

3. Policy Context of the Inquiry

Contents

Summary	37
The concept of the digital economy	37
Trends in consumer use of copyright material	45
Complexity of copyright law	48
The implications of cultural policy for copyright reform	50
Current regulatory models	53

Summary

3.1 This chapter discusses some of the broader context within which the ALRC is conducting this Inquiry and comments on the Terms of Reference, drawing out some concerns of stakeholders and identifying aspects of the needs and expectations of Australian business and consumers. This context includes:

- the concept of the digital economy;
- trends in consumer use of copyright material;
- the complexity of copyright law;
- the implications of cultural policy for copyright reform; and
- current modes of regulation.

The concept of the digital economy

3.2 The Terms of Reference for this Inquiry refer to the ‘importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies’. The ALRC takes this to refer to innovation within Australia and engagement globally in digital opportunities.

3.3 The ‘digital economy’ has been defined by the Australian Government as ‘the global network of economic and social activities that are enabled by information and communications technologies, such as the internet, mobile and sensor networks’.¹ This includes conducting communications, financial transactions, education, entertainment and business using computers, phones and other devices. Australia has made a

¹ Department of Broadband, Communications and the Digital Economy, *Australia’s Digital Economy: Future Directions* (2009).

commitment to becoming a leading digital economy,² and faces competition from comparable countries that have also adopted a focus on promoting a local digital economy. ‘Without open access to appropriate categories of information, Australia may not enjoy the potential innovation in the digital economy’.³

3.4 Copyright law is an important part of Australia’s digital infrastructure and is relevant to commercial, creative and cultural policy. Some stakeholders pointed out that the ‘digital economy’ is part of the economy generally and not a separate entity. Furthermore, it should be ‘interpreted broadly, to include the contributions made to the Australian economy by formal education, self-education, health services, social services, volunteer work and unpaid domestic work, as well as by commerce, agriculture, mining and industry’.⁴

3.5 Alongside digitisation of copyright material, online activities are a major aspect of the digital economy.

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.⁵

In this context, ‘copyright has a profound influence in regulating access to education, culture, social interaction, commercial innovation and the provision of essential government services’.⁶

3.6 The Australian Interactive Media Industry Association (AIMIA) observed that search functions, cloud-based solutions and other digital platforms mean the internet is a major contributor to economic efficiency for Australia in that it provides savings and efficiencies for individuals and businesses, increasing wealth in real terms and driving further economic growth.⁷ Stakeholders generally agreed that ‘participation in the digital economy is likely to be a critical source of innovation for Australian firms and consumers’.⁸ However, perspectives differ as to the optimum copyright environment to create sufficient incentives for investment and innovation.

3.7 There was some concern that in an assessment of global competitiveness ‘Australia ranked below the OECD average for factors such as technological readiness, business sophistication and innovation’.⁹ According to the most recent Department of

2 Ibid, 2. See also K Henry, ‘The Shape of Things to Come: Long Run Forces Affecting the Australian Economy in Coming Decades’ (Address to Queensland University of Technology Business Leaders’ Forum, Brisbane, 22 October 2009), cited in ADA and ALCC, *Submission 213*.

3 Department of Broadband, Communications and the Digital Economy, *Australia’s Digital Economy: Future Directions* (2009), 12.

4 National Library of Australia, *Submission 218*.

5 ADA and ALCC, *Submission 213*.

6 Ibid. See also Foxtel, *Submission 245*, Ericsson, *Submission 151*.

7 AIMIA Digital Policy Group, *Submission 261*. See also AIIA, *Submission 211*.

8 Australian Industry Group, *Submission 179*. Google submitted that ‘Copyright needs to be “future-proofed”, making it more flexible and technology-neutral. This will generate an economic benefit of \$600m per annum in Australia’: Google, *Submission 217*.

9 World Economic Forum, *Global Competitiveness Report 2011-2012* (2011), 94 cited in Australian Industry Group, *Submission 179*.

Innovation, Industry, Science and Research Report, Australia's investment in 'intangible innovation capabilities' is lower than for other OECD countries.¹⁰

Australia is investing significantly in a national broadband network to lay the foundation of the Australia's digital economy over the coming decade. Without proactively removing barriers to digital content and service uptake, we risk falling behind the rest of the world when it comes to actually accelerating our transition to the digital economy.¹¹

3.8 In announcing a review of copyright law in the EU, a background paper states:

The digital economy has been a major driver of growth in the past two decades ... The emergence of new business models capitalising on the potential of the internet to deliver content represents a challenge and an opportunity for the creative industries, authors and artists as well as the other actors in the digital economy.¹²

The 'actors' are identified as content creators and owners, content hosts and social networks, internet service providers and end-users.

3.9 Stakeholders acknowledged the importance, but also the uncertainty of the digital economy as it is not possible to anticipate what new technologies will emerge over coming years and decades. What is clear is that copyright will have direct and indirect impact:

It is therefore imperative that Australia puts in place an intellectual property framework that supports rather than hinders investment in the digital economy and that is sufficiently flexible to provide breathing space for the research and development that is essential to innovation without the need for constant readjustment.¹³

3.10 Some submissions made reference to the fact that students undergoing education and training are highly relevant to developing the digital economy. Copyright law is a significant issue for institutions that are developing our human capital—namely schools, TAFEs and universities.¹⁴ The National Panel for Economic Reform has noted that Australia needs 'reforms which will drive long-term productivity growth' and that human capital is the main area of investment to achieve these goals.¹⁵ Box Hill Institute of TAFE submitted that 'vocational training is at its core a system to encourage and facilitate economic participation'¹⁶ and went so far as to say that the Issues Paper 'lacked a comprehensive functional analysis of the requirements of a digital economy' in that it did not have TAFE education vocational training 'at the

10 Department of Innovation, Industry, Science and Research (DIISR) (2011), *Australian Innovation System Report 2011*, 3, cited in Australian Industry Group, *Submission 179*.

11 Ericsson, *Submission 151*.

12 European Commission, *Orientation Debate on Content in the Digital Economy* (2012) (accessed 20 February 2013).

13 Universities Australia, *Submission 246*. See also Google, *Submission 217*; Powerhouse Museum, *Submission 137*; Pandora Media Inc, *Submission 104*.

14 See Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Copyright Advisory Group—TAFE, *Submission 230*.

15 Julia Gillard (Prime Minister of Australia), 'National Panel for Economic Reform—Meeting One—Communiqué' (Press Release, 29 January 2013) (accessed 30 April 2013).

16 Box Hill Institute of TAFE, *Submission 77*.

centre of the inquiry's scope'. Although no one sector of the economy should dominate the policy debate, the education sector is a significant stakeholder in this Inquiry.

3.11 The assumption that law reform is required to access the economic opportunities of the digital economy is not endorsed by some stakeholders, who warn of the dangers of disruption to developing business models organically adapting to the emerging environment.¹⁷ It was suggested that 'content providers have in fact demonstrated an ongoing ability to adapt to changes in technology' and any reform of copyright law will 'have a further negative economic effect on publishing'.¹⁸

3.12 On the other hand, 'economists have long had concerns that copyright has a moral hazard effect on incumbent firms, including those in the creative industries, by encouraging them to rely on enforcement of the law rather than adopt new technologies and business models to deal with new technologies'.¹⁹

3.13 The Australian Consumer and Competition Commission (ACCC) submitted that the aim of copyright reform should be the 'pursuit of economic efficiency',²⁰ and IP Australia argued that the purpose of copyright law reform is to 'provide a net social and economic benefit for Australia'.²¹

3.14 A major concern of stakeholders is that reform should be 'evidence-based'.²² The ACCC considered it important that the ALRC takes into account available economic evidence when considering reform, as well as stakeholder views and economic rationales for reform.²³

3.15 APRA/AMCOS submitted that theoretical economic studies of the copyright and related industries are of little value and 'the only way to assess the impact of copyright law on the digital economy is by examining the available evidence'.²⁴ The ACCC noted that most of the empirical, rather than theoretical, economic evidence available is focused overseas and relates to particular industries, particularly unauthorised copying in the music industry and that the results can be 'inconclusive'.²⁵

3.16 In the UK, perhaps the main outcome of the Hargreaves Review has been the setting up of the CREATe Centre intended to investigate issues relating to copyright and new business models in the creative economy. A major concern of the Centre is to

17 Pearson Australia/Penguin, *Submission 220*; iGEA, *Submission 192*; Australian Film/TV Bodies, *Submission 205*; Allen&Unwin Book Publishers, *Submission 174*, Evolution Media Group, *Submission 141*.

18 Thomson Reuters, *Submission 187*. See also Motion Picture Association of America Inc, *Submission 197*.

19 R Towse, 'What We know, What We Don't Know and What Policy Makers Would Like Us to Know About the Economics of Copyright' 8(2) *Review of Economic Research of Copyright Issues* 101, cited in Ericsson, *Submission 151*. See also ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

20 ACCC, *Submission 165*.

21 IP Australia, *Submission 176*.

22 Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; Newspaper Works, *Submission 203*.

23 ACCC, *Submission 165*.

24 APRA/AMCOS, *Submission 247*.

25 ACCC, *Submission 165*.

investigate the question of what constitutes evidence for the purposes of copyright policy.²⁶

3.17 In the US, a major report on building evidence for copyright policy in the digital era noted that ‘not all copyright policy questions are amenable to economic analysis. In some cases, it may be possible to determine only the direction of the effect of policy change, not the magnitude’.²⁷ The Report further noted that copyright policy research can use a variety of methods, including ‘case studies, international and sectoral comparisons, and experiments and surveys’.²⁸

3.18 In Australia, the ARC Centre of Excellence for Creative Industries (CCI) focuses on research on the contribution of creative industries and their constituent disciplines to a more dynamic and inclusive innovation system and society. The CCI submission stated that ‘there are substantial costs and inefficiencies for creators associated with current copyright arrangements that adversely affect public access to new and original creative works.’ CCI recommended ‘a broadened concept of “fair use” that permits unlicensed use of copyright material ... in socially beneficial ways’.²⁹

3.19 With respect to theoretical research, one submission noted that it is simply too early to tell what the economic effect of the digital environment is for many sectors, particularly creators. Therefore ‘proposals for new exceptions to copyright should be based on clearly identified policy grounds as the economic analysis of the digital environment is contentious’.³⁰ Pointing to the Hargreaves Report The Arts Law Centre of Australia identified three obstacles to using evidence on the economic impacts of changes to intellectual property regimes:

absence of reliable data from which conclusions can be drawn to guide intellectual property policy; evidence relevant to policy questions involving new technologies or new markets, such as digital communications, is problematic as the characteristics of these markets are not well understood or measured; and the data that is available is held by firms operating these new technologies and the data, when it enters the public domain, cannot be independently verified.³¹

3.20 While many stakeholders urged caution in making changes that may disrupt the emerging digital economy, the ACCC supported ‘a review of the use and extent of copyright across the digital economy to ensure that the benefits continue to exceed the costs’.³² The ACCC submission applied an economic analysis to the incentives to create and produce copyright material in the digital environment and evaluated economic literature and the presumptions upon which the literature relies. The ACCC concluded that the ‘available literature mainly focuses on the impact of digital

26 M Kretschmer and R Towse, *What Constitutes Evidence for Copyright Policy?* (2013).

27 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 2.

28 *Ibid.*, 2.

29 ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*. The CCI also considers that development of a digital exchange would assist in reducing transaction costs associated with legal re-use of copyright materials.

30 Arts Law Centre of Australia, *Submission 171*

31 *Ibid.*, citing I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

32 ACCC, *Submission 165*.

technologies on copyright holders and submits that such analysis is incomplete, as the interests of consumers and intermediate users must also be considered'.³³

3.21 There is some economic evidence regarding the economic contribution of Australia's copyright industries, notably the PricewaterhouseCoopers (PwC) Report which demonstrates that copyright content industries in 2010–11 generated the equivalent of 6.6% of gross domestic product and employed 8% of the Australian workforce.³⁴ A report by Lateral Economics takes the approach of looking at the contribution of a wider group of industries described as 'exceptions industries' including 'education and research'. Taking into account the economic contribution of industries using this expanded methodology, in 2009–10 they were responsible for 14% of gross domestic product and employed 21% of Australia's workforce.³⁵

3.22 It is clear that the economic contribution of Australia's copyright industries is significant. What is contentious is how to increase that contribution to the benefit of copyright owners, users and the community, and what reform, if any, would effect this.

3.23 Another Lateral Economics report provides an analysis of the potential efficiency gains and 'substantial growth to Australia's economic growth and innovation' through amending copyright law to be more flexible with respect to exceptions and limitations.³⁶

3.24 The ALRC observes that these economic reports have been commissioned by different stakeholders and that the methodology and analysis of the Lateral Economics Reports has been criticised in another report, funded by a stakeholder in this Inquiry.³⁷

3.25 However, it is recognised that a number of industries claim that they 'would not exist, or be much smaller, but for the limitations and exceptions to copyright law' including 'Internet publishing and broadcasting, Internet service producers and search engines, data services, computer equipment and components, computer services, telecommunications, and other industry segments'.³⁸ Indeed, it is suggested that 'valuable research could build upon initial attempts to quantify the benefits of exceptions and limitations in terms of the economic outputs and welfare effects of

33 Ibid.

34 PricewaterhouseCoopers, *The Economic Contribution of Australia's Copyright Industries 1996–97–2010–11* (2012), prepared for Australian Copyright Council, 4.

35 Lateral Economics, *Exceptional Industries: The Economic Contribution of Australian Industries Relying on Limitations and Exceptions to Copyright* (2012), prepared for the Australian Digital Alliance, 6. See favourable comments on this research in eBay, *Submission 93*.

36 Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe Harbour Provisions* (2012), prepared for Australian Digital Alliance, 2.

37 G Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore* (2012), Centre for Law and Economics Ltd. Funded by Village Roadshow. WIPO is recognising the need to quantify the contribution of 'non core' copyright industries including interdependent and support industries, World Intellectual Property Organization, *WIPO Studies on the Economic Contribution of the Copyright Industries* (2012).

38 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

those individuals, businesses, educational institutions and other entities that rely on them'.³⁹

3.26 Commissioned research on the economic benefits of fair use in copyright law, using Singapore as a case study, found copyright industries to be 'relatively unaffected' by the introduction of fair use although significant stimulation of growth in private copying technology occurred.⁴⁰

3.27 Questions about the benefits of statutory licensing are explicitly raised by the Terms of Reference. The benefits and detriments of the current system are heavily contested as between licensees and licensors. For example, the TAFE sector submitted that statutory licensing for TAFE is not economically efficient or streamlined, and does not provide easy access to copyright material.⁴¹ Furthermore, existing current exceptions do not map well onto the dynamic and varied nature of education in the VET sector.⁴²

3.28 Other educational licensees have been more blunt, suggesting that 'Australia's statutory licences are unsuitable for a digital age and must be repealed'.⁴³ The ACCC considered that relevant factors in reviewing statutory licences include the transaction costs associated with the licences and the potential for the extent and use of the rights conferred by copyright to restrict competition and create market power.⁴⁴

3.29 Some stakeholders noted that there are ways in which the statutory licensing system could work better, both in terms of the legislative framework and the way the rights are managed in practice.⁴⁵ The Australian Society of Authors, while stating that pt VB of the *Copyright Act* 'works well for educational institutions and creators',⁴⁶ also noted that 'there could be more transparency in the process – particularly how much money is paid to which publishers and authors'.⁴⁷ The Society also submitted that:

the central reasons for some statutory licence schemes should be revisited and reassessed ... these schemes are paying massive amounts of money to foreign publishers of educational materials, with only a small amount trickling to Australian creators. This goes against the original intent.⁴⁸

39 Ibid, 42.

40 R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), prepared for Google, accessed 9 April 2013.

41 Copyright Advisory Group—TAFE, *Submission 230*. See also Universities Australia, *Submission 246*, but see Screenrights, *Submission 215*; Copyright Agency/Viscopy, *Submission 249*.

42 Copyright Advisory Group—TAFE, *Submission 230*.

43 Copyright Advisory Group—Schools, *Submission 231*. See also Universities Australia, *Submission 246*.

44 ACCC, *Submission 165*.

45 Copyright Agency/Viscopy, *Submission 287*.

46 Australian Society of Authors, *Submission 169*.

47 Ibid; see also ALAA, *Submission 129*.

48 Australian Society of Authors, *Submission 169*.

The Australian Writer's Guild pointed to the inflexibility of audiovisual statutory licensing and some 'conflation' of rights streams and lack of transparency in use of data.⁴⁹

3.30 The digital environment provides an opportunity for greater licensing as markets develop to satisfy consumer needs. Furthermore, markets can be seen as being about 'fairness and opportunity' as negotiated between parties, along with a 'reasonable level of regulation'.⁵⁰ Universities Australia submitted that 'a competitive commercial licensing model'⁵¹ makes it appropriate that copyright legislation should operate to create markets based on the rights given under copyright legislation and determined by agreement between parties, rather than a statutory licence. In similar vein, the proposals relating to the introduction of fair use made in this Discussion Paper are part of the context of developing markets in a digital environment; fair use is not intended to detract from new and emerging markets for copyright material.

3.31 On the aspect of licensing of copyright material more generally, the ACCC submitted that s 51(3) of the *Consumer and Competition Act*⁵² should be repealed, noting that in other jurisdictions such as the United States, intellectual property rights are subject to the same competition laws as all other property rights, without apparent impact on the rights of creators or incentives for production of copyright material:

In order to fully exploit the substantial potential benefits arising in the digital economy, it is important that competition laws are able to complement IP laws, including copyright laws, by preventing anti-competitive conduct associated with copyright usage that is not in the public interest.⁵³

3.32 The ALRC is aware of a number of 'user friendly'⁵⁴ licensing arrangements which demonstrate a dynamic market place able to address consumer needs. Rights holders consider this removes the need for government intervention by way of amendments to copyright law, for example, in the form of exceptions allowing greater private copying. It is clear that many licensing practices are pro-competition and pro-consumer, and presumably the application of a general competition test, without the intervention of s 51(3) would pose no problems.

3.33 Concerns about developing 'digital ecosystems' are expressed by the Australian Society of Authors which opposes the 'loosening' of copyright as likely to advantage overseas owners and distributors since 'distribution (of copyright material) is largely in the hands of overseas tech giants and/or e-tailers such as Amazon'.⁵⁵ The possibility of

49 Australian Writers' Guild & Australian Writers' Guild Authorship Collecting Society, *Submission 265*.

50 R Murdoch, 'Markets Radiate Morality', *The Weekend Australian*, April 6-7 2013, 19.

51 Universities Australia, *Submission 293*.

52 *Competition and Consumer Act 2010* (Cth) s 51(3) provides a limited exception for certain licence conditions from some competition provisions of the Act.

53 ACCC, *Submission 165*. This recommendation was made previously by the Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000) and is discussed further in Ch 17.

54 iGEA, *Submission 192*.

55 Australian Society of Authors, *Submission 169*.

creating closed ecosystems through licensing arrangements tied to particular devices would also be open to competition law scrutiny.⁵⁶

3.34 The ACCC noted that there is a lack of economic research regarding the magnitude of transaction costs of licensing in the Australian context, especially regarding these costs in relation to the digital economy.⁵⁷ However, the ACCC noted that the ALRC Inquiry may result in the submission of valuable evidence regarding transaction costs and inefficiencies for both creators and users from those who participate in the assignment or licensing of copyright material. ‘Where costs of licensing exceed benefits, this may affect overall production of copyright material especially where users are increasingly creators’. The ACCC considered that such evidence is likely to provide a useful starting point for considering the costs and benefits of potential solutions to any problems associated with high transaction costs.⁵⁸

Trends in consumer use of copyright material

3.35 The Terms of Reference for this Inquiry direct the ALRC to consider whether the *Copyright Act* needs reform to allow:

- transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and
- appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes.

The Terms of Reference require the ALRC to consider reform in the context of the ‘real world’ range of consumer and user behaviour in the digital environment. Many stakeholders agree that ‘law reform should be driven by a desire to simplify the law, provide certainty, promote accessibility and maintain the relevance of the law’.⁵⁹

3.36 Maintaining the relevance of copyright law was explicitly recognised as an aim of the 2006 amendments to the *Copyright Act*.⁶⁰ The Attorney-General, the Hon Philip Ruddock, referred in his second reading speech to making the law more ‘sensible and defensible’ by ‘making sure that ordinary consumers are not infringing the law through everyday use of copyright products they have legitimately purchased’.⁶¹

3.37 Clarifying which activities infringe copyright now, and whether certain activity should continue to be categorised as infringement, is part of this Inquiry. This context

56 M Bales, *Smash the Machine: Digital Monopolies Have You Trapped* (2013) The Conversation <<http://theconversation.edu.au>> at 27 February 2013.

57 See discussion of possible economic evidence in assessing copyright law in Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

58 ACCC, *Submission 165*.

59 Arts Law Centre of Australia, *Submission 171*. ‘Copyright law needs to be in step with common, established community practice. This is important to promote public perception of copyright law as a constructive, flexible and sensible framework for governing protection and access to content’: Law Institute of Victoria (LIV), *Submission 198*.

60 *Copyright Amendment Act 2006* (Cth).

61 *Debates*, House of Representatives, 19 October 2006, 1 (Philip Ruddock MP, Commonwealth Attorney-General).

is an integral part of reform discussions taking place around the world. In the EU, for example:

Citizens increasingly voice concerns that copyright laws hinder what they view as their freedom to access and use content. Experience shows that many of them would rather pay for legal offers than use illegal content, but they often do not know whether what they download, stream or share is illegal. Businesses increasingly argue that the current copyright model is a barrier to developing the business models they consider necessary for the digital economy. These consumers and businesses agree, for different reasons, that copyright rules have to be made more flexible.⁶²

3.38 In his book *Making Laws for Cyberspace*, Chris Reed points out:

Attempting to impose rules which clash with strongly established norms, or making law in such detail that the cyberspace user is not able to understand or comply with it, are not the only ways in which laws can be rendered meaningless. Law needs to regulate the reality which is faced by those who are subject to the law.⁶³

3.39 The ACCC referred to ‘consumer empowerment over consumption’ where consumers wish to organise use of copyright material around their own preferences in terms of time, location and method of consumption.⁶⁴ This could lead to a situation where:

worthy individuals and citizens, many of them children (some maybe even judges), are knowingly, ignorantly or indifferently finding themselves in breach of international and national copyright law. And they intend to keep on doing exactly as before.⁶⁵

3.40 The Australian Communications Consumer Action Network (ACCAN) observed that:

Currently multiple everyday activities without any commercial implications are likely to breach copyright. Indeed, many consumers would be surprised to learn they were breaking the law by privately copying and recording in a way that has been commonplace for decades and in using devices that have been marketed to them vigorously.⁶⁶

3.41 Any suggestion that taking note of consumer attitudes and practices is a consideration in law reform was treated with alarm by other stakeholders:

The ALRC must not allow social norms which condone illegitimate use of copyright material, or would be used to justify unreasonably broad exemptions to copyright infringement provisions, or to dictate amendments to copyright law which will diminish the ability of content creators and owners to appropriately exploit their protected works.⁶⁷

62 European Commission, *Orientation Debate on Content in the Digital Economy* (2012), 1.

63 C Reed, *Making Laws for Cyberspace* (2012), 151.

64 ACCC, *Submission 165*.

65 M Kirby foreword to B Fitzgerald and B Atkinson (eds), *Copyright Future, Copyright Freedom* (2011), 4. See also NSW Young Lawyers, *Submission 195*, citing I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) on this point.

66 ACCAN, *Submission 194*.

67 Foxtel, *Submission 245*. See also Music Council of Australia, *Submission 269*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; ALPSP, *Submission 199*. Some stakeholders note that consumers do not generally consider ‘infringement of copyright is justified’: AFL, *Submission 232*; Cricket Australia, *Submission 228*.

3.42 In this context some stakeholders stated that it is preferable for law to shape consumer behaviour, rather than for consumer behaviour to shape the law.⁶⁸ This would include educating consumers about copyright and ‘why the legislation is in place’.⁶⁹

3.43 However, laws that are almost universally ignored are not likely to engender respect for the more serious concerns of copyright owners: ‘[p]eople don’t obey laws they don’t believe in’.⁷⁰ CCI submitted that:

The wide gap between law and norms in terms of private use is not desirable for copyright law, It is possible that widespread, pervasive disregard for copyright rules in terms of private use may support a broader legitimacy problem in copyright. It seems clear that the gap between social norms and the law should be reduced where possible.⁷¹

3.44 The concern that lack of enforcement is a more significant issue than most other issues was expressed by a number of stakeholders.⁷² In discussing whether driving social norms through ‘education and more pervasive enforcement procedures’ achieves compliance with copyright law, CCI observed that the economic evidence available indicates that innovative new business models, rather than strengthened regimes of copyright enforcement, will ultimately be of most significance in reducing piracy and copyright infringement. CCI submitted that available evidence supports the view that a broader concept of ‘fair use’ would assist in removing existing inhibitions to ‘the development of new business models’.⁷³

3.45 Consistent with the framing principles set out in Chapter 2, the ALRC does not intend in any way to undermine property rights or a fair reward to copyright creators, owners and distributors. However, questions of recognising ways in which individuals use and communicate ideas and experiences, without damaging the economic interests of the copyright owner, are relevant. The Australian Communications and Media Authority (ACMA) has conducted research which shows that Australians are:

pragmatic about the limited capacity to regulate content distributed over the internet and, with the exception of illegal content, expected that much of the content available online would not be regulated.⁷⁴ These expectations may be helpful in framing individual rights and responsibilities for copyright material.⁷⁵

68 APRA/AMCOS, *Submission 247*.

69 ALPSP, *Submission 199*.

70 J Litman, *Digital Copyright* (2001), 112. See also R Xavier, *Submission 146*; EFA, *Submission 258*.

71 ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*

72 See eg AFL, *Submission 232*; Cricket Australia, *Submission 228*.

73 ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208* citing H Varian, ‘Copying and Copyright’ (2005) 19 *Journal of Economic Perspectives* 136 and J Karaganis, *Media Piracy in Developing Countries* (2011), Social Science Research Council. Hal Leonard Australia suggested that in the context of print music ‘copyright law has had zero impact on the introduction of new and innovative business models’: Hal Leonard Australia Pty Ltd, *Submission 202*.

74 Australian Communications and Media Authority, *Digital Australians—Expectations about Media Content in a Converging Media Environment* (2011).

75 ACMA, *Submission 214*.

3.46 Not all infringing behaviour is regarded as ‘piracy’ or ‘theft’.⁷⁶ There is clearly an understanding among stakeholders that some infringing use of copyright material is ‘fair enough’⁷⁷ and other use is more egregious. There is also a distinction between consumers who may (or may not) erroneously believe that certain practices constitute copyright infringement, and those who would blatantly infringe, steal or engage in piracy.⁷⁸

3.47 One way of taking consumer preferences into account is through market responses in providing copyright content as consumers wish to consume it. The ALRC is aware of a number of emerging business models that recognise time and format shifting, among other consumer behaviour. It is suggested that ‘providing convenient and legal means for consumers to access content may also reduce demand for illegal downloading’.⁷⁹ Indeed, the digital environment creates new market opportunities and ‘more sophisticated, flexible and efficient means for companies to measure and charge for usage’.⁸⁰

3.48 The ALRC considers that the reform proposals in this Discussion Paper recognise legitimate use of copyright material that does not detract from the rights of owners and will allow markets to operate efficiently.

Complexity of copyright law

3.49 Reform should not add further complications to an already complex statute.⁸¹ Ideally, reform should promote clarity and certainty for creators, rights holders and users. The many amendments to the current legislation have resulted in complex numbering and ‘a feeling that the Act is unable to be understood by copyright creators and users’.⁸² Aspects of the Act are ‘pointlessly narrow’ and there are ‘obvious deficiencies in drafting’.⁸³ The ALRC considers that one aspect of this Inquiry should be to reduce the complexity of the current *Copyright Act* and, with that, transaction costs for users and rights holders.

3.50 Reducing complexity can have a number of dimensions. Certainly, stakeholders are largely in favour of the concept ‘don’t make the statute more complex than it already is’. Many would go further and suggested overall simplification of what is

76 See a distinction made between individual infringing behaviour and piracy in C Geiger, ‘Counterfeiting and the Music Industry: towards a criminalisation of end users? The French ‘HADOPI’ example’ in C Geiger (ed) *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (2012) 386; P Yu, ‘Digital Copyright and Confuzzling Rhetoric’ (2011) 13 *Vanderbilt Journal of Entertainment and Technology Law* 881, 887.

77 For example, consumers who believe they have the ‘right’ to copy material legally acquired; ADA and ALCC, *Submission 213*.

78 Cricket Australia, *Submission 228*; AFL, *Submission 232*; Australian Industry Group, *Submission 179*; ALAA, *Submission 129*.

79 Australian Industry Group, *Submission 179*. See also Cricket Australia, *Submission 228*.

80 Australian Industry Group, *Submission 179*. See also AIMIA Digital Policy Group, *Submission 261*.

81 NSW Department of Attorney General and Justice, *Submission 294*; Australian Copyright Council, *Submission 219*; National Library of Australia, *Submission 218*.

82 A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), 146.

83 P Knight, *Submission 182*.

already there. The fear is always that attempting either aspect—let alone both—will result in even greater incoherence.⁸⁴

3.51 For law to be meaningful, ‘first, the law must be understandable, and if understood it must appear to the user to be reasonably possible to comply with its requirements’.⁸⁵ Setting out compliance requirements in exhaustive detail may seem to avoid uncertainty, but is not easy to understand, and may not further the law’s aims. The Internet Industry Association noted that the *Copyright Act*:

contains many provisions designed for specific cases and circumstances that appear to apply similar fundamental principles. This makes the Act difficult to penetrate, even for specialists.⁸⁶

3.52 The National Archives of Australia considered that the complexity of copyright law was an impediment to providing ‘fair access to archival material’.⁸⁷ and State Records of South Australia asked for ‘simplification and consolidation of exceptions’ as the ‘complexity and piecemeal nature of the Act makes the provision of access to information difficult for both the public and archival institutions’.⁸⁸ Similarly, News and Foxtel would welcome having four separate format shifting exceptions replaced by one.⁸⁹

3.53 While ‘a degree of complexity may be unavoidable’,⁹⁰ a number of stakeholders submitted that there is considerable scope for changing copyright law to make it more accessible:

Copyright law needs to be in step with common, established community practice. This is important to promote public perception of copyright law as a constructive, flexible and sensible framework for governing protection and access to content.⁹¹

3.54 APRA/AMCOS pointed to the undesirability of having ‘comprehensibility of a statute’ as an underlying principle for law reform, recognising, however, that unnecessary complexity results from confusion and redundancy.

3.55 Some stakeholders considered that reform for the purposes of simplification and clarity may be a ‘Trojan horse’ for substantive change in the law—there is opposition to using a ‘reducing complexity argument to support the introduction of a broad “fair use” exception’.⁹²

84 S Ricketson, ‘Simplifying Copyright Law: Proposals from Down Under’ (1999) 21(11) *European Intellectual Property Review* 537.

85 C Reed, *Making Laws for Cyberspace* (2012), 23.

86 Internet Industry Association, *Submission 253*.

87 National Archives of Australia, *Submission 155*.

88 State Records South Australia, *Submission 255*.

89 Foxtel, *Submission 245*; News Limited, *Submission 224*.

90 Law Council of Australia, *Submission 263*.

91 Law Institute of Victoria (LIV), *Submission 198*; Arts Law Centre of Australia, *Submission 171*—‘Law reform should be driven by a desire to simplify the law, provide certainty, promote accessibility and maintain the relevance of the law’.

92 News Limited, *Submission 224*. See also AAP, *Submission 206*.

3.56 While accepting that lawyers will always be needed to interpret complex legislation,⁹³ the ALRC considers that willingness to develop an understanding of desirable reform by stakeholders should be assumed. Some submissions seem to consider that Australian courts, industries and consumers are incapable of developing an understanding of concepts which, in a number of jurisdictions, including the US, courts, citizens and businesses deal with on a day-to-day basis.

3.57 This Inquiry is not aimed at overall simplification of the *Copyright Act* despite the concern of many stakeholders over the complexity and difficulty of the legislation. The ALRC considers that any reforms recommended should, at the very least, not add to that complexity. Many stakeholders endorse the view that a working understanding of copyright law should be more accessible so as to reduce transaction costs and facilitate more efficient transactions for business,⁹⁴ the public⁹⁵ and other users.⁹⁶ The various chapters in this Discussion Paper discuss how proposed reforms are intended to achieve this.

The implications of cultural policy for copyright reform

3.58 Many stakeholders in this Inquiry are at the forefront of cultural life in Australia, and it is clear that copyright law directly affects a broad range of cultural activity. The Terms of Reference specifically refer to ‘the general interest of Australians to access, use and interact with content in the advancement of ... culture’. The ALRC has been urged ‘not to think about copyright law solely or primarily in terms of trade and economic policy but to recall its central role in cultural policy’.⁹⁷

3.59 A National Cultural Policy Discussion Paper was launched by the Minister for the Arts, the Hon Simon Crean MP, in August 2011. It noted that: ‘a creative nation is a more productive nation’.⁹⁸ Following extensive feedback from organisations, community groups and individuals, a new National Cultural Policy was launched on 13 March 2013.⁹⁹ It explicitly recognises the importance of copyright law—and the ALRC Inquiry—in reform aimed at providing:

incentives for investment in innovation and content in a digital environment, while balancing the need to allow the appropriate use of both Australian and international content.¹⁰⁰

3.60 The objective of the new National Cultural Policy is to increase the social and economic dividend from the arts, culture and the creative industries and is explicitly

93 Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*.

94 iiNet Limited, *Submission 186*; ACCC, *Submission 165*.

95 See Internet Industry Association, *Submission 253*; Evolution Media Group, *Submission 141*.

96 Including cultural and community groups: State Library of New South Wales, *Submission 168*; State Records NSW, *Submission 160*; Blind Citizens Australia, *Submission 157*; National Archives of Australia, *Submission 155*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*.

97 Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

98 G Trainor and A James, *Review of the Australia Council* (2012), 9.

99 Australian Government, *National Cultural Policy Discussion Paper* (2011) accessed 13 March 2012.

100 *Ibid.*, 83.

linked to the opportunities to be provided by the National Broadband Network. In this context, a number of stakeholders point to desirable reform of copyright law to allow greater digitisation and communication of works by public and cultural institutions.¹⁰¹

3.61 The Issues Paper canvassed the various ways in which the *Copyright Act* provides for galleries, libraries, archives and museums (collectively, the ‘GLAM sector’). In considering reform that is beneficial for Australians in terms of accessing and interacting with culture: ‘we need to keep in mind the particular kind of cultural products we want to have access to and craft rights to support culturally meaningful forms of engagement with copyright works’.¹⁰²

3.62 Greater access to cultural material in a way that does not impede incentives to innovate and the capacity for a creator to be fairly rewarded is a common theme in submissions. For example, digitisation of material for library and archival purposes, for ‘non-commercial access’ during the copyright term is regarded as being of a different order to digitising collections for access on the internet.¹⁰³

3.63 In 2011, a Copyright Council Expert Group produced a statement of fundamental principles of Australian copyright law, recognising ‘the importance of encouraging the endeavours of authors, performers and creators by recognising economic rights’ (and also moral rights), ‘subject to limitations’, and in a manner that ‘takes account of evolving technologies, social norms and cultural values’.¹⁰⁴

3.64 One aspect of access to cultural heritage, which has attracted a great deal of comment from Australian cultural institutions, is the extension of the term of copyright protection.¹⁰⁵ Although extension of the term from 50 to 70 years has not in itself created the issues cultural institutions face in preserving and using material donated and otherwise acquired, it exacerbates them.¹⁰⁶ One issue here is that the copyright term commences from first publication of a work or other subject matter. For older material this means an even more extended time before it enters the public domain.¹⁰⁷

3.65 Difficulties in clearing rights in digital material leads to skewed representation of cultural aspects and history, and creates what has been termed ‘blockbuster skew’ or ‘digital skew’.¹⁰⁸

The sense of history which comes with access to the whole, or a substantial part, of an archive, is of much greater cultural value than a small selection curated through the

101 ADA and ALCC, *Submission 213*; Australian War Memorial, *Submission 188*.

102 K Bowrey, *Submission 94*.

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

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

105 See discussion in M Rimmer, *Digital Copyright and the Consumer Revolution* (2007) particularly Chapter 1 ‘The Dead Poets Society: The Copyright Term and the Public Domain’, 24; see also Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 80–84.

106 M Rimmer, *Submission 127*.

107 National Library of Australia, *Submission 218*.

108 J Given, *Submission 185* citing E Hudson and A Kenyon, ‘Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions’ (2007) 4(2) *SCRIPT-ed* 197 and S McCausland, ‘Getting Public Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use’ (2009) 14 *Media Arts Law Review* 21.

random prism of copyright clearance. ... There is a danger that in the digital age the publicly available cultural history of broadcasting will skew: we will remain familiar with ubiquitous blockbuster programs which are available everywhere more than we will remember local Australian programs left in the archives.¹⁰⁹

3.66 The ‘cultural value’ of works with no economic value is often high but ‘copyright protects equally works of economic value as well as those of no economic value’.¹¹⁰ and there can be onerous costs of compliance with copyright law, but with no resulting benefit to any creator or owner. Perhaps this could amount to circumstances where:

the policy rationale for any new exception should be based on the *purpose* for which content can be used without permission. This purpose should, as a matter of public interest, be more important than a content creator’s right to manage the use of their work.¹¹¹

3.67 Even those advocating an approach to copyright law reform based on evidence—particularly economic evidence—note that copyright exceptions and limitations applicable to the role of libraries and archives as ‘cultural custodians’ have important effects on ‘individual welfare, autonomy and freedom of expression which are harder to quantify but nonetheless critical’.¹¹²

3.68 It is clear that particular protocols and considerations may apply to Indigenous cultural material, whether within copyright protection or not.¹¹³ Considerable work has been done on developing and implementing protocols for digitisation and use of Indigenous material.¹¹⁴ The moral rights regime introduced into the *Copyright Act* in 2002 has deficiencies but also possibilities in recognising the importance of cultural and religious sensitivities. Moral rights can assist in ‘distinguishing between the two situations of the Aboriginal artist and the non-Aboriginal artist’, including around the very act of unauthorised reproduction itself.¹¹⁵ One existing exception in the *Copyright Act*, relating to parody and satire, may in particular set up a tension between moral rights and ‘the public interest in expressive freedom’ which is ‘a matter which would have to be worked out on a case by case basis in the courts’.¹¹⁶

109 S McCausland, ‘Getting Public Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use’ (2009) 14 *Media Arts Law Review* 21, 24. See also Australian War Memorial, *Submission 188*.

110 Australian War Memorial, *Submission 188*.

111 Copyright Agency/Viscopy, *Submission 249*.

112 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 8.

113 Arts Law Centre of Australia, *Submission 171*; ADA and ALCC, *Submission 213*; State Library of New South Wales, *Submission 168*.

114 Arts Tasmania, *Submission 150*; M Nakata and others, ‘Indigenous Digital Collections: An Early Look at the Organisation and Culture Interface’ (2008) 39(4) *Australian Academic and Research Libraries Journal* 137. See also M Nakata and others, ‘Libraries, Indigenous Australians and a Developing Protocols Strategy for the Library and Information Sector’ in M Nakata and M Langton (ed) *Australian Indigenous Knowledge and Libraries* (2005).

115 P Loughlan, ‘The Ravages of Public Use: Aboriginal art and moral rights’ (2002) 17 *Media and Arts Law Review* 24.

116 *Ibid*, 25, discussing parody of work albeit before the exception for parody and satire was introduced in 2006.

3.69 Concerns relating to Indigenous material do not centre only on outsiders using cultural material. Sometimes the issues are the reverse, where copyright can prevent access by Indigenous people to their own heritage. Arts Tasmania identified this as an issue of ‘cultural maintenance’:

There are instances where access to important cultural material has been denied to Aboriginal people by the copyright owners. Aboriginal living people should be allowed access to the cultural material of their ancestors to interpret, adapt and republish.¹¹⁷

Current regulatory models

3.70 Reform should promote the development of a policy and regulatory framework that is adaptive and efficient. The costs and benefits to the community should be taken into account in formulating options for reform. The *Australian Government Best Practice Regulation Handbook* requires law reform to ‘deliver effective and efficient regulation—regulation that is *effective* in addressing an identified problem and *efficient* in terms of maximising the benefits to the community, taking account of the costs’.¹¹⁸

3.71 A number of stakeholders pointed to uncertainty in applying current copyright law, due to the complexity or inadequacy of current legislation that deters innovation and promotes risk-averse behaviour.¹¹⁹ For example, State Records NSW advised that it is constrained in ‘exploring new digital means of access to government archives due to uncertainty in how to apply the many exceptions provided in the *Copyright Act*’.¹²⁰

3.72 A number of submissions questioned whether the current legal and institutional structures in copyright law offer an effective, efficient and functional model for dealing with digital content copyright issues, and what alternatives might apply. For example, the ACMA pointed to the need for ‘a mix of regulatory strategies’ for dealing with digital content issues in any revised copyright framework. These include: direct regulation with an emphasis on compliance and enforcement of rights and obligations; industry co-regulation and self-regulation; technology applications to assist with content management; and cultural and behavioural changes needed to promote and protect access to content.¹²¹

3.73 One theme that emerged from submissions was the desirability of ‘principles-based’ drafting of the Act,¹²² with details and examples supplied by regulations to the Act, supplemented by industry codes, guides to best practice and the like.¹²³

117 Arts Tasmania, *Submission 150*.

118 Australian Government, *Best Practice Regulation Handbook* (2010); *Australian Law Reform Commission Act (1996)* (Cth) s 24(2)(b).

119 See for example Yahoo!7, *Submission 276*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; Australian War Memorial, *Submission 188*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

120 State Records NSW, *Submission 160*.

121 ACMA, *Submission 214*.

122 Drawing on experience as a regulator, ACMA points out that increasingly ‘current regulatory schemes provide standards-setting arrangements’: *Ibid*. See also K Bowrey, *Submission 94*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*, citing authorities on the ‘expressive function of law’. Civil Liberties Australia

3.74 An example of a current legislative approach incorporating principles-based drafting can be seen in provisions relating to unconscionability in the *Competition and Consumer Legislation Act 2010* (Cth), where there is a list of factors for a court to weigh up.¹²⁴ In the copyright context, the ALRC is proposing a fair use model incorporating a list of the purposes and the fairness factors to be considered in an assessment as to whether any use of copyright material is ‘fair’.¹²⁵

3.75 With respect to developing an understanding of legislative principles, the Arts Law Centre of Australia points to the usefulness of *Fair Use Codes* and *Codes of Best Practice* guidelines developed in the US by Peter Jaszi and Pat Aufderheide, designed to educate users on fulfilling the requirements of copyright legislation.¹²⁶ A number of submissions commented on the possible uses of guidelines agreed between owners and users to find ‘common ground’ in terms of practices relating to copyright material.¹²⁷

3.76 The Department of Science, Information Technology, Innovation and the Arts (Qld) pointed out the many ‘legally ambiguous’ areas in the Act at present, and stated that ‘the business community would benefit from greater clarity in relation to copyright and acceptable practices, and the formulation of clear guiding principles’.¹²⁸

3.77 In a similar vein, News Ltd pointed to the undesirability of legislation defining too closely what ‘reporting the news’ is, and also what volume of material should be included in the concept. Rather, negotiations between news organisations and sports organisations, with the ACCC assisting, have led to a code of practice for sports news reporting.¹²⁹

3.78 Development of an industry code is recommended by the *Book Industry Strategy Group Report* to be adopted ‘in accordance with the legislative framework’ in order to combat book piracy, with the government acting as an intermediary in negotiations. In responding to the Report the Government noted that a number of meetings had already taken place with the Attorney-General’s Department and industry to find an acceptable way forward.¹³⁰ The ALRC is aware that talks relating to ISP activities have faltered

recommended ‘the development of a general objects clause for the Copyright Act’: Civil Liberties Australia, *Submission 139*.

123 See NAVA, *Submission 234*.

124 The *Competition and Consumer Act 2010* (Cth) has a statement of interpretative principles in the unconscionable conduct provisions.

125 Ch 5.

126 Arts Law Centre of Australia, *Submission 171* referring to work done by Peter Jaszi and Pat Aufderheide at the Centre for Social Media (American University, Washington, DC): P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011). See, however, comments on these studies in J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

127 Copyright Agency/Viscopy, *Submission 249*. See also APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*, PPCA, *Submission 240*.

128 DSITIA (Qld), *Submission 277*.

129 News Limited, *Submission 286*. Note that, in contrast, Major Professional and Participation Sports would prefer a ‘reporting the news’ exemption that is more prescriptive: COMPPS, *Submission 266*. See also Cricket Australia, *Submission 228*.

130 Australian Government, *Government Response to Book Industry Strategy Group Report* (2012).

following the iiNet case¹³¹ but raises the possibility that agreements and industry codes relating to ‘purposes’ in the *Copyright Act* could be provided for in the legislation.

3.79 Although these ‘inter-industry compacts’ do not always proceed as quickly as some parties would like, ‘privately negotiated arrangements will continue to emerge as new technologies make access, re-use, and distribution of content an inherent part of our culture and economy’.¹³²

3.80 Stakeholders also noted that this Inquiry is not dealing with the whole picture of reform, and piecemeal amendment ‘may not reflect the policy underlying the copyright regime’.¹³³ Furthermore, copyright is just one aspect of digital media markets which are themselves ‘a construction of the interplay of media, telecommunications and copyright law’.¹³⁴ In this context and ‘in accordance with historical jurisprudential tradition, the *Copyright Act* should be confined to expressing legal principles that affect us all, in a manner that assists in generating the required normative framework that allows it to be broadly understood’.¹³⁵ The statute cannot alone achieve clarity and certainty without the capacity to capture relevant policy and context factors.

3.81 The need for an ‘appropriate regulatory model to support copyright businesses’ innovation and sustainable growth’ is referred to in economic research prepared for the Australian Copyright Council.¹³⁶ The point about having an appropriate regulatory environment to encourage innovation in technology start-up companies is also made in another PwC report.¹³⁷

3.82 Stakeholders in this Inquiry have differing views as to what an ‘appropriate regulatory environment’ is, and many stress the importance of not destabilising ‘current existing legal structures on which copyright holders and their licensees rely as the basis for their business models’.¹³⁸

3.83 The Australian Copyright Council’s submission discusses the broader debate concerning legal rules and standards in the context of copyright law, specifically in the context of critiquing the problems with a flexible exception such as fair use, which is one specific aspect of this Inquiry.¹³⁹ The Australian Copyright Council noted that ‘an appropriate regulatory model’ needs to operate in ‘the broader copyright ecosystem’

131 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] 16 HCA.

132 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), citing, eg, the 2007 User Generated Content Principles as used in YouTube’s UGC portal; voluntary best practice codes for payment services where sites sell counterfeit goods and the flexible Copyright Alert System to discourage infringing distribution of copyright material, among others.

133 APRA/AMCOS, *Submission 247*, expressing a concern also that the Terms of Reference may result in ‘particular stakeholders’ having disproportionate influence.

134 K Bowrey, *Submission 94*.

135 *Ibid.*

136 PricewaterhouseCoopers, *The Economic Contribution of Australia’s Copyright Industries 1996–97–2010–11* (2012), prepared for Australian Copyright Council, 4. This comment is not explained further in the Report.

137 PricewaterhouseCoopers, *The Startup Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013).

138 BSA, *Submission 248*.

139 Australian Copyright Council, *Submission 219*.

which includes some matters not within the Terms of Reference and in particular, supports the Copyright Agency/Viscopy observation concerning a regulatory environment which protects ‘the principal incentive to create new content’ and ‘the opportunity to determine how that content will be used by others’.¹⁴⁰

3.84 The Australian Copyright Council seemed to cast doubt on a ‘standards’ approach on the basis that a ‘rules’ approach is more appropriate for Australia, given the different constitutional and legal tradition in which Australian and US jurisdictions operate.¹⁴¹ Uncertainty of application, lack of precedent and the existence of satisfactory exceptions are also reasons given for not recommending a fair use exception in Australian law, views shared by a number of stakeholders. However, alternative views expressing the desirability of introducing fair use into Australian copyright law have been expressed by a large number of other stakeholders.

3.85 In the educational context, the report commissioned by Screenrights from the Kernochan Center for Law, Media and the Arts of Columbia University¹⁴² usefully reviews the principal US copyright exceptions relevant to educational uses and comments on the possibility for Australia of such a provision. An important aspect of the fair use environment in the US is the development of guidelines as to how it should operate. Universities Australia submitted that in determining whether a particular use amounts to fair use/fair dealing or requires a licence ‘universities would adopt guidelines or similar instructions to staff that assist in making such decisions’ as in comparable jurisdictions¹⁴³

3.86 An important aspect of the discussion in the Kernochan Center report concerns the divergence of views on fair use and the length of time disputes take to resolve, despite the development of various sets of guidelines. However, the Standing Council on School Education and Early Childhood explicitly referred to the time and resources taken up dealing with the inefficiencies of the current educational copyright licensing environment.¹⁴⁴ The Council also stated that it is not correct to assume that the current environment creates greater certainty than an open-ended flexible exception.¹⁴⁵

3.87 The process of developing an understanding about how fair use might operate in response to the ‘changing technological frontier’ is discussed in the Kernochan Center report which refers to the Conference on Fair Use convened under the Clinton Administration,¹⁴⁶ the ‘best practice’ codes referred to above¹⁴⁷ and the attempts of various universities and schools to interpret fair use for their institutions.¹⁴⁸

140 Copyright Agency/Viscopy, *Submission 249*.

141 Australian Copyright Council, *Submission 219*.

142 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

143 Universities Australia, *Submission 293*.

144 Copyright Advisory Group—Schools, *Submission 290*.

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

146 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

147 *Ibid.*, 33.

148 *Ibid.*, 43.

3.88 While the process of producing codes and guidelines can be summarised as producing a ‘mixed bag’ of outcomes¹⁴⁹ the ALRC asks whether the risks of uncertainty documented by stakeholders are outweighed by the advantages of the reforms proposed in this Discussion Paper—albeit that change requires some adaptation:

The broader question implicated by these issues—whether fair use is a sound regulatory tool—is one that should certainly engage local policy makers in their deliberations as to the virtues of fair use.¹⁵⁰

3.89 In May 2013, Productivity Commission chair Mr Peter Harris called for a policy-making structure that reinforces the expectation of change:

a mechanism under which continuous reform is invited ... An integrated approach, where the voice of any one affected sector or region may not dominate; and where the breadth of necessary changes and the combined potential for economy-wide gains can be clearly set against any costs ... a generic way forward. But clearly there is scope in this idea for a regular, wide-ranging review of productivity-oriented reforms ... This is not a concept that can be created overnight.¹⁵¹

3.90 The ACCC endorsed a regulatory framework in which negotiating an understanding of acceptable uses of copyright material may be more effective and efficient in reducing inefficiencies than a strict enforcement regime which potentially inhibits innovation:

where the parameters can be set so that the rights of copyright holders are able to be preserved and protected commensurate with the objectives of providing incentives to create copyright material ... balanced against the potential for innovative business practices to meet and develop consumer expectations and practices.

3.91 Creation of this understanding can come through industry guidelines matched with consumer expectations. The ACCC also pointed to its role in drafting guidelines to which the Copyright Tribunal is required to have regard in determining licence conditions that are the subject of determinations by the Copyright Tribunal.¹⁵²

3.92 The ALRC proposes that in the digital environment a standard—a general rule based on principle—provides the flexibility to respond to technological change in a principled manner using criteria worked out between parties or ultimately a court.¹⁵³ This Discussion Paper canvasses views for and against the introduction of ‘fair use’ and proposes a particular model for a fair use exception in Chapter 4.

149 Ibid, 65.

150 G Austin, ‘The Two Faces of Fair Use’ (25) *New Zealand Universities Law Review* 285, 314.

151 P Harris, *The Productivity Reform Outlook* <www.pc.gov.au/speeches/peter-harris/reform-outlook> at 1 May 2013.

152 *Copyright Act 1968* (Cth) s 157A.

153 See discussion of ‘principles based’ legislation in Ch 4.

