumably, any challenge would be made only when a particular WTO member is so aggrieved by a particular application of fair use by the United States courts that it considers the matter sufficiently significant to mount a WTO challenge. A challenge to the abstract concept of fair use would make little sense in the WTO dispute resolution context.

¹⁴⁸ It has been suggested that the United States has acknowledged "*that the essence of the first condition [of the three-step test] is that the exceptions be well-defined and of limited application.*": Herman C. Jehoram, "Restrictions on Copyright and their Abuse" (2005) 27 *European Intellectual Property Review*, 359.

3. Third Parties

ARIA notes that the Commission has not issued any specific proposals or questions in relation to this topic. However, ARIA does not support the introduction of any changes to the Copyright Act which would permit third parties to take advantage of exceptions which allow third parties to profit from the exploitation of rights that are owned by an entity or exclusively licensed by another.

The *Optus TV Now* case¹⁴⁹ is often cited as being an example of the way in which Australian copyright law is impeding innovation and stifling Australia's participation in the digital economy. ARIA does not support this view. As noted in ARIA's previous submission to the ALRC Issues Paper, content creators have invested significantly in the development and licensing of new business models which enable consumers to access content in a variety of innovative and convenient ways. We refer the ALRC to the numerous examples of such innovative business models that were cited in that submission.

Rights holders (whether these are sporting bodies, television production companies or creators of sound recordings) have the exclusive right to authorise the communication, reproduction and exploitation of their work. As noted by the AFL, "[i]f any change to the law is proposed that would allow a cloud computing service to undertake commercial copying and transmission of the material via the internet to individuals, it would materially impact on the legitimate interests of rights holders and their licensees. It would also allow third parties to operate commercial services using valuable content accessed at no cost via free-to-air television broadcasts without obtaining a licence or providing consideration to the owner of the relevant copyright. Such services would also cut across existing commercial arrangements for those platforms, such as holdback restrictions for digital licensees"¹⁵⁰.

These third parties and the types of services that they are offering can, and should, be licensed as the third party in making the copy is exercising the exclusive rights of the copyright owner for the third party's own commercial purposes. There is no policy justification or evidence proposed by the ALRC as to why these third parties should be afforded the benefit of an exception to allow them to access for free what is legitimately licensed by others.

¹⁴⁹ National Rugby League Investments Pty Limited v Singtel Optus Pty Limited [2012] FCAFC 59.

¹⁵⁰ Australian Football League Response to the ALRC Issues Paper 30 November 2012 at page 8

4. Statutory Licences

ARIA is member of Screenrights, and participates in the educational statutory licence set out in Part VA of the Copyright Act through that society.

ARIA does not currently license educational institutions for these uses outside of the terms of the statutory licence, and endorses the submissions made by Screenrights in response to this question.

We note that ARIA could potentially offer a voluntary licensing scheme to cover the use of sound recordings currently managed under the existing Part VA licence. In our view, however, this would put users in a more complex and onerous situation, given that they are unlikely to have advance knowledge of the recordings contained in such broadcasts in order to secure the licences as and when they need them. It would also result in the requirement for multiple licensing arrangements with different classes of creators, in place of the single statutory licence currently available from Screenrights.

As it is our understanding that the statutory arrangements are not compulsory for users, and co-exist with any other commercial arrangements the educational institution wishes to negotiate, we do not see how this proposal improves the position of either users or creators and, in fact, would result in a system offering less flexibility.

ARIA has also had an opportunity to review the submission of the Australian Copyright Council (**ACC**), and supports the position taken by the ACC on this issue.

5. Fair Dealing

For all of the reasons outlined above in our responses to Section 4 of the Discussion Paper, ARIA does not support the proposals outlined at 7.1 and 7.2.

ARIA supports the proposals at 7.3 and 7.4, if such proposals improve the consistency and application of the current provisions.

6. Non-consumptive Use

ARIA does not support the introduction of fair use and accordingly, does not support Proposals 8-1 and 8-2.

However, overall, ARIA supports the comments made by the Australian Copyright Council (**ACC**) in relation to Proposals 8-1 to 8-3 but we make the following additional comments.

In relation to Proposal 8-3, we note that the Commission is proposing the introduction of a fair dealing exception which defines 'non consumptive use' as a use of copyright that does not directly trade on the underlying creative and expressive purpose of the material. In ARIA's view this is troubling as the exclusive rights of a copyright owner should not be constrained in this way. In ARIA's experience, temporary reproductions of sound recordings for the purpose of facilitating the communication of a sound recording are typically included within the licensing solutions that are offered to providers of digital services. These licensed rights supplement the existing exceptions in the Copyright Act relating to the technical processes and uses.

As noted by the ACC, the issues of data and text mining and other technical processes such as caching are inextricably linked to the safe harbour provisions which are under a separate review process and beyond the Terms of Reference of this Inquiry. ARIA does not support the introduction of any further exceptions to the Copyright Act for these activities at this time. ARIA believes that these issues should be dealt with in the context of the safe harbor review.

7. Private and Domestic Use

For all of the reasons outlined above in our responses to Section 4 of the Discussion Paper, ARIA does not support proposals for a broad fair use exception, including those at 9.1 and 9.2 of the Discussion Paper.

We refer to our submission in response to the Issues Paper,¹⁵¹ in which we outlined:

- (a) the utility of the current relevant exceptions relating to sound recordings;
- (b) the licensed multiple copies being provided under existing licence schemes in the digital environment (e.g. iTunes); and
- (c) that many countries that permit broader private copying exceptions do so within the framework of a remunerated scheme.

We note that in its most recent review of private and domestic use in the digital context, the recommendation of the Attorney General's Department was a free exception for format shifting and not the introduction of a broader fair use exception.

It is our understanding that the Commission may be troubled by the potential position of individuals who create content and then make it available on sites such as YouTube. In its earlier submission ARIA included information¹⁵² on the practices of sound recording copyright owners in relation to such user generated content. It is our experience that, despite the overwhelming volume of content made available through such channels, there have been no enforcement proceedings that would give rise to the Commission's apparent concern. The sweeping changes suggested have the potential to seriously disrupt established markets in order to address an issue that is only of theoretical concern. The current practices allow individual users to access and utilise an enormous range of content, while still allowing the creators to control and monetise the use of their work through licensing of the commercial businesses which aggregate and sell advertising in connection with user generated content, such as YouTube and Facebook.

ARIA would be particularly concerned by any amendments providing exceptions under headings as broad as 'private and domestic'. In our experience uses that an individual may consider to be of a 'private' or 'domestic' nature are now routinely uploaded to online services which make the content available globally and underpin very profitable commercial businesses. The changes proposed are likely to negatively impact the existing licensing arrangements, through which sound recording rights owners are able to license the commercial platforms carrying this content.

¹⁵¹ ARIA Response to the ALRC Issues Paper at page 43

¹⁵² ARIA Response to the ALRC Issues Paper at page 16

8. Transformative Use and Quotation

ARIA does not support the introduction of a fair use exception and we refer the Commission to Section 2 of this submission to our comments in relation to transformative use. Therefore we do not support proposal 10-1 and 10-2. In respect of these proposals, we draw the Commission's attention to the *Cariou* case study set out in that section.

In respect of Proposal 10-3, ARIA does not support the recommendation that if fair use is not enacted, the Copyright Act should provide for a new fair dealing for "quotation".

As referred to in Section 15 of this submission, the concept of "quotation" may have an accepted meaning within the book publishing industry. In this regard, the public is already permitted to quote works under the existing fair dealing exceptions. However, to the music industry, the introduction of "quotation" as a fair dealing may have a detrimental impact on the creators and owners of sound recordings and musical works, particularly if the exception for "quotation" is extended to "sampling".

APRA|AMCOS and ARIA provided extensive evidence in their respective submissions to the ALRC Issues Paper relating to the existing commercial licensing solutions undertaken in relation to the licensing of sound recordings and musical works as samples¹⁵³. ARIA strongly recommends that the Commission consider the inevitable disruption to existing licensing practices and the harm that such changes will bring to artists and copyright owners if such an exception is introduced to the Copyright Act.

ARIA is concerned that the Discussion Paper places too much emphasis on particular case law as a reason for introducing a fair use regime. For example, the Discussion Paper refers to *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*¹⁵⁴. In the context of commercial usage of copyright material, ARIA submits that the correct test in cases of this type is whether a substantial part of copyright material has been used rather than broad fair use exceptions which may undermine the ability of creators and copyright owners to properly license the sampling and usage of copyright material by third parties.

¹⁵³ See pages 50-56 APRA|AMCOS ALRC Issues Paper submission and pages 50-54 of the ARIA ALRC Issues Paper submission.

¹⁵⁴ ALRC Discussion Paper at paragraph 198.

9. Libraries, Archives and Digitisation

As outlined earlier in this submission, ARIA does not support the introduction of a broad fair use exception, and accordingly, ARIA does not support the further proposals outlined in Section 11 of the Discussion Paper.

ARIA supports the submission of the Australian Copyright Council on these issues. Further, it is ARIA's view that, should Section 49 of the Copyright Act be amended as proposed¹⁵⁵, commercially available sound recordings should be excluded. As outlined in our original submission¹⁵⁶ there are now a plethora of services (including free ad supported services) via which users, including those involved in research or study, can easily access sound recordings. These services have been licensed and, importantly, content creators and rights holders are properly remunerated for the use of sound recordings.

¹⁵⁵ Discussion Paper at Proposal 11.7

¹⁵⁶ ARIA Submission 241 at pages 12 to 18

10. Orphan Works

For all of the reasons outlined in Section 2 of this submission ARIA does not support Proposal 12.1, under which a fair use exception would be applied to determine whether a particular use of an orphan work infringes copyright.

We note that, in relation to sound recordings, issues relating to orphan works should be limited due to the industry practice of attaching both a © notice (indicating the respective copyright owners) and a @ notice (indicating the first year of publication of the sound recording, together with the copyright ownership of the sound recording). While these notices are generally affixed to physical product copies, we note that they are also displayed by digital online services. We do, however, have concerns that such critical information is not always included as meta data when unauthorised material is placed online.

We draw the ALRC's attention to the widespread concern relating to the introduction of the *Enterprise and Regulatory Reform Act* ("Instagram Act") in the UK, which poses serious challenges for copyright owners as the Act will permit the widespread commercial exploitation of unidentified work. When considering the vast amount of creative content now widely disseminated online without either the permission or any acknowledgement of the creator, an ever increasing volume of material is likely to be construed as 'orphan'¹⁵⁷.

In its primary submission¹⁵⁸ ARIA proposed a range of features it considered critical to any scheme established to facilitate the use of orphan works. In particular, we note that the proposals articulated at 12.2 and 12.3 of the Discussion Paper do not adequately cover:

- Unpublished works (e.g. bootleg or other unauthorised recordings),
- The capacity for the author to be adequately compensated for the use of their material, either through an account of profits or other reasonable compensation, or
- The ability of the rights owner to retain the right to terminate the use of their work, should they wish to do so.

In regard to unauthorised or infringing copies of sound recordings, which may be available on the internet without any accompanying ownership or other metadata, ARIA would contend that it is imperative that creators and copyright owners retain the right to terminate the use of their work.

For the reasons outlined above, in ARIA's view the proposals contained in section 12 of the Discussion Paper do not provide an adequate regime for the licensing of orphan works.

¹⁵⁷ 'The Copyright Fight – David Bailey weighs in' at <http://thebppa.wordpress.com/2013/04/16/the-copyright-fight-david-bailey-weighs-in/>

¹⁵⁸ ARIA *Submission* at pages 55 and 56

11. Educational Use

ARIA does not support the introduction of a fair use exception, and accordingly, does not support the proposals 13-1, 13-2 and 13-3.

From the music industry's perspective, a voluntary and freely negotiated licensing scheme is in place with the educational sector in relation to the use of sound recordings and musical works by the educational institutions. ARIA, together with PPCA, AMCOS and APRA has worked collaboratively with the educational sector to introduce broad, blanket licences that are tailored to meet the requirements of the educational sector¹⁵⁹. Voluntary licences provide greater certainty as to the scope of the licence, as opposed to reliance on a statutory exception which provides little guidance regarding specific exclusions and inclusions.

As noted in the ARIA submission to the ALRC Issues Paper, these licences have been amended over the years to keep pace with the changing technologies and diverse requirements of the educational sectors. To deviate from the existing licensing schemes to a "free-use model" would undermine the rights of creators and impact on their ability to earn a living. In ARIA's view it does not follow that a "fair use" must equate to a "free use". In order to ensure the continued creation of quality educational resources, it is imperative that the rights of the creators of such resources are maintained.

¹⁵⁹ See <http://www.apra-amcos.com.au/musicconsumers/musicineducation.aspx>

12. Government Use

ARIA does not support the introduction of a fair use exception, so accordingly we do not support Proposal 14-1.

ARIA does not support the inclusion of a new exception for fair dealing for “public administration”. Firstly, the term “public administration” as set out in the proposal, is to be “*used in a broad sense, to encompass the activities of all three branches of government: the executive, the legislature and the judiciary*”.¹⁶⁰ The expansive nature of the entities subject to this exception coupled with the uncertainty as to the type of activities that would fall within this exception is of concern to sound recording creators and copyright owners.

From a sound recording copyright perspective, it would be a detrimental consequence if for example, a government department relied on the fair dealing exception as a means to avoid paying public performance licensing fees for music that is played within the workplace or on hold. There is no sound policy justification for the introduction of this exception. The government has the capacity to pay for the use of sound recordings (and other copyright protected material) and existing licence schemes – both statutory and voluntary are in place to meet government requirements. The government pays for its other inputs – such as electricity, property and employment costs and there is no policy or public interest reason as to why copyright owners should subsidise the use by government of their material.

This is also consistent with the position of ARIA and PPCA in relation to the repeal of the section 152 caps and in particular, the inequitable cap imposed on the amount payable by the Australian Broadcasting Corporation in respect of the radio broadcasting of sound recordings. No such cap is imposed on the owners of musical works (songs) and the cap amounts to a subsidy to the ABC by performers and owners of copyright in sound recordings.

Given ARIA’s response to Proposal 14-1 and 14-2, ARIA does not support the repeal of these sections outlined in Proposal 14-3.

¹⁶⁰ See paragraph 14:15.

13. Retransmission of Free-to-air Broadcasts

ARIA endorses the PPCA submission (including the Annexure to the PPCA submission dealing specifically with internet simulcasting) in response to Proposal 15-1. ARIA does not support the extension of the Part VC statutory licences to retransmission of broadcasts over the internet.

14. Broadcasting

ARIA supports the submission made by PPCA in relation to these issues. In particular ARIA supports the following:

1. Repeal of the statutory caps on the licence fees payable by radio broadcasters for the broadcast of sound recordings

ARIA supports the ALRC's comments regarding the repeal of the statutory caps set out in s152 of the Copyright Act¹⁶¹ and ARIA endorses removal of these inequitable caps. As noted in the PPCA submission and the ALRC Issues Paper¹⁶² these caps are anomalous, arbitrary, inequitable and archaic and have no place in Australian copyright law. Furthermore, these caps cause a market distortion and allow "traditional" radio broadcasters to have a commercial and competitive advantage over new and innovative services that are being delivered over the internet.

The repeal of these caps has been recommended in several reviews and inquires¹⁶³ and most recently the Senate Environment and Communications Reference Committee in its report on the *Effectiveness of current regulatory arrangements in dealing with radio simulcasts (Simulcast Report)*¹⁶⁴, the Committee noted that it "can understand why previous reviews have recommended the abolition of such a cap".¹⁶⁵

2. Repeal of s109 – Promotion of Voluntary Licensing of Sound Recordings

ARIA supports PPCA's recommendation that section 109 of the Copyright Act should be repealed in conjunction with the repeal of the caps. Section 109 of the Copyright Act further intensifies the inequities faced by sound recording copyright owners and performing artists as this section only applies to sound recordings. The section removes the ability for a sound recording copyright owner to grant or withhold licences for the broadcast of their recordings – however no constraint applies to the owners of musical works who are able to grant licences on a voluntary basis.

3. Repeal of Section 199(2) of the Copyright Act

ARIA supports PPCA's proposal to repeal s199(2) of the Copyright Act. This section is another inequitable provision in the Copyright Act which applies to sound recordings but not musical works.

¹⁶¹ See paragraph 16.112 to 16.113 of the ALRC Discussion Paper.

¹⁶² See paragraph 16.110 of the ALRC Discussion Paper

¹⁶³ See paragraph 16.105 - 16.106 of the ALRC Discussion Paper

¹⁶⁴ Published 12 July 2013.

¹⁶⁵ Paragraph 2.82 of the Simulcast Report.

4. Extension of broadcast exceptions to the internet for radio and television programs is unnecessary due to voluntary licences

As noted in ARIA's submission in respect of the ALRC Issues Paper, the music industry actively participates in the digital economy and has licensed new and innovative online business models. ARIA supports the submission made by PPCA which notes that the operation of voluntary licensing models negates the need for statutory licences and exceptions to be extended to the internet. We refer to the PPCA submission for a more detailed response to this issue.

5. Internet simulcasting must be treated as a separate right and not characterised as a broadcast

One of the recommendations of the Simulcast Report was that the ALRC should consider the issue of simulcasting as a part of its Inquiry. ARIA supports PPCA's position on this issue.

Copyright law both in Australia and internationally, distinguishes broadcasting and communication via the internet as separate exclusive rights. If a "simulcast" is characterised as a "broadcast" then the Copyright Act would be creating further inequities against sound recording owners as compared with owners of musical works who are able to separately license different uses of their works (such as internet simulcasts) without limitations.

In addition, Australia would contravene its obligations under the AUSFTA and would not be aligned with comparable international jurisdictions where the right to communicate sound recordings to the public is considered as an exclusive right of the copyright owner and a right that has a value attributed to it for such exploitation.

15. Contracting Out

ARIA does not support this proposal.

As noted in ARIA's submission in response to the ALRC Issues Paper, freedom to contract is fundamental principle of Australian law. Agreements that are specific to a particular party's requirements provide certainty to both parties, as opposed to statutory exceptions which may necessitate legal advice to interpret and enforce. In order to foster the active participation of Australian businesses in the digital economy, it is important that these businesses are provided with flexibility to contract and certainty regarding for example, the provision of content from creators and effective protection measures.

In addition, the ability for content creators to enter into arrangements in relation to the exploitation of their creative efforts would be weakened if potential licensees are able to exploit such content for additional purposes without equitable remuneration. Content creators may be reticent to permit the exploitation of their works in new and innovative formats, if they are unable to safeguard the integrity of their creative works and receive a fair return for their creative endeavours and investment.

As noted in the Discussion Paper, the *"primary reason for this proposal is to ensure that the public interests protected by copyright exceptions, including the proposed fair use exception, are not prejudiced by private arrangements"*.¹⁶⁶ If public policy considerations are underpinning this introduction of this provision, then the practical implications of such a provision require consideration. Content creators should have the ability to contract out of "fair dealing" (and the introduction of any "fair use") exceptions and freely negotiate the terms upon which their content is used.

ARIA draws the ALRC's attention to the example provided by ARIA in its previous submission relating to the ALRC Issues Paper in relation to the "fair dealing" exception relating to "parody and satire". The example noted in that submission was that it would not be unreasonable for an artist who releases music for children to not want their sound recordings used in contexts which are perverse even if such usage fell within the context of the fair dealing exception for parody or satire. The artist may want to have the ability to contract out of this in order to protect the integrity of their work.

In addition, the introduction of a further exception for "quotation" is particularly problematic from the music industry's perspective. Although "quotation" may have a widely understood meaning within the publishing industry, it is uncertain enough that users may take a broad interpretation, and extend the exception to relate to "sampling" as it is commonly referred to in the music industry. An existing market exists for the licensing of sound recordings as samples. Content creators should have the ability to contract out of any proposed exception of "quotation" in order to protect their creative and commercial interests.

¹⁶⁶ See paragraph 17.4 of the ALRC Discussion Paper