

## APRA|AMCOS RESPONSE TO THE ALRC DISCUSSION PAPER COPYRIGHT AND THE DIGITAL ECONOMY

### 1. General response

- 1.1 The question referred to the ALRC was “whether the exceptions and statutory licences in the *Copyright Act 1968* are adequate and appropriate in the digital environment”. The proposals in the Discussion Paper go well beyond the scope of the reference and, if implemented, would have far reaching consequences for the ability of copyright owners to participate in not only the digital markets for their works, but in all markets.
- 1.2 It is apparent, and disappointing, that the ALRC has conducted its inquiry from, or at least accepting, a particular ideological approach to the issues, rather than by considering all of the evidence put before it in the course of submissions.
- 1.3 APRA|AMCOS are unaware of any evidence put before the ALRC that could give rise to the conclusion that the proposals in the Discussion Paper are necessary or desirable for the functioning of the digital economy. Conversely, there is ample evidence to suggest that the recommendations, if implemented, would cause economic loss to copyright owners and confusion in digital and other markets. Copyright owners have made genuine attempts to share with the ALRC the practical economic reality of being a copyright owner in the digital environment, and the fact that this actual evidence of real, practical experience in that environment has been overlooked in favour of academic hypothesis is disappointing.
- 1.4 The method used to construct the Discussion Paper makes a practical response difficult. The arguments made in the submissions on the Issues Paper are grouped together and summarised, but the Discussion Paper gives no insight as to why the ALRC has reached the conclusions that it has. By way of contrast, the *Hargreaves Report* sets out arguments for and against the various propositions, but also explains what about the various submissions was compelling for the authors of the Report. In this instance, those whose submissions have not been persuasive have little choice but to repeat those submissions – there is no indication of what type of evidence the ALRC might have found more persuasive. Accordingly, APRA|AMCOS do reiterate the matters set out in their primary submissions, and urge the ALRC to explain how that evidence has come to be disregarded by it or what further evidence might helpfully be provided.
- 1.5 The ALRC puts forward its recommendation for a new fair use exception as the centrepiece of its proposed reforms. That is misleading. The centrepiece of the proposed reforms is actually (with some anomalies) the repeal of the *paid* statutory licences, and the extension of the *free* exceptions and statutory licences contained in the Act. The new fair use exception is then put forward as a replacement for at least some of the uses covered by the existing *paid* statutory licences. APRA|AMCOS do not understand why the same approach was not adopted for the free statutory licences as for the paid ones – that is, they would be repealed, and the purposes for which they exist would be included in the list of illustrative purposes with a fairness consideration overlaid. The only conclusion that can be drawn is that the ALRC is inclined towards a free access model for copyright content.
- 1.6 When the case for fair use in Australia was last considered<sup>1</sup>, the Attorney-General’s Department and Parliament rejected a US style fair use exception, and instead proposed certain additional fair dealings and exceptions.

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<sup>1</sup> Attorney-General’s Department, 2005 Fair Use Review

- 1.7 In APRA|AMCOS' view, this important inquiry has been allowed to be dominated by academic submissions made by persons with limited practical experience in working in the copyright industries, and the juggernaut of services who profit massively from the dissemination of user generated content. Academic papers are not evidence. The opinions of Burrell *et al* are not novel, and many academics in isolation of commercial reality may have the time and the inclination to draft any number of elegant proposals for a law that has no history and no context. But these academics have limited, if any, experience working in the commercial copyright industries. They have limited, if any, experience of licensing copyrights, or of building and maintaining a business that uses copyright material, and little, if any, experience of trying to eke out a living from the products of creative labour.
- 1.8 It is interesting to note in this context that the ALRC has made no proposals whatsoever in relation to the mechanical statutory licence – a paid licence that applies only to physical recordings of musical works (the provisions are strongly linked to particular technologies that are quickly becoming obsolete). However, this is a subject that does not impact on the academic community whose rhetoric infuses this Discussion Paper, nor on the business models of service providers like Google and Yahoo!7, and accordingly has been overlooked completely.
- 1.9 As APRA|AMCOS submitted in response to the Issues Paper, simplicity in and of itself should not be a guiding principle of law reform. The *Copyright Act*, like many pieces of legislation, is not a document that will necessarily be improved by being dramatically simplified on its face. It is true that many of its provisions are responses to particular historical events, and there is good reason to restrict them accordingly. There are complex relationships between different parts of the Act, which makes a review of exceptions alone – especially if the review will propose a radical change as this one has proposed to do – likely to produce unintended consequences.
- 1.10 APRA|AMCOS reiterate their concern that the ALRC has been directed not to take into account matters that are the subject of other inquiries, including in particular relating to carriage service provider liability. The proper working of the safe harbour provisions is so integral to the impact of other exceptions that a review of exceptions without consideration of these other matters must be seriously flawed. APRA|AMCOS are also concerned that the inquiry has not considered (presumably because it is beyond the scope of its reference) any amendments that may need to be made to the provisions of the Act relating to damages, noting APRA|AMCOS' submissions relating to statutory damages below.
- 1.11 The ALRC and the submissions on which it relies are highly critical of the Act for being a product of reactivity, technology specific and inflexible. Ironically, the proposals contained in the Discussion Paper are themselves as reactive to particular circumstances, and as technology specific in their own way, as any provisions in the Act. The Discussion Paper, and the submissions on which it relies, point to the *Optus TVNow* and the *Kookaburra* litigation as being cases in which the outcomes were perceived by copyright users to be unsatisfactory. Revisions to the law are proposed accordingly. The major promoters of user generated content, such as Google and Yahoo!7, and those who support them, such as the EFA and the ADA, require technology specific exceptions to permit their particular business models to operate with as little restriction in the way of access and licence fees as possible, and proposals are made accordingly. Similarly, proposals to repeal the statutory licences appear to be the direct result of the dissatisfaction of the education lobby with the level of fees payable under the statutory licences. None of this is methodologically objectionable *per se*, but the ALRC would do well to not persuade itself that its proposals are anything other than reactive, and productive of further piecemeal statutory amendment.

The result of this reactive process is a series of far reaching proposals whose basis is in very particular factual and historical circumstances, which if implemented will have a dire impact on the production of and investment in creative content in Australia.

- 1.12 The point of this is to note that all law reform is a product of current circumstances. The statutory licences and other exceptions in the Act were introduced in response to issues of the day. It would be naïve, in APRA|AMCOS' view, to think that amendments could be drafted now, that will obviate the need for such responsive change in the future. The important thing to consider is that amendments are not made as a knee jerk reaction to current trends, but as a carefully considered response to genuine and properly formed views held by a majority of those affected by the law. Of course, the guiding principles of the inquiry into a reform of the law will be relevant in containing this process.
- 1.13 Unfortunately, the application of the principles stated by the ALRC is not necessarily evident in the Discussion Paper.
- 1.14 Paragraph 2.5 of the Discussion Paper refers to the general principle of the right of “authors and makers” to determine how their works are exploited, by reference to a statement regarding moral rights (although, of course, moral rights are personal rights not granted to many makers of copyright subject matter). Yet the Discussion Paper fails utterly to deal with the interaction between the proposed changes and moral rights. APRA|AMCOS note the submission in response to the Discussion Paper made by Pandora Media Inc. APRA|AMCOS welcome Pandora’s acknowledgement of the effectiveness of collective licensing, and its comments regarding the importance of rewarding creators and content owners. APRA|AMCOS also recognise the valuable contribution made to the businesses of their respective members by licensed services such as Pandora. However, any limitations on licences granted to Pandora, regarding the use of particular works<sup>2</sup>, are a direct result of the proper exercise of the individual copyright owner’s right to control use of works, in accordance with Principle 1.
- 1.15 The Discussion Paper states that it is guided by the need to promote fair access to and wide dissemination of content (Principle 3).<sup>3</sup> However, it appears to confuse fair access with free access. It also fails to acknowledge the fact that the evidence before the ALRC clearly shows that licensing solutions are available in Australia for all content, and that statutory licensing regimes ensure access to and wide dissemination of content. The submissions to the Issues Paper do not reveal a plethora of actual instances of denial of access on reasonable terms to copyright material. The ALRC has failed to identify why these existing solutions are not “adequate and appropriate” in the digital environment.
- 1.16 Principle 4, providing rules that are flexible and adaptive to new technologies, seems to suggest that the converged media environment requires an Act that is not mired in historical anomalies<sup>4</sup>. In APRA|AMCOS' view, this is just as strong an argument for repealing all of the technology specific exceptions as it is for extending them (see further APRA|AMCOS' submissions in response to Chapter 16). However, this does not appear to have been considered by the ALRC to be an option.
- 1.17 APRA|AMCOS are disappointed that the ALRC has not been more persuaded by evidence than rhetoric, and notes Recommendation 1 of *Hargreaves*. Although evidence of the impact of reforms on developing and future markets can be

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<sup>2</sup> Pandora under section 2.10

<sup>3</sup> Discussion Paper paragraphs 2.24 – 2.32

<sup>4</sup> Google, referred to in Discussion Paper footnote 61

problematic, and there can be difficulties establishing causal links between reforms and market effects, APRA|AMCOS firmly believe that law reform should first look to evidence of real markets at work before making changes that are based solely on principle.

- 1.18 APRA|AMCOS endorse the submissions in response to the Discussion Paper made by the Australian Copyright Council.

## RESPONSE TO PROPOSALS AND QUESTIONS

### 2. Chapter 4 - Fair Use

- 2.1 The ALRC proposes a US-style fair use exception, apparently on the basis that it would provide “flexibility”, assist “innovation”, “[restore] balance to the copyright system” and “[assist] with meeting consumer expectations”.<sup>5</sup> APRA|AMCOS strongly oppose this recommendation. It is their view that the amendment is not compliant with Australia’s international obligations, will increase uncertainty and cost for owners and users, reduce owners’ incomes, and that if US legislation is to be imported it should carry with it other relevant aspects of US law. The wholesale adoption of the safe harbour provisions without the accompanying Codes of Conduct is evidence of the risks of this approach.
- 2.2 A number of parties making submissions in response to the Issues Paper, including APRA|AMCOS, expressed concern that a US-style fair use exception is not compliant with the three-step-test required by Berne. Significantly, too, the AGD review of fair use rejected the proposal at least in part because of the likelihood that it would not be compliant with Australia’s international obligations.<sup>6</sup>
- 2.3 The ALRC dismisses any suggestion that a US-style fair use exception might not be compliant with Berne obligations. The fact that the US has not been challenged on this point is not an appropriate basis for a conclusion that by adopting a similar law, Australia would not be in breach of its obligations under the convention. In fact, the only argument put forward to support the position that an Australian fair use provision would be compliant with Berne, is that no-one has challenged the US on this basis.<sup>7</sup> This does not constitute a proper examination of whether the proposed provision would be compliant with Australia’s obligations, such as has been provided by the Australian Copyright Council. The US is unique. Its domination of at least western culture means that it is in a position unlike any other country with respect to enacting legislation relating to the creative industries.
- 2.4 APRA|AMCOS note that much of the academic debate on the “loosening” of the three-step-test is very recent, and suggest that caution should be used when adopting such arguments as the basis for dismissing genuine concerns about compliance. APRA|AMCOS refer to the submissions made by the Copyright Council in this regard.
- 2.5 APRA|AMCOS are concerned that the introduction of a US-style fair use exception would cause high levels of uncertainty in the copyright owner and user communities. In particular, the new illustrative purposes would be untested, and there is obviously (intended to be) significant overlap between what is now covered by statutory licences and what would be covered by fair use. The extent of this overlap would also need to be tested, and would by definition result in a diminution of copyright owners’ incomes.

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<sup>5</sup> Discussion Paper paragraph 4.34

<sup>6</sup> Discussion Paper paragraph 4.27

<sup>7</sup> see, for example, Sag, M “Setting the Record Straight on Fair Use in the US”, <http://matthewsag.com/>

- 2.6 Although business confidence, security and predictability in investment, certainty and stability in transactions costs and exposure to the risks of litigation are generally not amongst the primary concerns of academic proposals for law reform, they are – and must be – at the forefront of any practical enquiry that truly apprehends the nature of, and purports to respond to, the digital economy.
- 2.7 APRA|AMCOS also submit that the US fair use provisions must be looked at in context. As the ALRC must surely be aware, copyright infringement in the US attracts statutory damages in certain circumstances. Awards of damages in Australian courts are simply not as high. The risk of infringement under US law is accordingly far greater than in Australia. Any person seeking to rely on a fair use exception must take this into account. If the availability of statutory damages results in an aggressive litigious copyright owner culture,<sup>8</sup> it must also be the case that it results in a more risk-averse user body.
- 2.8 Further, the US fair use exception must also be viewed in the context of the constitutional right to freedom of speech in that jurisdiction, as well as the absence of moral rights.
- 2.9 APRA|AMCOS are concerned that the proposed fairness factors do not include the existing considerations of commercial availability and the requirement for sufficient acknowledgement.
- 2.10 The argument has been made, in response to the Discussion Paper, that the implementation of guidelines and codes would be useful in reducing any uncertainty caused by a US-style fair use provision. APRA|AMCOS note the inability of the content industries and the ISP industry to reach agreement – or even conduct meaningful negotiations – in relation to the industry code contemplated under section 116 of the Act. APRA|AMCOS urge that any codes or guidelines should be mandated by law, should take into account the views of both owners and users, and should be subject to the jurisdiction of the Copyright Tribunal.
- 2.11 Most importantly, the ALRC has failed to say why such an exception is necessary – that is, why the existing exceptions are inadequate in the digital environment. It is clear that the intention of the ALRC is that the new fair dealing exception is intended to protect:
- (a) existing fair dealings, with unlimited extra purposes;
  - (b) some technology specific exceptions;
  - (c) at least some acts currently undertaken under statutory licences; and
  - (d) existing free exceptions (but not free statutory licences).
- 2.12 The ALRC does not explain why the existing purpose based fair dealing regime is not adequate in the digital environment, even if it were to be expanded with additional specific purposes (which would at least have the advantage of complying with the “certain special case” aspect of the Berne test).
- 2.13 For example, when exceptions were considered in 2005, again in response to particular instances of copyright use, the AGD and Parliament considered that a fair use regime

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<sup>8</sup> *ibid*

was not appropriate, and that some additional fair uses (parody and satire) and free exceptions (format and time shifting) should be included in the Act.

- 2.14 The ALRC proposes to list the existing purposes, and to add, non-exhaustively, new purposes of “quotation”, “non-consumptive”, “private and domestic”, “education” and “public administration”. Each of these is responded to in detail below.
- 2.15 What is not clear as a matter of principle, however, is why purpose might be any different in a digital environment, such that flexibility is required. The ALRC was not asked to consider exceptions generally, but only in the digital environment. The last body that was asked to consider exceptions generally expressly rejected a US-style fair use provision. The proposals made in the Discussion Paper would apply to all uses of copyright material, not just uses in the digital environment. What results is a proposed law that contemplates the possibility of use of copyright material for any purpose, provided it is “fair”, to be non-infringing. No reasons are given for the necessity of such a radical change.
- 2.16 The arguments relating to flexibility are, with respect, misconceived. First, they refer to responsiveness to “rapid technological change.” The existing fair dealing defences are perfectly equipped to respond to technological change, rapid or otherwise. They are purpose-specific, not technology-specific. Flexibility, then, can only be an argument in favour of reconsidering the technology specific exceptions, not an argument in favour of fair use, or the extension of the existing fair dealing provisions.
- 2.17 Further, APRA|AMCOS do not understand why the arguments put forward in paragraph 11.28 of the Discussion Paper do not apply equally to the proposed US-style fair use exception. If the law were to include a US-style fair use, there would be “the uncertainty of the language”, a “lack of case law and practice”, a “lack of legal resources to interpret the provision” and “the risk averse nature of cultural institutions”.
- 2.18 APRA|AMCOS note that the AGD and Parliament did introduce a flexible, technology-neutral, free exception for education, in the form of section 200AB. That section is now said to be unusable – its flexibility causes so much uncertainty that its intended beneficiaries are paralysed<sup>9</sup>. The result of a similarly flexible and technology-neutral exception available to the public at large must either be a similar paralysis, or energetic acceptance resulting in litigation – neither an attractive outcome.
- 2.19 The proposal is to repeal the existing free exceptions that are technology specific, and to include “private and domestic” purposes as part of the illustrative list under fair use.
- 2.20 Making the existing free exceptions for time and format shifting technology-neutral does not require a broad fair use exception. The “problem” of technology specific time and format shifting exceptions could be dealt with just as easily, with the advantage of being consistent with the scheme of the Act, by making the existing exceptions technology neutral. This would also have the advantage of being consistent with the earlier intention of the legislature that these exceptions should only be subject to a private and domestic test, not also a fairness test. To legislate otherwise would be to cause an increased level of confusion amongst members of the public, who now can make the relevant reproductions free of considerations such as the proposed fairness factors. To impose fairness factors here also risks creating infringements where none now exist.

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<sup>9</sup> Discussion Paper paragraph 11.16

- 2.21 The idea that flexibility is required to deal with changing technology reflects an error of thinking that copyright exceptions are designed to permit business models. There is no principle that says that a new business model should not have to pay input costs simply because one of its inputs is copyright material.
- 2.22 The evidence clearly before the ALRC is that the existing copyright regime does not stifle innovation. APRA|AMCOS put forward detailed evidence of the number of start ups it has provided with licensing solutions that enabled them to commence business in Australia. All of the companies that state that copyright owners have impeded their entry into the Australian market<sup>10</sup> are in fact operating in this market.
- 2.23 Google's comments regarding its alleged inability to start operations in Australia<sup>11</sup> because of the absence of fair use (a) were made in the UK and appropriately dismissed by *Hargreaves*<sup>12</sup> and (b) are a clear demonstration that Google exploited the fair use provisions of the US law in order to acquire copyright content.
- 2.24 There is no evidence that the balance achieved by copyright law in Australia is distorted in favour of copyright owners. In fact, technological developments have resulted in unprecedented free and illegal access to copyright material, with little hope of detection, and limited legal remedies for infringement. Similarly, technological developments, particularly in the form of legal streaming services, have provided wide, cheap access to copyright material, with reduced financial rewards for copyright owners. APRA|AMCOS submit that the introduction of a US-style fair use exception would further distort the balance in favour of users. Copyright owners will be forced to litigate to test the boundaries of the new exceptions, and even after reliable jurisprudence has been established, will have to enforce their rights against potential infringers in the uncertain environment of a non-exhaustive list of purposes and fairness factors. Individual copyright owners may also have to rely on their personal moral rights to prevent uses that might otherwise be determined to be fair. One might justifiably query what practical value is had by owning rights that one cannot commercially afford to enforce.
- 2.25 The ALRC puts forward as the basis for a US-style fair use exception, the fact that consumers expect to be able to use copyright material in the way that they already do. This is a circular argument, and one that does not have to be taken to extremes to encourage widespread disregard for copyright law. APRA|AMCOS of course recognise that laws must reflect society's standards, but this is not the basis for amending laws whose principles have supported creativity for centuries.
- 2.26 APRA|AMCOS are concerned, too, at the ALRC's approach to *Hargreaves*. In that report, whose terms of inquiry were much broader than those before the ALRC, the authors chose not to adopt a US-style fair use exception. The ALRC seems to take at face value the use in *Hargreaves* of the term 'the big once and for all fix'<sup>13</sup>, without considering the possibility that the authors of the report are regarding with amusement – rather than "regret" – the tendency of academic commentators to treat a single-section exception as a panacea to cure all ills, when commercial experience suggests that the process of law reform is more nuanced and must take into account many more considerations than what looks good on "paper."

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<sup>10</sup> for example, Google on its own behalf, and Yahoo!7 on behalf of un-named start ups

<sup>11</sup> referred to in paragraph 4.47 of the Discussion Paper

<sup>12</sup> at paragraph 5.12

<sup>13</sup> at paragraph 4.14

### 3. Chapter 6 - Statutory licences

- 3.1 APRA|AMCOS see no evidence for the repeal of the statutory licences, and say that this proposal goes far beyond the scope of the inquiry. In particular, the wholesale repeal of the statutory licences goes far beyond anything that might be done with regard to the digital environment.
- 3.2 APRA|AMCOS have submitted that with respect to musical works, voluntary licensing is an appropriate mechanism for licensing educational institutions and government departments. This is on the basis that the educational statutory licences in particular are restricted in scope in a way that does not reflect the way that institutions use music. However, the AMCOS voluntary licences contain restrictions on use (such as a requirement to purchase originals and to mark copies) that are not part of the statutory licence. APRA|AMCOS' primary submissions should not be taken as an indication of their opinions as to the value of and necessity for statutory licences generally.
- 3.3 The existence of the educational and government statutory licences has been an important factor in APRA|AMCOS' ability to negotiate voluntary licences with educational institutions and government. At the very least, without the statutory licences, educational institutions and government would be under no obligation to disclose use of APRA|AMCOS' copyright material. Schools currently provide reporting on music use in conjunction with their reporting on statutory licence usage.
- 3.4 If the statutory licences were to be repealed, at least in part to be replaced by a US-style fair use exception, this must have an impact on the voluntary licences negotiated by APRA|AMCOS, at least when they fall due for renewal. Uses that are now paid for may be claimed to be fair use, and this may give rise to protracted disputes and litigation. In addition, there is no onus on a copyright user to disclose use of copyright material (and APRA|AMCOS understand that this was in part the reason for the introduction of the educational statutory licences). Educational institutions and governments conduct their activities within relatively closed communities such that it is certainly not open to APRA|AMCOS to observe use of copyright materials. APRA|AMCOS are concerned that they would be forced to resort to legal remedies to compel disclosure of the use of copyright materials, even before any consideration was given to fair use.
- 3.5 The repeal of the government statutory licence would cause similar difficulties. It is also difficult to anticipate the relationship between the current government statutory licence and the proposed fair use exception for "public administration". Certainly, the differences between "public administration" and use "for the purposes of the Crown" would need to be explored and clarified.
- 3.6 APRA|AMCOS do not propose to examine the likely impact of the repeal of the statutory licences in detail – this is the area of expertise of the declared societies. However, at least the following issues arise from the point of view of APRA|AMCOS:
- (a) the statutory licences apply to educational institutions, while the proposed exception is for "education". Thus the proposal is potentially much broader than the statutory licence. It could, for example, include the use of music for commercial in house training, private colleges, and private music lessons. These are all areas currently licensed by APRA|AMCOS, and all would need to be clarified in practice. APRA|AMCOS note that the current flexible exception in section 200AB requires the existence of both educational use and an educational institution;



- (b) AMCOS has voluntary licences with many educational institutions. Those licences have been entered into because of the institutions' need for licences beyond the scope of the statutory licence. It would be open to the institutions to say that all or some of these uses were fair use, requiring clarification in practice; and
- (c) as noted above, there may be a wide discrepancy between "use for the purposes of the Crown" and "public administration". In addition, the potential for bodies other than governments to engage in "public administration" means that many non-government bodies may claim this ground as a fair use, which would need to be clarified and tested in practice.

#### **4. Chapter 8 - Non consumptive use**

- 4.1 The ALRC proposes that uses that do not trade on the underlying "creative and expressive purpose" of copyright material, should be included in the illustrative purposes under fair use, as "non-consumptive" use.
- 4.2 The Act already contains a number of specific exceptions relating to technical uses of copyright material. The ALRC has referred to no actual evidence of inadequacy of the existing exceptions in the digital environment. Google's claims that it would not have been able to commence its business in Australia because of the copyright laws (referred to above at paragraph 2.23) can be rejected for the reasons set out in *Hargreaves*. The examples given by Burrell *et al* are hypothetical and academic. Even they only assert that some data and text mining "may" constitute an infringement.
- 4.3 A copyright owner's rights should not be limited to uses that align with the original purpose for which the work was created. Works have a value beyond the original market in which they are used, which is one of the fundamental reasons for the pervasive use of royalty structures to compensate copyright owners.
- 4.4 APRA|AMCOS are particularly concerned that this recommendation is being made in the absence of a review of the safe harbour provisions, as discussed above at paragraph 1.10.

#### **5. Chapter 9 - Private and domestic use**

- 5.1 When it considered private and domestic use in a digital environment, the AGD recommended free exceptions for format and time shifting rather than a US-style fair use exception.
- 5.2 The ALRC does not identify any actual examples of instances where private and domestic use of, say, music, is not exempted by the existing provisions. The Commissioner seems concerned about the position of individuals posting content on user generated content sites such as YouTube,<sup>14</sup> in spite of the fact that the evidence is clear that such uses, if they are infringing, are not the subject of enforcement proceedings. However, as APRA|AMCOS have submitted previously, this concern is misplaced and rectification of this perceived problem may have serious unintended consequences.
- 5.3 First, there is real doubt as to whether any posting onto a site such as YouTube, which is available to the world at large in a highly commercial context, could be said to be "private or domestic".

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<sup>14</sup> "What's Wrong with Copyright", J McKeough and S Wynn, artsHub Australia 17 July 2013

- 5.4 Secondly, even if the original use can be characterised as “private and domestic”, subsequent events may render the use commercial. For example, if the originator of user generated content were to accept money for advertising placed in or around the clip, or if the clip were to be picked up by a different third party and commercial arrangements entered into, the use could not be said to be “private and domestic”. If the clip were to “go viral” thus driving traffic to the YouTube site, the use could not be said to be “private and domestic.”
- 5.5 Copyright owners should not have to monitor websites to see whether videos that might once have been private and domestic, have changed in purpose.
- 5.6 Thirdly, there is a real concern that if the underlying use is non-infringing, rights against subsequent users may not be able to be enforced. There can be no doubt that subsequent use of user generated content by third parties is not “private and domestic” in nature.
- 5.7 While it is gratifying to note the ALRC’s view that the copying of “tethered” downloads in reliance on this provision would be “unlikely” to be a fair use,<sup>15</sup> APRA|AMCOS believe that this issue may realistically need to be clarified and tested in practice.

## **6. Chapter 10 - Transformative use and quotation**

- 6.1 APRA|AMCOS note the detailed reasons given by the ALRC in support of its decision not to recommend an exception for transformative use. Less clear is why these reasons do not also apply to the issue of an exception for quotation.
- 6.2 In particular, it is unclear why the ALRC considers that a “quotation” exception (whether in the guise of a US-style fair use exception or otherwise) is necessary in the digital environment, other than that technology makes the copying of content particularly easy. APRA|AMCOS have put forward significant evidence about the licensing of “quotation” of musical works, and the ALRC also has evidence about the licensing of “quotation” of sound recordings. An exception for quotation has the potential to significantly impact these existing markets.
- 6.3 APRA|AMCOS members also have licensing arrangements with other content owners, such as book publishers, for the licensing of music and lyrics in publications beyond the existing fair dealing provisions.
- 6.4 The ALRC also appears to have given no consideration to the possible interaction between moral rights and an exception for quotation.
- 6.5 This appears to be an exception sought by the academic community, with little regard for the desire of a creator to retain some artistic control over the use of his or her works (Principle 1), or even for the commercial opportunities for copyright owners to license quotations of their works. There appears to be no evidence of the inadequacy of the existing exceptions for criticism or review, research or study, and parody and satire, in the digital environment or otherwise, unless the sole purpose of the proposed amendment is to facilitate user generated content that does not fall within these exceptions. APRA|AMCOS consider that there is no compelling public policy for this.

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<sup>15</sup> Discussion Paper paragraph 9.106

6.6 APRA|AMCOS also note with concern that although the ALRC professes allegiance to its Principle 1 in paragraph 10.114, attribution is not one of the proposed fairness factors.

**7. Chapter 13 - educational use**

7.1 APRA|AMCOS reiterate their comments regarding “education” above at section 3, and support the views expressed in the submissions in response to the Discussion Paper made by the print music publishers Alfred Music Publishing Australia, Australian Music Examinations Board Hal Leonard Australia LTP Publishing and Music Sales Australia.

**8. Chapter 14 – government use**

8.1 APRA|AMCOS reiterate their comments regarding “public administration” above at section 3.

**9. Chapter 15 – retransmission of free-to-air broadcasts**

9.1 APRA|AMCOS endorse the submissions made by Screenrights in response to this chapter of the Discussion Paper.

**10. Chapter 16 – broadcasting**

10.1 APRA|AMCOS note that the ALRC’s summary of the ephemeral provisions of the Act omits to mention the prerequisite that the relevant broadcast must not be an infringement of the copyright in a work. That is, as is clear from the Explanatory Memorandum, the ephemeral statutory licence only applies where the broadcaster has a licence from the owner of the copyright in the work (usually APRA). The section 47 licence also contains strict storage parameters and is limited to reproductions necessary for facilitating the broadcast, and where the relevant reproduction is made by the broadcaster itself.

10.2 APRA|AMCOS oppose the extension of the ephemeral licence to the transmission of television and radio programs on the internet. The section 47 statutory licence is a free exception introduced to deal with specific issues faced by a nascent broadcasting industry.<sup>16</sup> As it is, AMCOS has licensing arrangements with all free-to-air broadcasters that extend the provisions of the ephemeral licence, due to its narrow application that renders it largely inutile in the current broadcast environment. A far more appropriate response in the digital environment would be to repeal the ephemeral provisions of the Act altogether.

10.3 APRA|AMCOS note that Pandora has, in its submissions in response to the Discussion Paper, proposed that the ephemeral provisions be extended to it as a provider of “internet radio”. APRA|AMCOS already have a licence agreement with Pandora on commercially negotiated terms, that extends to all of the services it provides. APRA|AMCOS find it extraordinary that the ALRC might recommend the extension of arcane statutory licence provisions in a manner that would effectively deny copyright owners the right to grant licences of the reproduction right to any person streaming music from server copies.

10.4 APRA|AMCOS also note Pandora’s comments in relation to the extension of section 109 to musical works. In the context of an inquiry that has recommended the repeal of

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<sup>16</sup> Copyright Bill 1968 Second Reading Speech

all paid statutory licences and extolled the virtues of voluntary licensing, APRA|AMCOS note with amusement the irony of this submission. APRA|AMCOS have licences with Pandora, negotiated on commercial terms, for the provision of all of its services. It is true that in the US, certain publishers have withdrawn their rights from collective administration in order to negotiate directly with Pandora. That has not happened in Australia, but it is open to APRA|AMCOS members to do so. That is consistent with Principles 1 and 2. Pandora's submission appears to be motivated by nothing more than the desire to keep licence fees low – a commercial consideration, but not one that has any place in an inquiry of this kind.

## **11. Contracting out**

- 11.1 Presumably to facilitate voluntary licensing, the ALRC proposes that some fair use purposes should be able to be the subject of contractual provisions preventing reliance on them. That is, certain purposes (including, by implication, any purposes not in the illustrative list) could be the subject of contract.
- 11.2 Accordingly, private and domestic, educational, public administration and non-consumptive (and all other unidentified) uses could be prohibited by contract.
- 11.3 Of course, such a prohibition or modification is only of value once a voluntary licensing arrangement has been entered into. To the extent that a US-style fair use exception might permit such conduct, one wonders what the commercial imperative would be for a user to enter into voluntary licensing arrangements that prohibited the user from taking advantage of those provisions. This proposal does little to redress the imbalance that would be brought about by the introduction of the other proposals contained in this Discussion Paper.