



31 July 2013

Professor Jill McKeough  
Australian Law Reform Commission  
Level 40, MLC Tower  
19 Martin Place  
Sydney NSW 2000,  
Australia

Dear Professor Jill McKeough,

**Re: Submission to the ALRC's Copyright and the Digital Economy Discussion Paper**

The BSA | The Software Alliance (**BSA**) appreciates the opportunity to further contribute to the Australian Law Reform's Commission's (**ALRC**) *Copyright and the Digital Economy* inquiry and to comment on and to make a submission in response to the Discussion Paper.

This submission provides general comments in response to the Discussion Paper, as well as, in Appendix A, specific responses to particular proposals made and questions posed by the ALRC in the Discussion Paper.

**About BSA | The Software Alliance**

As set out in BSA's response to the ALRC's Copyright and the Digital Economy Issues Paper (**Issues Paper Response**), the BSA | The Software Alliance ([www.bsa.org](http://www.bsa.org)) is the leading global advocate for the software industry. BSA directs the ALRC to BSA's Issues Paper Response for details of our member organisations and an explanation of how copyright law affects our members' creation, distribution and use of copyright materials.

BSA members are well-positioned to address the question of whether existing exceptions in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital economy. We are able to comment from a number of perspectives, having regard to the underlying objectives identified in the ALRC's Terms of Reference.

- BSA members develop and offer software and other creative content to users. As such, BSA members are well-placed to comment from the perspective of rights holders and incentives to create and disseminate copyright material.

- BSA members also develop technologies and services that enable copyright users to enjoy, access, use and interact with copyright material online, including cloud computing. As such, BSA members are well-placed to comment on the Discussion Paper having regard to the general interest of developing technology and services to access, use and interact with copyright content.
- Our members are also the victims of piracy and unauthorised use of their works. In some instances, persons who make available such illicit copies of software, often for profit, argue that it's legal for the user to acquire the software, because it is "fair use". Thus, ensuring any new law does not provide comfort to piracy and illicit use of software is a high priority for our members.
- Our members develop software, technologies and services in the digital environment and are well-placed to comment on the effect of copyright exceptions on the emergence of new digital technologies.

### General Comments

Having read the ALRC Discussion Paper, and the reasoning and policy considerations behind the ALRC's proposal, BSA supports a general fair-use exception. However, while BSA considers that this proposal could facilitate the development of new and innovative technology, products and services BSA is concerned to ensure that any application of the fair use exception should not interfere with the normal exploitation of the copyright material or undermine existing licensing and business models.

BSA considers the ALRC should ensure that there is sufficient certainty in the scope of the rights of users and copyright holders and sufficient safeguards to ensure these measures are not used to rationalize or excuse illegal use of software. If the level of legal uncertainty as to rights is too great, the benefits of a broad fair use exception may be partially counteracted by a hesitation to create or engage with new technologies and services or by inadvertently encouraging piracy. BSA has therefore proposed a number of measures which our members consider may assist to further certainty of the proposed fair use exception. This includes retaining some of the existing copyright exceptions, such as the computer program exceptions, which BSA considers will provide clarity for both users and rights holders.

Any reform to Australia's copyright laws should not harm current or future markets for copyright material, nor should reforms disrupt existing business models, or prevent the development of new, innovative, business models.

BSA members believe that it is inappropriate for the *Copyright Act* to include limitations on the freedom of contract. Our members are strongly against the enactment of a limitation on contracting out of copyright exceptions. Such a limitation is unnecessary, may disrupt existing business and licensing models and may limit the development of new business and licensing models.

**Comments regarding specific questions posed in the Discussion Paper**

While this submission is not intended to address all of the proposals and questions that were raised in the Discussion Paper in detail, BSA has taken this opportunity to respond to the issues that are of particular importance to software developers and distributors.

**Yours faithfully,**



Boon Poh Mok  
Director, Government Relations and Policy, APAC  
BSA | The Software Alliance

## Appendix A – Specific responses to proposals and questions in the Discussion Paper

This Appendix is not intended to address each of the ALRC's proposals and questions in the Discussion Paper in detail. Rather, BSA has specifically responded to issues that it considers are of particular importance to software developers and distributors.

### 4. The Case for Fair Use in Australia

BSA generally supports the ALRC's proposal to amend the *Copyright Act* to provide an exception for fair use. BSA supports the implementation of a fact specific based approach to fair use, to be implemented on a case-by case basis.

Given that the ALRC's Proposals 4-1 to 4-4 are interdependent, BSA's response to Chapter 4 of the Discussion Paper provides a response to these proposals together.

**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').

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

- (a) the purpose and character of the use;
- (b) the nature of the copyright material used;
- (c) 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
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

**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.

While the BSA generally supports the ALRC's fair use proposal, our members are concerned that the introduction of a fair use exception will generate more uncertainty than retaining the existing fair use exceptions and that the financial burden of resolving this uncertainty will be borne by rights holders. BSA submits that the ALRC should consider how best to assist predictability in the application of the exception and what can be done to minimise unnecessary and costly litigation.

BSA notes that our response to the ALRC Issues Paper was opposed to the introduction of a broad exception for fair use. Having read the ALRC Discussion Paper and the reasons for the ALRC's proposals, the BSA now generally supports the introduction of a fair use exception. However, as will be addressed below in response to Chapter 9, BSA does not support the inclusion of "private and domestic" as an illustrative purpose for fair use.

Additionally, our concern with the introduction of a fair use provision into the Australian *Copyright Act* is the potential for those engaged in copyright piracy to raise the new fair use exception as justification for their infringing activities. BSA is concerned with the activities of particular infringers, namely businesses who make unlicensed use of software (e.g. a business that buys a single installation copy of a program and installs that copy on multiple computers). The 2011 BSA Global Software Piracy Study<sup>1</sup>, released in May 2012, demonstrates the scale of the software piracy problem:

- 23 percent of new software installed on Australian personal computers was pirated.
- The commercial value pirated software in Australia was \$739 million in 2011.

While it may be obvious to any reasonable person that the new "fair use" exception would not permit such unlicensed use of software, a person engaged in copyright piracy may argue that the law has now changed and that their activities are permitted under "fair use". BSA considers that any measures that can be taken to increase the certainty of fair use will increase the likelihood of settlement and reduce the burden of enforcement on rights holders as well as the courts.

### ***Technology neutrality and uncertainty***

That fair use can further achieve technology neutrality is regarded by BSA as the most important benefit of introducing the exception. Rather than attempting to fit new technologies within the limited framework of existing fair dealing exceptions, a fair use exception permits the application of a principles-based approach to copyright exceptions. This, in turn, facilitates and provides incentives for innovation and the development of new technologies in a digital environment.

However, technological neutrality should not be achieved at the expense of certainty. If the level of uncertainty for rights holders' protection of copyright material is too great, this could potentially minimise and counteract any benefits achieved by technology neutrality for the goal of innovation and incentivising the development of new material. The problem of uncertainty was expressed by the ALRC at 2.40 of the Discussion Paper:

*While copyright law needs to be able to respond to changes in technology, consumer demand and markets, it also needs to have a degree of predictability so as to ensure sufficient certainty as to the existence of rights and the permissible use of copyright materials, leading to minimal transaction costs for owners and users and avoiding uncertainty and litigation.*

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<sup>1</sup> Business Software Alliance, *Shadow Market: 2011 BSA Global Software Piracy Study*, 9<sup>th</sup> Ed, May 2012, online at <[globalstudy.bsa.org/2011/downloads/study\\_pdf/2011\\_BSA\\_Piracy\\_Study-Standard.pdf](http://globalstudy.bsa.org/2011/downloads/study_pdf/2011_BSA_Piracy_Study-Standard.pdf)>. Business Software Alliance, *BSA Report Finds 63 of Computer Users in Australia Admit they Pirate Software*, Press Release, 15 May 2011, online at <[globalstudy.bsa.org/2011/downloads/press/pr\\_australia\\_en.pdf](http://globalstudy.bsa.org/2011/downloads/press/pr_australia_en.pdf)>.

While BSA accepts that current copyright exceptions are not 100% predictable, fair use will commence with *less* certainty than the current exceptions:

- Given the general scarcity of Australian jurisprudence on fair dealing, it is likely that it would take many years for Australian courts to consider the many facets of fair use. Many of the current fair dealing exceptions, such as parody or satire, have never received Australian judicial interpretation.
- As the fair use exception is intended to be “broader” and not limited to categories, cases will undoubtedly be brought in areas outside the existing fair dealing exceptions.

### ***Increasing certainty***

Given that rights holders are likely to be faced with increased uncertainty and additional litigation, BSA submits that the ALRC should consider how the fair use exception can be implemented with further certainty.

As for what type of measures may be appropriate, BSA makes the following comments:

- At 4.175 and 4.176 of the Discussion Paper, the ALRC discussed where guidance may be found for the fair use exception. This included the fairness factors, the list of illustrative purposes, existing Australian case law, other relevant jurisdictions' case law and any industry guidelines that are developed. BSA supports these as factors that may guide the interpretation of fair use. However, BSA notes that these factors may not be enough. For example, BSA notes that in the United States, despite a substantial body of fair use jurisprudence, differences exist between Federal Circuits as to the availability of fair use in relevantly identical fact scenarios<sup>2</sup>.
- BSA embraces the distinction drawn by the ALRC between principles-based legislation and rules-based legislation (Discussion Paper at p 81). We regard this distinction as the optimal method to achieve both technology neutrality and certainty.
- It is appropriate that further clarity around the scope of the fair use exception be determined by the legislature, rather than by the Courts. The Courts are then able to implement that principled approach on a case-by-case basis. In particular, the principled approach expressed by the ALRC to fair use relate to economic rights and policy principles, for which the legislature is best placed to establish the framework.

BSA suggests the explanatory materials could be utilised to achieve further certainty.

- For example: The explanatory materials for the fair use exception should make it clear that Parliament intends that there be a retention of existing Australian fair dealing jurisprudence – that is, that generally, uses that previously fell under the fair dealing exceptions are intended to fall under the broader fair use exception.

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<sup>2</sup> For example, compare the decision of the Second Circuit Court of Appeals in *WNET, Thirteen v Aereo Inc.* 12-2786-cv, 12-2807-cv (2d Cir. Apr. 1, 2013), and the decision in the Ninth Circuit of the Central District Court in California, *Fox Television Stations, Inc. v. BarryDriller Content Systems, Plc*, 2012 WL 6784498 (C.D. Cal Dec. 27, 2012)

- The explanatory materials should expressly state that the fair use provision has implemented the ALRC proposal. This will allow any reasons for the ALRC proposal and comments on the fairness factors and illustrative purposes to be referred to for the purposes of furthering clarity.
- As far as is reasonably possible and necessary, the explanatory materials should describe the uses that Parliament intends to be covered by fair use, specifically, what the Parliament intends by each of the illustrative purposes.

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

With the exception of the "private and domestic" illustrative purpose, BSA supports the list of illustrative purposes proposed by the ALRC and does not consider that any additional uses or purposes should be included in the list of illustrative purposes in the fair use exception.

BSA makes submissions on the "private and domestic" illustrative purpose below, in response to Chapter 9.

If the ALRC does propose to include additional purposes in the list of illustrative purposes in the Final Report, the BSA would appreciate and opportunity to consider and comment on any additional purposes.

**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?

If fair use is enacted, BSA agrees with the ALRC that it is preferable to repeal existing fair dealing exceptions. Not only would this reduce the length and detail of the *Copyright Act*, but this would avoid unnecessary arguments regarding the relationship between the fair use and fair dealing exception.

#### ***The computer program exceptions***

In the Discussion Paper, the ALRC noted that it had not yet examined a number of the computer program exceptions contained within Part III Division 4A of the *Copyright Act* (the computer program exceptions).

BSA considers that the computer program exceptions in Part III Division 4A should be retained. Since they have been introduced, these exceptions have worked well. They provide a level of certainty for both rights holders and users of copyright material. They represent a decision by Parliament as to the appropriate circumstances in which these types of exceptions apply and the appropriate balance between the rights of owners and users of computer programs. The exceptions should be retained to provide clarity for both users and rights holders on uses of computer programs that do not infringe copyright.

For the same reasons, BSA considers that s 47C should be retained. Our submission specifically in relation to s 47C will be made in response to Proposal 9-5 below.

In the table below, BSA makes submissions in relation to each of the remaining computer program exceptions.

Section	Comment
<p><b>s 47B - Reproduction for normal use or study of computer programs</b></p>	<p>Section 47B provides an exception to infringement for the making of a reproduction of a computer program for normal use or study. Under s 47B(1) it is not an infringement to make a reproduction incidentally and automatically as part of the technical process of running a copy of the program for the purposes for which the program was designed. Under s 47B(3) it is not an infringement to make a reproduction for the purpose of studying the ideas behind and function of the program.</p> <p>Section 47B contains a number of criteria that Parliament considered appropriate to the particular circumstances. For "normal use", the copy from which the reproduction is made must not be an infringing copy, the reproduction must not be contrary to an express direction or licence given by the owner of the copyright, and the reproduction or adaptation must be made by or on behalf of the owner or licensee of the original copy. Similarly, for "studying", the copy from which the reproduction is made must not be an infringing copy and the reproduction or adaptation must be made by or on behalf of the owner or licensee of the original copy. Section 47B(5) is intended to prevent persons decompiling programs under the guise of reproducing programs for normal use or study.<sup>3</sup></p> <p>Section 47B should remain in the <i>Copyright Act</i>, to provide certainty to rights holders and users in the particular circumstances of reproductions of computer program made within the context of normal use or study.</p>
<p><b>s 47D - Reproducing computer programs to make interoperable products</b></p>	<p>Section 47D provides an exception to infringement for the making of a reproduction or adaptation of a computer program to obtain the information for making an interoperable program or article. The qualifications to the s 47D exception are that the reproduction or adaptation is only permissible to obtain information reasonably necessary to make an interoperable product, to the extent the new program reproduces or adapts the original program, it does only to the extent necessary for interoperability, the information must not be readily available from another source, the reproduction or adaptation must be made by or on behalf of the owner or licensee of the original copy and the copy must not be an infringing copy.</p> <p>The exception should remain in the <i>Copyright Act</i>, to provide certainty to rights holders and users in the particular circumstances of reproductions or adaptations of computer programs to make interoperable products. Section 47D contains a number of criteria that Parliament considered appropriate both to enable interoperability for users and to provide protection to the rights holders.</p>
<p><b>s 47E - Reproducing computer programs to correct errors</b></p>	<p>Section 47E provides an exception to infringement for the making of a reproduction or adaptation of a computer program to correct errors error in the original copy that prevents it from operating. The qualifications to the s 47E exception are that the reproduction or adaptation is only permissible to the extent reasonably necessary to correct the error, a working copy of the program must not be available within a reasonable time at an ordinary commercial price, the copy must not be an infringing copy and the reproduction or adaptation must be made by or on behalf of the owner or licensee of the original copy.</p>

<sup>3</sup> Supplementary Explanatory Memorandum, *Copyright Amendment (Digital Agenda) Bill 1999*, p 9.

	<p>The exception should remain in the <i>Copyright Act</i>, to provide certainty to rights holders and users in the particular circumstances of reproductions or adaptations of computer programs to correct errors. Section 47E contains a number of criteria that Parliament considered appropriate to the particular circumstances of reproducing computer programs to correct errors.</p>
<p><b>s 47F - Reproducing computer programs for security testing</b></p>	<p>Section 47F provides an exception to infringement for the making of a reproduction or an adaptation of a work for security testing. The qualifications to the s 47F exception are that reproduction or adaptation is only permissible to the extent reasonably necessary for security testing, the security testing information must not be readily available from another source and the copy must not be an infringing copy.</p> <p>Section 47F was considered by the Full Court of the Federal Court in <i>Software AG (Aust) Pty Ltd v Racing &amp; Wagering Western Australia</i> [2009] FCAFC 36. The Court held that making copies for the purpose of testing the security of a disaster recovery copy did not fall within s 47F, as the exception was limited to testing the security of the original copy (at [55]).</p> <p>The exception should remain in the <i>Copyright Act</i>, to provide certainty to rights holders and users in the particular circumstances of reproductions or adaptations of computer programs for security testing. Section 47F contains a number of criteria that Parliament considered appropriate to the particular circumstances of reproducing computer programs for security testing.</p>
<p><b>s 47G - Unauthorised use of copies or information</b></p>	<p>Section 47G provides that ss 47B, 47C, 47D, 47E or 47F (the computer program exceptions) do not apply if the reproduction, adaptation or information derived from it, is sold or supplied without the consent of the copyright holder.</p> <p>Section 47G further emphasises that the only purposes permissible are those indicated in the computer program exceptions, and that an additional purpose would render the original reproduction or adaptation impermissible.</p> <p>If, as BSA has suggested, the computer program exceptions are not repealed, then s 47G should remain, with reference to those exceptions.</p> <p>However, if the computer program exceptions are all repealed, s 47G should likewise be repealed.</p>
<p><b>s 47H – Agreements excluding operation of certain provisions</b></p>	<p>Section 47H provides that an agreement, or provision of an agreement, that excludes or has the effect of excluding or limiting, the operation of certain computer program exceptions, has no effect.</p> <p>For the reasons set out in BSA's response to Proposal 17-1 below, we consider that this section should be repealed.</p>

## 6. Statutory Licences

**Proposal 6–1** The statutory licensing schemes in pts VA, VB and VII div 2 of the *Copyright Act* should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

**Question 6–1** If the statutory licences are repealed, should the *Copyright Act* be amended to provide for certain free use exceptions for governments and educational institutions that only operate where the use cannot be licensed, and if so, how?

BSA has no comments to make in respect of Chapter 6.

## 7. Fair Dealing

**Proposal 7–1** The fair use exception should be applied when determining whether a use for the purpose of research or study; criticism or review; parody or satire; reporting news; or professional advice infringes copyright. 'Research or study', 'criticism or review', 'parody or satire', and 'reporting news' should be illustrative purposes in the fair use exception.

**Proposal 7–2** The *Copyright Act* should be amended to repeal the following exceptions:

- (a) ss 40(1), 103C(1)—fair dealing for research or study;
- (b) ss 41, 103A—fair dealing for criticism or review;
- (c) ss 41A, 103AA—fair dealing for parody or satire;
- (d) ss 42, 103B—fair dealing for reporting news;
- (e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and
- (f) ss 104(b) and (c)—professional advice exceptions.

If fair use is enacted, BSA agrees with the ALRC that it is preferable to repeal existing fair dealing exceptions. Not only would this reduce the length and detail of the *Copyright Act*, but this would generally avoid unnecessary arguments regarding the relationship between the fair use and fair dealing exception.

**Proposal 7–3** If fair use is not enacted, the exceptions for the purpose of professional legal advice in ss 43(2), 104(b) and (c) of the *Copyright Act* should be repealed and the *Copyright Act* should provide for new fair dealing exceptions 'for the purpose of professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney' for both works and subject-matter other than works.

BSA has no comments to make in respect of Proposal 7-3.

**Proposal 7–4** If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright is infringed.

BSA has no comments to make in respect of Proposal 7-4.

## 8. Non-Consumptive Use

**Proposal 8-1** The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. 'Non-consumptive use' should be an illustrative purpose in the fair use exception.

If fair use is enacted, BSA agrees with the ALRC that "non-consumptive use" should be an illustrative purpose in the fair use exception.

Any "non-consumptive use" illustrative purpose should be appropriately defined in the *Copyright Act* itself. BSA agrees with the ALRC that the meaning of "non-consumptive use" is not immediately apparent and considers that the definition should be contained in the legislation, rather than in the explanatory materials.

Any "non-consumptive use" illustrative purpose should be applied for example, to uses where the copyright material is reproduced as a necessary part of the way in which a particular technology works. The purpose should be appropriately targeted, so that "non-consumptive" use is not used as a justification for a use that causes harm to the rights holder's market.

**Proposal 8-2** If fair use is enacted, the following exceptions in the *Copyright Act* should be repealed:

- (a) s 43A—temporary reproductions made in the course of communication;
- (b) s 111A—temporary copying made in the course of communication;
- (c) s 43B—temporary reproductions of works as part of a technical process of use;
- (d) s 111B—temporary copying of subject-matter as a part of a technical process of use; and
- (e) s 200AAA—proxy web caching by educational institutions.

While the activities of making temporary reproductions, caching and indexing in the circumstances of these exceptions may fall within the scope of a "non-consumptive use" illustrative purpose, it is also possible that scope of these exemptions and a fair use exemption are not entirely congruent.

Thus, to avoid upsetting settled expectations created by the existing exceptions, they should be retained, but with clarification that there is overlap between them and a fair use exception and that failure to qualify for one of these exceptions does not preclude application of the fair use exception to the activity.

**Proposal 8-3** If fair use is not enacted, the *Copyright Act* should be amended to provide a new fair dealing exception for 'non-consumptive' use. This should also require the fairness factors to be considered. The *Copyright Act* should define a 'non-consumptive' use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

Consistent with BSA's comments in respect of Proposals 8-1 and 8-2, BSA supports Proposal 8-3.

Consistent with BSA's comments in respect of Proposal 8-1 above, BSA considers that any new fair dealing exception for "non-consumptive" use should be appropriately defined and technologically neutral.

As noted above, if the fair dealing exception for "non-consumptive use" is introduced, BSA considers that the existing temporary copying and caching exceptions should be retained with clarification that failure to qualify for the existing exceptions does not preclude application of the new fair dealing exception.

## 9. Private and Domestic Use

**Proposal 9-1** The fair use exception should be applied when determining whether a private and domestic use infringes copyright. 'Private and domestic use' should be an illustrative purpose in the fair use exception.

In certain circumstances, private and domestic use of copyright material may be considered "fair" under a general fair use exception. However, these circumstances are limited to appropriate and "fair" circumstances:

- Any use or reproduction must be from a copy of copyright material which has been legitimately purchased or licenced.
- Any use or reproduction must be done by, or on behalf of, the owner of that original copyright material.
- Any consideration of "fairness" must depend upon the particular circumstances of the use of the copyright material. The particular circumstances would include the terms of the agreement under which the copyright material has been purchased or licensed.

BSA is concerned that any application of a general fair use exception in private and domestic circumstances should not interfere with the rights holder's normal exploitation of the work. The law should be careful not to interfere with this economic right.

Commercial actors should not be able to rely on the fair use exception to justify unauthorised distribution or unlicensed use of copyright material. Further, the application of a fair use exception should be careful not to undermine established and reasonable licensing and business models. BSA notes that the licensing models for different markets vary considerably, from hard copy books, to downloaded music, to per-installation computer software. A common software licensing model is the provision of software on a cost per-installation basis. For example, a user can purchase a cheaper one-installation software package or a more expensive six-installation software package, depending on the number of devices on which the customer wishes to install the software. A user should not be able to buy a one-installation package and install it on multiple home computers, justifying it on the basis that it is for "private and domestic use".

**Proposal 9-2** If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

In respect of Proposal 9-2, BSA repeats the submissions made in response to Proposal 9-1.

**Proposal 9-3** The exceptions for format shifting and time shifting in ss 43C, 47J, 109A, 110AA and 111 of the *Copyright Act* should be repealed.

As outlined above, BSA does not support the "private and domestic purposes" illustrative purpose for fair use or new fair dealing exception.

If there is some specific reason to legislatively protect the balance between private interests, BSA submits that this should be done through specific exceptions, such as the current format and time shifting exceptions. BSA therefore submits that the format shifting and time shifting in ss 43C, 47J, 109A, 110AA and 111 of the *Copyright Act* should be retained.

**Proposal 9-4** The fair use exception should be applied when determining whether a use of copyright material for the purpose of back-up and data recovery infringes copyright.

As outlined above, BSA does not support the "private and domestic purposes" illustrative purpose for fair use or new fair dealing exception. Any exceptions that change the balance between private interests of rights holder and consumers, rather protecting public interests, should be the subject of specific exceptions to infringement. Therefore, BSA submits that the fair use exception should not be applied in determining whether a use of copyright material for the purpose of back-up and data recovery infringes copyright.

BSA again raises the concern addressed above regarding licensing models. The fair use exception should not be used by users to circumvent the agreement under which their license to use the copyright material was granted. For example, if a customer buys a one-installation software package, the customer should be permitted under fair use to back-up that software, and commence recovery should this become necessary on the original device. However, the customer should not be permitted to "back-up" the software and then install the software on additional or new devices, claiming that this is "recovery". This would circumvent the licensing model under which the software has been provided.

Any exceptions for back-up and data recovery services should be *specific* exceptions to infringement, rather than being considered under a "private and domestic" use fair use illustrative purpose or a fair dealing exception.

**Proposal 9-5** The exception for backing-up computer programs in s 47J of the *Copyright Act* should be repealed.

As outlined above, BSA considers that any exceptions for back-up and data recovery services should be *specific* exceptions to infringement. BSA therefore submits that the existing exception

for backing up computer programs should be retained. In addition, even if a fair use exception or a fair dealing exception is introduced, BSA submits that the exception should be retained.

We note that Proposal 9-5 refers to s 47J of the *Copyright Act* and respectfully suggest that the ALRC intended to refer to s 47C of the *Copyright Act*, which contains the exception for backing up computer programs.

Section 47C contains a number of criteria that Parliament considered appropriate to the particular circumstances. The qualifications to the s 47C exception are that:

- the reproduction must be made by or on behalf of the owner or licensee of the original copy and the copy;
- the reproduction must be made for use only by or on behalf of the owner or licensee of the original copy;
- the original copy must not be an infringing copy or a copy for which the licence has been terminated or expired; and
- the reproduction must not be made if the computer program has been designed so that the program cannot be reproduced without modification.

Since s 47C allows the reproduction to be made on behalf of the owner or licensee of the copy, BSA considers that section 47C expressly permits the reproduction to be made by back-up and data recovery services.

Section 47C should remain in the *Copyright Act*, to provide certainty to rights holders and users in the particular circumstances of back-up copies of computer programs. The exception has worked well and is familiar to copyright owners and users.

## 10. Transformative Use and Quotation

**Proposal 10-1** The *Copyright Act* should not provide for any new 'transformative use' exception. The fair use exception should be applied when determining whether a 'transformative use' infringes copyright.

BSA supports Proposal 10-1 and the ALRC's decision not to propose a separate exception for transformative use or to include transformative use as one of the "illustrative purposes" in the proposed fair use exception.

**Proposal 10-2** The fair use exception should be applied when determining whether quotation infringes copyright. 'Quotation' should be an illustrative purpose in the fair use exception.

**Proposal 10-3** If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.

BSA has no comments to make in respect of Proposals 10-2 and 10-3.

## 11. Libraries, Archives and Digitisation

**Proposal 11-1** If fair use is enacted, s 200AB of the *Copyright Act* should be repealed.

**Proposal 11-2** The fair use exception should be applied when determining whether uses of copyright material not covered by specific libraries and archives exceptions infringe copyright.

**Proposal 11-3** If fair use is not enacted, the *Copyright Act* should be amended to provide for a new fair dealing exception for libraries and archives. This should also require the fairness factors to be considered.

**Question 11-1** Should voluntary extended collective licensing be facilitated to deal with mass digitisation projects by libraries, museums and archives? How can the *Copyright Act* be amended to facilitate voluntary extended collective licensing?

**Proposal 11-4** The *Copyright Act* should be amended to provide a new exception that permits libraries and archives to make copies of copyright material, whether published or unpublished, for the purpose of preservation. The exception should not limit the number or format of copies that may be made.

**Proposal 11-5** If the new preservation copying exception is enacted, the following sections of the *Copyright Act* should be repealed:

- (a) s 51A—reproducing and communicating works for preservation and other purposes;
- (b) s 51B—making preservation copies of significant works held in key cultural institutions' collections;
- (c) s 110B—copying and communicating sound recordings and cinematograph films for preservation and other purposes;
- (d) s 110BA—making preservation copies of significant recordings and films in key cultural institutions' collections; and
- (e) s 112AA—making preservation copies of significant published editions in key cultural institutions' collections.

**Proposal 11-6** Any new preservation copying exception should contain a requirement that it does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.

**Proposal 11-7** Section 49 of the *Copyright Act* should be amended to provide that, where a library or archive supplies copyright material in an electronic format in response to user requests for the purposes of research or study, the library or archive must take measures to:

- (a) prevent the user from further communicating the work;
- (b) ensure that the work cannot be altered; and
- (c) limit the time during which the copy of the work can be accessed.

BSA has no comments to make in respect of Chapter 11.

## 12. Orphan Works

**Proposal 12–1** The fair use exception should be applied when determining whether a use of an 'orphan work' infringes copyright.

**Proposal 12–2** The *Copyright Act* should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

- (a) a 'reasonably diligent search' for the rights holder had been conducted and the rights holder had not been found; and
- (b) as far as reasonably possible, the work was clearly attributed to the author.

**Proposal 12–3** The *Copyright Act* should provide that, in determining whether a 'reasonably diligent search' was conducted, regard may be had, among other things, to:

- (a) how and by whom the search was conducted;
- (b) the search technologies, databases and registers available at the time; and
- (c) any guidelines or industry practices about conducting diligent searches available at the time.

BSA has no comments to make in respect of Chapter 12.

## 13. Educational Use

**Proposal 13–1** The fair use exception should be applied when determining whether an educational use infringes copyright. 'Education' should be an illustrative purpose in the fair use exception.

**Proposal 13–2** If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.

**Proposal 13–3** The exceptions for education in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed.

BSA has no comments to make in respect of Chapter 13.

## 14. Government Use

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

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

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

- (a) ss 43(1), 104—judicial proceedings; and
- (b) ss 48A, 104A—copying for members of Parliament.

BSA has no comments to make in respect of Chapter 14.

## 15. Retransmission of Free-to-air Broadcasts

### Proposal 15-1

Option 1: The exception to broadcast copyright provided by the *Broadcasting Services Act 1992* (Cth), and applying to the retransmission of free-to-air broadcasts; and the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of the *Copyright Act*, should be repealed. This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

Option 2: The exception to broadcast copyright provided by the *Broadcasting Services Act*, and applying to the retransmission of free-to-air broadcasts, should be repealed and replaced with a statutory licence.

**Proposal 15-2** If Option 2 is enacted, or the existing retransmission scheme is retained, retransmission 'over the internet' should no longer be excluded from the statutory licensing scheme applying to the retransmission of free-to-air broadcasts. The internet exclusion contained in s 135ZZJA of the *Copyright Act* should be repealed and the retransmission scheme amended to apply to retransmission by any technique, subject to geographical limits on reception.

**Question 15-1** If the internet exclusion contained in s 135ZZJA of the *Copyright Act* is repealed, what consequential amendments to pt VC, or other provisions of the *Copyright Act*, would be required to ensure the proper operation of the retransmission scheme?

**Proposal 15-3** If it is retained, the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* should be clarified.

**Question 15-2** How should the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* be clarified and, in particular, its application to internet protocol television?

BSA has no comments to make in respect of Chapter 15.

## 16. Broadcasting

**Proposal 16-1** The *Copyright Act* should be amended to ensure that the following exceptions (the 'broadcast exceptions'), to the extent these exceptions are retained, also apply to the transmission of television or radio programs using the internet:

- (a) s 45—broadcast of extracts of works;
- (b) ss 47, 70 and 107—reproduction for broadcasting;
- (c) s 47A—sound broadcasting by holders of a print disability radio licence;
- (d) s 67—incidental broadcast of artistic works;
- (e) s 109—broadcasting of sound recordings;
- (f) s 135ZT—broadcasts for persons with an intellectual disability;
- (g) s 199—reception of broadcasts;
- (h) s 200—use of broadcasts for educational purposes; and
- (i) pt VA—copying of broadcasts by educational institutions.

**Question 16–1** How should such amendments be framed, generally, or in relation to specific broadcast exceptions? For example, should:

- (a) the scope of the broadcast exceptions be extended only to the internet equivalent of television and radio programs?
- (b) 'on demand' programs continue to be excluded from the scope of the broadcast exceptions, or only in the case of some exceptions?
- (c) the scope of some broadcast exceptions be extended only to content made available by free-to-air broadcasters using the internet?

**Proposal 16–2** If fair use is enacted, the broadcast exceptions in ss 45 and 67 of the *Copyright Act* should be repealed.

**Question 16–2** Section 152 of the *Copyright Act* provides caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings. Should the *Copyright Act* be amended to repeal the one per cent cap under s 152(8) or the ABC cap under s 152(11), or both?

**Question 16–3** Should the compulsory licensing scheme for the broadcasting of published sound recordings in s 109 of the *Copyright Act* be repealed and licences negotiated voluntarily?

BSA has no comments to make in respect of Chapter 16.

## 17. Contracting out

**Proposal 17–1** The *Copyright Act* should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect. These limitations on contracting out should apply to the exceptions for libraries and archives; and the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

There should be no limitations introduced into the *Copyright Act* to limit the rights holder's and customer's ability to agree to contract out of exceptions to copyright infringement. The public interests protected by copyright exceptions are not prejudiced by private arrangements and such a limitation will undermine freedom of contract.

For the purposes of following submissions, BSA has assumed that a fair use exception will be introduced. However, the arguments equally apply to fair dealing exceptions, should fair use not be introduced.

### ***Freedom of contract***

Contractual exceptions should not override the terms of a contract that have been agreed between owner and user of copyright material.

The ALRC Discussion Paper and proposals generally support freedom of contract as appropriate in the digital age, to enable parties to agree upon the terms of licensing agreements. For example, the ALRC accepts that rather than statutory licences, the digital environment appears to call for a new way for licences to be negotiated and settled and that voluntary licences are less prescriptive, more efficient and better suited to a digital age.

The *Copyright Act* grants the rights holder particular exclusive rights in their copyright material. The ability to determine contractual terms is the mechanism by which the rights holder can, as part of its exclusive rights, agree with a customer to allow (or limit) particular uses of its copyright material. Rights holders have historically and currently spelled out the specific terms on which they exploit their exclusive rights, through specifying terms of distribution, reproduction, length of licence, geographical restrictions, communication to the public etc. There should be freedom in determining the terms of this contract, which grant customers greater rights than are provided by statute and impose restrictions to protect the economic and other legitimate interests of copyright owners, such as integrity of the work.

Freedom of contract is vitally important to business in an increasingly digital world. BSA members, and copyright holders generally, are increasingly exploiting their exclusive rights in copyright material through licensing agreements. There has been a shift from the sale of tangible copies of materials to licensing agreements, a result of changing technologies and new ways of accessing and using copyright material. Examples include the online distribution of copyright materials, including movies, music, books and software.

An obvious example is the standard licensing model for software programs, used by BSA members, for a particular number of installations of a software program. The rights holder, entitled to decide the way in which it uses its exclusive rights, has elected to do so through licensing by installation. This business model is quite different to, for example, the sale of a DVD or a tangible book. Other examples of limited licence agreements and business models based on contractual restrictions are a licence to download a movie, which is only able to be watched once, before being automatically deleted, or a "try before you buy" computer game download, that limits the duration of access before the complete product is purchased. The ability to agree on these contractual restrictions is essential to effective licensing arrangements.

Freedom to agree upon the terms of those licensing agreements is fundamental to the development of new products and services, which may depend upon new and inventive business models. The ability to agree on specific licence terms, such as the duration of a licence, geographical restrictions, technological platforms, reproduction of material, is essential to those business models.

BSA members are concerned that the introduction of contracting out provisions into the *Copyright Act* will disrupt existing business models, contracts and pricing systems that are based on the current legislation. Further, given the importance of contracting out provisions to licensing business models, BSA members are concerned that limitations on these provisions will restrict new business models, on which new technologies and services can be based. The practical effect of the ALRC's proposal will be to seriously undermine the software industry's ability to develop new business models, with severe economic implications. This is exacerbated by the fact that the proposal extends beyond the digital environment.

The principle of freedom to contract under Australian law extends to IP licensing. The High Court of Australia has recognised the "great commercial value" of IP licensing rights.<sup>4</sup> Australian Courts have recognised that restrictive conditions in intellectual property licences are less likely to fall foul of the restraint of trade doctrine, because they are legitimate.<sup>5</sup>

The ALRC's proposal is based on an assumption that a contractual provision that is inconsistent with a copyright exception is necessarily unfair. BSA does not agree with this assumption. An agreement between a rights holder and a consumer, including an agreement that limits a copyright exception, should not be regarded as fundamentally unfair. The consumer has agreed to receive the benefits of that contract subject to the exclusion. That is, a consumer has agreed to receive a limited licence in order to obtain the benefit of accessing copyright material.

Conditional copyright licences should not be treated as mere contractual restraints. Courts have confirmed that licensing conditions operate to define the scope of the copyright licence, rendering non-compliance infringing conduct rather than merely contractual breach.<sup>6</sup> In 2010 the United States Court of Appeals similarly confirmed that the extent of restrictions on use and transfer imposed by a software licence agreement is determinative of whether software has been sold or merely licensed.<sup>7</sup>

#### **Unfair contracts**

It may well be that certain terms of some contracts for the provision of copyright material are unfair. However, the response to this should not be to introduce restrictions on contract law into the *Copyright Act*.

Existing contractual safeguards provide suitable and sufficient protection for consumer rights, to the extent that there is an imbalance in negotiating power and an exclusion or limitation of a copyright exception is seen as unfair. Given these existing protections, there is no evidence that the public interests protected by copyright exceptions are prejudiced by private arrangements. It is inappropriate to limit the freedom of a rights holder and customer to agree on the terms on which copyright material is provided, in order to achieve a goal that is dealt with at general law.

The ordinary principles of contract law include the requirement for formation of a contract that there be agreement between the parties. If there is not seen to be proper "agreement" then this may affect whether terms of contract have effect.

Other existing contractual safeguards include:

- Under s 23 of the *Australian Consumer Law*, a term of a standard form consumer contract is void if the term is unfair. If a contractual term that purports to limit or exclude a

<sup>4</sup> *JTI v Commonwealth* (2012) 291 ALR 669 at [81]-[82] (Gummow J); see also (in the trade mark context) the unanimous judgment in *Campomar Sociedad, Limitada v Nike International Ltd* (2000) ALR 677 at [42].

<sup>5</sup> See e.g. *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at [54] (Gleeson CJ, Gummow and Hayne JJ) and *Council of the City of Sydney v Goldspar Pty Ltd* (2004) 62 IPR 274 at [87] and [92].

<sup>6</sup> See e.g. (in the trade mark context) *Sporte Leisure Pty Ltd v Paul's International Pty Ltd (No 3)* (2010) 275 ALR 258 at [78] and *Paul's Retail Pty Ltd v Lonsdale Australia Limited* [2012] FCAFC 130 at [49]. In the US, see *Vernor v Autodesk, Inc*, 621 F.3d 1102 (9th Cir. 2010).

<sup>7</sup> *Vernor v Autodesk, Inc*, *ibid*.

contractual exception is fundamentally unfair, that term would likely be void under s 23 of the *Australian Consumer Law*.

- The *Australian Consumer Law* proscribes misleading and deceptive conduct and unconscionable conduct in trade and commerce (Part 2-1 and Part 2-2).
- The doctrine of unconscionable conduct applies to contract law where one party is placed at a special disadvantage and then the other party takes unfair or unconscientious advantage of their superior bargaining position.
- The misuse of market power is prohibited by the *Competition and Consumer Act 2010* (Cth) s 46.

There is no evidence that these competition and consumer law safeguards are currently insufficient to provide consumers with adequate protection or remedies for unfair contractual terms. We have yet to see a case where a rights holder has taken action against a licensee where the action has been brought for breach of a licence condition that excluded an exception to copyright infringement.

#### ***Unintended side effects***

The ALRC is concerned about the "possibility of unintended effects" of introducing a limitation on contracting out of copyright exceptions. BSA is concerned that the ALRC has not properly considered such side-effects. These would include severe economic implications for the rights holders, such those discussed above:

- inappropriate restrictions on the ability of the rights holder to agree on the terms under which copyright material is licensed; and
- preventing new and innovative licensing models from developing.

In addition, BSA is concerned that the proposal would introduce significant uncertainty into licensing of copyright materials. The proposal would create disputes between rights holders and customers about whether existing or future licence conditions are prohibited by the limitation, and the impact of the proposal would be incredibly difficult to predict.

The ALRC should consider the impact of the proposal on existing licences or whether the rights holders should be compensated for the heavy economic losses of invalidation of existing contractual terms. The ALRC proposal could substantially undermine existing licence agreements, in particular, where the imposition of the condition on the licence is a fundamental term under which the rights holder has agreed to license the material for the contracted amount. Further, even if the proposal was restricted to new contracts, this would be highly problematic for renewals of existing contracts, for example where the customer alone has the renewal option.