

7. Fair Dealing

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Summary

7.1 This chapter outlines the existing fair dealing exceptions and examines the operation of the exceptions in the digital environment; whether there is a need for simplification of the provisions; and whether new specific fair dealing exceptions should be introduced.

7.2 The purpose-based, or close-ended, nature of the fair dealing exceptions is problematic in the digital environment. Rather than take a piecemeal approach and propose the addition of further specific exceptions in the hope of addressing gaps, the ALRC proposes the repeal of the existing fair dealing provisions and application of the new fair use exception discussed in Chapter 4. The ALRC proposes that all but one of the fair dealing purposes in the existing exceptions should be included specifically as illustrative purposes in the new fair use exception.¹

7.3 If fair use is not enacted, the ALRC proposes that the *Copyright Act 1968* (Cth) should be amended so that all existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should be subject to the fairness factors² discussed in Chapter 4.³

Current law

7.4 Australia's copyright legislation has long provided for fair dealing. Australian legislation first used the expression 'fairly dealing' in its *Copyright Act 1905* (Cth)—the first common law country to do so.⁴ Subsequent Acts—the *Copyright Act*

1 Proposal 4–4.

2 Proposal 7–4.

3 Proposal 4–3.

4 M De Zwart, 'A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age' (2007) 1 *Intellectual Property Quarterly* 60, 89.

1912 (Cth), which declared the *Copyright Act 1911* (Imp) to be in force in Australia⁵ and the current *Copyright Act* which replaced the 1912 Act—use the term ‘fair dealing’. These latter two Acts, including amendments to the current *Copyright Act*,⁶ have instituted a list of specific exceptions under the fair dealing rubric.

7.5 The *Copyright Act* does not define a fair dealing. Rather, specific fair dealing exceptions exist for the purposes of:

- research or study;⁷
- criticism or review;⁸
- parody or satire;⁹
- reporting news;¹⁰ and
- a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.¹¹

7.6 Not all of these exceptions are available for all types of copyright material. The *Copyright Act* provides that fair dealings for these specified purposes may be made with the following copyright material:

- literary, dramatic, musical or artistic works;¹²
- adaptations of literary, dramatic or musical works;¹³ and
- audio-visual items¹⁴—defined as sound recordings, cinematograph films, sound broadcasts or television broadcasts.¹⁵

7.7 Where the use of a ‘substantial part’¹⁶ or more¹⁷ of the work, adaptation, or audio-visual item constitutes a fair dealing, there is no infringement of the copyright in

5 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [3.360].

6 The most recent amendment to note in this regard is the *Copyright Amendment Act 2006* (Cth) which introduced fair dealing exceptions for the purpose of parody or satire.

7 *Copyright Act 1968* (Cth) ss 40(1), 103C(1).

8 *Ibid* ss 41, 103A.

9 *Ibid* ss 41A, 103AA.

10 *Ibid* ss 42, 103B.

11 *Ibid* s 43(2). Note s 104(c), which could be seen as the equivalent provision for subject-matter other than works, does not in fact use the term ‘fair dealing’. Similarly, ss 43(1), 104(a) (anything done for the purposes of a judicial proceeding or a report of a judicial proceeding) and 104(b) (someone seeking professional advice from a legal practitioner, registered patent attorney or registered trade marks attorney) do not use the term ‘fair dealing’. All of these exceptions are broader than the fair dealing exceptions.

12 *Ibid* s 40(1) (research or study), s 41 (criticism or review), s 41A (parody or satire), s 42 (reporting news), s 43(2) (the giving of professional advice by certain individuals).

13 *Ibid* s 40(1) (research or study), s 41 (criticism or review), s 41A (parody or satire), s 42 (reporting news).

14 *Ibid* s 103C(1) (research or study), s 103A (criticism or review), s 103AA (parody or satire), s 103B (reporting news).

15 *Ibid* s 100A.

16 *Ibid* s 14.

17 As Ricketson and Creswell observe, ‘acts done in relation to insubstantial parts do not constitute infringement of copyright and the defences of fair dealing only come into operation in relation to

that specific copyright material. Further, in the case of an audio-visual item, there is no infringement of the copyright in any work or other audio-visual item that is included in that audio-visual item.¹⁸

7.8 Additionally, the *Copyright Act* provides that certain direct or indirect sound recordings or cinematograph films of performances, which constitute fair dealing for specified purposes, are outside the scheme affording protection to performers in their live performances.¹⁹ That is, the use of those recordings and films of the performances are permitted as exceptions.

When will a use be a fair dealing?

7.9 Determining whether a use comes within the bounds of a fair dealing exception is a two-step process. First, the use must be for one of the specific purposes provided for in the *Copyright Act*. Secondly, the use must be fair. Whether a particular use is fair will depend on the circumstances of the case.

Requirement to provide sufficient acknowledgement

7.10 The fair dealing provisions for the purpose of criticism or review, and those for the purpose of, or associated with, the reporting of news in a newspaper, magazine or similar periodical contain an additional requirement for a ‘sufficient acknowledgement’ of the work or audio-visual item.²⁰

Quantitative test

7.11 The fair dealing exception for the purpose of research or study with respect to works and adaptations contains a quantitative test that deems the use of certain quantities of copyright material to be fair.²¹ The concept of ‘reasonable portion’ is fixed by reference to chapters, or 10% of the number of pages or number of words.²²

General guidance as to fairness

7.12 The fair dealing exceptions for the purpose of research or study and s 248A(1A) (indirect sound recordings of performances) are the only exceptions that list matters to be considered when determining whether the use constitutes a fair dealing. These matters include, but are not limited to:

- the purpose and character of the dealing or recording;

substantial parts or more’: Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.15].

18 *Copyright Act 1968* (Cth) s 103A (criticism or review), s 103AA (parody or satire), s 103B (reporting news), s 103C(1) (research or study).

19 Such recordings and films come within the definition of ‘exempt recording’. Ibid s 248A(1)(aa), (f), (fa), (g). See also s 248A(1A) which contains a list of matters—which is in largely the same form as the factors in ss 40(2) and 103C(2)—which must be regarded when determining whether a recording is a fair dealing for the purpose of research or study under s 248A(1)(aa). One important difference is that ss 40(2) and 103C(2) are stated to be inclusive lists, whereas the language of s 248A(1A) is not so clear.

20 Ibid ss 41 and 103A (criticism or review); ss 42(1)(a) and 103B(1)(a) (reporting news).

21 See Ibid s 40(3)–(8).

22 See Australian Copyright Council, *Research or Study: Information Sheet G053v08* (2012) <www.copyright.org.au/find-an-answer/browse-by-a-z/> at 27 July 2012.

- the nature of the work, adaptation, audio-visual item or performance;
- the possibility of obtaining the work, adaptation, audio-visual item or an authorised recording of the performance within a reasonable time at an ordinary commercial price;
- the effect of the dealing or recording upon the potential market for, or value of, the work, adaptation, audio-visual item or authorised recordings of the performance; and
- in a case where part only of the work, adaptation, audio-visual item or performance is reproduced, copied or recorded—the amount and substantiality of the part copied, taken or recorded in relation to the whole work, adaptation, item or performance.

7.13 In 1976, the Copyright Law Committee which considered reprographic reproduction (the Franki Committee) recommended that this list of matters—with respect to works and adaptations—be included in s 40.²³ The matters listed are based to a large extent on principles derived from the case law on fair dealing.²⁴ The list of matters in ss 40(2) and 103C(2) are not the only relevant matters for assessment of the fairness of a dealing for the purpose of research or study, as these are inclusive rather than exhaustive lists.²⁵ The Franki Committee observed that it is for the courts to decide whether particular uses of copyright material constitute fair dealing and it was of the opinion that it would be ‘quite impracticable’ to attempt to remove this duty entirely.²⁶

7.14 One submission noted that the Australian approach with respect to the other fair dealing exceptions has been ‘to leave it completely to the courts to determine what factors are relevant to determining fairness in any particular case’.²⁷ Another remarked that there was ‘remarkably little useful guidance’ to be gleaned from the Australian case law and, in effect, one is ‘forced to look to old English precedents to try to determine what factors a court would be likely to look to when deciding whether a use would be fair’.²⁸

23 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (Franki Report), [2.60]. One possible reason why the Franki report did not recommend that these factors specifically apply to the other fair dealing exceptions may be due to the fact that the Franki Report was confined to investigating reprographic reproduction: M Sainsbury, ‘Parody, Satire and Copyright Infringement: The Latest Addition to Australian Fair Dealing Law’ (2007) 12 *Media and Arts Law Review* 292, 306.

24 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* [11.35]; Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.09].

25 Other factors may also be relevant. For example, Michael Handler and David Rolph have suggested seven factors which may assist a court in determining the fairness of a particular dealing; not all will be relevant in every case. M Handler and D Rolph, ‘“A Real Pea Souper”: *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’ (2003) 27 *Melbourne University Law Review* 381, 418.

26 Copyright Law Committee, *Report on Reprographic Reproduction* (1976), [2.59].

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

28 R Burrell and others, *Submission 278*.

7.15 The Copyright Law Review Committee (CLRC) suggested that it is ‘reasonable to assume’ that the matters listed in the statute ‘are also relevant in determining the fairness of a dealing for purposes other than research or study’.²⁹ This is because the matters in s 40(2) were derived from principles in the case law and because those principles were not limited to a specific purpose.³⁰

To whom do the exceptions apply?

7.16 Unlike some other exceptions in the *Copyright Act* and the statutory licences, the fair dealing exceptions appear on their face to be available to any users of the copyright material provided that *their* particular use—or ‘dealing’—falls within the bounds of one of those exceptions. A number of submissions were critical of court interpretations—particularly *De Garis v Neville Jeffress Pidler Pty Ltd*³¹—confining the availability of the exceptions.³² As Universities Australia explained:

On the current state of the law with respect to fair dealing—which directs a court to look to the purpose of the person *making* the copy rather than the actual *user* of the copy—the ‘maker’ of the copy ... may not be in a position to claim the benefit of the fair dealing exception.³³

The operation of fair dealing exceptions in the digital environment

7.17 The relationship between the fair dealing exceptions and the statutory licences—particularly whether the former can be relied upon where provision is made for the latter—is another contentious issue for copyright rights holders and users.³⁴

7.18 The ALRC asked three questions about Australia’s fair dealing exceptions.

- what problems, if any, are there with any of the existing fair dealing exceptions in the digital environment;³⁵
- how could the fair dealing exceptions be usefully simplified;³⁶ and
- Should the *Copyright Act* provide for any other specific fair dealing exceptions?³⁷

7.19 Views diverged about whether there are any problems with Australia’s current fair dealing exceptions in the digital environment.

29 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.09]. Later, at [6.36], the CLRC also referred to comments to similar effect made by Professors Ricketson and Lahore in each of their loose-leaf services.

30 Ibid, [4.09].

31 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, 105–6.

32 For example, R Burrell and others, *Submission 278*; Universities Australia, *Submission 246*. See also Ch 5.

33 Universities Australia, *Submission 246*.

34 See Ch 6 and Ch 14.

35 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 45.

36 Ibid, Question 46.

37 Ibid, Question 47.

7.20 A number of rights owners and entities representing or assisting rights owners submitted that the current fair dealing exceptions operate adequately and effectively.³⁸ They were of the view that no change,³⁹ or at least no substantial change,⁴⁰ was required to the fair dealing exceptions. For example, publisher John Wiley & Sons submitted that the current fair dealing exceptions ‘are well defined and understood’.⁴¹ Australian Associated Press (AAP) submitted:

The current [fair dealing] exceptions, as drafted, together with the guidance provided by judicial interpretation of these exceptions, provide sufficient certainty as to the respective rights of content producers and users. The existing exceptions also strike an appropriate balance between the interests of copyright owners and those who have a legitimate basis for using copyright material without consent.⁴²

7.21 A number of stakeholders, including the Australian Copyright Council, commented that they were unaware of any practical problems⁴³:

While the digital economy may give rise to different fact situations, the Copyright Council is not aware of any specific difficulties in applying fair dealing in this environment.⁴⁴

7.22 A number of stakeholders considered that the current provisions are sufficiently adapted, or flexible to respond, to the digital environment.⁴⁵ For example, Screenrights observed that the term ‘dealing’ is ‘technology neutral and covers all uses of works and other subject matter’.⁴⁶

7.23 APRA/AMCOS submitted that ‘many of the criticisms of the existing fair dealing exceptions are made in an academic context, and are not evidence based’.⁴⁷ There were calls for any reform to the exceptions to be evidence based⁴⁸ and include an assessment of the potential economic detriment for content owners.⁴⁹ Some called for no change where this would ‘give consumers and users greater freedom to undermine the rights of creators’⁵⁰—that is, by ‘impact[ing] on the capacity of content

38 SPAA, *Submission 281*; Free TV Australia, *Submission 270*; Music Council of Australia, *Submission 269*; BSA, *Submission 248*; APRA/AMCOS, *Submission 247*; Foxtel, *Submission 245*; ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; ASTRA, *Submission 227*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; AAP, *Submission 206*; AMPAL, *Submission 189*; Allen&Unwin Book Publishers, *Submission 174*; Arts Law Centre of Australia, *Submission 171*; Tabcorp Holdings Ltd, *Submission 164*; Commercial Radio Australia, *Submission 132*; ALAA, *Submission 129*.

39 For example, ASTRA, *Submission 227*; AAP, *Submission 206*; AMPAL, *Submission 189*; ALAA, *Submission 129*.

40 Music Council of Australia, *Submission 269*; BSA, *Submission 248*.

41 John Wiley & Sons, *Submission 239*.

42 AAP, *Submission 206*.

43 For example, Foxtel, *Submission 245*; ARIA, *Submission 241*; AMPAL, *Submission 189*; ALAA, *Submission 129*.

44 Australian Copyright Council, *Submission 219*.

45 For example, ARIA, *Submission 241*; John Wiley & Sons, *Submission 239*; Australian Film/TV Bodies, *Submission 205*; Confidential, *Submission 16*.

46 Screenrights, *Submission 215*.

47 APRA/AMCOS, *Submission 247*.

48 Ibid; Foxtel, *Submission 245*; AAP, *Submission 206*; AMPAL, *Submission 189*.

49 ASTRA, *Submission 227*.

50 Australia Council for the Arts, *Submission 260*.

owners to receive a fair and reasonable return for their investment'.⁵¹ There were calls for any reform to be justified on public policy grounds⁵² and comply with Australia's international obligations (particularly the 'three-step test').⁵³

7.24 Some respondents submitted that, rather than making changes to the current fair dealing exceptions, efforts instead should be focused on enhancing the public awareness and understanding of them.⁵⁴ For example, the Music Council of Australia submitted:

To the extent that there are any problems with the existing fair dealing exceptions, the MCA considers that many of these can be overcome by the Government addressing issues relating to clarity and education.⁵⁵

7.25 The Arts Law Centre of Australia stated that '[p]ublic awareness is essential to the success of our copyright laws' and in its view '[t]here seems to be a lack of public understanding as to how web users can engage with the fair dealing exceptions'.⁵⁶ Accordingly, the Centre supported 'an education campaign directed at informing Australians of their copyright rights and obligations'.⁵⁷

7.26 Stakeholders identified a range of problems with the fair dealing exceptions, including:

- for those wanting change, that the exceptions do not extend far enough;
- for some others, that the exceptions extend too far; and
- specific problems with the exceptions if they are to be retained.

7.27 Not all of these problems stem from the digital environment. However, technological change has highlighted existing problems, including with Australia's traditional approach to drafting specific, purpose-based copyright exceptions.

The exceptions do not extend far enough

7.28 A number of responses—notably from a number of copyright users—submitted that the fair dealing exceptions are problematic because they do not extend far enough.⁵⁸ There were three discernible arguments.

51 ASTRA, *Submission 227*.

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

53 BSA, *Submission 248*; Australian Film/TV Bodies, *Submission 205*. The three-step test is discussed in Ch 4.

54 Music Council of Australia, *Submission 269*; Arts Law Centre of Australia, *Submission 171*.

55 Music Council of Australia, *Submission 269*.

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

57 Ibid.

58 R Burrell and others, *Submission 278*; Yahoo!7, *Submission 276*; Grey Literature Strategies Research Project, *Submission 250*; Universities Australia, *Submission 246*; CAMD, *Submission 236*; Small Press Network, *Submission 221*; National Library of Australia, *Submission 218*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; R Wright, *Submission 167*; Society of University Lawyers, *Submission 158*; Powerhouse Museum, *Submission 137*.

7.29 First, some submissions were of the opinion that the fair dealing exceptions are not sufficiently broad to provide an effective balance between owners and users in the digital environment.⁵⁹

7.30 Secondly, for some, this was a complaint about the purpose-based, or closed-ended, nature of the existing fair dealing exceptions; and, in some cases, a complaint about their problematic interpretation by Australian courts.⁶⁰

7.31 Such submissions were of the view that the fair dealing exceptions are not sufficiently adapted, or flexible to respond, to changed and changing circumstances caused by new technologies and uses⁶¹—an environment where ‘almost every use of technology will involve making copies’.⁶² Many of the submissions which expressed this view advocated the introduction of a flexible, ‘open-ended’ exception such as fair use.⁶³

7.32 Thirdly, a few submissions considered that particular fair dealing exceptions were generally too specific due to drafting errors.⁶⁴

The purpose-based, or close-ended, nature of the exceptions is problematic

7.33 The existing fair dealing exceptions were characterised as ‘pernickety’.⁶⁵ A number of submissions were of the view that the fair dealing exceptions were insufficiently broad and responsive to deal with current or future uses.⁶⁶ For example, Robyn Wright submitted:

By favouring particular activities, purpose-based exceptions already restrict the exercise of some publicly valuable acts and also potentially limit the development of future unanticipated and innovative uses in the changing digital environment.⁶⁷

7.34 Others gave specific examples of uses which they considered to be beneficial to the public yet which they considered may, or would, not come within the bounds of the existing fair dealing exceptions. These uses were seen to encompass important public interest purposes such as free speech, cultural purposes and access to justice. For example:

59 Grey Literature Strategies Research Project, *Submission 250*; ADA and ALCC, *Submission 213*; Powerhouse Museum, *Submission 137*.

60 R Burrell and others, *Submission 278*.

61 For example, *Ibid*; University of Sydney, *Submission 275*; Universities Australia, *Submission 246*; M Rimmer, *Submission 122*.

62 Universities Australia, *Submission 246*.

63 For example, R Burrell and others, *Submission 278*; Grey Literature Strategies Research Project, *Submission 250*; R Wright, *Submission 167*; Society of University Lawyers, *Submission 158*; Powerhouse Museum, *Submission 137*.

64 For example, R Burrell and others, *Submission 278*; Australian Broadcasting Corporation, *Submission 210*.

65 K Bowrey, *Submission 94*.

66 For example, Yahoo!7, *Submission 276*; Universities Australia, *Submission 246*; ADA and ALCC, *Submission 213*; R Wright, *Submission 167*; Society of University Lawyers, *Submission 158*; M Rimmer, *Submission 122*.

67 R Wright, *Submission 167*.

- accessible formats of texts—including ‘verbalisation of elements such as page numbers or spelling of proper names’ and navigational tools⁶⁸—for blind or vision impaired persons;⁶⁹
- less formal research such as ‘the undertaking of inquiries to satisfy personal curiosity, without the need for some new discovery or insight to be made as a result’;⁷⁰
- the communication to the public of works created by students and researchers using museum collections;⁷¹
- ‘use of images in a presentation or seminar to illustrate the point being made’;⁷²
- ‘use of short quotations in academic publications’;⁷³
- the communication to the public of the datasets underlying research results which could assist in independent verification of those results, particularly for online qualitative research;⁷⁴
- a university’s creation of an open digital repository of theses and other research publications;⁷⁵
- a university’s communication of a student’s assignment to other students ‘as a “good example” or as part of a collaborative learning exercise’;⁷⁶
- a university’s reproduction and distribution of ‘reference articles obtained by one researcher for the rest of the research team’;⁷⁷
- the reproduction of ‘an extract from a book in the course of reviewing a film’ of that book;⁷⁸
- the reproduction of ‘an extract from a play in the course of reviewing a performance of a play’;⁷⁹
- criticism of individuals’ actions, including public figures, ‘cit[ing] works in support of an argument, analysis or review’;⁸⁰

68 Vision Australia, *Submission 181*.

69 Blind Citizens Australia, *Submission 157*.

70 R Burrell and others, *Submission 278*. See also State Library of New South Wales, *Submission 168*; National Archives of Australia, *Submission 155*.

71 CAMD, *Submission 236*; Powerhouse Museum, *Submission 137*.

72 Law Council of Australia IP Committee, *Submission 284*; Law Council of Australia, *Submission 263*. R Wright, *Submission 167* also gave this example.

73 R Wright, *Submission 167*.

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

75 Ibid; Society of University Lawyers, *Submission 158*.

76 Society of University Lawyers, *Submission 158*.

77 Ibid.

78 R Burrell and others, *Submission 278*.

79 Ibid.

80 Ibid.

- commentary or the expression of opinion rather than ‘reporting’ of events; for example, ‘some types of newspaper opinion piece and humorous topical news programmes’;⁸¹
- publication of previously unpublished copyright material even if for the purpose of criticism, review or news reporting;⁸²
- ‘the full range of contemporary cultural practices that might be thought of as “parodies” or as being “satirical”’, for example, pastiche or caricature;⁸³
- downstream uses of satirical or parodic material;⁸⁴
- professional legal or law-related services ‘such as preparing and executing agreements, mediation, arbitration or Alternative Dispute Resolution, or preparation of patent or trademark applications’;⁸⁵ and
- 3D printing.⁸⁶

The exceptions extend too far

7.35 By contrast, there were some submissions, mainly from rights holders, that suggested that the current fair dealing exceptions—perhaps as misunderstood by some users⁸⁷—extend too far. There were three discernible arguments.

7.36 First, some rights holders identified problems with the fair dealing exception for the purpose of reporting news which have, or could have, a negative effect on their businesses.⁸⁸

7.37 Secondly, there were some stakeholders, particularly publishers, who suggested that the fair dealing exceptions should not apply where licences—including the statutory licence for educational purposes—are available.⁸⁹ For example, Spinifex Press submitted that:

The fair dealing exceptions for research should not apply in a way that affects licences such as those offered by Copyright Agency. These income streams are important for underpaid writers and also for independent publishers.⁹⁰

7.38 Copyright Agency/Viscopy made a similar argument with respect to fair dealing for the purpose of research or study in s 40. It called for the exception to:

81 Ibid.

82 Ibid.

83 Ibid.

84 Ibid.

85 NSW Government, *Submission 294*.

86 M Rimmer, *Submission 122*.

87 Australian Society of Authors, *Submission 169*; Confidential, *Submission 02*.

88 COMPPS, *Submission 266*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; News Limited, *Submission 224*.

89 Copyright Agency/Viscopy, *Submission 249*; ALPSP, *Submission 199*; RIC Publications Pty Ltd, *Submission 147*; Spinifex Press, *Submission 125*; Confidential, *Submission 14*.

90 Spinifex Press, *Submission 125*.

- contain ‘an express condition that the exception not apply if there is a licensing solution applicable to the user’; and
- specifically exclude commercial research noting that ‘[t]his is the approach in the UK, where commercial research is allowed, but under licences from rightsholders and rights management organisations’.⁹¹

7.39 Thirdly, some submissions suggested that the fair dealing exceptions were misunderstood by some users and that this leads to infringement.⁹² For example, the Australian Society of Authors submitted:

in practice consumers now infringe creators’ rights more broadly than ‘fair dealing’ allows, because digital technology provides the capacity to do this, and the capacity is utilised.⁹³

7.40 The first argument was the most detailed of the three. A few rights holders expressed concern that their copyright material was being freely used by others for commercial purposes under the guise of news reporting when the rights holders considered the use to be for another purpose.⁹⁴ These submissions advocated change in this respect but otherwise wanted the current fair dealing exceptions to remain.⁹⁵

7.41 The Combined Newspapers and Magazines Copyright Committee (CNMCC) was specifically concerned with *who* may avail themselves of the exception under s 42(1)(b)—which provides that a dealing with a work or adaptation of a work will be a fair dealing if ‘it is for the purpose of, or associated with, the reporting of news by means of a *communication* or in a cinematograph film’.⁹⁶ The CNMCC provided information about the legislative history and rationale for the substitution of the word ‘communication’ for ‘broadcasting’ in s 42(1)(b) and submitted:

The change in the *Copyright Act* to include all ‘communications’ in the fair dealing defence had the unintended effect of greatly extending the scope of the defence by potentially making it available to anyone who wished to communicate a news item to the public, as opposed to a small number of organisations which supplied a broadcasting or diffusion service.⁹⁷

7.42 The CNMCC expressed concern that non-news organisations are taking articles and photographs about that organisation’s products and services that have been published in newspapers and magazines and are communicating them—either posting them on that organisation’s website or emailing them to that organisation’s clients or other organisations.⁹⁸ The CNMCC submitted that the exception was not intended to

91 Copyright Agency/Viscopy, *Submission 249*.

92 Australian Society of Authors, *Submission 169*; Confidential, *Submission 02*.

93 Australian Society of Authors, *Submission 169*.

94 COMPPS, *Submission 266*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; News Limited, *Submission 224*.

95 Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; News Limited, *Submission 224*.

96 Emphasis added.

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

98 Ibid.

apply to such acts. News Limited, which is a member of the CNMCC, characterised such behaviour as free riding on publishers' investment.⁹⁹

7.43 The CNMCC submitted that:

Publishers, through the Copyright Agency Limited (CAL), do provide licences to allow organisations to place articles on their intranets, send them to clients and make them available on the internet subject to conditions on the quantity of articles that can be used, the length of time on which they can appear on an organisation's website and payment of an appropriate fee. Photographs can also be purchased, usually direct from the publisher. If the fair dealing provisions can be used as claimed, a significant part of the business of the publishers will be undermined, in a market which is already facing severe pressures.¹⁰⁰

7.44 The CNMCC expressed concern that such activity, in lieu of licensing, 'may become an increasingly common occurrence'.¹⁰¹ It called for amendment of the *Copyright Act* to:

make it clear that the communication of newspaper or magazine articles is not permitted under the fair dealing exception unless such activity is performed by an organisation which provides a news or information service.¹⁰²

7.45 It advocated that 'news or information service' be defined exclusively as

a service conducted by an organisation whose principal business is the commercial provision of news or information to the public, including the publisher of a newspaper, magazine or similar periodical publication.¹⁰³

7.46 Further, it called for the fair dealing exception to be amended 'to explicitly state that it would not be available to an organisation whose news service is principally that of a news aggregator until after a specified time'.¹⁰⁴ In its first submission, News Limited supported the CNMCC's recommendations in respect of this fair dealing exception.¹⁰⁵ However, in its supplementary submission, News Limited submitted that the fair dealing exceptions, including that for news reporting, did not require amendment as they were 'functioning well'.¹⁰⁶

7.47 Several sports bodies were concerned that media organisations were using 'excessive' amounts of the sports bodies', or their exclusive licensees', audio-visual content or photographs—specifically highlights from games or matches—for the purpose of providing entertainment, including encouraging traffic to websites or apps, rather than for the purpose of news reporting.¹⁰⁷

7.48 The Coalition of Major Professional and Participation Sports (COMPPS) submitted that '[m]edia organisations which compile and broadcast unlicensed

99 News Limited, *Submission 224*.

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

101 *Ibid.*

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*

105 News Limited, *Submission 224*.

106 News Limited, *Submission 286*.

107 COMPPS, *Submission 266*; AFL, *Submission 232*; Cricket Australia, *Submission 228*.

highlight packages of matches are directly exploiting copyright material for commercial gain'.¹⁰⁸ It explained:

The value of media rights to a sporting event is particularly susceptible to being damaged by the broadcast of relatively small proportions of the event. For example, in some sports, there may only be a small number of scoring movements or highlights.¹⁰⁹

7.49 Cricket Australia submitted that 'a reasonably short video package or series of clips' of cricket matches 'has the potential to significantly undermine' its digital licensing program.¹¹⁰ Both Cricket Australia and the Australian Football League (AFL) submitted that they were supportive of 'genuine' news reporting of their sports.¹¹¹ However, the AFL was of the view that 'extensive and unreasonable use' was becoming more frequent; submitting that media organisations' websites 'are pushing the boundaries further and further under the guise of fair dealing for the reporting of the news'.¹¹² It too considered that such use constituted 'a real threat' to its digital licensing arrangements.¹¹³

7.50 All three sports bodies submitted that the current fair dealing exception for the purpose of news reporting is imprecise and/or uncertain.¹¹⁴ The AFL also submitted that it was costly to enforce its rights in this context: '[t]o say that sports bodies can litigate to deal with these matters is naïve, given the proliferation of these activities and the high cost of litigation'.¹¹⁵

7.51 The three sports bodies called for legislative or regulatory amendments to provide greater clarity and certainty as to *when* the exception applies.¹¹⁶ They called for such reform to encompass:

- guidance as to, or specific restrictions on, the *amount* of material that could be used—with COMPPS referring to the similar approach taken with fair dealing for the purpose of research or study, and the AFL noting that 'a one size fits all quantitative test' may not be appropriate for all sports;
- 'guidance on the distinction between reporting news and providing content for entertainment or aggregation purposes',¹¹⁷ that is 'the *boundaries*',¹¹⁸ of the exception; and
- a requirement that in order to come within the exception the *use must not materially impact the value of the copyright material*—that is, not materially

108 COMPPS, *Submission 266*.

109 Ibid.

110 Cricket Australia, *Submission 228*.

111 AFL, *Submission 232*; Cricket Australia, *Submission 228*.

112 AFL, *Submission 232*.

113 Ibid.

114 COMPPS, *Submission 266*; AFL, *Submission 232*; Cricket Australia, *Submission 228*.

115 AFL, *Submission 232*.

116 Only Cricket Australia specifically mentioned this possibility.

117 Cricket Australia, *Submission 228*.

118 COMPPS, *Submission 266*. Emphasis added.

impact the rights holder's ability to exploit its rights,¹¹⁹ including both its existing and potential market for the content.¹²⁰

7.52 News Limited's supplementary submission responded to these arguments. With respect to the suggestion that use of the reporting of news exception was undermining the value of sports organisations' media rights, it submitted that '[t]he evidence—media rights deals—suggests that this claim is unfounded'.¹²¹ It provided information about media rights agreements, which it stated were increasing in value and breadth. It also observed that if a sports organisation believes that the *Copyright Act* has been breached, 'action can be taken via the courts'. It was strongly of the view that '[a]ttempts to define news and/or set limits on the amount of material to be used to report news would pose significant threats to freedom of speech and freedom of press':¹²²

To claim that the exception is imprecise and uncertain and to suggest that what constitutes news could be articulated by boundaries and limitations is dangerous to the Australian public's right to know.¹²³

Specific problems with the exceptions

7.53 Some submissions detailed particular problems with some of the fair dealing exceptions.

7.54 The fair dealing provisions for the purpose of criticism or review and reporting of news in a text form contain a requirement for a 'sufficient acknowledgment' to be made of the work or audio-visual item.¹²⁴ There is no such requirement with respect to the fair dealing provisions for the purpose of reporting news by means of a communication or in a cinematograph film.¹²⁵

7.55 NSW Young Lawyers noted that the digital environment provides many opportunities and platforms for a person to criticise or review topics in which they may include or refer to third party copyright material. They submitted that the requirement for sufficient acknowledgment in order for a use to come within the criticism or review exceptions is problematic 'in the context of sharing or posting a URL online or in character-limited communication such as a tweet' and in cases where the identity of the original author is unclear or unknown.¹²⁶

7.56 The CNMCC acknowledged that it would be 'difficult' for broadcasters and others to provide an acknowledgment of the work they are dealing with in the course of

119 Cricket Australia, *Submission 228*.

120 AFL, *Submission 232*.

121 News Limited, *Submission 286*.

122 *Ibid.*

123 *Ibid.*

124 One submission was concerned about the inflexibility of the requirement as it could be unjust: failure to comply could 'automatically prevent an exception applying irrespective of whether the defendant acted in good faith and in accordance with ordinary industry practices'. A possible reform option would be for the factor to be considered when assessing fairness: R Burrell and others, *Submission 278*.

125 *Copyright Act 1968* (Cth) ss 42(1)(b) and 103B(1)(b).

126 NSW Young Lawyers, *Submission 195*.

reporting news but nevertheless were of the view that ‘there appears to be no reason why communications of a work by newspapers, magazines and similar services should not require sufficient acknowledgment’.¹²⁷ That is, they sought to rectify the inconsistency between s 42(1)(a) and (b) and suggested a draft form of wording for such an amendment to s 42(1)(b).

7.57 A second problem concerns the provisions relating to the use of works and subject matter other than works in the context of professional advice, which were described as ‘a mess’.¹²⁸ Section 43(2) provides a fair dealing exception with respect to *works* for the purpose of a legal practitioner, registered patent attorney or registered trade marks attorney *giving* professional advice. Section 104(c), which could be seen as the equivalent provision for *subject-matter other than works*, does not in fact use the term ‘fair dealing’ so it is a broader exception. Similarly, s 104(b), which provides an exception for someone *seeking* professional advice from a legal practitioner, registered patent attorney or registered trade marks attorney, does not use the term ‘fair dealing’. There is no corresponding exception—fair dealing or otherwise—with respect to works.

7.58 The CLRC noted these inconsistencies, for which it could see no basis, and recommended that the distinctions be removed.¹²⁹ At least one submission echoed the CLRC’s recommendation and called for ss 43(2), 104(b) and 104(c) to be made consistent with one another if reform is to be effected ‘within the existing paradigm’ of specific exceptions.¹³⁰ The authors of this submission went further, submitting:

The fact that what should be a straightforward and uncontroversial defence has been implemented in such an incoherent manner should give us serious pause for thought about the ability of the legislature to adequately draft provisions that exempt specific practices from infringement.¹³¹

7.59 Some submissions identified some drafting errors.¹³² For example, the ABC identified a drafting ‘oversight’ in the fair dealing exceptions for the purpose of reporting news. The ABC referred to the presence of the word ‘communication’ in ss 42(1)(b) and 103B(1)(b) but its point was different to that which had been made by the CNMCC, mentioned earlier. It presumed that ‘communication’ covered both television and radio broadcasting but was ‘concerned’ that it might not cover a ‘sound recording’. However, it held the view that ‘the practice of using sound recordings for reporting news is widely accepted within the industry’.¹³³

7.60 Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall identified a number of drafting ‘mishaps’.¹³⁴ For example, they observed that the

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

128 R Burrell and others, *Submission 278*.

129 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.28]–[4.29], [6.137].

130 R Burrell and others, *Submission 278*.

131 *Ibid.*

132 *Ibid.*; Australian Broadcasting Corporation, *Submission 210*.

133 Australian Broadcasting Corporation, *Submission 210*.

134 R Burrell and others, *Submission 278*.

definition of ‘sufficient acknowledgment’ in s 10(1) applies to ‘works’ only.¹³⁵ They submitted that this creates ‘real uncertainty’ as to the form any acknowledgment should take with respect to the use of audio-visual items for the purpose of reporting news (s 103B(1)(a)) or criticism or review (s 103A). Further, they criticised the wording of the provisions detailing fair dealing for the purposes of criticism and review, submitting:

a newspaper or blogger could not set out a passage from Tolkien’s *The Hobbit* in the course of a review of the Peter Jackson film. The extract would be taken from a literary work and, as such, s 41 would be the operative provision (s 103A only applying where there is a dealing with an audio-visual item). Section 41 only applies where the criticism or review *is of that work or another work*, and ‘work’ is defined ... so that it specifically does *not* include a ‘cinematograph film’.¹³⁶

7.61 They regarded the outcome as ‘clearly preposterous’. They held the view that such ‘mishaps’ are ‘inevitable’ if exceptions are approached from the perspective of being available only ‘in the most carefully defined circumstances’.¹³⁷

Reducing complexity

7.62 The CLRC’s simplification review is a key related review. The consolidation and expansion of the fair dealing purposes to an open-ended model was an important aspect of the CLRC’s review in 1998. Further, the CLRC recommended that the fair dealing provisions be simplified by:

- absorbing the provisions relating to the acts done for the purpose of professional advice in relation to subject matter other than works (ss 104(b) and 104(c)) within fair dealing; ...
- removing the provisions that require sufficient acknowledgment in relation to fair dealings for the purpose of reporting news (ss 42(1)(a) and 103B(1)(a)); and
- adopting a modified quantitative test (s 40(3)).¹³⁸

7.63 With respect to the third point, the *Copyright Amendment Act 2006* (Cth) repealed the former s 40(3) and (4) and substituted new s 40(3)–(8)¹³⁹ to improve clarity and certainty with respect to the quantitative test in s 40.¹⁴⁰

7.64 In the Issues Paper, the ALRC invited comments on how the fair dealing exceptions might usefully be simplified or made more coherent.

7.65 A few submissions, notably from those representing rights holders, argued that there was no need for, or benefit to be obtained from, simplification of the fair dealing

135 Ibid. The CLRC also noted this error: Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.119].

136 R Burrell and others, *Submission 278*.

137 Ibid.

138 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [2.01].

139 *Copyright Amendment Act 2006* (Cth) sch 6 pt 4.

140 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [6.64]; Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [63]–[69].

exceptions.¹⁴¹ The Music Council of Australia submitted that to the extent that the exceptions are complex, any problems could be ‘overcome by the Government providing explanatory material and guidelines which address operational issues’; that is, information on the practical operation of the exceptions.¹⁴²

7.66 SBS held the view that the fair dealing exceptions for the purpose of criticism, review, reporting news, parody and satire—upon which it ‘relies strongly’—‘are clear and well established’ so it ‘would not support any change’ to the provisions.¹⁴³ Notwithstanding its comments that some of these provisions are unclear and would benefit from greater consistency, the ABC held the view that the fair dealing exceptions could not be usefully simplified. It submitted that compared with other provisions in the *Copyright Act*, these provisions ‘are relatively technology neutral and simply drafted’. It was concerned that ‘[t]oo much prescription could narrow the exceptions and remove flexibility in the digital environment’.¹⁴⁴

7.67 AAP was concerned that consolidation of all aspects of the fair dealing provisions into a single omnibus provision, which it may have incorrectly understood the CLRC’s model to be,¹⁴⁵ ‘risk[s] generating unnecessary confusion and uncertainty’.¹⁴⁶ Its reasons included the failure to account for nuances such as the requirement to provide sufficient acknowledgment and the omission of certain language which risks changing the meaning of the exceptions.¹⁴⁷

7.68 By contrast, a number of other submissions were of the view that the fair dealing exceptions could be usefully simplified or made more coherent, including by:

- consolidation of the exceptions;
- greater consistency between the exceptions;
- narrowing the scope of the exceptions; and
- broadening the scope of the exceptions by enacting a broad, flexible open-ended exception for fair use.

141 For example, Music Council of Australia, *Submission 269*; AAP, *Submission 206*; Australian Society of Authors, *Submission 169*; ALAA, *Submission 129*.

142 Music Council of Australia, *Submission 269*.

143 SBS, *Submission 237*.

144 Australian Broadcasting Corporation, *Submission 210*.

145 With respect to the quantitative test, the CLRC recommended that its reformed test be included in ‘a stand-alone provision separate from the new fair dealing provision’ which was extracted in Chapter 4. With respect to the requirement to provide sufficient acknowledgment, the CLRC considered that this requirement could be removed from the exceptions pertaining to the economic rights of copyright and instead be dealt with under the then newly proposed moral rights regime. In the case of the requirement for sufficient acknowledgment with respect to criticism or review, the CLRC considered that a specific provision may need to be maintained unless the moral rights provisions were amended to provide sufficient compliance with art 10(3) of the *Berne Convention* which requires both identification of the author and the source. See Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.10], [6.29] and [6.122].

146 AAP, *Submission 206*.

147 Ibid.

7.69 Some submissions supported the consolidation or simplification of the existing fair dealing exceptions, with some of these submissions supporting expansion of the existing purposes by way of an open-ended exception,¹⁴⁸ and others opposing this aspect.¹⁴⁹

7.70 Foxtel submitted that simplification of the *Copyright Act* would be ‘in the best interests of industry and consumers’—provided this could be achieved without upsetting the existing ‘balance’.¹⁵⁰ However, ARIA saw ‘little reason’ to introduce a consolidated—but not expanded—model for fair dealing as it considered that it would result in only ‘a modest degree of simplification’, given the structure of the *Copyright Act*, which distinguishes between works and subject-matter other than works.¹⁵¹

7.71 Some submissions were ‘concerned’ about the possible results of a simplified and consolidated fair dealing provision.¹⁵² The Business Software Alliance was concerned it may lead to uncertainty and the Arts Law Centre of Australia was concerned that such a provision ‘could have the unintended result of substantially changing the law’.¹⁵³

7.72 A few submissions advocated greater consistency between the provisions.¹⁵⁴ The Internet Industry Association noted the inconsistency as to the extent of copying permitted and the requirement to provide sufficient acknowledgment and submitted that ‘[a]s far as reasonably possible each fair dealing right should apply to the same set of rights and be subject to the same conditions’.¹⁵⁵ The ABC submitted that there should be consistency of application between the exceptions with respect to ‘works’, ‘subject-matter other than works’ and ‘performances’.¹⁵⁶ It provided an example of existing inconsistency between the fair dealing exceptions as they apply to performances:

when reviewing a script of a film, the use of the cinematograph film and sound track and other underlying works would be permitted under s 41. However, a critique of a performance under s 248A in the definition of exempt recording (f) and (fa) (where arguably the review or critique must be of the performance) does not permit the use of other underlying works associated with that critique (and vice versa).¹⁵⁷

7.73 Some submissions suggested other reform options to simplify the fair dealing exceptions. Some of these would operate to narrow the scope of the exceptions while others would broaden the scope.

148 For example, Copyright Advisory Group—Schools, *Submission 231*; ADA and ALCC, *Submission 213*.

149 For example, Foxtel, *Submission 245*; ALPSP, *Submission 199*; Arts Law Centre of Australia, *Submission 171*.

150 Foxtel, *Submission 245*.

151 ARIA, *Submission 241*.

152 BSA, *Submission 248*; AAP, *Submission 206*; Arts Law Centre of Australia, *Submission 171*.

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

154 For example, Internet Industry Association, *Submission 253*; Australian Broadcasting Corporation, *Submission 210*.

155 Internet Industry Association, *Submission 253*.

156 Australian Broadcasting Corporation, *Submission 210*.

157 *Ibid.*

7.74 Copyright Agency/Viscopy proposed a number of changes that arguably would narrow the scope of the exceptions. It considered that the following changes would improve consistency and simplicity:

- a requirement in all cases that the source and author be acknowledged;
- an obligation to retain any rights management information (eg metadata);
- an express condition that the exception not apply if there is a licensing solution applicable to the user; and
- an express condition that the other factors in section 40(2) apply to all fair dealings.¹⁵⁸

7.75 It also called for s 40(3)—relating to the quantitative test for the fair dealing exception for the purpose of research or study with respect to works—to be amended so that it presumes, rather than deems, the use of a ‘reasonable portion’ to be fair, viewing this as ‘a more equitable outcome’.¹⁵⁹ In its supplementary submission, Copyright Agency/Viscopy noted s 40(5) effectively deems ‘a reproduction for research or study of 10% of the pages, or a chapter, of a work in an edition (or 10% of the words of a work in electronic form)’ as ‘fair, irrespective of whether or not the use would be fair if the criteria in section 40(2) were applied’.¹⁶⁰ It agreed with the education sector that there should not be a prescribed proportion of work whose use is deemed to be ‘fair’.¹⁶¹

7.76 The Copyright Advisory Group—Schools submitted that a quantitative-based deeming provision should not be included in an open-ended fairness provision.¹⁶² As discussed, the CLRC had also been of this view.¹⁶³ It is important to note that the Schools did not appear to be advocating the removal of this aspect of the fair dealing exception for research or study alone but rather it was in the context of their call for the introduction of a new open-ended, flexible exception.

Reform of fair dealing exceptions

7.77 Some stakeholders called for new specific fair dealing exceptions. Many submissions called for a specific exception for quotation,¹⁶⁴ which is discussed in Chapter 10. However, stakeholders also suggested other possible fair dealing exceptions, including:

158 Copyright Agency/Viscopy, *Submission 249*.

159 *Ibid.*

160 Copyright Agency/Viscopy, *Submission 287*.

161 *Ibid.*

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

163 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.67].

164 For example, Pirate Party Australia, *Submission 223*; Australian Broadcasting Corporation, *Submission 210*; R Wright, *Submission 167*; R Xavier, *Submission 146*; K Bowrey, *Submission 94*.

- fair dealing for the purpose of governmental and political discussion (with express reference to the implied constitutional right);¹⁶⁵
- fair dealing for ‘the purpose of discussing matters of public interest’ (possibly an extension of the existing fair dealing exception for reporting news or of any new fair dealing for the purpose of governmental and political discussion);¹⁶⁶
- fair dealing for the purpose of ‘the Crown to publish and disseminate research findings that arise from publicly funded research’;¹⁶⁷ and
- fair dealing for the purpose of independent researchers being able to access, read and make one copy of content (seen as the ‘equivalent to access to hard copies in a public library’).¹⁶⁸

7.78 The ALRC has considered the various arguments and detailed discussion in submissions about the operation of the fair dealing exceptions in the digital environment and whether these provisions could be usefully simplified or made more coherent. While some submissions were of the view that no or minimal reform is warranted, a number of other submissions identified gaps in coverage and provided information about inconsistencies and drafting errors. The ALRC considers that such issues merit attention.

7.79 The ALRC proposes that:

- the new fair use exception should be applied when determining whether a use for one of the existing fair dealing purposes—or another unspecified purpose—infringes copyright;
- the existing fair dealing exceptions, as well as broader exceptions for professional advice, be repealed;
- if fair use is not enacted, that the existing professional legal advice exceptions be repealed and that new fair dealing exceptions for the purpose of professional advice be enacted; and
- if fair use is not enacted, that the existing fair dealing exceptions proposed in this Discussion Paper—including the new professional advice exceptions proposed above—should provide that the fairness factors in Proposal 4–3 must be considered in determining whether copyright is infringed.

7.80 Some of those who called for reform of the existing fair dealing exceptions advocated for, or were sympathetic to, the introduction of a flexible exception such as

165 Australian Broadcasting Corporation, *Submission 210*. Civil Liberties Australia, *Submission 139* also appeared to support such an exception, submitting that existing exceptions ‘should be strengthened to protect the interests of the community in political communication, free expression and debate and criticism’.

166 Australian Broadcasting Corporation, *Submission 210*. SBS, *Submission 237* also supported a fair dealing ‘right’ to ‘include a use of copyright material in the public interest where an existing provision did not apply’.

167 Civil Liberties Australia, *Submission 139*.

168 I Turnbull, *Submission 67*.

fair use,¹⁶⁹ while others were opposed to this.¹⁷⁰ The ALRC considers that the close-ended nature of the fair dealing exceptions is problematic in the digital environment as it is not sufficiently adapted, or flexible to respond, to changing circumstances. For example, the CSIRO submitted:

It is not always clear whether activity falls within the concept of ‘research or study’ and reticence to misuse another’s IP may mean that uses that facilitate dissemination and communication of scientific and technical information may be avoided despite there being no or marginal impact on the legitimate interests of a copyright owner. If a more general purpose exception applied this concern may be alleviated, the focus then being on the key issue of the impact of the use on the legitimate interests of the copyright owner.¹⁷¹

7.81 Further, the degree of detail with which some of the fair dealing exceptions have been drafted has caused some complexity: gaps, different treatment and uncertainty. A new fair use exception, rather than new additional specific fair dealing exceptions, would provide an effective basis for responding to changed and changing circumstances caused by new technologies and uses, without unnecessarily complicating the *Copyright Act*. In light of this view, the ALRC proposes the repeal of the existing fair dealing provisions and application of the new fair use exception discussed in Chapter 4 when determining whether such uses infringe copyright.

7.82 The ALRC also proposes that the professional advice exceptions in ss 104(b) and (c)—which are not fair dealing exceptions—be repealed and replaced with the new fair use exception.

7.83 The ALRC proposes that all of the existing fair dealing purposes—apart from professional advice—be included specifically as illustrative purposes in the new fair use exception. Some submissions advocated a similar approach.¹⁷² For example, the Law Institute of Victoria submitted:

Whilst the exception should be open-ended, the Australian Act should set out a non-exhaustive list of examples that would constitute ‘fair use’. The sorts of examples that might be listed could include current fair dealing exceptions.¹⁷³

7.84 While the professional advice provisions serve an important public interest—in the CLRC’s view they serve ‘to facilitate access to the legal system and, indirectly, to lower legal costs’¹⁷⁴—the ALRC does not consider that all the current fair dealing

169 For example, Grey Literature Strategies Research Project, *Submission 250*; National Library of Australia, *Submission 218*; Google, *Submission 217*; Society of University Lawyers, *Submission 158*; Powerhouse Museum, *Submission 137*.

170 For example, Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; NSW Young Lawyers, *Submission 195*.

171 CSIRO, *Submission 242*.

172 For example, Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Law Institute of Victoria (LIV), *Submission 198*; M Rimmer, *Submission 122*. See also APRA/AMCOS, *Submission 247*.

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

174 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.136].

exceptions need be expressly listed as illustrative purposes in the new fair use exception. As was explained in Chapter 4, the illustrative purposes are not exhaustive.

7.85 With respect to assessing fairness, the ALRC notes that a divergent group of submissions called for the *Copyright Act* to outline factors to be considered in determining the fairness of the dealing or use of copyright material beyond the existing exceptions for research or study.¹⁷⁵ The current approach where fairness factors are expressly stated in the fair dealing exceptions for research or study only was seen to make ‘little sense’, particularly where the Australian case law ‘provides remarkably little useful guidance as to how the “fairness” of a dealing for the purposes of criticism, review, news reporting, etc is to be determined’.¹⁷⁶ The Australian Copyright Council acknowledged that ‘people sometimes find the case-by-case nature of fair dealing difficult to apply’ and submitted that applying a general set of fairness factors, such as those already existing with respect to the research or study exceptions, may assist in this regard.¹⁷⁷ The ALRC’s proposals for the repeal of the existing fair dealing exceptions, together with ss 104(b) and (c), and application of the new fair use exception would essentially effect such a change in approach. The fairness factors detailed in Proposal 4–3, along with any other fairness factors considered relevant in a particular case, would be considered in determining whether a particular use constitutes a fair use.

7.86 The ALRC makes two additional proposals concerning the fair dealing exceptions in order to provide an alternative in the event that fair use is not enacted. Many of the complaints raised about the existing fair dealing exceptions would require careful consideration if the purpose-based approach to exceptions were to be retained. The CLRC considered a number of these issues in its 1998 report.

7.87 One issue that was raised in both reviews—which the ALRC considers could be simply rectified—is reform of the professional advice provisions so that they are made more coherent. Accordingly, the first of ALRC’s alternative proposals is that ss 43(2), 104(b) and (c) of the *Copyright Act* be repealed and new fair dealing exceptions introduced ‘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. This essentially echoes the CLRC’s recommendations.¹⁷⁸

7.88 The second proposal, in the event that fair use is not enacted, is for all existing fair dealing exceptions and the new fair dealing exceptions for professional advice and others that are proposed in various parts of this Discussion Paper, to be subject to the fairness factors in Proposal 4–3. The ALRC considers that this would provide greater consistency across the provisions and should assist in determining their application. One negative would be that such an approach would likely lengthen the provisions.

175 For example, R Burrell and others, *Submission 278*; Copyright Agency/Viscopy, *Submission 249*; Australian Copyright Council, *Submission 219*.

176 R Burrell and others, *Submission 278*.

177 Australian Copyright Council, *Submission 219*.

178 See Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.138]–[6.140].

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.

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.

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.

