

4. The Case for Fair Use in Australia

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Summary

4.1 The Terms of Reference direct the ALRC to consider whether existing exceptions in the *Copyright Act 1968* (Cth), such as the fair dealing exceptions, are adequate and appropriate and also whether further exceptions should recognise 'fair use' of copyright material.

4.2 This chapter provides context for the ALRC's consideration of fair use. It outlines arguments raised both for and against Australia introducing a broad, flexible exception based on fair use.

4.3 The chapter outlines the changed environment since previous Australian reviews considered the issue. It examines current approaches to formulating standards (open-ended and general) as compared with rules (closed-ended and more prescriptive).

4.4 Having considered these matters, the ALRC proposes that the *Copyright Act* should be amended to provide a broad, flexible exception for fair use. The last part of the chapter outlines key aspects of the proposed fair use exception.

What is fair use?

4.5 Fair use is a defence to copyright infringement. It essentially asks of any particular use, ‘is this fair?’ This is determined on a case by case basis. The statute does not define what is fair.

4.6 In deciding whether a use is fair, a number of criteria—‘fairness factors’—are considered. These fairness factors are set out in the fair use statutory provision. Law that incorporates such principles or standards is generally more flexible and adaptive than prescriptive rules.

4.7 Most fair use provisions around the world list the same four fairness factors. These are also factors that appear in the current Australian exceptions for fair dealing for the purpose of research or study.¹ The four fairness factors are non-exhaustive; other relevant factors may be considered.

4.8 In other jurisdictions fair use provisions set out illustrative purposes—these are examples of broad types or categories of use or purposes that may be fair. A particular use does not have to fall into one of these categories to be fair. This is one of the key benefits of fair use. Unlike the fair dealing provisions, fair use is not limited to a set of prescribed purposes.

4.9 Also, just because a use falls into one of the categories of illustrative purpose, does not mean that such a use will necessarily be fair. It does not even create a presumption that the use is fair. In every case, the fairness factors must be ‘explored, and the results weighed together, in light of the purposes of copyright’.²

4.10 Where copyright legislation includes an exception for fair use, there will also be other more specific exceptions that operate in addition to fair use.

4.11 Fair use is not a radical exception. It largely codifies the common law. Fair use and fair dealing share the same common law source.³ Fair use has been enacted in a number of countries,⁴ but most notably, in the United States.⁵

1 *Copyright Act 1968* (Cth) ss 40(2), 103C(2), 248A(1A).

2 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 577.

3 See, eg, W Patry, *Patry on Fair Use* (2012), 9–10; M Sag, ‘The Prehistory of Fair Use’ (2011) 76 *Brooklyn Law Review* 1371; A Sims, ‘Appellations of Piracy: Fair Dealing’s Prehistory’ (2011) *Intellectual Property Quarterly* 3; M Richardson and J Bosland, ‘Copyright and the New Street Literature’ in C Arup (ed) *Intellectual Property Policy Reform: Fostering Innovation and Development* (2009) 199, 199; R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 253–64; Copyright Law Review Committee, *Copyright and Contract* (2002), 25.

4 See, eg, *Copyright Act 1967* (South Korea) art 35–3; *Copyright Act 2007* (Israel) s 19; *Intellectual Property Code of the Philippines*, Republic Act No 8293 (the Philippines) s 185.

5 *Copyright Act 1976* (US) s 107.

4.12 The codification of fair use in the US took effect in 1978. The intention was to restate copyright doctrine—‘not to change, narrow, or enlarge it in any way’.⁶ There was no intention ‘to freeze the doctrine in the statute, especially during a period of rapid technological change’.⁷ Section 107 of the US *Copyright Act* provides:

Notwithstanding the provisions of sections 106 and 106A, 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.

Reviews that have considered fair use

4.13 The Terms of Reference direct the ALRC to take into account recommendations from related reviews. A number of reviews, in Australia and in other jurisdictions, have considered the merits, or otherwise, of introducing fair use.

Recent international reviews

4.14 The Hargreaves Review was specifically asked to investigate the benefits of a fair use exception and how these benefits might be achieved in the United Kingdom (UK).⁸ The Review expressed regret that it could not recommend that the UK promote a fair use exception to the European Union (EU)—‘the big once and for all fix’⁹—as it had been advised that there would be ‘significant difficulties’ in attempting to transpose US-style fair use into European law.¹⁰

4.15 At the time of this Inquiry, a review of Irish copyright law is also taking place, to examine the ‘optimum’ copyright law for Ireland, including consideration of whether a fair use doctrine would be appropriate in the Irish/EU context.¹¹

6 United States House of Representatives, Committee on the Judiciary, *Copyright Law Revision (House Report No. 94-1476)* (1976), 5680.

7 Ibid.

8 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 101.

9 Ibid, 52.

10 Ibid, 46. Some scholars have challenged the view that a Member State of the EU cannot introduce flexible copyright norms. See, eg, B Hugenholtz and M Senftleben, *Fair Use in Europe: In Search of Flexibilities* (2011).

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

Australian reviews

4.16 This Inquiry is not the first Australian review to consider whether the *Copyright Act* should recognise the fair use of copyright material,¹² although some stakeholders consider that it has not been given ‘a sufficiently thorough examination in Australian law reform processes’ to date.¹³

The CLRC simplification review

4.17 In 1996, the Australian Government asked the Copyright Law Review Committee (CLRC) to consider how the *Copyright Act* could be simplified ‘to make it able to be understood by people needing to understand their rights and obligations’.¹⁴ The CLRC was mindful that it did not have ‘a mandate to undertake a wholesale review of the Act or recommend significant changes to the policy underpinning the law’.¹⁵

4.18 In 1998, the CLRC recommended, among other things, the consolidation of the existing fair dealing provisions into a single section and the expansion of fair dealing to an ‘open-ended model’ that would not be confined to the existing ‘closed-list’ of fair dealing purposes.¹⁶ The CLRC recommended that the existing non-exhaustive list of five fairness factors in s 40(2) of the *Copyright Act* specifically apply to all fair dealings.¹⁷

4.19 The CLRC recommended the following text for the consolidated statutory provision:

- (1) Subject to this section, a fair dealing with any copyright material for any purpose, including the purposes of research, study, criticism, review, reporting of news, and professional advice by a legal practitioner, patent attorney or trade mark attorney, is not an infringement of copyright.
- (2) In determining whether in any particular case a dealing is a fair dealing, regard shall be had to the following:
 - (a) the purpose and character of the dealing;
 - (b) the nature of the copyright material;
 - (c) the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price;
 - (d) the effect of the dealing upon the potential market for, or value of, the copyright material;

12 For an overview of the history see M Wyburn, ‘Higher Education and Fair Use: A Wider Copyright Defence in the Face of the Australia-United States Free Trade Agreement Changes’ (2006) 17 *Australian Intellectual Property Journal* 181.

13 R Burrell and others, *Submission 278*.

14 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [1.03].

15 *Ibid.*, [6.28].

16 *Ibid.*, [2.01]–[2.03].

17 See also *Ibid.*, [2.04], [6.36]–[6.44].

- (e) in a case where part only of the copyright material is dealt with—the amount and substantiality of the part dealt with, considered in relation to the whole of the copyright material.¹⁸

4.20 The CLRC considered that its model was ‘sufficiently flexible to accommodate new uses that may emerge with future technological developments’ and that it also contained ‘enough detail to provide valuable guidance to both copyright owners and users’.¹⁹ This model has been described as ‘a neat and elegant one that will bring the existing multiplicity of exceptions into a coherent and orderly relationship’.²⁰ The Australian Government did not formally respond to the recommendations made in this CLRC report.

4.21 The CLRC’s model is similar to that proposed by the ALRC in this Discussion Paper.

Intellectual Property and Competition Review Committee

4.22 In September 2000 the Intellectual Property and Competition Review Committee, chaired by Henry Ergas (Ergas Committee), considered the CLRC’s recommendation for expansion of the fair dealing purposes. It reported that it did ‘not believe there is a case for removing the elements of the current *Copyright Act*, which define certain types of conduct as coming within the definition of fair dealing’.²¹ In the context of reviewing copyright in terms of competition policy, the Ergas Committee considered that, at that time, the transaction costs of changing the *Copyright Act* would outweigh the benefits.²²

The Attorney-General’s Department’s Fair Use Review

4.23 The Australian Government Attorney-General’s Department’s Fair Use Review (AGD Fair Use Review) considered the CLRC and Ergas Committee’s respective relevant recommendations, as well as a recommendation that had been made by the Joint Standing Committee on Treaties (JSCOT) in the context of its consideration of whether the *Australia-United States Free Trade Agreement* (AUSFTA) would be in the national interest.

4.24 JSCOT had recommended replacing fair dealing with something closer to the US fair use doctrine ‘to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting’.²³

4.25 Submissions to the AGD Fair Use Review contained a number of arguments for and against Australia adopting such a fair use approach. As the AGD Fair Use Review

18 Ibid, [6.143].

19 Ibid, [6.08].

20 S Ricketson, ‘Simplifying Copyright Law: Proposals from Down Under’ (1999) 21(11) *European Intellectual Property Review* 537, 549.

21 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 15.

22 Ibid, 129.

23 The Joint Standing Committee on Treaties—Parliament of Australia, *Report 61: The Australia-United States Free Trade Agreement* (2004), Rec 17.

observed, the main difference between a provision which is open-ended, compared with one that is closed, is that the former is more likely to provide flexibility and the latter, certainty.²⁴ Views differed as to which was preferable.

4.26 A final report was not issued. However, a number of reforms were enacted in response to the Review—notably exceptions for time and format shifting and fair dealing for parody and satire.

4.27 The Australian Government did not enact a fair use exception for two reasons. First, the Government stated that, in the public consultation phase, ‘no significant interest supported fully adopting the US approach’.²⁵ Secondly, it appears that the Government may have been concerned about compliance with the three-step test in international copyright law.²⁶

The changed environment

4.28 Some stakeholders submitted that nothing had changed since 1996–98, 2000 and 2005–06 when the CLRC, the Ergas Committee and the AGD were considering, respectively, the issue of a fair use-style exception. However, the ALRC considers that developments in recent years provide further evidence in support of Australia introducing fair use.

4.29 The most important change is the development of the digital economy. There has been a noticeable degree of change with respect to digital technology, including increasing convergence of media and platforms. There has also been a significant move from rule-directed legislation to principles-based legislation in Australia. These changes are discussed further below.

4.30 The opportunities made possible by the digital economy provide further evidence in favour of fair use. In 2013, a report by PricewaterhouseCoopers (PwC) identified the possibilities for technology start-ups contributing 4% of the nation’s gross domestic product (\$109 billion) and up to 540,000 jobs by 2033, with the right fostering and ‘eco system’ in which ‘culture skills and entrepreneurship’ would be essential.²⁷ PwC stated that Australia has a ‘considerably higher “fear of failure” rate than nations such as the US and Canada’ and that an optimum environment for innovation includes appropriate copyright law.²⁸

24 Australian Government Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age*, Issues Paper (2005), [1.5].

25 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 10. However, it should be noted that a number of submissions—presumably defined as coming before ‘the public consultation phase’—did argue in favour of a broad, flexible exception. Further, ‘personal consumers’ had supported an open-ended exception: Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 12.

26 See Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 10–11.

27 PricewaterhouseCoopers, *The Startup Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013). See, also, C Griffith, ‘Entrepreneurs “need a leg up”’, *The Australian*, 23 April 2013, 29.

28 PricewaterhouseCoopers, *The Startup Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013), 13. The report did not suggest any particular changes to copyright law.

4.31 Another change since earlier reviews is that successive governments have given an increased focus to the use of competition to encourage microeconomic reform and to enable the Australian economy to blossom in a more open world economy.²⁹ For example, creative industries protected by copyright law have experienced many changes designed to enhance competition, including: freeing up the market for books, sound recordings, computer programs and other copyright material; removing parallel importing restrictions based only on labels of goods; the ‘Digital Agenda’ amendments; the introduction of moral rights and allowing decompilation of computer programs for the purposes of interoperability. Stakeholders in this Inquiry have demonstrated their capacity to respond to change: to develop and adapt in the digital economy.³⁰

4.32 The ALRC considers there is now more of an appetite for a broad, flexible exception to copyright. Since earlier reviews, there are new understandings of the interpretation of the three-step test. As one submission remarked, many leading copyright experts support ‘an open-textured understanding of the three-step test’ and ‘the compatibility of open-ended drafting with the three-step test’.³¹

4.33 Finally, the ALRC considers that the potential benefits of introducing fair use now outweigh the transaction costs.

Arguments in favour of fair use for Australia

4.34 There were four main arguments advanced in support of fair use in submissions, that it:

- provides flexibility to respond to changing conditions as it is principles-based and technology neutral;
- assists innovation;
- restores balance to the copyright system; and
- assists with meeting consumer expectations.

4.35 While some characterised these arguments slightly differently—for example, referring to ‘responsiveness’, ‘efficiency’ and ‘justice’—arguably they align.

29 This process began in October 1992: Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (1993) (known as the ‘Hilmer Report’). The Ergas Committee undertook the specialist review of intellectual property under these principles: Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).

30 See, eg, News Limited has announced that it will introduce a metered digital subscription model for its mastheads: D Davidson, ‘Demand for paid digital content “at tipping point”’, *The Weekend Australian*, 11–12 May 2013, 23.

31 R Burrell and others, *Submission 278*, citing Lionel Bently, William Cornish, Graeme Dinwoodie, Josef Drexl, Christophe Geiger, Jonathan Griffiths, Reto Hilty, Bernt Hugenholtz, Annette Kur, Martin Senftleben and Uma Suthersanen.

Fair use provides flexibility to respond to changing conditions

4.36 Stakeholders acknowledge that the digital economy facilitates many new developments, such as new technologies, services and uses, at a rapid rate. A number of submissions suggested that a broad, principles-based exception, which employs technology-neutral drafting such as fair use, would be more responsive to rapid technological change and other associated developments than the current specific, closed-list approach to exceptions.³²

4.37 Many stakeholders suggested that specific exceptions will inevitably reflect the circumstances that prevailed at the time of their enactment, while a general exception can respond to a changing environment. Furthermore: ‘there is nothing “natural” or inevitable about the current fair dealing defences in Australian law’.³³ Rather, the privileging of these particular uses as exceptions is the product of certain historical conditions. For example, the time shifting exception is an example of a technology-specific exception that has limited application beyond the technologies specified.³⁴

4.38 As Telstra noted:

the current exceptions are generally created in response to existing technologies, economies and circumstances. As a result, they tend to have a narrow ‘patchwork’ application to circumstances existing at the time the exception is introduced.³⁵

4.39 There was a view that there were various uses that ought to be permitted, but for which the *Copyright Act* does not make allowance because of the closed-list approach.³⁶ Yahoo!7 submitted that ‘the existing exceptions under the Act are no longer sufficient by themselves to protect and support the new services introduced by Internet and technology companies’.³⁷ For example:

In Australia, the absence of a robust principle of fair use within the existing fair dealing exceptions means that digital platforms offering search tools are not able to provide real time high quality communication, analysis and search services with protection under law.³⁸

32 See, eg, Law Council of Australia IP Committee, *Submission 284*; R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; Law Council of Australia, *Submission 263*; Telstra Corporation Limited, *Submission 222*; Google, *Submission 217*; ALIA and ALLA, *Submission 216*; ADA and ALCC, *Submission 213*; Law Institute of Victoria (LIV), *Submission 198*; Optus, *Submission 183*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

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

34 R Burrell and others, *Submission 278*; R Giblin, *Submission 251*.

35 Telstra Corporation Limited, *Submission 222*.

36 See, eg, R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; Telstra Corporation Limited, *Submission 222*; Google, *Submission 217*.

37 Yahoo!7, *Submission 276*.

38 Ibid.

4.40 Telstra referred to caching,³⁹ others to certain uses by government bodies and the ‘incidental inclusion’ of copyright material in a subsequent work or production.⁴⁰ Many examples are given in other parts of this Discussion Paper.

4.41 Stakeholders were concerned about the lengthy delay between the emergence of a new use and the legislature’s consideration of the need for a specific exception.⁴¹ The Law Council of Australia explained that, at present, ‘each new situation needs to be considered and dealt with in separate amending legislation which usually occurs well after the need is identified’.⁴² A copyright exception permitting time-shifting was not enacted in Australia until 22 years after time-shifting had been found to be fair use in the US.⁴³ Electronic Frontiers Australia submitted that the inflexibility of the current purpose-based exceptions, together with the increasingly rapid pace of technological change, ensure that ‘the law now lags years behind the current state of innovation in technology and service delivery’.⁴⁴

4.42 One submission noted that ‘[p]olicymakers simply cannot be expected to identify and define *ex ante* all of the precise circumstances in which an exception should be available’.⁴⁵ Similarly, Yahoo!7 and Google were of the view that no legislature can anticipate or predict the future.⁴⁶ Google submitted that ‘innovation and culture are inherently dynamic’ and that ‘you cannot legislate detailed rules to regulate dynamic situations; you can only set forth guiding principles’.⁴⁷

4.43 Others submitted that one of the advantages of a technology-neutral, open standard such as fair use, is that it has the requisite dynamism,⁴⁸ agility⁴⁹ or malleability⁵⁰ to respond to ‘future technologies, economies and circumstances—that don’t yet exist, or haven’t yet been foreseen’.⁵¹ That is, fair use may go some way to ‘future-proof’⁵² the *Copyright Act*. As the Law Council saw it, ‘a flexible fair use provision ... will enable the Act to adapt to changing technologies and uses without the need for legislative intervention’.⁵³

39 Telstra Corporation Limited, *Submission 222*.

40 R Burrell and others, *Submission 278*. See also eBay, *Submission 93*.

41 See, eg, Law Council of Australia IP Committee, *Submission 284*; R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; Law Council of Australia, *Submission 263*; R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Google, *Submission 217*.

42 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*.

43 R Giblin, *Submission 251*.

44 EFA, *Submission 258*.

45 R Burrell and others, *Submission 278*.

46 Yahoo!7, *Submission 276*; Google, *Submission 217*.

47 Google, *Submission 217*.

48 ADA and ALCC, *Submission 213*.

49 Law Institute of Victoria (LIV), *Submission 198*.

50 R Burrell and others, *Submission 278*.

51 Telstra Corporation Limited, *Submission 222*.

52 Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; Australian Broadcasting Corporation, *Submission 210*.

53 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*.

Fair use assists innovation

4.44 Another argument advanced in some submissions was that fair use may assist in encouraging innovation.⁵⁴ This is because, unless the use of third party copyright material would come within one of the existing exceptions, there is an ‘automatic no’,⁵⁵ to its use, regardless of whether that use could be perceived as innovative or socially useful and regardless of whether it would affect the rights holder’s market.⁵⁶

4.45 It is argued that Australia is ‘a hostile regulatory environment for technology innovators and investors’ and this has ‘long discouraged innovation and investment by technology providers and content owners alike’.⁵⁷ Yahoo!7 submitted:

Under Australia’s existing copyright regime, very many socially useful and economically beneficial technological innovations would simply have no breathing space to emerge. They would be blocked at the first post by a copyright regime that is insufficiently flexible to accommodate technological innovation.⁵⁸

4.46 Yahoo!7 provided an example of a technology that was ‘only possible due to the flexibility offered by the US copyright regime’.⁵⁹ One of its innovative mobile applications reproduces less than 1–2 seconds of the audio stream of a television program that a user is watching and matches that thumbprint against a database of thumbprints in order to inform the user of the program that they are watching.

4.47 Similarly, Google stated that it could not have created and started its search engine in Australia under the current copyright framework, as ‘innovation depends on a legal regime that allows for new, unforeseen technologies’.⁶⁰ The Australian Interactive Media Industry Association’s Digital Policy Group noted the adverse effect the Australian copyright regime was having on the Australian digital industry’s ability to innovate and compete globally.⁶¹ Other stakeholders shared the view that the current copyright regime puts Australian companies and individuals at a disadvantage compared with those in the US, or other countries that have a fair use exception.⁶²

4.48 As with a number of other stakeholders, the Law Institute of Victoria considered that fair use ‘would promote a framework to encourage innovation and investment in technological development in Australia’.⁶³ eBay submitted that a fair use exception ‘would enhance the environment for e-commerce in Australia’,⁶⁴ and both Google and

54 See, eg, R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; AIMIA Digital Policy Group, *Submission 261*; R Giblin, *Submission 251*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; Law Institute of Victoria (LIV), *Submission 198*; iiNet Limited, *Submission 186*.

55 Google, *Submission 217*.

56 See, eg, R Burrell and others, *Submission 278*; AIMIA Digital Policy Group, *Submission 261*; R Giblin, *Submission 251*; Google, *Submission 217*.

57 R Giblin, *Submission 251*.

58 Yahoo!7, *Submission 276*.

59 Ibid.

60 Google, *Submission 217*.

61 AIMIA Digital Policy Group, *Submission 261*.

62 See, eg, Universities Australia, *Submission 246*; Google, *Submission 217*.

63 Law Institute of Victoria (LIV), *Submission 198*.

64 eBay, *Submission 93*.

Yahoo!7 considered that a regime based upon a flexible, broad, principles-based exception would assist local start-ups.⁶⁵ Yahoo!7 submitted:

Application development can thrive in Australia if there is a broader approach to how content can be used by others while still ensuring that such use does not deprive the rights holder of a legitimate revenue stream or impact the market value of the underlying work. Given the relatively low barrier of entry to the digital innovation marketplace, it would also provide software and application developers the ideal regulatory environment to capitalize on the roll-out of the National Broadband Network.⁶⁶

4.49 The Copyright Advisory Group—Schools stated:

The flexibility of the fair use exception in the US has in effect operated as innovation policy within the copyright system because it creates incentives to build innovative products, which yield complementary technologies that enhance the value of the copyright works.⁶⁷

Fair use restores balance to the copyright system

4.50 Some submissions argued that a fair use exception would restore the balance between rights holders and users.⁶⁸ It was said that fair use ‘counterbalances what would otherwise be an unreasonably broad grant of rights to authors and unduly narrow set of negotiated exceptions and limitations’.⁶⁹ iiNet submitted that fair use would ‘play a role’ in countering the effects of the AUSFTA, especially for consumers.⁷⁰

4.51 There were calls from parts of the educational sector for a better balance in the *Copyright Act*.⁷¹ Universities Australia submitted that there was a need for ‘an appropriate balance’ to ‘enable universities and their students to make full use of technology to create and disseminate knowledge’.⁷² The Copyright Advisory Group—Schools compiled a table comparing a number of differences between the copyright laws that apply to schools in Australia, the US and Canada and submitted that the results suggest that the ‘balance struck in the Australian *Copyright Act* does not adequately recognise the public interest in allowing limited free uses of copyright materials for educational purposes’.⁷³

65 Google, *Submission 217*; Yahoo!7, *Submission 276*.

66 Yahoo!7, *Submission 276*.

67 Copyright Advisory Group—Schools, *Submission 231* citing Fred von Lohmann, ‘Fair Use as Innovation Policy’ (2008) 23 *Berkeley Technology Law Journal* 289.

68 See, eg, University of Sydney, *Submission 275*; Universities Australia, *Submission 246*; iiNet Limited, *Submission 186*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

69 ADA and ALCC, *Submission 213*, citing P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537, 2618.

70 iiNet Limited, *Submission 186*. See, also, Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

71 See, eg, Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*.

72 Universities Australia, *Submission 246*.

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

Fair use assists with meeting consumer expectations

4.52 Related to this view about balance was the idea that fair use would assist with meeting consumer expectations⁷⁴—the ‘common standards in society’.⁷⁵ The Hargreaves Review identified a ‘growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people’ as a ‘significant problem’.⁷⁶

4.53 Consumers expect to be able to post a photo of goods on eBay in order to sell them. However, eBay stated that those using its services may infringe copyright when the photograph includes an artistic work on the cover of a book or a garment bearing an artwork. In its view, in such a case ‘there is no loss or damage suffered by a copyright owner’. It submitted that within its business, and ‘a wide range of markets’, a fair use exception would provide ‘an opportunity to prevent the occurrence of repeated technical infringement of copyright’.⁷⁷

4.54 Similarly, Google submitted that there was a ‘disconnect between the law and practices that are both ubiquitous and unlikely to harm copyright owners’.⁷⁸ This disconnect was said to be undermining the copyright system and bringing the law into disrepute.⁷⁹ Electronic Frontiers Australia commented that:

Many Australian consumers, when the limitations of fair dealing exceptions are explained to them, roll their eyes in disbelief that the law insists that things they consider to be legitimate everyday activities are in fact illegal. Discussions on this topic tend to ridicule the law.⁸⁰

4.55 A number of submissions cited with approval the statement that ‘fair use exceptions keep copyright closer to the reasonable expectations of most people and thus help make sense of copyright law’,⁸¹ or made similar points.⁸²

4.56 Google submitted that flexible and technology-neutral exceptions permitting consumers to make personal uses of legitimately purchased content would ‘greatly restore people’s faith that the law makes sense’ and would not harm rights holders’ economic interests.⁸³

74 See, eg, EFA, *Submission 258*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*; S Hawkins, *Submission 15*.

75 S Hawkins, *Submission 15*.

76 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), [5.10].

77 eBay, *Submission 93*.

78 Google, *Submission 217*.

79 Ibid.

80 EFA, *Submission 258*.

81 M Sag, ‘Predicting Fair Use’ (2012) 73 *Ohio State Law Journal* 47, 50.

82 : EFA, *Submission 258*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

83 Google, *Submission 217*.

Arguments against fair use in Australia

4.57 There were four main arguments advanced against fair use in submissions, that it:

- is unnecessary and no case is made out for it;
- would create uncertainty and expense;
- originated in a different legal environment; and
- may not comply with the three-step test.

Fair use is unnecessary and no case is made out for it

4.58 First, a number of rights holder interests submitted that there is no need for a fair use exception to be introduced in Australia because the existing copyright system is effective. This argument was based upon views that: the existing exceptions are adequate and appropriate;⁸⁴ the common law was capable of ‘addressing the needs of promoting innovation’;⁸⁵ and business models, including licensing solutions, have been developed, or are evolving, to meet legitimate consumer expectations.⁸⁶

4.59 The Combined Newspapers and Magazines Copyright Committee submitted that ‘the current fair dealing exceptions sufficiently protect the public interest’.⁸⁷ The Australian Film and TV Bodies were of the view that:

The existing legislative framework (perhaps with some simplification and modernisation of its terminology) is an adequate and appropriate way forward for Australia in the digital age. ... The miscellaneous exceptions reflect the principled and balanced consensus between the various stakeholders, are largely technologically neutral and benefit from being nuanced and tailored to deal with specific situations.⁸⁸

4.60 Copyright Agency/Viscopy considered that it was also helpful to look at the test for infringement. It considered that some of the situations for which users were wanting a flexible exception may not actually constitute infringement at all because the part used would not constitute a ‘substantial part’.⁸⁹

4.61 BSA—The Software Alliance (BSA) submitted that it ‘has not been shown that the Australian common law system is incapable of addressing the needs of promoting innovation through case law development’ and gave the example of implied licences.⁹⁰

84 See, eg, Australian Publishers Association, *Submission 225*; BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; ARIA, *Submission 241*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Film/TV Bodies, *Submission 205*; TVB (Australia) Pty Ltd, *Submission 124*.

85 BSA, *Submission 248*.

86 iGEA, *Submission 192*.

87 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

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

89 Copyright Agency/Viscopy, *Submission 249*.

90 BSA, *Submission 248*.

4.62 The Interactive Games and Entertainment Association Ltd submitted that the games industry had already developed and introduced innovative business models under the existing regime, which meant that consumers were receiving many of the benefits that might flow from a fair use exception.⁹¹

4.63 Secondly, a number of stakeholders asserted that there is no evidence that fair use is necessary and disagreed with other stakeholders arguing in favour of fair use.⁹² For example, ARIA contested the view that ‘a closed list approach restricts new uses and acts as a disincentive for technological development’, and submitted that it misrepresented the situation to speak of a ‘closed’ list, as s 200AB constitutes a flexible exception.⁹³ Other stakeholders considered that fair use may not actually benefit users.⁹⁴ For example, Screenrights expressed concern about a ‘chilling effect’ where the need to obtain legal advice, together with fears over the possibility of being subject to expensive litigation, may deter the use of copyright material.⁹⁵

4.64 The argument that fair use would assist innovation was criticised by stakeholders in a number of submissions,⁹⁶ including on the basis that:

- there was no ‘evidence’ that innovation would be assisted⁹⁷—rather, the technology sector was operating,⁹⁸ indeed ‘expanding’,⁹⁹ in Australia under the existing regime;
- the Hargreaves Review was said to have rejected the argument, noting that ‘other factors such as attitudes towards business risk and investor culture were more important’;¹⁰⁰ and
- the introduction of a fair use exception in Australia may actually provide a less helpful environment for business,¹⁰¹ including start ups.¹⁰²

4.65 Foxtel submitted that ‘companies like Google and Facebook have very successfully established their Australian operations within the bounds of the existing regime’.¹⁰³

4.66 Some stakeholders, who considered that rights holders would be harmed, viewed the balance in the copyright system differently from those stakeholders in favour of fair

91 iGEA, *Submission 192*.

92 See, eg, Foxtel, *Submission 245*; ARIA, *Submission 241*; Australian Film/TV Bodies, *Submission 205*; Music Rights Australia Pty Ltd, *Submission 191*; Tabcorp Holdings Ltd, *Submission 164*.

93 ARIA, *Submission 241*. See Ch 11 for a discussion of the considerable dissatisfaction with s 200AB.

94 SBS and others, *Submission 295*; APRA/AMCOS, *Submission 247*; Commercial Radio Australia, *Submission 132*.

95 Screenrights, *Submission 215*.

96 See, eg, Australian Film/TV Bodies, *Submission 205*.

97 *Ibid.*

98 Foxtel, *Submission 245*

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

100 ARIA, *Submission 241*.

101 Tabcorp Holdings Ltd, *Submission 164*.

102 Screenrights, *Submission 215*.

103 Foxtel, *Submission 245*.

use.¹⁰⁴ APRA/AMCOS were concerned that ‘an open-ended exception would result in the balance between the interests of copyright owners and the interests of copyright users being too heavily in favour of users’.¹⁰⁵ Others wrote of their concern that: fair use could be ‘stretched too far to justify activity that is quite harmful to a robust copyright system’;¹⁰⁶ the ensuing ‘detriment to the public interest’¹⁰⁷ (bearing in mind that the public interest includes rights holders’ interests); and the likely creation of ‘a new class of people not satisfied with the state of affairs’.¹⁰⁸

4.67 TVB (Australia) described the present system as representing ‘a complete balance of the various stakeholders’ interests’.¹⁰⁹ In Foxtel’s view, ‘Australian copyright law sets a fair and finely struck balance between the rights holders and those of end users’.¹¹⁰

4.68 The Australian Film and TV Bodies submitted that economic evidence ‘suggests that the introduction of fair use has a harmful impact on content-producing industries’.¹¹¹ Foxtel submitted it was necessary for ‘clear and indisputable evidence’ in order to justify upsetting the existing balance.¹¹² Another stakeholder submitted that a fair use exception could not be enacted until there was complete data on the impact on all stakeholders concerned; an exercise described as ‘almost impossible’.¹¹³

4.69 Some submissions specifically mentioned the likely detriment to existing licensing arrangements.¹¹⁴ The Motion Picture Association of America (MPAA) submitted that:

it is almost inevitable that some licensees would be compelled to re-examine whether they any longer needed to obtain a licence for particular uses, or whether they could instead rely upon the expanded exception resulting from the new fair use provision. The likelihood that this would destabilize settled markets for the licensing of copyrighted material seems high.¹¹⁵

104 See, eg, Screenrights, *Submission 289*; Free TV Australia, *Submission 270*; Music Council of Australia, *Submission 269*; BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Australian Publishers Association, *Submission 225*; Australian Film/TV Bodies, *Submission 205*; ALPSP, *Submission 199*; Motion Picture Association of America Inc, *Submission 197*; Commercial Radio Australia, *Submission 132*; TVB (Australia) Pty Ltd, *Submission 124*.

105 APRA/AMCOS, *Submission 247*.

106 BSA, *Submission 248*.

107 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

108 TVB (Australia) Pty Ltd, *Submission 124*.

109 Ibid.

110 Foxtel, *Submission 245*.

111 Australian Film/TV Bodies, *Submission 205* citing 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. See, also, Australian Publishers Association, *Submission 225*.

112 Foxtel, *Submission 245*.

113 ALPSP, *Submission 199*.

114 See, eg, Motion Picture Association of America Inc, *Submission 197*; Australian Film/TV Bodies, *Submission 205*; Music Rights Australia Pty Ltd, *Submission 191*.

115 Motion Picture Association of America Inc, *Submission 197*.

Fair use would create uncertainty and expense

4.70 Many of those opposed to fair use were concerned that a lack of clear and precise rules would result in uncertainty about what the law is,¹¹⁶ and possibly misunderstanding and misapplication as well.

4.71 One reason given in some submissions as to why fair use is undesirable is because of the view that the scope of rights should be determined by the legislature. Some stakeholders were concerned that a fair use exception would mean that the judiciary, not the legislature, would be determining the scope of copyright.¹¹⁷ Some, like APRA/AMCOS, saw this as ‘an abrogation of parliament’s role in determining important public matters’.¹¹⁸ Others were concerned about the judiciary having such a role. The BSA submitted that ‘the Courts are not well equipped for legislating broad economic and policy issues of this type’,¹¹⁹ while NSW Young Lawyers was concerned that copyright law would be placed ‘too much in the hands of the judiciary and judges would have an undesirable level of discretion in individual cases, at least in the early years’.¹²⁰

4.72 A group of US academics characterised US law on fair use as a ‘moving target’ and observed that ‘[i]t can often take a long time to get final fair use determinations, with lower courts being reversed with regularity’.¹²¹

4.73 Some submitted that such an environment of legal uncertainty would constitute ‘an obstacle both to use and creation’.¹²²

4.74 There was a view that there would be no precedents, at least for a time after fair use was introduced;¹²³ and that it would take many years to develop case law — especially given that Australia is not as populous or litigious a society as the US;¹²⁴

116 See, eg, SPAA, *Submission 281*; Music Council of Australia, *Submission 269*; COMPPS, *Submission 266*; International Publishers Association, *Submission 256*; BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Australian Publishers Association, *Submission 225*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; Australian Film/TV Bodies, *Submission 205*; IASTMP, *Submission 200*; ALPSP, *Submission 199*; Motion Picture Association of America Inc, *Submission 197*; NSW Young Lawyers, *Submission 195*; Music Rights Australia Pty Ltd, *Submission 191*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*; Tabcorp Holdings Ltd, *Submission 164*; TVB (Australia) Pty Ltd, *Submission 124*.

117 See, eg, BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Australian Publishers Association, *Submission 225*; NSW Young Lawyers, *Submission 195*.

118 APRA/AMCOS, *Submission 247*.

119 BSA, *Submission 248*.

120 NSW Young Lawyers, *Submission 195*.

121 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights, 5, 24. However, Barton Beebe has asserted that reversal rates are not ‘especially high’ based upon his comprehensive empirical analysis of fair use case law: B Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions, 1978–2005’ (2008) 156 *University of Pennsylvania Law Review* 549, 574–5.

122 International Publishers Association, *Submission 256*.

123 See, eg, Motion Picture Association of America Inc, *Submission 197*; Music Rights Australia Pty Ltd, *Submission 191*.

124 ARIA, *Submission 241*.

and that all of the existing jurisprudence in respect to fair dealing would be open to re-interpretation.¹²⁵

4.75 A number of stakeholders were concerned that the ‘uncertainty’ of fair use would be likely to cause higher transaction costs.¹²⁶ There was a view that it would make things harder for both users and rights holders of copyright material¹²⁷ as a result of an increased need for legal advice and litigation.¹²⁸ There were concerns that rights holders would face increased costs in litigation—including recourse to appeal courts¹²⁹—in order to attain certainty about the scope of the exception¹³⁰ and to enforce their rights.¹³¹ In ARIA’s view, the uncertainty of the law would encourage users, including defendants, ‘to assert even an implausible fair use defense in the hope of avoiding liability or at least extracting favourable settlement terms’.¹³²

4.76 Tabcorp submitted that the introduction of fair use into Australia would ‘increase operating costs and add more red tape and administrative burden to some of the most innovative and dynamic industries in Australia’.¹³³ Similarly, the Association of Learned and Professional Society Publishers was concerned that a fair use exception would have a negative impact on small and medium-sized publishers—who ‘make up the vast majority of companies in the publishing industry’—and, in turn, this ‘could have serious implications for the creative digital economy in Australia’.¹³⁴

4.77 The need to litigate, to determine what constitutes fair use, was also seen as increasing costs to the judicial system.¹³⁵

4.78 Particular concerns were expressed with respect to artists,¹³⁶ musicians,¹³⁷ filmmakers,¹³⁸ and literary creators,¹³⁹ some of whom may be affected on both sides of their practice (being both creators and users of copyright material), and in respect of individuals and others who do not have sufficiently ‘deep pockets’ for litigation.¹⁴⁰

4.79 The Arts Law Centre of Australia submitted that its clients ‘are usually low income earners who are unlikely to be able to afford to bring or defend a court action to

125 See, eg, SBS and others, *Submission 295*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Motion Picture Association of America Inc, *Submission 197*.

126 APRA/AMCOS, *Submission 247*; Australian Publishers Association, *Submission 225*; iGEA, *Submission 192*.

127 APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*.

128 Music Council of Australia, *Submission 269*; APRA/AMCOS, *Submission 247*.

129 APRA/AMCOS, *Submission 247*.

130 Music Council of Australia, *Submission 269*; Foxtel, *Submission 245*; ARIA, *Submission 241*; iGEA, *Submission 192*.

131 ARIA, *Submission 241*.

132 Ibid.

133 ALPSP, *Submission 199*; Tabcorp Holdings Ltd, *Submission 164*.

134 ALPSP, *Submission 199*.

135 ARIA, *Submission 241*.

136 See, eg, Arts Law Centre of Australia, *Submission 171*.

137 See, eg, Music Council of Australia, *Submission 269*.

138 See, eg, Screenrights, *Submission 289*; SPAA, *Submission 281*.

139 See, eg, Australian Society of Authors, *Submission 169*.

140 See, eg, Pearson Australia/Penguin, *Submission 220*; AMPAL, *Submission 189*.

determine if a use is fair or not'.¹⁴¹ The Music Council of Australia submitted that most musicians and composers would not be able to afford to litigate matters and so it feared that 'over time, their interests could be marginalised'.¹⁴² The Australian Society of Authors stated that copyright litigation 'is already mostly beyond the resources of literary creators'.¹⁴³

4.80 AMPAL submitted that a fair use exception is 'really only feasible for large, well resourced companies'.¹⁴⁴ Pearson Australia/Penguin made a similar argument, submitting that in the US the average cost for each opposing party in a fair use case is US \$1 million, 'rendering such recourse inaccessible in practice to all but the richest entities'.¹⁴⁵

Fair use originated in a different legal environment

4.81 A number of submissions argued that because fair use developed in the US it would be difficult to transplant the concept to Australia as the legal environments are very different.¹⁴⁶

4.82 Specific differences identified included that the US has:

- a Bill of Rights which expressly protects freedom of speech;¹⁴⁷
- express articulation in the *US Constitution* of the purpose of copyright;¹⁴⁸
- statutory damages for copyright infringement;¹⁴⁹
- a higher volume of litigation than Australia generally;¹⁵⁰ and
- extensive case law on fair use.¹⁵¹

4.83 With respect to the final point, some submissions noted that the fair use exception in the US is based on over 170 years of case law,¹⁵² with 35 of those years being years when the codified version of the doctrine has been interpreted.¹⁵³ The MPAA noted these precedents provide 'content to the fair use framework in particular factual settings' and enable 'counsel, and the companies and individuals they advise, to

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

142 Music Council of Australia, *Submission 269*.

143 Australian Society of Authors, *Submission 169*.

144 AMPAL, *Submission 189*.

145 Pearson Australia/Penguin, *Submission 220*.

146 See, eg, International Publishers Association, *Submission 256*; ARIA, *Submission 241*; Australian Publishers Association, *Submission 225*; Pearson Australia/Penguin, *Submission 220*; Screenrights, *Submission 215*; IASTMP, *Submission 200*; Motion Picture Association of America Inc, *Submission 197*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*.

147 Screenrights, *Submission 215*; Arts Law Centre of Australia, *Submission 171*.

148 ARIA, *Submission 241*; Australian Publishers Association, *Submission 225*.

149 AMPAL, *Submission 189*.

150 Screenrights, *Submission 215*; IASTMP, *Submission 200*.

151 International Publishers Association, *Submission 256*; Pearson Australia/Penguin, *Submission 220*; Motion Picture Association of America Inc, *Submission 197*; AMPAL, *Submission 189*.

152 Pearson Australia/Penguin, *Submission 220*.

153 International Publishers Association, *Submission 256*.

rely upon the doctrine'.¹⁵⁴ Some stakeholders submitted that this canon of case law 'could not be lifted and dropped wholesale into Australian jurisprudence',¹⁵⁵ either because it would be inappropriate¹⁵⁶ to do so or because '[i]t cannot be assumed the Australian Courts will follow US court decisions',¹⁵⁷ especially in light of different constitutional guidance.¹⁵⁸

Fair use may not comply with the three-step test

4.84 Despite the fact that the US has had a fair use exception for 35 years, an often-repeated argument against the introduction of fair use is that it may,¹⁵⁹ or would,¹⁶⁰ not comply with the three-step test under international copyright law.

4.85 Article 9(2) of the *Berne Convention*, provides:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.¹⁶¹

4.86 The three-step test has become the international standard for assessing the permissibility of copyright exceptions generally. For example, in 1994 the three-step test was incorporated into the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs).¹⁶² With respect to copyright, it now applies to exceptions to an author's exclusive right of reproduction and to all economic rights under copyright excluding moral rights and the so-called related or neighbouring rights. Another obligation which should be noted is the AUSFTA, which requires Australia to employ the three-step test for exceptions to all exclusive rights of the copyright owner.¹⁶³

154 Motion Picture Association of America Inc, *Submission 197*.

155 Pearson Australia/Penguin, *Submission 220*.

156 AMPAL, *Submission 189*.

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

158 ARIA, *Submission 241*.

159 SPAA, *Submission 281*; Copyright Agency/Viscopy, *Submission 249*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Copyright Council, *Submission 219*; Arts Law Centre of Australia, *Submission 171*; Australian Society of Authors, *Submission 169*.

160 International Publishers Association, *Submission 256*; APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; Australian Publishers Association, *Submission 225*; Screenrights, *Submission 215*; Australian Film/TV Bodies, *Submission 205*.

161 The three-step test was retained in this form in the Paris Act of 24 July 1971, the latest Act of the *Berne Convention*: M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004), 52.

162 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, ATS 38 (entered into force on 1 January 1995). The three-step test was incorporated in a number of ways. First, the three-step test is included in TRIPs in respect of copyright, in respect of patents (albeit a modified version of the test) and arguably there are certain elements of the test present in respect of the general article relating to exceptions for trade marks. See M Ficsor, 'How Much of What? The "Three-Step Test" and its Application in Two Recent WTO Dispute Settlement Cases' (2002) 192 *Revue Internationale du Droit D'Auteur* 110, 111, 113. Secondly, in respect of copyright, the three-step test was incorporated by way of a 'double insertion'. The first insertion is by operation of art 9(1) of TRIPs which incorporates art 9(2) of the *Berne Convention* into TRIPs. The second insertion is by operation of art 13 of TRIPs.

163 *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005) art 17.4.10(a).

4.87 As its name suggests, the test consists of three cumulative steps or conditions. Limitations or exceptions to exclusive rights must be confined to

- (1) 'certain special cases';
- (2) which do 'not conflict with a normal exploitation' of the copyright material;¹⁶⁴
and
- (3) do 'not unreasonably prejudice the legitimate interests' of the rights holder.¹⁶⁵

4.88 The precise meaning of each limb or step of the test is far from certain. For example, there has been only one World Trade Organization (WTO) Panel decision on the three-step test as it relates to copyright under TRIPs.¹⁶⁶ That decision took a limited, 'dictionary approach' to the interpretation of the first limb of the three-step test, seeing it as 'requiring some clear definition of the contours of an exception'.¹⁶⁷

4.89 Many of the submissions expounding the view that fair use may not comply with the three-step test specified the first step of the test as being the part that would not be met.¹⁶⁸ Some submissions also considered that the second¹⁶⁹ and third steps¹⁷⁰ may also not be met.

4.90 The first step of the test uses the phrase 'certain special cases' and a number of submissions referred to Professor Sam Ricketson's commentary that this requires an exception to be 'clearly defined' and 'narrow in scope and reach'.¹⁷¹ Some submissions argued that a broad, flexible exception such as fair use would not meet these requirements. For example, Australian Film and TV Bodies submitted that '[e]xceptions based on notions of "fairness" or "reasonableness", in the absence of sufficiently interpretative jurisprudence are not sufficiently clear or defined to satisfy that test'.¹⁷² Similarly, APRA/AMCOS argued that fair use is 'too broad to be described as being confined to certain special cases—the cases are uncertain by definition'.¹⁷³

164 The broad term 'copyright material' is used here rather than the particular works or subject-matter other than works that are used in the treaties.

165 Article 9(2) of the Berne Convention uses the word 'author' whereas TRIPs uses the word 'right holder'.

166 World Trade Organization, *Panel Report on United States–Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).

167 D Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) 8(1) *University of Ottawa Law & Technology Journal* 1, 26.

168 Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Copyright Council, *Submission 219*; Australian Film/TV Bodies, *Submission 205*.

169 Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Film/TV Bodies, *Submission 205*.

170 ARIA, *Submission 241*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; Australian Film/TV Bodies, *Submission 205*.

171 See, eg, Copyright Agency/Viscopy, *Submission 249*; Australian Copyright Council, *Submission 219* and Australian Film/TV Bodies, *Submission 205* citing references such as S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003), prepared for the World Intellectual Property Organization Standing Committee on Copyright and Related Rights Ninth Session.

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

173 APRA/AMCOS, *Submission 247*.

4.91 One submission referred to the ‘considerable body’ of international academic opinion that fair use is inconsistent with the three-step test.¹⁷⁴ Another commented: ‘although the US fair use regime has never been challenged on the grounds of non-compliance with the three-step test, the issue of its compliance with the test is not without controversy’.¹⁷⁵

ALRC’s proposals for reform

4.92 The ALRC has considered the various arguments made for and against the enactment of a fair use exception in Australia and concludes that fair use:

- is suitable for the digital economy and will assist innovation;
- provides a flexible standard;
- is coherent and predictable;
- is suitable for the Australian environment; and
- is consistent with the three-step test.

Suitable for the digital economy and will assist innovation

4.93 The ALRC considers that fair use would provide flexibility to respond to changing conditions and would assist innovation. These arguments outlined earlier are not repeated here. In the ALRC’s view, a fair use regime will: employ technology neutral legislative drafting; assist predictability in application; minimise unnecessary obstacles to an efficient market; and reduce transaction costs.

4.94 The ALRC considers that a fair use exception is appropriate in the context of the digital economy and considers the proposals for reform in this Discussion Paper are likely to enhance adjustment to the digital environment.

4.95 As the CLRC stated in 1998:

[m]uch 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.¹⁷⁶

4.96 This statement is still relevant. Further, it could be said that the digital environment is highlighting and exacerbating the ‘technological redundancy’ of a number of specific exceptions, even those introduced in 2006.¹⁷⁷

4.97 The ALRC considers that the enactment of fair use would foster an entrepreneurial culture which contributes to productivity. Although ‘the conditions for

174 ARIA, *Submission 241*.

175 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

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

177 R Burrell and others, *Submission 278*.

innovation depend on much more than the details of copyright law, including everything from tax law to the availability of an educated workforce to matters of business culture',¹⁷⁸ an appropriate regulatory framework is a key aspect to innovation.¹⁷⁹ The ALRC considers that introducing fair use into Australian copyright law would contribute to such an environment and will constitute a measure that will assist in making Australia a more attractive market for technology investment and innovation.

4.98 The Hargreaves Review noted that the economic benefits of fair use 'may sometimes have been overstated'.¹⁸⁰ However, the report went on to state that intellectual property issues are important for the success of innovative, high technology businesses.¹⁸¹ The Hargreaves Review noted the introduction of fair use in other jurisdictions, but considered that the 'very protracted political negotiations'¹⁸² that would result for the UK made it unfeasible in the European context. This does not detract from the substantive merits of fair use for Australia.

4.99 The ACCC espoused the benefits of flexible regulation for business:

By ensuring that regulations remain flexible, regulation will not have the unintended effect of curtailing innovation and the creation of new copyright material. The ACCC considers that there is a fine balance that must be struck between providing certainty and stability in relation to regulation of copyright and providing sufficient flexibility to ensure that industries reliant on copyright can continue to develop and innovate ... The ACCC's view of stability encompasses the need to ensure that the law can adapt to a rapidly changing technological and consumer environment in order for businesses to have confidence in investing in new products and services.¹⁸³

4.100 Some stakeholders submitted that fair use would not necessarily cause economic harm to rights holders, citing economic studies.¹⁸⁴ Further, Google remarked that many companies are both owners and users of copyright materials and submitted that:

The idea that fair use somehow reduces copyright owners' rights is belied by the regular practice of large US media companies applying fair use in their every day commercial decisions.¹⁸⁵

4.101 The ALRC considers that the introduction of a broad, flexible exception for fair use into Australian law should allow flexible and fair mediation between the interests of owners and users in the digital environment.

178 Ibid.

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

180 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), [5.16].

181 Ibid, [5.17].

182 Ibid, [5.18].

183 ACCC, *Submission 165*.

184 Copyright Advisory Group—Schools, *Submission 231* citing 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; Google, *Submission 217* citing 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.

185 Google, *Submission 217*.

A flexible standard

4.102 Copyright exceptions that are more like standards than rules will generally be more flexible and better able to adapt to new technologies, services, licensing environments and consumer practices.

4.103 This distinction between rules and standards is commonly drawn in legal theory. Rules are more specific and prescribed. Standards are more flexible and allow decisions to be made at the time of application, and with respect to a concrete set of facts.¹⁸⁶

4.104 Rules and standards are of course points on a spectrum. Rules are ‘not infinitely precise, and standards not infinitely vague’.¹⁸⁷ The legal philosopher H L A Hart wrote that rules have a core of settled meaning surrounded by a penumbra of uncertainty.¹⁸⁸ The distinction is nevertheless useful.

4.105 Another way of talking about standards is to refer to ‘principles-based’ legislation. In 2002, a study by Australian academic Professor John Braithwaite concluded that, as between principles and rules:

1. When the type of action to be regulated is simple, stable and does not involve huge economic interests, rules tend to regulate with greater certainty than principles.
2. When the type of action to be regulated is complex, changing and involves large economic interests:
 - (a) Principles tend to regulate with greater certainty than rules;
 - (b) Binding principles backing non-binding rules tend to regulate with greater certainty than principles alone;
 - (c) Binding principles backing non-binding rules are more certain still if they are embedded in institutions of regulatory conversation that foster shared responsibilities.¹⁸⁹

4.106 Standards are becoming more common in Australian law, including, for example, in consumer protection and privacy legislation.

4.107 The well-known prohibition on ‘misleading or deceptive conduct’, previously in s 52 of the *Trade Practices Act 1974* (Cth) and now contained in s 18 of the Australian Consumer Law,¹⁹⁰ is an example of this kind of legislative drafting—that is, providing a broad standard that can be applied flexibly to a multitude of possible situations.

186 F Schauer, ‘The Convergence of Rules and Standards’ (2003) (3) *New Zealand Law Review* 303.

187 *Ibid.*, 309.

188 Quoted in *Ibid.*, 308.

189 J Braithwaite, ‘Rules and Principles: A Theory of Legal Certainty’ (2002) 27 *Australian Journal of Legal Philosophy* 47, 75.

190 *Competition and Consumer Act 2010* (Cth) sch 2, s 18.

4.108 Similarly, the unfair contracts provisions of the Australian Consumer Law provide a simple formulation of when a term of a consumer contract is ‘unfair’. Under that law, a term is unfair when:

- (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.¹⁹¹

4.109 Such standards are sometimes accompanied by factors a court may, or must, take into account in applying the standard, or examples of when the standard may have been breached, or complied with.

4.110 Again, the Australian Consumer Law provides illustrations of these approaches. The unconscionable conduct provisions contain an extensive, but non-exhaustive, list of factors to which a court may have regard in determining unconscionable conduct.¹⁹² The unfair contracts provisions contain examples of unfair terms.¹⁹³

4.111 There are parallels between these approaches and the ALRC’s proposal for the enactment of a new copyright exception based on a broad standard of fair use, together with fairness factors and illustrative purposes.

4.112 In another field, the *Privacy Act 1988* (Cth) is an example of principles-based legislation. The National Privacy Principles and Information Privacy Principles provide the basis for regulating the handling of personal information by private sector organisations and public sector agencies.¹⁹⁴ The principles provide broad standards such as obligations: not to collect personal information unless the information is ‘necessary’; not to use personal information other than for the ‘primary purpose’ of collection; and to take ‘reasonable steps’ to protect personal information from misuse.

4.113 Principles-based regulation was considered the best approach to regulating privacy for several reasons, including that principles have greater flexibility in comparison to rules. That is, being high-level, technology-neutral and generally non-prescriptive, principles are capable of application to all agencies and organisations subject to the *Privacy Act*, and to the myriad of ways personal information is handled in Australia. Further, principles allow for a greater degree of ‘future-proofing’ and enable the regime to respond to new issues as they arise without having to create new rules.¹⁹⁵ In the ALRC’s view, these rationales can also be seen as applying to the concept of fair use in copyright law.

191 Ibid sch 2, s 24(1).

192 Ibid sch 2, s 22.

193 Ibid sch 2, s 25.

194 From 12 March 2014, the Australian Privacy Principles will replace the National Privacy Principles and Information Privacy Principles: *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

195 See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

4.114 The ALRC considers that the potential benefits of enacting fair use outweigh any transaction costs, especially given that the argument that fair use would increase transaction costs often ‘paints an unrealistic picture of the status quo for both owners and users’.¹⁹⁶

4.115 The ALRC is aware that many stakeholders are opposed to fair use, and yet in their submissions many argue the points that favour the introduction of such a concept. For example, the capacity for business to influence the terms on which licensing should take place and to allow room for industry practice.

4.116 From the user point of view, fair use has the capacity to create more confidence and certainty and reduce transaction costs. There is evidence that the current rule-based approach has not provided certainty.

4.117 One submission observed that:

reliance on rules places a great deal of trust in the ability of the legislature—both intellectually, and as a matter of time and resources—to draft clear, detailed and appropriate exceptions to cover heterogeneous conduct.¹⁹⁷

4.118 The ALRC considers that it may be more efficient to move to open-ended rather than closed-ended drafting so as to save the legislature from constant law reform to ‘catch up’ with new technologies and uses. Rather, the law could ‘self-update through changes to the interpretative practices of copyright owners, users and the courts’.¹⁹⁸ Of course, the legislature could still act when it wanted to respond to particular developments.¹⁹⁹

Coherent and predictable

4.119 The choice between standards and rules may also be a choice between simplicity and certainty. In drafting laws, there must necessarily be some compromise. However, a commentator on making laws in the digital environment has written, ‘there should be general agreement that compromise, in the form of a law which is too complex to be understood easily but still contains major uncertainties of meaning, is the worst possible option’.²⁰⁰

4.120 Some would say that Australia’s copyright law is uncertain, despite being highly complex and prescriptive. Australia’s existing copyright exceptions are largely made up of rules.

4.121 The ALRC considers that the enactment of a fair use exception in the *Copyright Act* would not result in excessive uncertainty. First, the current copyright exceptions are also not entirely predictable or certain. Secondly, the ALRC considers that fair use can operate with sufficient certainty.

196 R Burrell and others, *Submission 278*.

197 *Ibid.*

198 *Ibid.*

199 *Ibid*; Google, *Submission 217*.

200 C Reed, *Making Laws for Cyberspace* (2012), 241.

4.122 A number of stakeholders stated that aspects of the existing regime of specific copyright exceptions and, in some cases statutory licences as well, are uncertain.²⁰¹ For example, the fair dealing exceptions, which have been described as ‘ostensibly standard-like’,²⁰² were criticised for the lack of statutory factors to guide application (other than in the case of research or study). It is possible that ‘a new flexible exception may in fact make Australian law *less* uncertain when compared with the status quo’.²⁰³ As the fair use provision does contain certain criteria, owners, users and courts do have something to work with.

4.123 The evidence that is available, from recent research, suggests that fair use in the US is not as uncertain as some of its critics have argued.²⁰⁴

4.124 In January 2008, Professor Barton Beebe’s empirical study of US fair use case law through to the year 2005 was published.²⁰⁵ He argued that the results ‘show that much of our conventional wisdom about that case law is mistaken’.²⁰⁶

4.125 In 2009, Professor Pamela Samuelson published her ‘qualitative assessment’ of the fair use case law, which was built upon Beebe’s study.²⁰⁷ Samuelson has argued that ‘fair use is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns’.²⁰⁸ She has explained that it is generally possible to predict whether a use is likely to be fair use by analysing previously decided cases in the same policy cluster.²⁰⁹

4.126 In 2012, Matthew Sag published his work that built upon these two studies.²¹⁰ He went further than Samuelson and ‘assesse[d] the predictability of fair use in terms of case facts which exist prior to any judicial determination’.²¹¹ He argued that his work

demonstrates that the uncertainty critique is somewhat overblown: an empirical analysis of the case law shows that, while there are many shades of gray in fair use

201 See, eg, Law Council of Australia IP Committee, *Submission 284*; R Burrell and others, *Submission 278*; Law Council of Australia, *Submission 263*; CSIRO, *Submission 242*; Copyright Advisory Group—Schools, *Submission 231*; Telstra Corporation Limited, *Submission 222*; ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*; K Bowrey, *Submission 94*.

202 E Hudson, ‘Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia’, *Thesis*, University of Melbourne, 2011, 8.

203 R Burrell and others, *Submission 278*.

204 See, eg, *Ibid*; Google, *Submission 217*.

205 B Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions, 1978–2005’ (2008) 156 *University of Pennsylvania Law Review* 549. Note that Beebe has updated the results ‘through 2011’ but this work has not yet been published. B Beebe, ‘An Empirical Study of US Copyright Fair Use Cases, 1978–2011’ (Paper presented at Fordham Intellectual Property Law Institute and Emily C and John E Hansen Intellectual Property Institute 20th Annual Intellectual Property Law and Policy Conference, New York, 12–13 April 2012).

206 B Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions, 1978–2005’ (2008) 156 *University of Pennsylvania Law Review* 549, 550.

207 P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537, 2542–43.

208 *Ibid*, 2541.

209 *Ibid*, 2542.

210 M Sag, ‘Predicting Fair Use’ (2012) 73 *Ohio State Law Journal* 47.

211 *Ibid*, 51.

litigation, there are also consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection.²¹²

4.127 One stakeholder characterised and dismissed this literature as the work of ‘a small number of US pro fair use academics’,²¹³ however, other stakeholders referred with approval to this research²¹⁴ and also directed the ALRC to further recent empirical research which argues:

a recurring criticism of fair use is that it is inchoate and uncertain, however at least amongst institutions participating in this study, the doctrine was used more broadly and confidently than this perspective might suggest.²¹⁵

4.128 In that study, the fieldwork indicates that ‘fair use can and does play a meaningful role for US cultural institutions, even amongst those who prefer a more restricted interpretation of its application’.²¹⁶

4.129 The US experience and empirical research suggest that certainty can come from things such as guidelines developed by peak bodies, industry protocols, and internal procedures and documentation.²¹⁷ As discussed in Chapter 3, the Australian Communications and Media Authority points to the benefits of industry co-regulation and self-regulation in setting standards and developing understanding of practices.²¹⁸

4.130 Further, a number of stakeholders point to the capacity of business, consumers and government to develop an understanding of acceptable practices. The Australian Content Industry Group (ACIG) discussed the benefits of an industry code being developed between the Australian Government and relevant industry participants for a ‘graduated response’ to unauthorised downloading.²¹⁹ This has not been concluded, but such a process is a guide as to how an understanding of indicative purposes and factors in legislation can be applied in specific industries and sectors. Indeed, ACIG specifically requested that the ALRC recommend the development of such a code. While this would be technically outside the Terms of Reference for the Inquiry, it provides a useful example of how ‘purpose-based’ legislation may gain an interpretation which serves the needs of all parties.

212 Ibid, 49.

213 ARIA, *Submission 241*.

214 See, eg, R Burrell and others, *Submission 278*; Google, *Submission 217*.

215 E Hudson, ‘Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia’, *Thesis*, University of Melbourne, 2011, 4.

216 *IbidThesis*, 174.

217 R Burrell and others, *Submission 278*.

218 ACMA, *Submission 214*. See also News Limited, *Submission 286*.

219 ACIG, *Submission 190*. Music Rights Australia also strongly endorses this approach: Music Rights Australia Pty Ltd, *Submission 191*.

Suitable for the Australian legal environment

4.131 The ALRC considers that there is nothing so intrinsically American about a fair use exception that one could not be enacted in Australia. Others agree.²²⁰ For example, some stakeholders highlighted American commentaries suggesting that the US First Amendment has made limited direct impact on copyright jurisprudence on fair use.²²¹ The recognition that copyright protects expression only—not ideas—has been found to be sufficient to protect freedom of expression without the need to substantively engage with the First Amendment.²²²

4.132 Further, what may be regarded as differences between the two legal environments—such as the fact that there is no express recognition of moral rights in the US—may not be so different in practice. One commentator recently remarked that, in fact, ‘the inherent dignity of creators that these rights protect [is] implicit in many copyright provisions’ in the US.²²³

4.133 As mentioned earlier, US ‘fair use’ and English and Australian ‘fair dealing’ share the same common legal sources. UTS law academics submitted:

much turns on the decision of legislators of the 1911 Act to codify the exceptions to copyright in terms that referred to specified defined purposes. Had they not done so, it seems not improbable that we might have ended up with something much more similar to the modern United States law of fair use, which shares more with the case law of the eighteenth and nineteenth century than does the Anglo-Australian modern law of infringement and exceptions.²²⁴

4.134 The ALRC’s proposed fairness factors derive from the same body of case law upon which the US doctrine developed.

4.135 The Australian Government took a positive view of the harmonisation of Australian intellectual property law with that of the US in the context of the AUSFTA:

The harmonisation of our laws with the world’s largest intellectual property market will provide Australian exporters with a more familiar environment and certain legal environment for the export of value-added goods to the United States. In turn, US

220 See, eg, R Burrell and others, *Submission 278*; Copyright Advisory Group—Schools, *Submission 231* citing Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012); E Hudson, ‘Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia’, *Thesis*, University of Melbourne, 2011, 8.

221 R Burrell and others, *Submission 278*.

222 *Harper & Row Publishers, Inc. v. Nation Enterprises* (1985) 471 US 539, 560; *Roy Export Co v CBS Inc.*, 672 F2d 1095 (2nd Cir, 1982), 1099; *Sid & Marty Krofft Television Prods Inc v McDonald's Corp.*, 562 F2d 1157 (9th Cir, 1977), 1170; *Eldred v Ashcroft*, 537 US 186 (239 F.3d 372, 2003). See also N Netanel, ‘Locating Copyright Within the First Amendment Skein’ 54(1) *Stanford Law Review* 1, 3–4.

223 T Hart, *Calculating Copyright: National Research Council Releases Copyright Report* <www.copyright.com/2013/05/calculating-copyright-national-research-council-releases-copyright-report/> at 7 May 2013.

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

investors will be attracted to the Australian market because of greater familiarity and confidence in our legal system.²²⁵

4.136 However, critics of the extension of copyright term pursuant to the AUSFTA considered that it granted significant benefits to owners without the countervailing fair use doctrine.²²⁶

4.137 In the words of one stakeholder:

Australia's copyright laws should seek to align with best practice approaches in other jurisdictions. This is justified both on the grounds of good policy and in recognition of the fact that we compete in a global economy and the law should assist Australian businesses to compete in that global economy.²²⁷

Consistent with the three-step test

4.138 The ALRC considers that fair use is consistent with the three-step test. A number of stakeholders share this view.²²⁸ Reasons include that:

- 'historical and normative' arguments²²⁹ have been made since the WTO Panel decision²³⁰ which challenge a limited interpretation of the test;²³¹
- the US provision has not been challenged in international fora;²³² and
- other countries have introduced fair use or extended fair dealing exceptions and have not been challenged in international fora.²³³

4.139 There is significant commentary challenging a narrow interpretation of the three-step test.²³⁴

4.140 The three-step test was first incorporated into international copyright law during the 1967 Stockholm revision of the *Berne Convention*.²³⁵ This revision also saw the

225 National Impact Analysis, *Regulation Impact Statement Australia-United States Free Trade Agreement* (2004), 7.

226 A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), 255, [8.36].

227 Optus, *Submission 183*.

228 See, eg, R Burrell and others, *Submission 278*; R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*.

229 R Burrell and others, *Submission 278*.

230 World Trade Organization, *Panel Report on United States—Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).

231 R Burrell and others, *Submission 278*, citing Lionel Bently, William Cornish, Graeme Dinwoodie, Josef Drexl, Christophe Geiger, Jonathan Griffiths, Reto Hilty, Bernt Hugenholtz, Annette Kur, Martin Senftleben and Uma Suthersanen; Universities Australia, *Submission 246*, citing the work of Senftleben, Hugenholtz, and Geiger; Copyright Advisory Group—Schools, *Submission 231* citing the work of Senftleben; Google, *Submission 217*, citing the work of Senftleben. See also M Sag, *The Imaginary Conflict Between Fair Use and International Copyright Law* <<http://matthewsag.com/>> at 25 March 2013.

232 R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*. See W Patry, *Patry on Fair Use* (2012), 554–57; W Patry, *Fair Use and Fair Dealing* (2008).

233 G Pessach, 'The New Israeli Copyright Act: A Case-Study in Reverse Comparative Law' (2010) 41 *International Review of Intellectual Property and Competition Law* 187, 192–93.

234 See, eg, see R Burrell and others, *Submission 278* and the many references cited.

235 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

introduction of the right of reproduction. Those developing the revised treaty text thought it necessary to have a provision setting out a general standard that exceptions to the right of reproduction must meet in order to be permissible.

4.141 As some national laws already contained various exceptions to the right of reproduction, that members to the *Berne Convention* wanted to retain, those developing the text were mindful that it would be necessary ‘to ensure that this provision did not encroach upon exceptions that were already contained in national laws’ and that ‘it would also be necessary to ensure that it did not allow for the making of wider exceptions that might have the effect of undermining the newly recognized right’.²³⁶

4.142 A number of submissions²³⁷ referred to Dr Senftleben’s comprehensive study of the three-step test published in 2004.²³⁸ For example, the Copyright Advisory Group—Schools submitted:

Dr Senftleben has shown that the three-step test was intended to reconcile the many different types of exceptions that already existed when it was introduced, and to be an abstract, open formula that could accommodate a ‘wide range of exceptions’.²³⁹

4.143 Another historical development to note is that in 1996 the three-step test was incorporated into the *World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)*²⁴⁰ and *WIPO Performances and Phonograms Treaty (WPPT)*,²⁴¹ both sometimes collectively referred to as the WIPO Internet treaties. Article 10 of the WCT applies the three-step test to the rights newly protected under the WCT, such as the right of communication, as well as to those rights already protected by the *Berne Convention*. Article 16 of the WPPT extends the three-step test so that it is applicable to exceptions to all economic rights of performers and producers of phonograms (that is, some of the holders of so-called related or neighbouring rights).

4.144 The Diplomatic Conference that adopted the WCT and WPPT texts, adopted the following agreed statement in respect of art 10 of the WCT, which applies ‘mutatis mutandis’ to art 16 of the WPPT.²⁴²

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the

236 S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003), prepared for the World Intellectual Property Organization Standing Committee on Copyright and Related Rights Ninth Session, 20.

237 See, eg, R Burrell and others, *Submission 278*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*.

238 M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004).

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

240 *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002). There was another ‘double insertion’. The first insertion is by operation of art 1(4) of the WCT which incorporates art 9(2) of the *Berne Convention* into the WCT. The second insertion is by operation of art 10 of the WCT.

241 *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, ATS 27 (entered into force on 20 May 2002).

242 *Agreed statements concerning WIPO Performances and Phonograms Treaty*, adopted by the Diplomatic Conference on December 20, 1996, concerning art 16.

Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.²⁴³

4.145 One commentator has observed:

Pursuant to article 31(2)(a) of the *Vienna Convention [on the Law of Treaties]*, ‘any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty’ forms part of the context for the purpose of interpretation. The agreed statement concerning article 10 WCT is thus a relatively strong source of interpretation. ... [I]t must be considered directly in connection with the treaty text itself.²⁴⁴

4.146 The CLRC took the view that its extended fair dealing model would be consistent with the three-step test, in part because it considered that its model would be ‘one such appropriate extension into the digital environment’ and so would be ‘in the spirit of art 10’ of the WCT in light of the agreed statement.²⁴⁵

No challenges in international fora

4.147 The US has never seriously been challenged about the consistency of its fair use exception with the three-step test.²⁴⁶ Opportunities for such challenge included the steps taken to adhere to the *Berne Convention*—‘years of public hearings before the US Congress, as well as numerous consultations with WIPO and foreign experts’²⁴⁷—where transcripts of hearings reveal that not once was there considered to be a problem with fair use and the three-step test.²⁴⁸ Further, one submission referred to a WTO review of copyright legislation in 2006 where in response to a question about the consistency of US fair use with art 13 of TRIPs, the US replied:

The fair use doctrine of US copyright law embodies essentially the same goals as Article 13 of TRIPs, and is applied and interpreted in a way entirely congruent with the standards set forth in that Article.²⁴⁹

4.148 Universities Australia made a similar point, submitting:

Hugenholtz and Senftleben have noted that the Minutes of Main Committee for the 1996 WIPO Diplomatic Conference (that led to the adoption of the WIPO Internet Treaties) provide evidence of ‘the determination to shelter use privileges’, including determination on the part of the US to ‘safeguard the fair use doctrine’.²⁵⁰

243 *Agreed Statements Concerning the WIPO Copyright Treaty*, adopted by the Diplomatic Conference on 20 December 1996, concerning art 10.

244 M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004), 106.

245 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), 54.

246 R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*.

247 W Patry, *Fair Use and Fair Dealing* (2008), 8.

248 *Ibid.*

249 R Giblin, *Submission 251*. See W Patry, *Patry on Fair Use* (2012), 554–57. Giblin notes the response was accepted.

250 Universities Australia, *Submission 246* citing B Hugenholtz and M Senftleben, *Fair Use in Europe: In Search of Flexibilities* (2011), 22.

4.149 Finally, a number of other countries have introduced an exception for fair use or extended fair dealing, including: The Philippines, Israel, the Republic of Korea and Singapore.²⁵¹ Like Australia, all of these countries are party to the *Berne Convention*, the WCT and the WPPT, amongst other WIPO treaties, and are WTO members.²⁵² None of these countries have been challenged in international fora about their enactment of such provisions.

Proposal 4–1 The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.

Proposal 4–2 The new fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').

The proposed fair use exception

The fairness factors

4.150 The fair use exception proposed contains four fairness factors. These serve as a checklist of factors to be considered in a given case, with no one factor being more important than another. Rather, all factors would need to be considered and balanced and a decision made in view of all of them.

4.151 The list of fairness factors is non-exhaustive. Other factors may be considered. For example, principles of justice, equity and perhaps even acknowledgment of moral rights may also be relevant in determining the fairness of a use.

4.152 The fairness factors proposed are based upon the four factors that are common to both the US fair use provision and the existing Australian provisions for fair dealing for the purpose of research or study—specifically the CLRC's consolidated expression of them. The ALRC proposes wording that closely paraphrases these similar factors but also seeks to improve the clarity of the language.

251 *Copyright Act 1987* (Singapore) ss 35, 109.

252 The fact that these other countries have fair use provisions is insufficient to constitute 'subsequent practice' for the purpose of the interpretation of *TRIPs*. See *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980), art 31(3)(b); M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004), 108–9; M Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5 *Journal of International Economic Law* 17, 32–35.

4.153 Analysis of the four factor test in the US requires consideration of the following matters.²⁵³

- *First factor*—‘*the purpose and character of the use*’. This factor encompasses two issues. First, was the defendant’s use commercial? Secondly, was the use ‘transformative’?²⁵⁴
- *Second factor*—‘*the nature of the copyrighted work*’. Again there are two separate matters to be considered. First, was the plaintiff’s work creative? Secondly, was that work published?
- *Third factor*—‘*the amount and substantiality of the portion used in relation to the copyrighted work as a whole*’. This consists of an evaluation of two matters. First, how much is the defendant alleged to have taken? Secondly, how important was that taking in the context of the plaintiff’s work?
- *Fourth factor*—‘*effect upon the market for or value of the copyrighted work*’. What is the market effect of the defendant’s conduct?

4.154 A number of submissions called for the use of the existing fairness factors for the fair dealing exceptions for research or study²⁵⁵ or the US fairness factors²⁵⁶—a number commenting on their similarity²⁵⁷—in determining the fairness of a use under a new fair use exception.

4.155 Reasons given in support of a new Australian fair use exception which adopts these fairness factors included:

- they derive from the common law;²⁵⁸
- the four factors in the US and Australia are substantially the same,²⁵⁹ so Australian courts are familiar with them²⁶⁰ and so are ‘academics and students who have relied on the fair dealing exception to undertake their own research and study’;²⁶¹
- they are ‘easily understood’ so would ‘assist users to feel confident making their own evaluation of how they are able to use copyright material in their own specific circumstance’;²⁶²

253 See, eg, M Sag, ‘Predicting Fair Use’ (2012) 73 *Ohio State Law Journal* 47, 54–5.

254 See Ch 11.

255 See, eg, EFA, *Submission 258*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*.

256 See, eg, Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*.

257 See, eg, Google, *Submission 217*. The similarity of four of the five fairness factors was also recognised by rights holders and others assisting them. For example, Copyright Agency/Viscopy, *Submission 249*; Australian Copyright Council, *Submission 219*.

258 Universities Australia, *Submission 246*.

259 Ibid.

260 ADA and ALCC, *Submission 213*.

261 Universities Australia, *Submission 246*.

262 R Wright, *Submission 167*.

- they are already being applied by some institutions with respect to orphan works and other copyright material in the mistaken belief that Australia already provides a fair use exception;²⁶³
- they are substantially the same as those used in other countries such as Israel and the Philippines;²⁶⁴ and
- Australian courts would be able to have regard to extensive US jurisprudence²⁶⁵ as well as that of other countries who have adopted a similar flexible, fairness-based model.²⁶⁶

4.156 Some also commented that this would afford courts and users greater statutory guidance than currently exists with respect to assessing the fairness of dealings for the specified purposes other than research or study.²⁶⁷

Proposal 4–3 The non-exhaustive list of fairness factors should be:

- the purpose and character of the use;
- the nature of the copyright material used;
- in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
- the effect of the use upon the potential market for, or value of, the copyright material.

The illustrative purposes

4.157 The fair use exception should contain a non-exhaustive list of illustrative uses or purposes of fair use. These may be thought of as examples of the broad types of uses that may be fair.

4.158 The fair use exceptions in the US and other countries that have enacted fair use or extended fair dealing exceptions, all include illustrative purposes or examples of fair use.

4.159 The importance of listing illustrative purposes in the fair use exception was noted in a number of submissions.²⁶⁸ For example, the Law Council of Australia

263 ADA and ALCC, *Submission 213*.

264 Universities Australia, *Submission 246*.

265 R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria (LIV), *Submission 198*.

266 R Giblin, *Submission 251*; Universities Australia, *Submission 246*.

267 R Burrell and others, *Submission 278*; K Bowrey, *Submission 94*.

268 See, eg, Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*; Grey Literature Strategies Research Project, *Submission 250*; Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Law Institute of Victoria (LIV), *Submission 198*; R Wright, *Submission 167*; M Rimmer, *Submission 122*.

suggested a fair use model ‘that would include reference to the existing specific copyright exceptions which would then act as examples to courts of the types of activities that constitute fair use’.²⁶⁹ Similarly, the National Library of Australia called for some existing exceptions

[to] be gathered together under the umbrella of a new fair use exception, and that existing exceptions be listed as within this general exception, illustrating but not defining the extent, of the fair use exception.²⁷⁰

4.160 The fact that a particular use falls into one of the categories of illustrative purposes does not necessarily mean that the use will be fair. Nor does this create a presumption that the use is fair.

4.161 Conversely, the fact that a use is not included as an illustrative purpose will not be a bar to that use constituting a fair use. In theory, a use for any purpose may be considered under the fair use exception.

4.162 Some submissions noted the need for the purposes to be illustrative only and non-exhaustive.²⁷¹ For example, Universities Australia stressed the need for the exception to be ‘sufficiently flexible to allow courts to determine that uses that are not expressly referred to in any opening words or preamble are nevertheless permitted subject only to a fairness test’.²⁷² It continued:

it should be sufficiently flexible to allow courts to determine that uses that are unanticipated at the time that the exception is introduced come within the scope of the exception if found to be fair.²⁷³

4.163 The ALRC’s list of proposed illustrative purposes includes purposes that are:

- currently the subject of purpose-based exceptions—for example, all but one of the existing fair dealing purposes; and
- not currently the subject of express free use exceptions in the *Copyright Act*—for example, quotation and non-consumptive use.

4.164 A number of submissions supported this approach, particularly with respect to consolidating the existing fair dealing provisions into a more general fair use exception.²⁷⁴

4.165 The rationale for including the specific illustrative purposes proposed below is made in a number of other chapters in this Discussion Paper.²⁷⁵

269 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*.

270 National Library of Australia, *Submission 218*. This idea was supported by Grey Literature Strategies Research Project, *Submission 250*.

271 See, eg, Grey Literature Strategies Research Project, *Submission 250*; Universities Australia, *Submission 246*; National Library of Australia, *Submission 218*.

272 Universities Australia, *Submission 246*.

273 Ibid.

274 See, eg, Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Law Institute of Victoria (LIV), *Submission 198*; M Rimmer, *Submission 122*.

275 See Ch 7 (Fair Dealing); Ch 8 (Non-consumptive Use); Ch 9 (Private and Domestic Use); Ch 10 (Transformative Use and Quotation); Ch 13 (Educational Use) and Ch 14 (Government Use).

Proposal 4–4 The non-exhaustive list of illustrative purposes should include the following:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) non-consumptive;
- (f) private and domestic;
- (g) quotation;
- (h) education; and
- (i) public administration.

Question 4–1 What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

Relationship with existing exceptions

4.166 If Australia is to adopt the new fair use exception then it is critical to determine the relationship with exceptions currently in the *Copyright Act*. It might be said that the issue of how fair use would fit with the existing exceptions and statutory licences was considered ‘very little’ during the earlier debates.²⁷⁶

4.167 In the Issues Paper, the ALRC asked whether a new broad, flexible exception should replace all or some existing exceptions or should apply in addition to existing exceptions.²⁷⁷ Submissions in favour of a new broad, flexible exception appeared to give the greatest attention to answering this issue. Among the options canvassed there was support for repeal of some exceptions,²⁷⁸ perhaps with a transitional approach.²⁷⁹

4.168 The main concerns expressed in response to this question were for a model that would best ensure the retention of the existing Australian jurisprudence,²⁸⁰ provide

276 M Wyburn, ‘Higher Education and Fair Use: A Wider Copyright Defence in the Face of the Australia-United States Free Trade Agreement Changes’ (2006) 17 *Australian Intellectual Property Journal* 181, 208.

277 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 53.

278 See, eg, NSW Government, *Submission 294*; R Burrell and others, *Submission 278*; Universities Australia, *Submission 246*; State Records NSW, *Submission 160*; S Hawkins, *Submission 15*.

279 S Hawkins, *Submission 15*. Singapore appears to have included transitional provisions in its move to a general fair dealing exception so as to protect existing rights under contracts entered into under the former law. See Singapore, *Parliamentary* 16 November 2004, 1041 (Professor S Jayakumar—Deputy Prime Minister and Minister for Law).

280 See, eg, SBS and others, *Submission 295*; Internet Industry Association, *Submission 253*; Australian Broadcasting Corporation, *Submission 210*.

clarity,²⁸¹ as well as allow the development of further exceptions in response to changing technology and practices.²⁸²

4.169 The Copyright Advisory Group—Schools suggested that a degree of certainty may be attained in other ways, including drawing upon the Israeli model of deeming certain uses as fair *ex ante*—that is, before the event.²⁸³ Under the fair use regime in Israel, the Minister of Justice may make regulations prescribing conditions under which a use shall be deemed a fair use.²⁸⁴ As one commentator has remarked:

This novel method may provide some certainty and clarity for future users who wish to rely on the fair-use defense. It overcomes some of the chilling effects that vague standard-based exemptions involve; especially regarding users who by nature are risk-averse. However, sec 19(c) could also lead to its minimum safe harbors becoming a de-facto ceiling.²⁸⁵

4.170 The ALRC considers that it is preferable to introduce a model that replaces some of the existing exceptions, particularly where it is anticipated that many of the existing excepted uses would be covered by the new fair use exception. This would reduce the length and detail of the *Copyright Act* and should assist in mitigating statutory interpretation problems.

4.171 Elsewhere, this Discussion Paper contains proposals to repeal a range of specific exceptions, if fair use is enacted. The exceptions are as follows:

- In Chapter 7 ('Fair Dealing'): ss 40(1), 103C(1), 41, 103A, 41A, 103AA, 42, 103B, 43(2), 104(b).
- In Chapter 8 ('Non-consumptive use'): ss 43A, 111A, 43B, 111B, 200AAA.
- In Chapter 9 ('Private and Domestic Use'): ss 43C, 47J, 109A, 110AA, 111.
- In Chapter 11 ('Libraries, Archives and Digitisation'): s 200AB.
- In Chapter 13 ('Educational Use'): ss 28, 44, 200, 200AAA.
- In Chapter 14 ('Government Use'): ss 43(1), 104(1), 48A, 104A.
- In Chapter 16 ('Broadcasting'): ss 45, 67.

4.172 On further review, there may be other exceptions that should also be repealed, if fair use is enacted. Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall submitted a comprehensive list of such provisions, and a list of those that should clearly remain.²⁸⁶ The former list contains a range of provisions, including

281 SBS and others, *Submission 295*; Internet Industry Association, *Submission 253*.

282 Australian Broadcasting Corporation, *Submission 210*.

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

284 *Copyright Act 2007* (Israel) s 19(c).

285 G Pessach, 'The New Israeli Copyright Act: A Case-Study in Reverse Comparative Law' (2010) 41 *International Review of Intellectual Property and Competition Law* 187, 190.

286 R Burrell and others, *Submission 278*.

exceptions relating to product information for chemicals and medicines,²⁸⁷ and computer programs,²⁸⁸ which the ALRC has not examined at this stage.

4.173 Other stakeholders suggested the repeal of certain exceptions, regardless of fair use reform. For example, the Arts Law Centre of Australia submitted that ss 65–68, which provide exceptions for the use of public art and artistic works should be repealed ‘at the least insofar as they permit commercial uses of any reproductions made under them’.²⁸⁹

4.174 Repeal of specific exceptions is proposed, in part, in the expectation that most uses now covered would remain permitted under a developing Australian fair use law. However, it is possible that some uses covered by these specific exceptions may not meet the test under the proposed fair use exception. As ARIA observed, ‘[i]n some cases exceptions in Australian law are more generous than those found under US law’.²⁹⁰

Question 4–2 If fair use is enacted, the ALRC proposes that a range of specific exceptions be repealed. What other exceptions should be repealed if fair use is enacted?

Interpreting fair use

4.175 The fair use exception contains some guidance for users of copyright material and the courts—namely the list of illustrative purposes and more importantly, the four fairness factors. This would provide users and courts with more statutory guidance than they currently have with respect to some of the exceptions such as the fair dealing exceptions for purposes other than research or study.²⁹¹

4.176 Further guidance may be found in:

- existing Australian case law;
- other relevant jurisdictions’ case law; and
- any industry guidelines that are developed.

4.177 A number of submissions considered that, if a new fair use exception were enacted, existing Australian case law, particularly that pertaining to fair dealing, would be of some relevance and provide some guidance to the courts.²⁹² For example, the Law Institute of Victoria submitted, ‘[g]iven the similarity of the US fair use factors

287 *Copyright Act 1968* (Cth) ss 44B, 44BA.

288 *Ibid* ss 47AB, 47A, 47B, 47C, 47D, 47E, 47F, 47G, 47H.

289 Arts Law Centre of Australia, *Submission 171*. The ALRC proposes the repeal of s 67: see Ch 16.

290 ARIA, *Submission 241*.

291 R Burrell and others, *Submission 278*; K Bowrey, *Submission 94*.

292 R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria (LIV), *Submission 198*.

with the Australian factors for determining fair dealing, our jurisprudence on when a dealing is fair may also be of assistance'.²⁹³

4.178 However, others were concerned that 'it may result in arguments that the current fair dealing exceptions have been relaxed'.²⁹⁴ In a joint submission, SBS, Commercial Radio Australia and the ABC expressed concern that any proposal to include the fair dealing exceptions for the purposes of reporting news, criticism or review, and parody or satire within a fair use provision would mean that these exceptions would be 'open to re-litigation' and their operation may be restricted.²⁹⁵

4.179 A number of submissions were of the view that it would be helpful if Australian courts could draw upon US or other countries' jurisprudence.²⁹⁶ The Law Council of Australia submitted:

as a relatively small country, the amount of litigation in relation to copyright should also be relatively small. Drawing upon the jurisprudence of the United States would permit Australia to take advantage of the intellectual and financial investment in the creation of that jurisprudence over many years without the disadvantage of having to expend significant judicial resources in the development of a completely stand alone Australian view of fair use.²⁹⁷

4.180 Google submitted that Australian courts would be able to draw upon the approaches taken in other relevant jurisdictions and clarified:

This is not to say, of course, that US or other foreign jurisprudence would be exported in its entirety to Australia; but rather that Australian judges would not necessarily be starting with a blank slate when deciding fair use cases.²⁹⁸

4.181 Some who considered that Australian courts would be able to use US or other countries' jurisprudence to inform their decisions submitted that it would be helpful for this to be specified,²⁹⁹ possibly by an express statement in the relevant Explanatory Memorandum.³⁰⁰ As the Australian Digital Alliance and Australian Libraries Copyright Committee submitted:

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.³⁰¹

4.182 In the ALRC's view, an express statement about the extent to which US or other countries' jurisprudence should be taken into account by Australian courts is unnecessary. It is well-established that foreign case law may be used by Australian

293 Law Institute of Victoria (LIV), *Submission 198*.

294 Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

295 SBS and others, *Submission 295*.

296 See, eg, Law Council of Australia IP Committee, *Submission 284*; R Burrell and others, *Submission 278*; Law Council of Australia, *Submission 263*; Universities Australia, *Submission 246*; Google, *Submission 217*.

297 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*.

298 Google, *Submission 217*.

299 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*; Universities Australia, *Submission 246*.

300 R Burrell and others, *Submission 278*; ADA and ALCC, *Submission 213*.

301 ADA and ALCC, *Submission 213*.

courts, to the extent that the reasoning of such decisions is persuasive.³⁰² If fair use is enacted, the ALRC would expect that Australian courts may look to US case law, in particular, as one source of interpretative guidance, but would not be bound by such decisions.

4.183 Another way in which some certainty could be sought in a fair use regime is by the development of industry guidelines and codes of practice.³⁰³

302 In *Tabet v Gett* (2010) 240 CLR 537, a negligence case, the High Court referred to case law in England, Canada, the United States, France, the Netherlands, Italy, Portugal, Spain, Germany, Austria, Greece, Norway, Estonia and Lithuania. See also *Hancock v Nominal Defendant* [2002] 1 Qd R 578, another negligence case, in which the Queensland Court of Appeal referred to case law from England, Canada, New Zealand, South Africa, Scotland, the United States and Ireland. Byrne J alone cited more than 60 US cases.

303 There is precedent for such use in the US, although views diverge as to the assistance such documents provide: J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights; P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011); K Crews, 'The Law of Fair Use and the Illusion of Fair-Use Guidelines' (2001) 62 *Ohio State Law Journal* 599.