

# 10. Transformative Use and Quotation

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## Summary

10.1 The Terms of Reference ask the ALRC to consider whether new exceptions under the *Copyright Act 1968* (Cth) should be introduced to allow ‘transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit’. This chapter considers whether there should be a new exception specifically to allow ‘transformative’ use of copyright materials, and discusses the possible scope and rationales for such an exception.

10.2 The ALRC concludes that transformative use of copyright material should be considered under the fair use exception proposed in Chapter 4, rather than under a new specific exception, in determining whether copyright is infringed. The proposed fair use exception can be expected to allow individuals to use copyright materials more freely in some transformative uses.

10.3 Relying on a fair use exception to deal with uses that may be characterised as transformative, rather than introducing a specific exception, is preferable in view of the difficulties involved in framing such an exception. These difficulties include defining whether a use is transformative, and determining the extent to which commercial uses of copyright materials should be covered. For similar reasons, the ALRC does not propose that any new specific transformative use exception should be introduced, even if a fair use exception is not.

10.4 The chapter also considers suggestions that the *Copyright Act* should provide a specific exception for quotation of copyright materials. The ALRC concludes that the use of copyright material for the purposes of quotation should also be considered under the fair use exception, rather than under a specific exception. Further, ‘quotation’ should be one of the illustrative purposes listed in the fair use exception.

10.5 If fair use is not enacted, the ALRC proposes that the *Copyright Act* should be amended to provide for a new exception for quotation. The Act should provide that in determining whether a dealing for quotation is fair, regard should be given to the fairness factors.

### **Defining ‘transformative’ use**

10.6 In this chapter, the term ‘transformative’ is used generally to refer to uses of pre-existing works to create something new, that is not merely a substitute for the pre-existing work. Works that are considered transformative include those described as ‘sampling’, ‘mashups’ or ‘remixes’.

10.7 Sampling is the act of taking a part, or sample, of a work and reusing it in a different work. The concept is most well-known in relation to music, where samples of one or more sound recordings are reused in a different composition.<sup>1</sup>

10.8 A mashup is a composite work comprising samples of other works. In music, a mashup is a song created by blending two or more songs, usually by overlaying the vocal track of one song onto the music track of another.<sup>2</sup> Remixes are generally a combination of altered sound recordings of musical works.<sup>3</sup> For example:

- *The Grey Album* by Danger Mouse, is a mashup remixing music and vocals from Jay Z’s *The Black Album* and the self-titled *The Beatles* album, known as ‘The White Album’.
- *Somebodies: A YouTube Orchestra*, created by Australian artist Gotye, samples and remixes audio-visual material, combining YouTube covers and parodies of the hit single *Somebody I Used to Know*.<sup>4</sup>

10.9 Many other instances of sampling, mashups and remixes of copyright material can be found on the internet, including musical compositions, new films, art works and fan fiction.<sup>5</sup>

10.10 More broadly, transformative use can also refer to some appropriation-based artistic practices, including collage, where images or object are ‘borrowed’ and recontextualised. Examples of appropriation art include Jeff Koons’ sculpture, *String of*

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1     *The Macquarie Dictionary Online*.

2     *The Macquarie Dictionary Online*.

3     See *The Macquarie Dictionary Online*; APRA/AMCOS, *Submission 247*.

4     ADA and ALCC, *Submission 213*.

5     See examples cited in *Ibid*.

*Puppies*,<sup>6</sup> and Shepard Fairey's poster of Barack Obama ('Hope'), which were both based on photographs taken by others.

### Transformative use and fair use

10.11 United States fair use doctrine, as discussed in Chapter 4, permits limited use of copyright material without acquiring permission from the rights holders. The first of the fairness factors—both in the US fair use exception and the fair use exception proposed by the ALRC—is the 'purpose and character of the use'. In US law, this essentially concerns whether the use is transformative. On some analyses, whether a use is transformative is the key question in US fair use doctrine.

10.12 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.<sup>7</sup>

10.13 This transformative use doctrine was adopted by the US Supreme Court in 1994, in *Campbell v Acuff-Rose*, and may now be 'the prevailing view in fair use case law'.<sup>8</sup> 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.<sup>9</sup>

10.14 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

<sup>6</sup> See *Rogers v Koons*, 960 F 2d 301 (2nd Cir, 1992), in which the US Court of Appeals found Koons liable for copyright infringement.

<sup>7</sup> P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105, 1111.

<sup>8</sup> N Weinstock Netanel, 'Making Sense of Fair Use' (2011) 15 *Lewis and Clark Law Review* 715, 746.

<sup>9</sup> *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579 (citations omitted).

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.<sup>10</sup>

10.15 Other commentators, though noting this trend, find the results less clear. Ginsburg and Gorman have written that under the first fair use factor,

the courts have indeed given great weight to the transformative aspects of an otherwise infringing work, but the decisions do not form an altogether coherent pattern. Moreover, contradictions have come to riddle the assessment of whether a work is transformative.<sup>11</sup>

10.16 William Patry states that finding a use is ‘productive’ or ‘transformative’ is not ‘essential for a fair use determination, nor is it necessarily the most important factor. The key issue in every case is whether the use is beneficial to society.’<sup>12</sup>

### **Transformative purpose**

10.17 United States copyright academic Professor Pamela Samuelson has distinguished US fair use cases concerning transformative uses as falling into three categories:<sup>13</sup>

- transformative—creating new works that ‘draw upon pre-existing works and transform expression from them in creating new works that criticize, comment upon, or offer new insights about those works and the social significance of others’ expressions’, including parody and satire;<sup>14</sup>
- productive—for example, quoting from an author’s writing in a critical biography or taking photographs of sculptures on which an author will be writing a commentary,<sup>15</sup> and
- orthogonal—using copyright material in ways different in purpose from the original, for example, copying a photograph in order to generate or report controversy about an event, or copying a book in connection with litigation concerning the author.<sup>16</sup>

10.18 These ‘productive’ and ‘orthogonal’ uses, in Samuelson’s taxonomy, appear to concern uses that have a transformative purpose. Ginsburg and Gorman state that

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

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

12 W Patry, *Patry on Fair Use* (2012), 115.

13 P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537, 2544; P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011), Kindle locations 553–555.

14 P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537, 2548–2549.

15 In Australia, some such uses may be covered by the fair dealing exceptions, eg, fair dealing for criticism or review: *Copyright Act 1968* (Cth) s 41.

16 In Australia, some such uses may be covered by the fair dealing for reporting news and judicial proceedings exceptions: *Ibid* s 42, 43.

‘recent cases evidence a drift from “transformative work” to “transformative purpose”; in the latter instance, copying of an entire work, without creating a new work, may be excused if the court perceives a sufficient public benefit in the appropriation’.<sup>17</sup>

10.19 Some important transformative purpose uses of copyright material are considered in the context of ‘non-consumptive’ uses, in Chapter 8. The two concepts overlap. Many non-consumptive uses may also have a transformative purpose. However, some transformative uses that have been found to be fair in the US courts do not appear to be ‘non-consumptive’, for example, using digital copies of books to facilitate access for print-disabled persons.<sup>18</sup>

10.20 Another instructive example of a transformative but consumptive use of copyright material may be displaying ‘thumbnail’ images of copyright photographs in search engine results.<sup>19</sup> In 2007, a US District Court considered this use in *Perfect 10 v Amazon*, and held that Google’s use of thumbnails was ‘highly transformative’:

Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. ... [A] search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.<sup>20</sup>

10.21 That Google incorporated entire images into its search engine results did not, the Court said, diminish the transformative nature of the use. The Court concluded that ‘the significantly transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s superseding and commercial uses of the thumbnails in this case’.<sup>21</sup>

10.22 As under US fair use doctrine, some broader concept of transformative use can be expected to emerge from the application of the fairness factors under the ALRC’s proposed fair use exception. Whether Australian courts should follow the recent trend in US case law to put transformativeness at the heart of fair use is an important question, on which the ALRC hopes to receive further submissions.

10.23 This chapter considers the merits of a stand-alone exception for transformative use outside fair use. The ALRC concludes that there should not be a stand-alone exception that does not require consideration of the fairness factors.

## Australian law

10.24 Depending on the facts of any particular case, existing exceptions may apply to some transformative uses. Most obviously, the *Copyright Act* provides that fair dealing

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

18 *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012).

19 *Perfect 10, Inc v Amazon.com, Inc*, 508 F 3d 1146 (9th Cir, 2007).

20 Ibid, [11].

21 Ibid, [12].

for the purposes of criticism or review;<sup>22</sup> and parody or satire,<sup>23</sup> do not constitute an infringement of copyright.

10.25 However, not all uses that might be classed as transformative will be parody, satirical or critical. Sampling, mashups or remixes will not usually fall within the scope of these exceptions and such uses will constitute infringement when a substantial part of the work or other copyright subject matter is used.

10.26 In *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (the Kookaburra case), for example, EMI's recordings of the Men at Work song 'Down Under' were found to have infringed the copyright in the song 'Kookaburra Sits in the Old Gum Tree'.<sup>24</sup>

10.27 The Kookaburra case confirmed existing law that, in order to establish infringement of copyright in a musical work, it must be shown that a substantial part of it has been copied. Determining what is substantial in this context depends on whether what is reproduced is a 'substantial, vital and essential part of the original'.<sup>25</sup>

10.28 Australian law may not be as clear in articulating how the notion of a 'substantial part' will apply to the sampling of sound recordings. In particular, there are concerns that courts may follow approaches in the US,<sup>26</sup> which suggest that any copying of a sound recording may amount to an infringement of copyright.<sup>27</sup>

10.29 Professor Kathy Bowrey observed that, while the Australian *Copyright Act* arguably lends itself to a similar narrow interpretation, the High Court of Australia has suggested a narrow and legalistic approach would lead to the over-protection of subject-matter other than works—including sound recordings.<sup>28</sup> The High Court, in considering the appropriate scope of copyright protection of a television broadcast, reaffirmed the importance of keeping separate the concepts of substantial part and fair dealing. This means that copying does not constitute an infringement, and the defences of fair dealing do not come into operation, unless a substantial part is copied.<sup>29</sup>

10.30 Finally, some transformative uses may infringe an author's moral rights under pt IX of the *Copyright Act*.<sup>30</sup> For example, in *Perez v Fernandez*, the Federal Magistrates Court held that a mashup involving only a few words mixed into a song

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22 *Copyright Act 1968* (Cth) ss 41, 103A.

23 Ibid ss 41A, 103AA.

24 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444.

25 Ibid, [48]–[49].

26 B Fitzgerald and D O'Brien, 'Digital Sampling and Culture Jamming in a Remix World: What Does the Law Allow?' (2005) 10(4) *Media and Arts Law Review* 279.

27 In *Bridgeport Music Inc v Dimension Films Inc*, the US Court of Appeals held that even where a small part of a sound recording is sampled, then the part taken is something of value, and will therefore infringe copyright: *Bridgeport Music Inc v Dimension Films Inc*, 410 F 3d 792 (6th Cir, 2005).

28 K Bowrey, *Submission 94*.

29 *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273, [21].

30 The three moral rights in Australian law are: the right to be attributed as the author; the right against false attribution; and the right of integrity, that is, the right not to have one's work treated in a derogatory way: *Copyright Act 1968* (Cth) pt IX.

was prejudicial to the artist's moral right of integrity.<sup>31</sup> Allowing new transformative uses of copyright materials may lead to more frequent assertion of moral rights.

### A stand-alone transformative use exception

10.31 This section considers a possible stand-alone transformative use exception. However, it is concerned only with the first of Samuelson's three categories of transformative use, set out above. It is not concerned with quotation (discussed separately) or using copyright material in ways different in purpose from the original. Nor is it concerned with other uses, such as displaying 'thumbnail' images of copyright photographs in search engine results,<sup>32</sup> or using digital copies of books to facilitate access for print-disabled persons,<sup>33</sup> which have been held to be fair use under US law.

10.32 In this Inquiry, a range of reasons have been put forward for introducing a transformative use exception in Australia.<sup>34</sup> These included that:

- a transformative use exception is needed to encourage cultural production and to legitimise current artistic practices;<sup>35</sup>
- existing exceptions are not broad enough—for example, because not all transformative use is parodic, satirical or critical;<sup>36</sup> and
- a transformative use exception, properly framed, would not prejudice the legitimate interests of copyright holders.<sup>37</sup>

10.33 Stakeholders observed that transformative use is an important part of creative practice, and is likely to become increasingly so in the digital environment.<sup>38</sup> In the words of one stakeholder, copyright law should:

allow certain fair transformative uses to be freely permitted to encourage creativity and provide Australian artists with the confidence to experiment and engage with different ways of using copyright material that don't damage the commercial use of the original.<sup>39</sup>

10.34 The Internet Industry Association observed that, in the 'world of digital media, there is a wide range of content shared by millions of people, many of whom have the tools to record, edit and manipulate the content being consumed'. It submitted that it would be 'an ordinary natural development to permit non-commercial transformative

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31 *Perez v Fernandez* [2012] FMCA 2 (10 February 2012).

32 *Perfect 10, Inc v Amazon.com, Inc*, 508 F 3d 1146 (9th Cir, 2007).

33 *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012).

34 Those in favour of a transformative use exception included Internet Industry Association, *Submission 253*; Pirate Party Australia, *Submission 223*; ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*; NSW Young Lawyers, *Submission 195*; R Wright, *Submission 167*; N Suzor, *Submission 172*; M Rimmer, *Submission 143*; K Bowrey, *Submission 94*.

35 Google, *Submission 217*; ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*; NSW Young Lawyers, *Submission 195*; K Bowrey, *Submission 94*.

36 Pirate Party Australia, *Submission 223*; M Rimmer, *Submission 143*.

37 N Suzor, *Submission 172*.

38 R Wright, *Submission 167*; M Rimmer, *Submission 143*.

39 R Wright, *Submission 167*.

uses in order to enrich the way we communicate'.<sup>40</sup> NSW Young Lawyers considered that a transformative use exception would 'potentially reflect common consumer expectations and behaviours' and, if carefully drafted, would 'not be at odds with similar positions being explored internationally'.<sup>41</sup>

10.35 Similarly, Google observed that, in an increasingly media-saturated age,

it is more and more natural for individuals to create 'mashups' or 'remixes' [of] the media around them for expressive purposes. While some of these creative acts would be permitted by existing fair dealing exceptions, many would not. As a result, transformative uses of existing material may be unduly hampered.<sup>42</sup>

10.36 Those opposing a transformative use exception<sup>43</sup> did so for a range of reasons, including on the basis that existing exceptions and licensing adequately cover legitimate cultural and artistic practices.<sup>44</sup> A transformative use exception would, it was suggested:

- create complexity and uncertainty in relation to its coverage;<sup>45</sup>
- prejudice the legitimate interests of copyright holders and interfere with the existing markets for derivative works;<sup>46</sup>
- conflict with the three-step test in international law;<sup>47</sup> and
- legitimise interference with the moral rights of creators;<sup>48</sup>

10.37 Many stakeholders commented on complexities and uncertainties that would be involved in framing a transformative use exception. These difficulties, and in particular, those concerning distinctions between commercial and non-commercial uses of copyright material, are discussed in detail later in this chapter.

10.38 Some stakeholders questioned whether there are any significant 'socially beneficial' transformative uses of works that cannot be enabled by existing exceptions and available licensing solutions.<sup>49</sup> For example, Copyright Agency/Viscopy observed that the current Australian copyright framework enables transformative uses in a number of ways, including where the use is: of part of the work, but not a substantial

40 Internet Industry Association, *Submission 253*.

41 NSW Young Lawyers, *Submission 195*.

42 Google, *Submission 217*.

43 For example, SPA, *Submission 281*; Music Council of Australia, *Submission 269*; COMPPS, *Submission 266*; Australia Council for the Arts, *Submission 260*; Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; NAVA, *Submission 234*; AFL, *Submission 232*; ASTRA, *Submission 227*; Australian Film/TV Bodies, *Submission 205*; IASTMP, *Submission 200*; ALPSP, *Submission 199*; iGEA, *Submission 192*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*; Australian Society of Authors, *Submission 169*; ALAA, *Submission 129*.

44 Copyright Agency/Viscopy, *Submission 249*.

45 SPA, *Submission 281*; APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*.

46 Australian Film/TV Bodies, *Submission 205*; AMPAL, *Submission 189*; Australian Society of Authors, *Submission 169*.

47 AFL, *Submission 232*; Arts Law Centre of Australia, *Submission 171*.

48 COMPPS, *Submission 266*; NAVA, *Submission 234*.

49 Australia Council for the Arts, *Submission 260*; Copyright Agency/Viscopy, *Submission 249*.

part; licensed; for the purposes of parody, satire, criticism, or review; for the purposes of reporting news; allowed by other exceptions or statutory licences.<sup>50</sup>

10.39 The Arts Law Centre stated that, in its experience, there is no ‘demand within the artistic community for a greater freedom to engage in appropriation techniques’, and artists that use appropriation techniques can operate within existing fair dealing exceptions or get permission from the rights holders.<sup>51</sup>

10.40 Australian Film and TV Bodies considered that the introduction of a transformative use exception has the capacity to ‘disrupt legitimate markets for “mash-ups”, “collages” and other related products incorporating protected works’.

For instance, Movieclips.com is a legitimate site where consumers can use clips from popular movies free of charge without resorting to movie piracy. In exchange for licensing film content free-of-charge, Movieclips advertises a site where consumers can rent or purchase the full length feature. It is also the case that online providers, such as YouTube, are working with the film industry to allow for authorised streaming and use of copyright material.<sup>52</sup>

10.41 APRA/AMCOS stated that there is a ‘well established market for licensing transformative uses of musical works’ and that the licensing of sampling is a significant part of music publishers’ and composers’ income. It submitted that allowing transformative uses would compromise ‘existing commercial markets and significantly interfere with the value of copyright rights’.<sup>53</sup>

10.42 A number of stakeholders<sup>54</sup> suggested that any transformative use exception would be likely to conflict with the ‘three-step test’ under the *Berne Convention* and other international copyright conventions.<sup>55</sup> However, the Australian Copyright Council stated that there may be ‘some scope for certain productive or “transformative” uses of copyright material by individuals to amount to a special case’ under the three-step test, based on the promotion of ‘innovation and social discourse, rather than a practical inability to regulate such activities’.<sup>56</sup>

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50 Copyright Agency/Viscopy, *Submission 249*.

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

52 Australian Film/TV Bodies, *Submission 205*.

53 APRA/AMCOS, *Submission 247*.

54 COMPPS, *Submission 266*; ARIA, *Submission 241*; AFL, *Submission 232*; Australian Film/TV Bodies, *Submission 205*.

55 *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), as incorporated in: *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, ATS 38 (entered into force on 1 January 1995), art 13; *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002), art 10; *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, ATS 27 (entered into force on 20 May 2002), art 16; *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005), art 17.4.10(a).

56 Australian Copyright Council, *Submission 219*.

10.43 Finally, concerns about the possible adverse effects on the moral rights of creators were raised by some stakeholders.<sup>57</sup> The Small Press Network, for example, suggested that, if copyright law were amended to allow transformative uses, ‘such uses should be introduced in the context of safe harbour or take down provisions’, so that authors (or copyright holders) would ‘have the option to request the take down of transformed works which breach the author’s right to maintain the integrity of the work’.<sup>58</sup> APRA/AMCOS anticipated more litigation involving infringement of authors’ moral rights.<sup>59</sup>

10.44 The Music Council of Australia commented that ‘the potential requirement for a consequential amendment of moral rights highlights the degree to which the existing rights of authors and copyright owners would have to be qualified for there to be an introduction of a general exception for transformative use’.<sup>60</sup>

### **Framing a transformative use exception**

10.45 A number of law reform and other bodies in Australia and overseas have recommended changes to copyright laws that would provide broader exceptions permitting transformative use of copyright materials. These generally apply only to non-commercial use, however defined.

10.46 In Australia, the Copyright Council Expert Group recommended, in 2011, an exception for transformative use of copyright works. The Group highlighted that this exception is particularly relevant in light of the rise of user-generated content. It suggested that an exception ‘permitting private, non-commercial, transformative uses would preserve the balance in copyright law between interests of creators and users, and preserve public respect for the relevance and integrity of copyright law’.<sup>61</sup>

10.47 The Group argued that such an exception would legitimise a large number of practices that are already occurring, without harming copyright owner interests<sup>62</sup>—in particular, creative uses on the internet characterised as being part of a new ‘remix’ culture.<sup>63</sup>

10.48 The most important existing model of such an exception is in Canada, where the *Copyright Modernization Act 2012* (Can) created a new exception for content

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57 Music Council of Australia, *Submission 269*; APRA/AMCOS, *Submission 247*; COMPPS, *Submission 266*; ARIA, *Submission 241*; NAVA, *Submission 234*; AFL, *Submission 232*; Small Press Network, *Submission 221*; Australian Film/TV Bodies, *Submission 205*; Arts Law Centre of Australia, *Submission 171*.

58 Small Press Network, *Submission 221*.

59 APRA/AMCOS, *Submission 247*.

60 Music Council of Australia, *Submission 269*.

61 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

62 Ibid, 4.

63 Professor Lawrence Lessig has suggested that non-commercial creative use (which he calls ‘amateur remix’) should be entirely exempted from the scope of US copyright law: L Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (2008), 245–255. This remix culture can also be seen as a continuation of a longer tradition of postmodern appropriation. See, eg, E Shimanoff, ‘The Odd Couple: Postmodern Culture and Copyright Law’ (2002) 11 *Media Law and Policy* 12.

generated by non-commercial users (the Canadian provision).<sup>64</sup> The Canadian provision is entitled ‘Non-commercial User-generated Content’ and has also been referred to as the ‘UGC’ (user-generated content) or ‘mashup exception’,<sup>65</sup> and as the ‘YouTube clause’.<sup>66</sup>

10.49 The Canadian provision applies to the use, for non-commercial purposes, of a publicly available work in order to create a new work. In full, it states:

- (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual—or, with the individual’s authorization, a member of their household—to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if
  - (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
  - (b) the source—and, if given in the source, the name of the author, performer, maker or broadcaster—of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
  - (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and
  - (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter—or copy of it—or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

### Defining ‘transformative’

10.50 Stakeholders in this Inquiry were concerned about the possible definition of ‘transformative’ for the purpose of any new exception. Screenrights, for example, stated that the term itself was ‘too broad and vague’, and that such an exception would have ‘a significant impact on the copyright owner’s market for derivative works, such as translations and adaptions (from a film to a game for example)’.<sup>67</sup> The Law Council of Australia submitted that, by definition, a ‘transformative’ use cannot be an ‘adaptation’ within the present meaning of that term in the *Copyright Act* and rejected the idea that any use of a publicly available work in the creation of a new work should be considered transformative.<sup>68</sup>

<sup>64</sup> Copyright Act 1985 (Can) s 29.21. The Ireland Copyright Review Committee has invited submissions on whether a similar exception for non-commercial user-generated content should be enacted in Ireland: Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).

<sup>65</sup> D Lithwick, M Thibodeau and Parliament of Canada, *Legislative Summary of Bill C-11: An Act to amend the Copyright Act* <[www.parl.gc.ca/About/Parliament/LegislativeSummaries](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries)> at 16 July 2012.

<sup>66</sup> M Patterson, R McDonald, Fraser Milner Casgrain LLP, *The Copyright Modernization Act: Canada’s New Rights and Rules* <[www.lexology.com/library](http://www.lexology.com/library)> at 22 March 2013.

<sup>67</sup> Screenrights, *Submission 215*. See also, SPAA, *Submission 281*.

<sup>68</sup> Law Council of Australia, *Submission 263*.

10.51 The Combined Newspapers and Magazines Copyright Committee observed that transformative uses can ‘potentially cover most of the exclusive rights of a copyright owner’.<sup>69</sup> The Arts Law Centre noted that uncertainty in determining whether a specific reuse of an existing work is transformative ‘illustrates the difficulty of framing an exception to permit the materials produced by appropriation techniques’ to be more freely used.<sup>70</sup>

10.52 The Copyright Council Expert Group stated that transformative implies something more than ‘just pasting two things together without any further modification’—for example, using a song as background to a home video posted to a video-sharing website is not ‘transformative’.<sup>71</sup> Bowrey suggested that a ‘transformative work could be defined as a form of expression that, notwithstanding use of or reference to prior works in its creation, stands alone in terms of exhibiting its own artistic integrity and identity’.<sup>72</sup> Similarly, the ABC suggested transformative use should cover ‘new works that combine pre-existing works in a way that indicates a level of curatorship or editorial judgement’.<sup>73</sup>

10.53 To address concerns about uncertainty, NSW Young Lawyers suggested that, in framing an exception, a ‘list of circumstantial uses of a work that would be presumed to be transformative, in conjunction with a list of characteristics which may help identify transformative works’ would be useful.<sup>74</sup>

10.54 Stakeholders commented on the concept of copyright material that is ‘publicly available’—or ‘available to the public’, in the words used in the Canadian provision. The Australian Football League stated that such a formulation was ‘illogical’ in suggesting, for example, that content available on free-to-air television would be ‘more open for (mis)use than audio-visual content available behind a pay wall’.<sup>75</sup> Foxtel also submitted that the concept of a ‘publicly available work’ was problematic.

Rights holders rarely make their works freely available for unrestricted use. A concept of this nature may validate (incorrect) consumer perceptions that works accessible via digital technologies are freely available to consumers to use as they see fit, which is rarely the case.<sup>76</sup>

10.55 There has been no judicial interpretation of the meaning and scope of the Canadian provision. However, it appears to require only that the use of an existing work is in the creation of a ‘new work’. In Australian law, providing a later work is not a ‘mere slavish copy’, it will constitute ‘an original work in its own right if the author

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<sup>69</sup> Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

<sup>70</sup> Arts Law Centre of Australia, *Submission 171*.

<sup>71</sup> Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

<sup>72</sup> K Bowrey, *Submission 94*.

<sup>73</sup> Australian Broadcasting Corporation, *Submission 210*.

<sup>74</sup> NSW Young Lawyers, *Submission 195*.

<sup>75</sup> AFL, *Submission 232*.

<sup>76</sup> Foxtel, *Submission 245*.

has expended sufficient independent skill and labour in bringing it into material form'.<sup>77</sup>

10.56 Using the concept of an original work in an Australian exception would provide a very low threshold for what amounts to transformative use. Framing any higher threshold, however, would raise the problem of how to distinguish transformative use from the making of an adaptation; and how to define the extent to which a transformative work needs to be original or creative.

10.57 Another related issue concerns subsequent uses of the transformative work. APRA/AMCOS submitted that, even if there were to be a transformative use exception, it could only apply to the original use:

All subsequent uses are, by definition, not themselves transformative. Thus the communication of a work that includes a transformative use of another work is itself not a transformative use and could not be the subject of the exception.<sup>78</sup>

10.58 That is, a transformative use exception may permit the creation of a new work but not the communication of the work—for example, by making it available on a social networking website. However, it appears that the Canadian provision is intended to facilitate the communication of the new work, as discussed further below.

### Commercial and non-commercial uses

10.59 A major complexity in considering a transformative use exception concerns the relevance of distinctions between commercial and non-commercial uses of copyright materials and how any such distinction should be framed. The commercial or non-commercial nature of uses needs to be considered in relation to both the original use and subsequent uses of the new work. A transformative use exception could be restricted to non-commercial uses, or be broader and extend to some commercial uses.

10.60 However, distinguishing between commercial and non-commercial uses of copyright material has become increasingly complex.<sup>79</sup> Changes in the digital economy have ‘substantially increased the opportunities for the creation of user-generated “non-commercial” copyright materials’.<sup>80</sup> For example, the Australian Competition and Consumer Commission (ACCC) reflected that ‘technology to splice or intersperse video with other content, such as TV clips, photos, and audio recordings is much more widely and cheaply available, and allows the creation of a wider range of productions by consumers for their private use’.<sup>81</sup>

10.61 At the same time, however, the sharing and distribution of such material may involve commercial entities. While many users of Facebook communicate copyright material for non-commercial purposes, Facebook, as an advertising-funded business

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77 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [7.103].

78 APRA/AMCOS, *Submission 247*.

79 ACCC, *Submission 165*.

80 *Ibid.*

81 *Ibid.*

model, is dependent on its members producing these materials.<sup>82</sup> Further, while some copyright material may be created without an intention to commercialise the work, digital platforms provide an opportunity for creators subsequently to commercialise their work. For example, users who post content on YouTube can apply to partner with YouTube to monetise that content both before and after the video has been posted.<sup>83</sup>

10.62 John Wiley & Sons Inc observed that social media platforms ‘cannot be accurately described as commercial free zones, with the plethora of advertising and monetisation options available’. Rather, to create a transformative use exception would ‘prejudice copyright holders by withholding their ability to participate in this new area of the digital economy; whilst still allowing online social platforms, software companies and commercial users to benefit without restrictions’.<sup>84</sup>

10.63 APRA/AMCOS submitted that ‘whatever the intentions of the maker of user generated content, once it is released to the public online it enters the commercial arena’ and strongly opposed the introduction of a new exception on this basis.<sup>85</sup> Similarly, the Arts Law Centre stated that ‘social networking websites (such as Facebook) and video aggregation sites (such as YouTube) are intrinsically commercial operations’.<sup>86</sup> Copyright Agency/Viscopy stated that, if a new exception were to be introduced,

it should be confined to private and domestic use, not apply where there is a licensing solution available to the user, be subject to the other fair dealing criteria in section 40(2), and not apply to the uploading to an online platform, or other forms of ‘sharing’.<sup>87</sup>

10.64 The Australian Copyright Council submitted that, while there may be limited scope for an exception for ‘non-commercial or private and domestic’ transformative uses, ‘a licensing regime would need to apply in relation to commercial entities hosting that material online’.<sup>88</sup> The Council stated that, alternatively, ‘it may be possible to address this issue through a license it or lose it model whereby uses are allowed unless there is a licence on offer’.<sup>89</sup>

10.65 APRA/AMCOS opposed the suggestion that a licensing scheme ‘for the communication of copyright material created pursuant to a transformative use exception on a license it or lose it basis’ was necessary or desirable, as this would interfere with existing markets.<sup>90</sup>

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82 Ibid.

83 Ibid.

84 John Wiley & Sons, *Submission 239*.

85 APRA/AMCOS, *Submission 247*.

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

87 Copyright Agency/Viscopy, *Submission 249*.

88 Australian Copyright Council, *Submission 219*.

89 Ibid.

90 APRA/AMCOS, *Submission 247*.

10.66 Other stakeholders considered that any transformative use exception should not be strictly limited to non-commercial use.<sup>91</sup> For example, Nicolas Suzor stated that the scope of a transformative use exception ‘should be based primarily on demonstrable harm to the direct licensing interests of copyright owners—the core of copyright’. Accordingly, the exception should ‘clearly permit uses which are not substitutes for (or do not directly compete with) the copyright material’.<sup>92</sup> The Internet Industry Association submitted that commercial transformative use should be permitted, at least where the use does not conflict with normal exploitation or unreasonably prejudice the legitimate interests of the owner of the copyright.<sup>93</sup>

10.67 Google observed that the ‘Australian fair dealing tradition has long recognised that commercial uses of copyright materials can be fair’ and submitted that there is no ‘public policy justification for limiting an exception for transformative uses by automatically excluding any uses with a commercial purpose’.<sup>94</sup>

10.68 The Canadian provision limits the scope of the exception to circumstances where the use of, or authorisation to disseminate, the new work is solely for non-commercial purposes; and the use, or authorisation to disseminate, does not have a substantial adverse effect on the exploitation of the existing work.

10.69 It is not entirely clear how this provision is intended to operate. However, it appears that, while the creator of the new work is prohibited from receiving a commercial benefit, an online platform such as YouTube may benefit from disseminating it—without remunerating the owners of copyright in either the original or the new work.

10.70 That is, while the authorisation to disseminate must be done solely for non-commercial purposes, actual dissemination can be for the commercial purposes of, for example, an internet intermediary, provided only that the authorisation itself does not have a substantial adverse effect on the exploitation of the existing work and the new work is not a substitute for the existing one.<sup>95</sup>

10.71 This may not provide adequate protection for the owner of copyright in the original from the possible effects on that owner’s interests of dissemination of the new work by the internet intermediary. The application of the Canadian provision means that the creation and authorisation to disseminate the new work does not infringe copyright. Removing primary copyright infringement in this manner seems to rule out any possibility of liability on the part of the intermediary to the original copyright owner.

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91 Internet Industry Association, *Submission 253*; Universities Australia, *Submission 246*; Pirate Party Australia, *Submission 223*; Google, *Submission 217*; N Suzor, *Submission 172*; K Bowrey, *Submission 94*.

92 N Suzor, *Submission 172*.

93 Internet Industry Association, *Submission 253*.

94 Google, *Submission 217*.

95 Copyright Act 1985 (Can) s 29.21(1)(d).

### **Fair use and transformative use**

10.72 Many stakeholders who favoured some additional leeway for transformative use considered that such uses of copyright material should be covered by a fair use exception, rather than under a new specific exception.<sup>96</sup> A fair use exception would be expected to allow individuals to use copyright materials more freely in transformative uses.

10.73 In some cases, this position was influenced by the problems involved in determining whether a transformative use should be considered commercial or non-commercial. For example, Google acknowledged that ‘a user’s commercial purpose would be relevant to whether a particular use should be permitted’, but considered that it would be more appropriate for the commerciality of the use to be considered ‘as part of a broader assessment of whether that use is fair’.<sup>97</sup>

10.74 Similarly, the Copyright Advisory Group—Schools stated that fair use is the best model, rather than ‘an exception which arbitrarily excludes all commercial transformative uses of copyright materials from being considered to be fair’.<sup>98</sup> The Australian Communications Consumer Action Network noted that:

There is little to be gained from having courts applying themselves to assessing ‘mash-ups’ or a ‘re-mix’ to ascertain whether they fall within a tightly-worded exception, when the real issue is whether the use is fair and the extent of the harm to the creator/owner.<sup>99</sup>

10.75 The Australian Digital Alliance and Australian Libraries Copyright Committee considered that ‘adopting a flexible fair use-style exception, rather than attempting to prescribe the scope of a purpose-based transformative exception’ would better cover the range of current transformative uses.<sup>100</sup> Robert Xavier submitted:

It would be best to use transformative use in the same way as it is used by US copyright law, where it is a legal concept, with a special meaning, that can form part of the basis for fair use. Repurposing the concept for a separate exception for derivative works would just be confusing.<sup>101</sup>

### **Rejecting a stand-alone transformative use exception**

10.76 In the ALRC’s view, there is no case for introducing a stand-alone transformative use exception. The reasons for rejecting a transformative use exception are that:

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96 For example, EFA, *Submission 258*; R Burrell and others, *Submission 278*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; ACCAN, *Submission 194*; M Rimmer, *Submission 163*; R Xavier, *Submission 146*.

97 Google, *Submission 217*.

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

99 ACCAN, *Submission 194*.

100 ADA and ALCC, *Submission 213*.

101 R Xavier, *Submission 146*.

- 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; and
- framing such an exception presents numerous problems, notably in how to define transformative use, and in determining the extent to which commercial uses of copyright materials should be covered.

10.77 Transformative uses of copyright material would be better considered under the fair use exception, rather than under a specific exception, in determining whether copyright is infringed.

10.78 As under US fair use doctrine, some concept of transformative use can be expected to emerge from the application of the fairness factors under the ALRC's proposed fair use exception. However, the issue should be whether a use is fair, given the extent of any interference with the interests of the copyright holder, rather than whether use falls within a narrowly drafted specific exception.

10.79 Under fair use, the extent to which a use is transformative, in view of the purpose and character of the use, and the commercial aspects of a use—that is, the effect of the use upon the potential market for, or value of, the copyright material—can be considered as part of a broader inquiry into fairness.

10.80 The ALRC does not propose that any new specific exception should be introduced, even if a fair use exception is not enacted, or that transformative use be included as an illustrative purpose in the fair use exception.

10.81 There are many difficulties in framing a stand-alone transformative use exception. These problems include how to distinguish transformative use from the making of an adaptation; and the extent to which a transformative work needs to be original or creative.

10.82 Transformative use would need to be distinguished from the making of an adaptation, which is the subject of a specific exclusive right under the *Copyright Act*, in the case of original literary, dramatic and musical works.<sup>102</sup> An adaptation is a new and original work in its own right. Some dividing line would need to be drawn between an adaptation, which should be the subject of a licence, and a work that is transformative.

10.83 The Canadian provision requires only the creation of a 'new work'. Such a low threshold would have a serious impact on the principle of acknowledging and respecting authorship and creation (Principle 1).<sup>103</sup> On the other hand, drafting some new threshold of originality would be problematic—for example, if two works are simply pasted together without any further modification, this should not constitute a transformative work—but what else should be required? Any new standard of originality would likely be novel, in Australian law and internationally, and produce a level of uncertainty.

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102      *Copyright Act 1968* (Cth) s 31(1)(a)(vi).

103      See Ch 2.

10.84 For example, where only part of copyright material is used, as in the case of sampling, the fact that this is incorporated in a new work will not prevent the use from being an infringement because ‘substantial part’ is assessed in relation to the copyright material used, rather than the new work in which the sample has been incorporated. Arguably, it would be a radical step to propose an exception that might mean that the substantial part requirement is to be overridden in the case of transformative use.

10.85 Limiting any transformative use exception to non-commercial purposes is problematic because the boundary between non-commercial and commercial purposes is not clear given ‘a digital environment that monetises social relations, friendships and social interactions’.<sup>104</sup> In particular, a creator may create a transformative work for a non-commercial purpose, but later opt to receive payments from advertising associated with a website, and many online business models now rely on views of user-generated content to make revenue.

10.86 An exception that allows those who disseminate works created for a non-commercial purpose to profit may, in the words of one stakeholder, ‘prejudice copyright holders by withholding their ability to participate in this new area of the digital economy; whilst still allowing online social platforms, software companies and commercial users to benefit without restrictions’.<sup>105</sup> Such an exception would also cut across the way rights holders currently work with internet platforms to manage copyright content uploaded by users. For example, in the case of YouTube, rights holders may choose to ‘monetize, block or track’ the use of their content.<sup>106</sup>

**Proposal 10–1** The *Copyright Act* should not provide for any new ‘transformative use’ exception. The fair use exception should be applied when determining whether a ‘transformative use’ infringes copyright.

## Quotation

10.87 In copyright terms, quotation refers to the taking of some part of a greater whole—a group of words from a text or a speech, a musical passage or visual image taken from a piece of music or a work of art—where the taking is done by someone other than the creator of the work.<sup>107</sup>

10.88 The *Copyright Act* does not provide a stand-alone exception for quotation. However, copyright infringement is generally dependent on use of a substantial part of copyright material. That is, the Act provides that an act will infringe copyright only if the act is done in relation to ‘substantial part’ of a work or other subject matter.<sup>108</sup>

104 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

105 John Wiley & Sons, *Submission 239*.

106 YouTube, *Content ID* <[www.youtube.com/t/contentid](http://www.youtube.com/t/contentid)> at 24 July 2012.

107 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 788, commenting on the quotation right provided for in the *Berne Convention*.

108 *Copyright Act 1968* (Cth) s 14(1)(a).

10.89 The phrase ‘substantial part’ has been held to refer to the quality of what is taken rather than the quantity, and courts have always refused to prescribe any particular proportion as amounting to a substantial part.<sup>109</sup> In determining whether the quality of what is taken makes it a ‘substantial part’, a number of factors are relevant, the most important being a general inquiry into the importance that the part bears in relation to the work as a whole—that is, whether it is an ‘essential’ or ‘vital’ or ‘material’ part.<sup>110</sup>

10.90 Some quotation may be covered incidentally by existing exceptions—in particular, fair dealing for criticism or review; parody or satire; and news reporting.<sup>111</sup> The coverage of quotation is incidental in that a quotation will not be fair dealing unless it is for a fair dealing purpose, such as criticism or review. While in some cases, the copying of the whole of a work may be regarded as a fair dealing for the purpose of research or study,<sup>112</sup> this is unlikely in other cases, such as criticism and review.

10.91 The Issues Paper noted suggestions that art 10(1) of the *Berne Convention* could be employed in Australia as the basis for a new exception for non-commercial transformative use; an exception permitting the quotation of copyright works in commercial works;<sup>113</sup> or an exception for fair dealing for the purpose of quotation.<sup>114</sup>

10.92 Article 10(1) of the *Berne Convention* provides:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.<sup>115</sup>

10.93 Article 10(1) is generally considered to impose an obligation to provide an exception for fair quotation,<sup>116</sup> rather than just permitting such an exception, although this was contested by some stakeholders.<sup>117</sup>

109 See Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [9.20].

110 Ibid, [9.20], citing, eg, *Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396.

111 *Copyright Act 1968* (Cth) ss 41, 41A, 42.

112 Ibid s 40(2).

113 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

114 E Adeney, ‘Appropriation in the Name of Art: Is a Quotation Exception the Answer?’ (2013) 23(3) *Australian Intellectual Property Journal* 142.

115 *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).

116 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 783.

117 ARIA, *Submission 241*. ARIA stated that a plain reading of the English text makes it clear that ‘permissible’ can only mean there is ‘a possibility to permit’ quotation, rather than an obligation, and that this construction is reinforced by the preceding provisions that state parties cannot provide beneficiaries under the *Berne Convention* a level of protection that is lower than that prescribed in it, but do not prohibit the granting of a higher level of protection.

10.94 The ‘quotation right’ provided for by the *Berne Convention*<sup>118</sup> is not limited to text-based copyright material. The word ‘work’ is used to encompass all the types of works that are listed in art 2. That is, literary and artistic works (including, for example, dramatic works, choreographic works, cinematographic works and photographic works), derivative works (including translations, adaptations and arrangements of music) and collections of works such as anthologies and encyclopaedias.

10.95 The text of art 10(1) makes it clear that a quotation must meet three requirements to be permitted under the provision.<sup>119</sup> These are, first, that the work in question must have been ‘lawfully made available to the public’; secondly, that the making of the quotation must be ‘compatible with fair practice’; and, thirdly, that the extent of the quotation must ‘not exceed that justified by the purpose’.

### A new quotation exception

10.96 In the Issues Paper, the ALRC asked whether there should be a fair dealing exception for the purpose of quotation.<sup>120</sup>

10.97 An example of when such an exception might be relevant arose in litigation over whether EMI’s recordings in the Kookaburra case had infringed copyright.<sup>121</sup> On appeal, Emmett J expressed his ‘disquiet’ in finding copyright infringement in the circumstances of the case.<sup>122</sup> He stated:

The better view of the taking of the melody from Kookaburra is not that the melody was taken ... in order to save effort on the part of the composer of Down Under, by appropriating the results of Ms Sinclair’s efforts. Rather, the quotation or reproduction of the melody of Kookaburra appears by way of tribute to the iconicity of Kookaburra, and as one of a number of references made in Down Under to Australian icons.<sup>123</sup>

10.98 The idea of a quotation exception received some support from stakeholders,<sup>124</sup> including because existing exceptions are not broad enough;<sup>125</sup> and as an alternative to a transformative use exception.<sup>126</sup>

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118 Ricketson has noted that due to the mandatory character of the exception, ‘article 10(1) is the one *Berne Convention* exception that comes closest to embodying a “user right” to make quotations’: S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 788–789.

119 Ibid, 785–786.

120 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 47.

121 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444.

122 Ibid, [98].

123 Ibid, [99].

124 For example, CSIRO, *Submission 242*; Pirate Party Australia, *Submission 223*; Australian Broadcasting Corporation, *Submission 210*; R Wright, *Submission 167*; R Xavier, *Submission 146*; M Rimmer, *Submission 143*; Civil Liberties Australia, *Submission 139*; Spinifex Press, *Submission 125*; K Bowrey, *Submission 94*.

125 For example, Australian Broadcasting Corporation, *Submission 210*; R Wright, *Submission 167*; R Xavier, *Submission 146*; K Bowrey, *Submission 94*.

126 K Bowrey, *Submission 94*.

10.99 Several stakeholders referred to the Kookaburra case as illustrating a gap in the law.<sup>127</sup> For example, Robert Xavier stated that reasonable sampling should be covered by an exception for quotation (and should not need a transformative use exception).

A quotation exception would be a very good thing. It is already the case that reproductions that are not ‘substantial’ do not infringe copyright, but ‘substantial’ has been interpreted so as to cover reproductions of almost any expressive elements of a work. No legitimate purpose or interest is served by preventing fair quotation, and legal action taken on the basis of quotations is often blatant rent-seeking.<sup>128</sup>

10.100 Robin Wright stated that the issue of ‘using quotations of third-party copyright material for academic purposes is of significant concern in universities’, in particular because university staff often have considerable difficulty determining if the amount they wish to use would be considered less than a substantial part of a work.

10.101 Wright suggested that any exception aimed at allowing quotation ‘should permit academic users and their publishers to include a deemed amount of a third-party copyright item as a quotation without seeking permission, but still be subject to an evaluation of fairness factors to allow for some flexibility’.<sup>129</sup> The CSIRO held similar concerns about the need for a ‘specific fair quotation right’ applying to existing published material cited in reports or literature studies;<sup>130</sup> and Professor Kathy Bowrey noted that a quotation exception could ‘empower some authors to resist unreasonable publisher requests to clear quotations’.<sup>131</sup>

10.102 The International Association of Scientific, Technical and Medical Publishers stated that it would support an exception for ‘academic use’ that was clearly defined, compliant with art 10(1) of the *Berne Convention* and required proper attribution.<sup>132</sup> The ABC advised that quotation is common in some genres of radio programming such as live talk-back and history programming. Section 45 allows for the use of an extract of a literary or dramatic work of reasonable length in a broadcast, but this exception does not cover recordings of broadcasts or online transmission.<sup>133</sup>

10.103 The Australian Digital Alliance and Australian Libraries Copyright Committee considered that ‘any uses of copyright material that would be covered by a fair dealing exception for “quotation” would be more simply and effectively covered by a broad, flexible exception’.<sup>134</sup>

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127 For example, R Wright, *Submission 167*; R Xavier, *Submission 146*; M Rimmer, *Submission 143*.

128 R Xavier, *Submission 146*.

129 R Wright, *Submission 167*.

130 CSIRO, *Submission 242*.

131 K Bowrey, *Submission 94*.

132 IASTMP, *Submission 200*.

133 Australian Broadcasting Corporation, *Submission 210*. Section 45 and other copyright exceptions applying to broadcasting are discussed in Ch 15.

134 ADA and ALCC, *Submission 213*.

10.104 Those opposing a quotation exception<sup>135</sup> did so for a range of reasons, primarily on the basis that existing exceptions adequately cover quotation. It was also suggested that a broader quotation exception would interfere with existing licensing practices<sup>136</sup> and present significant drafting problems and uncertainty,<sup>137</sup> including in relation to any conflict with the three-step test.<sup>138</sup> Screenrights, for example, stated:

Works may be quoted under the fair dealing provisions, provided the quote falls within one of the specified purposes. To allow for quotation outside these purposes, for example to sample one work in another or to use a work for the purpose of transforming it, can be, and is, adequately dealt with under a commercial licence obtained from the rightsholder. Filmmakers and publishers are used to obtaining permission to quote from other works and have well-established procedures to do this.<sup>139</sup>

10.105 The Australian Copyright Council observed that creating a ‘new fair dealing exception for quotation to facilitate mashups and other user-generated content would need to be justified on significant public policy grounds’ and that an exception ‘simply to legitimate common consumer behaviour would sit oddly as a fair dealing’.<sup>140</sup> The Arts Law Centre submitted that the framing of a fair dealing exception ‘simply for the purpose of quotation and for no other public purpose’ would be problematic—particularly as under the *Berne Convention* quotations need not be text-based.<sup>141</sup>

10.106 The Music Council of Australia acknowledged that the existing exceptions will not always be ‘a complete answer to the multitude of uses and methods of using musical works and materials and that certain musical genres (such as jazz and hip hop) rely on the quotation of existing copyright material as part of their vernacular’. The Council considered, however, that there is already sufficient uncertainty in the application of the tests concerning a ‘substantial part’. It stated that ‘including a further similar flexible (and thereby inherently uncertain) concept into the fair dealing exception’ may raise more problems than it purports to solve.<sup>142</sup>

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135 For example, Music Council of Australia, *Submission 269*; Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Directors Guild, *Submission 226*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; Australian Film/TV Bodies, *Submission 205*; Arts Law Centre of Australia, *Submission 171*; Australian Society of Authors, *Submission 169*.

136 APRA/AMCOS, *Submission 247*; Screenrights, *Submission 215*; Australian Society of Authors, *Submission 169*.

137 Music Council of Australia, *Submission 269*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Copyright Council, *Submission 219*; Arts Law Centre of Australia, *Submission 171*.

138 Australian Copyright Council, *Submission 219*; Australian Film/TV Bodies, *Submission 205*.

139 Screenrights, *Submission 215*.

140 Australian Copyright Council, *Submission 219*.

141 Arts Law Centre of Australia, *Submission 171*. ARIA was strongly of the view the concept of quotation has no application to neighbouring rights and that there should be no exception for the ‘quotation’ of sound recordings, broadcasts or performances: ARIA, *Submission 241*.

142 Music Council of Australia, *Submission 269*.

### Framing a quotation exception

10.107 A number of models for a quotation exception have been suggested. For example, in 2011, the Copyright Council Expert Group discussed an exception permitting the quotation of copyright material in commercial works, before recommending the development of a non-commercial transformative use exception.<sup>143</sup>

10.108 Associate Professor Elizabeth Adeney has proposed draft clauses providing fair dealing exceptions for quotation.<sup>144</sup> Her model provides for separate exceptions in relation to: (i) reproductions and communications of works; and (ii) and performances of works. Both exceptions would provide that a use would not constitute copyright infringement if:

- it is for the purpose of quotation;
- the quotation constitutes a fair dealing with the quoted material; and
- sufficient acknowledgement of the quoted material is made.

10.109 Both provisions would also provide a list of discretionary matters to consider in determining whether the use of a ‘quotation’ satisfies ‘fair dealing.’ These include:

- whether the quotation has been used in good faith;
- the extent of the quotation and whether or not this exceeds the purpose for which the quotation is used;
- the degree to which the quotation interferes with the commercial interests of the copyright owner of the quoted work; and
- whether the use of the quotation furthers the community interest in free speech and the freedom of artistic expression.<sup>145</sup>

10.110 Adeney acknowledges that any exception for quotation would have to address a number of complexities, including whether the provisions should apply only to published works; how ‘quotation’ is to be defined; and how an exception for quotation would interact with other fair dealing exceptions.<sup>146</sup> She states that specific exceptions for quotation:

would support or extend other fair dealing arguments in the areas of scholarship and debate and, like the recently implemented exception for parody and satire, it would have the capacity to soften the impact of copyright in the arts sphere. This capacity would be strengthened if a consideration of the freedom of art were to be mandated, going to the question of fair dealing in the quotation context. The defence would also bring Australian copyright law into closer alignment with both the European jurisdictions and the *Berne Convention/TRIPS* requirements.<sup>147</sup>

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143 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

144 E Adeney, ‘Appropriation in the Name of Art: Is a Quotation Exception the Answer?’ (2013) 23(3) *Australian Intellectual Property Journal* 142, 156.

145 Ibid, 156.

146 Ibid, 158.

147 Ibid, 159.

## Fair use and quotation

10.111 In the ALRC's view, there are strong arguments that Australian copyright law should provide more scope for the quotation of copyright material—particularly where there is little or no effect on the potential market for, or value of, the copyright material. The intention of such a reform would be to promote fair access to and wide dissemination of content (Principle 3), while continuing to acknowledge and respect authorship and creation; and to maintain incentives to the creation of works and other subject matter (Principles 1 and 2).<sup>148</sup>

10.112 The preferable means of reform is for quotation to be considered under the proposed fair use exception where a range of factors can be balanced in determining whether a particular use is permitted.

10.113 The concept of quotation is central to US fair use doctrine. The *Copyright Act 1976* (US) provides that one of the factors determining fair use is 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole'.<sup>149</sup> Even before codification, fair use was considered to cover the quotation of excerpts in a review or criticism for purposes of illustration or comment, and the quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations.<sup>150</sup> The amount of the copyrighted work quoted is not always determinative of fair use, and will depend on the application of other fair use factors.<sup>151</sup> It has been held that there is both a quantitative and qualitative element to determining whether a 'quotation' is fair use.<sup>152</sup>

10.114 The ALRC proposes that 'quotation' be one of the illustrative purposes listed in the fair use provision. This will signal that a particular use that falls within the broader category of 'quotation' is more likely to be fair than a use which does not fall into this, or any other, illustrative purpose category. However, all the fairness factors must be considered in determining whether a particular use is fair. As discussed in Chapter 4, the fact that a particular use falls into, or partly falls into, one of the categories of illustrative purpose, does not necessarily mean the particular use is fair. In fact, it does not even create a presumption that the use is fair. A consideration of all the fairness factors remains necessary.

10.115 Providing quotation as an illustrative purpose may be criticised on the basis that referring to quotation without reference to a particular purpose (such as criticism or review) may lack meaning. That is, without further context it would refer simply to the act of using a part, rather than the whole, of a work. The ALRC is interested in further comment on whether quotation should be framed as an illustrative purpose.

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148 See Ch 2.

149 *Copyright Act 1976* (US) s 107(3).

150 United States House of Representatives, Committee on the Judiciary, *Copyright Law Revision (House Report No. 94-1476)* (1976), 5678–5679.

151 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 586–587.

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

10.116 In the event that a fair use exception is not enacted, the ALRC proposes an alternative, namely, fair dealing for the purpose of quotation. This fair dealing exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the fair use exception. Applying the two exceptions to instances of quotation should, therefore, produce the same result.

**Proposal 10–2** The fair use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair use exception.

**Proposal 10–3** If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.

