

## 2. Framing Principles for Reform

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### Summary

2.1 The ALRC has identified five specific framing principles to define the policy settings for this Inquiry. The principles are derived from existing laws, other relevant reviews and government reports, international policy discussions and reviews. They are also principles stakeholders have identified in response to the Issues Paper and Discussion Paper.

2.2 As changes in the context of the digital economy are difficult to anticipate, there is a need for regulation that can be adaptive to changes in the copyright environment. The framing principles allow for flexibility in the application of copyright rules, while being anchored in an understanding of policy goals that can remain more constant over time.

2.3 The principles outlined are not necessarily the only considerations in copyright reform, but they generally accord with other established principles, including those developed for the digital environment in international discussions.

2.4 Submissions to this Inquiry demonstrated that most stakeholders agreed with the framing principles discussed below. However, the application of copyright law and possible reform to copyright law in pursuit of achieving these principles, is highly contested.

### **Principle 1: Acknowledging and respecting authorship and creation**

2.5 In the past, the Australia copyright law focused more on economic interests than moral rights, in contrast to European systems, which paid more attention to the personal rights of authors and creators. Moral rights were introduced into Australian copyright law in December 2000, with a scheme allowing for the right of attribution—

to be named as author or creator—and the right of integrity—to prevent the alteration or other treatment of work in a way that affects the author’s reputation.<sup>1</sup> A number of stakeholders consider recognition of moral rights and in particular recognition of ‘authorship’ as being the paramount consideration in any copyright discussion.<sup>2</sup>

2.6 The ALRC recommendations for reform to copyright law should be framed in a way that acknowledges and respects the rights of authors, artists and other creators. In this Report, the recommendations are tested against this and the other framing principles. Part of an assessment of the fairness of copyright exceptions includes the effect on authors and creators, including their moral rights and cultural considerations.

2.7 Moral rights and cultural considerations, in particular issues relating to Indigenous culture<sup>3</sup> and cultural practices, need always to be considered, alongside economic rights.<sup>4</sup> All reform recommended in this Report is consistent with the requirements of Indigenous artists, custodians and communities as they can incorporate, as appropriate, Indigenous cultural protocols.<sup>5</sup> This is particularly relevant in the context of digitisation of individual, family and community material.<sup>6</sup>

2.8 An important aspect to be made explicit is the general principle of the rights of authors and makers of copyright material to determine how their works are exploited ‘while at the same time acknowledging the rights of consumers to engage with content in a manner which does not adversely impact the rights of creators’.<sup>7</sup>

2.9 Regardless of the status of economic infringement of rights, ‘a creator should always be able to assert their moral rights and seek removal from the internet of derivative works considered to violate these rights’.<sup>8</sup>

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1 *Copyright Amendment (Moral Rights) Act 2000* (Cth).

2 See, eg. Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

3 See T Janke and R Quiggin, *Indigenous Culture and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006* (2006), prepared for the Aboriginal and Torres Strait Islander Arts Board and Australia Council.

4 The Australia Council considers ‘the protection of moral rights and economic incentives for the creation of work to be paramount considerations for copyright reform’: Australia Council for the Arts, *Submission 860*.

5 Ibid; AIATSIS, *Submission 762*; Viscopy Board, *Submission 638*.

6 K Bowrey, ‘Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights?’ in K Bowrey, M Handler and D Nicol (eds), *Emerging Challenges in Intellectual Property* (2011): ‘the digitisation and/or dissemination of “traditional cultural expressions”, including secret and sacred Aboriginal cultural heritage by museums, archives or other cultural institutions, should be subject to the free, prior and informed consent of Indigenous artists, custodians or communities’: Arts Law Centre of Australia, *Submission 171*; K Bowrey, *Submission 94*. See also J Anderson, ‘Anxieties of Authorship in the Colonial Archive’ in C Chris and D Gerstner (eds), *Media Authorship* (forthcoming 2013); T Janke, *Ethical Protocols from Deepening Histories of Place: Exploring Indigenous Landscapes of National and International Significance* (2013) <[www.deepeninghistories.anu.edu.au](http://www.deepeninghistories.anu.edu.au)> at 10 April 2013.

7 State Library of New South Wales, *Submission 168*.

8 Australian Major Performing Arts Group, *Submission 212*.

2.10 Some stakeholders preferred that the term ‘rights holders’ not be used in a manner which obscures the importance of authorship and creation of copyright material.<sup>9</sup>

2.11 ‘Authorship’ is not to be interpreted in a manner that is too narrow or culturally specific. It needs to be noted that the concept of the author is specifically left undefined in the *Copyright Act*, allowing for an enormous range of expressive and pedestrian works to be encompassed.

2.12 On a point of terminology, one stakeholder pointed out that the *Copyright Act* does not refer to ‘creators’, but rather to ‘authors’ of works and ‘makers’ of other subject matter, although the term ‘author’ is the only expression used in the relevant international conventions, such as the *Berne Convention* and the World Intellectual Property Organization Copyright Treaty.<sup>10</sup> In this Report ‘creator’ is used at times as a generic term referring to authors or makers of copyright material.

2.13 Moral rights were formally incorporated into Australian copyright law in 2000.<sup>11</sup> These are personal rights centred around the author or creator of material and are independent of the author’s economic rights. Consideration of moral rights is additional to and separate from consideration of economic rights, although may be a factor in assessing the fairness of the use of copyright material.<sup>12</sup>

2.14 Questions of authorship, moral and cultural rights are also discussed under the next framing principle.

## **Principle 2: Maintaining incentives for creation and dissemination**

2.15 The Terms of Reference for this Inquiry refer to ‘the objective of copyright law in providing an incentive to create and disseminate original copyright materials’. The ALRC considers that reform proposals in this Report recognise and facilitate this objective.

2.16 This principle is taken to mean that copyright reform should ensure the maintenance, and indeed, enhancement of incentives to create works and other subject matter, and to allow the dissemination of that material. In many submissions, ranked equally with (or above) the recognition of authorship and creation, was recognition of copyright as a form of property—specifically property that provides remuneration as a critical component of ongoing creative effort.<sup>13</sup>

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9 Law Council of Australia, *Submission 263*. The Copyright Review Committee (Ireland) referred to authors and rights holders together, albeit noting that the ‘situation of the individual author or artist is a dominant trope in copyright lore’: Copyright Review Committee (Ireland), *Copyright and Innovation*, Consultation Paper (2012), 33.

10 Law Council of Australia, *Submission 263*.

11 *Copyright Act 1968* (Cth) Pt IX.

12 See further Ch 5.

13 ‘The purpose of copyright law is to provide incentive for creation of works for the benefit of society as a whole, and it is essential that any reform process takes account of that fact’: APRA/AMCOS, *Submission 247*; Australian Industry Group, *Submission 179*. See also News Corp Australia, *Submission 746*; Cricket Australia, *Submission 700*.

2.17 The objective of Australia's 2013 *Cultural Policy* is to increase the social and economic dividend from the arts, culture and the creative industries. This ALRC Inquiry is referred to in the Cultural Policy as being:

designed to ensure Australian copyright law continues to provide incentives for investment in innovation and content in a digital environment, while balancing the need to allow the appropriate use of both Australian and international content.<sup>14</sup>

2.18 In this Inquiry, most submissions espoused the 'innovation incentive' theory of copyright but views differed as to how far the incentive reached. The Centre of Excellence for Creative Industries and Innovation noted, for example, that 'the evidence points to the need for caution in assessing claims that copyright as it currently operates is central to the ability of creators to earn a living from their creative works'.<sup>15</sup>

2.19 However, it is generally accepted that: 'the incentive theory (for creativity and innovation) underlies and continues to drive copyright law'.<sup>16</sup> Universities Australia submitted that the guiding principle for this Inquiry should be 'to ensure that copyright law does not result in over regulation of activities that do not prejudice the central objective of copyright, namely the provision of incentives to creators'.<sup>17</sup>

2.20 Historically, copyright has been included among laws that 'granted property rights in mental labour'.<sup>18</sup> In this tradition, Australian copyright law has been regarded primarily as conferring economic rights focusing on the protection of commercial activities designed to exploit material for profit.<sup>19</sup> Indeed, the *Copyright Act* refers to copyright as 'personal property'.<sup>20</sup>

2.21 It is generally, although not universally,<sup>21</sup> assumed that creation of personal property underlies the incentive to creation of copyright material.<sup>22</sup> While copyright ownership does play a role in the incentives of commercial producers of copyright

14 Australian Government, *Creative Australia: National Cultural Policy* (2013), [7.3.2]. News Corp submitted that the ALRC needs to fully appreciate 'the importance of legal protections for copyright and intellectual property encompassed in Government policy': News Corp Australia, *Submission 746*.

15 Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

16 Arts Law Centre of Australia, *Submission 171*.

17 Universities Australia, *Submission 246*. See also Australia Council for the Arts, *Submission 860*.

18 B Sherman and L Bently, *The Making of Modern Intellectual Property Law: The British Experience 1760–1911* (1999), 2.

19 *Copyright Act 1968* (Cth) s 196(1). 'IP laws create property rights and the goods and services produced using IP rights compete in the market place with other goods and services': ACCC, *Submission 165*. See also A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), [1.26].

20 *Copyright Act 1968* (Cth) s 196(1).

21 See NSW Young Lawyers, *Submission 195*.

22 'Today, this is the standard economic model of copyright law, whereby copyright provides an economic incentive for the creation and distribution of original works of authorship': J Litman, *Digital Copyright* (2001), 80. There is a body of commentary which doubts the link between copyright as a form of property as an incentive to create, and doubts the 'blind belief in the necessity of copyright to power activity': G Moody, *European Commission Meeting on Copyright* <<http://blogs.computerworlduk.com/open-enterprise/2012/12/european-commission-meeting-on-copyright/index.htm>> at 10 April 2013. See also W Patry, *How to Fix Copyright Law* (2011), 12; N Weinstock Netanel, 'Copyright and Democratic Civil Society' (1996) 106 *Yale Law Journal* 283. Nevertheless, for the purposes of this Inquiry, stakeholders have confirmed this principle as one fundamental to Australian copyright law.

works, who provide employment for creators,<sup>23</sup> ‘the extent of this role has not been extensively studied and may be less than is commonly thought’.<sup>24</sup>

2.22 The general proposition, however, is: ‘the purpose of granting rights of property in the products of creative labour is to reward and encourage creativity’.<sup>25</sup> Indeed, the ‘objectives of copyright regulation are to support an environment that promotes the creation of new content for the benefit of Australian society as a whole’.<sup>26</sup>

2.23 The proprietary analysis was expressed by a number of stakeholders as a ‘need to correctly frame the discussion as one sensitive to the notion of property’, that is, the starting point in a discussion about copyright reform should not be ‘that consumers are entitled to use and exploit the products or property of another person who has privately invested in them’.<sup>27</sup>

2.24 It has been said that to talk of copyright as property is to employ a different ‘dominant metaphor’ than the traditional ‘bargain between authors and the public’.<sup>28</sup> However, ‘this proprietary approach’ is seen as the basis of encouragement to create copyright material, albeit that motivation will ‘vary from industry to industry’.<sup>29</sup>

2.25 While the link between encouraging creativity and ownership of property rights is not inevitable, most stakeholders believe the property rights created by Australian copyright legislation provide the major incentive to creativity and production of new material. The ALRC considers that maintaining incentives for creation through appropriate recognition of property rights in copyright material is an important aspect of copyright reform.

2.26 Some submissions emphasised that creation without dissemination is of little value, Pandora, for example, submitted:

the financial return to creators and rights owners only comes from distribution through successful and viable businesses—the benefits for creators and rights owners cannot sensibly be considered in isolation from the need to also deliver a commercial benefit to those companies investing in making the creators’ works commercially available. As such, we consider that there is a pressing need to also deliver a commercial benefit to those companies investing in making the creators’ works commercially available.<sup>30</sup>

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23 News Limited, *Submission 224*.

24 Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208* citing J Cohen, ‘Copyright as Property in the Post-Industrial Economy’ (2011) *Wisconsin Law Review* 141.

25 APRA/AMCOS, *Submission 247*. See also International Publishers Association, *Submission 256*; Telstra Corporation Limited, *Submission 222*; ABC, *Submission 210*; Australian Industry Group, *Submission 179*.

26 Copyright Agency/Viscopy, *Submission 249*. See also News Limited, *Submission 224*.

27 APRA/AMCOS, *Submission 247*. See also Walker Books Australia, *Submission 144*.

28 J Litman, *Digital Copyright* (2001), 81.

29 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

30 Pandora Media Inc, *Submission 329*.

2.27 In similar vein other submissions emphasised the importance of intermediaries in that promotion of the continued production of original copyright material was significantly due to ‘industry’s role in the development, discovery and dissemination of scholarly communication that fuels innovation, job creation, and economic growth’.<sup>31</sup>

2.28 The interests of creators and disseminators are not always the same. Professor Kathy Bowrey noted, ‘care needs to be taken not to conflate the position of original content creators with that of copyright owners’.<sup>32</sup>

2.29 It was argued that the intermediaries involved in the dissemination of cultural products (such as record labels and music publishers) engage in ‘commercial cultural production’, which is less desirable than ‘individual and independent cultural production’ and furthermore ‘potentially consumes a much larger proportion of the revenue from copyright protections than goes towards the originators of intellectual property’.<sup>33</sup>

2.30 The Australian Society of Authors describes publishers and intermediaries as ‘part of the cost of business’ for an author, being the ‘margin that goes to publishers where they act as a form of agent for the author in control, management and exploitation of their copyright’.<sup>34</sup>

2.31 However, in this Inquiry, the ALRC notes that the arguments against reform advanced by disseminators and intermediaries are also adopted by, or on behalf of, creators.<sup>35</sup> One such argument is that introducing fair use to Australian copyright law ‘will impact negatively on artists’ income’.<sup>36</sup>

2.32 Research shows that many creators ‘earn very low incomes with considerable numbers living below the poverty line’.<sup>37</sup> In fact, actual remuneration to creators is ‘negotiated outside the copyright statute’ and is ‘much more a contractual arrangement issue than a copyright issue’.<sup>38</sup> The alleged threat to creators, culture and creativity from copyright reform is not supported by evidence presented to the ALRC.

2.33 An alleged ‘pro-author’ approach that sees a narrow role for unremunerated exceptions may be said to benefit existing rights holders, but it may also hinder the activities of new creators, for example, by limiting the scope of permissible derivative works, or increasing licensing costs. Indeed, it has been argued that exceptions should

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31 International Association of Scientific Technical and Medical Publishers, *Submission 560* citing News Limited, *Submission 224*.

32 K Bowrey, *Submission 94*.

33 Arts Law Centre of Australia, *Submission 706*, Citing D Throsby and A Zednik, *Employment Output for the Cultural Industries* (2007), Macquarie Economics Research Papers No 5.

34 Australian Society of Authors, *Submission 712*.

35 See, for example, Copyright Agency, *Submission 727*; Australian Society of Authors, *Submission 712*; Arts Law Centre of Australia, *Submission 706*; Australian Copyright Council, *Submission 654*.

36 Arts Law Centre of Australia, *Submission 706*.

37 K Bowrey, *Submission 94* citing D Throsby and A Zednik, ‘Multiple Job-holding and Artistic Careers: Some Empirical Evidence’ (2010) 20(1) *Cultural Trends* 9.

38 Ericsson, *Submission 597*.

be seen as protective of authors and authorship, rather than antithetical to these concepts.<sup>39</sup>

2.34 No property rights are ever completely unconstrained and it was noted in the UK Hargreaves Review that property principles cannot alone form the basis for copyright law as protection of creator's rights may today be 'obstructing innovation and economic growth'.<sup>40</sup> The ACCC similarly points out that, paradoxically, too much copyright protection can reduce the number of works created; for example if materials are prevented from entering the public domain, where this would be appropriate.<sup>41</sup>

2.35 The ACCC pointed to the important role that copyright plays in 'establishing incentives for creation of copyright material' but also noted the costs associated with placing too much weight on incentives, resulting in an inefficient copyright system 'which could place Australia at an economic disadvantage in relation to the copyright industries as compared with countries that have a more efficient system'.<sup>42</sup>

2.36 The ACCC considers that competition in markets for copyright material will generally maintain incentives for the wide dissemination and efficient use of copyright material and that 'there may be significant costs for economic efficiency and consumer welfare if protections for IP rights are too extensive and not balanced by appropriate exceptions'.<sup>43</sup>

2.37 An aspect of recognising that copyright reform should do nothing to disturb innovation and creativity is understanding what does, or does not, impose 'substantial harm' to the incentives of copyright owners.<sup>44</sup> It is quite clear that a great many uses of copyright material would not harm the incentive to create: 'copyright treats and protects equally works of economic value as well as those of no economic value'.<sup>45</sup>

2.38 The ACCC considers that there are some uses of copyright material that do not necessarily result in extraction of additional value, and may even work against benefits flowing to the copyright owner or rights holder, while at the same time exposing users to possible infringement proceedings. The ACCC submitted that in such circumstances an unintended effect of disrupting efficiency in the digital economy could be occurring.<sup>46</sup> These circumstances include 'incidental' use of copyright material,<sup>47</sup>

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39 E Hudson, 'Implementing Fair Use in Copyright Law: Lessons From Australia' (2013) 25 *Intellectual Property Journal* 201; L Bently, 'R v The Author: From Death Penalty to Community Service' (2008) 32 *Columbia Journal of Law and the Arts* 1.

40 Cited in NSW Young Lawyers, *Submission 195*. B Scott submits that 'the only people I have ever encountered who have discussed copyright as property are those with a vested interest in that characterisation': B Scott, *Submission 166*.

41 ACCC, *Submission 165*.

42 Ibid.

43 ACCC, *Submission 658*.

44 N Suzor, *Submission 172*.

45 Australian War Memorial, *Submission 720*.

46 ACCC, *Submission 165*.

47 See Ch 11.

private use,<sup>48</sup> and some ‘unauthorised copying’ as much of this activity tends to boost the demand for copyright products.<sup>49</sup>

2.39 There is an increasing weight of research indicating that ‘new technologies and innovations have been a key industry growth engine for the creative sector, as they have resulted in increased market reach and consumption opportunities, and introduced new types of creative products that all contribute to increased consumer spending’.<sup>50</sup>

2.40 Reform should encourage innovation and creation to enhance the participation of Australian content creators in Australian and international markets. Incentives to creation and dissemination of copyright material will be enhanced by the introduction of flexible and adaptive copyright rules, as recommended by the ALRC.

### Principle 3: Promoting fair access to content

2.41 The Terms of Reference refer to the ‘general interest of Australians to access, use and interact with content in the advancement of education, research and culture’. The principles of access, use and interaction with content are to be considered on the basis that this is done in a manner which is fair to copyright creators and owners, and intermediaries controlling the rights.

2.42 There are important economic and social benefits in promoting access to information. Stakeholders articulated different aspects of the public interest including: advancing education and research;<sup>51</sup> developing and supporting culture; public participation in decision making;<sup>52</sup> and promoting a transparent and accountable democracy.<sup>53</sup>

According to review after report after second reading speech, Australian copyright law exists to serve the public interest in both the creation and the dissemination of new works of knowledge and culture.<sup>54</sup>

2.43 A fundamental value in Australia is freedom of expression<sup>55</sup> and this is inherent in any principle concerning dissemination of information.<sup>56</sup> Furthermore, it is essential to recognise that ‘the digital economy is not measured purely by financial indicators, but also that cultural benefits play a significant part in the digital economy’.<sup>57</sup> A wide

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48 See Ch 10.

49 UK Strategic Advisory Board for Intellectual Property, *The Economics of Copyright and Digitisation: A report on the literature and need for further research* (2010), 31 and PricewaterhouseCoopers, *Outlook: Australian Entertainment and Media 2012–2016* (2013), p 147.

50 Ericsson, *The Tide is Turning: Now is the Time to Reform Copyright for the Digital Era* (2013) 3.

51 ADA and ALCC, *Submission 213*; Universities Australia, *Submission 246*.

52 Art Gallery of New South Wales (AGNSW), *Submission 111*.

53 National Archives of Australia, *Submission 155*; State Records NSW, *Submission 160*.

54 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

55 As reflected in the *International Covenant on Civil and Political Rights*, 16 December 1966, ATS 23 (entered into force on 23 March 1976), article 19 (2).

56 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; News Limited, *Submission 224*; ABC, *Submission 210*; Civil Liberties Australia, *Submission 139*.

57 ABC, *Submission 210*; see also Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*; Arts Tasmania, *Submission 150*; National Gallery of Victoria, *Submission 142*; K Bowrey, *Submission 94*.



variety of content and platforms for delivering content ‘services our pluralistic society and allows for the ability for niche groups to express themselves through media and consumer media’.<sup>58</sup>

2.44 A number of stakeholders pointed out that availability of content is vitally important to creation<sup>59</sup> of new copyright material:

To fulfil its public policy role, copyright needs to be consistent with, and promote, relevant individual rights, in particular the right to freedom of expression, as well as the public interest in ensuring the importance of education and research, and in safeguarding the functioning of public institutions which promote preservation of and public access to knowledge and culture, such as libraries, museums, galleries and archives ... Creation depends on access to existing cultural material, education, and freedom to express ourselves creatively.<sup>60</sup>

2.45 Some stakeholders refer to a concept of ‘users rights’, the view being that these are in fact ‘a central aspect of copyright’.<sup>61</sup> In economic terms, ‘the exclusive rights that copyright law grants to encourage creativity can impose costs in terms of reduced access and cumulative creativity. The exceptions and limitations to copyright can be understood as attempts to contain these costs and maintain an overall balance in copyright policy’.<sup>62</sup>

2.46 In line with the principle of fair access to material, one submission urged as a leading principle that copyright law should ‘focus on the end-user and their ability to access copyright material and not be used to unreasonably restrict the ability of end-users to view or use material that they otherwise have a legitimate right to view or use’.<sup>63</sup>

2.47 However, allowing access on terms decided by the content owner is also considered fundamental by many stakeholders, even in circumstances ‘which may not be wide’ and to some may not appear ‘fair’ or ‘free’.<sup>64</sup>

2.48 In this Inquiry the ALRC has been made aware of the introduction of many innovative services and licensing solutions to making content available to consumers. The music industry in particular ‘has responded to the developing market and related services with innovative licensing models that have resulted in increased access to music for consumers’.<sup>65</sup> APRA/AMCOS pointed to the dozen or so digital music

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58 AIMIA Digital Policy Group, *Submission 261*.

59 See, eg, ADA and ALCC, *Submission 213*: ‘Our understanding of “creativity” does not merely encompass new copyright works, but new ways of accessing and engaging with content’. See also Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

60 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*. See also R Xavier, *Submission 531*; N Suzor, *Submission 172*.

61 Universities Australia, *Submission 246*, citing R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 279.

62 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 42.

63 Optus, *Submission 183*. See also Civil Liberties Australia, *Submission 139*.

64 News Limited, *Submission 224*.

65 Music Victoria, *Submission 771*.

services which have been launched in Australia almost contemporaneously with, or even ahead of overseas launch, since 2010.<sup>66</sup>

2.49 Innovation in the licensed delivery of content has also occurred in the games<sup>67</sup> and film<sup>68</sup> industries, and under statutory licensing for educational use.<sup>69</sup> The fear that market-based solutions to providing access will be undermined by fair use is discussed below in this Report.<sup>70</sup>

2.50 Inherent in the notion of ‘fair access’ is providing appropriate remuneration to copyright owners<sup>71</sup> and attribution and other ‘key social norms’ need to be observed.<sup>72</sup> The National Archives of Australia submitted that:

in addressing fairness, it is relevant to consider that much copyright material held in archives, and especially in government archives, could be disseminated widely to the great benefit of the community and with no real harm to the commercial interests of the copyright owners.<sup>73</sup>

2.51 A variety of views is evident in determining the basis of appropriate remuneration. Understandably, rights owners organisations, on behalf of their constituents, argued for remuneration attaching to whatever is determined to be within the copyright owner’s exclusive rights. This raises questions about who should bear the cost of equitable remuneration: ‘should the cost be borne by the user, or, in effect, the content creator’.<sup>74</sup>

2.52 A key issue in this Inquiry is whether unremunerated use exceptions should apply ‘if there is a licensing solution’ applicable to the user. On one view, ‘in principle, no exception should allow a use that a user can make under a licensing solution available to them’.<sup>75</sup> This approach assumes that the content creator is inevitably de-incentivised by not being paid, and that there is no middle ground between ‘someone paying for it’, either the creator or the user. This is a different question from ‘what should be paid for, and what should not,’ which is ‘at the heart of all this’.<sup>76</sup>

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66 APRA/AMCOS, *Submission 247*. See also Australian Independent Record Labels Association, *Submission 752*; ARIA, *Submission 241*. Note, however, that Pandora submitted that Australia is regularly behind the rest of the developed world in gaining access to music subscription services: Pandora Media Inc, *Submission 329*.

67 iGEA, *Submission 192*.

68 Australian Film/TV Bodies, *Submission 205*; Australian Film/TV Bodies, *Submission 739*.

69 See, eg, the Clickview Service licensed by Screenrights: Screenrights, *Submission 215*; Pearson Australia, *Submission 645*.

70 See Ch 4.

71 Music Council of Australia, *Submission 269*; Copyright Agency/Viscopy, *Submission 249*; News Limited, *Submission 224*; iGEA, *Submission 192*; ACIG, *Submission 190*.

72 News Limited, *Submission 224*. See also Australia Council for the Arts, *Submission 860*.

73 National Archives of Australia, *Submission 155*.

74 Copyright Agency/Viscopy, *Submission 249* (with respect to the statutory licensing scheme for various cultural institutions).

75 Ibid.

76 P Banki, ‘Copyright and the Digital Economy: So Many Issues; So Little Time’ (2012) 30 *Copyright Reporter* 66, 67.

2.53 In this Report the ALRC considers the interests of Australians in availability of content in the digital environment and makes recommendations designed to achieve fair access to copyright material, taking into account social and economic benefits for all stakeholders.

#### **Principle 4: Providing rules that are flexible, clear and adaptive**

2.54 The Terms of Reference refer to the emergence of ‘new digital technologies’ as relevant in copyright reform. Stakeholders strongly endorsed the principle that copyright law should be responsive to new technologies, platforms and services and be drafted to recognise that the operation of the law is fundamentally affected by technological developments, which allow copyright material to be used in new ways.<sup>77</sup>

2.55 Adaptability and technological neutrality as a framing principle is to be weighed up against other objectives. While not an end in itself, the ALRC considers technological neutrality should be a highly relevant consideration. Stakeholders note that it is ‘an important principle’ as long as benefits exceed costs and the aim of neutrality does not override the rights of creators and owners of copyright material.<sup>78</sup>

2.56 As far as possible, the *Copyright Act* should be technology-neutral and predictable in application in such a way as to minimise and avoid unnecessary obstacles to an efficient market, and avoid transaction costs. To this end, the ACCC stated that ‘reforms should be in pursuit of economic efficiency’.<sup>79</sup> However, the ACCC acknowledged that economic efficiency is only one facet of the broader policy and legal framework and other policy considerations that need to be taken into account.

2.57 Some stakeholders submitted that the existing legislation is increasingly imposing costs through being out of date and unsuited to the digital environment. For example, rapid change in technology and consumer behaviour is creating a ‘growing rift between platform-specific provisions of the *Copyright Act* and the ways in which Australians are increasingly using copyright materials’.<sup>80</sup> The Australian Interactive Media Industry Association submitted that, despite all the opportunity offered by the digital economy, ‘the *Copyright Act* is too technology specific and inflexible and as a result is unable to support today’s and tomorrow’s innovations’.<sup>81</sup>

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77 See, eg, Internet Industry Association, *Submission 744*; ADA and ALCC, *Submission 586*; ADA and ALCC, *Submission 213*; Law Institute of Victoria, *Submission 198*; Australian Industry Group, *Submission 179*; ACCC, *Submission 165*; Ericsson, *Submission 151*; Commercial Radio Australia, *Submission 132*; eBay, *Submission 93*. The Law Council submitted that ‘a guiding principle of exceptions reform should be that stated in the Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999: ensuring that the technical processes which form the basis of the operation of new technologies such as the Internet are not jeopardised’: Law Council of Australia, *Submission 263*.

78 Australian Copyright Council, *Submission 219*.

79 ACCC, *Submission 165*.

80 ABC, *Submission 210*.

81 AIMIA Digital Policy Group, *Submission 261*.

2.58 In a converged media environment, where a multitude of different technologies can be used to create and distribute content, it is imperative that regulation does not restrict or impede technological innovation and investment because of artificial and outdated technological limitations.<sup>82</sup> It is ‘absolutely critical to our success that the Act operates effectively in a converged environment’.<sup>83</sup>

2.59 The desirability of technological neutrality in copyright reform and, inherent in this concept, notions of simplicity and accessibility to the law has been recognised in previous reform discussions.<sup>84</sup> It is still a concern: ‘The complexity of existing copyright laws makes it really difficult to innovate with content’.<sup>85</sup>

2.60 Technological neutrality is regarded as an important policy basis underpinning reform to copyright law at the international level<sup>86</sup> and indeed, has motivated much review and some reform in Australia.<sup>87</sup> However, technology-neutral law is not necessarily simple to draft,<sup>88</sup> and drafting laws of enduring relevance in the face of changing technology may be a good concept but difficult to achieve in practice. Even attempting technology-neutral law may enshrine ‘issues that are peculiar to this point in time, thereby stifling incentives for copyright owners to develop new business models’.<sup>89</sup>

2.61 While copyright law needs to be able to respond to changes in technology, consumer demand and markets, it also needs to have a degree of predictability to ensure sufficient certainty as to the existence of rights and the permissible use of copyright materials, leading to minimal transaction costs for owners and users and avoiding uncertainty and litigation. Uncertainty is created by definitions that become redundant or differentiate between subject matter or rights holders based on technology rather than underlying principle. As noted by the Copyright Review Committee (Ireland) in its consultation paper:

If copyright law were unclear, or if there were widespread misunderstanding about its scope, then this would certainly create barriers to innovation. Moreover, as has often been observed, predictions are difficult, especially about the future. Hence, as many of the submissions emphasised, it is important that copyright law be as technology-neutral as possible. It is equally as important that it be capable either of adapting or of

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82 Google, *Submission 217*. ‘The *Copyright Act* should not seek to draw distinctions between uses of copyright material merely because it is accessed via one technology over another. The underlying technology should be agnostic in defining whether a right exists to use or not use material. In any event, in a converged environment the differences between technologies are becoming increasingly blurred and technological boundaries are harder to define’: Optus, *Submission 183*. See also eBay, *Submission 93*.

83 Foxtel, *Submission 245*.

84 Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.01].

85 ABC, *Submission 210*.

86 iiNet Limited, *Submission 186* citing F Gurry, *Keynote Speech at Blue Sky Conference: Future Directions in Copyright Law* (2011) <[www.wipo.int/about-wipo/en/dgo/speeches/dg\\_blueskyconf\\_11.html](http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html)> at 29 May 2012.

87 See, eg, the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) and Australian Copyright Council, *Submission 219*.

88 See Cyberspace Law and Policy Centre, *Submission 201*.

89 Australian Copyright Council, *Submission 219*.

being easily adapted to unforeseen technological innovations. These are standards by which to judge both existing copyright law and any possible amendments.<sup>90</sup>

2.62 Stakeholders also strongly argued that ‘reform should not distinguish between technologies but should instead focus on the intention or purpose for which activities are undertaken.’<sup>91</sup> Copyright should not be dictating the direction of technological innovation or hampering the development of more efficient systems.<sup>92</sup>

2.63 The recommendations for reform in this Report are intended to enhance the flexibility and coherence of Australian copyright law, within the context of considering how copyright rules impact on those affected and more broadly within the Australian community.

### **Principle 5: Providing rules consistent with international obligations**

2.64 Australia is bound by treaty obligations requiring the protection of copyright, notably under the *Berne Convention*.<sup>93</sup> There is also a direct link between intellectual property law and international trade obligations—the explicit basis for the TRIPs Agreement.<sup>94</sup> Alongside multilateral harmonisation of copyright law is an emerging environment of bilateral trade agreements<sup>95</sup> and negotiations. The Terms of Reference refer to ‘having regard to Australia’s international obligations, international developments and previous copyright reviews’.

2.65 As the Copyright Law Review Committee observed:

The permissible scope of any statutory exceptions to those rights must also be determined by reference to the exceptions allowed for in those international agreements.<sup>96</sup>

2.66 A number of these agreements contain provisions which ‘delineate the acceptable contours’<sup>97</sup> of any limitations or unremunerated exceptions.<sup>98</sup> The ALRC is mindful that its proposals for new copyright exceptions or amendments to existing exceptions must be consistent with the three-step test of the *Berne Convention*.<sup>99</sup>

90 Copyright Review Committee (Ireland), *Copyright and Innovation*, Consultation Paper (2012).

91 Telstra Corporation Limited, *Submission 222*.

92 ADA and ALCC, *Submission 213*; Grey Literature Strategies Research Project, *Submission 250*.

93 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

94 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, ATS 38 (entered into force on 1 January 1995).

95 For example *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005).

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

97 E Hudson, ‘Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia’, *Thesis*, University of Melbourne, 2011, 21.

98 See Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [B.5], [B.11], [B.20]–[B.22], [B.25], [B.28].

99 See Ch 4.

2.67 International consistency is a major factor in ‘allowing Australian businesses to participate in global activities and industries; and Australian consumers to benefit from use of those global activities and industries’.<sup>100</sup> Australia needs to ensure that our copyright laws harmonise with those of our trading partners to facilitate export and import of copyright material.<sup>101</sup> For example, difficulties in the lack of reciprocity with regard to rights for foreign film directors means that Australian film directors are unable to benefit from certain collecting schemes in other countries.<sup>102</sup>

2.68 One stakeholder submitted that: ‘key elements of Australia’s international reciprocal agreements are overlooked in the transactional models available ... many collection societies will boast about their ‘impressive’ income to administrative expense ratios, but there is near silence on the accuracy of repatriation’.<sup>103</sup>

2.69 One aspect of international consistency, which many stakeholders commented on, was that ‘all free exceptions must be viewed from within the prism of our international treaty obligations’,<sup>104</sup> in particular the ‘three-step test’ from the *Berne Convention*. The ALRC does not consider the three-step test to be itself a ‘framing principle’<sup>105</sup> but it is said to be ‘the central plank underlying exceptions to copyright in international law’.<sup>106</sup>

2.70 Some submissions raised the three-step test as an impediment to introducing reform into Australian copyright law. Others pointed out that focusing on the three-step test should not be at the expense of other important international instruments supporting human rights, the development of science and culture and freedom of expression.<sup>107</sup>

2.71 The ALRC considers that proposals made in this Report are consistent with Australia’s international obligations. However, this Inquiry may also provide an opportunity for suggesting policy parameters within which future international negotiations may take place.<sup>108</sup> This might include an interpretation of the three-step test in the *Berne Convention* which allows for greater flexibility in the ‘general interest of Australians to access, use and interact with content in the advancement of education,

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100 Optus, *Submission 183*.

101 See further National Impact Analysis, *Regulation Impact Statement Australia-United States Free Trade Agreement* (2004), 13.

102 Australian Directors Guild, *Submission 226*.

103 Nightlife, *Submission 657*.

104 Screenrights, *Submission 215*; ‘Australia’s international treaty obligations must be the starting point for any consideration of copyright law and policy’: APRA/AMCOS, *Submission 247*.

105 Music Rights Australia Pty Ltd, *Submission 191*; Australian Copyright Council, *Submission 219*.

106 Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*. See also Pearson Australia/Penguin, *Submission 220*; Australian Film/TV Bodies, *Submission 205*; Motion Picture Association of America Inc, *Submission 197*.

107 Civil Liberties Australia, *Submission 139*.

108 This point has been made with respect to a review of patent extensions for pharmaceuticals: Australian Government, *Pharmaceutical Patents Review: Draft Report* (2013). See also Civil Liberties Australia, *Submission 139*.

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research and culture’, as set out in the Terms of Reference for this Inquiry.<sup>109</sup> As the UK Government has noted in response to the Hargreaves Review:<sup>110</sup>

Having accepted the general case for broader copyright exceptions within the existing EU framework, the UK will be in a stronger position to argue that other flexibilities are needed now and in the future.<sup>111</sup>

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109 See further Ch 4.

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

111 UK Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011), 8.

