

Copyright and the Digital Economy

*Submission by the Australian Digital Alliance and Australian Libraries
Copyright Committee to the Australian Law Reform Commission*

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Executive Summary

The Australian Digital Alliance (ADA) and Australian Libraries Copyright Committee (ALCC) welcome the opportunity to contribute to the discussion of how Australia's copyright regime can best foster innovation and creative community participation in the digital economy.

The Australian Government has made a commitment to becoming a leading digital economy by 2020. Dr Ken Henry, in his speech 'The Shape of Things to Come' identified an Information and Communication Technologies (ICT) revolution in Australia that is changing the shape of the Australian economy.¹ Today there are over 12 million Australians subscribed to the internet.² Of these, almost half are using mobile wireless connections.³ The internet has profoundly altered the delivery of government services, access to education and information, commercial innovation, social interaction and community engagement with culture over the past decade, and continues to evolve at a rapid pace.

A dynamic, flexible copyright regime is important to Australia's participation and investment in the digital economy. The Australian Law Reform Commission's Inquiry into Copyright, querying whether existing copyright exceptions and limitations are adequate and appropriate in the digital environment, could not come at a better time.

The last 25 years have seen an unprecedented expansion of the concentrated legal authority exercised by intellectual property rights holders,⁴ in response to the profound disruption of established business models for the reproduction and dissemination of content. The internet has heralded new challenges for traditional publishing models, as well as new opportunities.

And despite a decade of economic and technological upheaval for the creative industries, there's evidence that the **'sky is rising'**.⁵ Data from PricewaterhouseCoopers and iDate indicate the global entertainment industry grew 66% between 1998 and 2010.⁶ Consumers are spending more on entertainment than ever before.⁷ For creators, the internet has brought new opportunities for artists to create, promote, distribute and monetise their works.

It's important to remember that copyright law regulates more than that content produced by Australia's creative industries. Copyright law regulates our access to education and culture, social

¹ Dr. Ken Henry, 'The Shape of Things to Come: Long Run Forces Affecting the Australian Economy in Coming Decades', address to QUT Business Leaders' Forum 22 October 2009 http://archive.treasury.gov.au/documents/1643/PDF/QUT_Address.pdf.

² Media Release, Australian Bureau of Statistics, 'Internet Subscribers in Australia passes the 12 million mark', 9 October 2012, <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/8153.0Media%20Release1Jun%202012?opendocument&tabname=Summary&prodno=8153.0&issue=Jun%202012&num=&view=>.

³ Ibid.

⁴ The Washington Declaration on Intellectual Property and the Public Interest, <http://infojustice.org/wpcontent/uploads/2011/09/Washington-Declaration-Print.pdf>

⁵ Michael Masnick and Michael Ho, 'The Sky is Rising – A detailed look at the Entertainment Industry' (January 2012) <http://www.ccia.net.org/CCIA/files/ccLibraryFiles/Filename/000000000586/TheSkyIsRising7-130.pdf>.

⁶ Ibid.

⁷ Ibid, 2.

interaction, commercial innovation and the provision of essential government services. It affects services and products provided by schools and universities, libraries, archives and museums, government bodies and commercial companies. Copyright law also affects the way consumers engage with and enjoy content they have purchased lawfully. The Australian education and training sector alone contributes almost \$60 billion to the economy and employs over 1 million people.⁸ Taken together, all of the sectors relying on copyright exceptions (including the creative industries) contributed in 2010 approximately 14% of Australia's GDP, \$182 billion.⁹

A balanced copyright regime should provide sufficient protections for our creative industries, without locking down technological innovation and research and development.

The ADA and ALCC consider the current copyright regime to be too restrictive. Many of the questions asked by the ALRC in their Issues Paper reflect on uses of content already popularly recognised as legitimate, non-harmful uses of copyright material. The ADA and ALCC believe that a flexible copyright framework is essential to fostering a vibrant digital economy.

In short, the ADA and ALCC submission recommends:

- **The introduction of an open-ended, flexible exception to better keep pace with new technologies and digital services, as well as evolving consumer practices. We support the introduction of an exception modelled on the US 'fair use' provision, or some other analysis of 'fairness'. This is a critical reform for Australia's digital future; and**
- **If the ALRC should consider that some certainty is beneficial for particular groups or uses of content, the revision of some existing purpose-based exceptions, and possible introduction of others.**

The ADA and ALCC submission refers to "fair use", and the need for a "fair use" style exception. In this submission we use the term "fair use" as a short hand description for a flexible open-ended exception that operates similarly to the exception in section 107 of the US *Copyright Act 1976*. This is one possible model for implementation in Australian law; another may be an approach similar to the recommendations of the Copyright Law review Committee for an open-ended exception based on the existing factors in section 40(2) of the Copyright Act. After detailed consideration, the ADA and ALCC believe that the US fair use factors may provide the best model for adoption in Australia. However, the priority for the ADA and ALCC is the introduction of a flexible, open-ended exception in Australian law, and we look forward to participating in the debate as to the most suitable way to achieve this objective.

⁸ Lateral Economics, *Exceptional Industries: The economic contribution to Australia of industries relying on limitations and exceptions to copyright* (August 2012), 8, <http://digital.org.au/content/LateralEconomicsReports>.

⁹ Australian Digital Alliance, 'Potential \$600m Annual Economic Boost from Copyright Reform' (August 2012) Australian Digital Alliance <http://digital.org.au/content/LateralEconomicsReports>.

About the Australian Digital Alliance

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.

About the Australian Libraries Copyright Committee

The Australian Libraries Copyright Committee is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Australian Library and Information Association
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia
- Australian Government Libraries Information Network

1. Guiding principles for reform

The ADA and ALCC support the principles for reform proposed by the Australian Law Reform Commission. The principles recognise copyright as an incentive to create and disseminate original works, the importance of the public interest in access to education, research and culture and the promotion of competition and digital innovation. The ADA and ALCC don't subscribe to the view that exceptions that are good for consumers and organisations must be bad for rights holders. Rights holders are consumers and beneficiaries of services provided by commercial and cultural intermediaries too.

Copyright law is a law for both creators and users.

“Copyright law is a law for both writers and readers, for composers, performers, listeners and viewers. If the relationship between copyright’s exclusive rights and its liberties is unbalanced, then the writers or readers who feel ill-served by copyright law will disrespect or disregard it. Writers and publishers might bristle at suggestions that copyright should give them as much as they need and no more. Readers and listeners have at least as much reason to resent suggestions that so long as they have some opportunity to read or listen to copyrighted material, the system is working, or that they should look for preservation of their liberties to the grace or greed of copyright owners, who will (eventually) do what the market demands.”¹

Creators are also consumers of content, and acts of new creation build on, are inspired by, and reinterpret works that have come before. Fair access to and use of content is central to one commonly recognised purpose of copyright law: the creation of new works. Our understanding of “creativity” does not merely encompass new copyright works, but new ways of accessing and engaging with content, which can become important in their own right.

Copyright exceptions ensure important public services, innovation and consumer interests are protected from an overly proprietary interpretation of copyright. The proper balance in copyright law lies not only in recognising the creator’s rights but in giving due weight to their limited nature.²

Some ADA and ALCC members consulted with for this Inquiry commented that certain copyright exceptions, while appearing to recognise legitimate uses of content, serve rights holder interests first and the public interest second. These comments arose particularly strongly with reference to library and archival copying, and consumer copying, provisions, and are discussed further throughout this submission.

Copyright law is important to the “protection of commercial activities of rights holders designed to exploit material for profit”.³ Currently, copyright exceptions can regulate far more than those activities

¹ Jessica Litman, ‘Lawful Personal Use’ (2006-2007) 85 *Texas Law Review* 1871, 1909.

² *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 SCR 336, [30]-[31] (Binnie J) referring to the dual objectives of the Canadian Copyright Act.

that could pose a commercial risk to rights holders. Many consumers would argue, for example, that where you have purchased content lawfully, it shouldn't matter whether you make one or two copies for personal use, or format shift your content. A number of institutions have pointed out that some exceptions extend beyond protecting against commercial harm, to narrowly regulating terms under which an institution or individual could make use of the exception.

One library member commented:

"The way library and archive exceptions are drafted, it's like public interest activities are being treated with suspicion. The legitimate use is begrudgingly defined, as restrictively as possible, and loaded with terms and conditions that are difficult for staff to understand, let alone follow efficiently! Exceptions should be drafted so as to facilitate a legitimate use of content, not impose unnecessary, or abstract, restrictions."

In *CCH Canadian v Law Society of Upper Canada*, the Canadian Supreme Court cited Professor David Vaver,⁴ who said:

"user rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."

In that case, the Canadian Supreme Court recognised exceptions as "users' rights", which "must not be interpreted (or drafted, the ADA and ALCC would argue) restrictively."⁵

There is a need for evidence-based policy making

The ADA and ALCC don't support the unauthorised distribution of copyright works. However, we are concerned that threats of unauthorised distribution or "piracy" sometimes dictate or influence the introduction of further exceptions to achieve necessary public interest purposes.

Piracy concerns have coloured a number of recent copyright exceptions debates. It is of concern that the frequent use of the word "piracy" has subtly but inevitably altered its meaning. Once understood as the notion of expropriation for financial gain, the concept has been extended to be (emotively) deployed in another context, which covers infringing use without commercial intent. For example, copyright owners claim that exceptions to facilitate access to and cross-border use of content by the visually impaired would facilitate piracy,⁶ or that the storage of copyright material in digital form by libraries and archives

³ Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper*, (Issues Paper 42 (IP 42), August 2012) 11 http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_ip_42_4.pdf.

⁴ David Vaver, *Copyright Law* (Irwin Law, 2000) 171.

⁵ Ibid.

⁶ International Publishers' Association, *Visually Impaired Persons* <http://www.internationalpublishers.org/index.php/-industry-policy/visually-impaired-persons>.

(for the purposes of extended legal deposit,⁷ digitisation,⁸ document supply⁹) would facilitate piracy. Educational copying by universities has also been described in terms akin to piracy.¹⁰

There are valid concerns regarding the impact of unauthorised distribution and reproduction of copyright works on commercial business models. However, we are concerned that a perceived threat of 'piracy' has been expanded to prevent or seriously confine access to content by disadvantaged groups in the community, to counter access to education and to counter against flexible exceptions.

The ADA and ALCC are sensitive to issues of genuine commercial harm piracy for rights holders. It would be very useful to have further evidence and examples of circumstances in which works provided under existing exceptions have been distributed, unauthorised, online with an adverse impact on the market for that work.

Technology neutrality is essential to copyright law reform

The ADA and ALCC believe that copyright law should be device and technology neutral where possible. In an environment where a diversity of products and technologies can be used to create, engage with and share content, it's essential that Australia's copyright laws be future proofed against rapidly outdated technological limitations. Copyright should not be dictating the direction of technological innovation or hampering the development of more efficient systems.

The importance of technology neutrality has been recognised before. In 1998, the Copyright Law Review Committee recognised that:

"much of the present complexity in the fair dealing provisions and the miscellany of other provisions and schemes that provide for exceptions to copyright owners' exclusive rights is due to the fact that they operate on the basis of a particular technology or in relation to dealings with copyright materials in a particular material form. Technological developments will no doubt

⁷ See, eg, Australian Publishers' Association, Submission to Attorney-General's Department: *Extending Legal Deposit*, 2 <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Extending-Legal-Deposit.aspx>.

⁸ In their copyright infringement filed against universities comprising the Hathitrust consortia, the Authors Guild alleged their digitisation of books risked "potentially catastrophic, widespread dissemination of those millions of works" and sought the impounding of all digitised copies, "under commercial grade security, with any computer system storing the digital copies powered down and disconnected from any network.", *The Authors Guild, Inc. et al v Hathitrust et al* Complaint 1 http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2011cv0635_1/384619/1/

⁹ section 49(7A)(d) *Copyright Act 1968* (Cth) demands that libraries destroy reproductions supplied for the purposes of research and study "as soon as practicable after the reproduction is communicated."

Section 49(7A)(d) *Copyright Act 1968* (Cth) demands that libraries destroy reproductions supplied for the purposes of research and study "as soon as practicable after the reproduction is communicated."

¹⁰ In the Georgia State University litigation, publishers asserted "systematic, widespread and unauthorised copying and distribution of a vast amount of copyrighted works" (referring to e-reserves), *Cambridge University Press et al. v. Becker et al.* (N.D. Ga. Sept. 30, 2010).

*continue, and they will probably affect copyright owners and users in ways that are and will remain unpredictable.*¹¹

The Irish Government's Consultation on Copyright and Innovation recognises the importance of technology neutrality.¹² And the principle was reinforced by the Canadian Supreme Court in 2012 in their Entertainment Software Association of Canada v SOCAN decision:

"In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user."

*The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the Copyright Act in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.*¹³

The Australian schools sector has encountered issues of technology specificity under the Part VB statutory licence which act to "effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies."¹⁴

For example, Copyright Agency Limited (CAL) have interpreted section 28 of the Copyright Act, regulating the performance and communication of works or other subject-matter in the course of educational instruction, in a non-technology neutral way so that:

- displaying artworks from a laptop on an interactive white board is a *free* use, but;
- displaying an extract of a literary work stored on the same laptop is remunerable.

Another example involves additional fees for digital delivery of a work to students. Where a work is provided in print form, this involves one reproduction of a work (making a photocopy). If the same work is provided in electronic form, it can involve additional reproductions and communications, which are considered separately remunerable under the statutory licence. A teacher saving an online work to a USB memory stick, or uploading the work to a learning management system in the process of providing the work to the student, has engaged in additional technical steps in delivering the same content to the student, which CAL considers to be separate remunerable reproductions and/or communications.

¹¹ Copyright Law Review Committee, *Simplification of the Copyright Act 1968 Part 1 Exceptions to the Exclusive Rights of Copyright Owners* (1998) [6.01].

¹² Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012) 6.

¹³ *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] SCC 34.

¹⁴ *Ibid.*

Far from treating the Internet as a ‘technological tax’ (as the Canadian Supreme Court describes in the quote above), the Australian educational statutory licences treat additional electronic reproductions and communications made as part of digital delivery as separately remunerable acts.

The ADA and ALCC hope that the principles proposed for this Inquiry shape and underpin consideration of how our copyright framework may best support a dynamic digital economy.

In 2007 US Professor Pamela Samuelson convened the Copyright Principles Project¹⁵ with members including legal academics, lawyers from private practice and from copyright industry firms. Its goal was to explore whether it was possible to reach some consensus about how current copyright law could be improved, and how existing problems could be mitigated.¹⁶

Part of the impetus for that project was recognition that existing US exceptions reflected “more a product of legislative compromise, than principled assessment of how far the law should extend to regulate certain kinds of uses of copyright materials”.¹⁷ A principles-based approach to the ALRC’s Copyright Inquiry should help navigate through some of the complexities of existing copyright exceptions, and achieve reform outcomes in Australia’s best interests.

¹⁵ Pamela Samuelson et al, ‘The Copyright Principles Project: Directions for Reform’, (2010) 25 *Berkeley Technology Journal*.

¹⁶ *Ibid* 1.

¹⁷ *Ibid* 17.

2. Caching, Indexing and other Internet Functions

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

Caching, indexing, conduit and other internet-related functions necessary to facilitate efficient search are being undertaken by commercial content intermediaries, search engines, libraries and archives, cultural institutions, schools and universities. Those currently operating a cache or facilitating efficient search for users in Australia are currently (knowingly or unknowingly) potentially liable for copyright infringement.

On a macro level, Australia's outdated copyright framework may be impeding caching and indexing. It is unclear how many activities are being undertaken offshore, avoiding Australia's restrictive copyright regime. Our copyright regime may also prevent or deter multinational companies from hosting their operations locally in Australia.

"The legal reality in Australia is that fifteen years after the Altavista search engine was launched, a search engine can still not operate fully from Australia without facing a risk of copyright infringement. Five or six years after the launch of services like Facebook, YouTube and the WordPress blogging platform, the same applies to these Digital Economy companies and services. Current Australian law also creates an uneven playing field: carriage service providers face less overall legal risk than other Internet Intermediaries, even where they perform the same practical function."¹

Australia's internet regulatory system should reflect world best practice. The NBN will deliver high-speed broadband to the many Australians using the internet, but without a regulatory framework that supports local hosting latency issues will persist, with consumers retrieving large proportions of their data from overseas.

Efficient search provides a service both to end users, enabling them to more easily locate the information they need, and to internet content publishers, by making the information they publish more easily discoverable, and bringing users to their content.² Caching reduces costs and improves performance associated with the functioning of the internet. Lateral Economics, in reports prepared for the Australian Digital Alliance examining sectors relying on copyright exceptions, estimate the value of search for Australian home internet users to be equivalent to approximately \$12.6 billion per year.³

¹ Kimberlee Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform: A Policy Paper prepared for discussion by the Australian Digital Alliance* (April 2011) <http://digital.org.au/sites/digital.org.au/files/documents/Weatherall-InternetIntermediariesandCopyright.pdf>.

² Lateral Economics, *Exceptional Industries: The economic contribution to Australia of industries relying on limitations and exceptions to copyright* (August 2012) 11 <http://digital.org.au/content/LateralEconomicsReports>.

³ Ibid, 19.

Social network hosting has an approximate value of \$13.2 billion to Australian internet users, and caching alone is estimated to comprise 50% of total internet value.⁴

Caching and indexing are activities undertaken by every intermediary providing access to content over the internet. Libraries, for example, look consistently to improve the speed and scalability of user searches through caching. Digital repositories rely on systems of transient copying to deliver works efficiently to the user:

“This may be through wholesale replication of datasets using a system such as Akamai to geographically disparate locations, the use of local caching systems such as varnish and memcache on the primary site, or the use of tools such as zoomify to provide different resolution views of data. Sites that use such tools for legitimate purposes to enhance the user experience should not be seen as breaching copyright even if the original licence to use the data does not include such surrogate data.”⁵

While Australia's Copyright Act does not expressly prohibit activities such as indexing, searching and caching, the uncertainty created by the lack of exceptions clearly applicable to these activities makes undertaking these activities in Australia highly uncertain relative to comparable jurisdictions and exposes organisations deploying these technologies to uncertain legal risks. This has a negative effect on innovation, particularly innovation based in Australia.

Recent economic research into the benefits of flexible exceptions commissioned by the Australian Digital Alliance from Lateral Economics found that investment decisions are directly affected by copyright-related risk. Lateral Economics found that early stage investors put a risk premium on internet intermediary investments to the Australian equivalent of around \$2 billion a year when faced with inflexible exceptions and limited safe harbour provisions.⁶

Further, Lateral Economics found that without a copyright exception to facilitate caching, transaction costs associated with clearing permissions by search engines would exceed \$150 billion per year.⁷

⁴ Lateral Economics note the difficulty of trying to quantify the value of caching, which ‘has become ubiquitous and multilayered’. Ibid, 21.

⁵ Digital Repository of Ireland, Response to the Copyright Review Committee (Ireland) *Copyright and Innovation Consultation Paper* http://www.djei.ie/science/ipr/Digital_Repository_of_Ireland.pdf.

⁶ Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012) 2 <http://digital.org.au/content/LateralEconomicsReports>.

⁷ Ibid 5.

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?*

The ADA and ALCC believe caching, indexing and other necessary internet functions are best supported by a flexible fair use-style exception.

The Copyright Act should reflect the legitimacy of searching, caching and other internet functions. However, discussions with ADA and ALCC members reflect real concern that drafting purpose-based exceptions for caching, indexing and other internet functions could not be achieved without some technology specificity.

There's a variety of types of caching, including browser caching, buffering (or disk caching), and proxy caching (as well as varieties of caching yet to come). Sections 43A, 111A, 200AAA and 116AB of the Australian Copyright Act already address some caching, but the highly qualified, technical legal language of the provisions throws common forms of caching into doubt. Kimberlee Weatherall, in a paper prepared for the ADA in 2011, *'Copyright and Internet Intermediaries: An Australian Agenda for Reform'*, notes the provisions' shortcomings:

- 1 *In relation to ss 43A/11A, proxy caching is a deliberate, non-essential choice by an Internet Intermediary and can involve human discretion, and hence may not always be 'technical'.*
- 2 *Cache copies may not be 'temporary': for a large entity, elements of pages frequently accessed might be in a cache effectively for long periods.*
- 3 *The presence of specific definitions for caching in both ss 116AB and 200AAA suggest that if the government wanted to create an exception to cover all known forms of caching, it would have.*
- 4 *Sections 43A and 111A exempt reproductions but not the copyright owner's communication right. When material is transmitted to a user from a proxy cache, it could be argued that the operator of the cache is 'responsible for determining the content of the communication' under s 22(6).⁸*

In the US, caching, including proxy caching will often be non-infringing, either because copies made are too transient to fall within the reproduction right or because they amount to fair use. Google has consistently argued that the US fair use provision was vital to the successful emergence of indexing and caching technologies that have turned it into one of the most valuable and dynamic companies in the world.⁹

⁸ Kimberlee Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform: A Policy Paper prepared for discussion by the Australian Digital Alliance* (April 2011) <http://digital.org.au/sites/digital.org.au/files/documents/Weatherall-InternetIntermediariesandCopyright.pdf>.

⁹ Google, Submission to the Independent Review of Intellectual Property and Growth, March 2011, <http://www.ipo.gov.uk/preview-c4e-sub-google.pdf>.

The ADA and ALCC believe that adoption of a fair use-style exception alongside an expanded safe harbours regime provides the optimum framework for Australian companies innovating online.

A specific purpose-based exception that provides scope for future internet functions may be difficult or impossible to draft in a future proof way. To our mind, specific internet function-related exceptions will always be playing catch up and new intermediary activities welcomed by the public will still be at risk of copyright infringement.¹⁰

If, as a second best alternative, a series of purpose-based exceptions was proposed to facilitate necessary internet functions and other uses, we might cautiously support this, provided it had appropriate scope and technology neutrality. It's essential that at the very least, internet intermediaries and other entities undertaking non-permanent, intermediate copying activities be protected against liability for copyright infringement.

If a purpose-based exception was proposed, it must:

- encompass the full scope of existing search, cache and indexing activity (and other related internet functions) being undertaken, which do not impact on the market for a rights holder's work;
- be flexible enough to account for future internet-related functions; and
- be technology neutral.

Such an exception starts to look remarkably like a flexible, open-ended one.

¹⁰ Lateral Economics, above n 2.

3. Cloud computing

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

Australian copyright law exposes cloud service providers to greater risk of liability for copyright infringement, and greater legal uncertainty, than in competitor countries. Cloud storage is becoming an increasingly popular service for consumers, businesses and public institutions. Consumers are backing up data, and format shifting their music and film collections, to the cloud. Apple iCloud is one consumer cloud service potentially outside existing private copying provisions in the Copyright Act.

“iCloud does more than store your content - it lets you access your music, photos, calendars, contacts, documents, and more, from whatever device you’re on.”¹

The prescriptive nature of section 109A, which references an “earlier” and “later” copy of sound recordings made for private and domestic use (two copies), arguably doesn’t account for cloud storage of music collections. The consumer, rather than copying from one CD to a computer, is copying their lawfully purchased music to the cloud, and then accessing that music across multiple devices (involving the making of multiple copies).

Associate Professor Kimberlee Weatherall, in her 2011 paper ‘Internet Intermediaries and Copyright: An Australian Agenda for Reform’,² notes that:

“due to the nature of digital technology, just about any online or digital activity – such as reading an eBook or listening to a digital music file – involves making ‘copies’ of copyright material into digital memory. Owing to the way reproduction is defined in Australian copyright law,³ most of these copies ‘count’, meaning they require permission from the copyright owner or an exception. This is true even where equivalent acts offline (reading a book, listening to music) involve no infringement. Thus the reproduction right ‘looms large as the ultimate leverage of rights holders to control virtually all aspects of how [Internet Intermediaries] run their businesses’.⁴ Internet Intermediaries are therefore likely to undertake many actions that fall within the reproduction right in Australia– and their users will too.”

¹ Apple iCloud marketing statement, <http://www.apple.com/icloud/>.

² Kimberlee Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform: A Policy Paper prepared for discussion by the Australian Digital Alliance* (April 2011) <http://digital.org.au/sites/digital.org.au/files/documents/Weatherall-InternetIntermediariesandCopyright.pdf>.

³ Cited by Weatherall, Lucie Guilbault et al, Institute for Information Law (IvIR), Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, February 2007, at 61 (hereafter IVIR Infosoc Implementation Report) (commenting on EU law, but similar reasoning applies to Australia).

⁴ *ibid.*

Weatherall also notes the higher risk facing internet intermediaries (including cloud service providers) in Australia of being liable for authorisation of their users' infringements,⁵ and uncertainty surrounding the extent of any direct liability for infringement of the communication right online.⁶

The recent full Federal Court decision concerning the legitimacy of Optus' cloud-based personal video recording service, TV Now,⁷ illustrates the very real risks facing those seeking to invest in and deliver cloud services. In that case, Optus had sought to rely on the personal time-shifting exception, s 111 of the *Copyright Act*, to deliver a cloud-based time-shifting service for subscribers to record free-to-air TV to their mobile phones, tablets and other personal devices. The Full Federal Court found that, despite the customer initiating the service in pressing 'record' on their personal device, Optus either solely or jointly with the customer was the "maker" of the copy and so the time-shifting was outside the scope of the personal time-shifting provision.

The Full Federal Court's reasoning, that in 'capturing, copying, storing and streaming back' the program to the subscriber Optus could not be divorced from the making of the copy, throws into doubt the legitimacy of a wide range of cloud-based (as well as non-cloud based⁸) services. Since the Optus TV Now decision, similar cloud-based recording services based in Australia have been suspended.⁹

It's worth noting that the risks associated with the cloud not only affect commercial cloud service providers, but schools, libraries and universities. Cloud computing is not dissimilar to many digital products already used in schools and TAFEs. Such technologies include intranets, content/learning management systems and media libraries. Indeed, many of these products can be accessed remotely by teachers and students through a web browser. While the IT infrastructure behind these services may vary, these technologies all provide a digital space where content can be stored, accessed and shared amongst a group of people. In their 2010 report, *Cloud Computing: Opportunities and Challenges for Australia*, the Australian Academy of Technological Sciences & Engineering (ATSE) noted the potential benefits to be gained from cloud services for education and research.¹⁰

Risks and uncertainties associated with the development of cloud computing services in Australia have a significant negative effect on investment and innovation. Lateral Economics, in *Excepting the Future* cite recent studies by Booz & Co looking at the impact of changes to copyright law on early stage investment

⁵ Ibid 9.

⁶ Ibid 9.

⁷ *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.

⁸ Rebecca Giblin, 'Stranded in the Technological Dark Ages: Implications of the Full Federal Court's Decision in *NRL v. Optus*' (2012) 34.9 *European Intellectual Property Review* questions the validity of services like TiVo in light of the Full Federal Court's decision <http://works.bepress.com/giblin/16/>.

⁹ Josh Taylor, *Cloud TVRs stop in wake of TV Now ruling* (May 24 2012) ZDNet <http://www.zdnet.com/cloud-tvrs-stop-in-wake-of-tv-now-ruling-1339338503/>. Beem and MyTVR are two services to have been suspended in the wake of the Optus decision.

¹⁰ The Australian Academy of Technological Sciences and Engineering, *Cloud Computing: Opportunities and Challenges for Australia* (September 2010) ii.

in internet or digital content intermediaries.¹¹ Based on a survey of angel investors and interviews with venture capitalists, Booz & Co found that investors were highly averse to regimes that increased the cost of compliance or uncertainty of the size of damages in the event of non-compliance. 80% of US and 87% of European angel investors surveyed by Booz & Co indicated they were uncomfortable investing in an area with an ambiguous regulatory framework.¹²

A recent study by Josh Lerner,¹³ Jacob H Schiff Professor of Investment Banking at Harvard University, found that venture capitalist investment in cloud computing firms increased significantly in the US relative to the EU following the US Second Circuit Court of Appeals' August 2008 decision in *The Cartoon Network, et al v Cablevision*,¹⁴ which was 'widely seen as easing some of the ambiguities surrounding the intellectual property standing of these firms in the US.'¹⁵

*"Our results suggest that the Cablevision decision led to additional incremental investment in U.S. cloud computing firms that ranged from \$728 million to approximately \$1.3 billion over the two-and-a-half years after the decision. When paired with the findings of the enhanced effects of VC investment relative to corporate investment, this may be the equivalent of \$2 to \$5 billion in traditional R&D investment."*¹⁶

In *Excepting the Future*, Lateral Economics finds that investors are valuing reduced risk and uncertainty from copyright limitations and exceptions at around \$2 billion per year.¹⁷

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?*

The ADA and ALCC believe the development of new cloud services in Australia would be best supported by a flexible, fair-use style exception.

A flexible, open-ended exception would better account for the development of new cloud services than a purpose-based exception. A flexible exception creates room for experimentation by providers, and

¹¹ Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012) 36.

¹² Booz&Co, *The Impact of US Internet Copyright Regulations on Early-Stage Investment* (2012a) <http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf> and Booz&Co, *The Impact of EU Internet Copyright Regulations on Early-Stage Investment* (2012b) <http://www.booz.com/media/uploads/BoozCo-Impact-EU-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

¹³ Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (2012) <http://www.cci.net.org/CCIA/files/cclibraryFiles/Filename/000000000642/eu%20cloud%20computing%20white%20paper.pdf>.

¹⁴ *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

¹⁵ Above n 13, 2.

¹⁶ *Ibid.*

¹⁷ Lateral Economics, above n 11, 38.

moves Australia from a ‘permission to innovate’ culture to one conducive to taking risks and trying new things.¹⁸

There is a real danger that purpose-based exceptions merely freeze innovation to existing technologies and to established uses and services. They do not protect future innovation. The questions posed in this Issues Paper of ordinary online activities like caching, indexing, data mining, cloud services and social media use are those that we’re already aware of. As Weatherall points out,

“Innovation is, by definition, doing new things. Doing what is now known – following on from existing, often foreign innovations – is not enough: Australia needs to generate new ideas that can take on the world. Creating the environment in which people can come up with these new ideas, and pursue them through to commercialisation, depends in part on ensuring the law provides some room to experiment.”¹⁹

¹⁸ Weatherall, above n 2, 5.

¹⁹ Weatherall, above n 2, 3.

4. Copying for private use

Existing private copying exceptions are complex, technology specific and don't account for a range of common consumer practices. Most Australian consumers aren't aware of the detailed regulation governing the extent to which they can legally format shift, time shift and space shift their music, film and TV collections. It's not clear to consumers why format shifting from CDs to iPods is perfectly acceptable, but format shifting from DVDs to iPads is not. It's content they have purchased lawfully, and a use which bears no impact on the commercial market for the copyright holder (the consumer is not going to purchase the same content twice). It seems little exaggeration to say that many members of the general public believe that most, if not all private, non-commercial copying of content is lawful, where they've purchased the content themselves.

Long before amendment of the *Copyright Act 1968 (Cth)* in 2006 to recognise the legitimacy of format shifting for personal use, Australian consumers, to the extent they even thought about the issue, most likely believed they had the right to record free-to-air TV to their VCRs. Consumers today converting their DVD collections into MP4 format for portable use,¹ making copies of CDs for friends,² copying e-books onto multiple devices,³ tweeting photos of artworks in galleries to their friends, backing up digital content from desktop and laptop computers to portable hard drives, and increasingly the cloud, believe they are copying lawfully.

It seems likely that the majority of Australian consumers aren't aware that many of the ways in which they enjoy and engage with copyright works fall outside of the scope of what is permitted under copyright law. Sharing copyright images with colleagues and friends in emails, forwarding memes, using photos or music to illustrate PowerPoint presentations, bringing a portable CD player or iPod speakers to the beach to play music, and copying favourite recipes for friends or posting recipes to a personal blog are just some of the ordinary consumer activities falling outside the scope of existing copyright exceptions.

At the time private copying provisions were introduced in 2006, then-Shadow Attorney-General Nicola Roxon noted that "a number of the provisions do not seem to reflect the reality of how people access and use legitimately purchased copyright materials."

As to complexity and specificity of the private copying provisions, the Hon Nicola Roxon MP noted:

"Instead of moving towards making the laws technology neutral, in fact a number of the provisions in this bill have gone into more detail and more specifics about what is permissible and what is not permissible in different formats of material, some with current technology in

¹ In contravention of section 110AA *Copyright Act*, and circumventing TPMs as prohibited under Part V Div 2A of the Act.

² In contravention of section 109A, which only contemplates *loan* of copies to members of family or household

³ Circumventing TPMs in the process, in contravention of section 116AN.

mind but much of it in restrictive terms and I think potentially restrictive for dealing with future changes to technology.”⁴

In 2008, the Attorney-General’s Department reviewed the operation of the new format shifting provisions,⁵ eventually recommending that no changes be made to either provision.⁶ A number of submissions to that review supporting expansion of the exceptions highlighted the complexity of existing provisions,⁷ and ordinary consumer practices that fell outside of the scope of the exceptions (in much the same way those concerns will be raised with the ALRC in 2012). In their response in 2008, the Attorney-General’s Department recommended a ‘re-examination of public awareness material and consumer information on the meaning of the format-shifting exceptions to assist people to understand their rights and obligations under the Copyright Act 1968’⁸ rather than legislative change.

It’s 2012 and the general public remain widely in the dark as to the proper application of the private copying provisions. There may have been a concerted effort to increase public awareness of the format shifting provisions following the Attorney-General’s Department’s recommendation in 2008, but it’s arguable being made aware of their limits would only increase consumer incredulity. It doesn’t make sense to an end user, for example, that they only be permitted to format shift ‘video tape’, when the world has moved past VCRs to DVRs and to remote personal video recorders (PVRs). The ‘use’ to the consumer remains the same: copying for personal enjoyment. Nor does it make sense that the personal copying provisions, other than s109A relating to sound recordings, allow for the making of a single copy only - thus precluding the common place consumer practice of using multiple electronic devices including desktop computers, laptops, tablets, PVRs and smartphones to access the same content.

Copyright laws that appear to consumers to artificially regulate or unduly restrict their enjoyment of works in ways traditionally viewed as non-harmful are unlikely to be respected. The Honourable Justice Susan Crennan, of the High Court of Australia noted in a 2010 lecture that,

“...laws must be fair and capable of obedience. Intellectual property laws, like other rules or laws, must command a social consensus if they are to be enforceable.”⁹

⁴ Commonwealth, Parliamentary Debates, Senate, 1 November 2006, 33 (Nicola Roxon, Shadow Attorney-General)

⁵ Section 47J and 110AA *Copyright Act 1968* (Cth)

⁶ Attorney-General’s Department, *Copyright Exceptions For Private Copying Of Photographs And Films Review of Sections 47J and 110AA Copyright Act 1968* (2008) <http://www.ag.gov.au/Copyright/Issuesandreviews/Pages/ReviewofCopyrightExceptionsforPrivateCopyingofPhotographsandFilmsFinalReport.aspx>.

⁷ CHOICE, Submission to Attorney-General’s Department, *Copying Photographs And Films In A Different Format For Private Use* (February 2008) who noted private copying provisions were too confusing for consumers. <http://www.ag.gov.au/Documents/Choice%20-%20Submission.PDF>

⁸ Attorney-General’s Department, above n 6, Recommendation 1.

⁹ The Honourable Justice Susan Crennan, lecture Institute of Advanced Legal Studies on 15 February 2010, subsequently published in Issue 82 (Summer 2010) *Amicus Curiae*.

If consumers widely believe they have the “right” to copy content they’ve acquired legally for personal enjoyment, and it’s generally recognised as acceptable consumer behaviour, copyright laws should reflect this.

Copyright exceptions publicly perceived to be “out of touch”, or weighted too greatly in favour of particular vested interests, are not respected.

Options for reform

1. The various format and time shifting provisions could be replaced with a broad fair dealing right for “personal” or “private” use.

This option would ensure that Australian consumers are granted the rights they need to make all ‘fair’ uses of copyright material both in relation to current and emerging technologies, without hindering the development of new markets.¹⁰ The ADA and ALCC feel that in an age of iPods, iPads, smartphones, cloud storage and near-constant wireless connectivity, a fair dealing right for “private *domestic*” use is dangerously restrictive. The extension of the term “copying” to “use” encompasses other ordinary, non-harmful personal use of content that may infringe the exclusive right of communication, performance or adaptation reserved to the copyright holder.¹¹

The ADA and ALCC recognise that the area of personal copying is one where the consumer interest in certainty may provide grounds for introducing a purpose-based exception that could supplement a more general open-ended provision. We would support such an approach should the ALRC consider it correct.

2. Alternatively, personal use, and new technologies and devices created by businesses to facilitate personal use, may be enabled under a fair use provision.

In *Sony v Universal Studios*,¹² the right of people to make a copy of a television program for later viewing at home was recognised as fair use. Justice Stevens, who authored the majority opinion, focused primarily on the rights of homeowners using VCRs from the first Supreme Court deliberations on the

¹⁰ A ‘fair dealing right for private and domestic use’ was supported by the CCI Arc Centre of Excellence for Creative Industries and Innovation: Brian Fitzgerald, Stuart Cunningham and Jessica Coates, Submission to Attorney-General’s Department, *Copying Photographs And Films In A Different Format For Private Use* (February 2008) <http://www.ag.gov.au/Documents/B%20Fitzgerald,%20S%20Cunningham%20and%20J%20Coates%20-%20Submission.PDF> Jessica Litman, in her thoughtful study ‘lawful personal use’ proposes the term “personal use”, to describe those uses that “an individual makes for herself, her family, or her close friends”. See, Jessica Litman, ‘Lawful Personal Use’ (2006-2007) 85 *Texas Law Review* 1871, 1894.

¹¹ In particular, rights holders have argued in a variety of contexts that transmissions of material undertaken by consumers, even communications to the consumers themselves, are ‘communications to the public’: see, for example, *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34, [97]-[106]. In order to forestall these kinds of arguments in the context of individual consumer use, exceptions should be drafted to cover all exclusive rights – as the fair dealing provisions are.

¹² *Sony Corp of Am. v Universal City Studios Inc* 464 US 417, 420.

case, it has been noted that an early draft of his opinion characterised the lawsuit brought by Universal Studios as an effort to “control the way William Griffiths watches television.”¹³

While fair use could support the development of new technologies that facilitate personal use, a degree of uncertainty exists as to how it would be interpreted in relation to ordinary consumer copying for personal use.¹⁴

Regardless whether captured under a fair dealing or fair use exception, the need for an exception that allows some private copying has not changed since the provisions were introduced in 2006, and, we would submit, the fact that the provisions introduced in 2006 are already technologically redundant and do not address current consumer practices argues in favour of a flexible, technology neutral private copying provision. The UK Intellectual Property Office, addressing the economic impact of recommendations arising out of the Hargreaves Review of Intellectual Property and Growth, found there was “likely to be minimal cost to producers of content in the expansion of personal copying exceptions, as the exception legalizes what consumers are already doing”.¹⁵

Amendment of private copying provisions would “bring the law into line with consumer behaviour, and help reduce uncertainty over what is and is not legal.”¹⁶ The UK IPO found that a format shifting for private use exception could result in cost savings to the UK of 0.5 million pounds per annum, with a growth impact of 0.3 – 2 billion pounds.

The Hargreaves Review noted the importance of technology neutral exceptions to support local innovation.

“A classic example of this is the development of the Apple iPod, which had sold millions of devices before digital music could be purchased directly, meaning all content on these devices would have been format shifted and may have been illegal in the UK. Most recently, a new CD to digital private jukebox invented in Britain by Brennan experienced a 700 per cent sales growth last year and is a growing young firm. Brennan was forced to amend its advertisements, causing potential damage to its business, as the normal operation of the product was thought to breach copyright law. *It is worth noting that of all the major players who produce and design devices which make use of format shifting, none of them appear to be British, and when a young innovative firm comes along, like Brennan, the law works against them.*”

¹³ Jessica Litman, ‘The Story of *Sony v Universal Studios*: Mary Poppins meets the Boston Strangler’, in Jane C Ginsberg & Rochelle Cooper Dreyfuss eds *Intellectual Property Stories* 358 (2005).

¹⁴ See Rebecca Tushnet, ‘Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves it’ (2004) 114 *Yale Law Journal* 555, “Fair use...is ill-suited to protecting activities that are at the core of ordinary uses of copyrighted works; it is supposed to deal with unusual or marginal activities.”

¹⁵ UK Intellectual Property Office, Impact Assessment: Private Copying, <http://www.ipo.gov.uk/consult-ia-bis1055.pdf>.

¹⁶ *ibid.*

The recent full Federal Court decision ruling Optus' TV Now cloud-based personal video recording service invalid articulates the risk for Australian companies looking to innovate in the digital marketplace when faced with format-specific exceptions. Under Australia's existing copyright framework, a number of other established cloud-based services like Dropbox and iCloud could not operate in Australia.

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?*

Backing up important information has become standard practice in Australia, for businesses, government agencies, public institutions and consumers. The Australian Government initiative, *Stay Smart Online*, describes backing up files as 'the most important thing you will ever do with your computer (after creating the files in the first place, of course!)'.¹⁷ The Government's fact sheet on back-up copies guides consumers through setting up an automatic back-up schedule using an external storage device.¹⁸ Backing up can also protect against security breaches and cyber-attack. In late September 2012, Australian businesses were warned to back-up data following the spread of a new type of "ransomware" holding personal data 'to ransom', on the back of cyber-attacks affecting AAPT and LinkedIn.¹⁹

Consumers and businesses are backing up not only to hard drives and USB memory sticks, but increasingly, to the cloud. In addition, backing up a computer would increasingly involve a wide range of copyright subject matter and a mix of content that has been created by the owner of the computer as well as content that has been sent by other people and saved to the computer's hard drive. It may also involve the user's collection of content purchased from online content sources. Without a flexible copyright framework to support backing up of data, multinational cloud-based back up services like Dropbox and Arq arguably could not set up shop in Australia.

The Australian government already views back-up as standard, and acceptable, copying of legitimately acquired content, and it's important our copyright framework reflect this. A purpose-based exception for backing up may recognise the legitimacy of back-up for individual consumers, but the ADA and ALCC are concerned that if drafted too restrictively, such an exception may not adequately protect providers of cloud-based (and future) back up services. Back-up could be protected by a broad fair dealing right for "personal use", as discussed above, but for commercial innovators some greater flexibility may be necessary.

¹⁷ 'Factsheet 12 - How to create back-up copies of your important information' Australian Government, http://www.staysmartonline.gov.au/factsheets/factsheet_12.

¹⁸ Ibid.

¹⁹ Patrick Stafford, *Businesses warned to back up data after new "ransomware" emails spread across country* (28 September 2012) smartcompany <http://www.smartcompany.com.au/information-technology/052085-businesses-warned-to-back-up-data-after-new-ransomware-emails-spread-across-country.html>.

A number of cloud-based back up services, for example, now offer an automatic back up service. Arq, offering back up to Amazon, encourages clients to “add [their] folders to Arq, and Arq will back them up automatically.”²⁰ Apple’s iCloud offers similar automatic back-up. Any exception must account for consumers and organisations “making” copies of information for back-up purposes, and service providers who facilitate back up automatically, on their behalf.

Given the rapidly changing nature of back-up, and evolution of storage options in the digital environment, the ADA and ALCC strongly recommend the adoption of a flexible, fair use-style provision to account for future innovation. . It may be accompanied by a purpose-based exception, dependant on its wording, in the interests of certainty for businesses and consumers, to complement an open-ended provision.

²⁰ <http://www.haystacksoftware.com/arq/>.

5. 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?*

The internet has facilitated an explosion of new platforms, technologies and tools being used by Australians to create, mash up, curate, critique and share content with family, friends, fellow classmates and the wider Australian community. The ADA and ALCC recommend treating descriptions of such use as ‘private’ or ‘domestic’ with utmost caution, lest established consumer platforms (like YouTube, or Pinterest, or Tumblr) fall outside their scope.

Copyright materials are being explored and enjoyed in new ways by consumers, with cultural intermediaries also looking to new ways to encourage community engagement with their collections.

As highlighted in the Issues Paper, one of the most significant personal online uses of content involves “uploading and sharing on the internet of non-commercial ‘user-generated content’ including in social networking.”¹ Social media use in Australia is becoming increasingly widespread and pervasive; Social Media Statistics report that there are eleven million Australians using Facebook, two million on Twitter, one million on Tumblr, and six hundred thousand on Pinterest.² User-generated content created in Australia includes a wide range of material spanning the creative spectrum, from blog posts to posting a video of a politician singing their favourite karaoke song³ to using images and text to create ‘memes’⁴ to fan-fiction⁵ associated with a variety of genres.

Personal online use also encompasses collecting, collating and sharing user *found* content, where there is arguably no creative addition or alteration of the original work. Twitter, Pinterest, Facebook, Tumblr and Instagram are some of the social media platforms to have integrated sharing of content into their platforms.

The need to recognise user-generated and user-found content, as well as other social non-harmful uses of content has been reflected in recent copyright consultations in the UK, Ireland, and Canada.⁶

¹ Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper*, (Issues Paper 42 (IP 42), August 2012) 33.

² Social Media News, *Social Media Statistics – August 2012* (September 3 2012) <http://www.socialmedianews.com.au/social-media-statistics-australia-august-2012/>.

³ Michael Owen, ‘Kevin Foley sings the Gambler at karaoke bar’ *The Australian Online* (18 January 2010) <http://www.theaustralian.com.au/national-affairs/state-politics/kevin-foley-sings-the-gambler-at-karaoke-bar/story-e6frgczx-1225820936954>.

⁴ Sean Rintel and Andrew Harvey, *Meme team: Olympic fandom meets the internet* *The Conversation* (17 July 2012) <http://theconversation.edu.au/meme-team-olympic-fandom-meets-the-internet-7990>.

⁵ See, eg, FanFiction.Net <http://www.fanfiction.net/movie/Australia/>; A FanFiction competition run by Sydney Manga and Anime Show <http://www.smash.org.au/2012/events/fanfic/fanfiction-competition/>; and the range of FanFiction written about favourite Australian Soap Opera *Home and Away* <http://www.backtothebay.com/forum/index.php?showforum=15>.

⁶ See Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012) http://www.djei.ie/science/ipr/crc_consultation_paper.pdf; *Copyright Modernization Act*, SC 2012, c C-20.

Australians using Pinterest

Pinterest, the ‘online pinboard’, is a recent, widely successful addition to the social networking landscape. It allows users to ‘organize and share all the beautiful things [they] find on the web. People use pinboards to plan their weddings, decorate their homes, and organize their favorite recipes.’⁷

The social network’s popularity in Australia has exploded over 2012, from 200,000 users in February to 600,000 and counting in August 2012.⁸ Users on the site ‘pin’ pictures of different things they find and enjoy on the web, and curate their own ‘pinboards’ on the site which other ‘pinners’ are able to browse and, in turn, ‘re-pin’ onto their own virtual pinboards. The site is also used by creators such as crafters,⁹ bloggers, photographers, artists,¹⁰ fashion designers and even magazine publishers¹¹ and commercial retail stores to encourage sharing and dissemination of their content and engage with audiences.

Pinterest is based in the US and complies with the DMCA safe harbour scheme. Its users are arguably entitled to claim that sharing via these sites is fair use in the US.¹² Were Pinterest developed and hosted in Australia, without a flexible copyright framework to support it, it would certainly be infringing: ‘pinning’ is an infringement of the content owner’s exclusive right to reproduce and communicate their work. A number of creators use Pinterest and other social media themselves, to share sources of inspiration (including third party copyright content) with fans. These creators could also be considered copyright infringers, as are the fans who ‘follow’ their pinboards and share and disseminate the creator’s work.

It has been noted that media sites such as Pinterest can serve to increase the visibility and thereby the market for a creator’s work.¹³

Cultural institutions embracing social media

ADA and ALCC members include cultural institutions, education providers, and libraries using social media in various ways to engage with the wider community, and share insights into their collections. Some institutions maintain blogs and Tumblrs, others share pictures of items in their collections on Twitter and Facebook pages (although every institution we spoke to indicated they predominantly use out of copyright or low-risk orphan works – thus arguably leading to a distortion in the presentation of Australian history and culture online). Institutions have also noted individual users taking images from the institution’s blog posts and social media feeds to share through their own networks. Increasingly, institutions are looking to open up their collections to the community to interpret and package in their own ways.

⁷ Pinterest, *What is Pinterest?* <http://pinterest.com/about/>.

⁸ Social Media News, above n 1.

⁹ See, eg, <http://pinterest.com/meatmeatmikes/>.

¹⁰ See, eg, <http://pinterest.com/peachlings/>.

¹¹ See, eg, <http://pinterest.com/marieclaireau/>.

¹² See, eg, Gervais, above n 7.

¹³ See, eg, Lauren Indvik, *Pinterest Becomes Top Traffic Driver for Women’s Magazines*, MASHABLE (Feb. 26, 2012), <http://mashable.com/2012/02/26/pinterest-womens-magazines/>.

State Library of Victoria on social media

The State Library of Victoria is active on Facebook (15,307 friends), Twitter (8,218 followers) and Flickr (currently with 53 sets of photos and more than 138,000 views over the past 20 months). They also have several blogs.

Their key objectives in using these social media platforms are:

- “to build a relationship and increase online engagement with users by generating conversation across platforms and encouraging user-generated content;
- to drive traffic to our websites;
- to increase engagement with our collection
- to grow attendance at Library exhibitions and events.”

More recently, SLV report using social media channels to promote their community consultation process and drive traffic to their purpose-built consultation website. They do not post anything from their collection that is in copyright.

“We share topical, thought-provoking, historically significant or quirky digitized collection items (e.g. posters, photographs, illustrations, maps, front covers, ephemera, manuscripts. We also highlight new or topical subscription databases via Facebook and Twitter) We aim to engage the community by sharing materials which showcase the breadth of our collections, and their relevance to current events, historic anniversaries, and our followers' interests. Where possible we link to high resolution, out-of-copyright digital copies which are available for download. By linking to items that are available for full download, we show how our collections are increasingly available to all Victorians at their point of need - particularly users from rural communities who would otherwise have to travel several hours to come and view the original collection items.”

The State Library of Victoria has noted difficulties in show-casing in copyright collection material on social media (for socially beneficial purposes, to educate users about the Library collections). They have also noted that when it comes to historic, out-of-copyright material included in subscription databases the Library is also reluctant to make it available via social media. A number of agreements with database vendors override applicable copyright law (including reference to public domain works), and the agreements are not readily accessible to most staff.

Arguably, certain online uses of content by cultural institutions could be allowable under section 200AB (low resolution images illustrating a collection catalogue, for example). However, some ADA and ALCC members have expressed concern that licences introduced by collecting societies for low-resolution display of content, or for social media purposes, erode their ability to rely on section 200AB.

Feedback from members indicates that licences introduced for social media use, or other low-resolution use by cultural institutions, can impact on whether the institution will display a work online at all. One member commented:

“Viscopy currently charges us for the display of thumbnail images of works by Viscopy artists in our collection. It imposes a layer of cost in deciding whether we illustrate works we hold by certain artists, which would be for their benefit anyway. Having a thumbnail image available is more like free advertising for the artist: galleries, publishers and purchasers look for low res images to help them choose works for inclusion in exhibitions, books and in art sales.”

The ADA and ALCC would be glad to discuss these issues further with the ALRC, or arrange consultations with members, should it be useful to the Inquiry.

In addition to the creation of UGC and social media use, both individual consumers and businesses are being encouraged to use online backup and storage services like DropBox, Google Drive and iCloud to both store and protect their digital material.¹⁴ This is discussed further above, under private copying and cloud computing.

A comment on personal online use and safe harbours

The ADA and ALCC are aware of concerns regarding commercial benefits accruing to social media intermediaries from an exception facilitating use of content for social networking purposes. The ADA and ALCC consider these concerns to be relevant to issues surrounding the current scope of the safe harbour regime in Australia.¹⁵ Expanding the scope of safe harbours in Australia to include internet intermediaries sets out clear responsibilities for intermediaries engaging with copyright content and their limits of liability.

While reform of this scheme is outside the scope of the ALRC’s Inquiry, the ADA and ALCC submit that extending the existing safe harbour scheme to include internet intermediaries would facilitate appropriate protections for rights holders and that the reasonable remedies available to rights holders will not be diminished with the addition of any exception that allows for personal online use of copyright material.

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?*

¹⁴ See, eg, Patrick Stafford, *Businesses warned to back up data after new “ransomware” emails spread across country* (28 September 2012) smartcompany <http://www.smartcompany.com.au/information-technology/052085-businesses-warned-to-back-up-data-after-new-ransomware-emails-spread-across-country.html> , “AVG security expert Michael McKinnon: ‘Lean towards an internet backup provider, and preferably a solution that is backing up the files just as soon as they’ve been modified.’”

¹⁵ Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper*, (Issues Paper 42 (IP 42), August 2012) 35 [109].

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?*

The prevalence of social networking activities in Australia is undeniable, and it is outside the capacity of any law reform measures to ‘wind back the clock’ to curtail activities consumers now see as legitimate and non-harmful. The recent Irish Government consultation on copyright recognised similar failings in their own domestic regime:

“the law is increasingly out of step with users’ expectations, relating to matters such as format-shifting, parody, satire, pastiche, caricature, fan-fiction, and so on, and with the realities of user innovation... There are countless mash-ups, parodies, fan tributes and other similar transformative works, on user-generated sites. And the web is replete with user-generated applications, extensions and services.”¹⁶

Rather than attempt to confine online uses such as social networking activities to how they exist as present, or mechanisms to facilitate these activities structured around vexed limiting terms like “non-commercial”, “private” or “domestic” use, the ADA and ALCC support the introduction of a broad exception that encompasses these types of personal uses and online innovations based on criteria like the:

- nature of the use
- nature of the work
- interference with the market for the copyright holder
- non-commercial or commercial purpose

The ADA and ALCC consider the factors raised by Professor Pamela Samuelson in her paper, ‘Unbundling Fair Uses’, which are substantially reproduced in the Issues Paper, to equally apply to personal online use of content in Australia:¹⁷

1. Personal use has very little interference with the original market for the work
2. Personal use is often within the sphere of activities that copyright owners expect from users (although it is arguable that online use begins to stretch these expectations due to the unforeseen nature of the way that material is being used online)
3. Personal use of copyright material is an important aspect of self expression

¹⁶ Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012) 61.

4. Privacy of the home or individual use: copyright has not typically regulated the private/personal sphere
5. It is nearly impossible to regulate use in the private/personal sphere
6. High transaction costs preclude the formulation of a market for personal use
7. Ordinary people do not expect their private uses to be regulated by copyright and would likely fight against it, or ignore laws that attempted to intrude into these uses

The ADA and ALCC are concerned an exception specifically limited to “non-commercial use” may be especially restrictive. This is for two reasons: firstly, non-commercial use is difficult to define in the online space. Social media sites that facilitate a huge volume of personal online use may be commercial ventures. For example, would a use that to the end user is non-commercial may become “commercial” if uploaded to YouTube and displayed alongside advertising?

Secondly, an exception for non-commercial personal use appears to diverge from the existing fair dealing exceptions, which allow commercial enterprises such as newspapers, research institutions and television stations to benefit from their protection. The ADA and ALCC accept that the commercial nature of a use is relevant to whether the use is a fair dealing or not, but the fact that a use may be commercial should not by itself prevent someone from relying on any exception for online use such as social networking.

The ADA and ALCC consider a flexible, fair use-style exception would provide appropriate scope to assess the fairness of varied personal use of content online. The ADA and ALCC are concerned that drafting of a purpose-based exception could exclude cultural intermediaries like libraries and archives engaging with the community through social media platforms, or incomprehensibly limit personal online use to “non-public” platforms, or exclude popular platforms like YouTube and Facebook.

It seems more sensible to adopt an analysis based on criteria of “fairness”, to guard against commercial or other real and unreasonable harm to rights holders, while supporting uses that encourage access to information and the furtherance of culture and creativity.

We note that in the US, a fair use analysis involves consideration of the impact on the rights holder’s commercial market for the work, and any interference with normal exploitation of the work, in coming to a finding of fair use. In the US, the court is directed to “consider not only the extent of market harm cause[d] by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”¹⁸ This kind of analysis now has a strong precedent in

¹⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (quoting *Nimmer* § 13.05A 4, p. 13-102.61); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985). 137 *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984).

US case law, and has enabled US courts to determine that, for instance, unauthorised peer-to-peer filesharing is not a 'fair use'.¹⁹

Should the ALRC consider that a purpose-based exception for personal online use would be in Australia's best interests, we would cautiously support a technology neutral, and broadly drafted exception for personal use incorporating an analysis of "fairness". We would be concerned by any use of terms such as 'private use', 'domestic use' and 'non-commercial use' to frame any exception. These terms are difficult to apply to the world of social media, mobile applications and 'Web 3.0'. Posting to a social media site is as easily a public as it is a private act, and the uptake of mobile devices means that use of the internet and social media cannot be confined to the home or 'domestic' spaces.

In contrast, an exception involving an analysis of "fairness" facilitates a more nuanced approach to online use depending on the nature of the work. Not all copyright works are commercial in nature, nor have the same commercial value. Some works may have been made freely available, others donated to a cultural institution for public access. An analysis of what is "fair" in facilitating user-generated content could take into account factors like the impact on the market for the work, rather than a blanket "non commercial" use requirement.

¹⁹ See eg, *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

6. 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?*

‘Transformative use’ can span new creative works (including remixes and mash ups), uses for research purposes, digitisation and commercial uses.

A well-known Australian example involving the sampling and remixing of audio-visual material is ‘Somebodies: A YouTube Orchestra’ created by Australian artist Gotye from YouTube covers and parodies of his hit single ‘Somebody I Used to Know’.¹ Gotye expressly encouraged fans to use his material in a transformative way, which in turn enabled him to ‘remix the remixes’ to create a new work. As the artist notes on the video’s description on YouTube,

“Reluctant as I am to add to the mountain of interpretations of Somebody That I Used To Know seemingly taking over their own area of the internet, I couldn’t resist the massive remixability that such a large, varied yet connected bundle of source material offered.”²

The video has been watched more than 3 million times.³ Countless other remixes and mash ups of AV material by Australian artists can be found on the internet spanning transformative musical compositions,⁴ new films,⁵ art works⁶ and fan fiction.⁷

Cultural institutions are also embracing informative and transformative tools to explore their own collections, and encourage engagement with their collections by the public. Developers using material from major cultural collections available online like the National Library of Australia’s Trove, or Powerhouse Museum photo collections, have created geo-spatial ‘mash-ups’ using map data and meta-data from institutional collections to locate images on applications like Google Maps. An example of this is the recent Google Streetview Mashup, using images from the Powerhouse Museum collection.⁸ While

¹ Gotyemusic ‘Somebodies: A YouTube Orchestra’ Youtube, (12 August 2012) <http://www.youtube.com/watch?v=opg4VGVyj3M>.

² Ibid.

³ See also, Matthew Rimmer’s comments on the ‘Somebodies’ mashup in Asher Moses, *Copyright Stuck in a Horse and Buggy Era* Sydney Morning Herald (21 August 2012) <http://www.smh.com.au/technology/technology-news/copyright-stuck-in-horse-and-buggy-era-20120821-24jrl.html>.

⁴ Triple J Unearthed promotes remix artists DEJA, Haxx and By Elly among others. See, eg, [http://www.triplejuneearthed.com/DEJA\(Remixes\)](http://www.triplejuneearthed.com/DEJA(Remixes)).

⁵ See, eg, Soda_Jerk, <http://www.sodajerk.com.au/HollywoodBurn.php>.

⁶ Anna Zahalka is one well known Australian appropriation artist, http://www.ngv.vic.gov.au/australianimpressionism/education/insights_cvviews.html#04.

⁷ See, eg, the fanfiction around Australian television show *Rush* at <http://www.fanpop.com/spots/rush-australian-tv-series/links/9998022/title/rush-fanfiction>.

⁸ *Paul Hagon’s Then & Now - Flickr and Google Street View combined*, (August 2008) Powerhouse Museum, <http://www.powerhousemuseum.com/flickr/sv-index.php>.

these projects involve using text and data mining techniques, recent jurisprudence in the US has found that these, and indexing and search activities can be viewed as transformative uses.⁹

Other developers are investigating innovative ways of engaging with public photo collections housed on Flickr using the Flickr Commons website. For example, Canberra developer Mitchell Whitelaw has developed a Flickr Commons Explorer.¹⁰ Visualisation tools like these have the potential to be used to display and interpret collections housed in Australian collections for the benefit of the broader community.¹¹

We would emphasise that ‘mash-ups’ do not relate only to the use of musical or artistic works. In fact, mash-ups that combine data (as well, perhaps, as artistic works or other material) are becoming more common in the cultural and government sectors.

Library Hack¹²

Library Hack is a mashup and application competition designed to encourage the creative and innovative re-use of library data and digital content.¹³ The project provides Australian libraries with an “opportunity to interact with developers and artists and work in new ways to enhance the role of libraries in the community”¹⁴ and to embrace the “fundamentally collaborative nature of the future library.”¹⁵

Library Hack was inspired by other projects such as GovHack¹⁶ in Australia, and similar events overseas. Opening up government data through GovHack for collaborative and transformative uses resulted in “innovative and sometimes remarkable applications that have made significant improvements to government services or empowered everyday citizens.”¹⁷ Examples of useful applications developed from open source government data that inspired libraryhack creators included My Street <http://www.fixmystreet.com/>, which enabled citizens to report to local government issues that need to be dealt with in their local area; Live

⁹ *Authors Guild, Inc. et al. v. HathiTrust et al.* (United States District Court, Southern District of New York, 11 CV 6351 (HB) 10 October 2012) <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2011cv06351/384619/156/0.pdf?ts=1349944247>.

¹⁰ Mitchell Whitelaw, *commonsExplorer* The Visible Archive (March 2010) <http://visiblearchive.blogspot.com.au/2010/03/commonsexplorer.html>.

¹¹ The Flickr Commons collection enables any user to easily find images that are licensed under Creative Commons licences. Creative Commons licences are a useful tool for users and creators to open up their work over the web. The ADA and ALCC considers these licences to work most effectively within a permissive exceptions regime, as some forms of the licence can be quite restrictive, and we think it unreasonable to expect creators to limit their inspiration and creativity to the relatively small amount of material available under Creative Commons licences. Creative Commons licences always recognise the subsistence of domestic copying exceptions, such as fair use and fair dealing, and are therefore an effective complement to, rather than substitution for, an open and flexible exceptions regime.

¹² Library Hack, *Welcome* (27 January 2011) <http://libraryhack.org/>.

¹³ Margaret Warren and Richard Hayward, ‘Hacking the nation: Libraryhack and community-created apps’ (Paper Presented at VALA2012, Melbourne, 9 February 2012) 1 <http://www.vala.org.au/vala2012-proceedings/vala2012-session-12-warren>.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See, *GovHack* <http://www.govhack.org/>.

¹⁷ Warren, above n 13, 3.

Underground Tube Map <http://traintimes.org.uk/map/tube/> and Suburban Trends, <http://www.suburban-trends.com.au/> which brings together data about Australian suburbs and presents it in a meaningful way.¹⁸

Libraries participating in Library Hack made their data available to the public. The datasets have remained available after the competition closed. Examples of Library Hack submissions included 'Talking Maps': A mashup that combined library resources such as photographs and audio-recordings with old maps, creating stories from the materials,¹⁹ 'Reflection of Time': a photographic mashup reflecting old and new photographs,²⁰ and 'Conviz': a web based application visualising data from the British convict registry.²¹ Librarians running the program emphasised that increasing developments in technology have brought more and more new opportunities to use content in a transformative way: "*As a consequence of the development of web 2.0 tools, participating in collaborative creation is achievable in a way that has not been available in the past.*"²² In the context of the NBN rollout, possibilities for further innovation and collaboration between libraries and their users will continue to grow.

Transformative use in education

Transformative use of content is also being further encouraged in the education sector. A prime example is the Australian Broadcasting Corporation's 'Education Portal'.²³ The ABC is seeking to use the NBN to expand its services for education. As stated on its website,

The key aims and vision of the project are;

- To use and promote the capability of the NBN to improve the educational experience of Australian students, parents and teachers.
- To provide engaging and immersive digital learning experiences to engage students and parents in the home to support their learning at school.
- **To provide a wealth of digital media clips, content and interactive tools for use at home and in digital classrooms which align to the new Australian national curriculum**
- To ensure the ABC fulfils its Charter obligation to educate and inform Australians by maximising the value and reach of educationally relevant ABC content.

A joint media release²⁴ from the Ministers for Education and Broadband and the Digital Economy describes the way the project encourages educational users - students, teachers and parents - to use content in transformative ways:

¹⁸ Ibid.

¹⁹ *Talking Maps*, LibraryHack (27 May 2011) <http://libraryhack.org/2011/05/27/talking-maps/>.

²⁰ *Reflection of Time*, LibraryHack (28 May 2011) <http://libraryhack.org/2011/05/28/reflection-of-time/>.

²¹ *Conviz*, LibraryHack (30 May 2011) <http://libraryhack.org/2011/05/30/conviz/>.

²² Warren, above n 13, 2.

²³ *ABC/ESA Education Portal Project*, ABC Learn (February 2012) <http://www.abc.net.au/learn/education-portal.htm>.

²⁴ The Hon Peter Garrett MP and Sen the Hon Stephen Conroy, 'Enhanced learning as students access ABC's archive via new NBN education portal' (Joint Media Release, 15 December 2011) <http://www.minister.dbcde.gov.au/media/mediareleases/2011/299>.

"Students will be able to watch, listen, read, remix, tag and recommend resources. They will be able to have virtual tours of educationally relevant places, events or communities and participate in interactive games, in 3D immersive environments."

"The portal, which will be accessed over the NBN's high-speed broadband connection, will provide a rich interactive experience as students are able to mix, mash and adapt content according to their learning needs."

While the plans for the education portal are exciting and innovative, the ADA understands that this content is still claimed to be remunerable under the Part VA statutory licence,²⁵ and may therefore prove burdensome for educational institutions to effectively integrate into everyday classroom use. Please see the submissions of the Copyright Advisory Group of the Standing Council on School Education and Early Childhood (CAG), and Universities Australia, as well as our comments on educational copying below for more detail on the effect of the statutory licences in today's classrooms.

It's worth noting some transformative use projects that have been ended or impeded due to the lack of adequate provisions allowing for transformative use in Australian copyright law. The names of cultural institutions in the following examples have been removed.

A cultural institution supported university students using the institution's Application Programming Interface (API) to view the institution's content (in copyright and out) in new ways, through data and text mining techniques (forms of transformative use). While the students' work with in copyright content in the collection was arguably protected by fair dealing for the purposes of research and study, the students were unable to make their work publicly available (communicate it to the public) nor develop it further through commercial partnerships.

An institution released their API under a creative commons licence. The copyright in the text of the API belonged to the institution, but institution images were in copyright. While the institution believed they were able may to offer thumbnail images to some users under section 200AB, developers and other innovators often require high resolution images to properly explore the collection for transformative purposes. The institution recognises it is only a matter of time before tools to do more innovative things with material in the collection using APIs will be available to all kinds of users. A wide range of users will be aggregating and breaking up collections in ways that institutions are unable to do themselves. The current fair dealing exceptions are not equipped to facilitate new transformative uses of Australian cultural institutions in this way.

²⁵ House Rules, ABC Splash <http://splash.abc.net.au/house-rules>.

A number of developers working with cultural collections confine their efforts to low risk projects involving enhancements and reuse of image collections (for example, NLA's work and Trove). One reason for this relates to the way that data sets are currently held, in that all images in a set are contained as a 'chunk' for the purposes of visualisation or other work with the underlying data set. Metadata on images does not differentiate between what is in copyright and what is not. As a result, any high risk image sets tend to be avoided by these developers, even though visualisations and other transformative uses that could be made with the data sets largely add value to the work rather than interfere with the original market for it. High risk data sets include digitised images of gallery collections, commercial art works and new works, and there is a currently, therefore, huge amount of untapped value in these collections. This leads to a distortion in what innovative uses of collections may be undertaken, the cultural heritage that is available publicly, and what is available for research and interpretation.

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?*

Transformative use has been found to be highly indicative of a finding of fair use in the United States.²⁶ In his article assessing the predictability of fair use outcomes in litigation, US academic Matthew Sag finds that evidence of transformative use (he describes it as "creative shift"), where the defendant is not engaged in a direct commercial use, will result in a finding of fair use seven cases in ten.²⁷

Fair use in the United States provides flexibility for individuals engaging in transformative use in ways that aren't unreasonably harmful to the copyright holder. Adopting a flexible fair use-style exception, rather than attempting to prescribe the scope of a purpose-based transformative exception, seems best able to capture the variety of transformative use being made of content by Australians today.

²⁶ *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579, holding that the creation of transformative works "lies at the heart of the fair use doctrine's guarantee of breathing space within the confines of fair use". The ADA and ALCC would also stress, however, that there are fair uses of works which are not necessarily transformative, such as some educational uses.

²⁷ Matthew Sag, 'Predicting Fair Use', (2012) 73:1 *Ohio State Law Journal* 76.

In *Campbell v Acuff Rose Music*²⁸ the court found that a use would be seen as transformative if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.”²⁹ Here a transformative use does not necessarily always have to criticise the work, but can also transform as an ‘expression of artistic imagination’.³⁰

Pamela Samuelson has noted:

*“Authors often draw upon pre-existing works and transform expression from them in creating new works that criticise, comment upon or offer new insights about those works and the social significance of others’ expressions.”*³¹

Again, the ADA and ALCC note that in the event Australia adopted the US model that is fair use, it doesn’t automatically follow that Australian courts would rely on US case law. Nonetheless, the above examples give some indication of the flexible analysis that may be undertaken in considering whether a use is ‘transformative’.

Importantly, the ADA and ALCC support an exception that provides scope for findings of transformative uses where the *purpose* of the use is sufficiently removed from the purpose of the original work. This expansive definition in the US has recently been found to allow libraries to digitise their print holdings for the purposes of preservation, search, and access for print disabled persons.³²

It is crucial, not just in the digital environment but for the use and creation of new works generally, that creators be allowed to build on, find inspiration in, and draw from existing works. As noted in the recent review of Irish copyright law,

*“Technology is making it increasingly easier for users to innovate, and for that innovation to be based upon the transformation of existing content. On the one hand, in the submissions, rights-holders presented innovation as a linear top-down process and were generally wary of such transformative uses. On the other hand, users and others argued strongly that innovation is also an iterative and interactive process and that such transformative uses encouraged both cultural diversity and commercial innovation.”*³³

The ADA and ALCC recommend the introduction of a broad, flexible, open-ended exception into the Act to facilitate transformative uses.

²⁸ (1994) 510 US 569.

²⁹ *Ibid.*

³⁰ Pamela Samuelson, ‘Unbundling Fair Use’ (2009) 77:5 *Fordham Law Review* 2537, 2553.

³¹ Pamela Samuelson, ‘Unbundling Fair Use’ (2009) 77:5 *Fordham Law Review* 2537, 2548.

³² *Authors Guild, Inc. et al. v. HathiTrust et al.*, above n 9, discussed further in our discussion of Fair Use.

³³ Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012) 58-59 http://www.djei.ie/science/ipr/crc_consultation_paper.pdf.

Australian Digital Alliance

Australian Libraries Copyright Committee

The ADA and ALCC consider that the fairness analysis incorporated into such an exception will assist users and courts in determining whether a transformative use should be allowed. Such an assessment is able to take into account commercial transformative uses which do not directly compete with the original market for the work.

7. Libraries, archives and digitisation

Question 19. *What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?*

The library and archive exceptions set out terms under which libraries and archives undertake document supply,¹ interlibrary loan,² supply and publication of unpublished works³ and preservation.⁴

The ALCC conducts library copyright training for library and archive staff in every capital city (and two regional destinations) around Australia. Discussions with staff in these sectors indicate that existing library and archive exceptions are inadequate in the digital environment. Libraries and archives undertaking digital preservation are infringing copyright. Complex document supply and interlibrary loan provisions have had a chilling effect on legitimate library activities, encouraged institutional risk aversion and are vulnerable to misinterpretation by library staff without legal backgrounds. And without a copyright term duration for unpublished works, a wealth of unpublished works are locked up in cultural collections in perpetuity.

It's worth noting, too, the increasing tendency of digital content licences to contract libraries out of existing copyright exceptions, and ways in which TPMs impede preservation and long term access to copyright works in the public interest.

Document supply - section 49 Copyright Act 1968 (Cth)

A common concern raised with the ALCC regarding the document supply provision is its complexity, and the difficulties it poses for library staff with responsibility for fulfilling document supply requests. The section is noticeably lengthy and detailed when compared with its Parliamentary Library copying equivalent under section 48A, which simply provides that:

The copyright in a work is not infringed by anything done, for the sole purpose of assisting a person who is a member of a Parliament in the performance of the person's duties as such a member, by an authorized officer of a library, being a library the principal purpose of which is to provide library services for members of that Parliament.

In contrast, section 49 spans 1600 words rigidly prescribing circumstances under which a library staff member may facilitate document supply requests. Specific issues with its construction include:

¹ *Copyright Act 1968 (Cth)* s 49.

² *Ibid* s 50.

³ *Ibid* ss 51 and 52.

⁴ *Ibid* ss 51A and 51B.

A. Libraries and archives may only fulfil document supply requests *for the purposes of research and study*

The degree to which this is an issue varies between institutions. University libraries, copying content predominantly for students and staff members, may generally fall within the parameters of “research and study”. In contrast, local, state and national libraries receive a broader suite of requests from the general public pertaining not only to research and study, but general interest, creative development, and personal enjoyment.⁵ The National Library of Australia sets out a number of document supply requests in their submission to this Inquiry, which library staff felt could not be fulfilled within the parameters of section 49.⁶

Some examples provided to the ALCC by the National Library of Australia (document requests which were not supplied) include:

“A user asked for a copy of the sheet music When a boy from Alabama meets a girl from Gundagai. The words and music are by Jack O’Hagan 1898-1987 and the sheet music was published in 1942 in Melbourne by Allan’s. It is four pages long. The user listed their use as ‘research or study’ and noted that ‘it is an old Australian war song I just remember and I would like to play and sing it on my piano for my own private only enjoyment’. An online search of a few minutes found no evidence that this publication was available new.”

“A user asked for a copy of the poster Badges Of The Royal Australian Air Force, published by the Department of Defence in 1983. The user listed their use as research or study. An online search of a few minutes found no evidence that this poster was available new. The Online site ‘Carters Price Guide to Antiques’ records an auction sale of this poster i.e. as a second hand item.”

There’s been real uncertainty as to whether libraries can fulfil document supply requests for purposes other than research and study under section 200AB of the *Copyright Act*.

Section 200AB(6)(b) narrows the scope of the flexible dealing provision by providing that it does not apply to any use that “because of another provision of this Act...would not be an infringement of copyright assuming the conditions or requirement of that other use were met”. There is a view that section 200AB could be relied on for uses falling slightly outside the scope of existing library and archive exceptions, supported by a statement made in the Explanatory Memorandum accompanying its introduction:

⁵ In Canada, the broad interpretation of “research and study” would encompass a variety of activities possibly outside the scope of “research and study” in Australia. The narrow view of research taken in Australian cases to date prevents libraries from taking a broad approach to its interpretation

⁶ National Library of Australia, Submission to the Australian Law Reform Commission *Inquiry into Copyright and the Digital Economy*

“[section 200AB]...benefits users by providing a flexible exception to **supplement** the present range of specific exceptions and statutory licences.”⁷

It's very unclear whether section 200AB(6)(b) precludes reliance on the exception for any intended uses that fall just outside section 49 (like document supply for personal enjoyment, or criticism and review, parody and satire).⁸

The ADA and ALCC submit that libraries, who may be the only source of material requested by a user, should be permitted to supply documents in any circumstances where the user's purpose is recognised as legitimate under copyright law.

B. All electronic copies made under s49 must be destroyed as soon as practicable after communication to the user.⁹

The mandatory destruction of all electronic reproductions supplied under section 49 has resulted in inefficiencies for libraries fulfilling document supply requests, and increased costs for end users. Every time an item is requested, it must be retrieved by a staff member, scanned, OCR'd and prepared for communication to the user, and then destroyed. This has become a particular problem for university libraries fulfilling requests for a homogenous pool of students and staff pursuing the same course of study.

For the period 2011-2012, the Australian National University reports that of 10,693 bibliographic titles requested from offsite Hume repository alone, **3,077 titles were requested 2 or more times**. Of these, **2 titles were requested more than 100 times**.¹⁰ Further:

- 5 titles were requested between 50 - 99 times
- 23 titles were requested between 25 - 49 times
- 132 titles were requested between 10 - 24 times
- **477 titles were requested between 5 - 10 times.**¹¹

The mandatory destruction of electronic content supplied (and copyright issues associated with digitisation), contribute to inefficiencies and high costs in fulfilling document supply requests for students.

⁷ Explanatory Memorandum, Copyright Amendment Bill 2006, 10.

⁸ In the absence of case law testing this aspect of section 200AB, the ADA/ALCC have been reluctant to take the view that the flexible dealing provision can expand the scope of existing purpose-based exceptions (which are rigidly prescribed). The prescriptive nature of section 49 has encouraged risk aversion in library staff responding to requests falling outside its scope, even where it seems clearly in the public interest to supply.

⁹ *Copyright Act 1968* (Cth) s 49(7A(d)).

¹⁰ Although ANU notes that the 'title' refers to serial title, not individual article. Articles from 1 title requested more than 100 times.

¹¹ ANU have also noted the top five repeat requested serials: *Archaeology in Oceania* (138 times), *Linguistics* (121 times), *Australian Historical Studies* (78 times), *Medical Journal of Australia* (61), and *Nature* (60).

ANU has also raised issues caused by the mandatory destruction of all electronic copies in delivering services for students with a disability. ANU is permitted to scan whole books and other materials for individuals with a disability, but any items supplied must be re-scanned for the next student (ie each term, there may be a certain number of students requiring the same content in an alternative accessible format). ANU estimate the cost of scanning each book at over \$100, and notes there are often significant delays for students with disabilities to receive whole scanned works given the diversion of staff resources required to undertake the extensive scanning.¹² The mandatory destruction of scanned copies inhibits services for those with disabilities.

The Explanatory Memorandum to Copyright Amendment (Digital Agenda) Bill 1999 indicates that subsection 49(7) was intended to “*prevent libraries and archives from building up electronic collections of parts or the whole of articles or works as a result of communicating such works to users.*”¹³ This seems to have arisen out of concerns libraries would use section 49 to develop electronic collections of article excerpts rather than purchasing them in electronic format. This is not the case. Documents reproduced in electronic format under section 49 are to fulfil document supply requests - there has not been any expectation on the part of libraries that these copies would be made available for wider public access, or to reduce purchasing of digital content licences. Libraries have proven themselves to be eager and extensive purchasers of digital content licences. Additionally, the commercial availability of a work is already one of the considerations a library takes into account in deciding whether to supply a work. Internal storage of documents supplied in electronic format merely increases efficiency and effective provision of services for students with disabilities.

The ADA and ALCC understand there is concern among publishers that content supplied by libraries electronically might be made more widely available by the end user, through file sharing sites and other means. We would greatly benefit from understanding more of the circumstances in which this is occurring and the nature of works being uploaded or further distributed without authorisation. Examples would assist us exploring this issue further.

¹² Australian National University adds that occasionally, delays can be more than a month.

¹³ Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999, p 36.

Preservation Copying

Current preservation copying provisions only permit the making of one copy of a work for preservation purposes,¹⁴ or three copies if prescribed a “key cultural institution”.¹⁵

In their present form, the preservation copying provisions are completely out of step with established “best practice” preservation standards, and the requirements of digital preservation. Libraries and archives undertaking essential preservation activities often fall outside the scope of copying permitted under the Act.

The National Film & Sound Archive of Australia, internationally renowned for their preservation skill and expertise, has a body of preservation guidelines and fact sheets available on their website.¹⁶

In a 2011 presentation at the Society of Motion Picture & Television Engineers (SMPTE) annual conference, then-Development Manager Dominic Case expanded on preservation practices:

“It is important to distinguish between preservation and access. We aim always to have several copies of a film, which we will categorise – simply – as for:

- *preservation (not to be used for anything)*
- *duping (used to make new prints or transfers as required)*
- *access copies (distribution prints)*

This gives us the benefit of redundancy in case of disasters, and also allows for the wear and tear on access copies without affecting the original or preservation copies.”¹⁷

...

“There are a few common preservation principles to all archives. In summary they include:

- *Never destroy the original copy, even after you have duplicated it. The dupe may last longer, but the original is the best source for any future re-copying as long as it lasts.*
- *Preserve the reproduction equipment along with the content.*
- *Always preserve and present in the original medium and format. Of course, not everyone who wants newsreel footage of the Snowy River Project needs the ambience of a 1950s newsreel theatre, so modern access versions, from DVDs to clips on websites like our own Australianscreen Online, must be part of the mix.”*

¹⁴ Copyright Act 1968 (Cth) s 51A.

¹⁵ Ibid s 51B.

¹⁶ www.nfsa.gov.au.

¹⁷ Dominic Case, ‘Digitisation’s Last Hurdle, or a Bridge Too Far?’ (Speech delivered at SMPTE Conference, Sydney, 2011) <http://www.nfsa.gov.au/preservation/digitisations-last-hurdle-or-bridge-too-far/>.

And digital preservation itself cannot be achieved within the limits set under the Copyright Act. One Australian archive has commented:

“Under best practice procedures for archival standard digital preservation, the following would be a typical scenario for digital preservation:

- *A **Preservation Master file** (usually a Raw file but sometimes a TIFF) designed to faithfully reproduce the qualities of the original item*
- *An **Access Master file** (Usually a Tiff) – a file that is made available to staff to use and to researchers to view*
- *The **Access Master** will be copied (3rd iteration if the file) if the file is provided to an appropriate and approved third party*
- ***These files are all stored and also backed up on in house servers.** This creates at least 6 copies in total of the item.*
- *At regular intervals a major backup may save these files to tape or to an external backup server farm. If the backups were completed weekly, it is possible that there might exist at least 52 saves/versions and more likely 300 saves on various backup tapes held in a secure location.*
- *If the item is available online on an intranet, extra derivatives for display will also be created. These additional copies may be PDF, JPEG, PNG, HTML or other Web compliant files”*

We submit that to take account of rapidly evolving technologies and established “best practice” preservation standards, preservation copying provisions must be technology neutral and flexible, allowing as many copies to be made as is necessary to facilitate effective preservation.

The danger in drafting complex, conditional, purpose-based exceptions is most apparent in sections of the Copyright Act that simply do not make sense. Section 51A(1)(c), for example, permits the reproduction of a work by an institution for preservation purposes if ‘*that work has been lost or stolen - for the purposes of replacing the work*’. In layman’s terms, this means libraries and archives can only copy a work in their collection for replacement purposes once the work itself has been lost or stolen (which would be impossible to do). Such complex, nonsensical provisions can serve to increase public disrespect for copyright laws.

There is general consensus among library and archives that existing library and archive copying provisions put particular rights holder interests, whether proven or not, ahead of the public interest purpose behind the provisions. As one library member commented,

“The way library and archive exceptions are drafted, it’s like public interest activities are being treated with suspicion. The legitimate use is begrudgingly defined, as restrictively as possible, and loaded with terms and conditions that are difficult for staff to understand, let alone follow

efficiently! Exceptions should be drafted so as to facilitate a legitimate use of content, not impose unnecessary restrictions.”

Question 20. *Is s 200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?*

When section 200AB was first introduced, the ADA and ALCC responded with the creation of a comprehensive ‘User’s Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions’.¹⁸ Copyright in Cultural Institutions (CICI) together with the ADA published further guidelines for use of section 200AB for museums, archives and galleries.¹⁹ For the benefit of the education sector, the Copyright Advisory Group published Flexible Dealing information on their Smart Copying website.²⁰ The Australian Copyright Council also published an information sheet on section 200AB on their website.²¹ Every year, the ALCC conducts copyright training for library and archive staff with a dedicated session on use and interpretation of section 200AB. In 2012 the ADA and ALCC ran two additional stakeholder consultations on institutional use of, and concerns with, the operation of section 200AB.

While resources have been made available to guide libraries and archives through use of section 200AB since its introduction, the proper application of section 200AB in practice has proven incredibly problematic. Some institutions have made use of section 200AB to undertake targeted digitisation projects.²² Others have used section 200AB primarily for format shifting (and only where no TPMs are attached). The education sector has found their ability to rely on section 200AB limited by the broad nature of the Part VA and VB statutory licences.

In the ADA and ALCC’s view, section 200AB has not lived up to its express legislative intention of ‘bringing the education, library and cultural sectors into line with their counterparts in the US’ and should be repealed and replaced with something broader like a fair use-style exception, or, as has been proposed by some ADA and ALCC members, a flexible fair dealing right for cultural institutions.

¹⁸ Australian Libraries Copyright Committee and Australian Digital Alliance, *A User’s Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions Section 200AB of the Copyright Act 1968 (Cth)* (2008) <http://digital.org.au/our-work/publication/section-200ab-flexible-dealing-handbook-online>.

¹⁹ Originally published on National Museum of Australia website [link now broken].

²⁰ National Copyright Unit on behalf of the Copyright Advisory Groups (Schools and TAFEs), *Flexible Dealing*, Smartcopying <http://www.smartcopying.edu.au/scw/go/pid/533>.

²¹ Australian Copyright Council, *The ‘Special Case’ or ‘Flexible Dealing’ Exception: section 200AB’ information sheet* (Information Sheet G115 v02, February 2012) http://www.copyright.org.au/admin/cms-acc1/images/49561653_34f39b84a7e662.pdf.

²² The Australian War Memorial is one institution who have found great benefit from section 200AB. See, eg, their application of the provision to publish notebooks and diaries of WW1 correspondent C.E.W Bean: Robyn van Dyk, ‘Digital preservation: the problems and issues involved in publishing private records online: the web publishing of the notebooks and diaries of C.E.W. Bean’ (Paper presented at VALA2010, Melbourne, 10 February 2010) http://www.vala.org.au/vala2010/papers2010/VALA2010_77_van_Dyk_Final.pdf.

Consultations with stakeholders in 2012 indicate that a broad number of educational institutions, libraries and cultural institutions view section 200AB as a failure.²³ In anticipation of the Australian Law Reform Commission's Copyright Inquiry, the ADA and ALCC commissioned a report from Policy Australia examining the reasons underlying the perceived failure of section 200AB, and querying whether the Australian education, library and cultural sectors would be better off under fair use.²⁴ Policy Australia's report has been attached to this submission as **Appendix 1**.

Policy Australia considered there to be four main reasons section 200AB has not benefited Australian educational institutions, libraries and cultural institutions as expected:

- 1 Particular drafting choices made in the incorporation of the three step test into section 200AB have created a high degree of uncertainty as to its practical application and scope;
- 2 Section 200AB(6)(b) which provides that the exception does not apply to any use that "because of another provision of this Act...would not be an infringement of copyright assuming the conditions or requirement of that other use were met", appears to narrow the scope of the exception to a significant extent;
- 3 The absence of an exception permitting institutions to circumvent access control technological protection measures (TPMs) for the purposes of section 200AB, combined with the increasing use of TPMs on audio-visual works, has resulted in an ever-growing pool of content that effectively falls outside of the scope of the exception; and
- 4 The uncertainty caused by Australia's particular implementation of the three step test in section 200AB, combined with a general culture of risk aversion, has led institutions to refrain from using the exception at all for fear of facing a legal challenge.²⁵

Policy Australia noted from discussions with stakeholders the uncertainty felt by institutions attempting to interpret the three step test. A number of stakeholders commented that the language of the three step test was not as 'familiar or instinctive' as the language of 'fairness', which Australians are already used to assessing for the purposes of research and study, or criticism and review.²⁶ Indeed, some

²³ Attendees at ADA/ALCC consultations included: National Library of Australia, Powerhouse Museum, State Library of Western Australia, Australian Library & Information Association, National Archives of Australia, Art Gallery of NSW, National Gallery of Australia, National Museum of Australia, State Library of Victoria, Museums Australia, Museum of Contemporary Art, Swinburne University of Technology, Australian National University, Universities Australia, State Records Authority NSW, Public Libraries NSW and Murdoch University WA. The Australian War Memorial noted their use of section 200AB, and agreed that it could be repealed but *only* if it was to be replaced with something like fair use. Some members indicated a desire for "certainty" in the law, but opposed existing purpose-based exceptions which, while arguably "certain", they found very restrictive. The majority, on clarification, confirmed their preference for an open-ended exception easier to understand than section 200AB.

²⁴ 'Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?', by Policy Australia October 2012.

²⁵ Ibid 2-3.

²⁶ Ibid.

institutions the ADA and ALCC have communicated with indicate they already take a “fairness” approach to providing access to their collections in the digital environment. Some institutions describe the provision of access to items in their collection for public interest purposes as “fair use”.

Policy Australia undertook a detailed analysis of the application of the three step test drafted into domestic law (**Appendix 1**). Noting widely divergent views on the proper interpretation of the three step test at international treaty level,²⁷ and the problematic application of “special case”, Policy Australia highlighted the difficulty for trained copyright officers and legal advisers to confidently advise on the scope and application of section 200AB, let alone library staff without legal training.

The following scenario was provided to the ADA and ALCC by a regional library, and demonstrates the degree of uncertainty surrounding the application of section 200AB.

The library owns an original 120 year old diary handwritten by a notable early settler to a region, during his time there from November 1891 until December 1892. The author of the diary died in 1918. His son offered the diary for purchase in a letter to the library in January 1983. The library subsequently purchased the diary from the author’s son, although no longer has any documentary evidence of that payment. The son, from whom the diary was purchased, died in 1994.

The Library has a copy of a letter written by the son offering the diary for sale. He states in the letter (in which he enclosed some extracts from the diary) –

“Whilst I am delighted to make this a personal gift to you [meaning the extracts] I am open to a financial offer from any local paper for the remainder of the diary”.²⁸

Currently, because of its fragile state and its value, nobody has access to the diary and the library cannot locate any rights holders.

The library was uncertain as to whether they could lawfully digitise the diary and make it available to the general public. They considered the diary to be of interest to local history researchers in the region, family history researchers whose relatives or ancestors were mentioned in the diary, and family researchers in the UK whose relatives settled in the region during the early 1890s.

The ADA and ALCC maintain that arguably, section 200AB does facilitate digitization and online access in this instance, but note certain issues of interpretation. If a rights holder was to come forward and allege infringement of copyright, how would the son’s once-interest in a financial offer from a local paper (with view to publication) affect the scope of section 200AB? Does the library’s provision of free online access

²⁷ Ibid 4.

²⁸ The ADA/ALCC debated as to whether the offering of the diary for sale *to the library* satisfied ‘publication’ as per s29(1) *Copyright Act 1968* (Cth) - ‘offering or exposing work for sale to the public’. Whether considered unpublished or published, the work is still in copyright and an orphan work.

‘unreasonably prejudice the legitimate interests of the copyright owner’? And does unlimited, permanent online access to the diary satisfy the ‘special case’ requirement? The Australian Copyright Council considers section 200AB more likely to apply if:

- *the number of people the use is for is small;*
- *the time-frame of the use is short;*
- *the proportion of the work you are using is small;*
- *the material you are using has been published;*²⁹

None of these comfortably fit the provision of web access to a digitised 120 year old diary. It is this level of uncertainty that makes section 200AB an uneasy fit for institutions undertaking activities in the digital environment, and which encourage risk aversion. As Policy Australia noted from their consultation with libraries and archives on section 200AB,

“It became clear to us that the reluctance to use s 200AB could not be explained merely by a general cultural aversion to risk in educational institutions, libraries and cultural institutions. It is, of course, true that these institutions do tend to take a more risk averse approach to copyright than many in the private sector. But the story is more complicated than that. The feedback from stakeholders suggests that the particular complexities of s 200AB mean that it is not amenable to ordinary risk management assessment in institutions of this kind.”³⁰

Policy Australia considered whether, given their generally risk averse nature, educational institutions, libraries and archives would be more likely to make use of a different open-ended exception:

“It does appear from the evidence provided in consultations that despite their generally risk averse nature, educational institutions, libraries and cultural bodies would be more likely to use an exception that required them to engage in a fairness risk assessment. This, in our view, is significant. There would be little point seeking to replace s 200AB with a provision such as fair use if the institutions intended to benefit from such an exception were no more likely to use it than they have been to use s 200AB. Our consultations suggest that this would not be the case.”³¹

Policy Australia concluded that Australian cultural and educational institutions would fare better under a provision incorporating concepts of “fairness”.

²⁹ Australian Copyright Council, above n 21, 2.

³⁰ Policy Australia Report, Appendix 1, page 10

³¹ Policy Australia report, Appendix 1, page 10

Question 21. *Should the Copyright Act 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?*

The Copyright Act should be amended to allow greater digitisation and communication of works by public and cultural institutions.

As Australia moves towards becoming a leading digital economy by 2020, the Government has increased calls for Australian libraries, museums, archives and galleries to make more of their collections available online.

“Making content and the national collection available to the nation – this is the direction all of our cultural institutions must head in. This is why continued investment in digitisation is important not just here, but in other institutions.”³²

“More than half of the Australian population in one way or another is a member of a public library. There is an enormous resource there and when you couple it with the opportunities of the National Broadband Network, the ability to disseminate this information in different ways, this is a must resource.”³³

In this year’s national Budget, despite the funding freeze across multiple national portfolios in the Government’s effort to return to surplus, \$39.3 million funding was found for the national cultural institutions, *“to open up their collections for community, education and research uses, including providing curriculum resources for the national school curriculum”*.³⁴

An additional \$2.4 million was also found in the national budget for mobile robots in Australia’s cultural institutions: *“Using the high bandwidth capability of the NBN, visitors will be able to undertake virtual tours of these institutions via mobile robots.”³⁵*

And Australia’s much-heralded National Cultural Policy, the first comprehensive cultural policy in 20 years is explicitly linked to the opportunities provided by the National Broadband Network.

“The National Broadband Network, with its high-speed broadband, will enable new opportunities for developing and delivering Australian content and applications reflecting our diverse culture

³² Minister for Regional Australia, Regional Development and Local Government, Minister for the Arts, Simon Crean, ‘Launch of the 2012 National Year of Reading’, (Media Release, 14 February 2012).

³³ Ibid.

³⁴ Minister for Regional Australia, Regional Development and Local Government, Minister for the Arts, Simon Crean, ‘Government building the future for arts and creativity’ (Media Release, 8 May 2012) http://www.minister.regional.gov.au/sc/releases/2012/may/sc049_2012.aspx.

³⁵ Commonwealth of Australia, *Budget Paper No.2 Budget Measures 2012-2013*, http://www.budget.gov.au/2012-13/content/bp2/html/bp2_expense-04.htm.

*and interests. It will also give business and community organisations in regional areas a historic opportunity to connect with national and international audiences and markets.*³⁶

To achieve this, Australian copyright laws must be amended in a number of ways:

1. Introduction of a copyright term duration for unpublished works

Under Australian copyright law, unpublished works remain in copyright in perpetuity.³⁷ This exacerbates issues of long-term access to works in Australian cultural collections. The National Library of Australia alone estimates it has at least 2,041,720 unpublished items in its collection. The introduction of a copyright term duration for unpublished works would free up the digitisation of items of historic cultural significance in Australian collections.

2. Introduction of a fair use-style exception, or as a second best alternative, a fair dealing provision for libraries/galleries/archives (and repeal of section 200AB)

3. Mirrored exceptions permitting the circumvention of TPMs where an exception for digitisation or fair use or proposed legislative alternative exists³⁸

Question 22. *What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?*

Many institutions the ADA and ALCC have spoken to have protocols in place for the digitisation of indigenous works, and have stated they would seek community permission before undertaking digitisation even if a copyright exception applies. The ADA and ALCC believe that protocols are useful here, where copyright legislation can't comprehensively account for the complexities of community ownership and other cultural sensitivities which may be involved in use of indigenous works.

In addition, the ADA and ALCC consider that a "fairness" analysis or fair use-style exception would require a court to take into account issues associated with indigenous works. It would be hard to characterise offensive, inappropriate or non-consensual use of indigenous works as 'fair' given the known communal significance of such works.

³⁶ Department of Prime Minister & Cabinet, Office of the Arts, *National Cultural Policy Discussion Paper* (2011) 3 <http://culture.arts.gov.au/sites/default/files/discussion-paper/national-cultural-policy-discussion-paper.pdf>.

³⁷ Until 'supplied (whether by sale or otherwise) to the public' (*Copyright Act 1968* (Cth) s 29(1)).

³⁸ Where online access to permitted under copyright exceptions and limitations. Once a work is out of copyright, public institutions should be able to circumvent TPMs for any purpose, including online access.

8. Orphan Works

Question 23. *How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?*

Orphan works may only be used in circumstances where a relevant exception or limitation applies.¹ In the absence of an exception, and without an identifiable owner to seek permission from, use of an orphan work is frustrated indefinitely.

Elements of copyright protection have exacerbated the orphan works problem. Longer copyright term durations have increased the likelihood that, over time, information regarding ownership of a work will be lost or become outdated, particularly on death of the author. The absence of term durations for unpublished works has further added to the pool of orphan works in cultural collections.

Australian libraries and archives also preserve and safeguard a diverse variety of orphan works which were never intended to be commercially exploited by the copyright holder, as well as works which donors or depositors of material were not aware retained copyright protection at all. Library and archives have reported a number of instances where copyright works have been donated or deposited by families and rights holders with full intent that these works be made available to the general public by the library - without giving necessary copyright permissions.

Australian libraries and archives resolutely maintain that an extended licensing scheme is an attempt to paint all orphan works 'with the same brush': as works once exploited commercially. The notions of "commerciality", and "competitive advantage" underlie proposals put forward by the Brennan & Fraser white paper referred to be the ALRC in their Issues Paper. Libraries and archives are concerned that the use of orphan works for public interest purposes is being repositioned as having some commercial intent. Some members have also commented that some donors and depositors of in-copyright works do not see use of their works by the institution as commercial in nature, and do not charge.

One library commented:

"We hold a significant collection of photographs by a well-known Australian artist. While he does usually charge for re-use of his images, he has always granted us permission to use his images at no cost, as a public institution."

The library noted that they did always seek this particular rights holder's permission before using the works, which were still in copyright. However, they felt that a more appropriate solution than an upfront licence where the copyright owner could not be found, would be appropriate remedies for rights

¹ Attachment A, Attorney-General's Department 'Orphan Works: Internal Review' elaborates on exceptions in the Copyright Act that may apply to orphan works.

holders who did come forward and asked for the removal of their works (and possibly, if the institution would otherwise have paid for the use, compensation in kind).² The library commented that,

“an extended licensing scheme assumes in all circumstances rights holders would charge us for a use, which in our experience has not always been the case. Some rights holders don’t even expect to be asked permission by the library to use works they’ve donated to the collection. This has arisen in institutions where works were donated or deposited without completed copyright permissions forms.”

Any orphan works solution is necessarily complicated by the extraordinary variety of works ‘orphaned’ in cultural collections: spanning published books, commercial photographs, journals, newspapers, television shows, films, sound recordings, plays and music compositions, as well as email messages, home videos, private letters, community pamphlets, postcards, government publications and other non-commercial ephemera. Some of these may be accurately described as works with ‘missing owners’ (that is, an owner who once exploited the work commercially). Others are more accurately ‘abandoned’.

Without a dedicated exception facilitating access to, use, and dissemination of orphan works, and cognisant of issues of copyright protection that have exacerbated the orphan works problem, how are institutions currently responding to the problem?

In preparation for this review, National and State Libraries Australasia conducted a survey of orphan works in their members’ collections. Survey results indicate library collections could comprise between 10% - 70% of unpublished orphan works, dependent on the type of works each institution collects.³ Photographs were recorded as being the highest proportion of orphan works on average in library collections (38%), alongside pictures, manuscripts, maps, oral histories and other AV material comprising the bulk of unpublished orphan works. The survey did not include published orphan works, musical works, or other literary ephemera.

Every respondent to the survey indicated that the copyright status of collection materials influenced their decision to undertake digitisation. Currently, section 200AB is the primary exception on which cultural institutions rely to undertake digitisation of orphan works.

² See also Andrew Kenyon and Robin Wright, ‘Whose Conflict? Copyright, Creators and Cultural Institutions’ (2010) 33(2) *University of New South Wales Law Journal* 286; Kenyon and Wright’s research that shows that many current creators do not object to certain uses of low resolution copies of their work for promotional uses, and demonstrates that the uses of their works by cultural institutions that creators think reasonable can often be broad and varied.

³ National and State Libraries Australasia, *Survey of Orphan Works* (Unpublished, 2012) Page 12. The ADA and ALCC can supply the raw data to the ALRC if it proves useful.

Question 24. *Should the Copyright Act 1968 (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?*

The ADA and ALCC oppose the introduction of a collective or other licensing scheme for use of orphan works.

The ADA and ALCC believe a centrally-granted licence, or extended collective licensing scheme, will have a chilling effect on use of orphan works by public institutions and individuals.

Between 1990 and 2009, the Canadian Copyright Board opened files for 441 applications,⁴ involving a total 12,640 works. To put this figure in perspective, the National Library of Australia has estimated it has approximately 2 million unpublished works currently in its collection, of which it estimates at least 50% are orphans (the NLA has not provided an estimate to the ADA/ALCC of the orphaned *published* works in the National Collection). Applications for 12,640 works over 19 years is equivalent to roughly 1% of the National Library's unpublished orphan works, let alone published works or orphan works in other institutions' collections. It's worth noting too that of the 441 applications, the Canadian Copyright Board website indicates 264 licences have been granted.⁵ Processing times for applications varied between 2 weeks to more than one year, with approximately half of all applications taking less than eight weeks to decide.⁶ The Canadian model has been criticised as imposing undue administrative burdens, leading to lengthy delays and providing little public benefit.⁷ The payment of royalties to a collecting society if not collected by the rights holder has also been heavily criticized abroad.⁸

Similarly, Australian cultural institutions have expressed strong opposition to any system involving upfront royalties for use of orphan works. ADA and ALCC members with whom we have raised the possibility of an extended collective licensing scheme have been similarly dismayed. Given that many orphan works are not commercially available, or in the case of unpublished material generally, not produced with any commercial intent in mind, attempts to broadly commercialise orphan works through a licensing scheme remains a problematic concept. The British Library has gone so far as to say that creating markets where they did not exist, for bonafide reasons is *distorting of culture*.⁹

The 'non-commercial use exception for natural persons using unpublished subject matter derived from lawfully obtained material' and broader exception for use of published orphan works proposed by

⁴ Jeremy Beer and Mario Bouchard, *Canada's 'Orphan Works Regime: Unlocatable Owners and the Copyright Board* (1 December 2009) 31 <http://www.cb-cda.gc.ca/about-apropos/2010-11-19-newstudy.pdf>.

⁵ *Decisions – Unlocatable Copyright Owners* Copyright Board of Canada <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences-e.html> accessed 31 October 2012.

⁶ Beer and Bouchard, above n 3, 34.

⁷ Registrar of Copyrights, 'Report on Orphan Works' (United States Copyright Office 2006) 83 www.copyright.gov/orphan/orphan-report-full.pdf.

⁸ *Ibid*, 114.

⁹ British Library, Response to UK Government Consultation on Copyright <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1423>

Professor David Brennan and Professor Michael Fraser, highlighted by the ALRC, purport to balance user accountability, predictive certainty for users and fairness to rights holders.¹⁰ While Brennan and Fraser envisage administration of any orphan works exception by a declared collecting society, the proposed reforms do not expand on collecting society accountability nor their obligations to missing rights holders. It's also unclear where the proposed reforms sit alongside exceptions which do encompass use of orphan works without registration, under section 200AB, fair dealing exceptions and library and archive copying provisions.

One cultural institution, responding to an ADA/ALCC request for feedback on possible orphan works exceptions administered by collecting societies, described it as:

“collecting societies trying to insert themselves as the gatekeepers of access to orphan works”

...

“it wouldn't be about achieving something in the public's interest, access to culturally or historically important works. It wouldn't even be in the rights holder's interests, because they don't know who they are! It would all be about what's in the collecting society's interests.”

“There's an inherent lack of logic here - collecting money, or giving a licence for use 'in case' a rights holder can be found. Why not introduce remedies for rights holders who do come forward and identify themselves as owners of the work? That seems in the interests of both rights holders and public institutions.”

Other institutions warned of the chilling effect such exceptions would have on digitisation projects, as well as on individuals seeking to use orphan works for non-commercial purposes. In an environment characterised by constrained operational budgets, limited staff resources and wider reductions of government funding for cultural programs, Australian libraries and archives are unwilling, and some would say unable, to facilitate access to orphan works through an collective licensing scheme.

The ADA and ALCC support an exception to facilitate use of orphan works.

The ADA and ALCC believe an open-ended exception incorporating an analysis of “fairness”, strikes an appropriate balance between the interests of rights holders, the diversity of orphan works in cultural collections and wider public interest in access to and engagement with information and culture.

The outcome of recent *HathiTrust* litigation indicates some level of support for digitisation projects involving orphan works by public institutions in reliance on fair use in the United States. Whether digitisation of orphan works is considered “fair use” will be dependent on the nature of works and circumstances surrounding each use. This was noted by the US Copyright Office in their review of

¹⁰ David Brennan and Michael Fraser, *The Use of Subject Matter with Missing Owners - Australian Copyright Policy Options* (2012) 9-12.

orphan works issues and possible solutions in 2005.¹¹ As such, while the ADA and ALCC support the introduction of a flexible, open-ended exception in any event to provide some scope for use of orphan works, a specific exception may offer a more focused solution. We look forward to discussing this further at the Discussion Paper stage of this Inquiry.

The ADA and ALCC see the US Copyright Office's 2005 recommendation for legislative amendment as a positive starting point for orphan works discussions. That recommendation had two main components:

- the threshold requirements of a reasonably diligent search for the copyright owner and attribution to the author and copyright owner; and
- the limitation of remedies that would be available if the user proves that he conducted a reasonably diligent search.¹²

Nonetheless, library and archive members of the ALCC and ADA continue to express concern regarding a "diligent" search standard.

The ADA and ALCC are wary of adopting overly restrictive legislative definition of the level of search required before a work may be declared 'orphan'.

The State Library of Victoria has provided examples of the length of time and associated costs diligent search for each individual rights holder in a project to their institution.

The Riley Collection & posters digitization project

The State Library of Victoria's Riley & Ephemera Collection showcases the radical, political and social life of Victoria. The collection includes several thousand posters which publicise political candidates, trade unions, social justice campaigns, and student, peace, feminist and environmental causes. The majority of the posters are in copyright, and date from the 1980s and 1990s.

Copyright investigation needs to take place, to locate potential copyright holders, and to determine which sections of the Copyright Act will allow us to provide access to the digitized items. In the case of in-copyright items, we attempt to make contact with copyright owners in the hope that they will provide permission to display digitized items, or will assign copyright to the State Library of Victoria.

The State Library of Victoria outlined their progress clearing copyright for 120 posters. Of the 120 posters investigated, the SLV were refused permission to digitize twice.¹³ Each poster took roughly two hours to investigate, and staff encountered a number of issues locating rights holders, delayed response times from

¹¹ Registrar of Copyrights, above n 7, 4.

¹² Ibid, 8.

¹³ In the first instance, a former member of (now disbanded) committee who produced the poster in question was contacted, and was not comfortable giving permission on behalf of the group and was not sure which individual had produced the poster in question (the group disbanded in acrimonious circumstances. In the second instance, the event to which the poster referred had a new administering body, who did not know who owned copyright at the time the poster was produced.

presumed rights holders and difficulties making permissions official (copyright holders responded positively to initial contact, but then failed to return signed copies of copyright permissions forms).

The State Library of Victoria elaborated further on orphan works searches involved in digitisation of the Victorian Monographs Collection:

“Each monograph (of 200 on an initial list) took between 5 minutes and 1 hour of work to complete (up to 1 hour as some compilation volumes have up to 8 authors, plus illustrators). At a rough average I would say 20 minutes per volume. That is 200 volumes x 20 minutes, or 66.67 hours spent on copyright clearances across 5 weeks, at \$33.60 per hour, a total \$2240.11.”¹⁴

The ADA and ALCC submit that a flexible, “proportionate” standard of search encompasses the diverse nature of works, their age and any commercial value, in Australian cultural collections. A diligent search for each individual work would not facilitate large-scale digitisation projects. The US Copyright Office has recently announced its intention to revisit orphan works in the context of mass digitisation,¹⁵ and the ADA and ALCC look forward to seeing these discussions progress.

¹⁴ Estimate reached using Australian History and Literature staff member (VPS4 level).

¹⁵ Notice of Inquiry: Orphan Works and Mass Digitisation, US Copyright Office <http://www.copyright.gov/fedreg/2012/77fr64555.pdf>.

9. Data and text mining

Question 25. *Are uses of data and text mining tools being impeded by the Copyright Act 1968 (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?*

The Issues Paper, and the Hargreaves Review into intellectual property in the United Kingdom, recognise and highlight the use of data and text mining tools for academic and scientific research.¹ Libraries, archives, and museums are also highly valuable repositories of data, and a number of ADA and ALCC members have begun to explore the ways in which data and text mining tools can begin to uncover new meanings from cultural collections (elaborated on under Question 14 in this submission).

Recent fair use jurisprudence in the United States has viewed the use of data and text mining tools for indexing, search, visualisation and other content enhancing purposes as a subset of transformative use.² This classification of the purposes of text and data mining applications was adopted in a recent case against the HathiTrust Digital Library in reference to its digitisation program.³

Below are some examples of data and text mining activities undertaken by cultural institutions (names have been removed), which have been impeded by existing copyright restrictions:

A cultural institution supported university students using the institution's Application Programming Interface (API) to view the institution's content (in copyright and out) in new ways, through data and text mining techniques (forms of transformative use). While the students' work with in copyright content in the collection was arguably protected by fair dealing for the purposes of research and study, the students were unable to make their work publicly available (communicate it to the public) nor develop it further through commercial partnerships.

An institution released their API under a creative commons licence. The copyright in the text of the API belonged to the institution, but institution images were in copyright. While the institution believed they were able may to offer thumbnail images to some users under section 200AB, developers and other innovators often require high resolution images to properly explore the collection for transformative purposes. The

¹ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 47.

² Tushnet and others have noted that the US courts have perhaps over-stretched the definition of 'transformative' in fair use cases. When this has happened, however, the factors that led the court to consider the use as 'transformative' were allowable considerations leading to a finding of fair use, such as the use being 'orthogonal' or for a different purpose than the original, the copying being somehow 'productive', or perhaps even 'non-expressive', that is not harming the ability for the author or copyright owner to obtain remuneration for the expressive communication of her works. The 'orthogonal' or 'non-expressive' copying that takes place in the operation of internet searches, or in the HathiTrust libraries are the types of copying that occur using data and text mining tools. See Rebecca Tushnet 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It' (2004) 114 *Yale Law Journal* 535, 537; Matthew Sag, 'Predicting Fair Use' (2012) 73:1 *Ohio State Law Journal* 76 and 'Copyright and Copy-Reliant Technology' (2009) 103 *Northwestern University Law Review* 1; Pamela Samuelson 'Unbundling Fair Use' (2009) 77:5 *Fordham Law Review* 2537.

³ *Authors Guild, Inc. et al. v. HathiTrust et al.* (United States District Court, Southern District of New York, 11 CV 6351 (HB) 10 October 2012) <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2011cv06351/384619/156/0.pdf?ts=1349944247>.

institution recognises it is only a matter of time before tools to do more innovative things with material in the collection using APIs will be available to all kinds of users. A wide range of users will be aggregating and breaking up collections in ways that institutions are unable to do themselves. The current fair dealing exceptions are not equipped to facilitate new transformative uses of Australian cultural institutions in this way.

A number of developers working with cultural collections confine their efforts to low risk projects involving enhancements and reuse of image collections (for example, NLA's work and Trove). One reason for this relates to the way that data sets are currently held, in that all images in a set are contained as a 'chunk' for the purposes of visualisation or other work with the underlying data set. Metadata on images does not differentiate between what is in copyright and what is not. As a result – any high risk image sets tend to be avoided by these developers, even though visualisations and other transformative uses that could be made with the data sets by and large add value to the work rather than interfere with the original market for it. High risk data sets include digitised images of gallery collections, commercial art works and new works, and there is a currently, therefore, huge amount of untapped value in these collections.

Data and text mining tools are of immense potential social and cultural value to the Australian community. In addition to data and text mining applications described under the 'Transformative Use' section of this paper, the ADA and ALCC wish to highlight one more example, from digital historian Dr Tim Sherratt innovating with NLA Trove digitised newspapers.⁴

Dr Sherratt developed tools to mine the Trove digitised newspaper database and begin to extract meaning and new information from the vast volume of text and informative contained in the more than 76 million articles available to search on the database.⁵

One of these tools is 'QueryPic'⁶, which Dr Sherratt developed for his own studies but has made available to the wider public interested in exploring the Trove database. The program enables a user to enter a 'query', usually a keyword or phrase, which will produce a visualisation of the results of the query over time in a line graph.⁷ The graph assists historians to map out new questions for them explore, like the rise in use of a particular phrase over time. One of the early examples was to plot when the 'Great War' began to be referred to as the 'First World War'. As Dr Sherratt notes, "At some point we realised that the Great War was not the final act in a centuries-long drama of European jealousy and jostling, but the first in a series of global conflicts. Can newspapers tell us when?"⁸

⁴ Tim Sherratt, 'Mining the treasures of Trove: new approaches and new tools' (Paper presented at VALA2012, Melbourne, 7 February 2012) <http://www.vala.org.au/vala2012-proceedings/vala2012-session-2-sherratt>; *Trove Digitised Newspapers and More*, Trove <http://trove.nla.gov.au/newspaper>; Tim Sherratt, *QueryPic: Exploring digitised newspapers from Australia & New Zealand*, Wraggelabs <http://wraggelabs.com/shed/querypic/>; Tim Sherratt, *Trove Newspaper Graphs*, Wraggelabs <http://wraggelabs.com/shed/trove/graphs/>.

⁵ *About Digitised Newspapers and more*, Trove <http://trove.nla.gov.au/ndp/del/about>.

⁶ Sherratt, *QueryPic*, above n 4.

⁷ Tim Sherratt, *QueryPic*, Discontents (1 January 2012) <http://discontents.com.au/shed/hacks/querypic>.

⁸ Sherratt, 'Mining the treasures of Trove' above n 4, 9.

The tools Dr Sherratt developed for interrogating the vast amount of information contained in Trove begin to demonstrate the understanding and value that can be gained from these innovative ways of exploring our cultural history. It should be noted that copyright restrictions limit the effectiveness of Querypic, with National Library unable to digitise newspapers later than 1955. While most major newspapers published in Australia are collected by the Library, it is not possible to explore our more recent history in the same way.⁹

Research conducted using text and data mining tools is often unable to be published under existing copyright exceptions, where commenced in reliance on fair dealing for research and study. The underlying value of these tools, and results mapped and presented in new ways, are locked away.

As one developer we spoke to described:

“people who best benefit at the moment (from data and text analytics) are corporate interests who want to keep data private. What we really should be aiming for is to maintain the public value of these collections.”

While we have been unable to find figures to quantify benefits of text and data mining to the Australian economy, we draw your attention to figures cited by the British Library in their submission to the UK Government Review of Intellectual Property, articulating the efficiencies to be found from text mining:

“It is estimated that for every pound invested by the government in R&D, in the form of funding of the research councils, this returns somewhere between £9 and £17 to the British economy. That is to say £3.5 billion translates into between £30 - £60 billion worth of GDP. Given the size of the education and R&D markets, it is therefore probably reasonable to assume that even small and incremental improvements upstream to the sector’s ability to reuse knowledge in the form of copyright works, will downstream lead to a significant and meaningful growth in GDP. In an internationally competitive environment where for example the US is seeking to double public funding in R&D over the next 10 years, any gains in efficiencies that the this country can make in the sphere of research are gains that will translate into GDP growth.”¹⁰

Question 26. *Should the Copyright Act 1968 (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?*

The ADA and ALCC believe data and text mining, as a subset of transformative use, may be best supported by a flexible, open-ended exception.

⁹ I.e. to trace the evolution of the term ‘piracy’ to describe unauthorised sharing of content rather than plunder and pillage on the high seas.

¹⁰ British Library, *Response to HM Government Consultation on Copyright*. (March 2012) 3 <http://pressandpolicy.bl.uk/image/library/downloadMedia.ashx?MediaDetailsID=1423> (internal citations removed).

As Matthew Sag notes, there is a strong line of case law developing in the US allowing whole or substantial parts of works to be copied where the purpose of the copying is significantly different from the purpose of the original work.¹¹ He notes that,

[T]here is no linear relationship between the amount of a work copied and its propensity to fair use. All other things being equal, the more a defendant copies, the more likely she is to interfere with the copyright owner's right to market her works to the public. Thus, Napster users who trade complete copies of copyrighted music over the Internet are treated very differently from collage artists who copy only parts of works and add their own significant creative input. But all other things are rarely equal, and courts have repeatedly found that even total copying of expressive works can be fair use in the right circumstances. Courts have held that total copying is permissible in personal use cases, such as those testing the legality of the video cassette recorder and the mp3 player. In cases relating to photography and other visual works, courts have occasionally allowed defendants to reproduce entire images where it was unlikely that any market harm would result and the defendant's purpose required complete reproduction.¹²

Judge Baer's analysis of this 'third fair use factor' in his decision on the HathiTrust index and search activities also provides a useful run-down of US fair use precedent applicable to this area of use:

"The third fair-use factor considers whether the amount of copying was reasonable in relation to the purpose. *Sony*, 464 U.S. at 449–50. "[T]he extent of permissible copying varies with the purpose and character of the use." *Campbell*, 510 U.S. at 586–87. The question is whether "no more was taken than necessary." *Id.* at 587. Sometimes it is necessary to copy entire works. *Bill Graham*, 448 F.3d at 613; *Arriba Soft*, 336 F.3d at 821. "Intermediate" copies may not be infringing when that copying is necessary for fair use. See *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 206 (4th Cir. 1998) (finding that it was fair use to copy fragile manuscript so that the author of a critical review could study it without inflicting damage). Here, entire copies were necessary to fulfil Defendants' purposes of facilitation of searches and access for print-disabled individuals. See *Arriba Soft*, 336 F.3d at 821 ("If Arriba only copied part of the image, it would be difficult to identify it, thereby reducing the usefulness of the visual search engine."). Plaintiffs argue that Defendants did not need to retain copies to facilitate searches; however, the maintenance of an electronic copy was necessary to provide access for print-disabled individuals."¹³

The ADA and ALCC consider that the *HathiTrust* treatment of text and data mining indicates that an open-ended, flexible exception may be best suited to facilitate both 'transformative' uses of copyright

¹¹ Matthew Sag, 'Copyright and Copy-Reliant Technology' (2009) 103 *Northwestern University Law Review* 1, 32-44.

¹² *Ibid.*, 40 (internal citations removed).

¹³ *Authors Guild, Inc. et al. v. HathiTrust et al.* (United States District Court, Southern District of New York, 11 CV 6351 (HB) 10 October 2012) slip op 18-19 http://docs.justia.com/cases/federal/district-courts/new-york/nys_dce/1:2011cv06351/384619/156/0.pdf?ts=1349944247.

material, and other uses which may have be characterised as transformative, such as text and data mining, but may be better seen as ‘non-expressive’ or ‘orthogonal’ uses. Fair use in the US provides the flexibility for new technologies to develop which may straddle the two definitions, and similarly providing courts with the tools to deem when such uses will unreasonably harm the copyright owner.

We are cautiously supportive of a purpose-based exception in the alternative, such as that proposed by the Hargreaves review, which advocates for an “exception allowing uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work... to encompass the uses of copyright works where copying is really only carried out as part of the way the technology works.”¹⁴ The Irish Copyright Review Committee recommended a similar exception for text and data mining in their Consultation paper.¹⁵

The ADA and ALCC note that the Irish proposal includes language allowing circumvention of TPMs to perform acts covered by the exception. Circumvention of access control TPMs is outside the scope of this review, however, the ADA and ALCC strongly recommends the inclusion of similar language in any proposed new exception facilitating text and data mining. Similarly, such an exception would need to be protected from override by contract.

¹⁴ Hargreaves, above n 1, 47.

¹⁵ Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012) 109.

10. Educational Copying and function of Statutory Licences in the digital environment

The ADA and ALCC endorse the submissions of the Copyright Advisory Group to the Standing Council on School Education and Early Childhood (CAG) and Universities Australia to this Inquiry.¹

The ADA and ALCC support our educational members in recommending repeal of the statutory licences in Part VA and Part VB of the Act, and in their place recommend that educational uses of copyright material be covered by a broad, flexible exception where the use is fair and will not unjustifiably harm the creator or copyright owner.

Where educational uses of material fall above this threshold, the ADA and ALCC support the CAG and Universities Australia in suggesting that voluntary licences could operate for uses of works and broadcasts that are not covered by any exception, in the same way as educational institutions currently negotiate with music collecting societies for educational use of sound recordings and musical works.

The ADA and ALCC submit that the following principles and issues affecting operation of the statutory licences in the digital environment should shape the ALRC's response to this aspect of their Inquiry:

Technology Specificity

A number of current educational copying exceptions are technology specific and/or refer to specific technologies that are already outdated or are rapidly becoming outdated. The inclusion of all reproductions and communications - no matter how essential to the use of new digital technologies - within the educational statutory licence has increased the range of potentially remunerated 'uses' involved in the modern classroom delivery of content. Technology specificity also impacts on long-distance educational use of learning, internal use of content management systems, and may result in potential difficulties for assisting students with a disability, especially students with hearing difficulties. For specific examples, please refer to the CAG and Universities Australia submissions discussing sections 28, 200 and 200AAA, and other educational copying provisions of the Act.

Additionally, the technological specificity of educational copying provisions and the statutory licences are impeding the development of new forms of delivery for educational content. As discussed in the CAG and Universities Australia submissions, almost all new communications technologies involve copying and communicating of content. The architecture of the statutory licences makes them unfit to regulate this volume of copying. In addition, the statutory licence deems many new forms of delivery to be remunerable, no matter how minor or technical the copying. This goes against the Canadian Supreme Court's support for technology neutrality in copyright exceptions:

¹ Universities Australia and CAG are members of the Australian Digital Alliance.

“In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.”

The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the Copyright Act in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.”²

This has required the education sector to seek reactive adjustments to the copyright legislation to ensure they are able to cache, or to play video content in class.

Educational institutions are early adopters of new technologies

Educational institutions have been early adopters of a number of technologies and digital uses referred to in this Issues Paper: cloud computing services, data and text mining, transformative use of content by students in educational institutions, digitisation of library materials and use of social media to keep students engaged. Overly technology specific provisions, different legal treatment for different types of copyright subject matter and technologies means that the educational exceptions and statutory licences are no longer fit for purpose in the digital age.

Section 200AB has not been effective for schools and universities

While educational institutions have found section 200AB to be of some limited use for format shifting materials in analogue formats and to provide some types of content for students with a print disability, it has largely proved ineffective for educational uses of digital media. The ADA and ALCC support the Copyright Advisory Group’s exposition of ways in which importation of the ‘Three-Step Test’ into section 200AB has made it difficult to apply in educational settings. For further discussion of this issue please refer to our discussion of section 200AB in question 20 and Appendix 1 of this submission.

The statutory licences are inefficient

The statutory licences are inefficient, and can result in arbitrary cost increases with the uptake of new digital technologies to achieve the same end (for example, display of content in the classroom). As noted in the CAG submission, “The requirements of the statutory licence to record in a survey (and potentially pay for) every technological copy and communication involved in teaching simply do not reflect the realities of modern education in a digital age”.³ The “double dipping” that occurs as a result of overly

² *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] SCC 34.

³ Copyright Advisory Group to the Standing Council on Education and Early Childhood, Submission to the Australian Law Reform Commission, *Copyright and the Digital Economy* (November 2012).

strict protocols is also a matter of serious concern for the education sector. Replacing statutory licensing with voluntary licensing will bring significant efficiency gains, from the perspective of copyright creators, the education sector and the economy as a whole.

The statutory licences are out of step with international best practice

Figure 10 in the CAG submission reflects comparative licensing costs for full-time equivalent students (FTE) in Australia and three comparable jurisdictions. Under the statutory licensing regime, Australian schools pay significantly more per FTE than schools in the UK, Canada and New Zealand. Additionally, under the statutory licences, a number of uses that are free in these jurisdictions are remunerable for Australian educational institutions.

The United States Copyright Office has also rejected statutory licences for educational copying, as *'mechanisms of last resort that must be narrowly tailored to address a specific failure in a specifically defined market.'*⁴

Thoughts on Fair Use

Schools and universities accept that there will be a necessary higher level of initial uncertainty accompanying the introduction of a flexible exception. They still submit that a flexible exception would better serve the needs of Australian educational institutions. The ADA and ALCC additionally wish to highlight that the uncertainty of the fair use doctrine in the US has tends to have been overstated, and refer the Commission to our discussion of Pamela Samuelson and Matthew Sag's work⁵ refuting this under Questions 52 and 53.

The US fair use doctrine makes explicit mention of "teaching (including multiple copies for classroom use)" as the kind of use that should be protected under the doctrine.⁶

"Assuming materials are used in reasonable amounts, and that they are not materials created and marketed specifically for in-class use, a traditional fair use analysis should be favourable for most instructional uses of educational content on MOOC platforms."⁷

Below are some example principles describing good practice in fair use for instruction:

"The investigation of pre-existing works of authorship is an essential part of education, freedom of inquiry, and freedom of expression. Thus, this is a core example of fair use. Whatever the

⁴ Copyright Office, Library of Congress, *Notice of Inquiry – Orphan Works and Mass Digitisation* (22 October 2012) 17 <http://federalregister.gov/a/2012-25932>.

⁵ Pamela Samuelson, 'Unbundling Fair Use' (2009) 77:5 *Fordham Law Review* 2537; Matthew Sag, 'Predicting Fair Use', (2012) 73:1 *Ohio State Law Journal* 76.

⁶ *Copyright Act*, 17 USC § 107.

⁷ Brandon Butler, *Issue Brief: Massive Open Online Courses: Legal and Policy Issues for Research Libraries Association of Research Libraries* (22 October 2012) 6 <http://www.arl.org/bm~doc/issuebrief-mooc-22oct12.pdf>.

original informative or entertainment purpose that underlay the creation of the copyrighted material, it is being repurposed here as an object of commentary or other related discourse. This use of pre-existing information or entertainment materials is a classic mode of advancing learning in the conventional face-to-face classroom, and it should be equally available in any OCW.”⁸

“For the reasons described in this statement, the reproduction and use of images for teaching – whether in face-to-face teaching, non-synchronous teaching activities, or non-course related academic lectures – should be consistent with fair use.”⁹

“It is fair use to make appropriately tailored course-related content available to enrolled students via digital networks.”¹⁰

The ADA and ALCC support schools and universities in arguing that the statutory licensing system should be repealed, and that educational copying should continue under a broad flexible exception allowing for unremunerated copying of smaller excerpts of works, with copying that falls above this threshold being facilitated through voluntary licensing.

⁸ Terri Bays et al, *Code of Best Practices in Fair Use for OpenCourseWare*, Center for Social Media (October 2009) 11 <http://www.centerforsocialmedia.org/sites/default/files/10-305-OCW-Oct29.pdf>.

⁹ Gretchen Wagner and Allan T. Kohl, 'Visual Resources Association: Statement on the Fair Use of Images for Teaching, Research, and Study' (2012) 38 *VRA Bulletin* Article 5, 11 <http://online.vrweb.org/cgi/viewcontent.cgi?article=1013&context=vrab>.

¹⁰ Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries*, (January 2012) 14 <http://www.arl.org/bm~doc/code-of-best-practices-fair-use.pdf>.

11. Crown Copyright

The ADA and ALCC have not received substantial comment from our members concerning the use of content under the section 183 statutory licence, but would be willing to seek further input from members should the ALRC find it useful.

In general, government department members of the ALCC we have consulted with expressed concern regarding the cost of the statutory licence, and current application to the digital environment (we understand it is currently based on photocopying surveys). Members have informed us that the section 183 licence arises for renewal in 2013, and express apprehension at renegotiating the licence given issues encountered by the schools and universities sectors. There's real concern that more efficient reproduction of content by government agencies via digital technologies will result in increased licence fees, regardless of whether the end use remains unchanged.

We look forward to contributing more substantially in this area at the Discussion Paper phase.

12. 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?*

The ADA and ALCC support the implementation of a broad, open-ended, and flexible exception to replace the existing fair dealing exceptions, and to encompass other uses of copyright material that will not cause unreasonable harm to the creator or copyright owner of the material.

To preserve the certainty provided by the current fair dealing exceptions, any open-ended and flexible exception can explicitly refer to purposes covered by existing fair dealing exceptions. This is the approach adopted in the US fair use provision, which states that the fair use of a work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” will not be an infringement of copyright.¹

The ADA and ALCC acknowledge the need for Australian copyright law to more effectively facilitate quotation. However, rather than recommending the introduction of a further purpose-based exception, we envision that uses involving quotation of works would be sufficiently covered a broad, flexible exception.

While the fair dealing exceptions in Australia have been important for identifying limits to the exclusive grant of copyright afforded to copyright owners under the Act, the ADA and ALCC consider that the provisions are not sufficiently broad to supply an effective balance for both owners and users under Australian copyright law in the digital environment.

The Issues Paper highlights the Copyright Law Review Committee’s (CLRC) report into the Simplification

¹ *Copyright Act*, 17 USC § 107.

of the Copyright Act,² noting that the primary recommendation of the Committee was to consolidate fair dealing provisions into one open-ended fair dealing exception referring specifically to the existing purposes covered by the fair dealing provisions. The CLRC recognised difficulties inherent in the existing purpose-based exceptions, highlighting the need for broad purposes and technological neutrality in Australia’s fair dealing regime.

“Much of the present complexity in the fair dealing provisions and the miscellany of other provisions and schemes that provide for exceptions to copyright owners’ exclusive rights is due to the fact that they operate on the basis of a particular technology or in relation to dealings with copyright materials in a particular material form. Technological developments will no doubt continue, and they will probably affect copyright owners and users in ways that are and will remain unpredictable.”³

....

“The Committee is strongly of the view that an approach that seeks to deal with each specific case is undesirable. First, it cannot be comprehensive in its coverage because it is not possible to predict new uses to which the technological developments may give rise (or how they will affect copyright owners and users). Second, each new circumstance that needs to be dealt with simply adds to the complexity of the legislation.”⁴

The Committee ultimately recommended amending the fair dealing regime to ensure it was

“not limited to an exclusive set of purposes such as govern the extent of fair dealing as it currently applies. The Committee considers that the removal of such a limitation will provide greater flexibility by allowing courts to determine the existence of additional purposes that are regarded as falling within fair dealing. Only this approach will enable fair dealing to be adapted to changing technology and, in particular, will move fair dealing into the digital environment.”⁵

The CLRC ultimately recommended the fair dealing exceptions be simplified and expanded by consolidating all the fair dealing exceptions into one open-ended fair dealing exception.

“The Committee recommends the expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes—such as research or study (ss. 40 and

² Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998).

³ *Ibid.*, 49-50.

⁴ *Ibid.*, 51.

⁵ *Ibid.*

103C), criticism or review (ss. 41 and 103A), reporting news (ss. 42 and 103B) and professional advice (s. 43(2))—but is not confined to those purposes.”⁶

While the ADA and ALCC support as a best case the introduction of a new broad, flexible exception into the Act, we would also see the adoption of the CLRC’s proposal for an expanded fair dealing provision as a significant positive step for Australian copyright law in the digital environment.

The expanded fair dealing exception advocated by the CLRC is open-ended, and relatively flexible. Given some of the complexities of the fair dealing history, however, the ADA and ALCC at this stage promote the adoption of a new open-ended and flexible exception based on the style of the US fair use provision.

The fair dealing exceptions have to date been unable to effectively adapt to new technologies, evolving consumer norms and different ways of innovating and interpreting copyright material. This failure to adapt is demonstrated by the range of potentially unlawful uses this review considers.

The *Panel Case*⁷ provides a useful demonstration of the Australian Courts’ approach to the current purpose-based fair dealing exceptions, highlighting the boundaries of the fair dealing exceptions for reporting the news, and criticism and review. After the case concluded, the fair dealing provisions in the Act were amended to expand the range of fair dealing purposes to include parody and satire.⁸ The ADA and ALCC consider that in the absence of a broad, flexible exception that relies heavily on a ‘fairness’ analysis regarding whether the use will cause real and unjustifiable harm to the copyright holder, piecemeal adaptation of the Act will continue to clutter Australian copyright legislation, making it increasingly opaque to users and out of step with activities in the digital environment.

The Issues Paper has highlighted popular interest in the litigation in *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*,⁹ noting that one possible way to avoid a similar outcome in the future would be to enact an exception for quotation. It’s worth noting that in that case, Justice Emmett also considered whether the excerpt from ‘Kookaburra’ would have been ‘fair use’.¹⁰ The ADA and ALCC consider that any uses of copyright material that would be covered by a fair dealing exception for ‘quotation’ would be more simply and effectively covered by a broad, flexible exception.

⁶ Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998) 7.

⁷ *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273.

⁸ *Copyright Amendment Act 2006* (Cth).

⁹ (2011) 191 FCR 444.

¹⁰ *Ibid*, [101] ‘Nevertheless, one may wonder whether the framers of the *Statute of Anne* and its descendants would have regarded the taking of the melody of Kookaburra in the Impugned Recordings as infringement, rather than as a fair use that did not in any way detract from the benefit given to Ms Sinclair for her intellectual effort in producing Kookaburra.’

13. 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?*

The ADA and ALCC support amendment of the Copyright Act to include a broad, flexible exception. Although there are a number of options available to the ALRC to introduce a flexible exception, given the body of case law underpinning the US ‘fair use’ provision, its familiarity to end-users in Australia, the guidance developed through sector-based guidelines, and flexible, technology neutral drafting, the ADA and ALCC suggest that language based on section 107 of the US *Copyright Act 1976* may be the most appropriate approach for consideration in Australia:

“...The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- 1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;*
- 2. the nature of the copyrighted work;*
- 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- 4. the effect of the use upon the potential market for or value of the copyrighted work.”*

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

However, as noted throughout this submission, The adoption of a fair use exception modelled on US law does not necessarily mean that Australian courts will rely on US case law. If the ALRC believes there is merit in referring Australian courts to the approach adopted by courts in the United States, it could recommend that this be clarified by a statement in an accompanying explanatory memorandum to any new provision.

Fair use has been described as an essential doctrine ‘that counterbalances what would otherwise be an unreasonably broad grant of rights to authors and unduly narrow set of negotiated exceptions and limitations’.¹ It encompasses several principles proposed by the Australian Law Reform Commission to

¹ Pamela Samuelson, ‘Unbundling Fair Use’ (2009) 77:5 *Fordham Law Review* 2537, 2618.

guide the copyright reform process: it is technology neutral; it supports innovation and competition; is in line with our international obligations; and reflects criteria to guard against uses of works unreasonably harmful to the rights holder.

Fair use arguably ‘keeps copyright closer to the reasonable expectations of most people and thus helps make sense of copyright law’.² In a rapidly evolving digital environment, fair use is dynamic enough to respond to new technologies, services and consumer practices. And as noted in the *Hargreaves Review of Intellectual Property and Growth*,

“the creative industries continue to flourish in the US in the context of copyright law which includes Fair Use. It is likewise true that many large UK creative companies operate very successfully on both sides of the Atlantic in spite of these differences in law. This may indicate that the differences in the American and European legal approaches to copyright are less troublesome than polarised debate suggests. But this does not stop important American creative businesses, such as the film industry, arguing passionately that the UK and Europe should resist the adoption of the same US style Fair Use approach with which these firms coexist in their home market.”³

A number of other countries have recently adopted fair use-style exceptions, including The Philippines, Israel, South Korea and Singapore.

Fair use is not as unpredictable as is commonly portrayed

Critics of fair use often argue that the outcomes in any case are inherently unpredictable. The ADA and ALCC submit that flexibility and technology neutrality do not amount to unpredictability. A number of recent studies have concluded that fair use is not as unpredictable as critics would argue.⁴ Fair use exceptions are generally successful in transformative and productive use cases, where there is no direct commercial purpose.⁵ Iterative copying of earlier works has also often qualified as fair use, and recent fair use cases have addressed the digitisation of orphan works in library collections, and educational copying. Unlike any action brought under section 200AB, Australian courts considering a fair use exception would have a rich body of US case law to draw on.

Some critics assert fair use would be of limited benefit to cultural institutions, libraries and archives, because of inherent risk aversion. ADA and ALCC discussions with members have indicated strong support for the repeal of section 200AB and replacement with a ‘fair use’ exception. Staff have identified fair use criteria as being easier to understand (and less intimidating!) than section 200AB.

² Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 43. Countries without a fair use doctrine have “witnessed a growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people.”

³ Ibid, 45.

⁴ Samuelson, above n 1; and Matthew Sag, ‘Predicting Fair Use’, (2012) 73:1 *Ohio State Law Journal* 76.

⁵ Sag, *ibid*, 80.

Some institutions report already applying a 'fair use' style assessment in undertaking uses of in-copyright and orphan works. Some institutions also indicated a belief that 'fair use' was already an exception under Australian copyright law.

Australian courts have even been known to draw from fair use terminology when discussing fair dealing cases. In *Fairfax Media Publications v Reed International*,⁶ "The contribution of the abstracted article makes the use of the headline 'a transformative use' by 'adding something new, with a further purpose or character'" citing, *American Geophysical Union v Texaco*.⁷

After consideration, the ADA and ALCC consider that a broad, flexible, and open-ended exception based on the US fair use provision is an appropriate model for adoption into Australian copyright law. The ADA and ALCC consider that the principles of fairness embodied in the US provision are familiar and recognised criteria already being adopted by institutions and individuals in Australia, and that the body of judicial consideration of the US provision will be a valuable resource to assist Australian courts to determine what is a fair use of content.

⁶ (2010) 189 FCR 109.

⁷ 60 F.3d 913 (2d Cir. 1995).

14. Contracting out

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

The ADA and ALCC consider agreements which exclude or limit copyright exceptions to unreasonably alter the copyright balance in favour of rights holders.

The ADA and ALCC support the 2002 recommendations of the Copyright Law Review Committee (CLRC) that fair dealing and library exceptions be protected against override by copyright. Further, the ADA and ALCC consider that any new exceptions advocated by this Inquiry should be preserved from interference by contract and licensing terms.

In its report, the CLRC proceeded from the basis that copyright exceptions are fundamental to the copyright balance;

“Far from being just a minor appendix to the copyright rule, let alone a mere blot on the copyright landscape, exceptions to copyright are an indispensable complement to the exclusive right. Together, they form an important balance between the author’s rights and the interests of the community.”¹

The CLRC recognised that the scope a rights holder’s exclusive rights are partly defined by exceptions and limitations; that “rights only exist to the extent that they are not qualified by the exceptions.”²

Copyright exceptions are crucial to allowing libraries, cultural institutions, and educational institutions to carry out mandated functions in the digital environment. The ability to rely on copyright law reduces the massive transaction costs that would accrue should institutions be required to look up a licence for each and every work they seek to preserve or display. Exceptions allow users to use content in useful and relevant ways, and allow businesses and innovators to develop products and ideas that allow us to reshape the ways in which we view, use and understand content. Finally, exceptions enable creators to access and interpret existing content in new ways, to build on works that have come before. Creation does not occur in a vacuum.

In its report in 2002, the CLRC found contracts and licence agreements were being used to override copyright exceptions, and, in so doing, these agreements were altering the copyright balance.³ The ADA and ALCC submit that the only aspects of this situation which have changed since the publication of the CLRC report is that the practice of contracting out of exceptions has grown, and that the scope of activities affected by both contract and copyright law has widened.

¹ Copyright Law Review Committee, *Copyright and Contract*, (2002), 15, citing Spoor J. ‘General aspects of exceptions and limitations to copyright: general report’ in Libby Baulch, Michael Green and Mary Wyburn eds *ALAI study days—the boundaries of copyright: its proper limitations and exceptions*, University of Cambridge, 14–17 September 1998. (Australian Copyright Council, 1999) 27–41, 27.

² Copyright Law Review Committee, above n 1, 16.

³ *Ibid*, 258.

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

The ADA and ALCC support an amendment to the Act mandating all existing and, especially, future exceptions introduced into the Act. The CLRC made an assessment in 2002 about which exceptions were either essential to the copyright balance, or in need of clarification regarding the interaction of copyright and contract law. In the intervening decade technology has moved on, and technologies that rely on copying have become increasingly central to activities in the digital age. For example in 2002 it would not have been contemplated that contracts may be involved in communicating material to a classroom under section 28 of the Act, as the dominant technology was a VHS player being wheeled into a classroom. In the age of distributed networks and online content purchases being governed by contractual terms these assessments are outdated. If the Inquiry finds, however, that mandating all exceptions is infeasible, the ADA and ALCC wish to highlight the particular importance of protecting:

- Any proposed broad, flexible exception
- Failing the introduction of a fair use-style exception, exceptions allowing personal/social online use, transformative use, use of orphan works, uses which “do not trade on the underlying creative and expressive purpose of the work”
- The Fair Dealing exceptions
- Library and Archival copying exceptions
- Educational copying exceptions⁴

The ADA and ALCC wish to further highlight the similarity between issues associated with contracting out of exceptions, and the restriction of access to content using DRM and TPMs. Both TPMs and contractual terms and conditions distort the copyright balance. While the TPM regime is currently the subject of a Review by the Attorney-General’s Department, the ADA and ALCC submit that legislative reform will ultimately have to consider both issues as interlinked.

Since 2002, rather than becoming outdated, the need for reform in this area has only become more pressing, with uptake of e-materials steadily increasing in schools, universities, libraries and for personal use. The recent Hargreaves Review of Intellectual Property in the UK also emphasised the need to preserve exceptions from interference with contract:

“Applying contracts in this way means a rights holder can rewrite the limits the law has set on the extent of the right conferred by copyright. It creates the risk that should Government decide that UK law will permit private copying or text mining, these permissions could be

⁴ The CLRC’s 2002 review into copyright and contract did not recommend any educational exceptions be mandated, finding that the statutory licences had a different policy basis to the library and archival exceptions, and only briefly commenting on other free educational copying exceptions. Since the CLRC’s Report was handed down, the use of digital materials in schools has increasingly expanded, and educational copying exceptions have become crucial for ensuring educators are able to continue delivery high quality services to students. Given these changes, any existing or proposed educational copying exceptions should also be protected from override by contract.

denied by contract. Where an institution has different contracts with a number of providers, many of the contracts overriding exceptions in different areas, it becomes very difficult to give clear guidance to users on what they are permitted. Often the result will be that, for legal certainty, the institution will restrict access to the most restrictive set of terms, significantly reducing the provisions for use established by law. Even if unused, the possibility of contractual override is harmful because it replaces clarity (“I have the right to make a private copy”) with uncertainty (“I must check my licence to confirm that I have the right to make a private copy”). The Government should change the law to make it clear no exception to copyright can be overridden by contract.”⁵

Recent research by Swinburne University of Technology Copyright Manager Robin Wright indicates the practice of vendors using agreements that exclude or modify exceptions is just as (if not more) prevalent now as it was 10 years ago.⁶ Her research has identified “a number of areas where the terms of licensing agreements for electronic access could potentially have an impact on the delivery of library services.”⁷ In Ms Wright’s research, the contractual treatment of three particular areas of allowed use for libraries was examined: inter-library loans, educational use, and fair dealing.

- *Interlibrary loans (ILL)*: the study notes that all the licences examined “contained terms that could potentially have an impact on libraries delivering ILL”.⁸ Of the licences examined, six of the ten either prohibited ILL or required that material only be used in ways specified by agreement, ruling out ILL by default. Some agreements even contained specific wording excluding inter-library loans; ‘[f]or avoidance of doubt, this agreement does not permit interlibrary loans or document delivery.’⁹
- *Educational Use*: For agreements providing permission for educational institutions to provide hardcopy reproductions of material (in limited amounts), it was unclear as to whether the amounts specified would be more or less than under US fair use or Australian fair dealing. Five of the agreements specifically excluded inclusion of material in course packs, with one stating that course packs could only include material with ‘prior written permission of the publisher, who may set out further terms and conditions for such usage’.¹⁰ This language effectively places the educational institution outside the scope of the Part VB licence regarding that licensed content, even where they are already paying for that use under the Part VB licence. The study notes there are a number of factors that could be influencing drafting of terms and conditions, including: that the suppliers are using business models that rely on electronic tracking of use; that drafters of the agreements are more

⁵ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 51.

⁶ Robin Wright, ‘Libraries and licensing: the eFuture will need legal as well as technical skills’ (Paper presented at VALA2012, Melbourne, 9 February 2012).

⁷ *Ibid*, 1.

⁸ *Ibid*, 4.

⁹ *Ibid*, 4.

¹⁰ *Ibid*, 6.

familiar with US copyright law, which does not have educational statutory licences; and therefore drafters may not understand the Australian remunerated licence system.¹¹

- *Fair Dealing*: (defining the scope of ways in which individual researchers and students use material). Of the licences examined, none referred specifically to Australian fair dealing, although some referred to US fair use. Others had different permissions that may be more or less useful than fair dealing depending on the circumstance. For example, one agreement granted permission to quote 'up to an aggregate of 250 words from any single text'.¹²

The study concluded that the ways in which eBook licences limit libraries' ability to use exceptions in the Copyright Act has the potential to fundamentally affect the ways in which libraries deliver services to their users.¹³ It noted that "the move toward licensed access to electronic resources is having a major effect on the operation of libraries worldwide."¹⁴

Library staff will need to become better skilled, and perhaps undertake some legal training, to understand and identify terms and conditions that affect Australian copyright exceptions. The variety of content licences accompanying digital acquisitions make it difficult to create a centralised work flow for contracts. Each contract must be reviewed individually to determine the level of access that can be provided. In relation to ILL, "the range of different approaches taken by suppliers will limit Australian libraries' confidence in their ability to use material held in eBook format when delivering such services, even if some agreements would permit it."¹⁵

Other examples of problems that may arise include:

- "some electronic material not being available for delivery to clients in certain formats or via services that would have previously been permitted under exceptions in Australian law;
- potential for the breach of licence terms if all material is delivered using existing services such as in course packs for students; and
- client confusion about how they can use different material held in a library's collection"¹⁶

Finally, Wright notes the need to recognize that many licences are now negotiated by consortia that do not necessarily understand the specific needs of individual libraries,¹⁷ meaning that the provisions contracting out of exceptions may be beyond the control of individual libraries. Additionally, in general, suppliers of agreements surveyed were aggregators rather than the content owners,¹⁸ which may give individual libraries even less freedom to negotiate less restrictive agreements.

¹¹ Ibid, 6.

¹² Ibid, 7.

¹³ Ibid, 8.

¹⁴ Ibid, 7, quoting Charles Hamaker 'Ebooks on Fire, Controversies Surrounding Ebooks in Libraries' (2011) 19:10 *Searcher* <http://www.infotoday.com/searcher/dec11/Hamaker.shtml>.

¹⁵ Ibid, 4.

¹⁶ Ibid, 8.

¹⁷ Ibid, 2.

¹⁸ Ibid, 3.

A similar analysis of contracts, but on a much larger scale, has been conducted by the British Library.¹⁹ This analysis looked into 100 contracts offered to the Library to determine whether they allowed for archiving, printing, downloading and electronic copying, fair dealing, access for the visually impaired, ILL and any other exceptions. Many of the agreements were silent on a number of these issues; notably, only two of one hundred agreements considered access for visually impaired persons, 82 were silent on ILL, and only 25 agreements considered other exceptions. Of those contracts that considered archiving, 23 agreements permitted archiving, while 19 did not. Many of the clauses prohibiting archiving contained phrases such as

“On termination of this Agreement the Institution will destroy and will procure that all Authorised Users destroy all content supplied through the Service stored on any digital information storage media, including but not limited to system servers, hard disks, diskettes and back up tapes.”²⁰

Only one agreement prohibited printing, however, 47% of the agreements did not allow for the extent of use, including printing, that would be available under the UK fair dealing provisions.

Australian Library Examples:

Below are some examples of restrictive contractual terms encountered by Australian libraries. They largely concern the availability of document supply and interlibrary loan under the agreement.

Document supply: 79% of digital products (e-books, databases, aggregator licences) purchased by the National Library prohibit document supply. Of one-off purchased databases, however, this drops to 7%. An interesting aspect of the majority of these provisions covering document supply is that the practice was generally defined as meaning ‘supply on request from another Australian Library’, rather than adopting the meaning in the Act - that is, supplying to a member of the public or another library.

Examples of resources that do not permit any form of ILL/Document Delivery

British Newspaper Archives

“You can only use the website for your own personal non-commercial use. This means you can use the website to: purchase goods that we may sell on the website; research newspaper archives and other archives featured on the website that you are interested in; download and print low-resolution content for free or high-resolution content subject to payment of a fee (in either event, you cannot share the hardcopy content with any third party); transcribe and quote from website content that is out of copyright; use website content that is still in copyright in accordance with the exemptions set out in the Copyright, Designs and Patents Act 1988 and which includes using the website content for private study, research for non-commercial purposes (provided a suitable acknowledgement is included), and criticism, review and news reporting (again provided a suitable acknowledgement is included); make use of the

¹⁹ British Library, *Analysis of 100 Contracts Offered to the British Library* <http://pressandpolicy.bl.uk/image/library/downloadMedia.ashx?MediaDetailsID=691> and <http://pressandpolicy.bl.uk/content/default.aspx?NewsAreaId=316>.

²⁰ Ibid, 3 reference 6.

social network functionality on the website including our networking tag and comment facilities; and post links to any article or content of interest on third party sites such as Facebook, Twitter or Google. We are also happy for you to help out other people by telling them about the newspaper archives and other information available on the website and how and where they can be found. However, you must not provide them with copies of any of the newspapers (either an original image of the newspapers or the information on the results page), even if you provide them for free.

You are not permitted to use the website or services for commercial, business or professional use or gain. Nor are you permitted to copy website content and share this with your friends, family, colleagues or any third party whether in physical hard copy, email or by other means.”

Company 360

Customer may “copy parts of the Licensed product as part of its business for internal use only”.

It is clear that contracts and licences are being used to restrict the application of library and other exceptions in the Copyright Act. To ensure that copyright holders are not able to ‘rewrite the limits’ of copyright, and to ensure that the balance envisioned by any future reform is maintained, exceptions need to be mandated and preserved from interference by contract.