

**Australian Broadcasting Corporation**

submission to

**Australian Law Reform Commission**

**Discussion paper on copyright and the  
digital economy**

August 2013

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## **ABC submission on the ALRC discussion paper on copyright and the digital economy**

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### **Introduction**

The ABC acknowledges the efforts that the ALRC has made in its Discussion Paper on copyright and the digital economy to grapple with the wide range of issues presented by the rapidly-changing digital environment and the diverse range of submissions it received. However, the Corporation does not agree with Commission's approach to a number of critical issues, most particularly its proposals to introduce blanket fair use and to abolish a number of statutory licences.

As the ABC is both a creator and user of copyright, it has a broad perspective on Australian copyright law. As it argued in its previous submission in response to the Commission's Issues Paper on copyright and the digital economy, the Corporation believes that reform of Australia's copyright regime should be guided by principles, including the importance of freedom of expression and the role it plays in Australian society; the need to promote incentives to create, innovate and participate in the digital economy; and the desirability of a more technologically-neutral approach to copyright. Most fundamentally, it has argued that care should be taken to balance the interests and needs of the wide range of participants in the digital economy, including producers and creators, members of the audience and other users of copyright works.

The Corporation continues to believe that these remain critical factors in assessing proposals to amend Australia's copyright regime. Regrettably, while the ABC can see these principles applied at various points throughout the Discussion Paper, it is of the opinion that the ALRC's approach ultimately tips the balance too far in favour of some categories of users. As outlined below, of great concern to the Corporation would be the detrimental effect on the television production sector and the wider digital economy if the statutory licence schemes such as Part VA, VB and VC were to be abolished. The income generated by these licence schemes contributes significantly to the production of new content by the ABC and the independent production sector. Abolishing the statutory licences administered by

Screenrights, for example, would mean the Corporation would lose a majority, if not all Screenrights revenue, leading to a reduction in Australian content on the ABC. Such programs would include factual, arts and entertainment programs on the ABC. It would also represent a reduction in investment in the television industry across the country, including regional Australia.

## Fair use

Central to the changes proposed by the ALRC throughout the Discussion Paper is the introduction of a new, broad fair use exception (Proposals 4-1 through 4-4) that would replace a significant number of existing exceptions in the *Copyright Act 1968* (“Copyright Act”), including all of the established fair dealing exceptions (Proposals 7-1 and 7-2). This new exception is used throughout the Discussion Paper as the ALRC’s preferred single mechanism for resolving the majority of copyright issues resulting from the rise of the digital economy that the Discussion Paper covers (e.g. Proposals 8-1, 9-1, 10-1, 11-2, 12-1, 13-1 and 14-1).

As a reform proposal, the new exception and the accompanying simplification of the Copyright Act are extremely ambitious. Conceptually, fair use might be an appealing approach if Australia were developing its copyright laws from scratch. However, the reality is that there are over 100 years of established precedent and practice based on fair dealing and related exceptions that the ALRC’s fair use proposal would effectively obliterate. It is thus likely to result in an extended period of significant uncertainty and exploratory litigation as the boundaries of copyright are recalibrated.

The ABC believes that would represent an unacceptable level of disruption and cost for the majority of copyright owners and users. In addition, a broad fair use doctrine would shift responsibility for determining the limits of exceptions to copyright from the Parliament, where the principles of any change are open to public scrutiny and debate, to the closed decision-making processes of courts.

The Corporation notes that the Discussion Paper addresses the question of uncertainty in presenting its rationale for advocating a fair use regime and concludes that the introduction of a broad fair use exception “would not result in excessive uncertainty” (par 4.121). The ABC rejects the Commission’s analysis of this question, which rests on two distinct arguments. The first is that the current copyright exceptions are “not entirely predictable or certain”, a conclusion based on aspects of the current regime that were identified as uncertain in various submissions (par. 4.122). The Corporation does not disagree that uncertainties can be found in the existing system. However, in its experience the current law is generally well understood and allows copyright owners and users alike to make day-to-day decisions with considerable certainty. The ABC believes that there is no evidence that the sum of the uncertainties in current copyright law is so great as to justify a conclusion that the best solution is to dismantle the entire system, rather than seeking means of addressing specific issues directly.

The second argument is that fair use “can operate with sufficient certainty” (par. 4.121), a conclusion that is based on recent evidence that the Commission believes “suggests that fair use in the US is not as uncertain as some critics have argued” (par 4.123). The fallacy underlying this argument is that it takes as its object an established fair use system. The

practical question that needs to be considered when assessing the ALRC's proposal is not whether it is possible for a mature fair use regime to operate with an acceptable degree of certainty, but the level of uncertainty that will be created during the transition to such a model and the duration of the transition period. The Corporation believes that both will be substantial. The ALRC must give adequate consideration to both these issues.

Accordingly, the Corporation neither believes a new fair use exception should replace all, or even some, existing exceptions, nor that the fair dealing provisions and free-use exceptions should be abolished in favour of fair use. It likewise rejects all proposals in the Discussion Paper that rest on the application of a broad fair use exception to resolve specific issues.

### **A new flexible copyright exception**

While opposed to a blanket fair use exception, the ABC acknowledges the desirability of a mechanism in the Copyright Act to flexibly deal with new uses of copyright material that may emerge as technologies change. The Corporation continues to believe that the best means of delivering such flexibility is a hybrid model, such as the one it described in its submission in response to the ALRC's initial Issues Paper. In that submission, the ABC proposed that specific fair dealing and free exceptions continue to be articulated within the Copyright Act, but that they be complemented by a residual open-ended exception for developing uses of copyright material that do not conflict with its normal exploitation. Such an approach would allow new fair dealing and free-use exceptions to develop in the future.

As noted above, the ABC does not believe this new exception should replace all or some existing exceptions. This would ensure that established fair dealing jurisprudence is retained on the one hand, but would allow further exceptions to develop as technology and practices change on the other.

### **Fair dealing**

As noted in the Corporation's submission in response to the Issues Paper and the joint letter to the Commission from the ABC, SBS and Commercial Radio Australia (CRA) of 23 May 2013, the ABC relies upon the existing fair dealing exceptions for reporting news, criticism or review, and parody or satire in its day-to-day activities. It believes that these exceptions are simply drafted and relatively technologically neutral and, accordingly, that they should be maintained in their present form.

The ABC strongly rejects the ALRC's proposals that the current fair dealing exceptions be repealed (Proposal 7-2) and replaced by a broad application of fair use (Proposal 7-1).

### **Application of the fairness factors to existing fair dealing exceptions**

In addition, the ABC does not support the ALRC's proposal to add the four "fairness factors" outlined in its construction of fair use to all new and existing fair dealing exceptions as mandatory considerations when determining whether copyright is infringed (Proposal 7-4). Those factors do not currently exist in the legislation and to add them will not clarify, but will instead narrow the extent of the existing exceptions.

In particular, the ABC does not believe that the fourth factor – “the effect upon the market for or value of the copyrighted work” – should ever be relevant to the fair dealing provisions for the reporting news, criticism or review or parody or satire. Inherent in the nature of each of those activities is a potential effect on the market or value of the copyright work. Depending on whether the material is used in a positive or negative light when it is used in the context of criticism or review, parody or satire or news, the market for the copyright work may decrease or increase. The connotation of the fourth factor is that, if the use has a negative impact on the market value of the copyright material, then it may count against fairness. Another possible connotation of the fourth factor is that, if material is available to be licensed, the fact that a licence is not obtained could also count against fairness. It would thus appear to have the highly undesirable effect of undermining the free speech considerations underlying each of these fair dealing defences.

### **New fair dealing exceptions**

In relation to a number of areas, the Discussion Paper proposes, in the absence of a blanket fair use regime, that additional fair dealing exceptions be introduced. The ABC supports some, but not all, of these proposals, as set out below.

#### *Non-consumptive use*

The ABC supports a fair dealing exception for non-consumptive use (Proposal 8-3), provided the exception is drafted to be compatible with or cover the same ground as sections 43A, 111A, 43B, 111B and 200AAA (i.e. those listed in Proposal 8-2), all of which the ABC relies upon. In addition, the new fair dealing exception should be drafted to resolve the uncertainty surrounding the word “temporary” in the current sections.

#### *Quotation*

As indicated in its submission on the Issue Paper, the ABC supports the introduction of a fair dealing exception for quotation (Proposal 10-3).

#### *Libraries and archives*

The ABC supports the introduction of a fair dealing exception for libraries and archives (Proposal 11-3).

However, the Corporation does not support the introduction of a voluntary extended collective licensing to deal with mass digitisation projects by libraries, museums and archives (Question 11-1). Instead, digitisation and any subsequent non-preservation uses should be covered under the proposed fair dealing exception for libraries and archives, or else by the introduction of a new statutory licence that could be administered by existing collecting bodies.

*Educational use*

The Corporation is a creator and co-producer of audio and audiovisual content and broadcasts a great deal amount of such content that is used by educational institutions under the statutory licences in Part VA of the Copyright Act. It receives substantial revenue from this source, which it reinvests in further content production. This educational use also provides an important stream of revenue for the ABC's independent co-production partners. In a similar fashion, educational institutions make use of text and images on the ABC's website and the Corporation derives revenue via the statutory licence in Part VB. As outlined in greater detail below, the ABC submits these statutory licences must be maintained.

The Corporation understands that fees collected by Screenrights, the collecting society that administers the Part VA statutory licence, are charged on a per-student basis, as are those collected by Copyright Agency, which administers the Part VB licences, from schools. The ABC believes that this model strikes a fair balance between the interests of content creators and educational users, as well as providing predictable outcomes for educational institutions. As a result, it is not necessary to introduce a new fair dealing exception for education, as the ALRC has proposed (Proposal 13-2), and doing so has the potential to unfairly tip the existing balance in favour of rights users.

Accordingly, the ABC does not support the introduction of a new fair dealing exception for education and is also opposed to any concomitant repeal of existing exceptions for education in sections 28, 44, 200 and 200AB of the Copyright Act (Proposal 13-3). Section 200AAA should be dealt with as a non-consumptive use.

In addition, the Corporation commends to the ALRC the report commissioned by Screenrights from the Kernochan Center for Law, Media and the Arts at the Columbia University School of Law (attached the Screenrights submission of 31 July 2013), which provides insights into the operation of fair use and related exceptions for educational institutions in the United States.

*Private and domestic use*

The ABC does not support the introduction of a new fair dealing exception for private and domestic (Proposal 9-2) or the accompanying repeal of various sections of the Copyright Act relating to format-shifting and time-shifting of content (Proposal 9-3). It believes there is insufficient certainty around when a use of broadcast content or commercial products such as DVDs, CDs and books for private and domestic purposes would fall within or outside of such an exception. Further, the Corporation does not believe it is in the best interests of the television and radio industries, including the commercial use of the products of those industries, to have judges resolve those uncertainties. Instead, such significant policy decisions should be made by the Parliament, where they will be open to public scrutiny and comment.

Instead, the ABC advocates exceptions which build on the current provisions within the Copyright Act and legitimise uses that do not conflict with the usual exploitation of the copyright material. Such specific exceptions should set out clearly when a private and domestic use is permitted. In this way, they would ensure greater certainty in the marketplace.

The Corporation would, however, advocate the adjustment of the various format-shifting sections—sections 43C, 109A and 110AA—and the time-shifting exception, section 111, to provide a greater level of technological neutrality and flexibility. The ABC would consider providing its support to the consolidation of the various format-shifting exceptions into a single technology-neutral format-shifting exception.

The Corporation also supports the extension of section 111 to cover ephemeral transmissions, such as simultaneous online streams of broadcasts (“simulcasts”) and live webcasts by broadcasters. However, where a broadcaster provides content on a more-than-ephemeral basis, such as an online catch-up service, section 111 should not be extended to allow copying of that broadcast content.

#### *Transformative use*

The ABC accepts the ALRC’s arguments in the Discussion Paper that a fair dealing exception for transformative use would be too difficult to draft (pars. 10.81–10.86).

#### *Public administration*

The ABC believes that it is not appropriate to introduce a new fair dealing exception for public administration (Proposal 14–2), as Part VII of Division 2 of the Copyright Act already provides a highly workable statutory licence for such use. This is discussed further below.

The ABC acknowledges the points made in the Discussion Paper about the possibility for copyright restrictions to act as a constraint on the release of public information that might otherwise have been legitimately provided under freedom of information (FOI) requirements (pars. 14.37–14.41). It might support the introduction of a limited fair dealing exception for the purposes of release of information under FOI legislation.

### **Inconsistent Drafting Amongst the Various Fair Dealing Provisions**

The ABC also reiterates the desirability of clarifications to remove inconsistencies from the existing fair dealing exceptions and refers the ALRC to its suggestions in its submission on the Issues Paper. It believes that all fair dealing defences should be applicable to all works and subject matter and that present inconsistencies between their application to “works”, “subject matter other than works” and “performances” should be remedied.

### **Statutory licences**

The statutory licensing schemes set out in Parts VA and VB and in Part VII of Division 2 of the Copyright Act should not be repealed (Proposal 6–1). The ABC strongly opposes the replacement of the statutory licensing schemes with a voluntary licensing regime under which the use of copyright material by governments and educational institutions would be negotiated voluntarily.

The ABC relies upon Screenrights revenue to fund program production. Any removal or lessening of such revenue can be expected to have a noticeable effect on the Corporation’s production levels and quality of offering.

Independent television producers, including those with whom the ABC co-produces a significant amount of its television content, also rely on Screenrights revenue for their ongoing viability. A weakening of the independent production sector would reduce the quality and creative diversity of Australian television culture and would affect all broadcasters, including the ABC, as well as potentially undermining the growth of the digital economy. In this sense, the Corporation relies on the sustainability of the production industry to maintain relevance and comply with its Charter.

The ABC notes that the ALRC concludes in a later chapter of the Discussion Paper that the retransmission statutory licence should be retained as “the broadcaster may not have a licence from underlying copyright holders to authorise retransmission” (par. 15.81). The Corporation supports the retention of that statutory licence (see below) and submits that it is inconsistent not to retain other statutory licences, as similar issues arise with any licensing of broadcast content. For example, the clearance of content for educational use is complex and time-consuming due to the numerous underlying rights contained in such programs.

By way of illustration, Table 1, below, outlines the underlying rights for the ABC-made series *Atoms of Fire*, a popular education title. Under a voluntary licensing regime, a failure to secure voluntary licences for even a small quantity of these items would likely result in the Corporation being unable to make the whole series available to the educational market. Alternatively, if an independent producer had to speculatively clear these rights upfront for use by educational and government institutions, the costs would likely be prohibitive and may not be recouped if a subsequent licence did not take place.

**Table 1. *Atoms of Fire*, Underlying Rights**

<b>Episode no.</b>	<b>Footage</b>	<b>Musical Works</b>	<b>Sound Recordings</b>	<b>Images</b>
1	5	8	7	4
2	1	6	5	
3		7	6	
4	9	7	6	1
5	10	7	6	
6	10	8	7	4
7	7	8	7	5
<b>Total</b>	<b>42</b>	<b>51</b>	<b>44</b>	<b>14</b>
<b>Total items to be cleared</b>				<b>151</b>

The Corporation also notes that any voluntary licensing body is very unlikely to have the breadth of repertoire coverage that is provided by a statutory licence. As a result, the replacement of statutory licences with a voluntary regime would give rise to the administrative burden and cost of the ABC having to negotiate agreements with numerous licensing bodies and/or reduced access by educational institutions to essential educational content. If providing access to cultural activities and education are vital to stimulating a

healthy digital economy in Australia, the Corporation is concerned that a voluntary licence scheme could indeed stifle the digital economy rather than stimulate it, as the repertoire available for such cultural and educational activities under a voluntary licence would be much narrower than under a statutory licence, and the administrative costs potentially greater.

The Discussion Paper considers a “license it or lose it” approach and extended collective licensing as means of filling such gaps in rights availability (pars. 6.102–6.112). The ABC draws the Commission’s attention to the Screenrights submission, dated 31 July 2013, which provides direct evidence based on administering rights under such a scheme in New Zealand. Screenrights’ experience shows that the combination of voluntary licences and “license it or lose it” results in considerably greater costs for rights holders and little appreciable benefit for educational users (Screenrights submission, pars. 90–99).

The Corporation addresses each of the specific arguments for repeal set out in the Discussion Paper in turn:

- **Derogation from rights holders’ rights:** The ABC is not aware of any evidence provided by rights holders that they are concerned about the compulsory nature of the statutory licences. As a rights holder, the Corporation is more than satisfied with the way the licences are administered and the remuneration it receives. Such licences provide ease, flexibility, economies of scale, certainty, guaranteed repertoire and lower compliance costs. They are an effective way of licensing content which might not otherwise be available to the education and other sectors. Further, the Corporation understands that the independent television production sector is of the same view.
- **Schools and universities seek repeal:** The ABC is concerned that the educational institutions’ submissions appear to have been preferred by the ALRC in its assessment of the issues, leading to an imbalance in favour of copyright users. The fact that they seek repeal is not in and of itself a reason to repeal the educational statutory licences.
- **Technical copying:** The issue of technical copying by educational institutions should be included within the scope of a fair dealing exception for non-consumptive use, as described above. The desirability of enabling technical copying is not in and of itself a reason to repeal the educational statutory licences.
- **Determining equitable remuneration:** The ABC notes that Screenrights and Copyright Agency present a very different perspective from the education sector on this issue. It appears that there is already scope within the Copyright Act for statutory licensees to commercially negotiate equitable remuneration. The Corporation submits that whatever the model, there will be compliance costs for licensees. Under its music blanket agreements with collecting societies, the ABC is required to report on the vast majority of its broadcast use of musical works and sound recordings at considerable internal cost. In that context, periodic surveys of actual use appear to be a reasonable method of enabling statutory licensors (or indeed voluntary licensors) to ensure they distribute royalties to creators in an accurate fashion. The difficulties in this area are not sufficient to justify repealing statutory licences.
- **Complexity:** The ABC acknowledges that the Part VA and VB statutory licences may be in places more complex than they need to be. However, that is an argument for simplifying, rather than repealing, the licences. The ABC is not aware of any evidence that this argument applies to the government copying licence.

- **Availability of direct licensing:** If it is the case that government users must only licence through the statutory licensing scheme in Part VII of Division 2, then the ABC supports such users being given the freedom to licence outside that scheme, as it understands is the case for educational users.
- **Anti-competitive:** This appears to the ABC to be a non-argument. As the Discussion Paper notes, voluntary collective licensing bodies would exert the same or similar market power as Screenrights and Copyright Agency and would be subject to the same oversight from the ACCC (par. 6.95).
- **Licensing uses covered by exceptions:** The ABC agrees that such uses should not be licensed, and could be addressed by the ALRC's contracting-out recommendations (Proposal 17-1), which the ABC supports.

The ABC is not persuaded that the arguments above are individually or collectively sufficient reason to overturn a system which works well and maintains an appropriate balance between the interests of copyright creators and users.

Furthermore, the ABC is not convinced there is any evidence supporting the repeal of the statutory licences. The licences were created to make licensing simpler for schools and to address infringing behaviour; in the ABC's experience, they achieve these outcomes very effectively. The licences have the added benefits of relieving licensors and licensees of a substantial part of the administrative burdens of licensing. Television producers and smaller rights holders are unlikely to have the resources to administer voluntary licences, nor to litigate to enforce their rights, should they be infringed. The ALRC's proposal appears to use to shift the burden of enforcement squarely onto the rights holders.

The Corporation remains of the view that technological neutrality should be an underlying principle of copyright reform. However, it does not believe the proposals for the repeal of statutory licences in the Discussion Paper are the appropriate way to achieve this – or indeed to stimulate and grow the digital economy. Rather, an approach that seeks to neutralise the technological specificity of the statutory licences is more appropriate.

## Retransmission

As indicated in its response to the Issues Paper, the ABC takes a neutral position on whether the Copyright Act should permit broadcasters to charge for retransmission of their signal. If the free-to-air retransmission scheme were to be amended to allow charging, the Corporation would prefer to see this handled through a statutory licence for broadcasting copyright (Proposal 15-1, Option 2), rather than the repeal of the free-to-air retransmission scheme set out in section 212 of the *Broadcasting Services Act 1992* (Cth) and Part VC of the Copyright Act (Option 1).

Subject to certain caveats, the ABC agrees with the proposal to include simultaneous transmission over the internet within the retransmission scheme and the consequent repeal of the internet exclusion contained in section 135ZZJA of the Copyright Act (Proposal 15-2). Specifically, any extension of the retransmission scheme to the internet should be subject to geographical limits on reception, and be on the basis that the internet retransmitter may *do no more than* retransmit the broadcast signal via the internet. That is, the internet retransmitter

should not value-add to the retransmission nor affect the editorial integrity of the content being retransmitted nor impose any editorial content or advertising around the retransmission.

The ABC agrees that, if the internet exclusion in section 135ZZJA of the Copyright Act is retained, its scope and application should be clarified to ensure that the integrity of a broadcasters' signal is maintained at all times if retransmitted by a third party. For the reasons set out above, any amendments should make clear that an internet retransmitter is able to do no more than retransmit the signal via the internet.

The ABC is also concerned that underlying rights holders receive appropriate compensation for the retransmission of their copyright material both under any replacement of the free-to-air retransmission scheme and if internet retransmission is included.

## Broadcasting

In principle, the ABC agrees with the proposal to extend various broadcast exceptions to apply to the transmission of radio and television programs over the internet (Proposal 16-1).

Consistent with the Corporation's opposition to the adoption of fair use, it believes that sections 45 and 67 of the Copyright Act should not be repealed (Proposal 16-2). Rather, they should be treated in the same way as the various sections mentioned in Proposal 16-1 by being amended to apply to the transmission of television or radio programs using the internet.

The ABC wishes to reiterate that section 107 also needs to be amended to allow for copying "as necessary" to remove the confusion about the number of copies permissible under that section.

The amendments to the broadcast exceptions should relate specifically to broadcasters and be framed around the identity of a broadcaster. The (current) means by which a broadcaster is identified within the Copyright Act is under the *Broadcasting Services Act 1992* ("BSA"). On-demand programs should be included in the broadcaster exceptions. The exceptions should be extended only to content made available by broadcasters using the internet.

The Corporation sees no need to import the BSA definition of "broadcast" into the Copyright Act. The solutions proposed in Proposal 16-1 are adequate to address the ABC's previously-expressed concerns about the technological neutrality of the relevant sections.

The radio licence fee caps under section 152, in particular, the ABC cap under section 152(11) should not be repealed. The cap represents a financial indicia set by Government. Its constitutional basis has recently been upheld unanimously by the full bench of the High Court of Australia. It is a question of policy rather than law reform.

The compulsory licensing scheme for the broadcasting of published sound recordings in section 109 should not be repealed. It is in the public interest for broadcasters to be able to have access to the full available repertoire of sound recordings so that they can be made available to the public. The introduction of a voluntary licence scheme could result in censorship. Moreover, voluntary licensing would result in increased administration costs for broadcasters and delays in obtaining permission.

## Libraries and Archives

As described above, the ABC supports a new fair dealing exception for libraries and archives.

In addition, as a key cultural institution, the Corporation would welcome the introduction a new exception permitting libraries and archives to make copies of copyright material, whether published or unpublished, for the purpose of preservation and without limit on the number or format of preservation copies that may be made (Proposal 11-4). It likewise would support the repeal of the existing sections of the Copyright Act relating to preservation copying—sections 51A, 51B, 110B, 110BA and 112AA—(Proposal 11-5), provided the new preservation copying exception is drafted sufficiently broadly as to at least cover all of these uses.

However, the ABC rejects the ALRC’s proposal that the preservation copying exception should contain a requirement that it does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price (Proposal 11-6). The Corporation believes this requirement would be antithetical to the objective underlying cultural institutions’ preservation role. It also effectively incorporates the commercial sector, for which the preservation of cultural material is generally not an objective or driver of behaviour, into the process of preserving cultural heritage. At the very least, any commercial-availability test should consider whether the format or quality of the commercially-available material is suitable for preservation.

## Orphan works

The ABC supports the ALRC’s proposal that the Copyright Act be amended to limit the remedies available in an action for infringement of copyright in an “orphan work” where the rights holder has not been found after a reasonably diligent search and, as far as is possible, the work is clearly attributed to its author (Proposal 12-2).

The Corporation agrees with the ALRC that it is best not to precisely define a “reasonably diligent search” (par 12.19), as this will vary across platforms. The ABC would not support formal registration or licensing schemes that are required by or recognised in legislation, as they are likely to be unnecessarily costly and time-consuming. It believes that the creation of an orphan works register would practically assist organisations in demonstrating that they have performed reasonably diligent searches; however, any such a register should be voluntary and operate at a low cost to users.

The ABC supports the ALRC’s suggestion that subject to a reasonably diligent search, the liability for infringement is limited to “reasonable compensation” (par 12.20). As the question of what constitutes “reasonable compensation” is not answered, the ABC would suggest industry market value; e.g. equivalent to the license fee the copyright user would have offered had it been able to find the owner. If a copyright holder comes forward and asserts permission would not have been given under any circumstances, they should not have a right to claim additional compensation or “damages”; in such circumstances, it might be appropriate to adopt a protocol of removing the orphan work from any derivative works.

It would be appropriate for the Copyright Act to provide a non-exhaustive list factors to

which regard may be had when determining whether a “reasonably diligent search” was conducted (Proposal 12-3).

## **Contracting out**

The ABC agrees that Copyright Act should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect (Proposal 17-1).

## **Conclusion**

The ALRC’s Discussion Paper on copyright and the digital economy is framed by the quite radical proposals to abandon established copyright exceptions for an open-ended fair use regime and dispense with a number of statutory licences.

The ABC believes that these proposals would lead to at least a decade of uncertainty and readjustment while new licensing arrangements are established. That transitional period can also be expected to be characterised by an increase in litigation by those copyright owners with the resources to take such action—an outcome that will have the undesirable effect of privileging the interests of wealthier copyright owners at the expense of smaller content creators.

The ABC believes in maintaining existing fair dealing exceptions in their current form and retaining statutory licences for educational and government use. It would support the introduction of additional fair dealing exceptions for non-consumptive use, quotation and libraries and archives, as well as an open-ended exception for developing uses of copyright material that do not conflict with its normal exploitation.

The Corporation supports the ALRC’s proposals to include simultaneous transmission over the internet within the free-to-air retransmission scheme and to extend various broadcast exceptions to the transmission of radio and television programs over the internet. It welcomes the Commissions approach to preservation copying by cultural institutions and the introduction of limits on remedies for use of orphan works where the owner cannot be found even after a reasonably diligent search.