14. Government Use

Contents

Summary

14.1 Government uses of copyright material are currently the subject of a statutory licence in pt VII div 2 of the *Copyright Act 1968* (Cth). The ALRC proposes the repeal of the statutory licence in Chapter 6, in favour of voluntary licensing. Governments should continue to pay for many uses of copyright material.

14.2 However, there are certain uses that are essential for the proper conduct of the administrative, judicial and parliamentary work of government. The fair use exception proposed in Chapter 4 should be applied when determining whether a government use infringes copyright; and 'public administration' should be an illustrative purpose in the fair use exception.

14.3 This chapter considers some government uses that have caused disagreement and uncertainty under the existing legal arrangements: use required by statute — especially under freedom of information and planning and environment laws—and use where there may be an implied licence—including use of incoming correspondence, material on free websites, and other government material. The ALRC proposes that these uses should be considered under a fair use exception, and anticipates that many of these uses are likely to be fair. However, the fairness factors will ensure that uses that cause unwarranted harm to copyright owners will not be fair use.

Current arrangements

14.4 The *Copyright Act* contains a statutory licensing scheme for government use in pt VII div 2. Under this licence, government use of copyright material does not infringe copyright if the acts are done 'for the services of the Commonwealth or State'.[1] When a government uses copyright material, it must inform the owner of the copyright and agree on terms for the use.[2] However, if a collecting society has been declared in relation to a government copy, the government must pay the collecting society equitable remuneration for the copy.[3]

14.5 Two collecting societies have been appointed, Copyright Agency for text, artworks and music (other than material included in sound recordings or films) and Screenrights for the copying of audio-visual material, including sound recordings, film, television and radio broadcasts.[4] Equitable remuneration is worked out by using a sampling system to estimate the number of copies made.[5]

14.6 The *Copyright Act* also includes some specific exceptions that are relevant to government use of copyright material: reproduction for the purposes of judicial proceedings;[6] and copying in Parliamentary libraries for members of Parliament.[7]

14.7 It is unclear whether the fair dealing exceptions in pt III div 3 of the *Copyright Act* are available to governments in Australia, or whether a government can rely on an implied licence to use copyright material. These matters are discussed further below.

Changing patterns of government use

14.8 Government use of copyright material has changed significantly in response to the emergence of digital technologies. Governments now receive large amounts of copyright material via email and online, scan and digitally store documents sent to them, email documents internally and publish material on intranets and external websites. They are much more likely to rely on subscriptions to online libraries and media portals than on hardcopy newspapers, books, journals and looseleaf services.

14.9 Digital technology is also an intrinsic part of the open government agenda. The Australian Government has declared that 'it is committed to open government based on a culture of engagement, built on better access to and use of government held information, and sustained by the innovative use of technology'.[8] Reforms associated with open government include the amendment of the *Freedom of Information Act 1982* (Cth) (the FOI Act) and the establishment of the Office of the Australian

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1 *Copyright Act 1968* (Cth) s 183(1).
2 Ibid s 183(5).
3 Ibid s 183A(2).
4 Australian Government Attorney-General's Department, *Australian Government Intellectual Property Manual* <www.ag.gov.au> at 9 August 2012.
5 *Copyright Act 1968* (Cth) s 183A(3).
6 Ibid ss 43(1), 104.
7 Ibid ss 48A, 104A.
8 Australian Government Information Management Office, *Declaration of Open Government* <http://agimo.gov.au/2010/07/16/declaration-of-open-government/> at 30 April 2013.

Information Commissioner and the Information Publication Scheme. This scheme requires agencies to publish certain information, including information released under freedom of information requests, on their websites.[9] There are similar schemes at the state and territory level.[10]

14.10 These developments challenge the existing statutory arrangements for government use of copyright. There are particular concerns about whether the uses required by open government statutes are free or remunerable; and whether the increased numbers of copies made as a result of digital procedures are remunerable. Disagreements about which uses are remunerable have led to difficult and protracted negotiations over the amounts payable under the statutory licence.[11]

14.11 In Chapter 6, the ALRC proposes the abolition of the statutory licence for government use, on the basis that voluntary licensing is more suitable in the digital environment. Negotiations for voluntary licences will also be conducted in light of the availability of exceptions. The ALRC has considered whether specific exceptions should be available for certain government uses, as was suggested by several government agencies.[12] For example, both the United Kingdom and New Zealand copyright statutes include a list of exceptions under the heading 'public administration' that includes the following:

- parliamentary and judicial proceedings;
- royal commissions and statutory inquiries;
- material open to public inspection or on official registers;
- material communicated to the Crown in the course of public business; and
- acts done under statutory authority.[13]

14.12 The ALRC considers that specific exceptions are insufficiently flexible in the digital environment. They do not adapt to changing patterns of use. For example, neither the UK nor the NZ statute provides for online access to material open for public inspection.[14]

14.13 It is difficult to predict the type of government uses that will become vital for democratic processes in the future. As the Spicer Committee commented in 1959,

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9 Ibid.

10 For example, *Government Information (Public Access) Act 2009* (NSW); *Right to Information Act 2009* (Qld); *Right to Information Act 2009* (Tas).

11 Discussed in Ch 6.

12 NSW Government, *Submission 294*; Victorian Government, *Submission 282*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

13 *Copyright, Designs and Patents Act 1988* (UK) ss 45–50; *Copyright Act 1994* (NZ) ss 58–66.

14 The United Kingdom government has indicated its intention to amend the *Copyright, Designs and Patents Act 1988* (UK) with regard to online access (UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 47, but this has not yet occurred.

'most of us think that it is not possible to list those matters which might be said to be more vital to the public interest than others'.[15]

14.14 Further, specific exceptions offer inadequate protection to copyright owners. In the UK and NZ, a government use that falls within one of the above exceptions could be permitted even where it had a significant impact on the market value of the copyright material.[16] In Australia, the specific exception for judicial proceedings has been described as:

> potentially broad: it is not qualified by any requirement of fair dealing and extends to any use that would otherwise infringe copyright. Accordingly, this will permit such acts as the making of multiple hard copies of documents, the making of electronic versions, public performance or exhibition, communication to the public ... so long as they are for the purposes specified in the subsection.[17]

14.15 Instead, the ALRC proposes that government uses should be considered under a general fair use exception, and that 'public administration' should be one of the illustrative purposes listed in the fair use provision. 'Public administration' is used in a broad sense, to encompass the activities of all three branches of government: the executive, the legislature and the judiciary. It is in the public interest for governments to use copyright material in ways that encourage open government, contribute to effective administration, and facilitate parliamentary and judicial processes. These uses are, largely, not part of the normal market for copyright material and do not affect the incentives for the creation of works.

14.16 However, not all uses of copyright material for the purpose of public administration would be fair use. All uses would be considered in light of the fairness factors: the purpose and character of the use, the nature of the material used, the amount and substantiality of the part dealt with, and the effect of the use upon the market for the material. The 'purpose and character of the use' will be particularly relevant when considering government uses which are non-commercial and intended to serve the public interest. Uses that contribute to efficient and open government are more likely to be fair use. Uses that are engaged in for a commercial purpose or that have a significant impact on the market for the copyright material are less likely to be fair use.

14.17 The approach proposed is similar to the US approach, where the US Department of Justice, Office of Legal Counsel has said that:

> while government reproduction of copyrighted material for governmental use would in many contexts be non-infringing because it would be a 'fair use' under

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15 Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959), 77.

16 The UK and NZ exceptions contain some qualifications, such as allowing copying only 'for the purpose of enabling the material to be inspected at a more convenient time or place': *Copyright, Designs and Patents Act 1988* (UK) s 47(2); or for the purpose of a member of Parliament performing his or her duties as a member: *Copyright Act 1994* (NZ) s 58(3)(b), but do not refer to the impact of the use on the value of the material.

17 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.70].

> 17 USC § 107, there is no 'per se' rule under which such government reproduction of copyrighted material invariably qualifies as a fair use.[18]

14.18 The approach is also consistent with the European Directive on Copyright in the Information Society, which allows member states to make an exception for

> use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.[19]

Proposal 14–1 The fair use exception should be applied when determining whether a government use infringes copyright. 'Public administration' should be an illustrative purpose in the fair use exception.

14.19 The remainder of this chapter will consider some particular government uses, some problems that have arisen under the current statutory arrangements, and how these uses might be treated under a fair use exception.

Fair dealing exceptions

14.20 There is currently disagreement and uncertainty about whether governments can rely on the exceptions in the *Copyright Act*.[20] For government, perhaps the most important exception is the fair dealing exception for the purpose of research or study.[21] The Tasmanian Government told this Inquiry that 'a large part of government copying of third party works is undoubtedly for the purpose of research for policy development and good governance'.[22] Government agencies indicated that there are other exceptions of importance to governments, such as: labels for containers of chemicals (s 44B) and back-up copies of computer programs (s 47C). Clarification is required as to their availability.[23]

14.21 John Gilchrist has explained that two views are possible.[24] One construction of the statutory licence scheme in pt VII div 2 is that governments cannot rely upon fair dealing exceptions and must instead adhere to the requirements of the licence.[25] Governments have advised that the declared collecting societies have taken this view,[26]

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18 US Department of Justice, Office of Legal Counsel, *Whether Government Reproduction of Copyrighted Materials Invariably is a "Fair Use" under Section 107 of the Copyright Act of 1976* <www.loc.gov/flicc/gc/fairuse.html> at 16 April 2013.

19 *Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, (entered into force on 22 June 2001) art 5(3)(e).

20 *Copyright Act 1968* (Cth) pt III, divs 3, 4, 5 and 7; pt IV, div 6.

21 Ibid s 40.

22 Tasmanian Government, *Submission 196*. While *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99 contains repeated references to 'private study', all of the references are quotes from United Kingdom judgments citing the English statute which then referred to 'private study, research' and so on. The *Copyright Act 1968* (Cth) does not refer to 'private study'.

23 DSITIA (Qld), *Submission 277*, Table 1; State Records South Australia, *Submission 255*, Table 1.

24 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1.

25 Ibid, 7–9.

26 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

and that government arrangements with collecting societies do not exclude payment for copying that could be fair dealing under pt III div 3.[27]

14.22 The Victorian Government said that this approach 'puts the State at a disadvantage compared to most non-government copyright users, such as corporations and individuals, who are entitled to rely on the exceptions to infringement by not remunerating copyright owners for specified copyright acts'.[28]

14.23 An alternative construction is that governments, like individuals and corporations, can rely on the fair dealing exceptions. In this case the statutory provisions only come into play when government use goes beyond that permitted by the fair dealing exceptions.[29] Gilchrist suggested that this is 'the better view' of the relationship between the fair dealing and the government statutory licensing provisions.[30] This approach is supported by Professors Enid Campbell and Ann Monotti, by government agencies and by rights holder SAI Global.[31]

14.24 Copyright Agency/Viscopy submitted that all government copying is covered by the statutory licence, but some of it is 'zero rated' or not remunerable. It said that when considering whether governments should be able to rely on the fair dealing exceptions, compliance costs should be taken into account: 'reliance on "free" exceptions necessarily requires closer attention to the requirements of the exception, with associated compliance costs'.[32] Copyright Agency/Viscopy appears to consider that uses that would be free to a non-government user are remunerable for government, but that, overall, the statutory licence is a less expensive option. It also proposes that fair dealing exceptions should not be available to government (other institutional and corporate users) unless the use is 'for a socially desirable purpose' that is 'not covered by a licensing solution'.[33]

14.25 Gilchrist points out that the Australian Government's 2003 agreement with Copyright Agency Limited exempted material copied for judicial proceedings and giving professional advice, but expressly excluded reliance on the other exemptions, such as research or study.[34]

14.26 The *Copyright Act* should be clear on whether governments can rely on the same fair dealing exceptions as individuals and non-government organisations. The

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27 Victorian Government, *Submission 282*; J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 15–16.

28 Victorian Government, *Submission 282*.

29 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 7. See also E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 464.

30 *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279, [11] cited in J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 8.

31 E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 464; Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*; SAI Global, *Submission 193*.

32 Copyright Agency/Viscopy, *Submission 287*.

33 Copyright Agency/Viscopy, *Submission 249*.

34 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 15.

disagreement between governments and the collecting agencies about reliance on fair dealing exceptions has been a major barrier to an agreement on a survey method and equitable remuneration, as is discussed in Chapter 7.

14.27 The fair dealing exceptions are intended to serve the public interest by ensuring that socially beneficial uses, such as research and study, are not impeded. It can be argued that this reasoning applies to government in the same way as it does to individuals. While governments are seen as having 'deep pockets', requiring remuneration for all uses could result in governments limiting their uses in a way that would not be in the public interest.

14.28 The Franki Committee said that governments 'should be entitled to copy a work in the circumstances where a private individual would be entitled to copy it without obligation to the copyright owners'.[35] The ALRC agrees that governments should not be required to pay for uses that are free to others. If the statutory licence for government use is abolished, as proposed in Chapter 6, there should be no doubt that any exceptions in the *Copyright Act* that are available to individuals are also available to governments.

Uses required by freedom of information laws

14.29 Freedom of information (FOI) legislation is intended to promote democracy by contributing to increasing public participation in government processes, promoting better decision making, and increasing scrutiny, discussion, comment and review of the government's activities.[36] The 'second generation' of FOI law treats government information as a national resource that has been invested in by the public and so belongs to the public.[37] Access to these resources in the digital environment means online access, which poses some significant challenges when the information is made up, in part, of copyright material that is not owned by the government. For example, the Office of the Australian Information Commissioner's freedom of information disclosure log includes a document where the copyright is not owned by the Australian Government.[38] As discussed below, this will not pose a problem for the Australian Government, but a similar use by a state, territory or local government could create difficulties.

Australian Government

14.30 The FOI Act provides immunity from proceedings for copyright infringement to Australian Government agencies and officers who give access to a document as required by the FOI Act.[39] The Australian Government's FOI reforms introduced in

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35 Copyright Law Committee, *Report on Reprographic Reproduction* (1976), 7.10, cited in J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 7.

36 *Freedom of Information Act 1982* (Cth) s 3.

37 J Bannister, 'Open Government: From Crown Copyright to the Creative Commons and Culture Change' (2011) 34 *UNSW Law Journal* 1080, 1090–1091.

38 Australian Government, Office of the Information Commissioner,, *Freedom of Information Disclosure Log* <www.oaic.gov.au/about/foi/disclosure-log.html> at 15 May 2013. The log includes an email from the Canadian Information Commissioner.

39 *Freedom of Information Act 1982* (Cth) s 90.

2010 extended this immunity to cover the publication on a website of information released to an FOI applicant.[40]

14.31 Both Copyright Agency/Viscopy[41] and Gilchrist[42] consider that Commonwealth uses under the FOI Act are free. However, the Office of the Australian Information Commissioner raised concerns that some publication of material under the FOI Act could have an undesirable impact on the copyright owner's revenue or market. The Office indicated that it is considering whether to except certain information from the Information Publication Scheme 'in circumstances where publication on a website would be unreasonable, such as if the document is an artistic work or publication would clearly impact on the copyright owner's revenue or market'.[43]

14.32 Copyright Agency/Viscopy submitted that the existence of exceptions to copyright infringement in other legislation such as FOI laws 'is confusing and can lead to inconsistencies'.[44] It argued that the better approach is for all of a government's uses of third party copyright material to be covered by the government statutory licence.[45] It explained that it is possible for the collecting society and a government to agree that certain classes of use will be allowed but will not be remunerated−that is, not taken into account in the provisions for payment.[46] The ALRC has concerns about this approach. Past negotiations have been unsuccessful,[47] in part because the statute is not specific about the types of uses that are remunerable and does not provide any principles to guide the parties in their negotiations.

State and territory governments

14.33 The immunity in the FOI Act only applies to the acts of federal government agencies subject to the FOI Act. For state and territories, providing immunity from copyright infringement for government officials may not be possible. It is arguable that such a state or territory statutory provision would be inconsistent with the *Copyright Act*, and would, to the extent of the inconsistency, be invalid.[48]

14.34 The existence of the statutory licence means that a government use of copyright material in compliance with FOI laws could be encompassed by the statutory licence.[49] The notification requirements of s 183 would apply or, if the material was covered by a declared collecting society, the special arrangements in s 183A would apply.

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40 *Freedom of Information (Amendment) Reform Act 2010* (Cth) sch 4 pt 1 item 50. See *Freedom of Information Act 1982* (Cth) s 90.

41 Copyright Agency/Viscopy, *Submission 249*.

42 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1.

43 Office of the Australian Information Commissioner, *Submission 145*.

44 Copyright Agency/Viscopy, *Submission 249*.

45 Ibid.

46 Ibid.

47 State Records South Australia, *Submission 255*; Copyright Agency/Viscopy, *Submission 249*; Tasmanian Government, *Submission 196*.

48 *Constitution* s 109, see further E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 471–472; and Victorian Government, *Submission 282*.

49 J Bannister, 'Open Government: From Crown Copyright to the Creative Commons and Culture Change' (2011) 34 *UNSW Law Journal* 1080, 1097–1098.

14.35 The situation regarding remuneration for these uses at state and territory level is unclear. Copyright Agency/Viscopy has indicated that it does not seek payment for every use and that remuneration for disclosure under FOI laws is a matter for negotiation.[50] The Victorian Government indicated that payment is required for providing documents under the *Freedom of Information Act 1982* (Vic)[51] and the NSW Government raised concerns about 'the risk of facing unpredictable, potentially large claims for payment'.[52] The Law Council submitted that:

> the exercise of these obligations should not carry a penalty of having to remunerate the copyright owner. If such a requirement were made, it is likely that the public authority would wish to pass on such costs. The Committee believes the public interest in disclosure outweighs any detriment to the copyright owner.[53]

Local government

14.36 Local governments are subject to state and territory FOI laws, and they are not covered by the statutory licence in the *Copyright Act*. The effect is that they risk copyright infringement when using copyright material in a way that is required by an FOI law.[54] It has been necessary to make special provision in FOI laws so that, if access to a document in the form requested would breach copyright, then access in that form may be refused and access given in another form.[55] Limits on laws requiring governments to make information available proactively have also been enacted—for example, the *Government Information (Public Access) Act 2009* (NSW) was amended to provide that an agency is not required to make 'open access information' available if this would infringe copyright.[56] This approach gives blanket and inflexible protection for copyright material, and does not further the aim of open government. The NSW Information and Privacy Commission (NSW) stated that the risk of infringing copyright 'undercuts the transparency and effectiveness of the GIPA Act by limiting councils' ability to provide public access to documents that inform the basis of their decisions'.[57]

Disclosure under FOI laws and fair use

14.37 The current situation regarding FOI laws and government use of copyright material is complex, uncertain and is different for each level of government.

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50 Copyright Agency/Viscopy, *Submission 249*.
51 Victorian Government, *Submission 282*.
52 NSW Government, *Submission 294*.
53 Law Council of Australia, *Submission 263*.
54 Information and Privacy Commission NSW, *Submission 209*.
55 See, eg, *Freedom of Information Act 1982* (Cth) s 23(3)(c); *Government Information (Public Access) Act 2009* (NSW) s 72. These provisions are expressed generally, but are only relevant to local governments because Commonwealth or State government uses 'for the services of the Commonwealth or State' do not infringe copyright: s 183(1).
56 *Government Information (Public Access) Amendment Act 2012* (NSW) sch 1(1). See *Government Information (Public Access) Act 2009* (NSW).
57 Information and Privacy Commission NSW, *Submission 209*.

14.38 One option for reform would be to extend the statutory licence to local government. This options was favoured by some stakeholders, as enabling 'more comprehensive use of material by local governments on fair terms'.[58] However other stakeholders argued that voluntary licensing was working satisfactorily and that there should be no extension.[59] The ALRC notes that such an extension would mean that local governments would potentially be subject to claims for remuneration for material used, as required by FOI laws.

14.39 Another option might be to amend the *Copyright Act* to provide an exception for government (including local government) uses of copyright material as required by FOI laws. However such a broad exception could be problematic if it allowed widespread dissemination of material that is also commercially available. In response to a similar challenge, the UK government plans to allow public bodies to make copyright material available online, with the proviso that 'material that is available commercially to buy or licence (such as academic articles) would not fall within the scope' of the exception.[60]

14.40 The ALRC considers that the proposed exception for fair use, with public administration as an illustrative purpose, is a simpler and more flexible solution. It would apply equally to all levels of government. It would still be necessary for FOI laws to provide that governments must not release material where that would infringe copyright. The question of infringement would be answered by reference to the fairness factors—the purpose and character of the use, the nature of the material used, the amount and substantiality of the part dealt with, and the effect of the use upon the market for the material. According to Copyright Agency/Viscopy, negotiations already take place with governments regarding their use of copyright material as required by FOI laws. The fair use exception would provide principles on which to base the negotiations.

14.41 This approach should address the concerns raised by the Office of the Australian Information Commissioner concerning unwarranted harm to copyright owners. Copyright material would be protected when the circumstances require it, but the public interest and the goal of open government would also be taken into account.

Use under an implied licence

14.42 Government use of material open to public inspection or on official registers, incoming correspondence, free websites and of other governments' material are all uses where it might have been thought that a licence for government use could be implied. However, in *Copyright Agency Limited v New South Wales* ('*CAL v NSW*'), concerning the registration and dissemination of surveyors' plans, the High Court held that no implied licence to use the plans existed. A licence 'will only be implied where there is a necessity to do so ... such necessity does not arise in the circumstances that

58 Copyright Agency/Viscopy, *Submission 287*. See also Screenrights, *Submission 215*.
59 APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; PPCA, *Submission 240*; SAI Global, *Submission 193*.
60 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 47.

the statutory licence scheme excepts the State from infringement'.[61] It is not clear how far this judgment affects uses beyond the particular uses discussed in the case. Gilchrist has commented

> It is dangerous to generalize from the circumstances surrounding the lodgement of these survey plans ... more broadly to copyright works received by government in other circumstances, although the decision of the High Court has wider implications for the digitalisation of registration systems and the wider needs of government to disseminate such information.[62]

14.43 The following discussion considers government uses of material open to public inspection, incoming correspondence, free websites and other government material, and how these uses might be treated under a fair use exception.

Material open to public inspection

14.44 Some statutes require the registration or deposit of documents with the purpose of making those documents publicly available. For example, planning and environmental protection laws often require the proponent of a development to submit a development application, which may include plans by surveyors and architects and environmental impact statements.[63] The purpose of the laws is to facilitate public participation in planning processes,[64] with the expectation that this will improve decision making.

14.45 Material open to public inspection often contains third party copyright material, and copying this material or making it available online raises similar issues to disclosure under FOI laws. Commonwealth statutes requiring documents to be made available can create immunity for Australian Government agencies. However, state and territory governments cannot take advantage of immunity and may be liable for payment under the statutory licence. Local governments have no immunity and no statutory licence, and risk copyright infringement when providing public access to documents.[65]

14.46 Several government agencies submitted that government agencies should not have to remunerate copyright owners when using material as required by a statute.[66] The Department of Defence was particularly concerned about 'the potential for the Commonwealth to incur significant costs in performing its legislated or regulation required tasks'. It suggested that there should be an exception to allow governments to use material 'for the purpose for which it was provided', but should exclude any

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61 *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279, [93].

62 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 36.

63 For a useful example, see NSW Government, *Submission 294*.

64 For example, *Environmental Planning and Assessment Act 1979* (Cth) s 5.

65 A voluntary licence is available to local councils, but this licence does not cover placing third party material online: Copyright Agency, *Local Government* <www.copyright.com.au/licences/not-for-profit-sector/local-government> at 9 May 2013. Town planner Tony Proust described the extraordinary difficulties he had in obtaining a copy of a 20 year old building plan because of local government's copyright obligations: T Proust, *Submission 264*.

66 DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*.

commercial uses of the material.[67] IP Australia called for an exception that would allow it to publish the literature relied upon in its patent decisions (including journal articles, books and other technical material) on eDossier. This use is not required by statute, but IP Australia suggested that this would enhance transparency as 'the documents help explain the reasons for IP Australia's decisions, and contain the evidence on which decisions to grant or refuse rights are based'.[68]

14.47 Copyright Agency/Viscopy took a slightly different approach, suggesting that all government uses of copyright material should be by way of the government statutory licence (rather than by way of an exception). The extent to which remuneration is required for government uses of material open to public inspection would be a matter for negotiation between the parties.[69]

14.48 The guiding principle identified for this Inquiry regarding wide dissemination of material has particular weight regarding government activities that are intended to serve the public benefit. However, the principle regarding maintaining incentives to the creation of works appears to have less application in relation to material open to public inspection. Ordinarily, the owner of the copyright in the plan or report has been remunerated by the client, and is not motivated by remuneration for government use. Requiring payment for government use does not seem likely to have any impact on the creation of these materials.[70]

14.49 The ALRC considers that the proposed exception for fair use is the appropriate way of dealing with government uses of copyright material pursuant to a statutory obligation. Uses that are not fair should be dealt with by way of voluntary licensing arrangements. The fairness factors would assist governments and copyright owners in determining whether the particular use is fair. This approach creates a flexible and principled framework that can properly balance the interests of open government and the rights of copyright owners.

Use of incoming correspondence

14.50 Correspondence to government may be scanned into an electronic file for efficient storage and to provide access to government officers at distant locations. These copies are treated as remunerable by collecting societies, despite the likelihood that the author of the letter has given implied consent for the copying.[71] The Victorian and Tasmanian Governments suggested that such uses should fall within a fair dealing or fair use exception or otherwise be excluded from payment.[72] Other government

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67 Department of Defence, *Submission 267*.

68 IP Australia, *Submission 176*

69 Copyright Agency/Viscopy, *Submission 249*.

70 The situation described by IP Australia, above, is somewhat different as the use is not required by statute and the copyright materials used are ordinarily available to the public for a price. IP Australia indicated that the proposed use would not affect the commercial value of the material as eDossier does not facilitate searching for journal articles on a topic: IP Australia, *Submission 176*. The ALRC does not make any comment as to whether this type of use is likely to be fair use.

71 Victorian Government, *Submission 282*; State Records South Australia, *Submission 255*; Queensland Department of Natural Resources and Mines, *Submission 233*; Tasmanian Government, *Submission 196*.

72 Victorian Government, *Submission 282*; Tasmanian Government, *Submission 196*.

submissions said the *Copyright Act* should be amended to reverse *CAL v NSW* by including a definition of an implied licence,[73] or clearly indicating that the existence of the statutory licence should not be taken into account when determining whether an implied licence exists.

14.51 The ALRC considers that government use of incoming correspondence would be likely to fall under a fair use exception.

Freely available content

14.52 Some material is made available on websites with a Creative Commons licence (a licence allowing copying and distribution on liberal terms) or with an invitation to print the material. In these cases, the owner's purpose is to share the material and no remuneration is expected.[74] A number of government submissions were concerned that the effect of *CAL v NSW* is that the Crown cannot rely on the implied licence to use material that is evident on some websites.[75]

14.53 Governments argued that 'use of copyright material ... offered freely by copyright owners, particularly on websites, should not be remunerated under the statutory licensing scheme'.[76] The Tasmanian Government suggested that the Act should be amended to clarify that there is an implied licence for use of freely available material on websites 'to be used for personal, non-commercial purposes, or for use by government for the public benefit'.[77]

14.54 Copyright Agency/Viscopy acknowledges exclusions for 'government material made available under licences such as Creative Commons licences'.[78] Copyright Agency's *Distribution Rules* indicate that payment will not be made to rightsholders where 'an "open" licence such as a Creative Commons licence' has been used.[79] As payment is not required from the education sector for this material,[80] it may be that payment is not required from governments.

14.55 The ALRC considers that governments should be able to freely use material placed on websites where the owner has no commercial purpose. This would place governments in the same situation as individuals and businesses, and would respect the intentions of the copyright owner.

14.56 However, Screenrights pointed out that audio-visual material made freely available on the internet is often there for a commercial purpose, for example, in order to attract advertising or for cross promotional reasons.[81]

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73 State Records South Australia, *Submission 255*.
74 Ibid.
75 For example, DSITIA (Qld), *Submission 277*.
76 Victorian Government, *Submission 282*. See, also, DSITIA (Qld), *Submission 277*; Tasmanian Government, *Submission 196*.
77 Tasmanian Government, *Submission 196*.
78 Copyright Agency/Viscopy, *Submission 249*.
79 Copyright Agency, *Distribution Rules: How licensing fees are allocated to rightsholders* (2013).
80 Copyright Agency/Viscopy, *Submission 249*.
81 Screenrights, *Submission 215*.

14.57 If governments are to use free material without remuneration, it will be necessary to distinguish between material that is made freely available for a commercial purpose and material that is made available purely for communication and dissemination. Where there is a Creative Commons licence or other express statement that remuneration is not required, then this distinction will be more easily drawn. In other cases, implications are necessary. These distinctions would be best made via a fair use exception and consideration of fairness factors, rather than by attempting to define in the statute what 'free' material may be used.

Government use of government material

14.58 A final form of use that may be affected by *CAL v NSW* is government use of other government content. The Tasmanian Government has advised, for example, that:

> fees have been collected from the Tasmanian Department of Education for copying brochures from the Tasmanian Department of Health in relation to control of head lice.[82]

14.59 This is unsatisfactory as the government owner of the copyright did not expect or require remuneration for the use of the material, and the transaction costs of moving money from one arm of the government to another do not appear to be warranted. In the absence of the statutory licence, an implied licence for a government agency to use another government agency's material might be recognised, but *CAL v NSW* may exclude this approach.

14.60 The Tasmanian Government called for legislative change to ensure that these fees are not levied. Alternatively, government material could be published under Creative Commons licences, which would mean that they would be excluded from the calculation of licence fees.[83]

14.61 If the *Copyright Act* contained a fair use exception, most government use of other government material would fall within these exceptions.

Fair dealing for public administration

14.62 If fair use is not enacted, the *Copyright Act* should provide a new exception for fair dealing for public administration. Like fair use, the fair dealing exception would be flexible and able to respond to changing technology and government practices. Like fair use, fair dealing for public administration would be subject to the fairness factors. The fairness factors would protect the interests of copyright owners while ensuring that uses that do not interfere with the market for copyright material are not subject to undue restrictions.

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82 Tasmanian Government, *Submission 196*.
83 Copyright Agency/Viscopy, *Submission 249*.

Proposal 14–2 If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered.

Use for judicial proceedings and for members of Parliament

14.63 There are two specific exceptions in the *Copyright Act* that are of particular relevance to public administration:

- reproduction for the purpose of judicial proceedings or a report of judicial proceedings;[84] and
- copying by Parliamentary libraries for members of Parliament.[85]

14.64 The ALRC proposes that these specific exceptions should be repealed, in the expectation that such uses would generally fall within the proposed fair use exception. These uses have a purpose and character that is non-commercial, are necessary for activities that are central to the operation of democratic government, and are not likely to have an impact on the market for the material.

14.65 Government submissions to this Inquiry called for further specific exceptions for use in parliamentary proceedings and state commissions and inquiries.[86] The ALRC considers that these uses should be considered under a fair use exception.

Proposal 14–3 The following exceptions in the *Copyright Act* should be repealed:

(a) ss 43(1), 104—judicial proceedings; and

(b) ss 48A, 104A—copying for members of Parliament.

84 *Copyright Act 1968* (Cth) ss 43(1), 104.

85 Ibid ss 48A, 104A.

86 Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; Department of Defence, *Submission 267*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.