

5. The Fair Use Exception

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Summary

5.1 The ALRC recommends a fair use exception with a non-exhaustive list of four fairness factors to be considered in assessing whether use of another's copyright material is fair and a non-exhaustive list of eleven illustrative purposes. This chapter outlines these key aspects of the fair use exception, including the ALRC's conclusions on how the fairness factors and illustrative purposes should be interpreted.

5.2 The structure and interpretation of s 107 of the United States *Copyright Act 1976* provides an appropriate model for an Australian fair use exception, in providing a broad, flexible standard based on fairness factors.

5.3 This chapter also discusses sources of guidance for courts and users about the application of the fair use exception. The relevance of existing Australian case law, case law in other jurisdictions, and the development and use of industry codes and protocols are discussed.

5.4 The framing of the new exception, existing case law in Australia and other jurisdictions, and the development of industry codes and protocols should counter concerns about possible uncertainty and transaction costs associated with implementing fair use.

5.5 If fair use is enacted, many of the existing specific exceptions will be repealed as the fair use exception, or the new fair dealing exception recommended in Chapter 6, should be applied when determining whether relevant uses infringe copyright. The ALRC recommends the repeal of the existing fair dealing exceptions and the exceptions for professional advice. Recommendations for repeal of other exceptions are discussed in other chapters, and this chapter provides a summary of the recommended changes.

The structure of the fair use exception

5.6 The ALRC considers that the fair use exception should contain three elements:

- an express statement that a fair use of another’s copyright material does not infringe copyright;
- a non-exhaustive list of four fairness factors to be considered in determining whether use of that copyright material is fair; and
- a non-exhaustive list of illustrative uses or purposes.

5.7 Many stakeholders supported the proposed structure of a fair use exception.¹ For example, Communications Alliance submitted that the four fairness factors ‘represent a reasonable way in which to consider the circumstance of use of copyright material’, ensuring that consideration is given to why the material was copied.²

5.8 Professor Kathy Bowrey considered that the fairness factors and illustrative purposes would be mutually supportive:

The former primarily serve to better elucidate motivational factors related to the creation of the defendant’s work and allow for critical reflection on the significance of that evidence, in view of current cultural and economic practices. The non-exhaustive list of illustrative purposes document established cultural practices that might generally be indicative of fair use, where the fairness factors are also met.³

5.9 In her view, the advantage of this approach is that, by separating out the fairness factors from the illustrative purposes, it is ‘easier for the public to identify the normative factors they need to consider to determine the legitimacy of their use, regardless of any idiosyncrasies associated with their individual practice’.⁴

1 For example, Intellectual Property Committee, Law Council of Australia, *Submission 765*; eBay, *Submission 751*; Choice, *Submission 745*; Optus, *Submission 725*; Australian War Memorial, *Submission 720*; CAMD, *Submission 719*; EFA, *Submission 714*; Copyright Advisory Group—Schools, *Submission 707*; National Library of Australia, *Submission 704*; IP Australia, *Submission 681*; Communications Alliance, *Submission 653* National Archives of Australia, *Submission 595*; K Bowrey, *Submission 554*.

2 Communications Alliance, *Submission 653*.

3 K Bowrey, *Submission 554*.

4 Ibid.

5.10 The fairness factors and illustrative purposes provide adequate guidance for users of copyright material and the courts.⁵ This model of fair use was considered to meet the challenge of moving from the existing law to a principles or standards-based approach, by ‘building on the existing understanding of key concepts rather than starting from scratch’,⁶ providing stability and certainty for industry participants, as well as guidance to the courts.⁷

Recommendation 5–1 The fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use (‘the fairness factors’); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair use (‘the illustrative purposes’).

The fairness factors

5.11 The fair use exception should contain four fairness factors that will serve as a checklist of factors to be considered in a given case. The fairness factors recommended by the ALRC are based upon the four factors that are common to both the US fair use provision and the existing Australian provisions for fair dealing for the purpose of research or study.

Existing fairness factors

5.12 The existing fair dealing exceptions for the purpose of research or study are found in ss 40, 103C and 248A. They list five factors to be considered when determining whether a use constitutes a fair dealing. These factors include, but are not limited to:

- the purpose and character of the dealing or recording;
- the nature of the work, adaptation, audiovisual item or performance;
- the possibility of obtaining the work, adaptation, audiovisual item or an authorised recording of the performance within a reasonable time at an ordinary commercial price;
- the effect of the dealing or recording upon the potential market for, or value of, the work, adaptation, audiovisual item or authorised recordings of the performance; and

5 For example, Universities Australia, *Submission 754*; eBay, *Submission 751*; ACCC, *Submission 658*; Telstra Corporation Limited, *Submission 602*.

6 eBay, *Submission 751*.

7 ACCC, *Submission 658*.

- in a case where part only of the work, audiovisual item or performance is reproduced, copied or recorded, the amount and substantiality of the part copied, taken or recorded in relation to the whole work, adaptation, item or performance.

5.13 In 1976, the Copyright Law Committee that considered reprographic reproduction (the Franki Committee) recommended that this list of factors—with respect to works and adaptations—be included in s 40.⁸ The factors listed are based to a large extent on principles derived from the case law on fair dealing.⁹ The Franki Committee’s recommendations were influenced by the then proposed fair use exception in s 107 of the US Act.¹⁰

5.14 The list of matters in ss 40(2) and 103C(2) are not the only relevant matters for assessment of the fairness of a dealing for the purpose of research or study, as these are non-exhaustive lists.¹¹ The Franki Committee observed that the courts have a duty to decide whether particular uses of copyright material constitute fair dealing and that it would be ‘quite impracticable’ to attempt to remove this duty.¹²

5.15 The approach with respect to the other fair dealing exceptions has been to leave it to the courts to determine what factors are relevant to determining the fairness of a use in a particular case. As stakeholders noted, there is limited guidance to be gleaned from the Australian case law¹³ and, in effect, one is ‘forced to look to old English precedents to try to determine what factors a court would be likely to look to when deciding whether a use would be fair’.¹⁴

5.16 The Copyright Law Review Committee (CLRC) suggested that it was reasonable to assume that the matters listed in s 40(2) ‘are also relevant in determining the fairness of a dealing for purposes other than research or study’.¹⁵ This is because the matters in s 40(2) were derived from principles in the case law and because those principles were not limited to a specific purpose.¹⁶

8 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (Franki Report), [2.60].

9 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* [11.35]; Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.09].

10 Copyright Advisory Group—Schools, *Submission 707*. See Copyright Law Committee, *Report on Reprographic Reproduction* (1976), [1.33], [2.06], [2.60], [2.64], [11.52]–[11.54], [11.66].

11 Michael Handler and David Rolph have suggested seven factors which may assist a court in determining the fairness of a particular dealing; not all will be relevant in every case: M Handler and D Rolph, “‘A Real Pea Souper’: *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia” (2003) 27 *Melbourne University Law Review* 381, 418.

12 Copyright Law Committee, *Report on Reprographic Reproduction* (1976), [2.59].

13 Intellectual Property Committee, Law Council of Australia, *Submission 765*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

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

15 Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.09].

16 *Ibid.*, [4.09].

5.17 The current situation, where fairness factors are expressly stated only in the research or study fair dealing exceptions, makes ‘little sense’. As Professor Bowrey put it:

There is no logical reason why the fairness factors should be limited to certain nominated kinds of fair dealing or be only considered or addressed in fair dealing cases in an ad hoc fashion.¹⁷

5.18 The Law Council of Australia’s Intellectual Property Committee (Law Council) welcomed the potential of a fair use exception ‘to re-focus attention on the fairness analysis in light of the limited discussion of fairness considerations in cases such as the *Panel* case’.¹⁸

5.19 The Australian Copyright Council stated that ‘people sometimes find the case-by-case nature of fair dealing difficult to apply’ and submitted that applying a general set of fairness factors, such as those already existing with respect to the research or study exceptions, may assist.¹⁹

5.20 A key advantage of a fair use exception, or the alternative recommendation for a new fair dealing exception,²⁰ is that the *Copyright Act* will clearly provide that fairness factors must be considered in determining the fairness of any use or dealing. Users and courts would have more statutory guidance than they currently have with respect to fair dealing (other than for research or study).²¹

Support for the four fairness factors

5.21 Many stakeholders expressed support for the four fairness factors proposed in the Discussion Paper.²² Reasons given in support of a fair use exception incorporating these factors included:

- the factors derive from the common law;²³

17 K Bowrey, *Submission 554*.

18 Intellectual Property Committee, Law Council of Australia, *Submission 765*, referring to *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235.

19 Australian Copyright Council, *Submission 219*.

20 See Ch 6.

21 Copyright Advisory Group—Schools, *Submission 707*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; K Bowrey, *Submission 94*.

22 For example, Universities Australia, *Submission 754*; NFSA, *Submission 750*; NSW Government and Art Gallery of NSW, *Submission 740*; Optus, *Submission 725*; CAMD, *Submission 719*; EFA, *Submission 714*; National Library of Australia, *Submission 704*; Pirate Party Australia, *Submission 689*; IP Australia, *Submission 681*; ACCC, *Submission 658*; Communications Alliance, *Submission 652*; Telstra Corporation Limited, *Submission 602*; National Archives of Australia, *Submission 595*; ADA and ALCC, *Submission 586*; K Bowrey, *Submission 554*.

23 Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*; Telstra Corporation Limited, *Submission 602*; K Bowrey, *Submission 554*; Universities Australia, *Submission 246*.

- the four factors in the US and Australia are substantially the same,²⁴ so Australian courts are familiar with them²⁵ and so are ‘academics and students who have relied on the fair dealing exception to undertake their own research and study’;²⁶
- they are easy to read and understand,²⁷ so would ‘assist users to feel confident making their own evaluation of how they are able to use copyright material in their own specific circumstance’;²⁸
- they are already being applied by some institutions with respect to orphan works and other copyright material in the mistaken belief that Australia already provides a fair use exception;²⁹
- they are substantially the same as those used in some other countries;³⁰ and
- Australian courts, copyright owners and users would be able to have regard to extensive US jurisprudence,³¹ as well as that of other countries, who have adopted a similar flexible, fairness-based model.³²

5.22 However, some stakeholders—those who opposed the enactment of fair use in Australia—criticised the four factors as ‘nebulous’³³ or ‘uncertain’, and ‘complex’ because they involve consideration of multiple issues.³⁴ Some considered that the factors do not provide enough guidance.³⁵

24 Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*; Telstra Corporation Limited, *Submission 602*. Some stakeholders called for an exact copy of the words of the US provision: R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; R Giblin, *Submission 251*; Grey Literature Strategies Research Project, *Submission 250*; S Hawkins, *Submission 15*. However, the ALRC does not consider that this would be an appropriate course of action for Australia nor does it consider it to be necessary. As Associate Professor Matthew Sag has argued, there is ‘nothing magical or sacrosanct’ about the particular language used in the US statute. Rather, the language is a product of its time and place: See M Sag, *The Imaginary Conflict Between Fair Use and International Copyright Law* <<http://matthewsag.com/>> at 25 March 2013; M Sag, ‘Copyright Reform for the Digital Age: Is Fair Use Too Unpredictable?’ (Paper presented at Embracing the Digital Economy: Creative Copyright for a Creative Nation, the 2013 Australian Digital Alliance Copyright Forum, Canberra, 1 March 2013).

25 NSW Government and Art Gallery of NSW, *Submission 740*; ADA and ALCC, *Submission 586*; ADA and ALCC, *Submission 213*.

26 Universities Australia, *Submission 246*. See also NSW Government and Art Gallery of NSW, *Submission 740*.

27 NSW Government and Art Gallery of NSW, *Submission 740*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; ACCAN, *Submission 673*; ADA and ALCC, *Submission 586*; R Wright, *Submission 167*.

28 R Wright, *Submission 167*. See also ACCAN, *Submission 673*.

29 ADA and ALCC, *Submission 213*.

30 Universities Australia, *Submission 246*.

31 Communications Alliance, *Submission 653*; Telstra Corporation Limited, *Submission 602*; R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria, *Submission 198*.

32 Communications Alliance, *Submission 653*; R Giblin, *Submission 251*; Universities Australia, *Submission 246*.

33 Australian Education Union, *Submission 722*.

34 COMPPS, *Submission 634*.

35 Arts Law Centre of Australia, *Submission 706*; COMPPS, *Submission 634*.

5.23 The ALRC is not persuaded by such characterisations. The four fairness factors may be standard-like (that is, broad and principles-based), but this does not mean that they are inherently uncertain or devoid of meaning. A number of stakeholders spoke favourably of the standard-like nature of the fairness factors. In the words of one stakeholder:

The fairness factors are general in character, inclusive and forward looking. As such they provide a key for the law to accommodate for social and technological change, whilst allowing for consistency and justice in treating analogous cases alike.³⁶

5.24 Others referred to the four fairness factors as striking ‘an appropriate balance between familiarity, certainty and flexibility’,³⁷ and providing clear guidance about determining fairness and going ‘a long way to addressing perceived uncertainties’.³⁸ Some stakeholders also approved of the ‘balance’ inherent in the four fairness factors between the interests and needs of rights holders and the public³⁹—countering any arguments that fair use equates to ‘free riding’.⁴⁰

Interpreting the fairness factors

5.25 In the ALRC’s view, all four fairness factors need to be considered and balanced and a determination made in view of all of them. As in the US, no one factor is to be more important than another.⁴¹

5.26 This approach was supported in submissions,⁴² along with some concern that courts may treat the factors as threshold tests, rather than as factors to be balanced.⁴³ The latter approach to interpretation of the fairness factors would clearly not be appropriate. It is not intended and is not how existing fair dealing factors are interpreted.

5.27 The following section introduces each of the four fairness factors, explains the wording and discusses aspects of how the factors may be expected to be interpreted.

First factor—purpose and character of use

5.28 The ALRC recommends that the first fairness factor be expressed as ‘the purpose and character of the use’.

5.29 This wording is identical to the first of the existing Australian fairness factors, except the word ‘use’ is used instead of ‘dealing’.

36 K Bowrey, *Submission 554*.

37 ADA and ALCC, *Submission 586*.

38 Telstra Corporation Limited, *Submission 602*.

39 Copyright Advisory Group—Schools, *Submission 707*; IP Australia, *Submission 681*; Telstra Corporation Limited, *Submission 602*.

40 Telstra Corporation Limited, *Submission 602*.

41 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569.

42 Copyright Advisory Group—Schools, *Submission 707*; ACCC, *Submission 658*; R Xavier, *Submission 531*.

43 R Xavier, *Submission 531*.

5.30 This wording is also used in the first fairness factor in the US provision where the words are followed by the additional text: ‘including whether such use is of a commercial nature or is for nonprofit educational purposes’.

5.31 Bill Patry has commented that this language at the end of the first US fairness factor was added at ‘the 11th hour’ as a ‘sop’ to educators.⁴⁴ He and other commentators have observed that this element of the first US factor has caused difficulties for the US courts over the years.⁴⁵ In his opinion:

It is the greatest of ironies that a cosmetic amendment intended purely as a political gesture to nonprofit educators has been misconstrued both as a statement of the nature of the factor as a whole and as a judgment by Congress that commercial uses (which were referred to only to make the gesture to educators less obvious) are to receive unfavourable treatment.⁴⁶

Interpretation

5.32 Interpretation of this factor in the US encompasses two issues.⁴⁷ First, was the use ‘transformative’? That is, was the use for a different purpose than the use for which the material was originally created? On some analyses, whether a use is transformative in this sense is the key question in US fair use doctrine. Secondly, was the defendant’s use commercial?

Transformative use

5.33 Some stakeholders called for the Australian fairness factors to acknowledge recent developments in US law specifically, such as the transformative use doctrine,⁴⁸ and suggested that a requirement to show ‘transformative use or purpose’ should be included in the Act.⁴⁹ Others were opposed to this idea.⁵⁰

5.34 In the ALRC’s view, whether a use is transformative should be a key question when applying the fair use exception—or the new fair dealing exception. The case for introducing a stand-alone transformative use exception, however, has been considered and rejected.⁵¹ In the ALRC’s view, transformative uses of copyright material would be better considered under a fair use exception, where a range of factors can be balanced in determining whether a particular use is permitted.

44 W Patry, *Patry on Fair Use* (2012) 93.

45 W Patry, *Fair Use, Israel and the HIPA* <<http://williampatry.blogspot.com.au/2007/02/fair-use-israel-and-iipa.html>> at 3 May 2013; G Pessach, ‘The New Israeli Copyright Act: A Case-Study in Reverse Comparative Law’ (2010) 41 *International Review of Intellectual Property and Competition Law* 187, 191.

46 W Patry, *Patry on Fair Use* (2012), 93. Israel did not include these words in its fair use provision, which also simply refers to the purpose and character of the use.

47 See generally M Sag, ‘Predicting Fair Use’ (2012) 73 *Ohio State Law Journal* 47, 54–5.

48 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

49 Play It Again International Research Team, *Submission 494*.

50 Screenrights, *Submission 646* (supporting the Australian Copyright Council’s submission); Australian Copyright Council, *Submission 654* (‘Our answer is a categorical: no’); AIPP, *Submission 564*.

51 See Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Ch 10.

5.35 A much greater emphasis on transformativeness in US case law followed the influential 1990 *Harvard Law Review* article by Judge Pierre N Leval, ‘Toward a Fair Use Standard’. The first fairness factor, the purpose and character of the use, Judge Leval said, ‘raises the question of justification’:

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story’s words, it would merely ‘supersede the objects’ of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.⁵²

5.36 This transformative use doctrine was adopted by the US Supreme Court in 1994, in *Campbell v Acuff-Rose Music Inc* (*Campbell*), and may now be ‘the prevailing view in fair use case law’.⁵³ In *Campbell*, the Court stated:

Although such transformative use is not absolutely necessary for a finding of fair use, ... the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright ... and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.⁵⁴

5.37 Some commentators have suggested that US jurisprudence on transformative use is not altogether coherent.⁵⁵ However, others have found the trend in US court decisions much more consistent. Professor Neil Weinstock Netanel’s review of several empirical studies and his own analysis of US case law led him to conclude that, since 2005, ‘the transformative use paradigm has come to dominate fair use case law and the market-centered paradigm has largely receded into the pages of history’.

Today, the key question for judicial determination of fair use is not whether the copyright holder would have reasonably consented to the use, but whether the defendant used the copyrighted work for a different expressive purpose from that for which the work was created.⁵⁶

5.38 It is important to note the phrase ‘different expressive purpose’. On 14 November 2013, a US court found the digital scanning of entire books so that book text

52 P Leval, ‘Toward a Fair Use Standard’ (1989–1990) 103 *Harvard Law Review* 1105, 1111.

53 N Weinstock Netanel, ‘Making Sense of Fair Use’ (2011) 15 *Lewis and Clark Law Review* 715, 746.

54 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579 (citations omitted).

55 J Ginsburg and R Gorman, *Copyright Law* (2012), 187.

56 N Weinstock Netanel, ‘Making Sense of Fair Use’ (2011) 15 *Lewis and Clark Law Review* 715, 768.

could facilitate search, through the display of snippets, to be ‘highly transformative’.⁵⁷ In the Court’s view, Google Books ‘uses words for a different purpose—it uses snippets of text to act as pointers directing users to a broad selection of books’.⁵⁸

5.39 Some have expressed concern that the transformative use doctrine can undermine rights holders’ derivative rights, if it suffices to show that the secondary use has merely had a different ‘character’ from the original. However, Netanel stressed that empirical studies of US cases on fair use in the period 1995–2010 suggest that this concern is not warranted and that the ‘purpose’ of the use is vital:

In case after case decided since *Campbell*, courts have made clear that what matters for determining whether a use is transformative is whether the use is for a different *purpose* than that for which the copyright work was created. It can help if the defendant modifies or adds new expressive form or content as well, but different expressive purpose, not new expressive content, is almost always the key.⁵⁹

5.40 The ALRC favours this emphasis on the question of whether a use has a different expressive purpose from that of the original.

5.41 Similar thinking is also evident in the United Kingdom Hargreaves Review, which expressed support for exceptions that do not ‘trade on the underlying creative and expressive purpose on which traditional rights holders in music, publishing, film and television rely’.⁶⁰

5.42 The ALRC considers that the property rights granted to creators and rights holders are important and may be necessary to provide an incentive to create, publish and distribute copyright material.⁶¹ But this should not be extended further than necessary. Rights holders should not be entitled to all conceivable value that might be taken from their material. The incentive to create will not be undermined by the unlicensed use of copyright material for entirely different purposes from the purpose for which copyright material was created, and in markets that do not compete with rights holders. Rather, such uses will stimulate further creativity, and increase competition.

5.43 Under the fair use and new fair dealing exceptions recommended in this Report, a transformative use will be more likely to be fair than a non-transformative use. In fact, a finding that a use is transformative should be one of the more persuasive factors, when considering whether a particular use is fair.

5.44 Uses of copyright material vary in the degree to which they are likely to be transformative. There are uses for purposes different than those for which the material was created. The use of copyright material for criticism or review, parody or satire, reporting the news and for quotation will often be transformative. Where copyright

57 *The Authors Guild, Inc. v Google, Inc.*, (SDNY, Civ 8136, 14 November 2013).

58 *Ibid.*, 20.

59 N Weinstock Netanel, ‘Making Sense of Fair Use’ (2011) 15 *Lewis and Clark Law Review* 715, 747 (emphasis added).

60 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 5.

61 See the second framing principle in Ch 2: ‘maintaining incentives for creation and dissemination of material’.

material is cached or indexed, or electronic publications are mined,⁶² these uses will also be transformative, as the material was not created for these purposes.

5.45 However, like all other factors in the fair use and fair dealing exceptions, the ALRC considers that ‘transformativeness’ should not be considered determinative, but should be weighed along with other relevant matters. A use is not required to be transformative to be found fair.⁶³ Some exceptions discussed in this Report are less likely to be transformative—notably, private and educational uses. Such uses may be less likely to be fair for this reason, but other reasons for finding fair use may be found.

Commercial use

5.46 Some stakeholders expressed concerns about the possibilities of a fair use exception permitting the unlicensed use of copyright material for commercial purposes.⁶⁴ The AFL exemplified this view in stating that a fair use exception would need to ‘explicitly acknowledge that a commercial/profit making purpose or use by third parties cannot be a “fair use”’.⁶⁵ However, stakeholders in favour of a fair use exception considered it important that commercial uses not be automatically excluded.⁶⁶ Universities Australia, for example, submitted that the ability for a new fair use exception to apply to commercial uses was ‘particularly important in the digital environment’.⁶⁷

5.47 In the ALRC’s view, a use is less likely to be a fair use if it is commercial, but this does not mean that all commercial uses will be unfair. This approach accords with the interpretation of the existing fair dealing exceptions. For example, news organisations are permitted under the existing fair dealing exceptions to make some commercial use of copyright material for the purpose of reporting news.

5.48 Under fair use, while commerciality is relevant, it is also important to focus on the related questions of whether the use is transformative or harms the market of the rights holder. Aspects of US law illustrate this approach.

5.49 In the US, the ‘character of the activity’ is more important than whether the use is commercial or not: ‘the commercial or nonprofit educational element of a given use is but one aspect of its more general, multifaceted purpose and character’.⁶⁸ This interpretation was applied in *Sony Corp of America v Universal City Studios Inc*,⁶⁹ in which the Supreme Court said that ‘the commercial or nonprofit character of an

62 See Ch 11 (‘Incidental or Technical Use and Data and Text Mining’).

63 This is also the position under US law: W Patry, *Patry on Fair Use* (2012), 115.

64 For example, AFL, *Submission 717*; Cricket Australia, *Submission 700*; Australian Institute of Architects, *Submission 678*.

65 AFL, *Submission 717*.

66 For example, Universities Australia, *Submission 754*.

67 Ibid. Referring, in particular, to universities forging closer relationships with industry in line with the Australian Government’s innovation policy.

68 W Patry, *Patry on Fair Use* (2012), 95.

69 *Sony Corp of America v Universal City Studios, Inc* (1984) 464 US 417.

activity’ is to be weighed in any fair use decision, along with other factors. However, the fact that a use is commercial may ‘weigh against a finding of fair use’.⁷⁰

5.50 In *Campbell*, the Supreme Court observed that essentially all fair use claims are made in the for-profit context of publishing and broadcasting. Commercial use does not lead to a presumption that the use is not fair; and, conversely, the fact that something is non-profit or educational does not lead to a presumption that the use is fair.⁷¹

5.51 Cases following *Campbell* have tended to downplay the impact of commercial use, especially where the use is deemed to be transformative. In *Kelly v Arriba Soft Corp* it was said that, because the use was ‘not highly exploitative, the commercial nature of the use weighs only slightly against a finding of fair use’.⁷² It has been observed that commerciality can be placed on a continuum, with use for a ‘transformative, scholarly purpose’ at one extreme, and ‘verbatim, wholesale copying for resale to others’, at the other.⁷³

5.52 Other US courts have limited adverse rulings on commerciality to ‘commercial exploitation’, defined as a situation where ‘the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material’.⁷⁴

5.53 Some guidance may also be obtained from case law in the fair dealing jurisdictions of the UK and Canada. In the UK, the most important factor, in assessing whether commercial use is fair dealing, is the extent to which the use competes with the exploitation of the copyright work by the owner.⁷⁵ However, cases of fair dealing for purposes of criticism, review and the reporting of current events are said to ‘raise more difficult problems than cases of non-commercial research and private study’.⁷⁶ This is because there may be a risk to the ‘commercial value of the copyright’, but it does not follow that any damage or any risk makes any use of the material unfair:

If it did then there could be no use of copyright material in criticism or review if it could be said that that use might damage the value of the material to the copyright owner. That would be inconsistent with the purpose of the section which is to balance the interests of the copyright owner and the critic.⁷⁷

5.54 Although much criticism, review and reporting of the news is for a ‘commercial purpose’, where this does not directly compete with the copyright owner’s market, it is likely to be ‘fair’, particularly where

70 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539.

71 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 584. See also *Infinity Broadcasting Corp v Kirkwood*, 150 F 3d 104 (2nd Cir, 1998) which noted that most secondary uses of copyright material were commercial.

72 *Kelly v Arriba Soft Corporation*, 336 F 3d 811 (9th Cir, 2003), 818.

73 W Patry, *Patry on Fair Use* (2012), 105.

74 *American Geophysical Union v Texaco Inc*, 60 F 3d 913 (2nd Cir, 1994) 922, citing *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 562–3. See also *Blanch v Koons*, 467 F 3d 244 (2nd Cir, 2006) 253.

75 *Ashdown v Telegraph Group Ltd* [2002] Ch 149. See also *SAS Institute Inc v World Programming Ltd* [2011] RPC 1.

76 *SAS Institute Inc v World Programming Ltd* [2011] RPC 1, [194].

77 *Fraser-Woodward Ltd v BBC* [2005] EMLR 22, [64].

there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on.⁷⁸

5.55 In Canada, as in the US and UK, a commercial use is not determinative, but one of the factors to be taken into account in determining fairness. The Canadian courts also recognise that the nature of commerciality varies, and where the use is to generate revenue in competition to the copyright holder, the use is less likely to be fair.⁷⁹ However, if the purpose of the use 'produces a value to the public interest' that weighs towards fairness. If commercial returns to the user outweigh any such public benefit, the use may not be fair.⁸⁰

Second factor—nature of the copyright material

5.56 The ALRC recommends that the second fairness factor be expressed as 'the nature of the copyright material'.

5.57 The ALRC's recommended wording is the same as the second of the existing Australian fairness factors, except that the term 'copyright material' is used instead of 'work or adaptation' or 'audio-visual item'.

Interpretation

5.58 In considering the nature of the copyright material used, US courts have looked at factors including whether the work has been published, whether it is in print, and whether the content is factual or entertainment.

5.59 Whether a work is unpublished is a 'key, though not necessarily determinative factor' against fair use, as the scope of fair use is narrower with respect to unpublished works.⁸¹ One reason is that the 'the author's right to control the first public appearance of his undissemated expression' will normally mean that it is not 'fair' to publish what is not yet before the public.⁸²

5.60 An out of print work may, on the other hand, be more likely to be made available under a fair use analysis. Material that is unavailable for purchase through normal channels is unlikely to harm any market for that use.⁸³

5.61 If a work is about to be published, or is unavailable due to preparation of a new edition or version, it is not considered likely to be fair to make substantial use of an

78 *Ashdown v Telegraph Group Ltd* [2002] Ch 149, [70], quoting H Laddie and others, *The Modern Law of Copyright and Designs* (3rd ed, 2000), [20.16].

79 *Century 21 Canada Ltd Partnership v Rogers Communications Inc* (2011) Carswell BC 2348.

80 *Ibid.*

81 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 564. See also *Peter Letterese and Associates, Inc v World Institute of Scientology Enterprises, International*, 533 F 3d 1287 (11th Cir, 2008).

82 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 555.

83 W Patry, *Patry on Fair Use* (2012), 444.

existing version or edition,⁸⁴ particularly where this would impair the copyright owner's ability to market the new version.⁸⁵

5.62 The converse of the principles governing unpublished works does not follow: 'the fact that a work is published does not mean that the scope of fair use is broader'.⁸⁶

5.63 Factual works are considered more apt to be available for use under a fairness test: '[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy'.⁸⁷ This seems to be because protection of creative endeavour is valued more than compilation of factual material:

Works that are 'closer to the core of intended copyright protection', and thus merit greater protection, include original as opposed to derivative works; creative as opposed to factual works; and unpublished as opposed to published works.⁸⁸

5.64 In the UK, preventing the publication of material is regarded as an important aspect of the copyright owner's rights.⁸⁹ Although unpublished material is not exempted from fair dealing, the nature of the material is highly relevant to a decision as to whether it is fair to use such work.⁹⁰ This is particularly true when copyright infringement is also a breach of confidence,⁹¹ although it may be fair to inform the public about important matters—even where 'leaked' material is used.⁹²

5.65 In *Commonwealth v John Fairfax & Sons Ltd*,⁹³ a case concerning leaked documents, the High Court of Australia considered whether unpublished material could be published under the fair dealing exception for reporting the news. The litigation concerned a book entitled *Documents on Australian Defence and Foreign Policy 1968–1975*, which included documents produced by the Department of Foreign Affairs, as well as unpublished government memoranda, assessments, briefings and cables.

5.66 Injunctions to prevent instalments of this book being published in the defendant's newspaper were granted to the Australian Government, on the basis of breach of copyright in the documents. Mason J held that any dealing with unpublished work would not normally be fair within s 41, if an author had not released it to be the subject of public criticism or review.⁹⁴

84 See *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539.

85 W Patry, *Patry on Fair Use* (2012), 445.

86 *Ibid.*, 441.

87 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 563.

88 *Peter Letterese and Associates, Inc v World Institute of Scientology Enterprises, International*, 533 F 3d 1287 (11th Cir, 2008), 1313.

89 *Ashdown v Telegraph Group Ltd* [2002] Ch 149.

90 *Nora Beloff v Pressdram Ltd* [1973] FSR 33.

91 *Ashdown v Telegraph Group Ltd* [2002] Ch 149. This is also the case in Canada: *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

92 *Ashdown v Telegraph Group Ltd* [2002] Ch 149.

93 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

94 *Ibid.*, 56–7. In the US, the application of a 'strong' presumption to this effect has generated considerable controversy, with historians and biographers arguing that they cannot work effectively without being able to draw on the unpublished letters, manuscripts etc of public figures. It has been claimed that the practical effect of decisions such as *Salinger v Random House, Inc*, 811 F 2d 90 (2nd Cir, 1987) and *New Era Publications International ApS v Henry Holt and Co, Inc*, 873 F 2d 576 (2nd Cir, 1989) has merely been to enrich the estates of such figures since they can demand payment for use of those writings.

5.67 Section 107 of the US *Copyright Act* concludes with a paragraph stating, ‘The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors’. Some submissions expressed concern that the ALRC’s proposed fair use exception did not contain an equivalent statement.⁹⁵ The ALRC does not consider this additional wording to be necessary, if the second fairness factor is interpreted in a way similar to that in the US.

Third factor—amount and substantiality of the part used

5.68 The ALRC recommends that the third fairness factor be expressed as ‘the amount and substantiality of the part used’.

5.69 This factor parallels the fifth factor in the Australian fair dealing exceptions for the purpose of research or study, which is more fully expressed as: ‘in a case where part only of work or adaptation is reproduced—the amount and substantiality of the part taken in relation to the whole work or adaptation’.⁹⁶

5.70 It was suggested that the opening conditional words of the existing factor are not suitable, because of their limiting effect.⁹⁷ That is, this factor may have to be ‘disregarded where the entirety of the material is used, while fair use requires each factor to be weighed in every case’.⁹⁸ In the ALRC’s view, it is important that this factor does not imply that use of the whole of copyright material can never constitute fair use.

Interpretation

5.71 In the US, interpretation of this factor consists of an evaluation of two matters. First, how much is the defendant alleged to have taken? Second, how important was that taking, in the context of the plaintiff’s work?

5.72 Fair use may allow the taking of the whole of a work, where this would be fair.⁹⁹ Where the purpose of the use is parody, then taking a large amount of the original may not be excessive: ‘in parody, as in news reporting, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original’.¹⁰⁰

5.73 In *Commonwealth v John Fairfax & Sons Ltd*, the fairness of using the leaked documents was rejected, as the purpose (criticism or review) was ‘merely a veneer’, since the reproduction of the plaintiff’s documents was to occur on a large scale with little actual comment and in several instalments.¹⁰¹

95 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; R Xavier, *Submission 531*.

96 See *Copyright Act 1968* (Cth) ss 40(2)(e).

97 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; R Xavier, *Submission 531*.

98 R Xavier, *Submission 531*.

99 For another example, see *The Authors Guild, Inc. v Google, Inc.*, (SDNY, Civ 8136, 14 November 2013).

100 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569.

101 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39. Cf *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation Plc* (1993) 28 IPR 439, where a documentary including clips of the film, *A Clockwork Orange*, was held to be fair dealing, since the length of extracts was balanced by commentary. Furthermore, the film had been in the public domain despite being restricted in the UK, and it was not unfair to review it in that way.

5.74 In *Hubbard v Vosper*, Lord Denning observed that stating what amount of copyright material could be considered a fair dealing was ‘impossible to define’, and that it ‘must be a question of degree’ to be decided in all the circumstances of the case. These circumstances include the amount considered in the context, and what is appropriate for the purpose, and, ‘after all is said and done, it must be a matter of impression’.¹⁰²

5.75 US case law follows a line of English authorities beginning with the case *Bramwell v Halcomb*, in saying that: ‘It is not only quantity but value that is always looked to’.¹⁰³ US cases refer to considerations of quantity in terms of quality: ‘essentially the heart of the book’; containing the ‘most powerful passages’; and ‘the dramatic focal points’.¹⁰⁴

5.76 The context of the use will continue to be important when interpreting this factor. As the National Film and Sound Archive observed:

making a copy of a film for research and study is likely to require copying the whole item, a criticism or review of a visual artwork is more likely to use the whole item, but a criticism or review of a book is likely to use smaller proportions of the item. Rather than just considering the ‘amount and substantiality’, a factor might be whether the use of the material is appropriate for the purpose, for example, it may be fair to include the whole artwork in a review but not a large size high resolution copy.¹⁰⁵

Fourth factor—effect of the use upon the potential market or value

5.77 The ALRC recommends that the fourth fairness factor be expressed as ‘the effect of the use upon the potential market for, or value of, the copyright material’.

5.78 The ALRC’s recommended fourth fairness factor parallels the fourth factor in the Australian fair dealing exceptions, with minor changes: the factor again refers to ‘copyright material’ and the word ‘use’ is used instead of ‘dealing’.

Interpretation

5.79 In the US, this factor requires consideration of the market effect of the use. A number of stakeholders in favour of a fair use exception considered this factor important in protecting the interests of rights holders.¹⁰⁶ Copyright Advisory Group (CAG) Schools stated:

102 *Hubbard v Vosper* [1972] 2 QB 84, 94. See also *Ashdown v Telegraph Group Ltd* [2002] Ch 149; *Sony Corp of America v Universal City Studios, Inc* (1984) 464 US 417, 460; *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

103 *Bramwell v Halcomb* (1836) 3 My & Cr (Ch) 737, 738.

104 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 565. See also *WPOW, Inc v MRLJ Enterprises*, 584 F Supp 132 (DCDC, 1984), 136; *Ringgold v Black Entertainment Television, Inc*, 126 F 3d 70 (2nd Cir, 1997), 76.

105 NESA, *Submission 750*.

106 Copyright Advisory Group—Schools, *Submission 707*; Telstra Corporation Limited, *Submission 602*.

The requirement to consider market harm as part of a fairness assessment is a significant protection to ensure that copyright owner markets are clearly and properly preserved when determining the limits of fair use.¹⁰⁷

5.80 However, rights holders were concerned at the complexity inherent in the wording of the fourth factor, about likely disputes over meaning and the consequent cost, especially as rights holders may have an onus to establish market effects.¹⁰⁸ Cricket Australia, for example, stated that

this factor imposes an unreasonable burden on copyright owners as it is likely to require copyright owners to obtain and lead complicated evidence regarding the markets for copyright material, the value of the material and the impacts of particular uses.¹⁰⁹

Market harm

5.81 If a licence can be obtained for a particular use of copyright material, then the unlicensed use of that material will often not be fair. The availability of a licence is an important consideration in determining whether a use is fair, and will weigh against a finding of fair use. This factor helps ensure that copyright exceptions do not unreasonably damage rights holders' markets or undermine the incentive to create and distribute copyright material.

5.82 US Judge Leval has written concerning the fourth fairness factor:

A secondary use that interferes excessively with an author's incentives subverts the aims of copyright. Hence the importance of the market factor. ... When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user.¹¹⁰

5.83 However, the availability of a licence does not settle the question of fairness. Market harm should not be equated with *any* diminution of licence fees, otherwise this factor would always favour the rights holder.¹¹¹ For this factor to weigh against fair use, the harm to the market from the use should be substantial.

5.84 Any harm must also be weighed along with the other fairness factors. Some damage to a rights holder's market may be justified, for a use that is transformative or has an important social value, particularly if the damage is minor or remote.

5.85 When considering this fairness factor, courts should consider the harm that might result if the use were widespread. One photocopy of a book that displaces one paid copy of the book will not greatly damage the publisher's market. If the book were photocopied widely, however, the damage may then be substantial.

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

108 AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*.

109 Cricket Australia, *Submission 700*.

110 P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105, 1124.

111 'By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties': *Ibid*, 1124.

5.86 When considering harm to the rights holder's markets, the relevant markets are those that are 'traditional, reasonable or likely to be developed'. If a use fills a 'market niche' that the rights holder 'simply had no interest in occupying',¹¹² then the fourth factor may not disfavour fair use.

5.87 This interpretation given to the US fair use provision should address the concern expressed by the Australian Competition and Consumer Commission (ACCC) that the word 'market' in this fairness factor might be given an overly broad interpretation, and that rights would be 'extended in ways where they effectively create monopoly-type characteristics in markets that are ancillary to the primary market for the copyright materials':

The conceptual problem with a definition of markets that captures all ancillary markets is likely to be most evident in the consideration of 'potential markets,' where copyright holders may not be best placed, skilled or incentivised to innovate and create potential markets.¹¹³

5.88 Some argue that unremunerated exceptions to copyright should only be available when there is market failure, and that if a licence is available, an unlicensed use should *never* be fair. International copyright agreements do not mandate such a principle. The three-step test provides that free-use exceptions should not '*unreasonably* prejudice the *legitimate* interests of the author'.¹¹⁴ It does not say an exception must never prejudice any interest of an author.

5.89 In the UK, certain exceptions do not apply if a licence can be obtained for the use, however these provisions are now being amended. The UK Government has concluded that, while the existence or otherwise of a licence may be an important factor in deciding fair dealing, other factors are also important, such as 'the terms on which the licence is available, including the ease with which it may be obtained, the value of the permitted acts to society as a whole, and the likelihood and extent of any harm to right holders'. For this reason, the UK Government rejected the argument that the 'mere availability of a licence should automatically require licensing a permitted act'.¹¹⁵

5.90 The fourth fairness factor can also act as an incentive for rights holders to offer reasonable and convenient licences for the use of their material. Where such licences are not offered, it will more difficult to argue that an unpaid use harmed the rights holder's market. In *Cambridge University Press v Becker*, a US court found that publishers who did not offer licences for electronic excerpts of their books, could not claim that the unpaid use of electronic excerpts harmed the publishers' markets.¹¹⁶

112 *Princeton University Press v Michigan Document Services, Inc*, 99 F 3d 1381 (6th Cir, 1996), (citations omitted).

113 ACCC, *Submission 658*.

114 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972) art 9(2) (emphasis added).

115 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 13.

116 *Cambridge University Press v Becker*, 863 F Supp 2d 1190 (ND Ga, 2012).

5.91 Finally, it is important to recognise that the harm this factor is concerned with is harm that comes from a use that usurps the market of the original material. Judge Leval explains:

Not every type of market impairment opposes fair use. An adverse criticism impairs a book's market. A biography may impair the market for books by the subject if it exposes him as a fraud, or satisfies the public's interest in that person. Such market impairments are not relevant to the fair use determination. The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute, or, in Story's words 'supersede[s] the use of the original.' Only to that extent are the purposes of copyright implicated.¹¹⁷

5.92 The US Supreme Court stated in *Campbell* that the 'market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop'.¹¹⁸ The concept of a 'transformative market', which has emerged in US jurisprudence, is also helpful:

A non-transformative use that competes directly in the rights-holder's traditional market, or that seeks to avoid a traditional licensing arrangement, will not be favoured by this factor. A transformative use that falls within a 'transformative market' (rather than a 'traditional, reasonable or likely to be developed market') probably will be. Crucially, US courts do not allow a rights-holder to pre-empt a transformative market through conjecture about impairment of the possibility of licensing the transformative use.¹¹⁹

Additional factors?

5.93 A number of other fairness factors have been suggested and are discussed below. In the ALRC's view, the new fair use exception should not include these, or any other, additional fairness factors.

Ordinary commercial price

5.94 An additional factor specified in the Australian fair dealing exceptions for the purpose of research or study refers to 'the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price'.¹²⁰

5.95 Some stakeholders expressed concern at the omission of this factor.¹²¹ Media, Entertainment & Arts Alliance submitted that including this factor would 'at least demonstrate some recognition of the rights of copyright creators and owners'.¹²² The Print Music Publishers Group was concerned that omitting this factor would send the wrong message to consumers.¹²³

117 P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105, 1125.

118 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 592.

119 R Xavier, *Submission 531*.

120 See *Copyright Act 1968* (Cth) s 40(2)(c).

121 For example, MEAA, *Submission 652*; Print Music Publishers Group, *Submission 627*.

122 MEAA, *Submission 652*.

123 Print Music Publishers Group, *Submission 627*.

5.96 Some went further, submitting that fair use should not apply where a use may be licensed on reasonable terms.¹²⁴ That is, the legislation ‘should squarely state that if something is commercially available—including under a licence—then it is immediately disqualified’ from fair use.¹²⁵ This view can be challenged, however, because such an assessment would essentially be a ‘one factor test’.¹²⁶

5.97 The Australian Copyright Council submitted that an ‘ordinary commercial price’ factor should be a fundamental part of any fair use exception. The Council considered that this factor is not subsumed by the fourth factor—‘the effect of the use upon the potential market for, or value of, the copyright material’—but rather, is complementary:

the former factor deals with the existing market and the latter deals with future markets. The former factor provides a concrete means of assessing the effect on the existing market and therefore provides an insight into what might be a ‘normal exploitation’ of the relevant copyright material.¹²⁷

5.98 Other stakeholders submitted that an ‘ordinary commercial price’ factor should not be included in the fair use exception.¹²⁸ The ALRC takes this view for a number of reasons.

5.99 First, it is unnecessary. This factor is related to, or possibly a ‘subset’¹²⁹ of, the fourth factor—concerning market effect. So, to the extent that it is relevant, it will be considered as part of a fairness determination.

5.100 A related consideration is that advances in digital technology are increasingly facilitating the licensing of low value uses. This has led to claims by collecting societies that a fair use exception ‘conflicts with a normal exploitation of the work’ and ‘unreasonably prejudices the legitimate interests of the rights holder’.¹³⁰ CAG Schools observed:

If these claims are accepted, fair use would have little if any role to play in a digital environment where a licence can be sought and granted with relative ease. Taken to its logical conclusion, this is an entirely circular argument: any use which a rights holder is prepared to licence would be *per se* ‘unfair’ if done without permission.¹³¹

5.101 Secondly, the US and other jurisdictions, which have adopted a fair use exception, do not expressly include this factor in their legislation.

5.102 Singapore is the only jurisdiction which includes an ‘ordinary commercial price’ factor in its open-ended fair dealing provision. The factor was added as part of amendments in 2004. When Singapore extended its fair dealing regime, a number of

124 AIPP, *Submission 564*; Copyright Agency/Viscopy, *Submission 287*.

125 AIPP, *Submission 564*.

126 See Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*.

127 Australian Copyright Council, *Submission 654*.

128 R Xavier, *Submission 816*; Intellectual Property Committee, Law Council of Australia, *Submission 765*.

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

130 Copyright Advisory Group—Schools, *Submission 707*.

131 *Ibid.* See also Universities Australia, *Submission 754*.

rights holder interests opposed the introduction of this factor.¹³² One commentator explained:

There is a view that the presence of this new factor weighs against the copyright owner in that it embodies an ‘implication that a copyright owner’s pricing and distribution decisions could somehow convert an infringement into a fair dealing’.¹³³

5.103 The Copyright Review Committee (Ireland) has recommended the inclusion of a factor referring to ‘the possibility of obtaining the work, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case’¹³⁴ in its fair use exception. However, the fair use exception recommended for Ireland is substantially different from that in the US,¹³⁵ involving the determination of fairness by reference to up to eight factors.

5.104 Thirdly, an ‘ordinary commercial price’ factor may not be appropriate in determining the fairness of a range of uses including, for example, ‘criticism or review’ and ‘parody or satire’.

5.105 Finally, while such a factor is said to be derived from case law on fair dealing, there is little such case law, compared with that concerning the other fairness factors.

Other factors?

5.106 Other factors that were suggested as desirable included the existing requirement for sufficient acknowledgement;¹³⁶ and ‘the non-financial impact of the use on the copyright owner’, such as damage to reputation or brand.¹³⁷

5.107 Whether sufficient acknowledgement was made can be considered in the context of the first fairness factor,¹³⁸ and an assessment of fairness could include consideration of damage to reputation or brand—although this is not traditionally considered when determining whether there has been infringement of copyright.

5.108 In any case, the ALRC recommends that the list of fairness factors should be non-exhaustive. Other relevant factors may be considered in a given case. For example, principles of justice, equity and perhaps acknowledgement of moral rights may also be relevant in determining fairness.

132 N Wee Loon and A Leck, ‘Protection of Intellectual Property Rights’ in TK Sood (ed) *Singapore Academy of Law Conference 2006: Developments in Singapore Law Between 2001 and 2005* (2006) 242, 249, citing submissions from the US-based International Intellectual Property Alliance (IIPA), the Copyright Licensing and Administration Society of Singapore Ltd, and a Singaporean law firm.

133 Ibid, 249, quoting from the IIPA’s submission.

134 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 94.

135 Ibid, 11.

136 APRA/AMCOS, *Submission 664*.

137 Cricket Australia, *Submission 700*. See also COMPPS, *Submission 634*.

138 In US jurisprudence, the propriety of a defendant’s conduct is considered in the context of the first fairness factor. Sufficient acknowledgement or attribution may favour a finding of fair use: *Williamson v Pearson Education, Inc*, Civ No 8240(AGS) (SDNY, 19 October 2001). Some stakeholders referred to the desirability of considering attribution in determining fairness: Pirate Party Australia, *Submission 689*.

5.109 While some stakeholders who opposed a fair use exception criticised the non-exhaustive nature of the list as exacerbating the subjectivity, vagueness and imprecision they considered inherent in the fair use concept,¹³⁹ others acknowledged that this would enable other relevant public policy factors to be taken into account.¹⁴⁰

Recommendation 5–2 The non-exhaustive list of fairness factors should be:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material;
- (c) the amount and substantiality of the part used; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

The illustrative purposes

5.110 The fair use exception should contain a non-exhaustive list of illustrative uses or purposes. The fair use exceptions in the US and other countries that have enacted fair use or extended, open-ended fair dealing exceptions, all include illustrative purposes or examples. The ALRC's recommended list of illustrative purposes would be specifically Australian, but has parallels to those listed in other jurisdictions' statutes.

5.111 The illustrative purposes in the US fair use exception are set out in the preamble to the *Copyright Act*. The preamble provides, in part:

the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.¹⁴¹

5.112 The US Supreme Court has said that:

The text employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given ... which thus provide only general guidance about the sorts of copying the courts and Congress most commonly found to be fair uses.¹⁴²

5.113 In *Harper & Row v Nation*, the US Supreme Court commented further on the function of the preamble:

News reporting is one of the examples enumerated in §107 to 'give some idea of the sort of activities the courts might regard as fair use under the circumstances'. This listing was not intended to be exhaustive, or to single out any particular use as presumptively a 'fair' use. The drafters resisted pressures from special interest

139 News Corp Australia, *Submission 746*; ACCESS Ministries, *Submission 596*.

140 Australian Copyright Council, *Submission 654*.

141 *Copyright Act 1976* (US) s 107.

142 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 577.

groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis. '[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence'.¹⁴³

5.114 The ALRC intends the illustrative purposes in an Australian fair use exception to serve this same function. The listed purposes are illustrative, not exhaustive. The fact that a particular use falls within one of the broader categories of 'illustrative purposes' will tend to favour a finding of fair use. But this does not necessarily mean the particular use is fair. It does not even create a presumption that the use is fair. A consideration of the fairness factors is crucial.

5.115 A number of stakeholders approved including a list of illustrative purposes in the fair use exception.¹⁴⁴ For these stakeholders, the illustrative purposes were seen to provide helpful guidance on the application of the provision¹⁴⁵ and to reduce uncertainty.¹⁴⁶ In the Discussion Paper, the ALRC proposed nine illustrative purposes.¹⁴⁷ Some stakeholders supported the content of this list,¹⁴⁸ or at least some of the illustrative purposes listed.¹⁴⁹

5.116 The ALRC's list of illustrative purposes includes purposes that are:

- currently the subject of purpose-based exceptions—for example, the existing fair dealing purposes; and
- not currently the subject of express unremunerated use exceptions in the *Copyright Act*—for example, quotation.

143 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 561.

144 For example, Universities Australia, *Submission 754*; Optus, *Submission 725*; ACCC, *Submission 658*; Communications Alliance, *Submission 652*; BSA, *Submission 598*; ADA and ALCC, *Submission 586*; K Bowrey, *Submission 554*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*; Grey Literature Strategies Research Project, *Submission 250*; Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Law Institute of Victoria, *Submission 198*; R Wright, *Submission 167*; M Rimmer, *Submission 122*.

145 Universities Australia, *Submission 754*; ACCC, *Submission 658*; ADA and ALCC, *Submission 586*; K Bowrey, *Submission 554*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*; National Library of Australia, *Submission 218*.

146 ACCC, *Submission 658*; Telstra Corporation Limited, *Submission 602*.

147 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 4–4. These were: (a) research or study; (b) criticism or review; (c) parody or satire; (d) reporting news; (e) non-consumptive; (f) private and domestic; (g) quotation; (h) education; and (i) public administration.

148 Intellectual Property Committee, Law Council of Australia, *Submission 765*; NSW Government and Art Gallery of NSW, *Submission 740*; Optus, *Submission 725*; CAMD, *Submission 719*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; EFA, *Submission 714*; National Library of Australia, *Submission 704*; Pirate Party Australia, *Submission 689*; William Angliss Institute, *Submission 614*; Telstra Corporation Limited, *Submission 602*; National Archives of Australia, *Submission 595*; K Bowrey, *Submission 554*.

149 iGEA, *Submission 741* (the existing fair dealing purposes); BSA, *Submission 598* (all but 'private and domestic').

5.117 Stakeholders supported this approach, particularly with respect to consolidating the existing fair dealing provisions into a more general fair use exception.¹⁵⁰ For example, the Law Council approved of a fair use model that ‘would include reference to the existing specific copyright exceptions which would then act as examples to courts of the types of activities that constitute fair use’.¹⁵¹

Concerns about certainty

5.118 Some stakeholders expressed concern about lack of certainty. Those who opposed the enactment of fair use in Australia criticised the proposed illustrative purposes and submitted that a non-exhaustive list does not promote certainty.¹⁵² Others suggested some ways in which more certainty could be obtained.¹⁵³

More detailed illustrative purposes

5.119 Some suggested that more detail should be included in the illustrative purposes.¹⁵⁴ For example, the ACCC submitted that more detailed illustrative purposes should be developed that

are able to reflect the value of ensuring the efficient operation of markets for copyright material and which encourage a careful consideration of relevant factors to ensure that copyright rights are not extended in a manner which creates monopoly characteristics in ancillary markets.¹⁵⁵

5.120 There were many suggestions for additional illustrative purposes:

- professional advice¹⁵⁶—specified as ‘the preparation of legal advice’,¹⁵⁷ ‘the giving of professional advice’,¹⁵⁸ and ‘providing or seeking professional advice’;¹⁵⁹

150 For example, Australian War Memorial, *Submission 720* (‘the ALRC’s proposed list of illustrative uses must be as clear and at least as encompassing as the current fair dealing exceptions’); Telstra Corporation Limited, *Submission 602*; BSA, *Submission 598*; Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Law Institute of Victoria, *Submission 198*; M Rimmer, *Submission 122*.

151 Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*.

152 Australian Film/TV Bodies, *Submission 739*; AFL, *Submission 717*; Cricket Australia, *Submission 700*. Other objections included, first, that the purposes are too broad: see Australian Film/TV Bodies, *Submission 739*; Australian Copyright Council, *Submission 654*; Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*; Screenrights, *Submission 646*; Motion Picture Association of America Inc, *Submission 573*. Secondly, it was suggested that the illustrative purposes lack a coherent policy basis: Australian Copyright Council, *Submission 654*. Thirdly, the new illustrative purposes are untested: APRA/AMCOS, *Submission 664*.

153 One suggestion was to draw upon the Israeli model, which empowers the relevant Minister to ‘make regulations prescribing conditions under which a use shall be deemed a fair use’: *Copyright Act 2007* (Israel) s 19(c). Some stakeholders suggested that the ALRC consider a similar mechanism so that more illustrative purposes could be added over time: Pirate Party Australia, *Submission 689*; Cyberspace Law and Policy Centre, *Submission 640*.

154 Telstra Corporation Limited, *Submission 602*; Communications Alliance, *Submission 652*. For example, Telstra submitted that the illustrative purposes ‘non-consumptive’ use and ‘public administration’ should ‘each be defined to provide guidance as to their scope’.

155 ACCC, *Submission 658*.

156 CSIRO, *Submission 774*; Telstra Corporation Limited, *Submission 602*.

- legal proceedings;¹⁶⁰
- amateur photographers and audiovisual makers' use of digital images where used in the context of a photographic competition or display, including where held within a club and open to public viewing;¹⁶¹
- transformative uses;¹⁶²
- 'system-level caching';¹⁶³
- specification of 'digital remedial processes' such as 'conversion or reformatting of records and data';¹⁶⁴
- use for studying and testing the operation of computer software,¹⁶⁵ that is, 'for public interest reasons such as making a back up copy, security testing, reverse engineering for making interoperable products and error correction';¹⁶⁶
- software preservation and archiving;¹⁶⁷
- uses for cultural heritage, cultural enrichment or similar purposes;¹⁶⁸
- the sharing of public collections, to allow galleries, libraries and museums to share works in their collection online;¹⁶⁹
- 'using unpublished works deposited in cultural institutions for over 50 years to enable digital preservation and public access online';¹⁷⁰
- 'education, science and research';¹⁷¹
- teaching, or research or study (including multiple copies for classroom use);¹⁷²
- public administration, including 'public use of copyright works held by the government';¹⁷³

157 Communications Alliance, *Submission 652*.

158 CSIRO, *Submission 774*. At least one submission used a narrower construction. See Intellectual Property Committee, Law Council of Australia, *Submission 765* ('professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney').

159 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

160 Telstra Corporation Limited, *Submission 602*. However, Telstra's preference was for this to be retained as a blanket exception. See also Communications Alliance, *Submission 653* ('the use of copying in legal proceedings').

161 Victorian Association of Photographic Societies Inc, *Submission 312*.

162 Internet Industry Association, *Submission 774*; EFA, *Submission 714*.

163 Communications Alliance, *Submission 652*.

164 National Archives of Australia, *Submission 595*.

165 Google, *Submission 600* (note that the introduction of an additional illustrative purpose in this regard was just one option proposed).

166 ADA and ALCC, *Submission 586*.

167 Play It Again International Research Team, *Submission 494*.

168 NFSA, *Submission 750*; National Archives of Australia, *Submission 595*.

169 NSW Government and Art Gallery of NSW, *Submission 740*; Museum Victoria, *Submission 522*.

170 Australian War Memorial, *Submission 720*.

171 M Rimmer, *Submission 550*.

172 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

173 M Rimmer, *Submission 550*.

- ‘other non-commercial uses, such as in the government or non-profit sectors’;¹⁷⁴
- uses for ‘disadvantaged groups, such as elderly and/or those with a disability’;¹⁷⁵
- ‘third-party uses on behalf of an end-user where the third-party use is facilitating an otherwise fair use by the end-user’;¹⁷⁶
- ‘lack of supply’;¹⁷⁷ and
- uses for the purpose of advertising the sale of an artwork.¹⁷⁸

Professional advice exceptions

5.121 A number of stakeholders called for an illustrative purpose referring to the giving of professional advice, expressed in differing ways.¹⁷⁹

5.122 The current provisions relating to the use of works and subject matter other than works in the context of professional advice, were described as ‘a mess’.¹⁸⁰ In 1998, the CLRC identified these inconsistencies between subject matter and modes of advice, for which it could see no basis, and recommended that the distinctions be removed.¹⁸¹ Similarly, in this Inquiry, the Law Council submitted that it is ‘not aware of any particular reason why subject matter should be treated more favourably than original works’.¹⁸²

5.123 Some stakeholders considered that listing professional advice—however described—as an illustrative purpose would ensure that the new fair use exception works as intended, in clarifying that a fair use for the purpose of professional advice does not infringe copyright.¹⁸³ Telstra submitted that it ‘seems inconsistent’ not to

174 EFA, *Submission 714*.

175 Vic’s Flicks, *Submission 301*. The latter—‘disability’—was expressed in a number of different ways in submissions. See, eg, R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716* (‘facilitating access to works for persons with a print disability’); Google, *Submission 600* (‘assistance for persons with a visual impairment’); National & State Libraries Australasia, *Submission 588* (‘provision for disabled users’); ADA and ALCC, *Submission 586* (‘uses to assist people with a disability’); M Rimmer, *Submission 581* (‘use by or for a person with a disability’).

176 Optus, *Submission 725*.

177 Museum Victoria, *Submission 522*.

178 Kay and Hughes, *Submission 631*.

179 CSIRO, *Submission 774* (professional advice); Intellectual Property Committee, Law Council of Australia, *Submission 765* (‘professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney’); R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716* (‘providing or seeking professional advice’); Communications Alliance, *Submission 652*; Telstra Corporation Limited, *Submission 602* (‘Professional Advice’). In the US, relevant cases have ‘tended to cluster around legal advice and the preparation of documents for litigation’: R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716* (citing *Tavory v NTP, Inc*, 495 F Supp 2d 531 (ED Va, 2007) and referring to the cases cited in P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537).

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

181 Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.28]–[4.29], [6.137].

182 Intellectual Property Committee, Law Council of Australia, *Submission 765*

183 *Ibid*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

include this as an illustrative purpose, given that the ALRC proposed a fair dealing exception for this purpose.¹⁸⁴

5.124 The ALRC recommends that ‘professional advice’ be specified as an illustrative purpose in a fair use exception or new fair dealing exception. The term ‘professional advice’ should be adopted, rather than other expressions which may confine the purpose to advice given by a legal practitioner, registered patent attorney or registered trade marks attorney. Further, the ALRC does not consider that the *Copyright Act* needs to specify whether the exception be for seeking, giving or providing of advice. This is for three reasons.

5.125 The use of the term ‘professional advice’ is broad in scope. This is appropriate, and broadly expressed. This addresses concerns that ‘there is no reason of principle why advice provided by other professional groups such as accountants and doctors should not be treated in a broadly similar way’, especially given that the user will, in any case, always have to demonstrate that the use was fair.¹⁸⁵

5.126 Stakeholders held a spectrum of views on this issue. Some stakeholders sought a specific exception with respect to ‘giving and seeking advice’ with inclusion as an illustrative purpose seen as a second best option.¹⁸⁶ The Law Council considered that ‘fair use is the appropriate standard rather than a blanket defence’.¹⁸⁷

5.127 The ALRC’s recommended approach will result in some narrowing of the current exceptions applying to professional advice in s 104(b) and (c) of the *Copyright Act* (in that a fairness determination will be required), but there will also be some broadening of the fair dealing exceptions in s 43(2), because the exception will not be confined to the ‘giving’ of professional advice.

The eleven illustrative purposes

5.128 The ALRC recommends eleven illustrative purposes. The rationale for including these illustrative purposes in the fair use exception is explained in a number of other chapters in this Report.¹⁸⁸

5.129 For present purposes, it is sufficient to note that:

- some of the illustrative purposes that were proposed in the Discussion Paper have been recast: ‘incidental or technical use’ replaces ‘non-consumptive’ use and ‘non-commercial private use’ replaces ‘private and domestic’ use;

184 Telstra Corporation Limited, *Submission 602*. See Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposals 7–3, 7–4.

185 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

186 Telstra Corporation Limited, *Submission 602*.

187 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

188 See Ch 9 (‘quotation’); Ch 10 (‘non-commercial private use’); Ch 11 (‘incidental or technical use’); Ch 12 (‘library or archive use’); Ch 14 (‘education’); Ch 15 (decision not to include ‘public administration’); and Ch 16 (‘access for people with disability’).

- the ALRC is not recommending the inclusion of an illustrative purpose for ‘public administration’, instead the ALRC recommends amendment, and enactment, of a number of specific exceptions; and
- three new illustrative purposes have been added since the Discussion Paper: ‘professional advice’, ‘library or archive use’ and ‘access for people with disability’.

5.130 With respect to arguments that there should be more detail in the description of each illustrative purpose, the ALRC notes that the existing purpose-based exceptions in the *Copyright Act*—the fair dealing exceptions—are cast at a similar level of generality. Relevant chapters in this Report contain further guidance in respect of particular illustrative purposes. The ALRC has responded to stakeholder input concerning previously proposed illustrative purposes, such as ‘non-consumptive’ use and ‘public administration’, which may not have been as easily understood as acceptable uses of copyright material.

5.131 The list includes some, but not all, of the purposes that may tend to favour a finding of fair use. It is important that the non-exhaustive nature of the list be well understood. In the ALRC’s view, the list of purposes is not so lengthy as to suggest that flexibility has been compromised.¹⁸⁹

5.132 Academics stated that the proposed list of illustrative purposes was ‘comprehensive and consistent with comparative law in other jurisdictions’¹⁹⁰ and ‘very much in the tradition of s 107 of the US *Copyright Act*: it tries to map the contours of fair use, without attempting to set its future boundaries’.¹⁹¹ They approved broadly of the illustrative purposes not currently the subject of exceptions, submitting that these were ‘broad enough to meet temporary expectations of kinds of fair use’¹⁹² but do not foreclose further common law development.¹⁹³

Recommendation 5–3 The non-exhaustive list of illustrative purposes should include the following:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;

189 See Australian Copyright Council, *Submission 654* (‘In our submission, a lengthy list of illustrative purposes compromises [the flexibility of a standards-based approach]’).

190 K Bowrey, *Submission 554*.

191 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

192 K Bowrey, *Submission 554*.

193 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

- (e) professional advice;
- (f) quotation;
- (g) non-commercial private use;
- (h) incidental or technical use;
- (i) library or archive use;
- (j) education; and
- (k) access for people with disability.

Guidance to counter uncertainty and expense

5.133 While it could be said that ‘the uncertainty associated with fair use has been greatly overstated’,¹⁹⁴ to counter concerns about uncertainty and expense, stakeholders considered there should be sufficient guidance on the application of a fair use exception.

5.134 The fair use exception itself contains some guidance for users of copyright material and the courts based on the fairness factors and illustrative purposes. Further guidance may be found in:

- existing Australian case law;
- other relevant jurisdictions’ case law; and
- any industry guidelines or codes of practice that are developed.

Relevance of existing Australian case law

5.135 If a new fair use exception is enacted, existing Australian case law, particularly that pertaining to fair dealing, would be of relevance and provide guidance to the courts. A number of stakeholders shared this view.¹⁹⁵ The Law Institute of Victoria, for example, submitted that, given the ‘similarity of the US fair use factors with the Australian factors for determining fair dealing, our jurisprudence on when a dealing is fair may also be of assistance’.¹⁹⁶

5.136 While drawing on existing authority, a new fair use exception should not be seen as merely codifying the state of the law:

An approach that sought to shackle a fair use defence to the pre-fair-use state of the law would be regrettable, given the manifold problems we and others have

194 Copyright Advisory Group—Schools, *Submission 707*. See also Communications Alliance, *Submission 652*.

195 For example, NSW Government and Art Gallery of NSW, *Submission 740*; ACCC, *Submission 658*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Yahoo!7, *Submission 276*; Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria, *Submission 198*.

196 Law Institute of Victoria, *Submission 198*.

identified with both the current drafting of the defences and their interpretation by Anglo-Australian courts.¹⁹⁷

5.137 Some were concerned that the enactment of fair use ‘may result in arguments that the current fair dealing exceptions have been relaxed’.¹⁹⁸ SBS, Commercial Radio Australia and the ABC expressed concern that any proposal to include the fair dealing exceptions for the purposes of reporting news, criticism or review, and parody or satire within a fair use provision would mean that these exceptions would be ‘open to re-litigation’ and their operation may be restricted.¹⁹⁹

5.138 The ALRC considers these concerns to be overstated. First, any review of Australian fair dealing jurisprudence shows that such litigation occurs from ‘time to time’,²⁰⁰ but is relatively scarce,²⁰¹ with some of the exceptions, such as those concerning parody or satire, never having been litigated at all. The ALRC is not convinced that the ‘floodgates’ will be opened and uncertainty will ensue. Secondly, concerns that the scope of the existing fair dealing exceptions may be restricted seem to be predicated on a misunderstanding of the role that a fairness assessment already plays in determining the application of the existing fair dealing exceptions.

Relevance of other jurisdictions’ case law

5.139 It is well-established that foreign case law may be used by Australian courts, to the extent that the reasoning of such decisions is persuasive.²⁰² If fair use is enacted, the ALRC would expect that Australian courts would look to US case law, in particular, as one source of interpretative guidance, but would not be bound by such decisions.

5.140 A number of stakeholders submitted that it would be helpful for Australian courts to draw upon US jurisprudence and, to a lesser extent, other countries’ jurisprudence.²⁰³ The Law Council submitted:

as a relatively small country, the amount of litigation in relation to copyright should also be relatively small. Drawing upon the jurisprudence of the United States would

197 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*. See also M Handler and D Rolph, ‘“A Real Pea Souper”: *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’ (2003) 27 *Melbourne University Law Review* 381.

198 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

199 SBS and others, *Submission 295*. See also Commercial Radio Australia, *Submission 864*.

200 Telstra Corporation Limited, *Submission 602*.

201 Intellectual Property Committee, Law Council of Australia, *Submission 765*; BSA, *Submission 598*.

202 For example, in *Tabet v Gett* (2010) 240 CLR 537, a negligence case, the High Court referred to case law in England, Canada, the United States, France, the Netherlands, Italy, Portugal, Spain, Germany, Austria, Greece, Norway, Estonia and Lithuania. See also *Hancock v Nominal Defendant* [2002] 1 Qd R 578, another negligence case, in which the Queensland Court of Appeal referred to case law from England, Canada, New Zealand, South Africa, Scotland, the United States and Ireland. Byrne J alone cited more than 60 US cases.

203 For example, Intellectual Property Committee, Law Council of Australia, *Submission 765*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; Pirate Party Australia, *Submission 689*; Telstra Corporation Limited, *Submission 602*; ADA and ALCC, *Submission 586*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Law Council of Australia, *Submission 263*; Universities Australia, *Submission 246*; Google, *Submission 217*.

permit Australia to take advantage of the intellectual and financial investment in the creation of that jurisprudence over many years without the disadvantage of having to expend significant judicial resources in the development of a completely stand alone Australian view of fair use.²⁰⁴

5.141 However, some stakeholders objected to the use of other jurisdictions' case law in this way. In their view:

- it would be a difficult task, given that US jurisprudence reflects different legal frameworks than those found in Australia;²⁰⁵ and
- the scope and applicability of the guidance will be limited as 'a fair use exception has been introduced in only a small handful of countries throughout the world'.²⁰⁶

5.142 Specific differences identified included that the US has:

- a Bill of Rights, which expressly protects freedom of speech;²⁰⁷
- express articulation in the *US Constitution* of the purpose of copyright;²⁰⁸ and
- no express moral rights protection akin to that in Australia.²⁰⁹

5.143 The Motion Picture Association of America (MPAA) submitted that, 'whether, and to what extent, the Australian courts, in applying a new "fair use-like" provision, should be guided by US precedent' was 'the inescapable question'.²¹⁰ Other stakeholders expressed concern over what they referred to the 'transplantation' of US law,²¹¹ and future Australian 'dependence' on US law.²¹²

5.144 Such comments misunderstand the jurisprudential implications of introducing a fair use exception. Australian courts will be able to draw upon approaches taken in other relevant jurisdictions, primarily that of the US, but would not, in any way, be bound by them.²¹³ Some stakeholders understood this. Google submitted:

204 Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*.

205 For example, Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; International Publishers Association, *Submission 670*; Screenrights, *Submission 646*; AMPAL, *Submission 557*.

206 Cricket Australia, *Submission 700*. See also Association of American Publishers, *Submission 611*.

207 Free TV Australia, *Submission 865*; Foxtel, *Submission 748*; Australian Film/TV Bodies, *Submission 739*; APRA/AMCOS, *Submission 664*; Flemish Book Publishers Association, *Submission 683*; International Publishers Association, *Submission 670*; IFFRO, *Submission 481*; Screenrights, *Submission 215*; Arts Law Centre of Australia, *Submission 171*.

208 News Corp Australia, *Submission 746*; Music Council of Australia, *Submission 647*; Australian Copyright Council, *Submission 654*; ARIA, *Submission 241*; Australian Publishers Association, *Submission 225*.

209 Arts Law Centre of Australia, *Submission 706*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; AMPAL, *Submission 557*.

210 Motion Picture Association of America Inc, *Submission 573*; Motion Picture Association of America Inc, *Submission 197*.

211 Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*.

212 IFFRO, *Submission 481*.

213 See also E Hudson, 'Implementing Fair Use in Copyright Law: Lessons From Australia' (2013) 25 *Intellectual Property Journal* 201, 218: 'Utilization of US case law does not mean Australia would be tethering any domestic fair use exception to approaches in the US, or that judges would be required to

This is not to say, of course, that US or other foreign jurisprudence would be exported in its entirety to Australia; but rather that Australian judges would not necessarily be starting with a blank slate when deciding fair use cases.²¹⁴

5.145 Australia would not necessarily be adopting the outcome of every US court case:

Australian courts will no doubt continue to benefit from seeing how their American counterparts have dealt with similar questions in the past. However, United States jurisprudence will only persuade to the extent that it is persuasive.²¹⁵

5.146 Some rights holders took the view that this would mean there would be ‘uncertainty’ because ‘[t]he law of Australia would need to make that decision on what is fair or not, regardless [of] what another jurisdiction has proclaimed’.²¹⁶

5.147 Australian courts look to, and at times draw from, precedent developed in other jurisdictions where they consider it to be helpful.²¹⁷ As one stakeholder observed:

Federal Court and High Court justices routinely consider leading United States cases in the process of deciding Australian law according to Australian standards. In areas where standards of fairness are relatively similar, we would expect divergence to be minimal. ... However, it would not be surprising if Australian courts diverged from American ones in cases that pitted moral rights against freedom of expression.²¹⁸

5.148 The Law Council submitted that it is ‘imperative’ that courts and practitioners be given ‘strong encouragement’ to look to how fair use is applied in other jurisdictions, particularly in the US.²¹⁹ Some submitted that it would be helpful for this to be specified,²²⁰ possibly by an express statement in the relevant Explanatory Memorandum.²²¹

5.149 In the Discussion Paper, the ALRC expressed its view that an express statement about the extent to which US or other countries’ jurisprudence should be taken into

adopt statements from US cases uncritically and without considering local conditions. Instead, it would give judges (and users) a bank of authority to provide greater rule-like guidance to the fair use standard’.

214 Google, *Submission 217*.

215 G Hinze, P Jaszi and M Sag, *Submission 483*.

216 ALPSP, *Submission 562*. See also Free TV Australia, *Submission 865*; International Publishers Association, *Submission 670*.

217 Examples abound in the copyright context. See E Hudson, ‘Implementing Fair Use in Copyright Law: Lessons From Australia’ (2013) 25 *Intellectual Property Journal* 201, 218 (‘numerous English cases were cited in relation to fair dealing by Beaumont J in *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99 and Conti J in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235’ and referring to use of a US case in an Australian fair dealing case: ‘Bennett J using the language of “transformative use” to describe aspects of a news summary service’ in *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) FCR 109); G Hinze, P Jaszi and M Sag, *Submission 483* (referring to the use of leading US cases in *Roadshow Films Pty Ltd v iiNet Ltd* [2012] 16 HCA and *Ice TV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458).

218 G Hinze, P Jaszi and M Sag, *Submission 483*.

219 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

220 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*; Universities Australia, *Submission 246*.

221 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; ADA and ALCC, *Submission 213*.

account by Australian courts is unnecessary. While some submissions agreed with this approach,²²² others had concerns.

5.150 Some stakeholders took the view that an express statement in extrinsic materials would:

- help to direct judges to the extensive fair use jurisprudence that has been developed in the US;
- provide legal advisors with ‘a greater degree of comfort’ when advising clients in the absence of Australian case law directly on point; and
- help clarify, referring to ss 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth), that the purpose of introducing fair use is to afford a flexible, open-ended defence focusing on fairness and is ‘not obscure, or bound up with intractable questions of the overarching purpose of copyright law’.²²³

5.151 One possible model is the Explanatory Memorandum to the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth), which expressly stated that some concepts introduced by that Act into patent law were adopted from and intended to be interpreted in accordance with UK or US developments.²²⁴

5.152 The ALRC considers that it would be helpful for the Explanatory Memorandum to contain an express statement that the scope of the Australian provision can be informed by US and related foreign law. This would assist in countering concerns about uncertainty.

Industry codes of practice and guidelines

5.153 Another way in which some certainty could be sought in a fair use regime is by the development of industry guidelines and codes of practice.²²⁵ Some stakeholders, including the MPAA, supported this idea.²²⁶ Google observed that the *Documentary Filmmakers’ Statement of Best Practices in Fair Use*, which has been developed in the US, has provided enough certainty for major insurance companies to accept the statement as a basis for errors and omissions insurance for fair use claims.²²⁷

222 Pirate Party Australia, *Submission 689*.

223 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

224 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

225 There is precedent for such use in the US, although views diverge as to the assistance such documents provide: J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights; P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011); K Crews, ‘The Law of Fair Use and the Illusion of Fair-Use Guidelines’ (2001) 62 *Ohio State Law Journal* 599.

226 For example, Copyright Advisory Group—Schools, *Submission 861*; NSW Government and Art Gallery of NSW, *Submission 740*; Copyright Advisory Group—TAFE, *Submission 708*; Copyright Advisory Group—Schools, *Submission 707*; Google, *Submission 600*; National & State Libraries Australasia, *Submission 588*; ADA and ALCC, *Submission 586*; Motion Picture Association of America Inc, *Submission 573*; G Hinze, P Jaszi and M Sag, *Submission 483*.

227 Google, *Submission 600*.

5.154 Some stakeholders put the opposite view: that industry guidelines and codes of practice cannot play a useful role in creating additional certainty about the operation of fair use. In their view:

- the need for guidelines is evidence of the complexity and uncertainty inherent in a fair use exception;²²⁸
- protocols²²⁹ and guidelines may not be useful, given that they are not binding²³⁰ or enforceable,²³¹ particularly when parties are not located or regulated in Australia;²³²
- the negotiation of such guidelines in Australia would be difficult,²³³ with some sports bodies noting their own experience in this regard,²³⁴ a number of stakeholders noting the fact that negotiations between copyright owners and carriage service providers had not yet resulted in an industry code of practice in respect of infringement on their networks,²³⁵ and some submitting that it is unclear to what extent parties would be able to agree on the application of fair use,²³⁶ given their view that ‘fair use allows very substantial latitude for disagreement’,²³⁷ and
- experience in the US suggests that attempts to agree on guidelines to facilitate certainty about the application of fair use have been of limited success.²³⁸

5.155 However, some stakeholders who were opposed to the enactment of fair use in Australia, nevertheless saw some role for codes to play in the copyright context,²³⁹ including with respect to fair use.²⁴⁰

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- 228 Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*; COMPPS, *Submission 634*.
- 229 A number of stakeholders, however, expressed concerns about protocols or guidelines developed by users without rights holders. See ARIA, *Submission 731*; Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*; Cricket Australia, *Submission 700*.
- 230 AFL, *Submission 717*; COMPPS, *Submission 634*.
- 231 AFL, *Submission 717*; Screenrights, *Submission 646*.
- 232 Cricket Australia, *Submission 700*.
- 233 Free TV Australia, *Submission 865*; Copyright Agency, *Submission 727*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; Screenrights, *Submission 646*; COMPPS, *Submission 634*.
- 234 AFL, *Submission 717* (‘it is the AFL’s experience that the introduction and implementation of industry guidelines to negotiate the use of content is a difficult process and the results can be unsatisfactory ... Experience shows there is little appetite by media companies to agree to restrictions in this area’); Cricket Australia, *Submission 700* (‘In Cricket Australia’s experience, binding and meaningful industry codes are extremely difficult, time consuming and costly to negotiate and implement’).
- 235 Copyright Agency, *Submission 727*; APRA/AMCOS, *Submission 664*; Screenrights, *Submission 646*.
- 236 Free TV Australia, *Submission 865*; Copyright Agency, *Submission 727*.
- 237 Free TV Australia, *Submission 865*.
- 238 iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*.
- 239 Copyright Agency, *Submission 727* (‘we do think there is scope for industry guidelines on the operation of section 200AB that would increase its usefulness for the cultural sector’); NAVA, *Submission 655* (identifying the development of a copyright code of conduct to guide users in best practices as one way to protect creators’ rights).
- 240 Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*; Motion Picture Association of America Inc, *Submission 573*.

5.156 Further, submissions from two American entities expressed the view that guidelines can play a positive role with respect to fair use.²⁴¹ For example, the Kernochan Center for Law and Media and the Arts within the Columbia Law School submitted that ‘guidelines can be useful, provided they are developed with input from rightsholders and users, are reasonably clear, and not unduly rigid’.²⁴² In its view, the development of such guidelines was ‘a worthwhile goal’, and noted that ‘recent developments indicate that it is possible to arrive at multilateral agreements concerning the use of copyrighted works’.²⁴³

5.157 There were differing views about the form such guidelines or codes should take. APRA/AMCOS submitted that they ‘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’.²⁴⁴ However, some sports bodies submitted that negotiating binding industry codes can be ‘extremely difficult’, time consuming,²⁴⁵ and that the results can be unsatisfactory.²⁴⁶ The AFL submitted that:

The ‘compromises’ reached as part of industry arrangements are often a function of bargaining power, timing and political pressure, rather than an appropriate balancing of rights.²⁴⁷

5.158 Some US-based copyright academics observed that:

The United States experience under the *Copyright Act* of 1976 indicates voluntary guidance documents can be a means by which to achieve greater levels of certainty, and provide predictability and normative guidance to users.²⁴⁸

5.159 The ALRC considers that it is best left to the market to develop relevant guidelines as industry participants consider necessary.²⁴⁹ This aligns with a number of the ALRC’s recommendations for reform, which are premised on the value of market-based, deregulatory solutions.

5.160 Many stakeholders have already reached agreed understandings or developed guidelines in respect of the use of copyright material in view of certain exceptions. For example, National and State Libraries Australasia submitted that it has been developing standard practices and industry guidelines ‘for several years’,²⁵⁰ and Google observed

241 Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*; Motion Picture Association of America Inc, *Submission 573*.

242 Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*.

243 Ibid, citing the activities of the Section 108 Study Group in the US.

244 APRA/AMCOS, *Submission 664*. See also R Xavier, *Submission 531* (‘Industry codes may be appropriate if genuinely negotiated among all affected parties, or of negotiated with government for self-regulation to benefit third parties’); M Aronson, *Submission 317*.

245 Cricket Australia, *Submission 700*.

246 AFL, *Submission 717*.

247 Ibid.

248 G Hinze, P Jaszi and M Sag, *Submission 483* (noting, however, that negotiated guidelines often fail).

249 For example, the ADA and ALCC stated: ‘Our members, such as universities and libraries, have indicated that they would be supportive of codes of best practice that would provide some clarity and certainty to day to day operations in this area’: ADA and ALCC, *Submission 586*. See also Ch 3 in relation to the commitment of the education sector to develop guidelines and codes of practice to inform the use of educational material.

250 National & State Libraries Australasia, *Submission 588*.

that guidance was developed on the operation of s 200AB after the commencement of that provision.²⁵¹ Free TV Australia submitted that:

In the areas where broadcasters rely on the fair dealing provisions there is a strong and well-established understanding between various stakeholders as to the balance that the current system provides between the interests of copyright owners and users.²⁵²

Relationship with existing exceptions

5.161 If Australia adopts the new fair use exception, then it is critical to determine the relationship with exceptions currently in the *Copyright Act*. It has been said that the issue of how fair use would fit with the existing exceptions and statutory licences was considered ‘very little’ during the earlier debates.²⁵³

5.162 One rationale for retaining specific exceptions is a desire to retain certainty, which can reduce transaction costs, although care should be taken not to create problems of statutory interpretation where an illustrative purpose and a specific exception may seem to overlap.²⁵⁴ The merits of retaining particular specific exceptions in certain areas are detailed in other chapters.²⁵⁵

5.163 Some stakeholders opposed to fair use generally, also opposed the repeal of certain exceptions.²⁵⁶ However, others took the view that, if fair use were enacted, the existing fair dealing exceptions,²⁵⁷ or other specific exceptions such as s 200AB,²⁵⁸ should be repealed.

5.164 ARIA observed that, in some cases, exceptions in Australian law are more generous than those found in US law.²⁵⁹ In this context, the Australian Copyright Council stated:

If the ALRC’s thesis is that flexibility will make exceptions to copyright more appropriate for the digital economy, then this flexibility should clearly apply in both directions. That is, while a flexible standard may be broader than existing exceptions, it may also be narrower in some instances.²⁶⁰

251 Google, *Submission 600*.

252 Free TV Australia, *Submission 865*.

253 M Wyburn, ‘Higher Education and Fair Use: A Wider Copyright Defence in the Face of the Australia—United States Free Trade Agreement Changes’ (2006) 17 *Australian Intellectual Property Journal* 181, 208.

254 E Hudson, ‘Implementing Fair Use in Copyright Law: Lessons From Australia’ (2013) 25 *Intellectual Property Journal* 201, 226.

255 See Ch 12 (‘Libraries and Archives’) and Ch 15 (‘Government Use’).

256 For example, Australian Film/TV Bodies, *Submission 739*; Hillsong, *Submission 671* (‘the suggested repealing of many of the provisions is an overreaction and will create more uncertainty around the law than currently exists’); Screenrights, *Submission 646*; Print Music Publishers Group, *Submission 627*.

257 For example, Cricket Australia, *Submission 700*; Australian Copyright Council, *Submission 654*. However, others were opposed and submitted that the fair dealing exceptions should be retained alongside any fair use exception: Free TV Australia, *Submission 865*.

258 Australian Copyright Council, *Submission 654*.

259 ARIA, *Submission 241*.

260 Australian Copyright Council, *Submission 654*.

5.165 The ALRC considers that it is preferable to introduce a model that replaces many of the existing exceptions, particularly where it is anticipated that these existing excepted uses would be covered by the new fair use exception. Repeal of specific exceptions is proposed, in part, in the expectation that most uses now covered would remain permitted under a developing Australian fair use law.

5.166 The ALRC considers that its approach would reduce the length and detail of the *Copyright Act* and should assist in mitigating statutory interpretation problems.²⁶¹ Some stakeholders agreed.²⁶² For example, Communications Alliance submitted that ‘it would be confusing and unnecessary to have two separate parts of the *Copyright Act* providing exceptions to copyright’.²⁶³ Another stakeholder expressed concern about a ‘hybrid’ approach,²⁶⁴ in which fair use is merely added to the existing suite of specific exceptions:

With so many detailed exceptions, would it be anticipated that these be the primary focus for judges and users, with fair use as an occasional back-up? Or would fair use have more of a meaningful role? We support the emergence of fair use as the predominant exception in Australia and are concerned that excessive doubling up between fair use and other exceptions might cause confusion about the interaction between different provisions, and only serve to muddy the signals from government as to the role for fair use.²⁶⁵

5.167 It was also suggested that problems of statutory interpretation might be avoided through the use of a ‘no-limitation’ provision—‘a provision stating that fair use does not limit, and is not limited by, any other exception’.²⁶⁶

Repeal of the existing fair dealing and professional advice exceptions

5.168 The ALRC recommends the repeal of the existing fair dealing exceptions and the professional advice exceptions in ss 104(b) and (c) and the application of either the fair use exception, or the new fair dealing exception, if fair use is not enacted. The ALRC considers the fair use exception should be applied when determining whether a use for one of the existing fair dealing purposes, and ‘professional advice’ more broadly, infringes copyright.

261 See the fourth framing principle in Ch 2: ‘providing rules that are flexible, clear and adaptive to new technologies’.

262 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; Communications Alliance, *Submission 653*; R Xavier, *Submission 531*.

263 Communications Alliance, *Submission 653*.

264 The ABC favoured a hybrid model: ‘the ABC considers there may be some benefit in a hybrid model. That is, a model where specific fair dealing and free exceptions are articulated, but also where there is a residual open ended exception for developing uses of copyright material where the use does not conflict with the normal exploitation of the material and does not unreasonably prejudice the legitimate interests of the copyright owner. This would allow new fair dealing and free use exceptions to develop in the future’. ABC, *Submission 210*.

265 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

266 R Xavier, *Submission 531*.

Recommendation 5–4 The *Copyright Act* should be amended to repeal the following exceptions:

- (a) ss 40, 103C—fair dealing for research or study;
- (b) ss 41, 103A—fair dealing for criticism or review;
- (c) ss 41A, 103AA—fair dealing for parody or satire;
- (d) ss 42, 103B—fair dealing for reporting news;
- (e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and
- (f) ss 104(b) and (c)—professional advice exceptions.

The fair use or new fair dealing exception should be applied when determining whether one of these uses infringes copyright.

5.169 Elsewhere, this Report contains recommendations to repeal a range of specific exceptions, if fair use is enacted. The exceptions are as follows:

- in Chapter 10 ('Private Use and Social Use'): ss 47J, 109A, 110AA, 111;
- in Chapter 11 ('Incidental or Technical Use and Data and Text Mining'): ss 43A, 111A, 43B, 111B, 200AAA;
- in Chapter 12 ('Libraries and Archives'): ss 51A, 51B, 110B, 110BA, 112AA; and
- in Chapter 14 ('Education'): ss 28, 44, 200, 200AAA, 200AB.

5.170 On further review by the Australian Government, there may be other exceptions, including in other statutes,²⁶⁷ which should also be repealed, if fair use is enacted.²⁶⁸

²⁶⁷ One submission suggested *Patents Act 1990* (Cth) s 226: R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

²⁶⁸ Some submissions gave considerable thought to which exceptions could be repealed if fair use is enacted, and which could be retained. See *Ibid* (revised lists including their rationale); R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278* (earlier lists).