

Independent Cinemas
Association of Australia

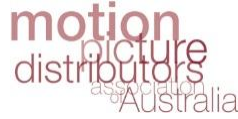


Response to the Issues Paper: Copyright and the Digital Economy

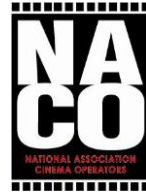
Joint-Submission November 2012

This submission is made by the following : Australian Federation Against Copyright Theft (**AFACT**), the Australian Home Entertainment Distributions Association (**AHEDA**), the Motion Picture Distributors Association of Australia (**MPDAA**), the National Association of Cinema Operators (**NACO**), the Australian Independent Distributors Association (**AIDA**), the Independent Cinemas Association of Australia (**ICAA**), and the Media Entertainment and Arts Alliance (**MEAA**) collectively referred to as the **Australian Film/TV Bodies**. These associations represent the following:

Ace Cinemas Group	Gympie Cinemas	Regal Twin
Amalgamated Holdings Group	Hamilton Cinema	Regency Media
Anchor Bay Home Entertainment	Hayden Orpheum	Regent Cinema
Arcadia Twin Cinema	Hervey Bay Cinemas	Rialto
Arts Centre Gold Coast	Hopscotch Entertainment	Ritz Cinemas
Arts Lounge Glen Innes	Hoyts Corporation	Roma Cinemas
Astor Theatre	Hoyts/Studiocanal	Roseville Cinemas
Australian Federation Against Copyright Theft	Huskisson Pictures	Roxy Cinema Nowra
Australian Home Entertainment Distributors Association	Icon	Sale Cinema
Australian Independent Distributors Association	Imax	Saraton Cinemas
Ballina Fair Cinemas	Independent Cinemas Association of Australia	Satellite Cinema Kingaroy
Bay City Cinemas Batemans Bay	Katherine Cinemas First Street	Scottys Cinemas
Becker Films	Lake Cinema Boolaroo	Semaphore Odeon Star Pty Ltd
Belgrave Twin Cinema	Lakes Squash & Movie Theatre	Sharmill
Big Screen Cinemas	Limelight Cinemas	Snowy Mountains Theatres
Blue Mountains Megacinemas	Lorne Theatre	Sony DADC
Blue Room Cinebar	Lunar Drive In Theatre	Sony Pictures Releasing
Box Office Promotions Group	Madman Entertainment	Southern Cross Cinema
Bribie Island Twin	Majestic	Sovereign Cinema
Burdekin Ayr	Manly Cinemas	Stadium 4 Cinema Leongatha
Caloundra Cinemas	Mansfield Armchair Cinemas	Star Cinema
Cameo Cinemas	McCann Cinemas	State Cinema
Capella Cinema	Media Entertainment and Arts Alliance	Statewide Cinema



Independent Cinemas
Association of Australia



Capri Theatre
Cinema Augusta
Cinema Mt Isa

Cineplex

CMax Cinemas
Colac Cinemas

Cultural Centre Proserpine

Curious Films
Deakin Cinema Complex

Deckchair Cinemas
Dendy Cinemas
Dromana Three Drive-In

Dumaresq Street Theatres
Echuca Paramount Cinemas
El Dorado Indooroopilly
Empire Cinemas Cook Islands
Empire Twin Bowral

Entertainment Services Project
Management
eOne/Hopscotch
Fremantle Media Australia

Gawler Twin Cinema
Gladstone Cinemas
Glen Innes Chapel Theatre
Glenbrook Cinemas
Grand Cinemas
Grand Theatre Company
Griffith City Cinemas

Merricum Pty Ltd
Metro Cinemas
Mossjoy Pty Ltd Alice Springs
Cinema

Motion Picture Distributors
Association of Australia
Movies By Burswood East Perth
Movies On the Move

Nambour Civic Centre

Narooma Cinemas
National Association of Cinema
Operators
Nelson Bay Cinema
Nova Cinemas
Oatmill Cinema Complex

Orana Cinemas
Outback Cinema
Pacific Cinemas
Palace Cinemas
Palace Films

Paramount Home Entertainment
Paramount Pictures
Picture Show Man Theatre

Picture Theatre Avoca Beach
Pighouse Flicks Mullumbimby
Pinnacle Films
Potential
Quirindi Royal Theatre
Reading Entertainment Group
Reel Cinema Warragul

Summergarden Theatre Bowen
Sun Cinemas
Sun Pictures Broome

Technicolor

Town Hall Theatre
Twentieth Century Fox Home
Entertainment
Twentieth Century Fox
International
Twin Cinemas QLD Warwick
Umbrella Entertainment

UniMovies Wollongong
Universal Pictures International
Universal Sony Pictures Home
Entertainment
Victa Cinema Ocean Street
Village Cinemas Australia
Village-Roadshow Group
Wallis Cinemas
Walt Disney Studios Home
Entertainment
Walt Disney Studios Motion
Pictures Australia
Wangaratta Cinema Centre
Warner Bros. Entertainment
Australia
Warner Home Video
Warrina Cinemas Townsville
Waverley Cinema
Westside Cinemas Graceville
Yatala Drive-In
Youthoria

1 Introduction

- 1 The Australian Federation Against Copyright Theft (**AFACT**), the Australian Home Entertainment Distributions Association (**AHEDA**), the Motion Picture Distributors Association of Australia (**MPDAA**), the National Association of Cinema Operators (**NACO**), the Australian Independent Distributors Association (**AIDA**), the Independent Cinemas Association of Australia (**ICAA**), and the Media Entertainment and Arts Alliance (**MEAA**) (collectively, the **Australian Film/TV Bodies**, representing a large cross-section of the film and television industry that contributed \$6.1 billion to the Australian economy and supported an estimated 49,000 FTE workers in 2009-10¹) make this submission in response to the Australian Government's issues paper *Copyright and the Digital Economy (Issues Paper)*.
- 2 AFACT was established in January 2004 by the Motion Picture Association (MPA²) to protect the film industry in Australia from the adverse effects of audio-visual copyright theft. AFACT's principal objective is to work closely with industry, government, law enforcement and educational institutions in Australia to address copyright theft and protect the interests of the film and television industry and Australian movie fans. AFACT is affiliated with MPA offices around the world and is charged with the monitoring, investigation and reporting of incidents of movie counterfeiting and unauthorized copying of copyright and trademark films, often referred to by the generic term 'movie piracy'. AFACT is also associated with Australian based film producers, distributors, and exhibitors as well as the video and optical disc replicators and distributors.³
- 3 AHEDA represents companies involved in the distribution of cinematograph films through a variety of formats (cinema, DVD, Blu-Ray, digital and online). It is involved in issues such as intellectual property theft and enforcement; classification; media access; technology challenges; copyright; and media convergence. AHEDA members include Australian companies such as Roadshow Entertainment, Madman Entertainment, Hopscotch Entertainment, Fremantle Media Australia and Anchor Bay Home Entertainment.
- 4 MPDAA is a non profit organisation formed in 1936 by a number of film distribution companies in order to promote the motion picture industry in Australia. The organisation represents the interests of motion picture distributors before government, media and relevant organisations, providing policy and strategy guidance on issues such as classification, accessible cinema, copyright piracy education and enforcement and industry code of conduct. The MPDAA also acts as a central medium of screen-

¹ Access Economics, *Economic Contribution of the Film and Television Industry* (August 2011) Access Economics Pty Limited <www.afact.org.au/assets/research/AE_report_AUG.pdf>, 9.

² MPA represents the interests of six international producers and distributors of filmed entertainment including Walt Disney Studio Motion Pictures, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, and Warner Bros Entertainment Inc.

³ AFACT's members include, for instance, Village Roadshow Australia, Walt Disney Studios Motion Pictures Australia, Paramount Pictures Australia, Universal Pictures International Australasia, Icon Film Distribution (owner of Dendy), Hopscotch Films, Palace Films, Transmission Films, Madman Entertainment, Pinnacle Films and Hoyts Distribution.

related information for members and affiliates, collecting and distributing film exhibition information relating to box office, admission prices, theatres, release details and censorship classifications.

- 5 NACO is a national organisation established to act in the interests of all cinema operators. Amongst other things, NACO hosts the Australian International Movie Convention. NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, Reading Cinemas Pty Ltd as well as independent exhibitors Dendy Cinemas, Grand Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners representing over 100 cinema screens.
- 6 AIDA is a not-for-profit association representing independent film distributors in Australia, being film distributors who are not owned or controlled by a major Australian film exhibitor or a major U.S. film studio or a non-Australian person. Collectively, AIDA's members are responsible for releasing to the Australian public approximately 75% of Australian feature films which are produced with direct and/or indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).
- 7 ICAA develops, supports and represents the interests of independent cinemas and their affiliates across Australia. ICAA's members range from single screens in rural areas through to metropolitan multiplex circuits. ICAA's members are located in every state and territory in Australia representing nearly 500 screens across 110 cinema locations.
- 8 MEAA is the union and professional organisation which covers everyone in the media, entertainment, sports and arts industries. MEAA's 20,000 members include people working in TV, radio, theatre and film, entertainment venues, recreation grounds, journalists, actors, dancers, sportspeople, cartoonists, photographers, orchestral and opera performers as well as people working in public relations, advertising, book publishing and website production.

2 Terms of Reference

- 9 The Australian Film/TV Bodies recognise that the Committee is tasked with undertaking a review within the Terms of Reference (**TOR**). While the TOR are improved from the earlier draft,⁴ the Australian Film/TV Bodies continue to have concerns about the remit of the Committee.
- 10 First, unlike the remit of previous committees, such as the reference given to the Copyright Law Committee in 1974 (the "Franki Committee")⁵, which involved examining the balance of interests of copyright owners and copyright users, the Committee here has been directed to examine one side of

⁴ A number of concerns and shortcomings of the earlier draft of the TOR were highlighted by the Initial Submission of AFACT and AHEDA made in April 2012, including inaccurate statements of the objectives of copyright, use of non-copyright terminology in the framing of the enquiry and language which suggested a lack of balance.

⁵ Report of the Copyright Law Review Committee ("Franki Committee"), Federal Parliament, *Report of the Copyright Law Committee on Reprographic Reproduction* (1974), para 1.01: "To examine the question of the reprographic reproduction of works protected by copyright in Australia and to recommend any alterations to the Australian copyright law and any other measures the Committee may consider necessary to effect a proper balance of interest between owners of copyright and the users of copyright material in respect of reprographic reproduction. The term 'reprographic reproduction' includes any system or technique by which facsimile reproductions are made in any size or form."

the copyright balance (exceptions) without explicit direction to consider the other (scope of protection and enforcement). By confining the inquiry to the appropriateness of exceptions without regard to the scope of protections and the capacity of copyright owners to efficiently and effectively enforce their rights in the digital environments, a balanced approach will be difficult to achieve.

- 11 The Australian Film/TV Bodies urge the Committee to consider the full context of any of the areas of potential legislative change, including the impact on rights holders, their capacity to enforce their rights and the copyright regime itself. By definition, further exceptions involve the reduction in copyright protection in the digital environment, where copyright protection has already been eroded due to rampant piracy. Without adopting a broad and balanced perspective there is a real danger that the investigation will be too narrow, relevant considerations overlooked or ignored, inadequate testing of contentions of those supporting change and that any recommendations will lack the credibility required to build a consensus.
- 12 Secondly, aspects of the TOR could leave the impression that there is an unstated assumption (or expectation) that legislative change is intended by the government and that it may be expected that the Committee will in some way ratify such a course of change. The Issues Paper would only enhance that impression, based on the way that many propositions are stated as if they are unchallenged facts.⁶ Many of the questions posed in the Issues Paper appear to be based on either stated or unstated contentions which are highly contestable or which have never been established. Factual contentions are no substitute for evidence-based analysis, as the Committee would recognise. The government has committed itself to evidence-based policy making⁷ and the same approach will be important in the Committee's investigation.
- 13 In any event, stakeholders with an interest in the Australian copyright regime will be looking to the Committee to ensure that the investigation it conducts involves clear and transparent processes, a fearless preparedness to rigorously test submissions made in support of change and an open-mindedness to the outcome and implications or consequences of every aspect of the inquiry. Proof of the effectiveness of the Committee ought not be measured by the number of changes the Committee recommends but the rigour with which the Committee has undertaken its task.
- 14 Third, the issues the Committee has been directed to consider could involve radical changes to the copyright regime in Australia. Issues such as whether Australia should adopt an open ended US style "fair use" exception to infringement, whether there should be blanket exceptions for social media use of copyright materials which would effectively take them outside of copyright law and the overriding of moral rights are extremely serious issues which could have warranted their own separate inquiry. Australia's fair dealing provisions are not the "blunt, inflexible instruments" (they are sometimes said to

⁶ See for example, *Issues Paper*, 13 "Irrelevant laws, which do not fit community practice and seem incapable of change, are not suitable for assisting in the development of an innovation-based economy".

⁷ Roger Wilkins AO, 'Evidence-based Indigenous Justice Policy', (Canberra Evaluation Forum, Canberra, 16 February 2012), <<http://www.ag.gov.au/Aboutthedept/Speeches/2012/Pages/Evidence-based-Indigenous-Justice-Policy.aspx>>.

be),⁸ are technologically neutral and have the benefit of an accumulated body of case law. The miscellaneous exceptions are many and varied and reflect the principled and balanced consensus between the various stake holders for particular works.⁹

- 15 The potential knock-on effect of such radical reforms may be far-ranging and their impact on existing business models and commercial arrangements developed in the current regime may be profound. Australia is not the only country to have considered such reforms. Other countries have concluded that the reforms are too radical, too inconsistent with their existing legal systems and history and have rejected them. The fact that only 4 countries (Philippines, Israel, Singapore and USA) out of 164 signatories to the *Berne Convention* have a “fair use” defence sounds an alarm of caution before such a path is pursued. The majority of developed economies, including for example the UK, Canada and New Zealand, delimit fair dealing to specified purposes.¹⁰ The Committee will recognise the gravity of the situation and the need for very compelling, evidence-based, policy justifications before recommending changes which could have such a radical impact and are out-of-step with the majority of the participants in the international community.

3 The objective of copyright

- 16 The objective of copyright ought to be the starting point for the Committee’s investigation. As far back as the Statute of Anne 1710, the purpose of copyright law has been clearly stated to be to incentivize, through rewards, the creation of certain types of property.¹¹ The right to rewards flowed from the creations being a form of property resulting from the “labour and invention” of an author.¹² Reward for creation of works that benefit society has been the overriding rationale for copyright law ever since. In 1959 the Spicer Committee described the “primary end” of copyright as being:¹³

“to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.” (Emphasis added)

⁸ Michael Handler and David Rolph, “A Real Pea Souper: The Panel Case and the development of the fair dealing defences to Copyright Infringement in Australia” (2003) 27 *Melbourne University Law Review* 382,383

⁹ Mark Davison, Ann Monotti and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge, 2nd ed, 2012) 298

¹⁰ *Copyright Designs and Patents Act 1988* (UK) , ss 29(1), (30); *Copyright Act*, RSC 1985, c C-42; s 29 (Canada) *Copyright Act 1994*, ss 42, 43 (NZ)

¹¹ *Statute of Anne 1710* (UK) the preamble begins “Whereas printers, booksellers and other persons have of late frequently taken the liberty of printing, reproducing and publishing or causing to be printed, reprinted and published books and other writings without the consent of the authors or proprietors of such books and writings, to their great detriment and too often to the ruin of them and their families; for preventing such practices for the future and for the encouragement of learned men to compile and write useful books ...”

¹² Walter Copinger, *The Law of Copyright in Works of Literature and Art: Including that of the Drama, Music, Engraving, Sculpture, painting, Photography and Ornamental and Useful designs*. (Stevens and Haynes, 1st ed, 1870) Ch 1.

¹³ Report of the Copyright Law Review Committee (“**Spicer Committee**”), Federal Parliament, *Report to Consider what alterations are desirable in the Copyright Law of the Commonwealth* (1959) para 13.

- 17 The Franki Committee agreed with this statement of the “purpose of copyright” in 1974.¹⁴ More recently, in their 2009 decision in the *IceTV* case, three members of the High Court observed the “longstanding theoretical underpinnings of copyright legislation” as being:

*“concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public.”*¹⁵

- 18 Copyright law is thus premised upon the derivative benefits society enjoys through incentivising and rewarding production of original works. In particular, copyright law recognises that while creative works such as books, music, art and films are expensive and time-consuming to produce, they can be easily reproduced (particularly in digital form). The legal protection given by copyright is intended to ensure that the author controls the work’s reproduction by providing incentives that encourage the production and dissemination of creative works. Copyright is the legal means by which those involved in the production and dissemination of such creative works can be confident that they will be able to not only recoup their investment but also seek returns that are commensurate with the popularity and value of their works.
- 19 The objective of copyright has remained constant, even though there have been a myriad of changes in the political, economic, social or technological environments, often dramatic changes. There are good reasons for this. Copyright is rooted in the modern political economy that gave rise to democracy, the recognition of private property rights and the rule of law. It is as relevant today as it was in the 18th Century. The fact that copyright is reflected in numerous treaties and is universally recognised throughout the world stakes its claim as one of the important foundations of Australia’s legal and economic system, which ought not be lightly reduced in effectiveness.
- 20 The history of copyright is a history of adaptation to changing circumstances. Current changes in technology echo widespread changes in the industrial revolution, in the 19th and 20th centuries. In each case there was a recognition that the law may need some modification to move with developments – sometimes involving the expansion of rights - but the objective of copyright has remained constant.
- 21 There is no evidence, let alone compelling evidence, to suggest that today’s copyright laws have or will unduly restrict commercial activity including in digital environments. Assertions that are sometimes made to this effect have never been established and are all too often, understandably, conditioned by the commercial interests of those making such assertions. Technological developments in the last several decades - including the development of software, telecommunications, the internet etc – have developed with copyright laws in place. In the last decade the digital agenda laws have done nothing to stifle legitimate economic activity, restrict consumer offerings or hold back the development of useful technology.

¹⁴ Franki Committee Report, above n 5, para 1.05.

¹⁵ *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] 239 CLR 458 at 471[24]-[25].

- 22 The objective of copyright is not inconsistent with users obtaining access on reasonable terms. Copyright owners and their licensees are clearly aware of the importance of commercial exploitation, the benefits that flow from providing access and use of copyright works and are already engaged in such exploitation on a massive scale. Some of the most popular online distribution businesses, such as iTunes, have developed and thrived in a copyright regime that has protected content and enabled it to be commercialised by reason of its protection. Consumer-facing services such as iTunes and commercial content suppliers leave virtually no room for assertions that content is either available or unavailable at a reasonable price, to consumers, institutions and businesses.

4 Australia's international obligations

- 23 The Committee will be conscious of the importance of Australia's international obligations when conducting its review and the fact that Australia has committed to the protection of copyright as a member of the international community.¹⁶ Withdrawal from the letter, or substance, of its international copyright commitments would be entirely inconsistent with its new enhanced international standing.¹⁷ This consideration applies to all of the questions in the Issues Paper.
- 24 As the Committee would be aware, Australia is a party to at least 14 international treaties that constrain its law-making authority in relation to copyright. These include the *Berne Convention for the Protection of Literary and Artistic Works* ("Berne"), the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* ("Rome"), the *Universal Copyright Convention* ("UCC"), the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS"), the *World Intellectual Property Organization Copyright Treaty* ("WCT") and the *World Intellectual Property Organization Performances and Phonograms Treaty* ("WPPT").¹⁸
- 25 The treaties require Australia to protect exclusive rights including the rights of reproduction, adaptation, performance, distribution and communication including making available to the public, as well as the exclusive right to authorise these actions.¹⁹ Some also require the protection of moral

¹⁶ Australian Law Reform Commission, *Copyright and the Digital Economy* (29 June 2012) ALRC Inquiries <<http://www.alrc.gov.au/inquiries/copyright/terms-reference>>, ("Issues Paper 2012") 4.

¹⁷ Ibid [34]: "This Inquiry may provide an opportunity for suggesting policy parameters within which future international negotiations take place".

¹⁸ Obligations to protect intellectual property rights also arise under some human rights instruments, including the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 10 March 1976).

¹⁹ *Berne Convention for the Protection of Literary and Artistic Works* ("Berne Convention") opened for signature (entered into force 14 April 1928) arts. 8, 9, 11, 12; *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* ("Rome Convention") (entered into force 30 September 1992) arts. 5-7, 10, 13; *Universal Copyright Convention* ("UC Convention") (entered into force 1 May 1969) Arts. IV, V; *Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement") (entered into force through Australia's WTO membership) Arts. 9-11; *World Intellectual Property Organization Copyright Treaty* ("WIPO Copyright Treaty") (entered into force 26 July 2007) Arts. 6-9; *WIPO Performances and Phonograms Treaty* ("WPP Treaty") (entered into force 26 July 2007) Arts. 5-14.

rights.²⁰ The treaties also permit Australia to create exceptions in certain circumstances to these rights²¹ as long as they conform to the “Three-Step Test”.

26 Australia is also a party to a number of trade agreements that impose obligations relating to intellectual property rights, including the *Thailand – Australia Free Trade Agreement between Thailand and Australia*; the *Australia-Chile Free Trade Agreement* and the *Australia – United States Free Trade Agreement between Australia and United States of America* (“AUSFTA”). Insofar as exceptions or limitations to exclusive rights are concerned, these agreements generally repeat or incorporate the “Three-Step Test” and other obligations under the IP treaties.

27 The “Three-Step Test”²² imposes three substantive requirements that must be satisfied before any exception or limitation can be introduced into domestic legislation: the exception or limitation must be confined to “certain special cases”; it must not “conflict with a normal exploitation of the work”; and it must not “unreasonably prejudice the legitimate interests” of the author (under Berne and the WCT) or (under TRIPS) the rights holder.²³ The WTO Dispute Settlement panels, which have construed the “Three-Step Test” under TRIPS and leading test writers on the Treaties, treat each step separately and cumulatively. If any one step is not satisfied, the exception will not comply with the treaty obligations.²⁴ The party seeking to defend the exception has the burden of proving that each condition is satisfied.²⁵

First Step: “Certain special cases”

28 The phrase “certain special cases” requires that exceptions or limitations are clearly and specifically articulated, go beyond the individual interests of copyright users, and have a clear public interest character, that is consistent with, for example, the provisions of the *Berne Convention*.²⁶ The term “certain” imposes a predictability requirement allowing an assessment of whether the exception does

²⁰ *Berne Convention*, above n 19, Arts. 6bis, 11bis; *WPP Treaty* above n 19, Art. 5.

²¹ *Berne Convention*, above n 19, Arts. 9(2), 10(1), 10bis, 11bis(2), 13(1), 14ter(2); *Rome Convention*, above n 19, Arts. 15-16; *UC Convention*, above n 19, Art. V; *TRIPS Agreement*, above n 19, Art. 13; *WIPO Copyright Treaty*, above n 19, Art. 10; *WPP Treaty*, above n 19, Art. 16.

²² Under Art. 9 of *Berne Convention*, above n 19, the Three-Step Test applies to limit the scope of the exceptions to the right of reproduction. Under Art 13 of the *TRIPS Agreement*, above n 19, the obligation was extended to apply to all exclusive copyrights and related rights. Under Art 10 of *WIPO Copyright Treaty*, above n 19, the obligation was extended to apply to the new rights of rental, distribution, and communication to the public and making available protected by that treaty.

²³ Art 9(2) of *Berne Convention*, above n 19, states: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” Art 13 of *TRIPS Agreement*, above n 19, states: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

²⁴ Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford: Oxford University Press, 2nd ed, 2006) 763 (“**Ricketson & Ginsburg**”); Panel Report on *United States – Section 110(5) of the US Copyright Act*, WTO Doc. WT/DS160/R (15 June 2000) (“**WTO Panel Decision DS160**”), para. 6.74; Panel Report on *Canada – Patent Protection of Pharmaceutical Products* (7 April 2000) WTO Doc. WT/DS114/R (“**WTO Panel Decision DS114**”), para. 7.20; Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: commentary and legal analysis* (Butterworths Lexis Nexis, 2002) (“**Reinbothe & von Lewinski**”) 124; Martin R. F. Senftleben, *Copyright, Limitations, and the Three-step Test* (Kluwer Law International, 2004) 125, 127 (“**Senftleben**”).

²⁵ *WTO Panel Decision DS160*, above n 24, para. 6.13, *WTO Panel Decision DS114*, above n 24, para. 7.60; Jane C. Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (2001) *Revue Internationale du Droit d’Auteur* 10.

²⁶ Ricketson & Ginsburg, above n 24, 773.

or does not apply on particular facts and a limitation on scope²⁷. The exception or limitation must apply with a sufficient degree of legal certainty.²⁸ The term “special” requires the exemption to have an individual or limited application or purpose, and to be narrow in a quantitative as well as qualitative sense. The exception or limitation cannot be a normal case.²⁹

- 29 In summary, the first step requires the exception or limitation to be “clearly defined ... narrow in its scope and reach”³⁰ and have “an individual or limited application or purpose.”³¹

Step two: not conflict with “normal” exploitation

- 30 An exception or limitation must not conflict with a normal exploitation of works. Forms of exploiting a work which have, or are likely to acquire considerable economic or practical importance, must therefore be reserved to the owner of the right. The exception or limitation cannot enter into economic competition with the exercise of the exclusive right in the sense that it must not undermine the market for the work in any way whatsoever or undermine the ways that right holders normally extract economic value from that right to the work and thereby deprive them of significant or tangible commercial gains. Normal exploitation covers a particular usage that the copyright owner would “ordinarily expect or seek to exploit”.³² In the online environment, and in respect of the right of communication to the public, it is necessary to take particular care to avoid compromising the rights holder’s market, as the risks of uncontrolled acts of communication to the public in online environments are potentially far greater.³³
- 31 The phrase “normal exploitation” covers not only those forms of exploitation that currently generate significant or tangible revenues, it also encompasses forms of exploitation that, with a certain degree of likelihood and plausibility, could acquire economic or practical importance. It is a “dynamic evolving concept”³⁴ not limited to historical forms of exploitation so as to freeze into place a decision not to

²⁷ See *WTO Panel Decision DS160*, above n 24, para 6.145 (“the term “*certain* special case” connotes ‘known and particularised, but not explicitly identified’”); see also Ricketson & Ginsburg, above n 24, 767 (“a more realistic interpretation [...] is that the exceptions in question should be finite and limited in scope”); Senftleben, above n 24, 135 (“an incalculable, shapeless provision exempting a wide variety of uses would not be allowed”); Reinbothe & von Lewinski, above n 24, 124 (“in essence, exceptions have to be well-defined and to be of limited application”); Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Geneva: WIPO 2003), (“*Ficsor Guide*”) at CT-10.2 (“the use to be covered must be specific – precisely and narrowly determined”).

²⁸ Mihály Ficsor, *The Law of Copyright and the Internet* (2002) paras. 5.55, C10.03; *Ficsor Guide*, above n 27, CT-10.2.

²⁹ *WTO Panel Decision DS160*, above n 24, para. 6.109; Ficsor, above n 28, paras. 5.55, C10.03; *Ficsor Guide*, above n 27, CT-10.2.

³⁰ *WTO Panel Decision DS160*, above n 24, para 6.108. This is consistent with the recommendations of the Stockholm Study Group which recommended that any exception to the right of reproduction be “for clearly specified purposes.”: David Gervais, “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations” (2008) 5 *University of Ottawa Law and Technology Journal* 1, 26.

³¹ *WTO Panel Decision DS160*, above n 24, para 6.109. There is a debate amongst the writers whether there is a third requirement that an exception or limitation must serve some specific public policy objective: Compare *Ficsor Guide*, above n 27, at BC-9.15; Ficsor, above n 28, at paras. 5.55, C10.03 with Reinbothe & von Lewinski, above n 24, at 124; Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, (2003) World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO Doc. SCCR/9/7 at 22 (“*Ricketson 2003*”); Ricketson & Ginsburg, above n 24, 767.

³² Ricketson & Ginsburg, above n 24, 767-773; *Ficsor Guide*, above n 27, CT-10.2; Ficsor, above n 28, 284-285; *WTO Panel Decision DS160*, above n 24, para. 6.183; *WTO Panel Decision DS114*, above n 24, 7.54.

³³ Reinbothe & von Lewinski, above n 24, 126; Ficsor, above n 28, 5.56; Ricketson & Ginsburg, above n 24, 703-4.

³⁴ Ricketson & Ginsburg, above n 24, 769; Ricketson 2003, above n 31, 23-24; *WTO Panel Decision DS160*, above n 24, para. 6.180; Senftleben, above n 24, 178.

exploit a particular market at a particular time. The normal exploitation step applies to each exclusive right conferred by copyright, not simply the right of reproduction or communication to the public. A far-reaching exception to one exclusive right cannot be justified by the fact that an author might still be able to exploit a different exclusive right.³⁵ In one particular WTO Panel decision, an exception which negated an estimated 44% of potential licensing revenues for use of music in restaurants was held to conflict with normal exploitation.³⁶

Third Step: no “unreasonable prejudice” to “legitimate interests”

- 32** The third step requires that limitations or exceptions cannot unreasonably prejudice the legitimate interests of the author (in *Berne*) or the rights holder (in *TRIPS*). The condition includes actual or potential economic advantage or detriment such as when an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner. However, it is a broader concept that also covers other forms of potential detriment or advantage requiring protection of interests that are “justifiable” in the sense that they are supported by relevant public policies or other social norms in the light of the objectives that underlie the protection of exclusive rights and the moral rights of authors.³⁷ These interests include pecuniary and non-pecuniary interests, among them the moral rights of the author and the author’s legitimate interests in controlling adaptations or other future uses of a work.³⁸
- 33** The words “not unreasonably prejudice” do not allow for exceptions that may cause prejudice to the legitimate interests of authors and rights holders. These words require a balancing assessment of what prejudice an author or rights holder could reasonably be required to tolerate and the quantity and quality of the actual or potential prejudice to rightsholders or authors’ legitimate interests. The prejudice must be proportionate or within the limits of reason³⁹ and may include the imposition of conditions, such as guidelines, attribution or payment.⁴⁰
- 34** Remuneration paid under a compulsory licensing scheme may be a factor in determining whether an exception causes unreasonable prejudice. But such remuneration will avoid unreasonable prejudice only in justifiable cases.⁴¹ The exclusive right to authorise the reproduction or communication of a copyrighted work is undermined by a compulsory license and in some circumstances a compulsory

³⁵ Reinbothe & von Lewinski, above n 24, 125; Ficsor, above n 24, paras. C10.33-10.34; Ricketson & Ginsburg, above n 24, 852.

³⁶ *WTO Panel Decision DS160*, n 24 above, para. 6.209.

³⁷ *Ibid.*, paras. 6.220-6.229; *WTO Panel Decision DS114* at paras. 7.68-7.73 (7.69 “To make sense of the term ‘legitimate interests’ in this context, that term must be defined in the way that it is often used in legal discourse – as a normative claim calling for protection of interests that are ‘justifiable’ in the sense that they are supported by relevant public policies or other social norms.”); Reinbothe & von Lewinski, above n 24, at 127; Ricketson & Ginsburg, above n 24, at 773-76; Ficsor, above n 28 at paras. 5.57, C10.03; Ricketson 2003, above n 31, at 27.

³⁸ Ricketson & Ginsburg, above n 24, at 774 and 778; Senftleben at 226; *Berne Convention* Art. 6bis. Moral rights are excluded from the *TRIPS Agreement*, above n 24, Art. 9(1).

³⁹ Ricketson & Ginsburg at 776, above n 24, Ficsor, above n 28, at paras. 5.58, C10.33-10.34; *Ficsor Guide*, above n 27, para. BC-9.26; Reinbothe & von Lewinski, above n 24, at 126-127; Senftleben, above n 24, at 127-133.

⁴⁰ Ricketson 2003, above n 31, at 27.

⁴¹ Senftleben, above n 24, at 231; Ficsor, above n 28, at para. 5.55; Ricketson 2003, above n 31, at 27; *Ficsor Guide*, above n 27, at CT-10.2.

license may not be justifiable at all.⁴² For example, a compulsory license that covered unpublished works might be an unreasonable prejudice to the author's right to authorize publication.⁴³ The third step therefore requires a careful contextual evaluation of the import of the loss of exclusivity, given that unreasonable prejudice could not be assumed to be remedied through the imposition of a compulsory licence; some prejudices cannot be remedied this way.⁴⁴

- 35 In interpreting the phrase "legitimate interests", the WTO Panel has observed that legitimate interests include economic and non-economic interests and that prejudice to the legitimate interest of the rights-holders "reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright holder."⁴⁵ There must therefore be proportionality between the prejudice and the public policy objective underlying the exception or limitation, in that the exception or limitation "must not go beyond a certain level of prejudice which may still be justified in consideration of the underlining special and well-founded public policy considerations."⁴⁶ Consequently an assessment of the validity of a policy justification may also come into play at the third step.⁴⁷

5 Question 1: The Australian digital economy

Question 1. The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;
- (b) affects the introduction of new or innovative business models;
- (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or
- (d) places Australia at a competitive disadvantage internationally.

- 36 In the context of the film industry, a number of entities (of varying size) are all dependent on the exclusive rights afforded by copyright law to secure finance for the production and lawful dissemination of films and broadcasts in this country. The success of Australia's creative industries (including the film industry) owes much to our copyright laws and the broader regulatory framework, which combine to create an attractive climate for investment in such activity including the distribution of copyrighted

⁴² *WTO Panel Decision DS114*, n 24 above, paras. 7.72.

⁴³ Reinbothe & von Lewinski, above n 24, at 127.

⁴⁴ Ricketson & Ginsburg, above n 24, at 775.

⁴⁵ *WTO Panel Decision DS160*, n 24 above, at [6.229].

⁴⁶ *Ficsor Guide*, above n 27, at CT-10.2; Ficsor, above n 28, at 5.57.

⁴⁷ *Ficsor Guide*, above n 27, at BC-9.18 (noting that a "clear and sound political justification" must be identified at the first step to deal with the question at the third step of which areas limitations and exceptions may be introduced and of what burdens societies will allow to be placed on specific categories of its citizens for the benefit of other categories.)

works digitally. The “incentives” as referenced in Guiding Principal 1, should be to allow copyright to be monetised in the digital economy rather than for the heavy hand of government to “regulate to innovate”. The most effective way for the digital economy and its new business models to be “promoted” is for its laws and regulations to ensure ongoing certainty and to allow for new online business models to be protected and monetised.

- 37** The Issues Paper states at page 19: “Copyright law is an important part of the legal infrastructure that supports the development of the digital economy. Sufficient incentives to encourage investment must be in place for desirable innovation to occur. However, without open access to appropriate categories of information, Australia may not enjoy the potential innovation in the digital economy”⁴⁸. This reference is from the Department of Broadband and Communication the “information” in question is specifically related to “public sector information” held by governments and as such is somewhat out of context to the argument it is trying to confer. The importance of copyright in providing sufficient incentives and encouraging innovation is recognised by the Department of Innovation, Industry, Science and Research, in their 2011 *Australian Innovation System Report* which states: “Protection of intellectual property is important so inventors and producers of original work have economic incentives to begin or continue innovation”⁴⁹. The World Economic Forum’s *Global Competitiveness Report*⁵⁰ likewise found a clear correlation between countries that rank high on Intellectual Property Protection and countries that rank high on innovation.
- 38** There is no evidence that copyright law has imposed unnecessary costs or inefficiencies on creators or those wanting to lawfully access or make use of copyright material. The film industry, and the content industries in general, are partnering with online providers to develop new digital business models which broaden the scope of the legitimate market, offer consumers greater ease of access and choice whilst at the same time protecting the value of underlying copyright. In particular, the film industry has partnered with:
- digital content transactional providers (i.e. iTunes, X-Box Video, Google Play, and Hoyts.com.au) which allow consumers to either buy a perpetual license for the film in digital format or rent the film for a set period;
 - advertising-based online providers (Fix-play, Ten Network and Crackle) which offer film and broadcast content for streaming online free of charge but with advertising displayed to the viewer which secures returns to the rights holders of the film or broadcast;

⁴⁸ Issues Paper 2012, above n 16, 19.

⁴⁹ Department of Innovation, Industry, Science and Research, *Australian Innovation System Report 2011*, (2011) Commonwealth of Australia
<<http://www.innovation.gov.au/Innovation/Policy/AustralianInnovationSystemReport/AISR2011/wp-content/uploads/2011/07/Australian-Innovation-System-Report-2011.pdf>> 67.

⁵⁰ Xavier Sala-i-Martin, *The Global Competitiveness Report 2011-2012*, (2011) World Economic Forum
<http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf>.

- subscription based providers (Foxtel, Quickflix and Fetch TV) which allow consumers to purchase a subscription giving them unlimited access to film and television content during the currency of the subscription period.

- 39** These digital business models have emerged within the existing Australian copyright framework and are discussed in further detail in Annexure A. This extensive list of digital business models is evidence that the current laws do not require the substantive change promulgated by the Issues Paper around a fair use system. The plethora of new legal models is also evidence that the laws promoting the digital economy are to the benefit of consumers.
- 40** More broadly, the film industry has a continuing role to play in the cultural, social and economic prosperity of this country.⁵¹ The industry comprises a number of different businesses and services,⁵² including production and post production, distribution, exhibition and hire.⁵³ Production services form the “*first link of the value added chain that makes up the industry*”,⁵⁴ creating and editing the product that is then supplied and circulated by the distribution sector.⁵⁵ The exhibitors display the films for public consumption.⁵⁶ The hire or rental sector makes up the final element of the supply chain.⁵⁷
- 41** The film and television industry’s contribution to the Australian economy is widely acknowledged. In 2010, Australia’s film and television industry employed 48,667 Australians on a full time basis, and contributed approximately \$6.1 billion to the Australian economy.⁵⁸ From 2005 to 2010, the industry grew 5.1% per annum, compared to an average of about 3.3% for the whole economy.⁵⁹ It is also understood that the Australian film and television industry has the capacity to generate significant social and cultural benefits that are not captured by economic data.⁶⁰ The digital contribution of the film and television industry is estimated to be about \$4.1 billion, with digital rentals (DVD and more recently Blu-Ray) contributing approximately \$651.3 million to the Australian economy alone.⁶¹ Turnover in the online movie market has increased from \$1.2 million in 2008 to \$23.9 million in 2010, a figure set to rise to \$73.6 million in 2015.⁶²
- 42** Despite the film and television industry’s diversification and propensity for growth in the digital economy, it remains vulnerable due to its dependence on copyright and other laws to attract investment. In 2010 AFACT commissioned IPOS (a market research organisation) and Oxford

⁵¹ Price Waterhouse Cooper, *The Economic Contribution of Australia’s Copyright Industries 1996-97 to 2010-11: Prepared for the Australian Copyright Council* (2012) Price Waterhouse Coopers <<http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>>, 9.

⁵² Screen Australia, *Employment*, (1993-2007) Commonwealth of Australia <<http://www.screenaustralia.gov.au/research/statistics/oesummary.asp>>

⁵³ Ibid.

⁵⁴ Access Economics, *Economic Contribution of the Film and Television Industry* (2011), 9.

⁵⁵ Ibid, 11.

⁵⁶ Ibid, 11-12.

⁵⁷ Ibid, 19.

⁵⁸ Ibid, i.

⁵⁹ Ibid.

⁶⁰ Price Waterhouse Cooper, n 51 above, 7.

⁶¹ Ibid, 8

⁶² Access Economics, n 54 above, 24-25.

Economics (an economics consultancy) to measure the economic impact of movie piracy in Australia (**Oxford Study**).⁶³ The Oxford Study found that:

- (a) a third of the adult population of Australia is active in some form of movie piracy (downloading, streaming, buying counterfeit, borrowing unauthorised, burning);
- (b) the highest volume of pirated movie content is from receiving digital copies of movies – an activity that accounts for a quarter of all pirated movies;
- (c) just under half (45%) of all people consuming pirated movies would have paid to view the movie via an authorised channel had the unauthorised channel not been available;
- (d) direct consumer spending loss to the movie industry (i.e. cinema owners, local distributors, producers and retailers) in 2010 totalled A\$575m, with approximately \$240 million attributable to digital piracy.⁶⁴

- 43 It is beyond doubt that that piracy presents one of the biggest challenges to the film and television industry's participation in the Australian digital economy, and is preventing the business models outlined Annexure A from reaching their full potential. The extent of the problem and the consequences to the Australian economy are extensive. Approximately 55% of people admit to participating in film and television theft.⁶⁵ 23.76% of global internet traffic is estimated to be infringing.⁶⁶ Almost half of this is infringing bittorrent traffic,⁶⁷ of which 43.3% have been estimated as being film files.⁶⁸
- 44 In the case of cinematograph films, these losses do not capture the significant loss of revenue suffered by the film industry where newly released motion picture content is made available for illicit download through file-sharing, black-market DVDs, and streaming sites. Not only has digital piracy caused a decrease in revenue, but it has led to the loss of 6100 jobs, with almost 2300 lost in the Australian film industry.⁶⁹
- 45 The emergence of the digital market does not require reconsideration or revision of the fundamentals principles of copyright. Indeed, they are arguably more relevant than ever.⁷⁰ It enables studios, cinema owners and authorised distributors to monetise demand for copyrighted works and secure returns that can be reinvested into new films and creations. It also protects the necessary investment

⁶³ Ipsos Australia & Oxford Economics, *Economic Consequences of Movie Piracy: Australia* (January 2011) AFACT <http://www.afact.org.au/assets/research/IPSOS_Economic_Consequences_of_Movie_Piracy_-_Australia.pdf>. The study defined "movie piracy" as "anyone watching a full length movie via 'unauthorised' means, including digital (downloading, streaming, digital transfer of pirated copies physically buying counterfeited / copied DVDs)."

⁶⁴ Ibid, 3-5.

⁶⁵ Vicky Roach, '\$1 billion dollar pirates killing film in Australia' *The Daily Telegraph* (Sydney, 12 September 2011) 1.

⁶⁶ Envisional Ltd, *Technical Report: An Estimate of Infringing Use of the Internet – Summary* (January 2011) Motion Picture Association of America <<http://mpaa.org/resources/8aaaecf5-961e-4eda-8c21-9f4f53e08f19.pdf>>.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ipsos Australia & Oxford Economics, n 63 above, 3

⁷⁰ Michael Williams and Cameron Andrews, "Why the Foundations of Copyright Remain Sound in the 21st Century" (2011) 29 *Copyright Reporter* 134, 146

that is critical to a viable and qualitatively diverse film and television industry in Australia. As a recent submission to the Hargreaves Review observed:

“[R]esearch from the film industry suggests that 7 out of 10 films produced are not profitable. The content industries, which re-invest much of their revenue back into content production, typically operate on relatively modest margins in the range of 10% - 20%. This contrasts with far higher margins for companies like Google whose business models profit from others’ content, but do not re-invest in its creation”.⁷¹

- 46 A strong copyright framework is essential to ensure continued creativity, access to legitimate content and fair return on investment for the film and television industry in Australia. As the Hargreaves Report observed in relation to the equivalent UK market:

“IPRs cannot succeed in their core economic function of incentivising innovation if rights are disregarded or are too expensive to enforce. Ineffective rights regimes are worse than no rights at all: they appear to offer certainty and support for reliable business models, but in practice send misleading signals. Widespread disregard for the law erodes the certainty that underpins consumer and investor confidence. In the most serious cases, it destroys the social solidarity which enables the law abiding majority to unite against a criminal minority.”⁷²

- 47 Having regard to the objective of copyright law and the importance of Australia’s digital economy,⁷³ it is surprising that the Issues Paper does not mention “Enforcement of Rights” in its Guiding Principles or discussion questions. In directing the ALRC to consider “amongst other things”⁷⁴ existing and further copyright exceptions, the TOR do not prevent the Committee from formulating recommendations in respect of enforcement in digital environments. As the Committee would be aware, the inquiries into, for instance, technological protection measures (TMP) and the safe-harbour provisions (SHP) involve discrete copyright questions and are not directed towards enforcement at large in digital environments.
- 48 International inquiries on copyright and digital environments have all proceeded on the basis that piracy education, enforcement and measures aimed at strengthening and growing legitimate markets for copyright content are important questions.⁷⁵ For instance, the Hargreaves Review listed enforcement of rights as a specific term of reference as well as including seven (7) questions on the topic of enforcement in its “Call for Evidence” paper.⁷⁶ One of the ten recommendations in the final Hargreaves Report (Define earlier, used 1st on previous page) related exclusively to enforcement of intellectual property rights in digital environments and the need for government to encourage the

⁷¹ News Corporation, *Response to Ian Hargreaves’ Independent Review of Intellectual Property and Growth* (March 2011) Intellectual Property Office <<http://www.ipso.gov.uk/ipreview-c4e-sub-news.pdf>> 5.

⁷² Professor Ian Hargreaves, *Digital Opportunity A review of Intellectual Property and Growth: An independent report by Ian Hargreaves* (May 2011) Intellectual Property Office <<http://www.ipso.gov.uk/ipreview-finalreport.pdf>> (“Hargreaves Report”) at 5.

⁷³ Australian Law Reform Commission, above n 16, Preamble.

⁷⁴ Ibid, Terms of Reference.

⁷⁵ Indeed, some of the issues raised in the discussion questions appear to be directly relevant to a number of ongoing inquiries.

⁷⁶ Professor Ian Hargreaves, *Call for Evidence: Independent Review of Intellectual Property and Growth*, (December 2010) Intellectual Property Office <<http://www.ipso.gov.uk/ipreview-c4e.pdf>> 99.

development of legitimate online markets for copyright content.⁷⁷ This inquiry, having regard to the matters contained in the preamble to the TOR,⁷⁸ cannot ignore enforcement if it wishes to have a balanced and principled discussion of copyright law and the digital economy.

6 Question 2: “Guiding principles for reform”

Question 2. What guiding principles would best inform the ALRC’s approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

- 49** The Issues Paper contains a set of 8 “Guiding principles for reform”, which appear to have been used by the ALRC to frame the questions posed. There is a significant danger in the use of such principles as a substitute for a more wide-ranging and balanced analysis of the remitted issues according to the TOR.
- 50** In discussing **Principle 2**, the Issues Paper states: “While too little intellectual property protection will discourage people from innovating, too much may discourage innovation because ‘the pathways to discovery are blocked’”. This quote is from the Department of Industry, Innovation, Science and Research (**DIISR**) paper *Powering Ideas: An innovation agenda for the 21st Century*⁷⁹. DIISR has policy responsibility for IP Australia which manages patents and trade marks. This quote, whilst it does come from a sub-heading labelled ‘intellectual property’ is problematic as the section where the quote was taken is specifically referring to the patent system to which DIISR has policy responsibility, as the proceeding sentence makes clear: “There is no consensus on how much protection is right,....granting patents for obvious and trivial inventions, and producing impassable ‘patent thickets’”The patent system for protecting a patentable invention is quite different to the subject matter of copyright which is at issue in this review. The inclusion of such references to patent law, is clearly out of context, inappropriate and misleading as a basis for arguments which may influence evidence driven policy in the present review.
- 51** Not all of the guiding principles relate to the 4 issues raised in the preamble to the TOR. For example, **Guiding Principle 7** “Reducing the complexity of copyright law” finds no support in the TOR and the issue of simplification is not even referenced in the TOR. It is not clear why the Committee is proposing to pursue this issue, let alone as a “guiding principle”. Whether copyright law is inappropriately complex is a highly contestable proposition – it is not a fact. The Issues Paper cites only academics in support of the criticism that the Copyright Act is too complex.⁸⁰ Their voice is

⁷⁷ Hargreaves Report, above n 72, at 99.

⁷⁸ Australian Law Reform Commission, above n 16, Preamble.

⁷⁹ Department of Innovation, Industry, Science and Research, above n 49, 56.

⁸⁰ Ricketson 2003, above n 31, at 27; *Ficsor Guide*, above n 27, at BC-9.18.

neither proof that the Act is too complex nor representative of those who engage with copyright laws in industry, in practice and in the Courts.

- 52 It would be a mistake for the Committee to adopt such minority opinions and elevate them to principles without a clear mandate in the TOR (which is absent). The Copyright Act is directly related to the balancing of rights and interests that has occurred over many years, incrementally as is the case in a common law legal regime. Much of the complexity in the Act relates to the growth of exceptions to copyright, which have emerged over the last two decades, whereas the parts of the Act reflecting and stating the rights of copyright owners have remained relatively short. Overly simplistic statements about the objective of simplicity could equally support a winding back of existing exceptions to copyright which have contributed the most to complexity.
- 53 Where there is a relationship between the Guiding Principles and the TOR, the former often appear to differ in form and emphasis from the latter.⁸¹ For example, **Guiding Principal 4** appears to confuse access to content with access to information. As the Committee is no doubt aware, the flow of information is supported, rather than impeded by copyright protection. Furthermore, information itself is not subject to copyright protection unless it is embodied in some form of creative expression, and even then copyright protection does not attach to the raw information itself. This kind of conflation with the subject of copyright protection is commonly (and irrationally) argued in the debate over "access to knowledge", and comes from a position that is inherently hostile to copyright without a rational and justifiable basis. Incentives for innovation and access to content can be accomplished by improving copyright protection and enhancing the availability and opportunities for the distribution of digital works in a legitimate setting. Likewise, **Guiding Principle 5** "Responding to technological change" reflects a very different emphasis from the third bullet point in the preamble and the explanatory language used in relation to that principle appear to focus on reducing uncertainty based on the application of present laws to new technology.⁸²
- 54 The Committee needs to be reminded that the Australian Film/TV Bodies are part of a technology orientated industry. As such the Committee needs to ensure that it is not perceived as establishing an institutional bias in favour of one technology over another. The whole notion of copyright requires that the commercial interests of owners and users are considered and balanced. There is no *a priori* greater economic or social worth to technology than there is to the creation of copyright works, particularly in a democratic society in which the rights and the protection of property constitute an essential foundation.
- 55 **Guiding Principle 6** is also inappropriate as any guidance to the Committee. Its stark terms are repeated below:

⁸¹ the "objective of copyright"; the "general interest of Australians to access, use and interact with content"; the "importance of the digital economy"; and "Australia's international obligations, international developments and previous copyright reviews".

⁸² "the importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies."

“38. Digital technology has, arguably, been accompanied by changed consumer attitudes to copyright—specifically, less willingness to recognise that copyright is a form of property, owned by a creator (or more usually, the assignee of a creator). Even where copyright is recognised, infringement may be seen as justified. There is a spectrum of ‘real world’ use which ranges from incidental de minimus use of material to transformative, creative use of material. Clarifying which activities infringe copyright now, and whether certain activity should continue to be categorised as infringement, is part of this Inquiry.

... Laws that are irrelevant and do not fit with community practice are undesirable.

- 56** The Australian Film/TV Bodies are not insensitive to the needs of consumers and users who interact with commercial content in various ways and have gone to great lengths to accommodate their needs where they are reasonable and not detrimental to the legitimate interests of producers, creators and others who make their living from the creation and exploitation of copyrighted works. As such we question whether Principle 6 is an appropriate policy guideline or a morally or economically acceptable approach to policy development. Any attempt to try to find an appropriate balance must address both the users’ needs and the copyright owners’ need for protection against unauthorised use.
- 57** Copyright owners, commercial licensees, Courts and academics have called unanimously for legislative action to stem the tide of online copyright infringement. The evidence of the infringing activity, and its impact, is overwhelming.
- 58** To the extent that the Committee would be assisted by guiding principles, in its inquiry the Australian Film /TV Bodies recommend that the Committee return to the four (4) stated elements of the preamble of the TOR as the relevant principles (namely, the “objective of copyright”; the “general interest of Australians to access, use and interact with content”; the “importance of the digital economy”; and “Australia’s international obligations, international developments and previous copyright reviews”). They are balanced, succinctly stated, require no further explanation and minimise the potential for the Committee to deviate from its required investigation, which is established by the preamble and the TOR.

7 Questions 3 and 4: Caching and Indexing

Question 3. What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia’s copyright law?

Question 4. Should the *Copyright Act 1968* (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

- 59** Question 3 is framed in a way that appears to assume, inappropriately, that some caching and indexing functions are being impeded. The film industry is not aware of any internet-related functions which are being impeded by Australia’s copyright laws, including caching and indexing. On the contrary, and on any measure, the Australian information, technology and communication (ITC) sector

is thriving.⁸³ It would be an extraordinary suggestion to make that the development of the internet is not advancing in Australia because of a lack of additional freedom to undertake caching and indexing activity. The argument put forward by technology companies that copyright and other regulation must be more flexible to encourage innovation and the freedom to cache and index was not accepted by the UK Hargreaves Review which concluded that:

*"Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography than it does to the shape of IP law"*⁸⁴

- 60 Caching and indexing are not new internet functions; in fact, they happen every day. Despite this, no provider of caching, indexing or hyper-linking services, other than the ISP in the unique circumstances of *Cooper v Universal Music*,⁸⁵ has been found liable by an Australian Court for copyright infringement by authorisation.
- 61 The High Court in *iiNet* reaffirmed the unique circumstances of Cooper's active promotion and distribution of infringing material online.⁸⁶ It has never been suggested that the result in *Cooper* ought to be reversed by way of statutory amendment and there is no policy justification for doing so, particularly as it represents an important authority in relation to the enforcement of online copyright for over 5 years.
- 62 Providers of caching and indexing activities also have the benefit of a number of existing exceptions and provisions that would limit any risk of liability or monetary or non-monetary exposure for those functions, absent infringing activity. Sections 43A and 111A permit "temporary storage" of copyright material "as part of the technical process of making or receiving a communication". Caching and indexing are also given the benefit of a safe harbour defences in Division 2AA of the Copyright Act which include exemptions for automated catching, re-transmission and temporary storage of copyrighted materials.⁸⁷ There is no evidence to suggest that such protections are inadequate to protect legitimate caching and indexing activity or such activity by legitimate operators.

⁸³ For example, the 2010 Australian ITC Statistical Compendium found that the ITC industry (a) contributed 4.9 per cent gross value to Australia's economy (last measured in 2006) (b) generated \$81.6 billion in revenue in 2009 and (c) accounted for 26 per cent of Australian research and development: Australian Computer Society, *Australian Information & Communications Technologies Statistical Compendium* (2010) Australian Computer Society <<https://www.acs.org.au/2010compendium/ICTStatisticalCompendium2010.pdf>>

⁸⁴ Hargreaves Report, above n 76, at 45.

⁸⁵ *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380. In *Cooper*, the Full Federal Court found that Cooper (the owner of a website called "MP3s4FREE"), E-Talk (the host internet service provider for the site) and a director of E-Talk (Mr Bal), were all liable for authorising acts that infringed copyright under s 101 of the *Copyright Act 1968* (Cth). As suggested by the website's name and the host provider, the site "MP3s4FREE" were designed to infringe copyright by providing hyperlinks to external websites where users could download music files for free. Similarly, the Federal Court in *Universal Music Australia v Sharman Licence Holdings* [2005] FCA 1242 determined that active promotion of underlying software and peer-to-peer website facilities constituted infringement of copyright by authorisation.

⁸⁶ *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 86 ALJR 494 at 508 [65].

⁸⁷ *Copyright Act 1968* (Cth) ss 116AC-AH.

- 63 If additional exceptions were enacted, they run the risk of misuse or sanctioning infringing activities by businesses and individuals that are involved in online infringement of copyright, including P2P software suppliers and operators of index sites or streaming websites that are optimised and overwhelmingly used for copyright infringement. In *iiNet*,⁸⁸ the High Court drew an important distinction between such operators and *iiNet*, which was “not a host of infringing material, or of websites which make available .torrent files relating to infringing material” nor did it “assist its customers to locate BitTorrent clients or .torrent files by any indexing service or database entries” citing a number of cases including *Cooper*.⁸⁹

8 Questions 5 and 6: Cloud computing

Question 5. Is Australian copyright law impeding the development or delivery of cloud computing services?

Question 6. Should exceptions in the *Copyright Act 1968* (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

- 64 Cloud computing is a form of online content or service delivery “in which IT resources and services are abstracted from the underlying infrastructure and provided on demand and at scale in a multi-tenant environment”⁹⁰. While the development of cloud computing has required changes to network infrastructure, core elements of an internet based network continue to form a part of the service, including internet connectivity, server equipment to store and provide access to content and controls over the terms of access.
- 65 In some respects, cloud computing involves a return to client/server architecture associated with websites developed in the late 1990s, except that the service that can be delivered by a cloud architecture increasingly involve streaming services optimised to new forms of devices (eg. smartphones and tablets) in addition to downloads. The transmission of content via a cloud based service will involve acts of reproduction and communication to the public under the Copyright Act, as would the making available online of the same content prior to transmission.⁹¹ These are important rights for copyright owners and Australia’s implementation of these rights is in response to its international obligations.
- 66 The Copyright Act does not recognise cloud-based services as a special category of service delivery or provide a different copyright framework for those services. There is no reason either as a matter of policy why cloud based services should be treated any differently from any other form of internet based service or architecture. If one of the objectives of the Digital Agenda Act was to promote technological neutrality, such an objective would be defeated by the introduction of a two tiered

⁸⁸ *iiNet Ltd*, above n 86, 508.

⁸⁹ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1; *In re Aimster Copyright Litigation* 334 F 3d 643 (2003); *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608.

⁹⁰ Cisco, *Networking and Cloud: An Era of Change* (2011) Cisco White Paper.

⁹¹ *Cooper*, above n 89.

copyright system, which provided more favourable treatment for one particular form of internet architecture.

- 67 Before any change were contemplated to copyright laws to provide a special regime for cloud based services, there would need to be very compelling evidence that there is an existing problem that needs to be addressed. There is no evidence that Australian copyright law is impeding the development or delivery of legitimate or appropriate cloud computing services. Conversely there is considerable evidence of the development of cloud based services within existing copyright laws. To the extent that Optus promoted its TV Now service as a cloud based service, it represents a compelling illustration of the reason why some special rule for all cloud based services would be inappropriate. There is no policy justification to exempt from copyright liability a cloud based service which makes content available without a licence so that it can compete with a licensed service.

9 Question 7 and 8: Copying for private use, format shifting

Question 7. Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

Question 8. The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

- 68 The issues of private copying and format shifting were the subject of the Fair Use Review in 2005 (**Fair use Review**). That review concluded that only limited rights of private copying and format shifting should be permitted, recognising the significant risks that would be posed to the rights of copyright owners if uncontrolled copying and format shifting were permitted. Those conclusions are as valid today as they were in 2005. The basic premise that an open exception for private copying would not provide remuneration to creators and might lead to less production of copyright works was supported by Australian copyright academics during the Fair Use Review in 2005.⁹²
- 69 Following that the Fair Use Review, the Parliament enacted a number of private copying exceptions into Australian law enabling a person to make:
- (a) one copy in a different form of a work contained in a book, newspaper or periodical publication;⁹³

⁹² IPRIA and CMCL, *Response to the Issues Paper: Fair Use and Other Copyright Exceptions in the Digital Age* (July 2005) Australian Government Attorney-General's Department <www.ag.gov.au/Documents/p150%20IPRIA%201.PDF> 11.

⁹³ *Copyright Act 1968* (Cth), s 43C

- (b) one copy of a photograph (from paper to electronic, or vice versa, but not from paper to paper, or electronic to electronic);⁹⁴
- (c) any number of copies of a legitimately purchased sound recording in any format;⁹⁵
- (d) one copy in electronic form of a film on video tape;⁹⁶
- (e) copies of broadcasts for private watching or listening at a more convenient time;⁹⁷

70 In addition to these accommodations for private copying, the Copyright Act also includes a number of other defences which may apply in private or domestic circumstances. For example there are defences for copying computer programs to create interoperable programs or products,⁹⁸ defences that allow for normal use or study of a computer program⁹⁹ and defences that enable error correction¹⁰⁰ and security testing.¹⁰¹ There are exceptions that permit the reading aloud in public of reasonable portions of published literary or dramatic works.¹⁰²

71 Australian consumers can of course make fair dealings for the purposes of research or study, criticism or review, news reporting, parody or satire. In addition, there are defences which enable works to be performed in certain residential facilities (such as prisons) and defences for libraries and archives, educational institutions and specialist bodies to make non-commercial uses of copyright works.¹⁰³ The sum total of these defences is that Australian copyright law offers an already generous set of exceptions for private copying and format shifting.

72 As Professor Austin observed in relation to the United States.¹⁰⁴

“Some of these more closely-delineated provisions [in Australia] do quite a lot of the work that is asked of the fair use defence under US law. For example, in the United States decompilation of computer programs remains largely a ‘fair use’ matter, where as in Australia a specific statutory provision covers this kind of use. Time shifting of television programs is another example. In the Australian Act, a specific section addresses this issue, so the judiciary has no need to agonise over whether such dealings are fair. Moreover, the Australian time-shifting defence excuses a greater range of time-shifting activities. The Supreme Court’s

⁹⁴ Copyright Act 1968 (Cth), s 47J

⁹⁵ Copyright Act 1968 (Cth), s 109A

⁹⁶ Copyright Act 1968 (Cth), s 110AA

⁹⁷ Copyright Act 1968 (Cth), s 111(1)

⁹⁸ Copyright Act 1968 (Cth), s 47D

⁹⁹ Copyright Act 1968 (Cth), s 47B

¹⁰⁰ Copyright Act 1968 (Cth), s 47E

¹⁰¹ Copyright Act 1968 (Cth), s 47F

¹⁰² Copyright Act 1968 (Cth), s 45

¹⁰³ Copyright Act 1968 (Cth), ss 46, 200AB

¹⁰⁴ In addition to fair use, the United States also regulate private copying through the *Audio Home Recording Act of 1992*, 17 USC §§ 1001–10.

*Sony holding was arguably confined to free-to-air broadcasts, whereas the Australian Statute would appear to include programs transmitted on cable services.*¹⁰⁵

- 73** The same is true of other countries. For instance, section 81A of the New Zealand Copyright Act contains a format-shifting defence for sound recordings and literary and musical works that is more restrictive than s109A.¹⁰⁶ Likewise Part VIII of the Canadian Copyright Act imposes a levy on "blank audio recording media", such as CD-Rs.
- 74** Countries¹⁰⁷ which do allow more generous private copying exemptions typically require compensation to copyright owners by way of a levy charged on the purchase of recordable media which is then distributed back to copyright owners, to in some way remunerate them for displaced market revenues resulting from such copying. Following the High Court's decision in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 the viability of a private copying levy in Australia is doubtful.¹⁰⁸
- 75** Without adequate compensation to copyright owners, the broader format-shifting and time-shifting defences are likely to be incompatible with the Three-Step Test.¹⁰⁹ The existing regime already runs that risk, because it has the capacity to conflict with copyright owners' normal exploitation of their works and unreasonably prejudice their legitimate interests.¹¹⁰ With the existing scale of online copyright infringement, particularly of motion pictures and television programs, the risks associated with an overly permissive, non-conditional and format agnostic private copying exception is likely to result in a free-for-all in Australia and one that has no parallel internationally.
- 76** The Committee ought to consider whether the existing right of videotape copying under s.110AA ought to continue. Section 110AA permits the owner of a videotape embodying a cinematograph film in analogue form to copy the film in electronic form for his or her private and domestic use.¹¹¹ The intention of this provision was to permit consumers to continue to be able to view films purchased on video cassette without the need to maintain a video cassette player which are increasingly obsolescent.¹¹² It was never intended to allow digital-to-digital copying of cinematograph films (as is contemplated by the question 8).

¹⁰⁵ Graeme Austin, "Four Questions about the Australian Approach to Fair Dealing Defences to Copyright Infringement" (2009-2010) 57 *Copyright Society of USA* 611, 623-624.

¹⁰⁶ Australian Copyright Council, *Response to the Issues Paper: Copying Photographs and Films in a Different Format for Private Use: Review of sections 47J and 110AA of the Copyright Act 1969* (February 2008) Australian Copyright Council <www.copyright.org.au/.../14310710974c97fc118f161.pdf>, 7.

¹⁰⁷ Including Belgium, Canada, Finland, Germany, Luxembourg, Netherlands, the Russian Federation, Sweden, Switzerland, France, Japan, and the United States among others.

¹⁰⁸ The minority (Dawson, Toohey and McHugh JJ) in that case delivered a powerful dissent. Their Honours were critical of the majority's reliance on dicta from *Air Caledonie v Commonwealth* (1988) 165 CLR 462. Their Honours found, correctly in our submission, that the levy imposed was not a tax because it was not paid to government consolidated revenue. The Commonwealth merely played a supervisory role in re-distributing funds to a collecting agency which in turn distributed the funds to copyright owners.

¹⁰⁹ Australian Copyright Council, above n 106, 1.

¹¹⁰ *WTO Panel Decision DS160*, above n 24, para[6.108] – [6.22].

¹¹¹ Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 6.43

¹¹² Australian Law Reform Commission, *Copyright Exceptions for Private Copying of Photographs and Films, Review of sections 47J and 110AA of the Copyright Act 1968* (2008) Australian Government Attorney-General's Department

- 77 As the Australian Copyright Council points out s.110AA is out-of-step with the majority of the international community, is inconsistent with Three Step Test requirements,¹¹³ and has a broader application than is often acknowledged.¹¹⁴ In fact, one recommendation made by the Australian Copyright Council to the ALRC in 2008, was that such a right, if maintained, should be limited to situations where :
- (a) the videotape containing the content being copied was purchased by its owner;
 - (b) the content is unavailable in digital form;
 - (c) the digital copy is to replace a videocassette that is no longer being used; and
 - (d) the copy is to play on a device owned by the videotape owner.¹¹⁵
- 78 The issue of extending s.110AA to cover digital-to-digital format shifting was considered and rejected by the Australian Law Reform Commission in 2008. As the ALCR observed in its Final Report:
- “In considering this issue, the Department notes the importance of the home entertainment market for film rights holders. At present, 99% of the video home market consists of DVDs. AVSDA statistics indicate that in 2007 the net revenue from DVD sales in Australia was \$1.3 billion. This compares with gross box office sales for feature films of \$895.4 million. It would be imprudent to embark on legislative change affecting a home entertainment market of this value without clear indications that intervention is appropriate and is likely to be effective.*
- 79 Nothing has changed. It remains the case that in excess of 85% of the Australian video market are DVDs and that net revenue from DVD sales is in excess of \$1 billion annually.¹¹⁶ Another major concern is that extending section 110AA to allow digital format-shifting may encourage circumvention of technological protection measures. That is the public may not appreciate the distinction between permission to copy but a continuing prohibition against circumvention. Furthermore, once measures are circumvented for the purposes of format-shifting it would then be possible for unprotected copies to be limitlessly reproduced or made available online for distribution thereby undermining the opportunity of copyright owners to receive financial returns from exploitation of their works.

10 Question 9: Time shifting under s111

Question 9. The time shifting exception in s 111 of the *Copyright Act 1968* (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

<http://www.ag.gov.au/Copyright/Issuesandreviews/Pages/ReviewofCopyrightExceptionsforPrivateCopyingofPhotographsandFilmsFinalReport.aspx> 7

¹¹³ Australian Copyright Council, above n 106, 6-7

¹¹⁴ Ibid, [18]

¹¹⁵ Ibid, [19]. Unlike s.109A, there is no requirement that the copy be for a device owned by the videotape owner.

¹¹⁶ Percentage calculations based on AHEDA data: Australian Home Entertainment Distributors Association, *Statistics: DVD, Blu Ray, HD, UMD & VHS Formats* (1999-2011) AHEDA <<http://www.aheda.com.au/statistics>>.

- (a) should it matter who makes the recording, if the recording is only for private or domestic use; and
- (b) should the exception apply to content made available using the internet or internet protocol television?

80 Section 111 of *Copyright Act 1968* (Cth) (**Act**) provides a defence to copyright infringement for time-shifting of broadcasts for private or domestic use. Section 111(1) prescribes a number of important conditions for the exception to apply:

- (a) it only applies to the maker of the film. It provides no recognition of a right to cause another person to make the film on their behalf and extends no immunity to them;
- (b) it only applies where the film or the recording has been made “solely for the private and domestic use” (which may occur on or off domestic premises);¹¹⁷
- (c) the film or recording must be for watching or listening “at a time more convenient than the broadcast is made”¹¹⁸

81 Sub-section 111(3) imposes further limitations. It provides that the exemption in s.111(2) does not apply if an “*article or thing embodying the film or recording*” is:

*“(a) sold; (b) let for hire; (c) by way of trade offered or exposed for sale or hire; (d) distributed for the purpose of trade or otherwise; (e) used for causing the film or recording to be seen or heard in public; or (f) used for broadcasting the film or recording”*¹¹⁹

82 If an ‘article or thing’ embodying the film or recording is dealt with in the manner described in s.111(3), then copyright in the broadcast may be infringed not only by the “making” of that article or thing but also by other dealings with that article or thing (for example, as a direct infringement of the communication right or an indirect infringement by dealing with an infringing article).¹²⁰

83 The Explanatory Memorandum to the *Copyright Amendment Act 2006* which repealed the former s.111¹²¹ and substituted the present section, reveals that the legislative intention was to permit, in limited circumstances, individual time-shifting, not to sanction commercial copying services which unreasonably affect copyright owners’ interest:

“New s 111 reflects the intention that copyright law should ensure appropriate exceptions are provided to allow common domestic practices that do not unreasonably affect the copyright

¹¹⁷ *Copyright Act 1968* (Cth), s 10(1).

¹¹⁸ Explanatory Memorandum, above n 111, at 96; LexisNexis, *Lahore Copyright and Designs*, Service Private Use, ‘Time-shifting of broadcasts’, [41,520].

¹¹⁹ *Copyright Act 1968* (Cth), s 111(3); sub-sec (4) clarifies that paragraph (3)(d) does not apply to the lending a copy of a broadcast to a family or household member for that person’s private and domestic use.

¹²⁰ *Copyright Act 1968* (Cth), s 111(3); Note: Although s 111(3) does not define the term ‘an article or thing embodying the film or recording’, the deeming provisions in ss 21(6) and 24 of the Act may affect its meaning: See comments of Rares J in the *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300 at 332-333 [107].

¹²¹ Prior to the *Copyright Amendment Act 2006* (Cth), an ineffective version of s 111 only prevented the making of a film or sound recording of a broadcast for private and domestic use from infringing copyright ‘in the broadcast’. The operation of provision was limited in that it did not extend to infringements of copyright in works, films or sound recordings included in broadcasts: see Explanatory Memorandum, above n 111, at 96

owner's interests, such as video taping or recording television and radio programs in the home to watch or listen to at a later time.

*Whilst the exception does not require immediate deletion of the television or radio program after watching or listening to it, the exception does not permit a person to record a broadcast and keep it indefinitely in a collection of films or sound recordings for repeated use*¹²²

- 84 As the Full Court observed in the Optus TV Now decision, a recording made as part of a commercial service allowing consumers to watch recordings virtually live was never intended to be captured by the provision:

*"There is nothing in the language, or the provenance, of s 111 to suggest that it was intended to cover commercial copying on behalf of individuals. Moreover, the natural meaning of the section is that the person who makes the copy is the person whose purpose is to use it as prescribed by s 111(1). Optus may well be said to have copied programmes so that others can use the recorded programme for the purpose envisaged by s 111. Optus, though, makes no use itself of the copies as it frankly concedes. It merely stores them for 30 days. And its purpose in providing its service – and, hence in making copies of programmes for subscribers – is to derive such market advantage in the digital TV industry as its commercial exploitation can provide."*¹²³

- 85 Special leave to appeal was refused by the High Court and the transcript of that application reveals no criticism of the Full Court's decision by the High Court. The issue of the appropriate construction of s111 and the policy behind the provision, which strongly influenced the Full Court's decision, is now authoritatively settled.
- 86 For the reasons set out in our responses to questions 12 and 13 below, we consider that extension of the format-shifting provisions to allow for internet-based recording services (**PVRs**) of the kind offered by Optus TV would be incompatible with Australia's international obligations under the Three-Step Test. In particular, the TV Now decision reveals the capacity for PVRs to enter into competition with licensed providers and so undermine ability of rights holders to extract value from digital and online markets; outcomes which directly at odds with the second and third steps of Australia's international obligations. The commercial development of the legitimate online business models outlined in Annexure A (including, for instance, 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. A blanket proposal to allow time-shifting in online environments would diminish the

¹²² Ibid. Furthermore, the 'general overview' section of the Explanatory Memorandum, above n 111, suggested that an overruling policy behind the suite of reforms introduced by the *Copyright Amendment Act 2006* (Cth) was that the '**reforms should not unreasonably harm or discourage the development of new digital markets by copyright owners...**' Indeed, the reforms were premised on a impact study which found that consumers did not "*regard adhoc home copies as a substitute for commercial standard DVDs*" and therefore the reforms would not adversely affect the copyright owner's interests: Explanatory Memorandum, above n 111, at 9

¹²³ *National Rugby League Investments Pty Ltd & Ors v Singtel Optus Pty Ltd* [2012] FCAFC 59, at [89]

development of authorised online content providers and the capacity for rightsholders to extract value in online environments.

- 87 It would be inappropriate for s111 to be amended following the decision in the TV Now case. There is no compelling reason why a contrary result should now apply, particularly after the appellate decisions.

11 Question 10: Back-up copies

Question 10. Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

- 88 The concept of the creation of a back-up derives from the software industry. This concept developed in response to the experiences of computer crashes and the loss of data and software. The Copyright Act already provides for a right to make back-ups of software in certain circumstances under s 47C. There is no evidence to suggest that this right is not effective or that it is not utilised. There are also no examples of decided cases which expose some weakness in the existing back-up exception.
- 89 There is no policy justification for a more generalised right of back-up that would apply to other forms of copyright works or subject matter. The concept of a back-up has never applied to other forms of content, such as music or film, which are fundamentally different from software. Were such an exception to exist, it would invariably be open to widespread abuse, particularly in relation to music or film copyright. It would likely be used as the justification wherever infringing files were identified. It would also have other unintended consequences, by deeming the copy non-infringing and thereby taking it outside the copyright law and enabling the copy to be distributed without risk of infringement through secondary dealing.
- 90 A broad right of back-up is also not necessary. There is substantial evidence of online business models and content delivery services that permit a consumer to re-download or restream content if another copy is legitimately required. iTunes is a popular example. The introduction of a right of back-up for any content downloaded from iTunes would undercut existing licensing models and therein licensees' ability to offer specific licence conditions for authorised content (including at different price points). It would also run into conflict with the TPM regime which protects access controls and anti-copying technology applied to content from circumvention. The TPM regime is outside the TOR of the ALRC.

12 Questions 11, 12 and 13: Online use for social, private or domestic purposes

Question 11. How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

Question 12. Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

Question 13. How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

- 91 The Australian Film/TV Bodies oppose any exception for “social, private or domestic purposes”. The Issues Paper suggests in vague terms that the exception would exempt “*use of copyright materials by individuals for ‘social, private or domestic purposes’*”.¹²⁴ It suggests that non-commercial user-generated would be covered and then quotes Professor Samuelson:

*“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 work.”*¹²⁵

- 92 That statement would not be an accurate statement of Australian copyright law or its impact. Australian copyright law does not regulate all uses of copyrighted work, only uses that involve the exercise of one of the exclusive rights without the licence of the copyright owner. This applies to all forms of exercise of the exclusive rights, on the internet and otherwise.
- 93 The quoted statement does not distinguish between the types of copyright uses on social networking sites. Many forms of user-generated content on social networking sites would not result in copyright infringement as contributors own copyright in their original comments, posts and photographs. Even where this is not the case, copyright law provides no impediment to users posting links to authorised websites. In Australia, copyright industries (such as the newspaper industry) are already partnering with Facebook and Twitter to encourage users to access and share links to authorised material.
- 94 Having regard to the losses the Australian film and television industry sustains through unauthorised file sharing, there should be no encouragement of infringing activity. Suggestions that the use of copyright works on social networking sites should be in some way excepted from the ordinary laws of copyright, thereby denying copyright owners compensation for the exercise of such rights, is self-serving and would have the effect of creating a commercial advantage to one class of internet based businesses over all others.¹²⁶
- 95 Such an amendment to the Copyright Act would also put Australia in clear breach of its international obligations. An exception defined solely by a mere “non-commercial”, “social”, “personal” or “private”

¹²⁴ Issues Paper 2012, above n 16, [95].

¹²⁵ *National Rugby League Investments Pty Ltd & Ors v Singtel Optus Pty Ltd* [2012] FCAFC 59, at [89]

¹²⁶ Michael Williams and Cameron Andrews, above n 70, at 136.

use restriction would be inconsistent with Australia's international law obligations and fail every step of the "Three-Step Test".

96 As Mihály Ficsor observed in relation to the requirements of the "Three-Step Test":

*"[S]pecial cases covered by exceptions and limitations under the Convention seems to require more justification than that policy-makers [may] wish to achieve There is a need for a clear and sound political justification, such as freedom of expression, public information, or public education; authors' rights cannot be curtailed in an arbitrary way."*¹²⁷

97 The detrimental implications of this exception to content providers cannot be overstated. The exception would potentially affect many rights guaranteed under international copyright treaties including the right to make and authorise the making of translations,¹²⁸ adaptations, arrangements, and alterations of works which includes the right to create derivative works,¹²⁹ the right of authorising the cinematographic adaptation and reproduction of literary and artistic works and the distribution of the adapted works as well as the adaptation into any other artistic form of a cinematographic production derived from any literary or artistic works,¹³⁰ rights of performers,¹³¹ the right of recitation,¹³² and the right to authorize reproductions of works and other subject matter.¹³³

98 The proposed exception would also cut across guaranteed rights of reproduction, public performance, communication to the public and making available, and distribution. It would also potentially call into question the use of TPMs which are critical to the film industries' protection of their rights in a digital environment of commercially-released cinematograph films.

99 In assessing the first step, a threshold determination would be whether such an exception can be justified by any specific and sound public policy objective. A proposal to create a broad exclusion for "non-commercial" or "private, social or domestic" purposes do not fit into any of the recognised policy objectives, such as public education, public security, freedom of expression, the needs of disabled persons, or the like. It may also be inconsistent with the objectives of *Berne Convention* which is the protection of the rights of authors. As Ricketson and Ginsburg explain:

"In keeping with the first step, however, these non-economic purposes will need to be clearly and specifically articulated, and will need to be set against the stated objective of the Convention, which is the protection of the rights of authors. This indicates that such

¹²⁷ *Ficsor Guide*, above n 27, at BC-9.16-9.18

¹²⁸ *Berne Convention*, above n 18, Arts 2(3), 8; *UC Convention*, above n 18, Art. V; *TRIPS Agreement*, above n 18, Art. 9.

¹²⁹ *Berne Convention*, above n 18, Arts. 2(3), 12; *TRIPS Agreement*, above n 18, Art. 9. As for the level of intellectual creation required for something to be an adaptation, arrangement, or alteration of a work, see Ricketson & Ginsburg, above n 24, at 481-483.

¹³⁰ *Berne Convention*, above n 18, Art. 14; *TRIPS Agreement*, above n 18, Art. 9, *WIPO Copyright Treaty*, above n 18, Art. 7.

¹³¹ *Rome Convention*, above n 18, Art. 7; *WPP Treaty*, above n 18, Arts. 5-10.

¹³² *Berne Convention*, above n 18, Art 11ter; *TRIPS Agreement*, above n 18, Art. 9.

¹³³ *Berne Convention*, above n 18, Art. 9; *TRIPS Agreement*, above n 18, Art. 9; *WPP Treaty*, above n 18, Arts. 7, 11.

*justifications will need a clear public interest character that goes beyond the purely individual interests of copyright users”*¹³⁴

- 100 Clearly an exception based on the “user entitlement” by Professor Samuelson does not satisfy that requirement of exhibiting a purpose that is consistent with the *Berne Convention*.
- 101 In addition to requiring the exception to have “*an individual or limited application or purpose*”,¹³⁵ the first step also requires the exemption to be “*clearly defined*”¹³⁶ and “*narrow in its scope and reach*.”¹³⁷ An exception for non-commercial social, private or domestic purposes does not meet either of those requirements.
- 102 The exception described in the Issue Paper appears to be universally available to all users, for all exclusive rights, and for all works. It appears to apply to all adaptations and derivative works, including compilations and collections of whole works and related subject matter. There is no proposed limit on the proportion of a work that could be used or any implied limit on the number of copies or uses for any given work. Nor does the Issues Paper suggest that there should be a limit on the extent of the dissemination, which over the Internet and in social networks can be extremely extensive.¹³⁸
- 103 Finally, there is an inherent uncertainty to the terms “non-commercial”, “social”, “personal” and “private”.¹³⁹ For instance, any use involving more than one person could be considered “social”. At the same time, it is difficult to imagine how any use involving *sharing* could be considered “private and personal”.¹⁴⁰ This contradiction is not explained by the Issues Paper. The terms are particularly ambiguous in digital and online environments. For instance, in the context of the Internet and other digital networks, copyright uses may involve many parties and platforms, including the users who upload a work, the intermediaries and online social networks such as Facebook and YouTube who handle and relay it, and users who download or stream content. Do all of these entities which facilitate the distribution and dissemination of the copyright materials have to be “non-commercial”, “social”,

¹³⁴ Ricketson & Ginsburg, above n 24, at 773.

¹³⁵ Ibid, at [6.109]

¹³⁶ Ibid, at [6.108]. This is consistent with the recommendations of the Stockholm Study Group which recommended that any exception to the right of reproduction be “*for clearly specified purposes*.”: David Gervais, “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations” (2008) 5 *University of Ottawa Law and Technology Journal* 1, at 26

¹³⁷ Ibid, at [6.108]. This is consistent with the recommendations of the Stockholm Study Group which recommended that any exception to the right of reproduction be “*for clearly specified purposes*.”: David Gervais, “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations” (2008) 5 *University of Ottawa Law and Technology Journal* 1, at 26

¹³⁸ The Social Sciences Research Network, an authorized but arguably non-commercial undertaking, for example, has a library of over 350,000 works and distributes nearly 30,000 copies of those works every day. See statistics at Social Sciences Research Network, *Browse eLibrary*, (2012) <<http://papers.ssrn.com/sol3/DisplayJournalBrowse.cfm>>.

¹³⁹ Alexander Peukert, “A Bipolar Copyright System for the Digital Network Environment”, (2005) 28:1 *Hastings Comm. & Ent. L. J.* 1; Brent Hugenholtz et al, “The Future of Levies in a Digital Environment, Final Report”, Institute for Information Law, March 2003 at 41; Ginsburg et al, “Private Copying in the Digital Environment”, in Kabel et al, *Intellectual Property and Information Law* (Kluwer Law International 1998) at 149-51; Bob Rietjens, “Copyright and the Three-Step Test: Are Broadband Levies Too Good to be True?” (2006) 20 (3) *Int'l. Rev. L. & Computers* 323.

¹⁴⁰ Access-controlled services that actively prevent use by anyone other than the authorized user might satisfy this requirement, but these types of purely private services do not fit the mould described in the Issues Paper 2012. In any event, such services could be authorized by the right holder or could fit within a targeted time- or format-shifting exception. There would be no reason to define a broad “non-commercial use” exception if this was the only use case of concern.

“personal” or “private” in nature? These entities are some of the largest in the world and earn substantial revenues and profits from using or helping to disseminate content uploaded by individuals and content providers.¹⁴¹

- 104** The second step similarly presents intractable difficulties. It seems incontrovertible that non-commercial content distribution may directly compete with authorised commercial distribution. Legitimate online distribution models are increasingly significant to content providers however their continued viability is thwarted by the prevalence of free unauthorised content (notwithstanding that it occurs in private, social or domestic settings).¹⁴² Furthermore, the exception has the capacity to interfere with the collaborative arrangements established by YouTube and others to promote user-generated services whilst at the same time protecting the rights of copyright owners. Under existing processes, users are able to upload and distribute user-generated content. Content providers and service providers have put in place mechanisms to prevent infringing works from being posted, and, as importantly, means to enable such content to be monetised for the benefit of the service providers, authors and rights holders.¹⁴³ A general exception that extends to intermediaries including user-generated content sites, social networks and carriage service providers would undermine these existing and developing markets for works and thus also lead to any such exception not meeting the second step of the Three-Step Test.
- 105** Unlicensed use of copyright film content in 2010 amounted to direct consumer spending losses to the Australian movie industry of an estimated \$575 million.¹⁴⁴ An exception that made such unlicensed uses lawful would increase the extent of those uses, and consequently the resulting loss of income.¹⁴⁵
- 106** There is also a valid concern that such an exception would provide a pretext for carriage service providers to reduce cooperation with copyright owners in deterring copyright infringement on their networks.¹⁴⁶ Any measure that blurs the question of whether file-sharing activities on a network or in a storage location are permissible risks a cascading effect by making it more difficult to establish that a carriage service provider has the knowledge that infringing activities are taking place on its systems, thus incentivizing the provision of “grey market” services, which risk conflicting with the normal commercial exploitation of copyrighted works.
- 107** In assessing the proposal against the third step of the “Three-Step Test”, the legitimate interests of authors, performers, and rights holders have to be taken into account. In addition to the possible

¹⁴¹ Google does not publish separate financial statements for YouTube. However, published estimates suggest that YouTube may generate over \$1 billion in annual revenues and generate over \$700 million in annual profits. See Peter Kafka, “Another YouTube Revenue Guess: \$1 Billion in 2011” *All Things D* (online), 10 March 2010 <<http://allthingsd.com/20100305/another-youtube-revenue-guess-1-billion-in-2011/>>. Facebook reported 2011 revenue of \$3.71 billion in its published SEC filings.

¹⁴² Reinbothe & von Lewinski, above n 24, at 126; Ficsor, above n 24, at 5.56; Ricketson & Ginsburg, above n 24, at 703-4

¹⁴³ See Principles for User Generated Content Services, <http://www.ugcprinciples.com>. The agreed-to Principles include the following statement: “In coming together around these Principles, Copyright Owners and UGC Services recognize that they share several important objectives: (1) the elimination of infringing content on UGC Services, (2) the encouragement of uploads of wholly original and authorized user-generated audio and video content, (3) the accommodation of fair use of copyrighted content on UGC Services, and (4) the protection of legitimate interests of user privacy.”

¹⁴⁴ Ipsos Australia & Oxford Economics, above n 63, at 9.

¹⁴⁵ This concern has been influential in other countries. See, for example, New Zealand, “Digital Technology and the Copyright Act 1994: Internal Working Paper” (July 2002) (“*NZ Working Paper*”) at paras 18, 248-49.

¹⁴⁶ Issues Paper 2012, above n 16, [109]

economic effects, these interests include the moral rights of authors as well as the legitimate interests in controlling adaptations or other potential uses of works. A broad exception for non-commercial purposes may result in unauthorised alterations that may violate the moral right in the integrity of works.¹⁴⁷

- 108** In addition, such an exception could significantly affect the author's, performer's, and rights holder's legitimate interests in being able to authorise the creation and dissemination of adaptations and future uses of his or her work. The legitimate interests could include objections to alterations made on moral, political, literary, artistic, legal, reputational, or other grounds, or the use of the work in association with a cause, person, work, or other reason which the author, performer, or rights holder finds objectionable. Even if conditions or qualifications were included in an exception to try limit its *economic* effects, these other legitimate interests would remain as valid concerns under the third step of the "Three-Step Test".

13 Questions 14 and 15: Transformative use

Question 14. How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

Question 15. Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

Question 17. Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

- 109** The Australian Film/TV Bodies consider that "transformative use" is too vague and indeterminate to be an appropriate concept for reform. As the Copyright Council Expert Group (**Expert Group**) acknowledged in their discussion paper,¹⁴⁸ there is no clear definition for "transformative use". Some of the questions they identify with the framing of an exception based on this concept include:
- (a) Is there an identifiable "threshold of merit"?
 - (b) What would such an exception be called: "mash-up", "transformative", "remix", "collage", "pastiche", "alternation", "quotation" exception?

¹⁴⁷ Moral rights are not required to be enforced under the *TRIPS Agreement*, above n 18, but Australia is bound to protect them as a *Berne Convention*, above n 18, member (Art. 6bis) and *WPP Treaty*, above n 18, member (Art. 5).

¹⁴⁸ Copyright Council Expert Group, "Directions in Australian Copyright Reform", (2011) 29 *Copyright Reporter* 169, 172

- (c) What is “non-commercial” in terms of such a use? What constitutes commercial use in a digital environment that monetises social relations, friendships and social inter-actions?
- (d) What are the boundaries of “private”?
- (e) What about something “private” or “non-commercial” that goes viral and is commercialised? To what extent could intermediaries (such as YouTube and Facebook) take advantage of such an exception?

110 American case law provides no answer to those questions. As the Issues Paper acknowledges, transformative use is not a standalone exception in America. It is one fairness factor used to decide whether particular a use meets the first factor of the fair-use test, namely an investigation into the purpose or character of the use. Like the modern fair use doctrine, transformative use is founded in Justice Story’s seminal 1841 opinion:¹⁴⁹

*“if [someone] thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.”*¹⁵⁰

111 Tasked with determining whether a rap parody of Roy Orbison’s song “Oh Pretty Woman” amounted to fair use under US law, the Supreme Court returned to Justice Story’s idea of a use which has the purpose or character of superseding an original work:

“The first factor in a fair use enquiry is ‘the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.’ 107(1)...The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’

¹⁵¹

112 There are number of difficulties with this formulation. First, it provides no “bright line” as to when or how one work will supersede the purpose, character or expression of another. Second, it establishes an uneasy relationship between infringement standards for derivative works and defence standards for superseding purpose, character or expression. In other words, the doctrine requires that there be a double investigation into the substantiality of the defendants’ appropriation and, as each standard is different, the two investigations must arrive at diametrically opposed conclusions in order for the defence to apply. Third, it is unclear whether either, both, or a combination of transformative ‘content’ or transformative “purpose” is required to fall with the defence. In other words, is it acceptable to copy a work in its entirety but apply the entirely appropriated content to an entirely different context and still

¹⁴⁹ *Folsom v. Marsh* 9 F. Cas. 342, No. 4,901 (C.C.D. Mass. 1841).

¹⁵⁰ Having said that, transformative use is generally acknowledged to derived from Judge Leval’s article: Judge Pierre Leval, “Toward a Fair Use Standard” (1990) 103 *Harvard Law Review* 1105.

¹⁵¹ *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

fall within the doctrine? Fourth, it provides no clear guidelines to the real practical problem faced by users and rights-holders; namely, what can I do in commercial settings? When do I need to a licence?

113 As Professor Netanel has observed about the doctrine of “transformative use” in the US:

*“[The] fundamental uncertainty about what is a transformative use has led some commentators to challenge the transformative use doctrine as fundamentally untenable. They argue, in particular, that if transformative use means different character flowing from new expressive contributions, the doctrine would severely undermine the copyright holders’ derivative rights.”*¹⁵²

114 The effect of the exception would be to extinguish or severely curtail the copyright owner’s market for derivative works. The rights of translation, adaptation and reproduction¹⁵³ are very important rights which are used throughout all of the creative industries. For example, they cover, among other things, the right to convert a book or script into a movie, create sequels and new works in a series, localize a work for a new market, adapt movies and TV series characters and storylines to create console, PC and mobile games, and adapt traditional works for uses in new and ever-expanding new media types.

115 In other industries, the concept of “transforming” a work might logically include:

- (a) converting a computer program which operates under one operating system to another or creating modifications and enhancements to computer programs;
- (b) creating music videos by combining all or parts of sound recordings with videos or video clips;
- (c) music sampling to create a new musical work or sound recording;
- (d) developing sequels to video games or game software;
- (e) taking engineering, architectural or other drawings and adapting them for other uses both commercial or non-commercial;
- (f) creating sequels or abridgements to books;
- (g) making changes to original corporate logos and using them in association with a cause;
- (h) copying an entire website (which may be a literary or artistic work) and, after making some changes, posting it for use by the person or others; or
- (i) creating an “original” compilation or collection of pre-existing works including the “best of” a person’s music, movie, TV, or software collections.

116 The exclusive derivative rights to control these activities are enshrined in international copyright treaties.¹⁵⁴ For instance, Article 12 of the *Berne Convention* guarantees that

¹⁵² Neil Netanel, “Making Sense of Fair Use” (2011) 15 *Lewis & Clark L. Rev.* 715, 747

¹⁵³ *Berne Convention*, above n 18, Arts. 2(3), 8, 9, 12, 14, 14bis; Ricketson & Ginsburg, above n 24, at 473-74; *Ficsor Guide*, above n 27, at BC-2.40 to BC-2.48.

¹⁵⁴ *Ibid.*

“[a]uthors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.”¹⁵⁵

- 117** Likewise, Articles 14 and 14bis of the *Berne Convention* confers on authors “the exclusive right of authorizing the adaptation the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced.” A “transformative use” exception is fundamentally at odds with the exclusive rights guaranteed by these provisions.
- 118** Additionally, once again the Committee is focused on an issue that has largely been resolved by the marketplace. First, many of those arguing for a transformative use exception are intermediaries whose business model is based on profit from what they imagine to be the transformative uses of third parties. Some of these intermediaries have already sensibly decided that if they are in the business of disseminating content owned by others, it is reasonable to obtain licenses to do so. The introduction of a transformative use defence has the capacity to disrupt legitimate markets for “mash-ups”, “collages” and other related products incorporating protected works. For instance, Movieclips.com is a legitimate site where consumers can use clips from popular movies free of charge without resorting to movie piracy. In exchange for licensing film content free-of-charge, the movieclips advertises site where consumers can rent on purchase the full length feature. It is also the case that online providers, such as Youtube, are working with the film industry to allow for authorised streaming and use of copyright material.

14 Question 18: Moral rights

Question 18. The *Copyright Act 1968* (Cth) provides authors with three ‘moral rights’: a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

- 119** The moral rights regime was introduced into Australian copyright law to ensure that Australia was in compliance with its international treaty obligations. As was explained in the Amended Explanatory Memorandum to the bill in 1999, it gave “effect to Australia’s obligations under Article 6bis of the *Berne Convention* for the Protection of Literary and Artistic Works.”
- 120** The moral rights regime has been in place since 2001. There are few published decisions in which a moral rights claim has been brought. The claim in most recent decided moral rights case, in *Perez v Fernandez*,¹⁵⁶ resulted in a finding of infringement of the applicants’ moral rights and an award of \$10,000 damages. There was no appeal from that decision and it has generated no public concern about the ambit of moral rights.

¹⁵⁵ See also, *Berne Convention*, above n 18, Art 8 for the special case of translation of works.

¹⁵⁶ *Perez & Ors v Fernandez* (2012) 260 FLR 1.

- 121** The concept of a “right” to make a “mash-up” of a copyright work or subject matter that can be posted online in contravention of moral or other rights lacks any policy justification. Why should a member of the public be able to post infringing copies of works online? Mr Perez was sufficiently concerned by the unauthorised use of a modified version of his song to bring a claim for infringement of his moral rights. Why should his moral rights, or those of other copyright owners, be overridden by a mash-up?
- 122** It is also likely that the introduction of any exception for mash-ups would put Australia in breach of its international obligations, including the Article 6b of the *Berne Convention* for the Protection of. Nor would such an exception be permissible under the Three-Step Test, because it would fail the requirements of each step, including, for instance, unreasonable prejudice to the legitimate interests of authors.

15 Questions 35-39: Retransmission of free-to-air broadcasts

- Question 35.** Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?
- Question 36.** Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?
- Question 37.** Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?
- Question 38.** Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?
- Question 39.** What implications for copyright law reform arise from recommendations of the Convergence Review?

- 123** The Australian Film/TV Bodies are generally unsupportive of any further extension of, or exception from, the statutory licensing scheme for the retransmission of free-to-air broadcasts over the internet and do not feel it appropriate to comment further on this issue in the context of this review. We instead view this issue as more appropriately viewed within the context of the ongoing Convergence Review.

16 Questions 40-44: Statutory licences in the digital environment

- Question 40.** What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?
- Question 41.** How can the *Copyright Act 1968* (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?
- Question 42.** Should the *Copyright Act 1968* (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

Question 43. Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

Question 44. Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

124 The Australian Film/TV Bodies are generally unsupportive of any further extension of, or exception from, the statutory licensing scheme in the digital environment and do not feel it appropriate to comment further on this issue in the context of this review. Again, we instead view this issue as more appropriately viewed within the context of the ongoing Convergence Review.

17 Questions 45-47: Fair dealing exceptions

Question 45. The *Copyright Act 1968* (Cth) provides fair dealing exceptions for the purposes of:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news; and
- (e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

Question 46. How could the fair dealing exceptions be usefully simplified?

Question 47. Should the *Copyright Act 1968* (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

125 The Copyright Act exempts fair dealings for the purposes of research or study,¹⁵⁷ criticism or review,¹⁵⁸ new reporting,¹⁵⁹ professional advice¹⁶⁰ and parody or satire.¹⁶¹ Contrary to what is sometimes asserted,¹⁶² Australian courts have afforded these purposes an objective and reasonable construction that is plainly capable of applying in digital environments. For example:

¹⁵⁷ *Copyright Act 1968* (Cth), ss 40, 103C.

¹⁵⁸ *Copyright Act 1968* (Cth), ss 41, 103A.

¹⁵⁹ *Copyright Act 1968* (Cth), ss 42.

¹⁶⁰ *Copyright Act 1968* (Cth), s 43(2), 103B.

¹⁶¹ *Copyright Act 1968* (Cth), s 43A, 103B.

¹⁶² IPRIA and CMCL, above n 92, 11.

- (a) “Research” has been held to include an inquiry or investigation into a subject in order to discover facts or principles;¹⁶³
- (b) “Study” has been held to mean “the application of the mind to the acquisition of knowledge, as by reading, investigation or reflection; The cultivation of a particular branch of learning, science or art; A particular course of effort to acquire knowledge... A thorough examination and analysis of a particular subject;”¹⁶⁴
- (c) “Criticism” has been held to mean “the act or art of analysing and judging the quality of a literary or artistic work or ‘the act of passing judgement as to the merits of something’;”¹⁶⁵
- (d) “Review” has been held to mean “the result of critical application of mental faculties”;¹⁶⁶
- (e) “Reporting” news has been held to include providing information about current events and may involve use of humour or provision of historical material.

126 There are further flexibilities in Australia’s fair dealing provisions. For instance, “criticism and review” are interpreted in Australia as “*wide and infinite scope which should be interpreted liberally.*”¹⁶⁷ It is also not necessary that the permitted purpose be the defendant’s only purpose.¹⁶⁸ Nor is it necessary for a defendant to direct his criticism or review or reporting of the news to the copyright work or other subject matter itself.¹⁶⁹ An acceptable criticism or review, for instance, would extend to the social or political implications of the work.

127 Once it has been shown that the dealing was carried out for one of the specified purposes, the courts then engage in a wide-ranging investigation as to whether the dealing was fair. The classic statement of the nature of the enquiry came from Lord Denning:

*“It is impossible to define what is ‘fair dealing’. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. ... But, after all is said and done, it must be a matter of impression.”*¹⁷⁰

128 The combination of clear purpose tempered by a flexible fairness investigation into fairness should not be lightly abandoned. Almost all common law countries favour fair dealing models not open

¹⁶³ *De Garis v Neville Jeffress Pidler Pty Limited* (1990) 37 FCR 99

¹⁶⁴ *De Garis v Neville Jeffress Pidler Pty Limited* (1990) 37 FCR 99

¹⁶⁵ *Ibid*; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235.

¹⁶⁶ *Ibid*

¹⁶⁷ *TCN Channel Nine*, above n 165.

¹⁶⁸ *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545.

¹⁶⁹ *Pro Seiben Media v Carlton Television* [1999] FSR 610.

¹⁷⁰ *Hubbard v Vosper* [1972] 2 QB 84, 94.

standards.¹⁷¹ Any inroads into copyright owner's rights must be clearly justified on public policy and compliant with Australia's international obligations.

- 129** Simplifying legislation is not the answer to changing technology, or to demands made by some businesses or sectors. As Ricketson observed in relation to Simplification Review, simplification of legislation may distract from the real challenges of digital age for users and rights:

The CLRC proposals treat copyright as a closed system, holding out the prospect (perhaps unintentionally) that this will solve the challenge of a continually changing technological environment. But the real challenges may well lie elsewhere, in the sphere of enforcement, technological anti-infringement measures, contractual provisions, and resolution of the difficult private international law issues that arise in the online environment. This is not intended as criticism of the CLRC for not having addressed these issues-they were not part of its brief. On the other hand, it may indicate that simplification, whether formal or substantive, may really be a side issue to those which are of real concern to owners and users

- 130** In response to question 46, the following amendments are proposed

- (a) Sections 42 and 103B of the Copyright Act should be amended to require 'sufficient acknowledgment' for news reported by means of broadcasting or cinematograph films (as is the case for literary works and newspapers, magazines and the like). In circumstances where television news reports already adopt the practice of acknowledging the source of audio visual material by way of a small logo, the differing standards for print and audio-visual media can no longer be maintained.
- (b) The definition for "sufficient acknowledgement" in the Copyright Act should accordingly be extended to apply to broadcasts and cinematograph films.
- (c) Sections 40(1A) and 40(IB) should be repealed. As the Australian Copyright Council has pointed out these provision add nothing to what is otherwise permitted under s.40.

- 131** The existing fair dealing provisions already exempt quotations of a substantial part of a copyrighted work in legitimate circumstances. To allow for quotation outside these purposes, for example to use an extract from a film in another film, is incompatible with Australia's international copyright obligations.¹⁷²

¹⁷¹ Copyright Act 1994 (NZ), ss 42 and 43; Copyright Act 1978 (SA), ss 12 and 20 Copyright, Designs and Patents Act 1988 (UK) ss 29, 30, 178;

¹⁷² Art 10(1) of *Berne Convention*, above n 18, contains a provision which guarantees the use of protected works for the purpose of freedom of expression. Under this provision, it is permissible to make quotations from a work that has been lawfully made available to the public in a way that is compatible with fair practice to an extent that does not exceed that justified by the purpose (which normally relates to criticism, review, and news reporting) including quotations from newspaper articles and periodicals in the form of press summaries. It does not sanction the whole sale introduction of a quotation exemption limited only by the fairness of the quotation itself.

18 Questions 48, 49, 50 and 52: Other free-use exceptions

Question 48. What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

Question 49. Should any specific exceptions be removed from the *Copyright Act 1968* (Cth)?

Question 50. Should any other specific exceptions be introduced to the *Copyright Act 1968* (Cth)?

Question 51. How can the free-use exceptions in the *Copyright Act 1968* (Cth) be simplified and better structured?

- 132** We are unaware of any problems with the operation of the miscellaneous exceptions in digital environments. The miscellaneous exemptions are the result of detailed consultation with stakeholders and reflect the complexities of particular copyright industries and markets. They should not be simplified or restructured without consideration of the divergent circumstances and markets for copyright works and other subject-matter. As the ALRC observed in 2008:

*“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. That approach may not benefit consumers because it would be necessarily limited”*¹⁷³

- 133** Issues relating to technological development are too varied, nuanced and complex to be resolved satisfactorily by replacement of the miscellaneous exemptions with open defences. The miscellaneous exemptions (accompanied by consultation with stakeholders) are a better regulatory tool than open-ended and undefined discretionary standards which require interpretation by the courts.

19 Questions 52 and 53: Fair use

Question 52. Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on ‘fairness’, ‘reasonableness’ or something else?

Question 53. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

- 134** The introduction in Australia of a broad, flexible US style fair use exception (whether based on “fairness”, “reasonableness” or otherwise) is not appropriate and the Australian Film/TV Bodies oppose any such proposal.

¹⁷³ Australian Law Reform Commission, above n 112, 3.17.

- 135** The existing fair dealing provisions and miscellaneous defence already provide adequate and sufficient protection. In the absence of Australian jurisprudence, which would likely take decades to develop, open ended fair use defences will increase businesses uncertainty and potentially have a harmful effect on growth and innovation. Broad, flexible exceptions are particularly suspect under the “Three-Step Test”. Australian and international reviews which have previously considered fair use exceptions recommended not introducing a fair use exception into Australian copyright law and the circumstances have not changed since those recommendations were made.
- 136** The Terms of Reference direct the ALRC to consider whether existing exceptions are adequate and appropriate in the digital environment. Australian copyright legislation has long provided for a closed list of permitted purposes exceptions and miscellaneous exceptions which apply in prescribed circumstances. The majority of developed economies, including for example the UK, Canada and New Zealand, adopt this structure.¹⁷⁴ By contrast, United States legislation and only three other countries (the Philippines, Israel and Singapore), provide for an open ended fair use exception.
- 137** The existing legislative framework (perhaps with some simplification and modernisation of its terminology) is an adequate and appropriate way forward for Australia in the digital age. As Davison and others observe, Australia’s fair dealing provisions are not the “blunt, inflexible instruments” (they are sometimes said to be),¹⁷⁵ and have the benefit of an accumulated body of case law.¹⁷⁶ The miscellaneous exceptions reflect the principled and balanced consensus between the various stakeholders, are largely technologically neutral and benefit from being nuanced, proscriptive and tailored to deal with specific situations.
- 138** Business growth is helped by legal certainty. The open fair use defence involves uncertain standards and may therefore have a detrimental economic impact on users and content providers alike.¹⁷⁷ From its introduction into US law in 1841, the fair use doctrine was designed a discretionary standard to be applied on a case-by-case basis.¹⁷⁸ As the Report of the House of Representatives accompanying passage of the Copyright Act 1976 noted:

*“Although the courts have considered and rule upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”*¹⁷⁹

¹⁷⁴ UK: *Copyright Designs and Patents Act 1988* (UK) ss 29(1), (30); Canada: *Copyright Act*, RSC 1985, c C-42, s 29; New Zealand: *Copyright Act 1994* (NZ) ss 42, 43.

¹⁷⁵ Michael Handler and David Rolph, above n 8, 383

¹⁷⁶ Mark Davison, Ann Monotti and Leanne Wiseman, above n 9, 299-300 (see comments in relation to criticisms of the research or study fair dealing exception).

¹⁷⁷ Business growth is helped by legal certainty see: United Nations Economic Commission For Europe, *Financing Innovative Development for Europe: Comparative Review of UNECE Countries in Early Stage Financing* (January 2007) UNECE <<http://www.unece.org/index.php?id=2152>> (characterising uncertainty as an impediment to securing finance).

¹⁷⁸ *Folsom v. Marsh*, above n 149.

¹⁷⁹ HR Report No 94-1476, 94th Congress, 2d Sess 65-66 (1976)

139 The statutory language in Section 107 of the Copyright Act deliberately provides “very little guidance for predicting whether a particular use will be deemed fair.”¹⁸⁰ One US law professor has observed that the “*facial emptiness of the statutory language means that ... it is entirely useless analytically, except to the extent that it structures the collection of evidence.*”¹⁸¹ Another leading scholar has suggested the idea that the statutory test determines the outcome of fair use cases is “*largely a fairy tale.*”¹⁸² Indeed, the leading US fair use cases are characterised by divergent conclusions and conflicting results. Compare *Sony v. Universal City Studios, Inc.*, 464 US 417 (1984),¹⁸³ *Harper & Row Publishers, Inc. v Nation Enterprises*, 471 US 539 (1985)¹⁸⁴ and *Campbell v. Acuff-Rose Music, Inc.* 510 US 569 (1994).¹⁸⁵

140 In practice, fair use adds significant uncertainty to every case in which it is pleaded as a defence to infringement. US Lawyers confirm this with anecdotal reports. Introduction of such an unpredictable doctrine is likely to have the type of detrimental impact recognised by Professor Hargreaves when he made the following observation about the likely impact on UK law:

*“Among the economic implications is the danger, which attends all legal uncertainty, of eroded incentives for consumers to purchase and for investors to invest, which is precisely what we hear reported, for example in the UK music industry. Commercially it leaves rights holders with an unsatisfactory choice between having rights they cannot or do not enforce, or seeking to preserve legal entitlement to payment for acts of private use and reuse, which ordinary consumers regard as part of normal use. This alienates customers and puts the state in a position where it is invited to “choose sides” between rights holders and citizens. Effective enforcement of the law, in these circumstances, can become impossible.”*¹⁸⁶

141 Proponents of fair use models often point to the technology sector in the US thriving while creative industries continue to flourish.¹⁸⁷ More recently, it has been suggested that flexible exceptions have a dynamic effect on economic Australian growth innovation and a little or no impact on copyright-holders.¹⁸⁸ In reality, there is no evidence that flexible exceptions have resulted in increased productivity or negligible impact on rights-holders. Indeed, as previously noted the technology sector in Australia has been expanding under the present legal regime.

¹⁸⁰ Michael Carroll, “Fixing Fair Use”, (2007) 85 *North Carolina Law Review* 1087, 1106

¹⁸¹ Michael J Madison, “A Pattern-Orientated Approach to Fair Use”, (2004) 45 *William & Mary Law Review* 1525, 1564

¹⁸² David Nimmer, “Fairest of them All and Other Fairy Tales of Fair Use” (2003) 66 *Law and Contemporary Problems* 263, 282

¹⁸³ Supreme Court: 5 judges in favour of fair use and 4 judges against fair use, Court of Appeals: 3 judges against fair use, District Court: 1 judge in favour of fair use.

¹⁸⁴ Supreme Court: 6 judges against fair use and 3 judges in favour of fair use, Court of Appeals: 2 judges in favour of fair use and 1 judge against fair use, District Court: 1 judge against fair use.

¹⁸⁵ Supreme Court: 9 judges generally in favour of fair use – but no final decision (case remanded for further evidence), Court of Appeals: 2 judges against fair use and 1 judge in favour of fair use, District Court: 1 judge in favour of fair use.

¹⁸⁶ Hargreaves Report, above n 72, [5.11].

¹⁸⁷ *Ibid*, [5.15].

¹⁸⁸ Lateral Economics, *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions*, (August 2012) Lateral Economics <<http://www.lateraleconomics.com.au/outputs.html>>.

- 142 What little economic evidence there is suggests that the introduction of fair use has a harmful impact on content-producing industries. A 2012 study on the economic effects of the introduction of fair use exemptions in Singapore found that after the amendments were introduced the growth in the copyright industries slowed down in absolute terms :

“The copyright group enjoyed an average growth rate of 14.16%, yet this slowed to 6.68% for the period after the amendments were introduced (a total increase of over 274 million Euros in value-added). This slowed to 6.68% for the period after the amendments were introduced and resulted in a total increase of over 158 million Euros in value-added.”

- 143 Dr George Barker in critiquing a recent study commissioned by the Australian Digital Alliance that purported to show a potential for a \$600m annual economic boost from adopting a fair use doctrine observed:

“Economic theory further suggests that if there are flexible copyright ‘exceptions’ and better crafted ‘safe harbours’ that would make a substantial contribution to Australia’s economic growth and innovation, with negligible downsides for rights holders, then in all likelihood they would have already been agreed to in the market or may be expected to emerge over time through automated market based electronic payment systems”.¹⁸⁹

- 144 Indeed, the identification of a causal connection between flexible exceptions and economic growth – in isolation from other relevant factors, such as levels of education, labour productivity, infrastructure, innovation hubs etc – may not be possible. As Professor Austin explained:

“Claims that fair use contributes positively to levels of innovation are likely to prove unsustainable when examined in the wider economic and social contexts within which innovative activity occurs. Many cultural, economic, social, and legal factors affect levels of innovation, including: domestic infrastructure supporting innovation finance;⁴⁰ levels of education; labour productivity; the current state of “entrepreneurial culture” and the presence of innovation hubs; levels of direct or indirect public sector support of innovation, including military funding; taxation; the cooperative character of the research culture; and obligations imposed on researchers to provide for a “public stake” in research outcomes. These factors vary significantly from country to country. Sound innovation policy must engage with all of these issues, taking account of the overall public interest, and the interests of all affected stakeholders”¹⁹⁰

- 145 The Issues Paper leaves open how the new exception for fair use might be framed.¹⁹¹ There are essentially three legislative models that could be used. The first is that the exception could impose no limitation other than a condition of “fairness” made subject to judicial interpretation (the **Pure Fairness**

¹⁸⁹ George Barker, *Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore* (November 2012) Centre for Law and Economics <<http://ssrn.com/abstract=2180769>>.

¹⁹⁰ Graeme Austin, *Fair Use Paper Prepared for the BPI*, March 2011.

¹⁹¹ Australian Law Reform Commission, above n 16, at [297].

Model). The second model would involve imposing a set of analytical factors or indicia without reference to the “Three-Step Test” (the **Domestic Indicia Model**). The third model would incorporate requirements that the use does not cause unreasonable prejudice to the rights-holder’s legitimate interests (the **International Requirements Model**).

- 146** The first step of the “Three-Step Test” requires that the uses covered by the exception be at least “clearly defined” and “narrow in scope and reach”. Exceptions based on notions of “fairness” or “reasonableness”, in the absence of sufficiently interpretative jurisprudence are not sufficiently clear or defined to satisfy that test. They are also insufficiently broad in scope, potentially covering any dealings in respect of any of the exclusive economic rights in relation to any work or any subject matter by any persons or institutions and for any purpose, including in any and all technological contexts.
- 147** Even if fairness or reasonableness was defined by reference to specific purposes or factors (as per the Domestic Indicia Model) then the exception still may not comply with the first step absent sufficient precedent elucidating the standard. For example, Professor Sterling found that unqualified exception for the purposes of “education” does not satisfy the first step.¹⁹² Likewise, Professor Ricketson expressed reservations that an unqualified exception for the purposes of libraries and archives were not “clearly defined” and “narrow in scope and reach”.¹⁹³ Providing statutory factors that are relevant to the assessment of “fairness” and reasonableness are no clearer. As the Ninth Circuit Court of Appeals in *Monge v. Maya Magazine, Inc*¹⁹⁴ observed in relation to the 4 “fairness” factors in s.107 of the Copyright Act:

“The fair use doctrine has been called “the most troublesome in the whole law of copyright.” Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam). This affirmative defense presumes that unauthorized copying has occurred, and is instead aimed at whether the defendant’s use was fair...”

In the years following the 1976 Act, courts have decided countless cases involving the fair use doctrine. Some commentators have criticized the factors, labeling them “billowing white goo” or “naught but a fairy tale,” echoing courts that threw up their hands because the doctrine is “so flexible as virtually to defy definition.” Princeton Univ. Press v. Mich. Doc. Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (citation omitted). A leading treatise in this area notes that the statute provides “no guidance as to the relative weight to be ascribed to each of the listed factors,” and, in the end, “courts are left with almost complete discretion in determining whether any given factor is present in any particular use.” Nimmer on Copyright § 13.05[A] (footnotes omitted).

¹⁹² J.A.L Sterling, *World Copyright Law* (Sweet & Maxwell, 3rd ed, 2008) (“**Sterling**”) at 529: “The reference to ‘certain special cases’ is intended to indicate the general limitations and exceptions to the reproduction right (for instance, a limitation which provides that ‘reproduction of any work may take place for any purpose connected with education’) would not be permissible.”

¹⁹³ Ricketson 2003, above n 31, at 75-76;

¹⁹⁴ *Monge v Maya Magazines Inc*, 668 F.3d 1164 (2012).

We acknowledge the porous nature of the factors but nonetheless recognize that we are obliged to make sense of the doctrine and its predicates...”

- 148** Introducing fair use into Australian copyright law would likely create uncertainty in the law even beyond what exists in the United States, at least initially. The US is able to draw on a substantial body of interpretive jurisprudence to determine whether a particular use is fair. When the fair use doctrine was codified in s. 107 of the 1976 *U.S. Copyright Code*, the codification was based on 135 years of case law beginning with *Folsom v. Marsh*, 9 F.Cas. 342. Thus the apparently open-ended language of s. 107 was actually confined by longstanding jurisprudential parameters establishing which categories of use were presumptively unfair.¹⁹⁵ In Australia there would not be any judicial interpretations when the law is enacted and consequently there will be no guidance as to the scope of the exception in an Australian setting.¹⁹⁶
- 149** In this regard, it is instructive to note that Israel's replacement of its “fair dealing” defences with a US-style fair use exemption resulted in judicial uncertainty and was disruptive to the licensing arrangements of broadcasters and other content providers. In the first major case dealing with the unauthorised streaming of copyright content on the internet, Judge Agmon-Gonen observed that in the digital environments “fair use” amounted to a right granted to users (rather than as an exception to copyright protection).¹⁹⁷ Her honour found that the streaming of sports events serve important social interests that should be allowed under the fair use exception irrespective of the damage to broadcasters and others. It was not until the case proceeded to the Supreme Court (3 years later) that it was clarified that the new provisions did not have the effect of transforming defences into user-rights and the market harm to content provided prevented the use from being fair. As Dr Zemer has commented, Judge Agmon-Gonen ruling may have had a detrimental effect on rights-holders’ negotiation and enforcement licences for the streaming of the Olympic Games and other free-to-air broadcasts online.¹⁹⁸
- 150** An open-ended fair use exception would also violate the second and third steps of the “Three-Step Test”. The breadth of the “fair use” doctrine means uses which have the potential to conflict with actual or potential markets for a particular copyright work are potentially covered. Even if the second and third steps were incorporated in the legislation (as per the International Requirements Model), then the results may not be satisfactory. Further, a statutory fair use exception would not involve any

¹⁹⁵ The question of whether the U.S. fair use regime is compliant with *Berne Convention* is also highly controversial. The U.S. was a relative latecomer to the Berne Union, having joined only in 1989, and having made “only those changes to American copyright law that [were] clearly required under the treaty’s provisions”. Internationally, the U.S. takes the position that the fair use doctrine complies with its international obligations. Others take a different view. However, as stated above, the U.S. case law bears unique characteristics that make its fair use regime somewhat more likely to be compliant than a country implementing a *tabula rasa* fair use regime.

¹⁹⁶ It is also doubtful that the U.S. case law, complementary legislative framework, or negotiated fair use guidelines could be easily “transplanted” to the Australian environment. See Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations* (15 September 2009) <<http://www.barrysookman.com/2009/11/22/why-canada-should-not-adopt-a-fair-use-regime/>> at 157-59.

¹⁹⁷ *Football Association Premier League Ltd. v. John Doe* Civil Appeal 9183/09 (Israel)

¹⁹⁸ Dr Lior Zemer, ‘Streaming of a Live Sporting Event is not a User Right’, *IP OSGOOD* (online), 30 July 2012 <<http://www.iposgoode.ca/2012/07/streaming-of-a-live-sporting-event-is-not-a-user-right>>.

remuneration or compulsory license or remuneration to rights holders. This is a factor recognized by the authorities that can mitigate a violation of the third step.

- 151** All of these considerations lead to the conclusion that, at best, the compatibility of a “fair use” exception with Australia’s obligations under international law is questionable. A wide-open exception subject to nothing but a judicial fairness test would not comply; a careful exception that expressly incorporated aspects of the “Three-Step Test” itself would face challenges at all three steps of the test and, if challenged, would also raise issues with respect to Australia’s ability to meet its evidentiary burdens in a WTO trade dispute.
- 152** In light of this uncertainty, it is perhaps not surprising that many countries, including Australia as recently as 2005, have declined to adopt the fair use model.¹⁹⁹ The Australian consultation in 2005 specifically considered adopting an open-ended fair use provision.²⁰⁰ This option was rejected, at least in part “because it is not consistent with treaty obligations to include such general uses in a flexible exception.”²⁰¹ Instead the government opted for a set of more targeted reforms.²⁰²
- 153** The 2005 Australian consultation also noted other disadvantages of a “fair use” exception. The uncertain scope of such an exception makes it difficult to predict what uses will be found to be infringing.²⁰³ There is no way to get a definitive answer except through litigation, which is expensive and unpredictable for both the right holder and the user.²⁰⁴ The result may be that legitimate uses are chilled by litigation fear,²⁰⁵ while blatantly appropriative uses attempt to clothe themselves in mantles of legitimacy.²⁰⁶

¹⁹⁹ Only the United States, Singapore, the Philippines and Israel have incorporated a fair use provision into their copyright laws; however, Israel’s *Copyright Act of 2007* (Israel)s 19(c) permits the Minister of Justice to issue regulations specifying conditions for a use to be fair, and Singapore’s *Copyright Act* (Singapore) Chapter 63, s 35(2) contains as relevant factors “the effect of the dealing upon the potential market for, or value of, the work or adaptation” and “the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price”, thus building in factors that pay heed to the second and third steps of the Three-Step Test.

²⁰⁰ Australian Government Attorney-General’s Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age*, (May 2005) Australian Government Attorney-General’s Department <www.ag.gov.au/Documents/FairUseIssuesPaper050505.pdf> (“**Issues2005**”) paras 14.1-14.9 .

²⁰¹ Explanatory Memorandum, above n 111, at 7, 10.

²⁰² *Ibid* 13.

²⁰³ *Issues2005*, above n 200, 7.9.

²⁰⁴ *Ibid* 7.12.

²⁰⁵ *Issues 2012*, above n 16 at 77; also see IPRIA and CMCL, above n 92, at 8; Lawrence Lessig, *Free Culture: How Big Media uses technology and the law to lock down culture and control creativity* (The Penguin Press, 2004) at 187, describing fair use as an “astonishingly bad” system amounting to little more than “the right to hire a lawyer to defend your right to create.” Lessig notes of the fair use system: “It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law.” There is vivid disagreement as to whether, after more than 150 years of case law, the fair use doctrine in the United States delivers predictable results: see, e.g. David Nimmer, “Fairest of them All” and Other Fairy Tales of Fair Use” (2003) 66 *Law and Contemporary Problems* 263 at 280 (stating that “had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same”), Neil Netanel, “Making Sense of Fair Use” (2011) 15 *Lewis & Clark L. Rev* 715 (reviewing recent studies and finding that post-2005 case law reveals greater consistency and determinacy in fair use doctrine than many previously believed was the case.)

²⁰⁶ Any exception will create opportunities for free riders to attempt to mould their activities to fit within its contours. The broader the exception, the more likely it will be that undesirable uses will be able to shelter within them. An example is the increasingly popular model of segregating search and retrieval functions from storage of content for distribution of illicit content, which arguably arose as a response to the inducement theory articulated by the U.S. Supreme Court in the 2005 *Grokster* decision.

154 Similarly, in 2002, New Zealand considered the possibility of adopting a “fair use” exception and the applicable international obligations.²⁰⁷ After consultation with stakeholders, New Zealand concluded there was no compelling reason to modify its traditional approach based on narrower, targeted exceptions.²⁰⁸ Likewise, the U.K. rejected suggestions that it should move towards a “fair use” style exception, because they “need[ed] to comply with the international legal framework”.²⁰⁹ Canada, too, recently rejected calls to adopt an open-ended fair use exception.²¹⁰ Like Australia in 2005, all three of these countries concluded that the best way to meet their policy goals while complying with their international obligations was to define focused, policy-based exceptions. There is no obvious reason why Australia should come to a different conclusion.

20 Questions 54 and 55: Contracting out

Question 54. Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

Question 55. Should the *Copyright Act 1968* (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

155 Copyright owners should continue to be able to negotiate by contract use of their copyright material. In guaranteeing freedom of contract,²¹¹ the Copyright Act promotes distribution and use of copyright material particularly in online and multi-jurisdictional environments.²¹²

156 The market, rather than government, is generally in the best position to determine appropriate terms of access and use of copyright materials. As one submission observes, both rights-holders and users benefit from the variety of licences available:

“A consumer who wants the right to view an audio-visual work only once, or three times, need not pay the same tariff as the person who wants to view it an unlimited number of times. A

²⁰⁷ NZ Working Paper, above n 145, 252-64.

²⁰⁸ New Zealand, “Digital Technology and the Copyright Act 1994: Position Paper” (December 2002) (“**NZ Position Paper**”) at paras 160-61.

²⁰⁹ UK Intellectual Property Office, “Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions” (November 2007) UK Intellectual Property Office <<http://www.ipo.gov.uk/consult-copyrightexceptions.pdf>> at para 30.

²¹⁰ A representative example can be found in the submissions of the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) “CIPPIC endorses calls to fix fair dealing. Canada must abandon the restrictive categorical approach to one that flexibly accommodates dealings that don’t fit well into the current Act.” See submission of David Fewer, *Re: Copyright Policy* (13 September 2009) Canadian Internet Policy and Public Interest Clinic <http://www.cippic.ca/sites/default/files/copyright-law-reform/CIPPIC_LT_Copyright%20Consultations-13Sept2009.pdf>. The amendment that was passed in 2012 and which will soon be proclaimed into force instead adds three new allowable fair dealing purposes (education, parody and satire) along with targeted exceptions that cover the provision of alternate format works for users with perceptual disabilities, educational uses, parody and satire, time- and format-shifting, backups, certain non-commercial uses, software interoperability, encryption research and security testing. See Canada, *Copyright Modernization Act*, RSC 2012 c C-20; Sookman and Glover, above n 196, at 153 (describing earlier Canadian copyright reform process).

²¹¹ See s 47H of the *Copyright Act 1968* (Cth) relating to agreements that exclude or limit the reproduction of computer programs for technical study, back-up, security testing and error correction

²¹² ACC, *CLRC Submission*, August 2001, at [12]

researcher who wishes to acquire a single article need not pay for the entire journal. Consumers of music, software, or other works can “try before they buy” through a low-cost, limited-duration license. ... On the other side of the bargain, copyright owners are able to reach market niches that might be priced out of the market or missed altogether under the “all or nothing” outright sale paradigm. The result, once again, is greater access by a wider public than would otherwise be achievable, an outcome that is also threatened by legislative restrictions on freedom to contract.”²¹³

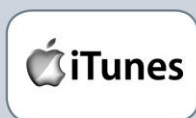
²¹³ IIPA, CLRC Submission, August 2001, at 5-6

EXISTING & EMERGING DIGITAL VIDEO BUSINESS MODELS

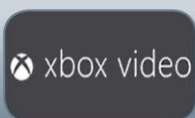
A report recently published by the Organisation for Economic Cooperation and Development (OECD), has defined legitimate online content services into four categories:

DIGITAL CONTENT RENTALS:	Where the Film/TV Show is downloaded for a specific period of time
DIGITAL CONTENT PURCHASES :	Where Films and TV shows can be purchased to own in a digital format
ADVERTISING-BASED REVENUES:	Where the content is free for consumers to access on demand, but the content provider relies on advertising revenue generated from advertisements displayed to the user
SUBSCRIPTION-BASED REVENUES:	Where a monthly premium is payed and consumers are allowed unlimited access to a library of film and TV content on demand.

DIGITAL CONTENT RENTALS



Apple iTunes is a free program that allows the user to purchase or hire film and TV content online. Purchases and rentals come in the form of digital downloads and can be transferred to apple devices including the iPhone, iPod, iPad and Apple TV. Once the rental period has expired, rentals disappear from the user's library.



Xbox video is a service available for PC, xbox and Windows phone users, that allows the hire or purchase of movies and TV shows on demand (streaming) or as digital downloads. Content is purchased or hired through a user's xbox live account.



Hoyts has developed a three-pillar strategy to place the Hoyts brand at the centre of its business. It will rebrand its DVD rental business Oovie as Hoyts Kiosk, joining Hoyts Cinema and Hoyts Stream. (more to come once launched)



Sony Entertainment Network is an online store which allows owners of Sony products (TVs/PlayStation) to purchase or hire movies. Purchases are then stored in a cyber locker/cloud and can be accessed at any time from any Sony device registered to a user's account.



Google Play is a subscription based Video-On-Demand (V.O.D) rental service that is accessed through an android smartphone, computer (via youtube) or smart TV. Once hired, the file is hosted in your youtube account and is streamed directly to your device. The rental can be viewed an unlimited amount of times during a 48-hour period. The user must always have an active Internet connection in order to view the movie. In order to access Google Play, you must have a Gmail account and a Google wallet.



Bigpond movies is a service provided by ISP Telstra Bigpond that allows subscribers to hire movies online through their account and download them onto their windows computer or T-box viewing device. Movies are removed from the device's digital library after a 48-hour period.



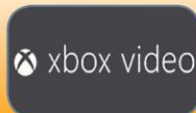
A media device which allows the user to record, pause and rewind live TV through a user interface and provides access to broadband entertainment including on demand movies and television rentals (CASPA). CASPA On-Demand is the online rental service used in conjunction with TiVo to allow users to hire film and TV content. Once users have downloaded a movie they have a set number of days to start watching it.

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DIGITAL CONTENT PURCHASES



Apple iTunes is a free program that allows the user to purchase or hire film and TV content online. Purchases and rentals come in the form of digital downloads and can be transferred to apple devices including the iPhone, iPod, iPad and Apple TV. Once the rental period has expired, rentals disappear from the user's library.



Xbox video is a service available for PC, xbox and Windows phone users, that allows the hire or purchase of movies and TV shows on demand (streaming) or as digital downloads. Content is purchased or hired through a user's xbox live account.



Sony Entertainment Network is an online store which allows owners of Sony products (TVs/ PlayStation) to purchase or hire movies. Purchases are then stored in a cyber locker/cloud and can be accessed at any time from any Sony device registered to a user's account.



Madman Entertainment, an independent Australian distributor, provides online access to a large amount of their anime content via their website's "screening room". The content is streamed on demand for free. Madman also provides a shopping service for all of their titles, which are paid for via a secure network and delivered to your home.

ADVERTISING-BASED REVENUES



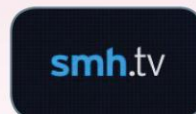
Fixplay is a free, on-demand catch-up TV service for the 9 Network, which allows visitors access to the latest episodes of their favourite TV shows and news programs. Fixplay also allows access to video content unique to popular ACP Magazine titles, including the Australian Women's Weekly, RalphTV and Gourmet Traveller.



The Ten network has 3 free to air channels. This free, on-demand catch-up TV service allows visitors access to all Ten Network programming - including TV shows and news broadcasts, online.



Yahoo 7 is a free, on-demand catch-up TV service offered for Channel 7 network viewers, allowing them access to the latest episodes of their favourite TV shows online.



The Sydney Morning Herald is a news media source that offers digital content via an online streaming service. It is free of charge, and features interviews, TV programs and documentaries in a range of genres.



Crackle offers full-length movies, TV shows, and original series from all genres free of charge. Content is streamed on-demand, directly to the device the user has registered.

EXISTING & EMERGING DIGITAL VIDEO BUSINESS MODELS

SUBSCRIPTION-BASED REVENUES



FOXTEL On Demand is a free service for FOXTEL customers that lets subscribers watch TV shows and movies from over 30 FOXTEL channels on their PC, Smart TV, Tablet, or smartphone. In addition, users can download pay per view movies from FOXTEL's Box Office offering.



BBC iPlayer is an app (currently available on mobile devices and tablets), which offers unlimited streaming and downloading of a back catalogue of BBC television content for a monthly premium. Downloads are accessible until your subscription expires.



Mubi is an online community of film enthusiasts as well as an outlet for streaming unlimited foreign, independent, and classic films on-demand for a monthly premium. Subscribers are able to stream films from any device. Mubi is also available as a pay-as-you-go service.



Quickflix is a subscription-based Video On Demand streaming service, which offers unlimited access to the latest films and TV shows for a monthly premium. This service is now also available as a pre-pay and pay as you go service for rentals.



For a monthly premium, JB HiFi allows subscribers to stream an unlimited amount of songs on demand, as well as create their own mixtapes, share them with other subscribers, and download all tracks to playback in offline mode. Subscribers can also access their account via the JB HiFi now app on their mobile phone, and play all of their content anywhere, anytime regardless of whether they have an internet connection.



Fetch TV is a service, accessible via a set-top box, which provides the ability for users to rewind and record free-to-air and subscription television. The service also provides subscribers with 30 free new release movies per month, included in their ISP subscription fee. Fetch TV also provides subscribers with an on-demand movie rental service, which they pay for as they go. Users must have an Internet account with eligible ISPs.

GOVERNMENT FUNDED SITES



TVS is a free to air television broadcaster which, like SBS & ABC allows its viewers to catch up on content online via a streaming service attached to their website. This is free to access.



SBS on demand is a free catch-up TV service that offers all of the SBS Network's content including documentaries, programming and news broadcasts online. It has a back catalogue that dates back to two months from the current broadcast.



ABC iview is a free, on-demand catch-up TV service for ABC content, including TV shows, documentaries, news broadcasts and kids programming. Programs aired on the TV network are available online for 14 days.

EXISTING & EMERGING DIGITAL VIDEO BUSINESS MODELS

DISC TO DIGITAL

Blu-Ray and DVD Disc triple plays, which include a digital copy in addition to a physical disc.

ULTRAVIOLET

UltraViolet, to be launched in Australia in Q1 2013, is a free online collection that gives you greater flexibility with how and where you watch the movies and TV shows that you purchase.

Once a movie or TV show has been added to your UltraViolet collection, you will have the option to stream it over the internet, download it for offline viewing, or play it back on a disc.

Because UltraViolet offers so many viewing choices, you have greater freedom to choose where you want to watch - whether it's on a mobile device, computer, television, game console, etc.