

10. Private Use and Social Use

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Summary

10.1 The fair use and new fair dealing exceptions are suitable exceptions to apply to determine whether an unlicensed private use of copyright material infringes copyright.

10.2 These fairness exceptions are considerably more versatile than the existing exceptions for private use, and they are not confined to technologies or practices that change rapidly. They also allow for the consideration of social norms, and permit productive uses that do not harm rights holders by usurping their markets.

10.3 The existing exceptions for time shifting broadcasts and format shifting other copyright material should be repealed.

10.4 The ALRC also recommends that ‘non-commercial private use’ should be an illustrative purpose in the fair use exception, to signal that many private uses may be fair. This does not mean that all private uses are fair, nor will it create a presumption that a private use is fair. Sometimes, a private use will harm a market that a rights holder alone should be entitled to exploit, and will not be fair. But a private use is more likely to be fair than a non-private use. Some unlicensed private uses are also very

common, and widely thought to be fair. ‘Non-commercial private use’ is therefore a suitable purpose to include in the list of purposes in fair use.

10.5 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception that includes ‘non-commercial private use’ as a prescribed purpose. Applied to a private use, this fair dealing exception will have the same outcome as fair use.

10.6 Private use is a much narrower concept than social use. Some social uses of copyright material—for example, in creating and sharing user-generated content—may be fair in some circumstances, particularly when transformative. Social uses can also be considered under the fair use exception. However, the ALRC does not recommend that ‘social uses’ be an illustrative purpose in the fair use exception, because often social uses will harm rights holders’ markets and will not be fair use.

10.7 Importantly, piracy—such as exchanging music, films and television programs with strangers—is neither private use, nor fair use. The exceptions in this Report do not permit or condone piracy.

Current law and criticisms

10.8 Format shifting and time shifting are two types of private use exception currently provided for in the *Copyright Act*.

10.9 Format shifting exceptions were enacted in 2006. They allow for the copying, in limited circumstances, of books, newspapers and periodicals,¹ photographs,² videotapes,³ and sound recordings.⁴ These exceptions have common elements. For example, the exceptions apply only if the owner of the original makes the copy, and the original is not an infringing copy. This raises questions about whether others should be able to make these copies for the owner’s private use.⁵

10.10 Some of these conditions may mean the exceptions do not apply to copies stored on remote servers in ‘the cloud’. For example, the exception for format shifting of sound recordings only applies if the copy is to be used with a device owned by the user.⁶ Further, the exception for books, newspapers and periodicals only allows users to make one copy in each format, and storing content in the cloud may require multiple copies.⁷

10.11 The format shifting exception for films only applies to copies made from films in analog form.⁸ It does not allow digital-to-digital copying. This means the exception does not apply to copies made, for example, from DVDs and Blu-Ray discs and digital copies downloaded from the internet. One reason given for this limitation is that ‘unrestricted digital-to-digital copying could allow consumers to reproduce the full

1 *Copyright Act 1968* (Cth) s 43C.

2 *Ibid* s 47J.

3 *Ibid* s 110AA.

4 *Ibid* s 109A.

5 This is discussed later in this chapter, and more broadly in Ch 7.

6 *Copyright Act 1968* (Cth) s 109A(1)(b).

7 *Ibid* s 43C(1)(e).

8 *Ibid* s 110AA(1)(a).

picture quality and features provided in commercially produced digital film content'.⁹ Many consumers find it surprising that the law prohibits them from copying a film they own from one computer or device to another, without a licence.

10.12 The time shifting exception in s 111 of the *Copyright Act*, which was also enacted in 2006, provides an exception for the making of 'a cinematograph film or sound recording of a broadcast solely for private use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made'.¹⁰

10.13 This exception is confined to recordings of 'a broadcast', defined to mean a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* (Cth). By ministerial determination, a service that makes available television and radio programs using the internet is not a broadcasting service under the *Broadcasting Services Act*.¹¹ This raises the question of whether the time shifting exception in the *Copyright Act* should apply to some content made available online.¹² Another important question is how this exception should operate with new technologies and services, such as the cloud.¹³

10.14 The ADA and ALCC submitted that 'the fact that the provisions introduced in 2006 are already technologically redundant and do not address current consumer practices argues in favour of a flexible, technology neutral private copying provision'.¹⁴

10.15 The existing exceptions for time shifting and format shifting have also been criticised for their complexity.¹⁵

Fair use

10.16 The ALRC recommends that fair use or the new fair dealing exception should be used to determine whether an unlicensed private use of copyright material infringes copyright. Both of these exceptions call for an assessment of the fairness of a particular use of copyright material and the consideration of relevant fairness factors. Applied to a particular private use, both exceptions should have the same result.

10.17 The benefits of fairness exceptions are discussed more generally in Chapter 4. For private uses, they have the particular benefit of being flexible and technology neutral, and better able to account for social norms.

9 Australian Government Attorney-General's Department, *Copyright Exceptions for Private Copying of Photographs and Films, Review of sections 47J and 110AA of the Copyright Act 1968* (2008), [2.11].

10 *Copyright Act 1968* (Cth) s 111.

11 *Determination under paragraph (c) of the definition of 'broadcasting service'* (No 1 of 2000), Commonwealth of Australia Gazette No GN 38, 27 September 2000.

12 The application of broadcast exceptions to the transmission of television or radio programs using the internet is discussed in Chs 18 and 19.

13 See Ch 7.

14 ADA and ALCC, *Submission 213*.

15 For example, Telstra Corporation Limited, *Submission 222*; R Wright, *Submission 167*.

10.18 The fair use provision should include ‘non-commercial private use’ as an illustrative purpose. This is a suitable purpose to include, because many private uses of copyright material are unlikely to have a significant effect on rights holders’ markets. Where they do, they are unlikely to be fair.

10.19 Proposals similar to these recommendations were made in the Discussion Paper.¹⁶ On the whole, stakeholders who supported the introduction of fair use agreed that private uses should be considered under the exception, and supported the inclusion of a private use illustrative purpose.¹⁷ eBay submitted that the ALRC’s approach was ‘a practical solution to the difficult problem created by the existing framework’.¹⁸ Telstra observed that current exceptions for private use of copyright material are

complex, difficult to navigate and out of step with current and likely future customer expectations and practices. Telstra believes that allowing consumers fair access to legal content—in a format, on a device, using a technology and at a time that suits them—will stimulate innovation and continue to grow the content market.¹⁹

10.20 The Australian Communications Consumer Action Network submitted that

the current private or domestic use exception needs to be replaced with a fair dealing or fair use provision that is technology-neutral and that allows for the increasingly diverse ways that the public might consume and arrange content for their private enjoyment.²⁰

10.21 Stakeholders who did not support the introduction of fair use, also said there should not be a private use illustrative purpose in the fair use provision.²¹ These stakeholders submitted that fair use or a fair dealing for private use would be too broad and too uncertain; the current exceptions are adequate, and strike the right balance; Parliament should decide on the scope of exceptions, not courts; and exceptions for private use should be carefully prescribed and confined.

10.22 Stakeholders who did not support fair use generally did not discuss what the exception should look like if it were to be enacted, but some expressed particular concern about including private and domestic use as an example in the provision. Some

16 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013) Ch 9.

17 For example, ADA and ALCC, *Submission 868*; Intellectual Property Committee, Law Council of Australia, *Submission 765*; eBay, *Submission 751*; Choice, *Submission 745*; Optus, *Submission 725*; Electronic Frontiers Australia, *Submission 714*; ACCAN, *Submission 673*; Communications Alliance, *Submission 652*; Cyberspace Law and Policy Centre, *Submission 640*; Telstra Corporation Limited, *Submission 602*; Google, *Submission 600*; National Archives of Australia, *Submission 595*; Museum Victoria, *Submission 522*. See also: Telstra Corporation Limited, *Submission 222*; EFA, *Submission 258*; iiNet Limited, *Submission 186*; Law Institute of Victoria, *Submission 198*. iGEA members had differing views on whether there should be a fair use exception, but were reportedly unanimous in opposing having ‘private and domestic use’ as an illustrative purpose: iGEA, *Submission 741*.

18 eBay, *Submission 751*.

19 Telstra Corporation Limited, *Submission 222*.

20 ACCAN, *Submission 194*.

21 For example, ABC, *Submission 775*; Foxtel, *Submission 748*; News Corp Australia, *Submission 746*; iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; AFL, *Submission 717*; Arts Law Centre of Australia, *Submission 706*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; COMPPS, *Submission 634*.

of the arguments for and against fairness exceptions for private uses are discussed further below. In considering these arguments, the ALRC also discusses the application of fair use to private uses.

10.23 Including ‘non-commercial private use’ in the list of illustrative purposes in the fair use provision will signal that a particular use that is non-commercial and private is more likely to be fair than a use which is not. While not determinative, a finding that a use is private will favour fair use.

10.24 However, this does not create a presumption that the use is fair. It will be crucial to consider the fairness factors. These factors may often weigh against a finding of fair use. For example, failing to pay for a private use that is commonly licensed by a rights holder may harm the rights holder’s market. Also, many private uses of copyright material may not be transformative. These factors may weigh against a finding of fair use.

10.25 Nevertheless, generally a private use will be more likely to be fair than a non-private use. Further, as discussed below, there are widespread community expectations that some private uses of legally acquired copyright material should not infringe copyright. In the ALRC’s view, ‘non-commercial private use’ is a suitable illustrative purpose to include in the fair use provision.

10.26 Some called for the scope of the private use concept to be made clear in the Act. However, the ALRC considers that the meaning of the phrase is sufficiently clear, and should not need to be defined in the Act. For both fair use and fair dealing, the listed purposes should be given a broad interpretation, and the focus of the fairness analysis should be on whether the use is fair, having regard to the fairness factors.

10.27 In the Discussion Paper, the ALRC proposed an illustrative purpose for ‘private and domestic use’. The ALRC now recommends that the purpose be ‘non-commercial private use’, without the word ‘domestic’. The ALRC does not see a great difference in the two phrases; they are intended to capture the same type of use. However, although many private uses will no doubt continue to occur in the domestic sphere—in the home—many may not. Omitting the word domestic should avoid the suggestion that a private use must occur on domestic premises.²² The popularity of remote and mobile computing would make such a limitation anachronistic.

10.28 By omitting the word ‘domestic’ from this illustrative purpose, the ALRC also does not mean to imply that domestic uses among family members or members of the same household cannot be, or are unlikely to be, fair use. The word ‘private’ is intended to differentiate the use from public uses, rather than to privilege uses that are confined entirely to the one person.²³

22 *Copyright Act 1968* (Cth) s 10 defines ‘private and domestic’ to mean ‘private and domestic use on or off domestic premises’, but the ALRC considers this should be clear on the face of the fair use and new fair dealing exceptions.

23 Some stakeholders also submitted that if the word domestic were included, the purpose should read ‘private *or* domestic’, rather than ‘private *and* domestic’. This would make the purpose more consistent with the other listed purposes, and ensure the purpose was not given an overly confined interpretation: For example, Google, *Submission 600*; ADA and ALCC, *Submission 586*.

10.29 Fair use could be enacted without including an illustrative purpose for private use. The US fair use provision and the fair use provisions in other countries do not have an illustrative purpose for private use. Private uses can be considered under these fair use exceptions anyway, and some have been held to be fair. Perhaps most notably, the private copying of broadcast television on home video recorders was held to be fair in the US Supreme Court in 1984,²⁴ 22 years before a time shifting exception was enacted in Australia.

10.30 For reasons set out below, the ALRC considers that including ‘non-commercial private use’ in the list of illustrative purposes would represent an important clarification of the fair use doctrine. It is not intended to substantially broaden the scope of fair use, as it applies in the United States.

International law

10.31 Fair use has been adopted in a number of countries, most notably the US, and is consistent with Australia’s international legal obligations.²⁵

10.32 The Committee of Government Experts that prepared the program for the 1967 Berne Conference, included the following paragraph, which was debated, amended and became art 9(2) of the *Berne Convention*—the three-step test:

It shall be a matter for legislation in the countries of the Union to permit the reproduction in such works

- (a) *for private use*;
- (b) for judicial or administrative purposes;
- (c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work.²⁶

10.33 Professors Sam Ricketson and Jane Ginsburg pointed out that this proposal elicited a wide range of amendments. Some sought to restrict the scope of the exception; others to expand it. France, for example, proposed the substitution of the words ‘individual or family use’ for the words ‘private use’, to avoid the possibility of commercial enterprises claiming that their copying was for private purposes. These differences, Ricketson and Ginsburg stated, ‘perhaps made delegates more ready to consider a proposal advanced by the UK which sought to embrace all possible exceptions within a single generalized exception consisting simply of paragraph (c) of the programme amendment’.²⁷

10.34 The provision drafted by the Committee of Government Experts seems to countenance private use exceptions that are not confined by the limitations in paragraph (c)—for example, ‘not contrary to the legitimate interests of the author’. The

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

25 See Ch 4.

26 Quoted in S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 762 (emphasis added).

27 *Ibid.*

final provision that was later accepted and became art 9(2), and the fair use exception recommended by the ALRC, are both narrower than the provision drafted by the Committee of Government Experts. The ALRC only proposes that unlicensed private uses be permitted where the use is fair, having regard to the fairness factors. However, it is interesting to note that private use has long been considered a likely subject of exceptions to copyright, and sometimes in terms considerably broader than recommended by the ALRC.

Social norms, user rights and new technologies

10.35 Many common private uses of legally acquired copyright material infringe Australian copyright law. Some of these private uses are widely thought by the public to be fair. This is one factor that suggests that some private uses of copyright material should not infringe copyright.

10.36 Many stakeholders said that Australians do not understand or respect the current copyright laws, and that the law does not reflect community attitudes or practice. The *Copyright Act* is said to be ‘out of sync with consumer behaviour and contemporary attitudes,’ because

technology and the myriad applications available to consumers provide consumers with new, cheap (often free) ways to use and store material, including copyright material, particularly for personal use.²⁸

10.37 Expanding private use exceptions would simply legalise what consumers are already doing, some said. Many submitted that the law should take account of consumer expectations. Commercial Radio Australia, for example, said:

The current copyright framework cannot be considered fit for the digital age when so many users repeatedly breach copyright, simply by shifting a piece of content from one device to another. Users expect to be able to store content on a variety of devices—including computers, mobile phones, tablets—and in a variety of locations, such as on local servers and in the cloud. Copyright law should recognise these changing use patterns and reflect them, to permit private individuals to take advantage of new technologies and storage devices available.²⁹

10.38 The ADA and ALCC submitted that the current private use exceptions ‘draw arbitrary lines not consistent with ordinary consumer behaviour: making the law ridiculous’.³⁰

10.39 Professor Kathy Bowrey submitted that changing technologies, often beyond the consumer’s control, can ‘effectively frustrate or terminate access to legitimate works’. An ebook bought for one device, for example, will often not work on another. Bowrey said it is ‘hard for consumers to understand why they do not have the right to maintain

28 NSW Young Lawyers, *Submission 195*.

29 Commercial Radio Australia, *Submission 132*.

30 ADA and ALCC, *Submission 586*. Also, ADA and ALCC, *Submission 213*: ‘It seems likely that the majority of Australian consumers aren’t aware that many of the ways in which they enjoy and engage with copyright works fall outside of the scope of what is permitted under copyright law. ... If consumers widely believe they have the ‘right’ to copy content they’ve acquired legally for personal enjoyment, and it’s generally recognised as acceptable consumer behaviour, copyright laws should reflect this.’

functional access to content they have purchased, because of technical decisions made by third parties'.³¹

10.40 Ericsson submitted that consumers 'increasingly expect to be able to consume creative content on demand, anytime, any device and anywhere' and the ability to copy lawfully acquired content within the private sphere is an 'integral and necessary step of modern consumer behaviour'.³²

10.41 Professor Pamela Samuelson, discussing US law, has said that 'ordinary people do not think copyright applies to personal uses of copyrighted works and would not find acceptable a copyright law that regulated all uses they might make of copyrighted works'.³³ Other US academics refer to research that suggests that 'most members of the public ... believe that personal use copying is acceptable as long as the copies are not sold'.³⁴ There is a core belief, Ashley Pavel argues, that strictly private uses of a purchased copy are 'none of the copyright owner's business'.³⁵

10.42 Laws that are widely ignored also lower the community's respect for the law more generally, and particularly other copyright laws. The force of the message that peer-to-peer file sharing of copyright material between strangers is illegal may be diluted by the message that copying a purchased DVD to a computer for personal use is also illegal. The Explanatory Memorandum for the Copyright Amendment Bill 2006 stated that failure to recognise such common practices as time and format shifting 'diminishes respect for copyright and undermines the credibility of the Act'.³⁶

10.43 Many stakeholders made these points. The ACCC said that failing to recognise common practices, such as format shifting purchased music or time shifting a broadcast, 'diminishes respect for copyright and undermines the credibility of the Act'.³⁷ The Law Institute of Victoria said that, 'if the law significantly diverges from widespread expectation and common community practice, then there is a serious risk that credibility for copyright law will become undermined'.³⁸ Similarly, eBay submitted:

The respect for copyright and the credibility of the Act depend on its ability to accommodate the ordinary use and enjoyment of legally obtained digital material by ordinary members of the public.³⁹

31 K Bowrey, *Submission 94*.

32 Ericsson, *Submission 151*.

33 P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537, 2591.

34 A Pavel, 'Reforming the Reproduction Right: The Case for Personal Use Copies' (2009) 24 *Berkeley Technology Law Journal* 1615, 1617.

35 Ibid, 1617. See also A Perzanowski and J Schultz, 'Copyright Exhaustion and the Personal Use Dilemma' (2012) 96(6) *Minnesota Law Review* 2067, 2077.

36 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 6.

37 ACCC, *Submission 165*.

38 Law Institute of Victoria, *Submission 198*.

39 eBay, *Submission 751*.

10.44 Choice suggested that many consumer expectations with respect to private copying were ‘perfectly reasonable’.⁴⁰

If consumers feel like copyright law is out-of-touch or even unjust, then their respect for it will diminish. This may make it easier for consumers to justify other activities, such as piracy, as they already feel that copyright law is nothing to be taken seriously. This ultimately undermines the rights of copyright owners and also the benefits to consumers of ensuring the creators of copyright material are properly rewarded.⁴¹

10.45 However, other stakeholders were sceptical of the relevance of social norms to copyright policy. Some stressed that consumer expectations and behaviour should not justify changes to the law. The Australian Directors Guild said it was alarming and simplistic to consider community standards: ‘It may be common practice for people to smoke Marijuana but should we make it legal? It may be common practice for teenagers to drink underage but should it be made legal?’⁴² Foxtel submitted:

While we understand the Government’s desire to ensure that Australian copyright law keeps pace with legitimate consumer practices, simply because digital technology is available which makes copying and storing content easier does not mean that the law should be amended to legitimise infringing conduct.⁴³

10.46 Others said that, if the public does not know that common practices are illegal, then this is not an argument for law reform, but for a public awareness campaign.⁴⁴

10.47 The ALRC agrees that social norms should not dictate the law. But the law should at least account for social norms—policy makers must consider community standards. If a practice is very widespread, and commonly thought to be harmless, then this should be considered when determining whether the practice should be prohibited. It may also be a relevant factor to consider when applying fair use or fair dealing.

10.48 By appealing to fairness and requiring consideration of real market harm, fair use and the new fair dealing exception better account for these social norms than the existing prescriptive and confined private copying exceptions.

A single, technology-neutral provision

10.49 Australia’s private copying exceptions should be less complex and more flexible. Currently, they are complex, prescriptive, and tied too closely to specific technologies.

10.50 A number of stakeholders agreed that a single, technology-neutral exception for private use, though not necessarily fair use, would simplify and clarify the *Copyright Act*. The ABC, for example, submitted that ‘a single, technology-neutral, format

40 Choice, *Submission 745*.

41 Ibid.

42 Australian Directors Guild, *Submission 594*.

43 Foxtel, *Submission 245*.

44 COMPPS, *Submission 266*.

shifting exception with common restrictions that reflects the underlying policy of the exception would be preferable'.⁴⁵

10.51 A technology-neutral approach to copyright policy might seem to suggest that whatever users may do using technology in their own home, they should be able to do using technology stored remotely. Individuals are increasingly using cloud computing services to store copies of copyright material, enabling consumers to access their content from multiple computers and devices more easily. This also raises the question, discussed in Chapter 7, of third parties facilitating private use.

10.52 Some stakeholders said that private copying exceptions should focus on the purpose of the use, rather than on any particular technology or the type of material being used.⁴⁶ This, it was said, would allow the law to adapt to new technologies.

10.53 Some called for a more technology-neutral application of time shifting exceptions, saying that they should not be confined to broadcast material. Ericsson submitted, for example, that a time shifting exception 'should apply irrespective of content delivery method or underlying technology' and that it 'strongly believes that copyright law should adhere to a technology neutral principle, where the basis of an exception should be the purpose rather than the technology itself'.⁴⁷

10.54 The focus should be on the nature of the activity, others submitted, rather than the type of content or platform. Is a service merely a recording and storage facility, or something more?⁴⁸

10.55 The Internet Industry Association submitted that, if advertiser-supported broadcast television content were made available on the internet, without requiring payment of a subscription fee to access, then time shifting exceptions to copyright should apply.⁴⁹ The ABC made a similar point, but said the exception should be confined to 'ephemeral content'—a scheduled stream of content, rather than content that can be watched on demand.⁵⁰

10.56 The fair use and new fair dealing exceptions are both technology neutral. They are also not confined to particular types of copyright material, nor to particular rights. In these respects, they are considerably better suited for application to private uses that will use technologies and digital practices that change rapidly, often in unforeseen ways. But these technology-neutral exceptions need not apply equally to all similar technologies, just as they may not apply equally to all types of copyright material (as discussed in the following section). When fair use and fair dealing are applied, uses with some technologies may be found to be fair, while uses with other technologies may not. This is one of the strengths of fairness exceptions.

45 ABC, *Submission 775*.

46 For example, K Bowrey, *Submission 94*.

47 Ericsson, *Submission 151*. See also ACCAN, *Submission 194*; ACCC, *Submission 165*.

48 For example, ABC, *Submission 775*.

49 Internet Industry Association, *Submission 253*.

50 ABC, *Submission 775*.

10.57 Fair use is also less complex than Australia's current private copying exceptions. Case law applying fair use may not be widely understood by members of the public, and opinions about what is fair will vary, but at least the concept of fairness is relatively easy to comprehend.

Business models and market harm

10.58 Some private uses of copyright material are unlikely to have any significant effect on the market for the material, provided the original or copies are not sold or given away. Members of the public may be unlikely to seek licences for purely private, non-commercial uses of copyright material that they may feel they have already paid to use as they please. ACCAN submitted that it was:

not merely 'unlikely' that the public would seek out the fine print governing non-commercial use of content already paid for in order to find out what kind of private copying is allowed—it is entirely unrealistic.⁵¹

10.59 However, some unlicensed private uses of copyright material may well harm a market that rights holders alone should be able to exploit. Copyright owners may offer licences for making multiple copies, or license access to copyright material from multiple computers, phones, tablets and other devices. For example, subscription music services may allow users to stream music to multiple devices. Films sold on DVD and Blu-ray discs are sometimes sold with a digital file that may be stored and played on computers and tablets. Similar licensed services are available for ebooks and other copyright material.

10.60 Some argue that if the market for private copying had ever failed, it has now been corrected, and that exceptions for private copying will undermine existing and emerging business models. Such arguments were made by many rights holders and others in submissions to this Inquiry.⁵² The Australian Copyright Council submitted that 'business models are reducing the need to engage in private copying' and that there was no need to extend the private copying exceptions.⁵³ The iGEA said that a new fairness exception

would interfere with the development and continued operation of a number of technology driven licensing models that satisfy consumer demand for format shifting and backup as well as innovative business models for game content delivery.⁵⁴

10.61 BSA—The Software Alliance submitted that 'a wide variety of rights to copy legally acquired computer programs for private and domestic use is currently provided for in the applicable license agreements for the programs'.⁵⁵

51 ACCAN, *Submission 673*.

52 For example, Foxtel, *Submission 748*; News Corp Australia, *Submission 746*; iGEA, *Submission 741*; ARIA, *Submission 731*.

53 Australian Copyright Council, *Submission 219*.

54 iGEA, *Submission 741*: 'The proposed exception risks interfering with the operation of such licensing models to the detriment of Australian consumers.'

55 BSA, *Submission 248*.

10.62 ARIA referred to Apple's iTunes as an example of a program that 'allows customers to store downloads on five authorized devices at any time, and burn an audio playlist up to seven times for personal non commercial use'. Not only should new exceptions not be introduced, but the existing exception for copying music in s 109A of the Act is now 'of limited utility as many acts of copying are now covered under licensing provisions'.⁵⁶

10.63 Discussing the time shifting of broadcast television content, the Australian Film and TV Bodies submitted that the commercial development of legitimate online business models, including 'licensed cloud based services, online video on demand, and catch-up online television ... are already enabling consumers to watch copyright material at a time that suits them'. New exceptions would diminish the capacity for rights holders to extract value in online environments.⁵⁷

10.64 Foxtel submitted that it was 'very concerned' that any loosening of the existing provisions will undermine its ability to market and benefit from the catch-up television services it offers its customers.⁵⁸

10.65 The ALRC does not recommend a blanket exception for private use, or an exception that treats all copyright material and all copyright markets in the same way. The recommended fair use exception is better suited to account for the effect of a given use on the market for copyright material than specific, closed-ended exceptions. Fair use is a flexible exception that, unlike the existing Australian time and format shifting exceptions, requires consideration of the 'effect of the use upon the potential market for, or value of, the copyright material'. Where the market offers properly licensed copies, then it may be less likely that making private copies will be fair. Where a television station offers an online catch-up service, for example, then a competing service that makes copies of broadcasts for consumers may be less likely to be fair.

10.66 Many of the other factors that rights holders said should affect the scope of copyright exceptions can also be considered in determining whether a use is fair. For example, in deciding whether a particular private use is fair, under fair use, consideration might be given to whether the content was provided with advertising, or upon payment of a fee. Whether the consumer purchased a permanent copy, or whether they were only entitled to have access to the content for a limited period of time, will also be relevant.

Different markets

10.67 Others stressed that private copying may harm the market for some works more than others. Recorded music, sheet music, films and books all have considerably different markets. For some stakeholders this suggested that a single technology-

56 ARIA, *Submission 241*.

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

58 Foxtel, *Submission 748*: 'Foxtel refreshes this content regularly and the period of time such content is available to stream or download varies, although is rarely longer than 28 days. It is unclear how a new exception for private and domestic use would operate in the context of such services.' See also News Corp Australia, *Submission 746*.

neutral exception for private use would be inequitable, and that specific exceptions are needed to ensure no substantial harm is caused to any particular market.⁵⁹ For example, it was submitted that exceptions for private copying might particularly harm the audiovisual sector⁶⁰ and publishers of printed music.⁶¹

10.68 Concerns about the differing effects of exceptions on different markets also informed the conclusions of a 2008 review of the format shifting exceptions. The Australian Government Attorney-General's Department stated that it recognised the advantages of consistency and simplicity, but also that:

The test of financial harm must be applied to particular markets. Markets for digital music, photographs and films are very different. This will produce differences in exceptions unless they are drafted in a common form which causes no substantial harm to any copyright market.⁶²

10.69 The ALRC appreciates these concerns of copyright owners, but considers that the fair use and new fair dealing exceptions can account for these differences in markets, copyright materials and technologies. This is one important reason the ALRC prefers these fairness exceptions to a new specific exception that does not allow for a proper consideration of the likely effect of a use on a rights holder's interests.

10.70 The flexibility of the fairness exceptions recommended in this Report allow for a use of one type of content to be fair, and another unfair, because the two uses have different effects on rights holders' markets. This is one of the benefits of fair use and fair dealing. The Act need not distinguish between the markets, because the exceptions are flexible and can distinguish between types of copyright material in their application.

10.71 Much of the discussion of the ALRC's proposal about private and domestic use seemed to ignore the fact that, for the exception to apply, a particular use would have to be fair, having regard to fairness factors which include any harm to the rights holder's market. Some stakeholders seemed almost to suggest that all a user would need to establish was that their use was private, for the exception to apply. This is not how fair use or fair dealing work. These exceptions are not blanket exceptions for private use.

Commercial use

10.72 Private uses of copyright material that will be fair use will also usually be non-commercial. Arguably, a private use will necessarily be a non-commercial use. Although it may be possible for a truly private use to be commercial, this will be rare.

59 For example, ASTRA, *Submission 747*; Free TV Australia, *Submission 270*.

60 Australian Film/TV Bodies, *Submission 739*: 'The model proposed is inappropriately broad and likely to result in significant harm to rights holders, particularly those in the audio visual sector.'

61 Hal Leonard Australia Pty Ltd, *Submission 202*.

62 Australian Government Attorney-General's Department, *Copyright Exceptions for Private Copying of Photographs and Films, Review of sections 47J and 110AA of the Copyright Act 1968 (2008)*, [3.16], [3.17].

10.73 Some stakeholders submitted that non-commerciality should be a mandatory condition of any private use exception (that is, if the use is commercial, the exception necessarily does not apply).⁶³ The draft private copying exception being considered in the UK only applies if the copy is made ‘for that individual’s private use for ends that are neither directly nor indirectly commercial’. Many stakeholders were particularly concerned about people posting material to commercial social networks and thinking that this was private.⁶⁴ As discussed below, sharing content online with large groups of people should not be considered a private use.

10.74 Under fair use, a commercial use is less likely to be fair, but the commerciality is not determinative. The ALRC recommends that the illustrative purpose for this type of use be ‘non-commercial private use’. The possible tautology is intended to remove doubt about the kind of activity the ALRC considers a good example of fair use.

10.75 This does not mean that time shifting and format shifting by commercial enterprises can never be fair. Such uses will not be private or non-commercial, and so are less likely to be fair, but in some circumstances they may be fair.

10.76 Many commercial third parties facilitate non-commercial private uses.⁶⁵ The fact that a commercial third party facilitator is not itself acting for a private non-commercial purpose, and so will not be covered by the illustrative purpose for private use, does not mean that such uses will necessarily be unfair. Unlike fair dealing exceptions, fair use is not confined by the listed purposes.

Other factors

Permanent copies

10.77 Some submitted that private copying exceptions should only apply where someone has legally acquired a permanent copy of the copyright material.⁶⁶ The new private copying exception being considered in the UK only applies where the individual had lawfully acquired, on a permanent basis, the copy from which further copies are made.

10.78 The ALRC agrees that a private use will be more likely to be fair, where the user owns a permanent copy of the original. It would rarely, if ever, be fair use for a person to make digital copies of films and CDs the user has borrowed from friends or from a library. But it may be fair use to make a copy of a broadcast television program, so that the user may look at the material at a more convenient time (currently permitted under the *Copyright Act*). It also may be fair use in some circumstances to keep a copy of a page of a website for later reference.

63 For example, Foxtel, *Submission 748*; Australian Film/TV Bodies, *Submission 739*; Cricket Australia, *Submission 700*. However, these bodies did not support new private copying exceptions.

64 For example, AFL, *Submission 717*; Arts Law Centre of Australia, *Submission 706*.

65 See Ch 7.

66 For example, Foxtel, *Submission 748*; Australian Film/TV Bodies, *Submission 739*.

10.79 The ALRC does not recommend that a rule about this be set in the Act. This matter is better considered along with other relevant matters, in determining whether a use is fair.

Own device or in the cloud

10.80 It is now commonplace to use remote servers in ‘the cloud’ for private storage and use of copyright material. Many computer programs and internet browser add-ons also allow users to copy and store internet content such as web pages for later viewing, often storing the content in the cloud and giving users access from multiple devices.

10.81 Private copying exceptions should not be confined to copies stored on a computer or device owned by the person making the copy. If private copying exceptions cannot apply to the use of copyright material using cloud-based technologies, then Australian copyright law will not be fit for the digital age.

10.82 This is not to say that third parties, such as companies that provide cloud computing services, should necessarily be free to use copyright material for their customers in all circumstances. Such third parties, including cloud service providers, offer a range of services across a wide spectrum. Pure storage in digital lockers may be on one end of the spectrum and, in the ALRC’s view, should be fair use.⁶⁷

Disposal of original

10.83 Private copying will be much less likely to be fair if the user gives the new or original copy to someone else. Sharing copyright material in this way can clearly harm a rights holder’s market, reducing the incentive to create and distribute copyright material. A person should not be free to ‘rip’ their CD collection and then sell their CDs. For this copying to be fair, the CDs should either be stored or destroyed.

10.84 The existing private copying exceptions feature an explicit limitation, providing for example that the exception ‘is taken never to have applied if the owner of the original photograph disposes of it to another person’.⁶⁸ This seems too strict. If a person copies a CD, listens to a copy on his or her iPod for a few years, then later wishes to sell the CD or give it away, then the person should simply be required to delete the copies before disposing of the original.⁶⁹

67 Third party facilitators and cloud technologies are discussed in Ch 7.

68 *Copyright Act 1968* (Cth) s 47J(6).

69 See further, R Xavier, *Submission 146*: ‘Also, a problem with some of the existing format-shifting exceptions is the way that the act of format-shifting is retrospectively deemed to have been an infringement if the original copy is disposed of to someone else (see eg s 47J(6)). This seems to mean that if a copy is made for the purposes of format-shifting, the original can never be dealt with again even if the format-shifted copy is destroyed. ... This retrospectivity should be fixed throughout the Act, as it appears several times.’

Fair dealing and third parties

10.85 If fair use is not enacted, the ALRC recommends that an alternative new fair dealing exception be introduced.⁷⁰ This exception should include ‘non-commercial private use’ as one of the prescribed purposes.

10.86 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 general fair use exception. Applying either of the two exceptions to a private use should therefore produce the same result.⁷¹

10.87 As discussed in Chapter 6, the new fair dealing exception leaves less room for unlicensed third parties to use copyright material in circumstances where they facilitate private uses. This is because the new fair dealing exception is confined to uses for specified purposes. Sometimes the purpose of a third party use will be nearly indistinguishable from the purpose of the end user. At other times, the third party use may be quite different.

10.88 Some stakeholders were concerned that fair use might permit third parties to make copies on behalf of their customers, for their customer’s private use. This would ‘allow unlicensed entities to profit at the expense of those who have invested in the creation of Australian content’.⁷² ASTRA said it would ‘strongly oppose’ reforms that permitted such third parties ‘to build a business model using copyright material based on exceptions specifically created only for private or domestic use’.⁷³

10.89 While many of these third party uses may not be fair, a general fair use exception is preferable to the new fair dealing exception, because with fair use, the question of fairness can at least be considered. Uses for purposes not listed in the provision are not automatically excluded.

10.90 Copyright law that wishes to allow for the development of new technologies and services should not presumptively exclude uses of copyright material for particular purposes, without asking whether the use would be fair. For this reason, the ALRC prefers the general fair use exception. However, a flexible exception that requires consideration of key principles, even if confined to a specified purpose, is still preferable to the current specific exceptions in the *Copyright Act*.

Contracting out and TPMs

10.91 Copyright owners may sometimes provide their material only to customers who agree not to copy, or use in other prescribed ways, the material. This raises the question of ‘contracting out’ of copyright exceptions, discussed in Chapter 20. Technological protection measures (TPMs) may also be used to enforce these provisions.

70 See Ch 6.

71 The difference between the two exceptions should only affect uses not for one of the listed purposes.

72 Foxtel, *Submission 748*.

73 ASTRA, *Submission 747*.

10.92 These contracts and TPMs can work to lock consumers into content ‘ecosystems’. The more a person buys from one company, the more convenient it is to buy other content from that company, and the more inconvenient it becomes to buy content from another company. This becomes more pronounced, as content providers increasingly offer to store content for their customers in the cloud.

10.93 Exceptions for private use will be of less value to consumers, if they cannot circumvent TPMs and they must contract out of the exceptions before being given access to copyright material.⁷⁴

Piracy is not fair use

10.94 Fair use does not legalise piracy. Unauthorised peer-to-peer file sharing of music and films with strangers, for example, would not be fair use nor a fair dealing for private use.

10.95 However, some object to exceptions for private copying on the grounds that they may facilitate piracy. It may be fine for the owner of a DVD to make a copy of the film for his or her own use but if this is permitted, it is argued, then the person may be more likely to share the copy with others, including through peer-to-peer networks. Foxtel, while open to the idea of a new single exception for private copying, expressed concern about digital-to-digital copying of films, and the possible facilitation of online piracy.⁷⁵

10.96 The Motion Picture Association of America submitted that fair use, with an illustrative purpose for private use, would ‘undoubtedly register in the public mind as a policy conclusion that infringements are excused if they take place at home or in a domestic environment’ and ‘businesses that cater to facilitating such infringements will be normalized in the public eye’.⁷⁶

[I]t is easy to imagine that someone knowingly downloading pirated content in her own home would assume that a newly-created ‘private use’ exception would apply to that activity, as incorrect as this may be. This eminently foreseeable communication problem would contribute to an already problematic culture of piracy.⁷⁷

10.97 The ALRC considers that the introduction of fair use, with an illustrative purpose for private use, will not have this effect. Piracy will be no less criminal if fair use is enacted. If a person is prepared to infringe copyright laws by illegally sharing films with strangers over peer-to-peer networks, that person will presumably have little regard to laws that prohibit digital-to-digital copying of films for purely private use.

Social uses

10.98 Uploading a copyrighted song or video clip to YouTube or Facebook is not a private use. Whether or not such uses should sometimes be considered fair, these uses

74 Exceptions in relation to TPMs are outside the Terms of Reference.

75 Foxtel, *Submission 245*. See also News Limited, *Submission 224*.

76 Motion Picture Association of America Inc, *Submission 573*.

77 *Ibid.* See also Association of American Publishers, *Submission 611*.

are clearly not private and so will not be captured by the fair use illustrative purpose for ‘non-commercial private use’ recommended in this Report.

10.99 Some social uses of copyright material would be fair use. However, sharing content outside the domestic sphere is less likely to be fair—particularly if the use is not transformative and harms a market that rights holders should be entitled to exploit. For this reason, the ALRC does not recommend that ‘social uses’ be included as an illustrative purpose for fair use.

10.100 Many online uses of copyright material are not transformative, and some are clearly not fair. Arguably the ‘sharing’ of copyright content that is most unfair and causes the greatest damage to rights holders is the use of peer-to-peer file sharing networks, digital lockers and other means to exchange entire films, television programs, music and ebooks.

10.101 Many submissions stressed that some so-called ‘social’ uses of copyright material must not be confused with true private uses. The Music Council of Australia said that a ‘clear distinction must be drawn between burning a compilation CD at home to play on the kitchen stereo, on the one hand, and disseminating to 800 “friends” via social media such as Facebook’.⁷⁸ Cricket Australia submitted:

The use of content on social media (such as Facebook and Twitter) or online sharing sites (such as YouTube) cannot properly be classified as ‘private and domestic’ where the content can be viewed by a large number of people (and in many cases all users of the internet) and monetised either by the uploader or site operator.⁷⁹

10.102 Many users will not understand or recognise the difference between private and social uses, some stakeholders suggested. ARIA submitted that, in its experience, ‘uses that an individual may consider to be of a ‘private’ or ‘domestic’ nature are now routinely uploaded to online services which make the content available globally and underpin very profitable commercial businesses’.⁸⁰

10.103 However, many other social uses of copyright material—for example, creating certain user-generated content⁸¹—are arguably less harmful and now commonplace. These may even include uses that are unlicensed, not transformative, and feature on commercial platforms.

78 Music Council of Australia, *Submission 269*.

79 Cricket Australia, *Submission 700*. See also Arts Law Centre of Australia, *Submission 706*: ‘from the perspective of the artist or creator of the copyright work, it may be one thing to create a family video that incorporates a copyrighted song and share that video with family by email ... However, it is another to put such a video on a social networking site.’ COMPPS, *Submission 634*: ‘in the digital environment, many online services used by individuals are both public and commercial’.

80 ARIA, *Submission 731*. See also Arts Law Centre of Australia, *Submission 706*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*.

81 Content made publicly available over the internet, which ‘reflects a certain amount of creative effort’ and is ‘created outside of professional routines and practices’. User-generated content includes, for example, audio-visual excerpts from copyright material, such as movies or music, perhaps associated with commentary by the individual: Organisation for Economic Co-operation and Development, *Participative Web and User-Created Content* (2007), 9.

10.104 Existing exceptions, such as the fair dealing for parody or satire exception,⁸² may apply to some user-generated content that uses copyright material. However, much user-generated content will not be covered by these existing exceptions—for example, using a copyright sound recording in a home video.

10.105 Jeff Lynn, chairman of the UK Coalition for a Digital Economy has written that this ‘incidental’ sort of copyright infringement is ‘part and parcel of using the internet and participating in innovation’:

It is simply impossible to confirm the rights to every image, block of text or sound clip that one shares with friends on Facebook or incorporates into a home video to send to the grandparents.⁸³

10.106 Further, Lynn writes that ‘while this sort of copying may not always be innovative itself, its inextricable link with the highly innovative activities associated with internet use means that quashing it results in quashing a lot of collateral good’:

[A]ny hypothetical loss [to rights holders] from the failure of a handful of people to buy a licence to a given work shared casually among a small network is not only negligible but it is almost certainly outweighed by the discovery advantages.⁸⁴

10.107 Individuals who upload copyright material onto social websites—such as YouTube—are not often the subject of legal action by rights holders. The ALRC understands that rights holders increasingly work with internet platforms to manage content by other means. For example, in the case of YouTube, rights holders may choose to ‘monetize, block or track’ the use of their content.⁸⁵

10.108 The ALRC agrees with the Copyright Council Expert Group’s observation that user-generated content ‘reflects a full spectrum of creative and non-creative re-uses’ and should not automatically qualify for protection under any proposed exception aimed at fostering innovation and creativity.⁸⁶

10.109 Social uses of copyright material are best considered on a case-by-case basis, applying the fair use exception. It is doubtful that attempting to prescribe types of social uses that should not infringe copyright would be beneficial. Attempts to distinguish between types of user-generated content without using general fairness principles seem unlikely to be successful.

An alternative—a new specific exception

10.110 If neither a fair use, nor a fair dealing for private use, exception is enacted in Australia, then the ALRC suggests that the existing private copying exceptions in the *Copyright Act* should be consolidated and simplified. Such an exception would not

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

83 J Lynn, ‘Copyright for Growth’ in I Hargreaves and P Hofheinz (eds), *Intellectual Property and Innovation: A Framework for 21st Century Growth and Jobs* (2012) 15, 15.

84 *Ibid.*, 15.

85 YouTube, *Content ID* <www.youtube.com/t/contentid> at 24 July 2012.

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

refer to fairness factors, but would instead simply describe the circumstances in which a private or domestic copy might be made.⁸⁷

10.111 The Law Institute of Victoria submitted that, if fair use is not enacted, ‘then a separate, single exception should be introduced, along the lines of Canada’s *Copyright Modernization Act 2012* (Can)’.⁸⁸ Rather than a separate format shifting exception for each type of work (one for films, one for music, etc), each with its own conditions, Canada’s *Copyright Act* contains only one exception for reproductions for private purposes. This exception applies to ‘a work or other subject-matter or any substantial part of a work or other subject-matter’.⁸⁹

10.112 It has been argued that fair use may not allow for a sufficiently wide range of private uses—particularly for uses that are non-transformative, for example copying an entire film or television program from one format to another, for personal use.⁹⁰ Some have suggested broader exceptions that apply to all private uses, without an assessment of fairness. However, in the ALRC’s view, without a fairness test, such exceptions may be too broad and may unfairly harm rights holders’ interests.

Repeal of existing exceptions

10.113 The existing exceptions for time shifting and format shifting in the *Copyright Act* should be repealed. Most stakeholders that supported the introduction of fairness exceptions agreed that if such exceptions were enacted, the existing private copying exceptions could be repealed.

10.114 A few stakeholders suggested that the existing private copying exceptions should be repealed, but not replaced with fair use or other private copying exceptions. The Australian Film and TV Bodies submitted that the exceptions for time shifting broadcasts and format shifting VHS tapes should be repealed, because they were no longer necessary.⁹¹ The Australian Copyright Council said that given the criticism of the existing exceptions for private use, the exceptions should be repealed.⁹²

10.115 However, the ALRC recommends the existing exceptions for private use only be repealed if fair use or the new fair dealing exception is enacted.

87 The ABC supported specific exceptions for private use, rather than fair use, but said it would consider supporting ‘the consolidation of the various format-shifting exceptions into a single technology-neutral format-shifting exception’ and it ‘supports the extension of section 111 to cover ephemeral transmissions, such as simultaneous online streams of broadcasts (‘simulcasts’) and live webcasts by broadcasters’: ABC, *Submission 775*.

88 Law Institute of Victoria, *Submission 198*.

89 *Copyright Modernization Act, C-11 2012* (Canada) s 29.22(1).

90 See, eg, A Pavel, ‘Reforming the Reproduction Right: The Case for Personal Use Copies’ (2009) 24 *Berkeley Technology Law Journal* 1615, 1630.

91 Australian Film/TV Bodies, *Submission 739*: ‘The growth of the digital market for feature films and television programs and the decline in sales of analogue recording equipment and mediums means that ss 111 and 110AA are no longer necessary.’

92 Australian Copyright Council, *Submission 654*.

Recommendation 10–1 The exceptions for format shifting and time shifting in ss 47J, 109A, 110AA and 111 of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether a private use infringes copyright.

