

3. Copyright Reform in Context

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Summary

3.1 This chapter discusses some of the broader context within which the ALRC is conducting this Inquiry and comments on the Terms of Reference, drawing out some concerns of stakeholders and identifying aspects of the needs and expectations of Australian business and consumers. This will set the scene for the case for fair use, discussed in Chapter 4.

The concept of the digital economy

3.2 The Terms of Reference for this Inquiry refer to the ‘importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies’.

3.3 The digital economy has been defined as ‘the global network of economic and social activities that are enabled by information and communications technologies, such as the internet, mobile and sensor networks’.¹ It is not separate from the general economy, and is intrinsic not only to commercial transactions but also to education, health services, social services, paid and unpaid work.²

1 Department of Broadband, Communications and the Digital Economy, *Australia’s Digital Economy: Future Directions* (2009).

2 National Library of Australia, *Submission 218*.

3.4 Australia has made a commitment to becoming a leading digital economy.³ Digital technology, including search functions, cloud-based solutions and other digital platforms, provides savings and efficiencies for individuals, businesses and governments, increasing wealth in real terms and driving further economic growth.⁴ Stakeholders generally agreed that ‘participation in the digital economy is likely to be a critical source of innovation for Australian firms and consumers’.⁵

3.5 A Department of Innovation, Industry, Science and Research Report has called for Australia to remove barriers to digital content and service uptake, or ‘risk falling behind the rest of the world’.⁶

3.6 It is not possible to anticipate what new technologies will emerge over coming years and decades. What is clear is that copyright will have a direct and indirect impact. Copyright law is an important part of Australia’s digital infrastructure, and has a profound influence in ‘regulating access to education, culture, social interaction, commercial innovation and the provision of essential government services’.⁷

3.7 Copyright law requires reform in order to facilitate the commercial and cultural opportunities of the digital economy. Universities Australia submitted:

It is therefore imperative that Australia puts in place an intellectual property framework that supports rather than hinders investment in the digital economy and that is sufficiently flexible to provide breathing space for the research and development that is essential to innovation without the need for constant readjustment.⁸

3.8 Economists have warned of the

moral hazard effect on incumbent firms; that copyright in itself can create an incentive for existing industries to rely on law enforcement to protect their business model, rather than to adopt new technologies.⁹

3.9 The recommendations in the Report are aimed at equipping Australian copyright law to serve more effectively the needs of Australia and Australians in the digital environment.

3 Department of Broadband, Communications and the Digital Economy, *Australia’s Digital Economy: Future Directions* (2009), 2. See also K Henry, ‘The Shape of Things to Come: Long Run Forces Affecting the Australian Economy in Coming Decades’ (Address to Queensland University of Technology Business Leaders’ Forum, Brisbane, 22 October 2009), cited in ADA and ALCC, *Submission 213*.

4 AIMIA Digital Policy Group, *Submission 261*. See also AIIA, *Submission 211*.

5 Australian Industry Group, *Submission 179*. Google submitted that ‘Copyright needs to be “future-proofed”, making it more flexible and technology neutral. This will generate an economic benefit of \$600m per annum in Australia’: Google, *Submission 217*.

6 Department of Innovation, Industry, Science and Research (DISSR) (2011), *Australian Innovation System Report 2011*, 3, referred to in Australian Industry Group, *Submission 179*.

7 ADA and ALCC, *Submission 213*. See also Foxtel, *Submission 245*, Ericsson, *Submission 151*.

8 Universities Australia, *Submission 246*. See also Google, *Submission 217*; Powerhouse Museum, *Submission 137*; Pandora Media Inc, *Submission 104*.

9 R Towse, ‘What We know, What We Don’t Know and What Policy Makers Would Like Us to Know About the Economics of Copyright’ 8(2) *Review of Economic Research of Copyright Issues* 101, cited in Ericsson, *Submission 151*. See also Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

Innovation and productivity

3.10 Copyright is an essential aspect of innovation in the digital environment. Productivity is lifted by innovation, which includes ‘creation of new copyright works and innovation in legal access, distribution, storage and consumption of those works’,¹⁰ as well as ‘new ways of producing or distributing goods and services’ or new ways of managing existing processes to do so.¹¹

3.11 Copyright law is fundamentally concerned with motivating the creation and distribution of new copyright material, by giving rights holders a limited monopoly over the use of their material. It is generally accepted that without this monopoly, there would be fewer new works, and less innovation.

3.12 However, innovation generally thrives where there is competition; therefore, by limiting the copyright monopoly, *exceptions* can also increase competition and stimulate innovation. Reforming copyright exceptions may therefore be seen as an attempt to find the optimum point at which creation and innovation is maximised. This is an elusive point, but it is important to recognise the conflict and the trade-offs.

3.13 Douglas Lichtman has written that the ‘central challenge facing copyright law over many years to come’ will be ‘the difficulty of balancing copyright’s role in encouraging authors with its possibly unintentional but also unavoidable role in influencing the development of related technologies.’ There is ‘no formula for any of this, and a purely economic approach fails for lack of data,’ he writes. However:

The key to getting the analysis right is to honestly account for the trade-offs between these two categories of innovation, recognizing three fundamental truths: society wants both, authors provide input that makes many of the relevant technologies more valuable, and technological advancement, in turn, typically makes copyrighted work more valuable too.¹²

3.14 The Business Council of Australia has stated:

We need to have the right innovation systems and environment in place to ensure that creative people and businesses in Australia are allowed to thrive and create value from new ways of doing things ... A successful innovation system is one that is robust, adaptable and capable of evolving over time.¹³

3.15 In the European context, Professor Ian Hargreaves has written that:

A mechanism put in place to promote creation by ensuring fair rewards to creators is becoming, in important respects, a hindrance to deeper development of Europe’s digital economy, a stain on the online experience of so many consumers and an impediment to promoting the innovation Europe so desperately needs.¹⁴

10 Telstra Corporation Limited, *Submission 602*.

11 S Eslake and M Walsh, *Australia’s Productivity Challenge* (2011).

12 D Lichtman, ‘Copyright as Innovation Policy: Google Books Search from a Law and Economics Perspective’ (2009) 9 *Innovation Policy and the Economy* 55, 73.

13 Business Council of Australia, *Action Plan for Enduring Prosperity* (2013), 132.

14 I Hargreaves and B Hugenholtz, ‘Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework’ (2013) 13 *Lisbon Council Policy Brief* 1, 1.

3.16 In further research conducted since the publication of the Hargreaves Review, Professor Ian Hargreaves noted that ‘research has shown that much of the innovation and productivity growth in advanced economies comes from the smaller, technology-rich firms which characterises the new, internet-based service economy’.¹⁵

3.17 Australian firms and entrepreneurs face barriers to innovation through the operation of market conditions which adversely affect the price of key digital infrastructure. The House of Representatives Inquiry into IT Pricing coined the phrase ‘Australia tax’ to illustrate the fact that Australians pay a great deal more than citizens in other developed countries for electronic material including books, games and computer software and this includes ‘apparently vastly higher costs to Australian consumers to access digitally downloaded music’.¹⁶

3.18 Copyright law is a key element in these market conditions:

Clearly the increased presence of a digital IT environment has created challenges for interpretation of the balance of rights of access by consumers, protections for the artists, and the ability to generate financial benefits. It has also meant that ideas of appropriate competition are contested.¹⁷

3.19 A number of stakeholders expressed concern about the effect of technological innovation on traditional business models, and implicit in their submissions is the implication that the ALRC recommendations need to protect existing business models.¹⁸ The tension is about managing risks associated with shifts in the value chain and necessary transformation of business models brought about by the introduction of new technology and innovation.¹⁹

3.20 However, innovation provides emerging and expanding opportunities for creators and owners of copyright material. In a generally vibrant and growing entertainment and media economic outlook, the print consumer and educational book market is expected to decline by 5.2% and 1.5% respectively over 2013–2017, with 19.1% and 19.2% growth in digital/electronic books in those sectors respectively over the same period.²⁰

3.21 All copyright reviews, it seems, face the same arguments from stakeholders on all sides, and the argument that ‘only copyright protection—and not exceptions—can drive innovation’²¹ was strongly claimed by stakeholders in this Inquiry and in the 2013 Irish review of copyright law. The Copyright Review Committee (Ireland) noted that ‘[t]o assert that only one group of copyright stakeholders can drive innovation, to

15 Ibid, 3.

16 House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (2013), 3.63.

17 Ibid, 4.10. See further the submission of the Treasury to the IT Pricing Inquiry, 4.7.

18 See for example News Corp Australia, *Submission 746*; Australian Society of Authors, *Submission 712*; Combined Newspapers and Magazines Copyright Committee, *Submission 619*; MEAA, *Submission 652*; AIPP, *Submission 564*.

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

20 PricewaterhouseCoopers, *Outlook: Australian Entertainment and Media 2012–2016* (2013), 43–44.

21 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 73.

the exclusion of innovation from any other quarter, simply claims too much,’ and concluded ‘exceptions facilitate a great scope for beneficial user innovation’.²²

3.22 The recommendations in this Report are intended to facilitate a copyright framework in which innovation and productivity are enhanced as Australians participate in the digital economy and diversify areas of economic development for the future.

Consumer use of copyright material

3.23 The Terms of Reference for this Inquiry direct the ALRC to consider whether the *Copyright Act* needs reform to allow:

- transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and
- appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes.

3.24 Many stakeholders agree that law reform should be driven by a desire to ‘provide certainty, promote accessibility and maintain the relevance of the law’.²³ Choice warns that the content industries are ‘by and large playing catch-up’ with changes in technologies and consumer behaviour.²⁴

3.25 Clarifying which activities infringe copyright now, and whether certain activity should continue to be categorised as infringement, is part of this Inquiry. This context is an integral part of reform discussions taking place around the world. In the EU, for example:

Citizens increasingly voice concerns that copyright laws hinder what they view as their freedom to access and use content. Experience shows that many of them would rather pay for legal offers than use illegal content, but they often do not know whether what they download, stream or share is illegal. Businesses increasingly argue that the current copyright model is a barrier to developing the business models they consider necessary for the digital economy. These consumers and businesses agree, for different reasons, that copyright rules have to be made more flexible.²⁵

3.26 In Australia, the House of Representatives Inquiry into IT Pricing noted that consumer perceptions of copyright law as unfair ‘can generate infringement and undermine the copyright system as a whole’.²⁶

22 Ibid.

23 Arts Law Centre of Australia, *Submission 171*. ‘Copyright law needs to be in step with common, established community practice. This is important to promote public perception of copyright law as a constructive, flexible and sensible framework for governing protection and access to content’: Law Institute of Victoria, *Submission 198*.

24 Choice, *Submission 745*.

25 European Commission, *Orientation Debate on Content in the Digital Economy* (2012), 1.

26 House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (2013), 4.44.

3.27 In his book, *Making Laws for Cyberspace*, Chris Reed points out:

Attempting to impose rules which clash with strongly established norms, or making law in such detail that the cyberspace user is not able to understand or comply with it, are not the only ways in which laws can be rendered meaningless. Law needs to regulate the reality which is faced by those who are subject to the law.²⁷

3.28 The ACCC referred to ‘consumer empowerment over consumption’ where consumers wish to organise use of copyright material around their own preferences in terms of time, location and method of consumption.²⁸ This could lead to a situation where

worthy individuals and citizens, many of them children (some maybe even judges), are knowingly, ignorantly or indifferently finding themselves in breach of international and national copyright law. And they intend to keep on doing exactly as before.²⁹

3.29 ACCAN observed that:

Currently multiple everyday activities without any commercial implications are likely to breach copyright. Indeed, many consumers would be surprised to learn they were breaking the law by privately copying and recording in a way that has been commonplace for decades and in using devices that have been marketed to them vigorously.³⁰

3.30 Some stakeholders expressed concern about the extent to which consumer attitudes and practices may influence law reform.³¹ In this context some stakeholders stated that it is preferable for law to shape consumer behaviour, rather than for consumer behaviour to shape the law.³² This would include educating consumers about copyright and ‘why the legislation is in place’.³³

3.31 Laws that are almost universally ignored are not likely to engender respect for the more serious concerns of copyright owners: ‘[p]eople don’t obey laws they don’t believe in’.³⁴ The Australian Research Council Centre of Excellence for Creative Industries and Innovation submitted that research indicates:

The wide gap between law and norms in terms of private use is not desirable for copyright law. It is possible that widespread, pervasive disregard for copyright rules in terms of private use may support a broader legitimacy problem in copyright. It

27 C Reed, *Making Laws for Cyberspace* (2012), 151.

28 ACCC, *Submission 165*.

29 M Kirby foreword to B Fitzgerald and B Atkinson (eds), *Copyright Future, Copyright Freedom* (2011), 4. See also NSW Young Lawyers, *Submission 195*; I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) on this point.

30 ACCAN, *Submission 194*.

31 Foxtel, *Submission 245*. See also Music Council of Australia, *Submission 647*; Music Council of Australia, *Submission 269*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; ALPSP, *Submission 199*. Some stakeholders noted that consumers do not generally consider ‘infringement of copyright is justified’: AFL, *Submission 232*; Cricket Australia, *Submission 228*.

32 APRA/AMCOS, *Submission 247*.

33 ALPSP, *Submission 199*.

34 J Litman, *Digital Copyright* (2001), 112. See also EFA, *Submission 258*; R Xavier, *Submission 146*.

seems clear that the gap between social norms and the law should be reduced where possible.³⁵

3.32 The Australian Communications and Media Authority (ACMA) has conducted research which shows that Australians are

pragmatic about the limited capacity to regulate content distributed over the internet and, with the exception of illegal content, expected that much of the content available online would not be regulated. These expectations may be helpful in framing individual rights and responsibilities for copyright material.³⁶

3.33 Not all infringing behaviour is regarded as ‘piracy’ or ‘theft’.³⁷ The Chief Justice of Australia, the Hon Justice Robert French, has stated that ‘messages equating copyright infringement with theft do not always compute’ due to ‘the difficulty in trying to attach a moral purpose’ to laws that do not make sense to people.³⁸

3.34 There is clearly an understanding among stakeholders that some infringing use of copyright material is ‘fair enough’³⁹ and other use is more egregious. There is also a distinction between consumers who may (or may not) erroneously believe that certain practices constitute copyright infringement, and those who would blatantly infringe, steal or engage in piracy.⁴⁰

3.35 One way of taking consumer preferences into account is through market responses in providing copyright content as consumers wish to consume it. The ALRC is aware that new services and business models are increasingly meeting consumer demand for some types of personal use, for example format shifting and time shifting.⁴¹ Indeed, the digital environment creates new market opportunities and ‘more sophisticated, flexible and efficient means for companies to measure and charge for usage’.⁴²

3.36 As discussed in Chapter 2, a framing principle for this Inquiry is recognition of the role of copyright as an incentive to creation. The ALRC does not intend in any way to undermine property rights or a fair reward to copyright creators, owners and distributors. However, questions of recognising ways in which individuals use and

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

36 Australian Communications and Media Authority, *Digital Australians—Expectations about Media Content in a Converging Media Environment* (2011).

37 See a distinction made between individual infringing behaviour and piracy in C Geiger, ‘Counterfeiting and the Music Industry: towards a criminalisation of end users? The French ‘HADOPI’ example’ in C Geiger (ed) *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (2012) 386; P Yu, ‘Digital Copyright and Confuzzling Rhetoric’ (2011) 13 *Vanderbilt Journal of Entertainment and Technology Law* 881, 887.

38 Hon Justice R French, *Justice in the Eye of the Beholder* (2013).

39 For example, consumers who believe they have the ‘right’ to copy material legally acquired: ADA and ALCC, *Submission 213*. See also Choice, *Submission 745* for examples of what is considered acceptable use of copyright material by consumers.

40 AFL, *Submission 232*; Cricket Australia, *Submission 228*; Australian Industry Group, *Submission 179*; ALAA, *Submission 129*.

41 Australian Industry Group, *Submission 179*. See also Cricket Australia, *Submission 228*.

42 Australian Industry Group, *Submission 179*. See also AIMIA Digital Policy Group, *Submission 261*.

communicate ideas and experiences, without damaging the economic interests of the copyright owner, are relevant and have been taken into account in reform recommendations.

Complexity of copyright law

3.37 Aligned with principle 4 discussed in Chapter 2, the ALRC considers that one aspect of this Inquiry should be to reduce, where possible, the complexity of the current *Copyright Act* and, with that, transaction costs for users and rights holders.

3.38 Reform should not add further complications to an already complex statute.⁴³ Ideally, reform should promote clarity and certainty for creators, rights holders and users.

3.39 The many amendments to the current legislation have resulted in complex numbering and ‘a feeling that the Act is unable to be understood by copyright creators and users’.⁴⁴ Aspects of the Act are ‘pointlessly narrow’ and there are ‘obvious deficiencies in drafting’.⁴⁵

3.40 Chief Justice French regards the complexity of copyright law as obscuring concepts of ‘what is just and fair’ and this makes enforcement difficult:

the complexity of law today can deprive it of moral clarity and thus detach it from concepts of what is just and fair. To that extent, the perceived legitimacy of the law may depend more upon the fact that it has been enacted through democratic process than because people think it is a good law. That may be sufficient for most. However it makes the job of securing compliance more difficult.⁴⁶

3.41 Reducing complexity can have a number of dimensions. Certainly, stakeholders are largely in favour of the concept of not making the statute more complex than it already is. Many went further and suggested overall simplification of what is already there. The fear is always that attempting either aspect—let alone both—will result in even greater incoherence.⁴⁷

3.42 For law to be meaningful, ‘first, the law must be understandable, and if understood it must appear to the user to be reasonably possible to comply with its requirements’.⁴⁸ Setting out compliance requirements in exhaustive detail may seem to avoid uncertainty, but is not easy to understand, and may not further the law’s aims. The Internet Industry Association noted that the *Copyright Act*

43 NSW Government, *Submission 294*; Australian Copyright Council, *Submission 219*; National Library of Australia, *Submission 218*. ACMA, *Submission 613* submitted that certain proposed changes to broadcast copyright might have had the effect of adding complexity to the regulatory environment. The ALRC has taken this into account in this Report, see Chs 15 and 16.

44 A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), 146.

45 P Knight, *Submission 182*.

46 Hon Justice R French, *Justice in the Eye of the Beholder* (2013).

47 S Ricketson, ‘Simplifying Copyright Law: Proposals from Down Under’ (1999) 21(11) *European Intellectual Property Review* 537.

48 C Reed, *Making Laws for Cyberspace* (2012), 23. See also Copyright Agency, *Submission 727*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; EFA, *Submission 714*.

contains many provisions designed for specific cases and circumstances that appear to apply similar fundamental principles. This makes the Act difficult to penetrate, even for specialists.⁴⁹

3.43 ACANN pointed to complexity that results from having ‘exceptions confined to particular devices’.⁵⁰ Similarly, News Corp and Foxtel would welcome having four separate format shifting exceptions replaced by one.⁵¹

3.44 The National Archives of Australia considered that the complexity of copyright law was an impediment to providing ‘fair access to archival material’,⁵² and State Records of South Australia asked for ‘simplification and consolidation of exceptions’ as the ‘complexity and piecemeal nature of the Act makes the provision of access to information difficult for both the public and archival institutions’.⁵³ While ‘a degree of complexity may be unavoidable’,⁵⁴ a number of stakeholders submitted that there is considerable scope for changing copyright law to make it more accessible:

Copyright law needs to be in step with common, established community practice. This is important to promote public perception of copyright law as a constructive, flexible and sensible framework for governing protection and access to content.⁵⁵

3.45 APRA/AMCOS pointed to the undesirability of having ‘comprehensibility of a statute’ as an underlying principle for law reform, recognising, however, that unnecessary complexity results from the current confusion and redundancy in the legislation.⁵⁶

3.46 Some stakeholders considered that reform for the purposes of simplification and clarity may be a ‘Trojan horse’ for substantive change in the law—there is opposition to using a ‘reducing complexity argument to support the introduction of a broad “fair use” exception’.⁵⁷

3.47 Others argued that any reform necessarily causes increased complexity, as adaptation is needed to the alterations.⁵⁸ While accepting that lawyers will always be needed to interpret complex legislation,⁵⁹ the ALRC considers that willingness to develop an understanding of desirable reform by stakeholders should be assumed.

49 Internet Industry Association, *Submission 253*.

50 ACCAN, *Submission 673*.

51 Foxtel, *Submission 245*; News Limited, *Submission 224*.

52 National Archives of Australia, *Submission 155*.

53 State Records South Australia, *Submission 255*.

54 Law Council of Australia, *Submission 263*.

55 Law Institute of Victoria, *Submission 198*; Arts Law Centre of Australia, *Submission 171*—‘Law reform should be driven by a desire to simplify the law, provide certainty, promote accessibility and maintain the relevance of the law’. See also Cricket Australia, *Submission 700*; IP Australia, *Submission 681*.

56 APRA/AMCOS, *Submission 247*.

57 News Limited, *Submission 224*. See also AAP, *Submission 206*.

58 News Corp Australia, *Submission 746*; ARIA, *Submission 731*; Arts Law Centre of Australia, *Submission 706*; Screenrights, *Submission 646*; MEAA, *Submission 652*; Pearson Australia, *Submission 645*; COMPPS, *Submission 634*.

59 Thomson Reuters, *Submission 592*; Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*.

3.48 Many stakeholders endorse the view that a working understanding of copyright law should be more accessible so as to reduce transaction costs and facilitate more efficient transactions for business,⁶⁰ the public⁶¹ and other users.⁶²

3.49 This Inquiry is not aimed at overall simplification of the *Copyright Act*, despite the concern of many stakeholders over the complexity and difficulty of the legislation. However, the ALRC considers that the reforms recommended do not add to that complexity, but rather provide a clearer and more adaptive framework.

3.50 Recommendations in this Report are designed to reduce legislative complexity and create a better environment for business, consumers, education and government. For example, the recommendations relating to statutory licensing are aimed at removal of much of the overly-prescriptive rules relating to the operation of the licenses, which are increasingly irrelevant in a digital environment. The ALRC considers that the introduction of fair use will create a more flexible, adaptive and relevant copyright environment.

Cultural policy and copyright reform

3.51 Many stakeholders in this Inquiry are at the forefront of cultural life in Australia, and it is clear that copyright law directly affects a broad range of cultural activity. The ALRC considers that the reform recommendations in this Report will enhance local cultural production, access to culture, and opportunities for Australian creators.

3.52 The Terms of Reference specifically refer to ‘the general interest of Australians to access, use and interact with content in the advancement of ... culture’. The ALRC has been urged ‘not to think about copyright law solely or primarily in terms of trade and economic policy but to recall its central role in cultural policy’.⁶³

3.53 Following extensive feedback from organisations, community groups and individuals, a National Cultural Policy was launched on 13 March 2013.⁶⁴ It explicitly recognises the importance of copyright law—and the ALRC Inquiry—in reform aimed at providing

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.⁶⁵

3.54 The objective of the National Cultural Policy is to increase the social and economic dividend from the arts, culture and the creative industries. In this context, a

60 iiNet Limited, *Submission 186*; ACCC, *Submission 165*.

61 See Internet Industry Association, *Submission 253*; Evolution Media Group, *Submission 141*.

62 Including cultural and community groups: State Library of New South Wales, *Submission 168*; State Records NSW, *Submission 160*; Blind Citizens Australia, *Submission 157*; National Archives of Australia, *Submission 155*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*.

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

64 Australian Government, *Creative Australia: National Cultural Policy* (2013).

65 Australian Government, *National Cultural Policy Discussion Paper* (2011), 83.

number of stakeholders point to desirable reform of copyright law to allow greater digitisation and communication of works by public and cultural institutions.⁶⁶

3.55 Some stakeholders considered the National Cultural Policy to be mainly about the economic interests of copyright owners,⁶⁷ and suggested that reform recommendations intended to enhance cultural activities are not in the interests of copyright owners.⁶⁸

3.56 The National Film and Sound Archive stated that a number of the reforms recommended by the ALRC will provide greater legislative support for cultural institutions to undertake their statutory functions and allow Australia, as a net importer of copyright,⁶⁹ not to be overwhelmed by more dominant cultures.⁷⁰

3.57 In this Inquiry, the ALRC has reviewed the various ways in which the *Copyright Act* provides for galleries, libraries, archives and museums—collectively, the ‘GLAM sector’. In considering reform that is beneficial for Australians in terms of accessing and interacting with culture: ‘we need to keep in mind the particular kind of cultural products we want to have access to and craft rights to support culturally meaningful forms of engagement with copyright works’.⁷¹

3.58 Greater access to cultural material in a way that does not impede incentives to innovate and the capacity for a creator to be fairly rewarded is a common theme in submissions. For example, digitisation of material for library and archival purposes, for ‘non-commercial access’ during the copyright term is regarded as being of a different order to digitising collections for access on the internet.⁷²

3.59 The Australian Children’s Television Foundation expressed concern about possible loss of statutory licensing income, which is used to subsidise creation of new material. Recouping costs from the Australian audience is more difficult compared with the economies of scale for producers of screen content with larger domestic markets from which to recoup costs, predominantly the US but also the UK.⁷³

66 Australian War Memorial, *Submission 720*; National Archives of Australia, *Submission 595*; ADA and ALCC, *Submission 213*; Australian War Memorial, *Submission 188*.

67 News Corp Australia, *Submission 746* ‘The policy contains 17 references to references to copyright—the vast majority of which associated with economic value, contribution to GDP, and providing incentives for investment and innovation in content’; SPAA, *Submission 768*; Screenrights, *Submission 646*.

68 SPAA, *Submission 768*; News Corp Australia, *Submission 746*; Arts Law Centre of Australia, *Submission 706*; Kultour, *Submission 688*; Screenrights, *Submission 646*; Australian Copyright Council, *Submission 654*.

69 PricewaterhouseCoopers, *The Economic Contribution of Australia’s Copyright Industries 1996–97–2010–11* (2012), prepared for Australian Copyright Council, 31.

70 NFSA, *Submission 750*; Department of Broadband, Communications and the Digital Economy, *Advancing Australia as a Digital Economy: Update to the National Digital Economy Strategy* (2013).

71 K Bowrey, *Submission 94*.

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

73 Australian Children’s Television Foundation, *Submission 724*. The ACTF pointed, however, to the targeted support received from government and the ALRC notes that in terms of economic efficiency, direct subsidy is the most appropriate form of funding for valuable endeavours, such as ensuring quality Australian content.

3.60 The Screen Producers Association of Australia emphasised the audiovisual trade deficit of \$1.1Billion ‘of which two-thirds comes from the import of US film and television content’.⁷⁴

3.61 One aspect of access to cultural heritage, which has attracted a great deal of comment from Australian cultural institutions, is the extension of the term of copyright protection.⁷⁵ Although extension of the term from 50 to 70 years has not in itself created the issues cultural institutions face in preserving and using material donated and otherwise acquired, it exacerbates them.⁷⁶ One issue here is that the copyright term commences from first publication of a work or other subject matter. For older material this means an even more extended time before it enters the public domain.⁷⁷

3.62 Difficulties in clearing rights in digital material leads to skewed representation of cultural aspects and history, and creates what has been termed ‘blockbuster skew’ or ‘digital skew’.⁷⁸

The sense of history which comes with access to the whole, or a substantial part, of an archive, is of much greater cultural value than a small selection curated through the random prism of copyright clearance. ... There is a danger that in the digital age the publicly available cultural history of broadcasting will skew: we will remain familiar with ubiquitous blockbuster programs which are available everywhere more than we will remember local Australian programs left in the archives.⁷⁹

3.63 The ‘cultural value’ of works with no economic value is often high but ‘copyright protects equally works of economic value as well as those of no economic value’⁸⁰ and there can be onerous costs of compliance with copyright law, but with no resulting benefit to any creator or owner. Perhaps this could amount to circumstances where

the policy rationale for any new exception should be based on the *purpose* for which content can be used without permission. This purpose should, as a matter of public interest, be more important than a content creator’s right to manage the use of their work.⁸¹

74 SPAA, *Submission 768*. See also Australian Children’s Television Foundation, *Submission 724*; Australian Society of Authors, *Submission 712*; Price Waterhouse Coopers, *Making the Intangible Tangible: The Economic Contribution of Australia’s Copyright Industries* (2008), prepared for Australian Copyright Council.

75 See discussion in M Rimmer, *Digital Copyright and the Consumer Revolution* (2007) particularly Chapter 1 ‘The Dead Poets Society: The Copyright Term and the Public Domain’, 24; see also Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 80–84.

76 M Rimmer, *Submission 127*.

77 National Library of Australia, *Submission 218*.

78 J Given, *Submission 185*; J Given, *Submission 185* citing E Hudson and A Kenyon, ‘Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions’ (2007) 4(2) *SCRIPT-ed* 197 and S McCausland, ‘Getting Public Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use’ (2009) 14 *Media Arts Law Review* 21.

79 S McCausland, ‘Getting Public Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use’ (2009) 14 *Media Arts Law Review* 21, 24. See also Australian War Memorial, *Submission 188*.

80 Australian War Memorial, *Submission 188*.

81 Copyright Agency/Viscopy, *Submission 249*.

3.64 Even those advocating an approach to copyright law reform based on economic evidence note that copyright exceptions and limitations applicable to the role of libraries and archives as ‘cultural custodians’ have important effects on ‘individual welfare, autonomy and freedom of expression which are harder to quantify but nonetheless critical’.⁸²

3.65 It is clear that particular protocols and considerations may apply to Indigenous cultural material, whether within copyright protection or not.⁸³ Considerable work has been done on developing and implementing protocols for digitisation and use of Indigenous material.⁸⁴ The moral rights regime introduced into the *Copyright Act* in 2002 has deficiencies but also possibilities in recognising the importance of cultural and religious sensitivities.

3.66 Moral rights can assist in ‘distinguishing between the two situations of the Aboriginal artist and the non-Aboriginal artist’, including around the very act of unauthorised reproduction itself.⁸⁵ One existing exception in the *Copyright Act*, relating to parody and satire, may in particular set up a tension between moral rights and ‘the public interest in expressive freedom’ which is ‘a matter which would have to be worked out on a case by case basis in the courts’.⁸⁶

3.67 Concerns relating to Indigenous material do not centre only on outsiders using cultural material. Sometimes the issues are the reverse, where copyright can prevent access by Indigenous people to their own heritage.⁸⁷

3.68 The ALRC considers that the reforms recommended in this Report will enhance the capacity of cultural institutions to fulfil their mandates, will allow creators to access copyright material in an understandable and fair manner, without damaging the interests of copyright owners, and will enhance the capacity of copyright law to fulfil national cultural aims.

Statutory licensing in the digital economy

3.69 Questions about the benefits of statutory licensing are explicitly raised by the Terms of Reference. Australia’s statutory licensing schemes for education, government and persons with disabilities were established to facilitate access to copyright material in circumstances where market failure would otherwise occur.

82 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 8.

83 ADA and ALCC, *Submission 213*; Arts Law Centre of Australia, *Submission 171*; State Library of New South Wales, *Submission 168*.

84 Arts Tasmania, *Submission 150*; M Nakata and others, ‘Indigenous Digital Collections: An Early Look at the Organisation and Culture Interface’ (2008) 39(4) *Australian Academic and Research Libraries Journal* 137. See also M Nakata and others, ‘Libraries, Indigenous Australians and a Developing Protocols Strategy for the Library and Information Sector’ in M Nakata and M Langton (ed) *Australian Indigenous Knowledge and Libraries* (2005).

85 P Loughlan, ‘The Ravages of Public Use: Aboriginal art and moral rights’ (2002) 17 *Media and Arts Law Review* 24.

86 *Ibid.*, 25, discussing parody of work albeit before the exception for parody and satire was introduced in 2006.

87 Arts Tasmania, *Submission 150*.

3.70 The benefits and detriments of the current system are heavily contested as between licensees and licensors. The TAFE sector submitted that statutory licensing for TAFE is not economically efficient or streamlined, and does not provide easy access to copyright material.⁸⁸ Other educational licensees have been more blunt, suggesting that ‘Australia’s statutory licences are unsuitable for a digital age and must be repealed’.⁸⁹

3.71 The ACCC considered that relevant factors in reviewing statutory licences include the transaction costs associated with the licences—said to be considerable by education and government stakeholders—and the potential for the extent and use of the rights conferred by copyright to restrict competition and create market power.⁹⁰

3.72 Some stakeholders submitted that there are ways in which the statutory licensing system could work better, both in terms of the legislative framework and the way the rights are managed in practice.⁹¹

3.73 The Australian Society of Authors, while stating that pt VB of the *Copyright Act* ‘works well for educational institutions and creators’⁹² also noted that ‘there could be more transparency in the process—particularly how much money is paid to which publishers and authors’.⁹³ The Society also submitted that:

The central reasons for some statutory licence schemes should be revisited and reassessed ... these schemes are paying massive amounts of money to foreign publishers of educational materials, with only a small amount trickling to Australian creators. This goes against the original intent.⁹⁴

3.74 The Australian Writers’ Guild pointed to the inflexibility of audiovisual statutory licensing and some ‘conflation’ of rights streams and lack of transparency in use of data.⁹⁵ Even many of those advocating retention of statutory licensing in its current form often commented on the small returns⁹⁶ and lack of transparency in current collective licensing arrangements.

3.75 The digital environment provides an opportunity for greater licensing as markets develop to satisfy consumer needs. Furthermore, markets can be seen as being about ‘fairness and opportunity’ as negotiated between parties, along with a ‘reasonable level of regulation’.⁹⁷

88 Copyright Advisory Group—TAFE, *Submission 230*. See also Universities Australia, *Submission 246*, but see Screenrights, *Submission 215*; Copyright Agency/Viscopy, *Submission 249*.

89 Copyright Advisory Group—Schools, *Submission 231*. See also Universities Australia, *Submission 246*.

90 ACCC, *Submission 165*.

91 Copyright Agency/Viscopy, *Submission 287*.

92 Australian Society of Authors, *Submission 169*.

93 Ibid; see also ALAA, *Submission 129*.

94 Australian Society of Authors, *Submission 169*.

95 Australian Writers’ Guild & Australian Writers’ Guild Authorship Collecting Society, *Submission 265*.

96 M Woods, *Submission 829*; The Copyright Licensing Agency, *Submission 766*; Australian Major Performing Arts Group, *Submission 648*; Allen & Unwin, *Submission 582*; Australian Major Performing Arts Group, *Submission 212*; citing PwC research ‘An Economic Analysis of Copyright, Secondary Copyright and Collective Licensing’ (2011).

97 R Murdoch, ‘Markets Radiate Morality’, *The Weekend Australian*, April 6-7 2013, 19.

3.76 Statements that introducing fair use would lead to ‘no licensing’⁹⁸ of educational material are grossly over-stated; on the contrary, the education sector is adamant that ‘fair use is not free use’.⁹⁹ Universities Australia has provided evidence of the important continuing role for collective licensing.¹⁰⁰

3.77 The ALRC was provided with evidence of the large amounts of money spent on educational and library resources by the university sector alone, expenditure which would be unaffected by changes to statutory licensing.¹⁰¹

3.78 Universities Australia submitted that ‘a competitive commercial licensing model’¹⁰² makes it appropriate that copyright legislation should operate to create markets based on the rights given under copyright legislation and determined by agreement between parties, rather than a statutory licence.

3.79 Recommendations in this Report support a continuing role for statutory licences, provided they incorporate more flexibility and be made less prescriptive.

Competition issues and copyright reform

3.80 Copyright law and competition law are largely complementary in that both seek to promote innovation, higher living standards, and expand the choices and benefits to society.¹⁰³

3.81 The ACCC considered that competition in copyright markets will generally maintain incentives for the creation of copyright material and promote fair licensing schemes for the wide dissemination and efficient use of copyright material.¹⁰⁴

3.82 The ACCC considers the uncertainty created by s 51(3) of the *Competition and Consumer Act 2010* (Cth) which undermines the capacity of competition law to regulate anti-competitive conduct, including unilateral exercise of market power, to be detrimental to the proper operation of copyright licensing.

3.83 Section 51(3) of the *Competition and Consumer Act 2010* provides an exception to some of the restrictive trade practices provisions of that Act in relation to intellectual property licensing. The ACCC submitted that s 51(3) of the *Consumer and*

98 Australian Society of Authors, *Submission 712*; Copyright Agency, *Submission 727*.

99 Copyright Advisory Group—Schools, *Submission 861*.

100 Universities Australia, *Submission 754*.

101 In 2011, university libraries spent \$256.7 million on library resources, mainly through direct subscription to electronic resources. This money flows directly to rights holders and will continue to do so: *Ibid*. The Australian school education sector currently spends upwards of \$665 million dollars per annum on purchasing educational resources for Australian schools, this is in addition to over \$80 million on copyright licensing fees paid to collecting societies: Copyright Advisory Group—Schools, *Submission 707*.

102 Universities Australia, *Submission 293*.

103 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 6. See also H Bakhshi, I Hargreaves and J Mateos-Garcia, *A Manifesto for the Creative Economy* (2013), 91.

104 ACCC, *Submission 658*.

*Competition Act*¹⁰⁵ should be repealed, noting that in other jurisdictions, such as the United States, intellectual property rights are subject to the same competition laws as all other property rights, without apparent impact on the rights of creators or incentives for production of copyright material:

In order to fully exploit the substantial potential benefits arising in the digital economy, it is important that competition laws are able to complement IP laws, including copyright laws, by preventing anti-competitive conduct associated with copyright usage that is not in the public interest.¹⁰⁶

3.84 The ACCC has a long-standing position in favour of repealing s 51(3), on the basis that this would simply prevent copyright owners from imposing conditions in relation to the licence or assignment of their intellectual property rights for an anti-competitive purpose or where the provisions had an anti-competitive effect. All other uses would be unaffected.¹⁰⁷

3.85 The Ergas Committee regarded s 51(3) as seriously flawed and unclear and noted that the National Competition Council had previously recommended repeal of s 51(3). The repeal and replacement of s 51(3) of the *Trade Practices Act* (now *Consumer and Competition Act*) was recommended.¹⁰⁸

3.86 In 2013 repeal of s 51(3) was again recommended, by the House of Representatives Standing Committee on Infrastructure and Communications in its July 2013 report, *At What Cost? IT Pricing and the Australia Tax*.¹⁰⁹ The Committee recommended the repeal of s 51(3) on the basis that it constrains the ACCC unjustifiably from investigating restrictive trade practices in relation to intellectual property rights.¹¹⁰

3.87 The ACCC considers that intellectual property should be regarded in the same light as other property and that the authorisation process in the *Consumer and Competition Act* is appropriate in assessing whether licensing activity confers benefits that outweigh anti-competitive effects:

It is now accepted that, generally, IP laws do not create legal or economic monopolies. IP laws create property rights and the goods and services produced using IP rights compete in the marketplace with other goods and services.¹¹¹

105 *Competition and Consumer Act 2010* (Cth) s 51(3) provides a limited exception for certain licence conditions from some competition provisions of the Act.

106 ACCC, *Submission 165*. See also ACCC, *Submission 658*. This recommendation was made previously by the Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000) and is discussed further in Ch 17.

107 See also Copyright Advisory Group—Schools, *Submission 707*.

108 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 203.

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

110 *Ibid*, Recommendation 8.

111 ACCC, *Submission 165*; See also ACCC, *Submission 658*.

3.88 The ALRC is aware of a number of ‘user friendly’¹¹² licensing arrangements that demonstrate a dynamic marketplace able to address consumer needs. Rights holders consider this removes the need for government intervention by way of amendments to copyright law, for example, in the form of exceptions allowing greater private copying. It is clear that many licensing practices are pro-competition and pro-consumer, and presumably the application of a general competition test, in the absence of s 51(3), would pose no problems.

3.89 The ALRC is recommending that voluntary collective licensing arrangements be allowed to develop alongside statutory licensing.¹¹³ At present, collecting societies administering collective copyright licences are not necessarily open to the full gaze of Australian competition law. In 2000, the Intellectual Property Competition Review Committee (Ergas Committee) took the view that all collecting societies ‘whether declared or not, should generally be subject to the scrutiny that ... authorisation procedures allow’.¹¹⁴

3.90 Small publishers may face serious problems with the exercise of market power in the context of voluntary collective licensing of educational material.¹¹⁵ Collecting societies offering voluntary licences are currently subject to authorisation proceedings and this would also apply to new and developing licensing arrangements.

3.91 An aspect of copyright markets is the tendency to market failure where there is widespread use of copyright material with no way of tracking that use. This is a situation that collective and statutory licensing is designed to address, as discussed elsewhere in this Report.¹¹⁶

3.92 However, the mere existence of a licensing situation, particularly a statutory licence, does not create a market. As the Australian War Memorial pointed out, licensing creates a false value for some material which has no economic value.¹¹⁷ Similarly, the Council of Australasian Museum Directors does not support the concept that certain unremunerated use exceptions should operate only when the use cannot be licensed: ‘this allows for future forms of licensing which may add unnecessary cost and complexity to the copyright system’.¹¹⁸

3.93 Choice points out that ‘the right of creators to be commercially rewarded for their works is not the same as a right to endless commercial exploitation of a work’.¹¹⁹

112 APRA/AMCOS, *Submission 247*; iGEA, *Submission 192*. See also APRA/AMCOS, *Submission 247*; Australian Film/TV Bodies, *Submission 205*.

113 See Ch 8.

114 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 126.

115 Endeavour Education, *Submission 870*.

116 Ch 8.

117 Australian War Memorial, *Submission 720*.

118 CAMD, *Submission 719*.

119 Choice, *Submission 745*.

3.94 To facilitate licensing of copyright material around the EU, a digital hub has been recommended in the UK.¹²⁰ The ACCC submitted that efficient licensing might be facilitated by a digital hub, as recommended by the UK Hargreaves Review. The ALRC notes the 2013 proposal by Professor Michael Fraser and David Court¹²¹ for an Australian Copyright Registry.

3.95 The ALRC makes no specific recommendations for a digital hub for Australia, but notes that technological solutions could be used to lower transaction costs and, importantly, to ensure accurate recording of actual usage of copyright material. Technological solutions can be tailored for particular uses. Examples of this include the Clickview system for facilitating the licensing of broadcast material in education,¹²² and the Nightlife system for facilitating licensing of music in entertainment venues, which uses proprietary software and hardware to track, register and update music used so as to ensure ‘transactional transparency’.¹²³

3.96 The ACCC noted that there is a lack of economic research regarding the magnitude of transaction costs of licensing in the Australian context, especially regarding these costs in relation to the digital economy.¹²⁴ The ACCC submitted that the ALRC Inquiry may result in the submission of valuable evidence regarding transaction costs and inefficiencies for both creators and users from those who participate in the assignment or licensing of copyright material. ‘Where costs of licensing exceed benefits, this may affect overall production of copyright material especially where users are increasingly creators’.¹²⁵

3.97 One of the themes in this Inquiry is that licensing solutions should be used wherever possible to allow creators to control their material, and to gain maximum revenue. The ALRC considers that licensing arrangements for copyright licensing should be assessed against the same general competition law framework that applies to other transactions across the Australian economy.

3.98 The ALRC notes that, given the relevance of s 51(3) of the *Consumer and Competition Act* to the other recommendations in this Report, that the repeal of s 51(3) should be considered, as an integral aspect of equipping copyright law for the digital economy.

Evidence and law reform in the digital economy

3.99 A major concern of stakeholders is that reform should be ‘evidence-based’.¹²⁶ The ACCC considered it important that the ALRC takes into account available

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

121 D Court and M Fraser, *Call for 21st Century Copyright Register* (2013).

122 Screenrights, *Submission 288*; Screenrights, *Submission 646*.

123 Nightlife, *Submission 657*.

124 See discussion of possible economic evidence in assessing copyright law in Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

125 ACCC, *Submission 165*. These current transaction costs are commented on in other Chapters.

126 Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; Newspaper Works, *Submission 203*.

economic evidence when considering reform, as well as stakeholder views and economic rationales for reform.¹²⁷

3.100 One of the main criticisms made by copyright owners in this Inquiry is that there is ‘no evidence’ for reform of copyright law. Stakeholders cited the view of Professor Hargreaves in insisting that ‘IP reform takes place in the light of the best available economic evidence’.¹²⁸ A perceived lack of evidence was said to militate against any reform, unless it constituted greater enforcement or stronger rights. In doing so the stakeholders who cited the Hargreaves Review tended to overlook the fact that the overall thrust of Hargreaves was to ‘call for a more adaptive IP framework’.¹²⁹

3.101 A number of submissions to the ALRC Inquiry asserted that giving owners and publishers total control over use of copyright material is the only way to create value.¹³⁰ Asserting that copyright law must entrench ‘orderly management’¹³¹ of copyright material through permitting only the exercise of monopoly control by the copyright owner, is not a valid argument. Indeed, those most avidly asserting the need for total control rely most heavily on existing exceptions, and extensively use the copyright material of others. For example, publishers, broadcasters, newspapers and authors are the main users of copyright material provided under document supply and interlibrary loan provisions of the *Copyright Act*.¹³²

3.102 In the UK, perhaps the main outcome of the Hargreaves Review has been the setting up of the CREATE Centre, to investigate issues relating to copyright and new business models in the creative economy. A major concern of the Centre is to investigate the question of what constitutes evidence for the purposes of copyright policy.¹³³

3.103 In the US, a major report on building evidence for copyright policy in the digital era noted that ‘not all copyright policy questions are amenable to economic analysis. In some cases, it may be possible to determine only the direction of the effect of policy change, not the magnitude’.¹³⁴ The report further noted that copyright policy research can use a variety of methods, including ‘case studies, international and sectoral comparisons, and experiments and surveys’.¹³⁵

3.104 In Australia, the ARC Centre of Excellence for Creative Industries (CCI) focuses on research into the contribution of creative industries and their constituent disciplines to a more dynamic and inclusive innovation system and society. The CCI submission stated that ‘there are substantial costs and inefficiencies for creators associated with current copyright arrangements that adversely affect public access to

127 ACCC, *Submission 165*.

128 H Bakhshi, I Hargreaves and J Mateos-Garcia, *A Manifesto for the Creative Economy* (2013), 91.

129 *Ibid.*, 91.

130 News Corp Australia, *Submission 746*; Australian Publishers Association, *Submission 629*.

131 News Corp Australia, *Submission 746*.

132 ADA and ALCC, *Submission 868*.

133 M Kretschmer and R Towse, *What Constitutes Evidence for Copyright Policy?* (2013).

134 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 2.

135 *Ibid.*, 2.

new and original creative works'. CCI recommended 'a broadened concept of fair use that permits unlicensed use of copyright material ... in socially beneficial ways'.¹³⁶

3.105 With respect to theoretical research, one submission noted that it is simply too early to tell what the economic effect of the digital environment is for many sectors, particularly creators. Therefore 'proposals for new exceptions to copyright should be based on clearly identified policy grounds as the economic analysis of the digital environment is contentious'.¹³⁷ Pointing to the Hargreaves Report, the Arts Law Centre of Australia identified three obstacles to using evidence on the economic impacts of changes to intellectual property regimes:

absence of reliable data from which conclusions can be drawn to guide intellectual property policy; evidence relevant to policy questions involving new technologies or new markets, such as digital communications, is problematic as the characteristics of these markets are not well understood or measured; and the data that is available is held by firms operating these new technologies and the data, when it enters the public domain, cannot be independently verified.¹³⁸

3.106 While many stakeholders urged caution in making changes that may disrupt the emerging digital economy, the ACCC supported 'a review of the use and extent of copyright across the digital economy to ensure that the benefits continue to exceed the costs'.¹³⁹ The ACCC applied an economic analysis to the incentives to create and produce copyright material in the digital environment and evaluated economic literature and the presumptions upon which the literature relies. The ACCC concluded that the 'available literature mainly focuses on the impact of digital technologies on copyright holders and submits that such analysis is incomplete, as the interests of consumers and intermediate users must also be considered'.¹⁴⁰

3.107 The ACCC noted that most of the empirical, rather than theoretical, economic evidence available is focused overseas and relates to particular industries, particularly unauthorised copying in the music industry, and that the results can be 'inconclusive'.¹⁴¹

3.108 There is some economic evidence regarding the economic contribution of Australia's copyright industries, notably a PricewaterhouseCoopers (PwC) Report which demonstrates that copyright content industries in 2010–11 generated the equivalent of 6.6% of gross domestic product and employed 8% of the Australian workforce.¹⁴² The PwC report is a snapshot of economic activity in the copyright sector, and does not comment on likely effects of any reform.

136 Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*. The CCI also considers that development of a digital exchange would assist in reducing transaction costs associated with legal re-use of copyright materials.

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

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

139 ACCC, *Submission 165*.

140 Ibid.

141 Ibid.

142 PricewaterhouseCoopers, *The Economic Contribution of Australia's Copyright Industries 1996–97–2010–11* (2012), prepared for Australian Copyright Council, 4.

3.109 A report by Lateral Economics takes the approach of looking at the contribution of a wider group of industries described as ‘exceptions industries’ including ‘education and research’. Taking into account the economic contribution of industries using this expanded methodology, in 2009–10 they were responsible for 14% of gross domestic product and employed 21% of Australia’s workforce.¹⁴³

3.110 WIPO is promoting the need to quantify the contribution of ‘non-core’ copyright industries including interdependent and support industries.¹⁴⁴

3.111 It is clear that the economic contribution of Australia’s copyright industries is significant. What is contentious is how to increase that contribution to the benefit of copyright owners, users and the community, and what reform, if any, would effect this.

3.112 It is recognised that a number of industries claim that they ‘would not exist, or be much smaller, but for the limitations and exceptions to copyright law’ including ‘Internet publishing and broadcasting, Internet service providers and search engines, data services, computer equipment and components, computer services, telecommunications, and other industry segments’.¹⁴⁵ Indeed, it is suggested that ‘valuable research could build upon initial attempts to quantify the benefits of exceptions and limitations in terms of the economic outputs and welfare effects of those individuals, businesses, educational institutions and other entities that rely on them’.¹⁴⁶

3.113 Commissioned research on the economic benefits of fair use in copyright law, using Singapore as a case study, found copyright industries to be ‘relatively unaffected’ by the introduction of fair use although significant stimulation of growth in private copying technology occurred, with overall benefits for economic activity.¹⁴⁷ This research has been endorsed by some stakeholders¹⁴⁸ and criticised by others.¹⁴⁹

3.114 Professor Hargreaves has written further on copyright law since his review was completed, and stated:

The review rejected adoption of the fair use approach as technically too difficult in the EU legal context at this stage. Instead, the review advocated reforms ... with the aim

143 Lateral Economics, *Exceptional Industries: The Economic Contribution of Australian Industries Relying on Limitations and Exceptions to Copyright* (2012), prepared for the Australian Digital Alliance, 6. See favourable comments on this research: Google, *Submission 217*; eBay, *Submission 93*; iiNet Limited, *Submission 186*.

144 World Intellectual Property Organization, *WIPO Studies on the Economic Contribution of the Copyright Industries* (2012).

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

146 Ibid, 42. A number of stakeholders overlooked what the ALRC said in the Discussion Paper about building policy for economic evidence, based on this report. See Australian Film/TV Bodies, *Submission 739*; News Corp Australia, *Submission 746*.

147 R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), prepared for Google.

148 American Library Association and Association of Research Libraries, *Submission 703*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; iiNet Limited, *Submission 186*.

149 News Corp Australia, *Submission 746*; Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; Arts Law Centre of Australia, *Submission 706*; G Barker and I Png, *Submission 507*.

of securing specific benefits of flexibility comparable with those afforded by fair use.¹⁵⁰

3.115 The emphasis on creating licensing solutions in Hargreaves was taken to mean that owners' rights should be enhanced, overlooking the emphasis in the Hargreaves Review on collaboration to reduce deadweight costs in the economy through the waste of resources on, for example, the HADOPI legislation.¹⁵¹ The ALRC agrees that a commercially-focused, market-based approach to dealing with IP rights is entirely appropriate, and considers that fair use has the potential to enhance negotiated outcomes in the developing digital economy.

3.116 Those advocating for greater enforcement have little or no evidence for the efficacy of increased legislative measures.¹⁵² The ALRC notes that the report of the House of Representatives in the IT Pricing Inquiry, relied on economic research to conclude that the impact of infringement on copyright owners was 'less severe than rights holders claim' and that 'household spending on entertainment, and growth in employment in the entertainment industry, and ... the number of creative works being produced has grown at a tremendous rate'.¹⁵³ The Committee cited with approval a 2012 Report demonstrating growth in worldwide box office receipts for the film industry and also growth in the global music industry:

you wouldn't know it, just listening to the entertainment industry talk about how much the entertainment industry is 'dying', but data from PricewaterhouseCoopers (PwC) and iDATE show that from 1998 to 2010 the value of the worldwide entertainment industry grew from \$449 billion...to \$745 billion. That's quite a leap for a market supposedly being decimated by technological change.¹⁵⁴

3.117 One stakeholder pointed out: 'the 'no evidence' position¹⁵⁵ is 'very self-serving, and is counter to the contents within submissions of a number of major organisations within the IT sector that Australian copyright law would better accommodate the development of the digital economy by the adoption of the proposed fair use test'.¹⁵⁶

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- 150 I Hargreaves and B Hugenholtz, 'Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework' (2013) 13 *Lisbon Council Policy Brief* 1, 4. One of the arguments common to a number of stakeholders was to suggest that the ALRC had misstated or misread the Hargreaves Review. However, on reading that document, it is clear that a number of stakeholders selectively quoted from it to support their position, but without giving the correct impression of what was actually said by Hargreaves.
- 151 S Dato, 'France Stops Controversial 'Hadopi law' after Spending Millions', *The Guardian*, Wednesday 10 July 2013, <www.theguardian.com/technology/2013/jul/09/france-hadopi-law-anti-piracy>.
- 152 Ericsson, *The Tide is Turning: Now is the Time to Reform Copyright for the Digital Era* (2013). See also H Bakhshi, I Hargreaves and J Mateos-Garcia, *A Manifesto for the Creative Economy* (2013); Sarah Laskow, *Does copyright law work?* (2013) Columbia Journalism Review <http://www.cjr.org/cloud_control/empirical_ip.php?page=all> at 6 November 2013. See also R Giblin, *Evaluating Graduated Response* (2013): 'there is little to no evidence that that graduated responses are either successful or effective. The analysis casts into doubt the case for their future international roll-out and suggests that existing schemes should be reconsidered'.
- 153 House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (2013), [4.39] citing M Masnick and M Ho, *The Sky is Rising* (2012), 2.
- 154 M Masnick and M Ho, *The Sky is Rising* (2012).
- 155 See also Australian Society of Authors, *Submission 712*.
- 156 Internet Industry Association, *Submission 744*.

3.118 The polarisation of views about ‘evidence’ and research is evident elsewhere. A House of Commons Committee, despite the favourable reception given to the Hargreaves Review by the UK Government, had this to say:

Following all the evidence we have received, we think Hargreaves is wrong in the benefits his report claims for his recommended changes to UK copyright law. We regret that the Hargreaves report adopts a significantly low standard in relation to the need for objective evidence in determining copyright policy. We do not consider Professor Hargreaves has adequately assessed the dangers of putting the established system of copyright at risk for no obvious benefit. We are deeply concerned that there is an underlying agenda driven at least partly by technology companies (Google foremost among them) which, if pursued uncritically, could cause irreversible damage to the creative sector on which the United Kingdom’s future prosperity will significantly depend.¹⁵⁷

3.119 Professor Hargreaves has responded critically to these comments,¹⁵⁸ and so have other commentators:

The creative industries are innovating to adapt to a changing digital culture and evidence does not support claims about overall patterns of revenue reduction due to individual copyright infringement. The experiences of other countries that have implemented punitive measures against individual online copyright infringers indicate that the approach does not have the impacts claimed by some in the creative industries.¹⁵⁹

3.120 The ALRC considers that, given the impossibility of obtaining empirical research informing most aspects of copyright reform, it is appropriate to adopt a hypothesis-driven approach. This is explicitly approved of with respect to copyright reform in the European context:

Despite the evident stakes, there is a shortage of reliable data that directly addresses the relationship between copyright reform and economic growth. Forecasting the relationship between specific acts of reform and quantified economic outcomes is, therefore, and assumptions-based exercise. There have, however, been a number of reports which clearly show the significant scale advantages for Europe of developing its digital economy, and there is a clear line of logic in suggesting that a more flexible copyright regime, better adapted to digital circumstances, would add to these economic benefits.¹⁶⁰

3.121 The ALRC considers that there will be minimal free riding from the recommendations in this Report, and the micro-economic changes envisaged will encourage innovation and creation of copyright material, without harm to the interests of copyright owners.

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

158 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>>; 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>>.

159 B Cammaerts, R Mansell, B Meng, *Copyright & Creation: A Case for Promoting Inclusive Online Sharing* (2013).

160 I Hargreaves and B Hugenholtz, ‘Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework’ (2013) 13 *Lisbon Council Policy Brief* 1, 2.

Current regulatory models

3.122 Reform should promote the development of a policy and regulatory framework that is adaptive and efficient. The costs and benefits to the community should be taken into account in formulating options for reform. The *Australian Government Best Practice Regulation Handbook* requires law reform to ‘deliver effective and efficient regulation—regulation that is *effective* in addressing an identified problem and *efficient* in terms of maximising the benefits to the community, taking account of the costs’.¹⁶¹

3.123 The ACCC endorsed a regulatory framework in which negotiating an understanding of acceptable uses of copyright material may be more effective and efficient in reducing inefficiencies than a strict enforcement regime which potentially inhibits innovation:

where the parameters can be set so that the rights of copyright holders are able to be preserved and protected commensurate with the objectives of providing incentives to create copyright material ... balanced against the potential for innovative business practices to meet and develop consumer expectations and practices.¹⁶²

3.124 A number of stakeholders pointed to uncertainty in applying current copyright law, due to the complexity or inadequacy of current legislation that deters innovation and promotes risk-averse behaviour.¹⁶³ For example, State Records NSW advised that it is constrained in ‘exploring new digital means of access to government archives due to uncertainty in how to apply the many exceptions provided in the *Copyright Act*’.¹⁶⁴

3.125 A number of submissions questioned whether the current legal and institutional structures in copyright law offer an effective, efficient and functional model for dealing with digital content copyright issues, and what alternatives might apply. For example, the ACMA pointed to the need for ‘a mix of regulatory strategies’ for dealing with digital content issues in any revised copyright framework. These include: direct regulation with an emphasis on compliance and enforcement of rights and obligations; industry co-regulation and self-regulation; technology applications to assist with content management; and cultural and behavioural changes needed to promote and protect access to content.¹⁶⁵

161 Australian Government, *Best Practice Regulation Handbook* (2010); *Australian Law Reform Commission Act 1996* (Cth) s 24(2)(b).

162 ACCC, *Submission 658*.

163 See for example Yahoo!7, *Submission 276*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; Australian War Memorial, *Submission 188*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

164 State Records NSW, *Submission 160*.

165 ACMA, *Submission 214*.

3.126 One theme that emerged from submissions was the desirability of ‘principles-based’ drafting of the Act,¹⁶⁶ with details and examples supplied by regulations to the Act, supplemented by industry codes, guides to best practice, and the like.¹⁶⁷ However, despite Australians generally being concerned about over-regulation, many submissions revealed a desire for even more copyright regulation, on the basis that this would increase certainty.

3.127 Stakeholders also noted that this Inquiry is not dealing with the whole picture of reform, and piecemeal amendment ‘may not reflect the policy underlying the copyright regime’.¹⁶⁸ Furthermore, copyright is just one aspect of digital media markets which are themselves ‘a construction of the interplay of media, telecommunications and copyright law’.¹⁶⁹ In this context and ‘in accordance with historical jurisprudential tradition, the *Copyright Act* should be confined to expressing legal principles that affect us all, in a manner that assists in generating the required normative framework that allows it to be broadly understood’.¹⁷⁰ The statute alone cannot achieve clarity and certainty without the capacity to capture relevant policy and context factors.

3.128 The Australian Copyright Council seemed to cast doubt on a ‘standards’ approach on the basis that a ‘rules’ approach is more appropriate for Australia, given the different constitutional and legal tradition in which Australian and US jurisdictions operate.¹⁷¹ Uncertainty of application, lack of precedent and the existence of satisfactory exceptions are also reasons given for not recommending a fair use exception in Australian law, views shared by a number of stakeholders. However, alternative views expressing the desirability of introducing fair use into Australian copyright law have been expressed by a number of other stakeholders.

3.129 The ACCC agreed that principles or standards-based legislation is a ‘pragmatic approach to meeting the demands on copyright law in the context of a fast-developing digital economy’ and would lessen the dampening effect on business practices and innovation of delays between market developments and legislative change.¹⁷²

3.130 The ACCC stated that ‘standards-based legislation has the ability to provide the degree of flexibility required for meeting the demands of users and rights holders as changes occur in the digital economy’.¹⁷³

166 Drawing on experience as a regulator, the ACMA pointed out that increasingly ‘current regulatory schemes provide standards-setting arrangements’: Ibid. See also Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*, citing authorities on the ‘expressive function of law’. Civil Liberties Australia recommended ‘the development of a general objects clause for the Copyright Act’: Civil Liberties Australia, *Submission 139*; K Bowrey, *Submission 94*.

167 See NAVA, *Submission 234*.

168 APRA/AMCOS, *Submission 247*, expressing a concern also that the Terms of Reference may result in ‘particular stakeholders’ having disproportionate influence.

169 K Bowrey, *Submission 94*.

170 Ibid.

171 Australian Copyright Council, *Submission 219*.

172 ACCC, *Submission 658*.

173 Ibid.

3.131 With respect to developing an understanding of legislative principles, the Arts Law Centre of Australia pointed to the usefulness of the *Fair Use Codes* and *Codes of Best Practice* guidelines, developed in the US by Peter Jaszi and Pat Aufderheide. The Guidelines were designed to educate users on fulfilling the requirements of copyright legislation.¹⁷⁴ A number of stakeholders commented on the possible uses of guidelines agreed between owners and users to find ‘common ground’ in terms of practices relating to copyright material.¹⁷⁵

3.132 Guidelines for ‘diligent search’ for orphan works have been developed in Europe and are referred to by the International Federation of Reproductive Rights Organisations (IFFRO), which ‘strongly suggested’ that such guidelines could be established in Australia. IFFRO sees this operating in conjunction with an orphan works registry.¹⁷⁶

3.133 The Department of Science, Information Technology, Innovation and the Arts (Qld) pointed out the many ‘legally ambiguous’ areas in the *Copyright Act* at present, and stated that ‘the business community would benefit from greater clarity in relation to copyright and acceptable practices, and the formulation of clear guiding principles’.¹⁷⁷

3.134 Consult Australia, representing design, architecture, technology, survey, legal and management services firms, considered that reforming the law to allow adaptation to technological change is a strong reason for introducing fair use, and submitted that:

any legislative change be accompanied by the development of non-binding guidance material made available to business and other stakeholders, to assist in raising their awareness of their rights and the limitations to their use of copyright material.¹⁷⁸

3.135 Sporting bodies are concerned that changes to copyright law may impact more harshly on them than other sectors. In particular, sporting bodies which rely mostly on broadcast copyright due to lack of copyright protection for their underlying ‘spectacles’, use contract and industry arrangements to regulate their business, and fear the disruption that changes in copyright law may cause.¹⁷⁹

3.136 Sporting bodies are concerned that the existing exception for the reporting of news is being exploited and relied on by third parties to use an excessive amount of content (such as footage of sporting events) for a purpose other than the reporting of

174 Arts Law Centre of Australia, *Submission 171* referring to work done by Peter Jaszi and Pat Aufderheide at the Centre for Social Media (American University, Washington, DC): P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011). See, however, comments on these studies in J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

175 Copyright Agency/Viscopy, *Submission 249*. See also APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*, PPCA, *Submission 240*.

176 IFFRO, *Submission 481*. See further discussion in Ch 12 on codes of practice for use of orphan works.

177 DSITIA (Qld), *Submission 277*.

178 Consult Australia, *Submission 555*.

179 NRL, *Submission 732*; COMPPS, *Submission 634*; Cricket Australia, *Submission 228*. Arguments were made for exclusion of sporting events from, for example, extension of statutory licensing schemes to internet transmission. See, however, discussion of the retransmission provisions in Ch 15.

news, without a licence.¹⁸⁰ The exception, it is argued, is being used for other purposes, such as driving traffic to particular websites.¹⁸¹

3.137 Submissions urged greater definition of ‘news’ and ‘reporting the news’ as part of the current fair dealing exception.¹⁸² It was argued that ‘[t]he exception for the purpose of news reporting should include whether the purpose of the use has an impact on the market or potential market for the content’.¹⁸³ This is an aspect of the fair use factors proposed by the ALRC.¹⁸⁴

3.138 However, News Ltd pointed to the undesirability of legislation defining too closely what ‘reporting the news’ is, and also what volume of material should be included in the concept. Rather, negotiations between news organisations and sports organisations, with the ACCC assisting, have led to a code of practice for sports news reporting.¹⁸⁵

3.139 Development of an industry code is recommended by the *Book Industry Strategy Group Report* to be adopted ‘in accordance with the legislative framework’ in order to combat book piracy, with the government acting as an intermediary in negotiations. In responding to the report, the Government noted that a number of meetings had already taken place with the Attorney-General’s Department and industry to find an acceptable way forward.¹⁸⁶

3.140 Although these ‘inter-industry compacts’ do not always proceed as quickly as some parties would like, ‘privately negotiated arrangements will continue to emerge as new technologies make access, re-use, and distribution of content an inherent part of our culture and economy’.¹⁸⁷

3.141 The ALRC noted in the Discussion Paper¹⁸⁸ that talks relating to curbing piracy through industry agreement with respect to ISP activities had faltered following the iiNet case,¹⁸⁹ but raised the possibility that agreements and industry codes relating to ‘purposes’ in the *Copyright Act* could be provided for in the legislation. This approach is endorsed by the possibility that the government could ‘write into law an industry

180 NRL, *Submission 732*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*.

181 AFL, *Submission 717*.

182 NRL, *Submission 732*; AFL, *Submission 717*; COMPPS, *Submission 634*.

183 AFL, *Submission 717*.

184 See Ch 5.

185 News Limited, *Submission 286*. Note that, in contrast, Major Professional and Participation Sports would prefer a ‘reporting the news’ exception that is more prescriptive: COMPPS, *Submission 266*. See also Cricket Australia, *Submission 228*.

186 Australian Government, *Government Response to Book Industry Strategy Group Report* (2012).

187 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), citing, eg, the 2007 User Generated Content Principles as used in YouTube’s UGC portal, voluntary best practice codes for payment services where sites sell counterfeit goods and the flexible Copyright Alert System to discourage infringing distribution of copyright material, among others.

188 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), [3.78].

189 *Roadshow Films Pty Ltd v iinet Ltd* [2012] 16 HCA.

code on online piracy'¹⁹⁰ as part of renewed government commitment to copyright issues.

3.142 In the educational context, the report commissioned by Screenrights from the Kernochan Center for Law, Media and the Arts of Columbia University¹⁹¹ usefully reviewed the principal US copyright exceptions relevant to educational uses and commented on the possibility for Australia of such a provision. An important aspect of the fair use environment in the US is the development of guidelines as to how it should operate. Universities Australia submitted that in determining whether a particular use amounts to fair use/fair dealing or requires a licence 'universities would adopt guidelines or similar instructions to staff that assist in making such decisions' as in comparable jurisdictions.¹⁹²

3.143 Copyright Agency submitted that the Attorney-General's Department Guidelines for the 'declared' collecting societies could be reviewed and updated for example to make specific reference to the digital environment and new forms of content:

The current guidelines were developed for the education statutory licences, and have not been reviewed since being adopted in 1990. Similar guidelines could be developed for the government statutory licence, including its application to cultural institutions.¹⁹³

The ACCC also pointed to its role in drafting guidelines to which the Copyright Tribunal is required to have regard in determining licence conditions that are the subject of determinations by the Copyright Tribunal.¹⁹⁴

3.144 In their submission to this Inquiry, APRA/AMCOS urged that any such codes or guidelines 'should be mandated by law, should take into account the views of both owners and users, and should be subject to the jurisdiction of the Copyright Tribunal'.¹⁹⁵ Copyright Agency/Viscopy had a positive view of the role that Copyright Tribunal processes could play generally in streamlining issues identified in this Inquiry, including, for example:

reviewing the principles and processes for identifying uses of internet content that are excluded altogether as a factor in compensation negotiations, and assessing the value of those that are not excluded. If necessary, this can be assisted by the Copyright Tribunal.¹⁹⁶

190 M Bingemann, 'Brandis Calls Time on Online Piracy', *The Australian*, 28 October 2013, 23.

191 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

192 Universities Australia, *Submission 293*.

193 Copyright Agency, *Submission 727*. This submission was put in the context of using existing mechanisms to promote understanding of licensing in the digital economy, without the need for statutory intervention in the current licensing schemes. The ALRC notes that the review of guidelines as submitted is also relevant in the context of the reform recommendations in this Report.

194 *Copyright Act 1968* (Cth) s 157A.

195 APRA/AMCOS, *Submission 664*.

196 Copyright Agency, *Submission 866*.

3.145 Both statutory and voluntary licence schemes may be referred to the Copyright Tribunal, with amendments made in 2006 to expand this jurisdiction. The ACCC may be made a party to proceedings relating to voluntary licence schemes, in circumstances relating to failing to provide a licence or on unreasonable terms.¹⁹⁷

3.146 An important aspect of the discussion in the Kernochan Center report concerns the divergence of views on fair use and the length of time disputes take to resolve, despite the development of various sets of guidelines. However, the Standing Council on School Education and Early Childhood explicitly referred to the time and resources taken up in dealing with the inefficiencies of the current educational copyright licensing environment.¹⁹⁸ The Council also stated that it is not correct to assume that the current environment creates greater certainty than an open-ended flexible exception.¹⁹⁹

3.147 However, ‘statements and codes of Best Practices created by and for various communities (including libraries and educators) have shown considerable potential as a tool to promote both understanding and relative predictive certainty’.²⁰⁰

3.148 Universities Australia further submitted²⁰¹ that ‘the potential for industry guidelines and codes of practice as an appropriate policy tool in copyright law, has been recognised for many years’ and pointed to a number of statements of best practice for fair use in the movie industry and by other rights holders, which have been lauded by the US Department of Commerce.²⁰²

3.149 The education sector expressed a strong commitment to working to develop guidelines and codes of practice to inform the use of educational material.²⁰³

3.150 In May 2013, Productivity Commission Chair, Mr Peter Harris, called for a policy-making structure that reinforces the expectation of change:

a mechanism under which continuous reform is invited ... An integrated approach, where the voice of any one affected sector or region may not dominate; and where the breadth of necessary changes and the combined potential for economy-wide gains can be clearly set against any costs ... a generic way forward. But clearly there is scope in this idea for a regular, wide-ranging review of productivity-oriented reforms ... This is not a concept that can be created overnight.²⁰⁴

197 s 155(2)(d), 157. See with respect to music licensing, eg, Reference by APRA and AMCOS [2009] A Copy T 2 under s 154.

198 Copyright Advisory Group—Schools, *Submission 290*.

199 Copyright Advisory Group—Schools, *Submission 231*.

200 G Hinze, P Jaszi and M Sag, *Submission 483*. Screenrights stated that principles-based regulation is ‘an academic approach’ that fails to acknowledge the value of the forty-five years of investment by copyright owners and copyright users in the interpretation and operation of the current regime’.

201 Universities Australia, *Submission 754*.

202 US Department of Commerce Internet Policy Taskforce, *Copyright Policy, Creativity and Innovation in the Digital Economy* (2013).

203 Copyright Advisory Group—Schools, *Submission 861*; Universities Australia, *Submission 754*; CAG Tafe, *Submission 708*; Copyright Advisory Group—Schools, *Submission 707*.

204 P Harris, *The Productivity Reform Outlook* <www.pc.gov.au/speeches/peter-harris/reform-outlook> at 1 May 2013.

Creation of this understanding can come through industry guidelines matched with consumer expectations.

3.151 The ALRC proposes that in the digital environment, a standard—a general rule based on principle—provides the flexibility to respond to technological change in a principled manner.²⁰⁵

3.152 The ALRC's recommendations are designed to allow copyright policy and practice to develop within a framework that is sensible, flexible and adaptable and allows for negotiation between parties, the development of industry understanding, the operation of market forces and the creation of certainty for business and confidence for consumers.

205 See discussion of 'principles based' legislation in Ch 5.