

1. Introduction to the Inquiry

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Introduction

1.1 This Report is the result of an inquiry into whether the *Copyright Act 1968* (Cth) needs amendment to allow Australia to fully participate in a modern, digital economy. The Terms of Reference were released for public comment before the Inquiry began, and attracted over 60 submissions. Following consideration of this feedback, the Attorney-General released the final Terms of Reference on 1 June 2012.

1.2 Chapters 1–3 provide an overview of the policy framework and the background to the Inquiry. They set out in detail the issues raised by the Terms of Reference, the research behind the recommendations, analysis and discussion of stakeholder views.

1.3 In considering whether changes are needed to the *Copyright Act*, and options for reform, the ALRC is required to consider whether existing exceptions to copyright are appropriate, and whether further exceptions should be introduced. In doing so the ALRC has to take into account the impact of proposed changes on other areas of law, consistency with Australia’s international obligations and recommendations from other reviews.

Scope of the Inquiry

1.4 The Terms of Reference for this Inquiry focus on exceptions to copyright law. Exceptions allow certain uses of copyright material that would otherwise be infringements of copyright. Stakeholder input has been highly relevant in identifying the focus of investigation for this Inquiry, and not all exceptions have received consideration. The recommendations in this Report are intended to make the *Copyright Act* more accessible and better suited to the digital environment, but do not attempt overall redrafting or simplification of the legislation.

1.5 In performing its functions in relation to this Inquiry, the ALRC was asked not to duplicate work being undertaken in four areas of importance to the digital economy, namely:

- unauthorised distribution of copyright material using peer-to-peer networks;
- the scope of a safe harbour scheme for internet service providers;
- exceptions in relation to technological protection measures; and
- increased access to copyright works for persons with a print disability.

1.6 The items listed are under discussion at government level or are the subject of separate processes. The first refers to concerns about controlling the unauthorised distribution of copyright material using the internet as a file sharing network. This type of sharing was originally typified by the Napster music file sharing service and is now perhaps most commonly associated with the use of the BitTorrent peer-to-peer file sharing protocol. However, the Terms of Reference place the focus of the ALRC Inquiry on legal exceptions to copyright rather than on measures to combat copyright infringement.

1.7 The second and third matters listed above concern work the ALRC is ‘not to duplicate’. This refers to work being undertaken by the Australian Government Attorney-General’s Department on the safe harbour scheme for internet service providers (ISPs)¹ and technological protection measures (TPMs)² respectively. The Attorney-General’s Department Consultation Paper, *Revising the Scope of the Copyright Safe Harbour Scheme*, was released in 2011.

1.8 The fourth matter above refers to initiatives to facilitate access to published works by persons with a print disability, including through the World Intellectual Property Organization (WIPO). WIPO discussed an instrument providing access to copyright works for persons with a print disability at its 24th Session in Geneva, July 2012 and subsequently concluded a Treaty in 2013.³

Related inquiries

1.9 Policy makers around the world are actively reconsidering the relationship between copyright exceptions and innovation, research, and economic growth, with a

1 The ‘safe harbour’ scheme refers to the provisions of the *Copyright Act* limiting remedies available against carriage service providers for infringements of copyright relating to carrying out of online activities: *Copyright Act 1968* (Cth) pt V, div 2AA. See Australian Government Attorney-General’s Department, *Revising the Scope of the Copyright ‘Safe Harbour Scheme’*, Consultation Paper (2011).

2 The use of circumvention technology to gain unauthorised access to electronic copyright works led to the amendments contained in the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). See further Australian Government Attorney-General’s Department, *Review of Technological Protection Measure Exceptions made under the Copyright Act 1968* (2012).

3 World Intellectual Property Organization, *Standing Committee on Copyright and Related Rights: Twenty-Fourth Session* (2012); *Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled*, (adopted by the Diplomatic Conference, Marrakesh, 27 June 2013).

view to ensuring that their economies are capable of fully utilising digital technology to remain competitive in a global market.⁴

1.10 Relevant Australian reviews include previous work by the Copyright Law Review Committee, particularly *Simplification of the Copyright Act*⁵ and *Copyright and Contract* in 2002.⁶ Other relevant reviews include the *Review of Intellectual Property Legislation under the Competition Principles Agreement* (Ergas Report),⁷ the *Powering Ideas: An Innovation Agenda for the 21st Century*⁸ and the 2011 Book Industry Strategy Group Report.⁹

1.11 In its 2005 review of fair use, the Australian Government Attorney-General's Department considered whether it was appropriate to introduce a general fair use exception into the *Copyright Act*.¹⁰ This review resulted in exceptions being introduced into the Act in 2006, for time shifting, format shifting, parody and satire and flexible fair dealing.¹¹

1.12 The Convergence Review examined Australia's communications and media legislation and advised the Government on potential amendments to ensure this regulatory framework is effective and appropriate in the emerging communications environment.¹²

1.13 The Convergence Review noted that copyright-related issues in general may have implications for investment in the content services market. Advances in technology and evolving business models are providing new ways of accessing and distributing content in the converged environment, which are likely to have implications for content rights holders, and for users. These changes have been highlighted in recent developments, such as the ruling of the Federal Court on the Optus cloud-based TV Now service.¹³

1.14 The Convergence Review proposed that the issue of copyright and the retransmission of free-to-air broadcasts be examined as part of this Inquiry and that, in investigating content-related competition issues, a new communications regulator

4 See, for example, World Economic Forum, *Global Agenda Council on the Intellectual Property System Digital Copyright Principles* <www3.weforum.org/docs/WEF_GAC_CopyrightPrinciples.pdf> at 1 February 2013.

5 Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998).

6 Copyright Law Review Committee, *Copyright and Contract* (2002).

7 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).

8 Department of Innovation, Industry, Science and Research, *Powering Ideas: An Innovation Agenda for the 21st Century* (2009).

9 Book Industry Strategy Group, *Final Report* (2011). See also Australian Government, *Government Response to Book Industry Strategy Group Report* (2012).

10 Australian Government Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age*, Issues Paper (2005).

11 *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

12 Australian Government Convergence Review, *Convergence Review Final Report* (2012).

13 *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147. See Ch 10.

should have regard to copyright implications and be able to refer any resulting copyright issues to the relevant minister for further consideration by the Government.¹⁴

1.15 In July 2013, in its report on radio simulcasts the Senate Environment and Communications References Committee, commented on the many related broadcasting and copyright issues identified in numerous reviews—of which this Inquiry is one.¹⁵

1.16 Also in July 2013, the House of Representatives Standing Committee on Infrastructure and Communications released its report on price differentials for Australian business and consumers for products including computer software, hardware, music, films, ebooks and games.¹⁶ The report made a number of recommendations relating to creating a more open and competitive market environment for the supply of IT products to business, the community and government.

1.17 Copyright reform has been pursued in overseas jurisdictions, notably in the UK through the Hargreaves Review, which was intended to reshape copyright to be ‘fit for purpose’ in the digital environment.¹⁷ In its response to the Hargreaves Review the UK Government agreed that ‘the IP framework is falling behind and must adapt’.¹⁸

1.18 The Hargreaves Review has been favourably received by the UK Government, which has responded with a number of legislative initiatives. Stakeholders in this Inquiry generally have approved of the Hargreaves Review. However, a House of Commons committee has also criticised it as ‘likely to cause irreparable damage’¹⁹ to the UK economy, and considered ‘the existing law works well’.²⁰ Professor Hargreaves has refuted this criticism of his report.²¹ The disjunction between those who state that there is no need for reform, and others who see a critical need to update copyright law, is also a characteristic of this ALRC Inquiry.

1.19 In January 2013, the European Commission announced seven new priorities for the European Digital Economy and Society. One of these steps is to ensure the EU copyright framework ‘remains fit for purpose in the digital context’.²² Among the proposals are new EU Directives concerning the activities of collecting societies in order to facilitate introduction of new business models that enhance online distribution of music.

14 See Ch 18.

15 Parliament of Australia, Senate Environment and Communications References Committee, *Inquiry into the Effectiveness of Current Regulatory Arrangements in Dealing with Radio Simulcasts* (2013). See further Ch 15.

16 House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (2013).

17 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

18 UK Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011), 2.

19 House of Commons Culture, Media and Sport Committee, *Supporting the Creative Economy* (2013), 55.

20 *Ibid.*, 68.

21 I Hargreaves, ‘MPs Have Missed the Mark in Copyright Reform’, *The Conversation*, 30 September 2013, <<http://theconversation.com/mps-have-missed-the-mark-in-attacking-copyright-reform-18703>>.

22 European Commission, *Orientation Debate on Content in the Digital Economy* (2012).

1.20 The Copyright Review Committee (Ireland) reported in October 2013,²³ after considering submissions received in response to an earlier discussion paper.²⁴ The Review made a number of recommendations, including the establishment of a copyright council and specialist courts for copyright matters, as well as exceptions for innovation and fair use.

1.21 In April 2013, the US House of Representatives announced ‘a comprehensive review of US copyright law’.²⁵

1.22 In 2012, Canada enacted the *Copyright Modernization Act 2012 (Can)*.²⁶ It included an amendment to address the issue of user-generated content and specifically recognises fair dealing for educational purposes, as well as a number of other matters under consideration in the ALRC Inquiry.

Matters outside the Terms of Reference

1.23 This Inquiry is defined by its Terms of Reference. A number of stakeholders raised issues of wider concern which the ALRC did not, or could not, address. Despite exclusion from the Terms of Reference, and work being done elsewhere, a number of stakeholders have been critical of the ALRC for not considering infringement and enforcement matters.²⁷

1.24 A number of submissions pointed out that enforcement, ISP safe harbour schemes and TPMs are matters of importance to many stakeholders, and highlighted the difficulty of making recommendations on matters within the Terms of Reference without taking account of the issues the ALRC is directed not to inquire into.²⁸

1.25 The Australasian Performing Right Association and Australasian Mechanical Copyright Owners Society (APRA/AMCOS), for example, noted that to ‘maximise the potential contribution of content industries in the digital economy there are a number of significant challenges which will need to be overcome’. These include ‘the ease with which digital content can be distributed and copied’ and ‘meaningful regulation of the

23 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013).

24 Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).

25 US House of Representatives, Committee on the Judiciary, ‘Chairman Goodlatte Announces Comprehensive Review of Copyright Law’ (Press Release, April 24, 2013).

26 *Copyright Modernization Act, C-11 2012* (Canada). See further M Patterson, R McDonald, Fraser Milner Casgrain LLP, *The Copyright Modernization Act: Canada’s New Rights and Rules* <www.lexology.com/library> at 22 March 2013.

27 See, eg, News Corp Australia, *Submission 746*; Australian Film/TV Bodies, *Submission 739*.

28 The Copyright Licensing Agency, *Submission 766*; News Corp Australia, *Submission 746*; Australian Film/TV Bodies, *Submission 739*; NRL, *Submission 732*; ARIA, *Submission 731*; COMPPS, *Submission 634*; COMPPS, *Submission 266*; iGEA, *Submission 192*. See also Australian Film/TV Bodies, *Submission 205*; Motion Picture Association of America Inc, *Submission 197*; Music Rights Australia Pty Ltd, *Submission 191*.

ISP industry'.²⁹ Other stakeholders also raised the need to consider ISP and intermediary liability.³⁰

1.26 The Arts Law Centre of Australia raised a matter relating to protection of Indigenous cultural heritage in the form of *sui generis* legislation and asked the ALRC to consider the engagement of the *Copyright Act* with Indigenous artists, arts organisations and Indigenous communities where copyright law does not recognise aspects of Indigenous customary law.³¹

1.27 The Australian Directors Guild requested amendment to s 98 of the *Copyright Act* to delete the words 'commissioned film' in that section to enhance the rights of film directors and access to revenue streams 'as an equal creator of audiovisual works'.³² The Screen Producers Association of Australia opposed this suggestion.³³ The ALRC acknowledges the concerns of film directors but considers that this issue does not fall within the Terms of Reference for this Inquiry.

1.28 The question of copyright protection for newspaper headlines and internet links was raised by some including the Combined Newspapers and Magazines Copyright Committee.³⁴ Newspaper publishers submitted that press aggregators' practice of 'free riding', by so called 'abstracting' of newspaper or magazine articles should be prohibited under the *Copyright Act* until the eighth day after the original publication first appears. An attempt to redress this sort of activity and redress the loss of revenues suffered by newspaper companies as a result of free online news aggregators has apparently been discussed in Germany, but has not proceeded.³⁵

1.29 Refusal to supply electronic resources to libraries in a timely manner, at a fair and affordable price and under licences that acknowledge copyright law exceptions for libraries is a matter of concern.³⁶ Library access to ebooks and e lending has become an issue and the subject of 'national think tanks' as to securing equitable access to information in digital formats. These concerns, relating to refusal to supply and contractual matters, are outside the Terms of Reference.

29 APRA/AMCOS, *Submission 247* citing also International Federation of the Phonographic Industry, *Digital Music Report 2012: Expanding Choice, Going Global* (2012).

30 Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; COMPPS, *Submission 266*; AFL, *Submission 232*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*.

31 Arts Law Centre of Australia, *Submission 171* citing *T Janke, Our Culture Our Future: Report on Australian Indigenous Culture and Intellectual Property Rights* (1998). An outline of recommendations for *sui generis* protection or extended moral rights for Indigenous culture is provided in A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), [9.9]. See also Australian Society of Archivists Inc, *Submission 156*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*. See also Australia Council for the Arts, *Submission 860*.

32 Australian Directors Guild, *Submission 226*.

33 SPAA, *Submission 281*.

34 News Corp Australia, *Submission 746*; MEAA, *Submission 652*; C Snow, *Submission 254*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

35 H Bakhshi, I Hargreaves and J Mateos-Garcia, *A Manifesto for the Creative Economy* (2013), 82. An industry solution seems to be underway with Google paying 65 million euro into a fund to assist newspapers develop digital models.

36 ALIA, *Submission 859*.

1.30 eBay raised an issue of exhaustion rights and parallel importation and supported amendment of the *Copyright Act* to effect removal of all barriers to the importation and sale in Australia of products manufactured under the authority of the legitimate copyright owner.³⁷ This would have the effect of facilitating the sale of second-hand digital media. Some aspects of this issue are currently under discussion by consumer advocates.³⁸

The Inquiry process

1.31 Since 1975 the ALRC has had a history of independent inquiry into law reform, and over that time has developed a well-established, rigorous process, the results of which have gained a considerable degree of public respect and recognition of high quality outcomes.³⁹ Within that established framework the process for each law reform project may differ according to the scope of inquiry, the range of key stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. While the exact procedure needs to be tailored to suit each topic, the ALRC usually works within a particular framework when it develops recommendations for reform.

Stakeholder consultation

1.32 As is usual, in this Inquiry the ALRC consulted with relevant stakeholders, including the community and industry, and engaged in widespread public consultation.

1.33 The first stage of the Inquiry included the release of the Issues Paper⁴⁰ in August 2012, to identify the issues raised by the Terms of Reference and suggest principles which could guide proposals for reform, as well as to inform the community about the range of issues under consideration, and invite feedback in the form of submissions. The Issues Paper generated 295 submissions.

1.34 On 30 May 2013 a Discussion Paper was released⁴¹ and the ALRC again called for submissions to inform the final stage of deliberations leading up to this Report. In total, the ALRC received 870 public and 139 confidential submissions to the Inquiry.⁴²

1.35 The ALRC also undertook 109 consultations.⁴³ Key stakeholders were invited, and took the opportunity, to advise on the composition of industry roundtable meetings. In addition, industry-specific roundtable meetings, consultations and visits were conducted on numerous occasions.

1.36 Consultations and submissions included those with and from:

- academics (individuals and groups);

37 eBay, *Submission 751*.

38 Choice, *Own What You Download* (2013) <www.choice.com.au/consumer-action/consumer-protection/digital-rights-copyright/fair-use.aspx> at 25 October 2013.

39 D Weisbrot, 'The Future for Institutional Law Reform' in B Opeskin and D Weisbrot (ed) *The Promise of Law Reform* (2005), 25.

40 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012).

41 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013).

42 The public submissions are available on the ALRC website at: www.alrc.gov.au.

43 Consultations are listed in Appendix 1.

- creators and organisations (authors, directors, photographers and others);
- the education sector;
- the GLAM (galleries, libraries, archives and museums) sector;
- government authorities, (Australian Competition and Consumer Commission; the Australian Communications and Media Authority; IP Australia; Standards Australia and many others);
- media and broadcasting and related organisations and industry bodies;
- music organisations;
- online service providers;
- publishers and publisher organisations; and
- rights management organisations.

1.37 Internet communication tools—including an enewsletter and online forums—were used to provide information and obtain comment. The ALRC also made use of Twitter to provide information on relevant media reports, as well as to provide a further avenue for community engagement.

1.38 The ALRC acknowledges the contribution of all those who participated in the Inquiry consultation rounds and the considerable amount of work involved in preparing submissions. It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries and the ALRC records its deep appreciation for this contribution.

Appointed experts

1.39 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of its Advisory Committees and the appointment of part-time Commissioners. While the ultimate responsibility for the Report and recommendations remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee is an aspect of ALRC inquiries. Advisory Committees assist in the identification of key issues and provide quality assurance in the research and consultation aspects of the Inquiry. The Advisory Committee for this Inquiry was unusually large at 24 members, listed at the front of this Report, and met in Sydney on 19 July 2012, 11 April 2013 and 26 September 2013.

1.40 In this Inquiry the ALRC was able to call upon the expertise and experience of its standing part-time Commissioners, all judges of the Federal Court of Australia: the Hon Justice Susan Kenny, the Hon Justice John Middleton and the Hon Justice Nye Perram. All are experienced intellectual property judges, and Justice Perram was President of the Copyright Tribunal of Australia at the time of the Inquiry.

1.41 In this Inquiry the Advisory Committee also included the Hon Justice David Yates. As well as four Federal Court judges, the Advisory Committee benefited from a

number of senior legal practitioners who have represented all manner of copyright owners and large copyright interests, a former member of the Copyright Tribunal of Australia, two regulatory economists and the Chief Executive of the peak body of copyright owners. The role of the Advisory Committee is to advise on coherence and structure of the ALRC process and recommendations; it does not formulate reform recommendations, and members are invited in their individual capacity. They are explicitly asked not to act in any representative capacity.

1.42 The ALRC acknowledges the contribution made by the part-time Commissioners, Advisory Committee and expert readers in this Inquiry and expresses gratitude to them for voluntarily providing their time and expertise.

Outline of the Report

1.43 Chapter 1 outlines the background to the Inquiry, analyses the scope of the Inquiry as defined by the Terms of Reference, and describes previous and related inquiries. It also describes and comments on the Inquiry process and on the development of the evidence base supporting the law reform response reflected in the recommendations of this Report.

1.44 Chapter 2 identifies and discusses five framing principles, which define the policy settings for this Inquiry.

1.45 Chapter 3 discusses some of the broader context within which the ALRC conducted this Inquiry and comments on the Terms of Reference, drawing out some concerns of stakeholders about the scope of the Inquiry, and identifying aspects of the needs and expectations of Australian business and consumers.

1.46 Chapters 4 and 5 make the case for introducing a broad, flexible exception for fair use into the *Copyright Act*. Chapter 4 locates fair use in Australia's longstanding fair dealing tradition. The move from closed-ended fair dealing to open-ended fair use represents a move from prescriptive categories to a more principled approach. In Chapter 4, the ALRC explains how fair use can encourage public interest and transformative uses, and promote innovation, while at the same time respecting authorship and protecting rights holders' markets.

1.47 Chapter 5 outlines key elements of the recommended fair use exception. These are a non-exhaustive list of four fairness factors, which should be considered in assessing whether use of copyright material is fair use, and a non-exhaustive list of eleven illustrative purposes. It also discusses how the interpretation and application of the fair use exception may be guided by existing Australian case law, other jurisdictions' case law, and the development and use of industry guidelines and protocols. The ALRC also recommends that the existing fair dealing exceptions, as well as broader exceptions for professional advice, be repealed.

1.48 Chapter 6 considers an alternative to an open-ended fair use exception, namely, a new fair dealing exception that consolidates the existing fair dealing exceptions in the *Copyright Act* and introduces new prescribed purposes. The ALRC recommends that, if fair use is not enacted, this new fair dealing exception be introduced.

1.49 Chapter 7 examines ‘third party’ uses of copyright material, where an unlicensed third party copies or otherwise uses copyright material on behalf of others. These are unlicensed uses to deliver a service, sometimes for profit, in circumstances where the same use by the end user would be permitted under a licence or unremunerated exception. The ALRC concludes that such uses should be considered under the fair use or new fair dealing exceptions, in determining whether the use infringes copyright.

1.50 Chapter 8 discusses statutory licences, which allow for certain uses of copyright material, without the permission of the rights holder, subject to the payment of reasonable remuneration. The ALRC has concluded that there is a continued role for the statutory licences in pts VA, VB and VII div 2 of the *Copyright Act*, but they should be made less prescriptive. Many of the criticisms of the statutory licences are better directed at the scope of unremunerated exceptions, and would be largely addressed by the introduction of fair use.

1.51 The ALRC recommends that a fair use exception should be applied when determining whether quotation infringes copyright and that ‘quotation’ should be an illustrative purpose in the fair use exception. Chapter 9 considers various uses of copyright material in quotation, and describes examples of quotation that may be covered by fair use but are, in at least some circumstances, not covered by existing fair dealing exceptions. It also explains how the concept of quotation can be expected to be interpreted under a fair use exception.

1.52 In Chapter 10, the ALRC recommends that the existing exceptions for time shifting broadcasts and format shifting other copyright material be repealed. Instead, fair use or the new fair dealing exception should be applied when determining whether a private use infringes copyright. These fairness exceptions are more versatile, and are not confined to technologies that change rapidly. ‘Non-commercial private use’ should be an illustrative purpose in the fair use exception.

1.53 Incidental or technical uses—such as caching and indexing—are essential to the operation of the internet and other technologies that facilitate lawful access to copyright material. Chapter 11 considers incidental or technical uses of copyright material and data and text mining. The ALRC concludes that current exceptions in the *Copyright Act* are uncertain and do not provide adequate protection for such uses, and should be repealed. The ALRC recommends that such uses should be considered under the fair use exception and that ‘incidental technical use’ should be an illustrative purpose of fair use. Similarly, the fair use exception should also be applied in determining whether data and text mining constitute copyright infringement.

1.54 Chapter 12 considers uses of copyright material by libraries and archives in the digital environment. The ALRC recommends that ‘library and archive use’ should be an illustrative purpose of the fair use exception or, if fair use is not implemented, the *Copyright Act* be amended to introduce a new fair dealing exception, including ‘library and archive use’ as a prescribed purpose. The ALRC also recommends a new preservation exception for libraries and archives that does not limit the number of copies or formats that may be made. As a consequence of the new exception, a number of existing exceptions should be repealed.

1.55 Chapter 13 discusses orphan works—copyright material with no owner that can be identified or located by someone wishing to obtain rights to use the work. The ALRC recommends that the *Copyright Act* be amended to provide that remedies available for copyright infringement be limited where the user has conducted a ‘reasonably diligent search’ for the copyright owner, and, where possible, has attributed the work to the author. The chapter also discusses options for the establishment of an orphan works or copyright register, which could be the subject of further consideration by the Australian Government.

1.56 Chapter 14 concludes that new exceptions are needed to ensure educational institutions can take full advantage of the wealth of material and new technologies and services now available in a digital age, and that these exceptions should be fair use or the new fair dealing exception. These exceptions would permit some unremunerated use of certain copyright material for educational purposes, without undermining the incentive to create and publish education material. ‘Education’ should also be included as an illustrative purpose in the fair use exception.

1.57 Chapter 15 considers government use of copyright material and recommends that the current exceptions for parliamentary libraries and judicial proceedings should be retained, and further exceptions for government use added. These new exceptions should cover use for public inquiries, uses where a statute requires public access, and use of material sent to governments in the course of public business. Governments should also be able to access the general fair use exception, and other exceptions in the *Copyright Act*, and exceptions should be available to Commonwealth, state and local governments.

1.58 The *Copyright Act* provides for a statutory licence for institutions assisting people with disability. Chapter 16 examines this licence, which has limited scope, onerous administrative requirements and has not facilitated the establishment of an online repository for people with print disability. The ALRC recommends that access for people with disability should be an illustrative purpose listed in the fair use exception. Many uses for this purpose will be fair, as they are transformative and do not have an impact on the copyright owner’s existing market.

1.59 Chapter 17 discusses exceptions for computer programs and for backing-up all types of copyright material. The ALRC concludes that the use of legally-acquired copyright material for the purpose of back-up and data recovery will often be fair use, and should be considered under the fair use exception. There may also be a case for repealing or amending the existing exceptions for computer programs, if fair use is enacted, but further consultation may need to be conducted.

1.60 Chapters 18 and 19 examine exceptions that relate to free-to-air television and radio broadcasting. Chapter 18 examines exceptions that apply to the retransmission of free-to-air broadcasts and whether they are adequate and appropriate in the digital environment. This raises complex questions at the intersection of copyright and communications policy. The ALRC recommends that, in the light of media convergence, the Australian Government should consider whether aspects of the retransmission scheme for free-to-air broadcasts should be repealed.

1.61 Chapter 19 discusses other exceptions that refer to the concept of a ‘broadcast’ and ‘broadcasting’. In a changing media environment, distinctions currently made in copyright law between broadcast and other platforms for communication to the public require justification. Innovation in the digital economy is more likely to be promoted by copyright provisions that are technologically neutral. The ALRC recommends that, in developing media and communications policy, and in responding to media convergence, the Australian Government give further consideration to reform of these broadcast exceptions.

1.62 Chapter 20 discusses ‘contracting out’—agreement between owners and users of copyright material that some or all of the statutory exceptions to copyright are not to apply. The ALRC recommends that the *Copyright Act* should not provide any statutory limitations on contracting out of the new fair use exception. However, if the fair use exception is not enacted, limitations on contracting out should apply to the new consolidated fair dealing exception. The ALRC also recommends that, in either case, the *Copyright Act* should provide statutory limitations on contracting out of the libraries and archives exceptions.