

ALRC COPYRIGHT AND THE DIGITAL ECONOMY

**A submission in response to the Discussion
Paper 79 (DP 79)**

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THE ARTS LAW CENTRE OF AUSTRALIA

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts.

Arts Law provides expert legal advice, publications, education and advocacy services each year to over 2,500 Australian artists and arts organisations operating across the arts and entertainment industries.

Arts Law provides an Indigenous arts service - *Artists in the Black* (AITB). The aim of AITB is to increase access to legal advice and information about arts law issues for Indigenous artists and communities. We therefore feel we are in a unique position to address Indigenous peoples' concerns in relation to creative works.

About our clients

Our clients reside in metropolitan centres and in regional, rural and remote parts of Australia. They are from all Australian states and territories. Our client base is multi-cultural, Indigenous and non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists. We also represent the organisations that support them.

The comments that we make in this submission are informed by our clients' profiles. Our clients usually:

- are both copyright creators and users;
- are either new, emerging artists or established arts practitioners or arts organisations;
- are operating arts businesses;
- are operating in all arts sectors;
- are working in both traditional and digital media;
- have low incomes/limited funds;
- need to be self-reliant in business;
- have a very limited ability to enforce rights;
- are eager for accessible legal information, although they typically have limited legal education; and
- are (at least professionally) copyright compliant.

Our essential approach to copyright reform issues:

As an independent organisation giving legal advice to copyright users, copyright owners and creators across Australia, Arts Law is in a unique position to comment on the balance between competing interest groups when considering proposed amendments to the *Copyright Act 1968* (Cth) (**Copyright Act**). Our perspective here is in keeping with our 'artists first' policy. That policy is implemented in our protocols as to circumstances in which Arts Law will provide advice or may decline to provide advice. That is, Arts Law's policy is to advise on matters that relate to, or affect the rights of individual 'artists'. In situation where there is the potential for conflict between the interests of

individual ‘artists’ and those of arts organisations and other entities, Arts Law will normally not advise those arts organisations and other entities so as to avoid conflict with the ‘artists first’ policy. Arts Law advocates for artists to be rewarded for their creative work so that they can practise their art and craft professionally. We also support fair and reasonable access to copyright material. We believe that balance is crucial in fostering creativity and is essential for the intellectual and cultural development of society.

Arts Law submits that Australian copyright law and the encouragement of awareness about and compliance with Australian copyright law are important elements of any Australian government’s arts policy.

Clients of Arts Law seek advice in relation to copyright issues arising in the digital environment. The following are some examples from the Arts Law client records:

- Indigenous and non-Indigenous artists who find their online promotional artwork images mass printed for sale;
- Indigenous artists/communities who find inappropriate use of their expressions of culture uploaded to the web (without free, prior and informed consent);
- Images and photographs copied and published or distributed by individuals, businesses and the news media without the permission of the owner and without attribution of authorship;
- The digital dissemination of literary works without the consent of the author or publisher.

Every unauthorised copy, publication or distribution of an artistic work, music or audio-visual work may be lost income for an artist who can ill afford it.

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1. Executive Summary of the Arts Law submission

- 1.1 Two key principles are relevant to the reform of the *Copyright Act 1968*¹:
 - 1.1.1 That objective evidence should drive copyright reform; copyright policy development should balance measurable economic objectives against social goals as well as balancing the impact of changes on rights holders against impacts on consumers and other copyright users; and
 - 1.1.2 That the existence of the moral rights in Part IX, *Copyright Act 1968*, has the consequence that copyright policy development in Australia must take account of the non-economic factors (such as moral rights) as well as the measurable economic objectives in determining the social welfare consequences of reform proposals.²
- 1.2 Moral rights (6bis of the *Berne Convention*), which have been adopted in the *Copyright Act 1968*, are an important element of the 'legitimate interests of the author'³. Having implemented a moral rights regime consistent with its treaty obligations under the *Berne Convention*, Australia cannot adopt an open-ended fair use exception (Proposals 4-1 to 4-4) and must work within the narrow public-interest based exceptions (criticism and review, research and study, parody and satire, and reporting the news) in meeting the challenges in the digital environment.
- 1.3 In relation to the development of exceptions founded in copyright policy, Australia must:
 - 1.3.1 balance all public interest values (including non-economic values such as moral rights) and
 - 1.3.2 limit the scope of exceptions to circumstances in which the moral rights of authors are off-set by a significant public interest value.
- 1.4 While the proposed fair use doctrine provides a superficially flexible test, the flexibility of the doctrine comes at a cost - the lack of clarity, certainty and predictability in the application of the four fairness factors.⁴ In comparison, the existing fair dealing exceptions (criticism and review, research and study, parody and satire, and reporting the news) operate within the public interest parameters described above.
- 1.5 Arts Law accepts that the *Copyright Act 1968* should, as set out in the terms of reference of the ALRC inquiry, enhance the objective of providing an incentive to create and disseminate original copyright materials while meeting the interests of all Australians to access, use and interact with that material. Achieving the optimal balance between creators and users of copyright material has been the intended purpose of copyright law since the first copyright legislation – the *Statute of Anne* (1709). Digital

¹ I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

² I Hargreaves, *ibid*, 97.

³ "11.2 We do not propose any diminution of existing non-economic IP rights, as we take the view that rights granted for non-economic purpose, such as the moral rights of creators to prevent usage of their work in unacceptable contexts, are compatible with the economic goals upon which the Review was asked to focus."

⁴ As discussed in Article 9(2) of the *Berne Convention*.

⁴ See Section 3. (H).

technologies have an important role in the Australian economy and internet technologies connect Australia to the global market place of ideas, culture and business opportunities. However, the importance of authors and other creators of copyright material means that proposals for new exceptions to copyright, that diminish the economic and moral rights of author and creators, should be based on clearly identified policy grounds.⁵

- 1.6 The concern of Arts Law with regard to the adoption of a fair use exception flows from the absence of independent research as to the economic benefits of the application of open-ended fairness factors and the failure of submissions to the ALRC to address how the adoption of a US-style fair use exception meets the requirement of Article 9(2) of the *Berne Convention* that provides:

‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’ (the ‘3-step test’)

- 1.7 The argument that has been made in submissions to the ALRC that Article 9(2) does not preclude the adoption of an open-ended fair use exception (as applied in the US *Copyright Act 1976* (17 U.S.C.)) is not persuasive as it lacks evidence demonstrating that it will not ‘unreasonably prejudice the legitimate interests of the author’ (the 3rd step in Article 9 (2)); which interests include both economic interests and the separate and non-economic interests that are the moral rights of creators as provided for in Article 6bis of the *Berne Convention*.
- 1.8 An open-ended fair use exception that allows the appropriation of existing work appears to conflict with the existing obligation of third party users to provide attribution of authorship and the author’s right to protection against derogatory treatment of works. The move to an open-ended fair use exception will impact negatively on the moral rights of the author.
- 1.9 Arts Law submits that the digital environment has evolved to the point where there are enterprises at which web users congregate, including search engines (eg Google) and social networking platforms (eg YouTube and Facebook). Because these enterprises are key nodes in the architecture of the internet, the search engines and social networking platforms should participate in the mechanisms and approaches to both manage compliance with the copyright system (such as ‘take down’ notices) and to implement the licensing and payment mechanisms that allow consumers to access works, and artists and rights holders to receive payment for use of copyrighted works.
- 1.10 The digital environment already allows for mechanisms that give rights holders’ choices as to how to respond to unlicensed use of their work while facilitating fair access and wide dissemination. The YouTube ‘ID Content’ policy allows copyright owners to ‘monetize, block or track’ uses that are not fair uses of copyright material.⁶ Through

⁵ ALRC Discussion Paper 79 (DP79) [3.19].

⁶ The YouTube description of the ‘ID Content’ policy is that “*YouTube has created an advanced set of copyright policies and content management tools to give rights holders control of their content. YouTube provides content management solutions*

such a policy, rights holders have choices as to whether to block the use of their copyrighted works through ‘takedown notices’; or track the use (as the rights holders may decide that the reuse is beneficial in that it draws public attention to the copyrighted work, with the rights holders deriving value from the work from some other sources); or the copyright owner can engage with internet service providers and internet content hosts to monetize what is otherwise an unlicensed use of the work through accessing advertising revenue related to the user-generated content.

1.11 The following is a summary of Arts Law’s response to the ALRC proposals in DP79:

- Arts Law opposes Proposals 4-1 to 4-4 to create an open-ended fair use exception;
- Arts Law opposes Proposal 6-1 to repeal the statutory licensing schemes in pts VA, VB and VII div 2 of the *Copyright Act 1968* for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, so that licences should instead be negotiated voluntarily;
- Arts Law opposes Proposal 7-1 related to the application of the fair use exception, therefore Arts Law does not support the repeal of the existing fair dealing exceptions as described in Proposal 7-2;
- Arts Law supports Proposal 7.3 regarding the professional advice provisions of the *Copyright Act 1968*;
- In relation to Proposal 7.4, Arts Law argues that the indiscriminate application of fairness factors set out in Proposal 4-3 may bring uncertainty to the application of the fair dealing exceptions (e.g. reporting the news, research and study, parody and satire, criticism and review);
- Arts Law opposes Proposal 8-1 related to the application of an open-ended fair use exception to ‘non-consumptive use’ and opposes the repeal of the existing fair dealing exceptions as described in Proposal 8-2, except as part of the implementation of Proposal 8-3 to create a specific fair dealing exception for ‘non-consumptive use’;
- Arts Law opposes Proposals 9-1 and 9-2 related to an exception of ‘private and domestic use’;
- Arts Law opposes Proposals 9-3 to 9-5 regarding time shifting and format shifting;
- Arts Law opposes Proposals 10-1 to 10-3 related to an exception for ‘quotation’;
- Arts Law opposes Proposals 11-1 to 11-3 regarding either an open-ended fair use exception or a general fair dealing exception for libraries and archives;
- Arts Law provides qualified supports the exception as described in Proposals 11-4 to 11.7 that allows libraries and archives to make copies of copyright material, whether published or unpublished, for the purpose of preservation of that material;
- Arts Law opposes Proposal 12-1 and provides qualified support for Proposals 12-2 and 12-3 regarding the management of ‘orphan’ works;
- Arts Law opposes Proposals 13-1 to 13-3 regarding the introduction of either an open-ended fair use exception or a fair dealing exception for educational use; and
- Arts Law opposes Proposals 14-1 to 13-4 regarding a ‘public administration’ exception.

for rights holders of all sizes across the world, and provides tools to cater to the specific needs of various rights owners.”
<http://www.youtube.com/t/contentid>

2. Framing Principles for Reform and the incentives for creation of content

(A) Framing Principles for Reform

Summary:

- 2.1 “[T]he legitimate interests of the author” (as described in Article 9(2) of the *Berne Convention*) include both the economic rights (the exclusive rights of creators) and non-economic rights (which include the moral rights of creators) provided in Article 6bis of the *Berne Convention*.
- 2.2 The consequence of Australia having enacted the moral rights protections in Part IX, *Copyright Act 1968*, means that that copyright reform options are now circumscribed by the prism that is currently provided by Article 9 (2) of the *Berne Convention*. Accordingly Australia must work within the scope of the specific exceptions and in this context Arts Law notes that an open-ended fair use exception that allows the reproduction of existing works also appears to conflict with the moral rights obligations (in Part IX, *Copyright Act 1968*) to provide attribution of authorship and the protection against derogatory treatment of works.

Detail:

- 2.3 The Discussion Paper (DP 79) comments that stakeholders are generally agreed about the 5 framing principles for reform of the *Copyright Act 1968* that are set out in Chapter 2 of DP79 “*but not about how they are to be interpreted or prioritised.*”⁷ Those framing principles are:

Principle 1: Acknowledging and respecting authorship and creation

Principle 2: Maintaining incentives for creation of works and other subject matter

Principle 3: Promoting fair access to and wide dissemination of content

Principle 4: Providing rules that are flexible and adaptive to new technologies

Principle 5: Providing rules consistent with Australia’s international obligations

- 2.4 Arts law argues that Principles 1, 2 & 5 provide the framework within which Principles 3 & 4 must be viewed.
- 2.5 In regard to Principle 1, the concept of ‘authorship’ is referred to “*as being the paramount consideration in any copyright discussion.*”⁸ As regards Principle 2, DP79 also identifies the *Copyright Act 1968* as encompassing both economic rights (the exclusive rights of creators) and non-economic rights (which include the moral rights of creators).⁹ DP79 also acknowledges the importance of cultural considerations, “*in particular, issues relating to Indigenous culture and cultural practices in the context of*

⁷ DP79, [2.1].

⁸ DP79, [2.4].

⁹ Ibid.

digitisation of individual, family and community material.”¹⁰ An important principle that frames the rights of creators, as noted by DP79, is the “the rights of authors and makers of copyright material to determine how their works are exploited ‘while at the same time acknowledging the rights of consumers to engage with content in a manner which does not adversely impact the rights of creators’.”¹¹

2.6 Arts law submits that both the economic rights (the exclusive rights of creators) and non-economic rights (which include the moral rights of creators) must be considered in any revision of the framework of exceptions and statutory licences in the *Copyright Act 1968*.

2.7 An important framing principle of reform directed to providing an effective framework of exceptions and statutory licences in the *Copyright Act 1968* is the principle that creators of copyright material should be able to determine how their works are exploited. Therefore when Principles 3 & 4 are to be considered the ‘consumers rights’ or ‘users rights’ of achieving fair access to and wide dissemination of copyright material and providing a copyright regime that is flexible and adaptive to new technologies, must take account of:

2.7.1 the opportunities that the digital environment allows for mechanisms that give rights holders’ choices as to how to respond to the use of their work by users of digital technologies:¹² such as:

- (a) the YouTube ‘ID Content’ policy is described as being intended to allow copyright owners to ‘monetize, block or track’ uses that are not fair uses of copyright material;¹³ or
- (b) the recent UK initiative to launch the Copyright Hub;¹⁴ and

2.7.2 both the economic rights (the exclusive rights of creators) and non-economic rights (which include the moral rights of creators); as quoted in DP79 [2.5]:

“Regardless of the status of economic infringement of rights, a creator should always be able to assert their moral rights and seek removal from the internet of derivative works considered to violate these rights.”¹⁵

2.8 Both the economic rights (the exclusive rights of creators) and non-economic rights (which include the moral rights of creators) are also significant matters when considering Principle 5 (providing an effective framework of exceptions that are consistent with Australia’s international obligations). As discussed later in this

¹⁰ Ibid.

¹¹ DP79, [2.5].

¹² Arts Law Centre of Australia, *Submission 171*, [12.8] & [12.9].

¹³ IP42 [101]. The YouTube description of the ‘ID Content’ policy is that “YouTube has created an advanced set of copyright policies and content management tools to give rights holders control of their content. YouTube provides content management solutions for rights holders of all sizes across the world, and provides tools to cater to the specific needs of various rights owners.” <http://www.youtube.com/t/contentid>

¹⁴ <http://www.copyrighthub.co.uk/>

¹⁵ DP79, [2.5], quoting Australian Major Performing Arts Group, *Submission 212*.

submission, the ‘3-step test’ set out in Article 9(2) of the *Berne Convention*¹⁶ is the basis on which proposed exceptions to the reproduction of copyright works are to be reviewed. While the ALRC Inquiry may provide an “*opportunity for suggesting policy parameters within which future international negotiations take place*” as to revision of the *Berne Convention*;¹⁷ the prism that is currently provided by Article 9(2) of the *Berne Convention* directs attention to the extent to which any proposed exception will “*prejudice the legitimate interests of the author*”.

(B) Comment on Principle 2: Maintaining incentives for creation of works and other subject matter

2.9 Arts Law makes the further comments directed to Principle 2 and the role of copyright policy to provide an incentive for the creation of works and other subject matter. Authors, artists and other creators are granted intellectual property rights in the material they create, with that grant of (IPRs) acting as an incentive to create the material.

2.10 *Creative Australian* (2013) sets out five linked goals of the Australian National Cultural Policy, that include:

GOAL THREE *Support excellence and the special role of artists and their creative collaborators as the source of original work and ideas, including telling Australian stories.*

GOAL FOUR *Strengthen the capacity of the cultural sector to contribute to national life, community wellbeing and the economy.*¹⁸

Arts Law agrees with the submission of the Copyright Council of Australia – that the role of government is to enable culture and that the ALRC’s proposal run a very real risk of undermining the National Cultural Policy.¹⁹

2.11 In the submission in response to IP42, Arts Law commented on two studies conducted by David Throsby and Anita Zednik and David Throsby and Virginia Hollister entitled “Do you really expect to get paid?”²⁰ and “Don’t give up your day job”²¹ These studies are part of a 30 year series of studies into the incomes of professional artists in Australia.²²

¹⁶ Article 9 of the *Berne Convention* modified by Article 13 of the *TRIPs Agreement*, Article 10 of the *WIPO Copyright Treaty* and the *Australia-United States Free Trade Agreement*.

¹⁷ DP79, [2.49].

¹⁸ *Creative Australia* (2013) p. 6.

¹⁹ ‘Cultural Policy’ section of Copyright Council of Australia, submission in response to DP79.

²⁰ David Throsby and Anita Zednik, *Do you really expect to get paid?: An economic study of professional artists in Australia* (Australia Council for the Arts, 2010).

²¹ David Throsby and Virginia Hollister, *Don’t give up your day job: An economic study of professional artists in Australia* (Australia Council for the Arts, 2003).

²² Arts Law Centre of Australia, *Submission 171*, [1.3] - [1.9].

In 2013 Peter DiCola published a study into income of American musicians and the correlation of income with copyright incentives.²³

- 2.12 From the studies of David Throsby *et al* and Peter DiCola the argument can be made, first of all, that notwithstanding the fact that significant portions of actual artists' incomes are derived from sources other than their ownership of intellectual property, nevertheless the protection of such rights are 1) a significant asset to those artists; and 2) a significant incentive to their production of art. The second argument supported by the findings in those research articles is that introducing changes into the Australian regime of fair dealing to make it similar to the US fair use exceptions would have a negative impact on the production of art and on the welfare of individual and independent artists by posing significant barriers to entry into the cultural industries and entrenching the dominance in the creative-cultural industries of commercial enterprises such as advertising.
- 2.13 The research material discussed below is consistent with the conclusion that an open-ended fair-use exception will impact negatively on artists' income in many sectors of what have been variously termed the creative, copyright and arts industries. DiCola describes his study as "*showing the present-tense importance of copyright to some musicians and the less obvious relevance of copyright to other musicians.*"²⁴ The DiCola study in particular indicates that a practicing artists' income has a direct relationship with their copyright ownership – the higher the income of the musician, the higher the percentage of revenue from sources directly related to copyright.²⁵ The studies demonstrate that artists appreciate doing creative work,²⁶ and often find other types of work related to their art such as teaching tedious and thus engage in them only as necessary to supplement their income.²⁷
- 2.14 In other words, it appears from these studies that artists subsidise their creative activity through other arts-related or even non-arts-related employment,²⁸ and that artists are often forced to accept earnings below that which they would otherwise have access to

²³ Peter DiCola, 'Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives' (2013) *Northwestern Law and Economics Research Paper No 13-01*.

²⁴ *Ibid*, p. 5.

²⁵ DiCola summaries the results of his study: "According to my classification of the eight revenue categories, the survey data show that, in aggregate, the musicians in our sample earned 12 percent of revenue from sources directly related to copyright, 10 percent from sources with a mixed relationship to copyright, and 78 percent from sources indirectly related or unrelated to copyright. These aggregate numbers suggest that many musicians earn little money from activities directly subject to copyright protection. But this reflects an average across all respondents. If one looks at the subgroup of composers in top income bracket, the figures are 68 percent of revenue being directly related to copyright, 17 percent having a mixed relationship, and 15 percent being indirectly related or unrelated." 4-5, *ibid*, see also 28-31; see also at Figure 2.

²⁶ Throsby and Zednik, *ibid* (2010), 8: "A majority of artists (55 percent) are able to spend all of their working time at some sort of arts work (creative plus arts-related work), leaving 45 percent who work less than 100 percent of their time at all arts work. About two-thirds of these latter artists claim they would like to spend more time on arts work."

²⁷ DiCola, *ibid*, 45.

²⁸ *Ibid*: "By contrast, a vast majority of respondents want to spend more time composing, recording, and performing. Among survey respondents, 60, 69, and 65 percent, respectively, would prefer to spend more time on those activities."

for their level of education in order to continue their creative work.²⁹ Conversely successful artists report a greater proportion of their income from copyright royalties.³⁰ To the extent artists are rewarded for their creative works they are freed-up to spend more time on creative activity,³¹ and are less dependent on other forms of income production. Further pressure on the ability to extract economic value from creative endeavour (such as is likely to be the result of a broader fair use doctrine) will arguably have a depressing effect on the creative industries generally, and may even drive artists out of the creative industries altogether.

- 2.15 A number of conclusions can be drawn from the DiCola research: first, whilst actual income from copyright may only represent a small portion of revenue for many artists, the music industry at least can be considered a ‘high-risk’ or ‘winner-take-all’ market where copyright incentives play a significant role in the creation of artistic work.³² Accordingly, where other forms of employment are often necessary for many artists for livelihood, the ‘mail-box money’³³ provided to commercially successful artists provides important stability for those successful artists to be able to focus on creative work.
- 2.16 Another research paper by David Throsby and Anita Zednik “Employment Output for the Cultural Industries” (‘MERP paper’)³⁴ compares different models of “cultural industry”.³⁵ The significance of the comparison of the models is the different measures of artist’s or creative cultural producer’s share of economic output is the way in which it reveals how different types of artist receive different allocations of economic revenue from the arts.
- 2.17 The core of the concentric circles model is identified by Throsby and Zednik from census data as those individual artists defined by occupation: “*visual artists, photographers, sculptors, craftspeople, writers, editors, musicians, composers, singers, dancers, choreographers, actors and directors*”. Such a group most closely correlates with those types of independent artists who seek advice from Arts Law. From the study comparison of different models artists from these industries comprised 21,800 people and added value of 766 million AUD to the economy.³⁶ In comparison, the core of the symbolic texts model, those employed in the “*advertising, film, internet, music,*

²⁹ See also, Neil O Alper and Gregory H Wassall, ‘Artists’ Careers and Their Labour Markets’ in Victor Gisburgh and David Throsby (eds) *Handbook of the Economics of Art and Culture* (Elsevier, forthcoming, 2006), 33–5 [6 Summary, Conclusions and Future Research]; see also Throsby and Zednik, above n 4, 7–8.

³⁰ DiCola, *ibid.* 4–5.

³¹ *Ibid.*, 44 (note: DiCola includes the caveat: “A small increase in revenue might not shift the average musician into a situation where he or she can spend more hours per week on music.”).

³² DiCola, *ibid.*, 37–8 n 93: “Data on the distribution of sound recording revenue is also consistent with the winner-take-all model of the labour market for musicians. Over 40 percent of the survey respondents who earn some revenue from recordings earn \$1,000 or less from that revenue stream. At the top end, I estimate that 5 percent of musicians who earn some revenue from recordings earn \$17,000 or more, with 1 percent earning \$59,500 or more from recordings.”; see also Alper and Wassall, *ibid.*

³³ DiCola, *ibid.*, 34.

³⁴ David Throsby and Anita Zednik, ‘Employment Output for the Cultural Industries’ (Macquarie Economics Research Papers No 5/2007, Macquarie University, December 2007).

³⁵ 1) the concentric circles model; 2) the symbolic texts model; and 3) the WIPO model. *Ibid.*, 8–10.

³⁶ Throsby and Zednik, *ibid.* (2007), 10.

publishing, television and radio, and video and computer games” industries comprised 147,700 people and added value of 11,799 million AUD to the economy.³⁷ The implication of an open-ended fair use exception is that it may tend to favour commercial cultural production over independent and individual cultural production for the reasons discussed below.

(C) Proposed Exceptions Could Further Entrench Commercialisation of Artistic and Cultural Production

- 2.18 An important point flowing from the above argument that an open-ended exception to copyright would effectively favour commercial cultural production over independent and individual cultural production. This effect is argued to be the consequence of the role played by intermediaries involved in the dissemination of cultural production (such as record labels, music publishers), which are involved in creating demand for cultural production and disseminating cultural production for public consumption and participation.³⁸ To the knowledge of Arts Law, no study has as yet been undertaken as to the dependence of the intermediaries involved in the dissemination of cultural production on revenues stemming from copyright protection. Nevertheless, while the necessary role of such intermediaries in the creation of cultural production is not able to be determined, there is no doubt that it exists and as pointed out in the MERP paper potentially consumes a much larger proportion of the revenue from copyright protections than goes towards the originators of intellectual property.³⁹
- 2.19 Intermediaries involved in the dissemination of cultural production (such as record labels, music publishers) are more likely than artists engaged in independent and individual cultural production to have the resources to engage in legal challenges to claims of fair use. Consequently, open-ended fair use exceptions may tend to result in fewer opportunities for artists for the commercialisation of their works outside of the intermediate industries as artists are exposed to users claiming a fair use of copyright material and the artists do not have the financial resources to challenge such use.
- 2.20 Further, it has been noted that “[m]any of Australia’s traditional copyright industries (eg music, movies, games, software, books, newspapers, television, etc) have been challenged by the ‘perfect storm’ generated by the simultaneous move to digitisation, the enhanced ability for consumers to use the Internet to compare prices, the increase in unauthorised copying and the increased competitiveness of overseas products because

³⁷ Ibid.

³⁸ See also DiCola, *ibid.*, 32: “Another way to think of the relationship between these revenue sources and copyright law is to consider the institutions of the music industry. If copyright law is necessary for record labels, music publishers, PROs, and other music-industry intermediaries to exist, and if these intermediaries create opportunities to earn revenue and increase consumer demand for music, then copyright would be responsible—indirectly—for supporting live performance, merchandising, and other revenue.”

³⁹ David Throsby and Anita Zednik, ‘Employment Output for the Cultural Industries’ (Macquarie Economics Research Papers No 5/2007, Macquarie University, December 2007).

of the high Australian Dollar."⁴⁰ Such an environment will present additional barriers to entry in a set of industries which have been noted for possessing higher entry and exit rates than over the wider economy.⁴¹

- 2.21 Thus, whilst corporations may be otherwise able to protect those revenue streams deriving from creative content, and some corporations even thrive in such an environment, for individual artists the addition of a copyright exception represents a further limitation on their ability to derive income from their intellectual property. Accordingly, removal of such protections for artists can represent greater barriers to entry into their artistic field, and introduce new obstacles in the career development of artists from amateur to part-time to professional.⁴²

(D) Conclusions drawn from the studies of David Throsby *et al* and Peter DiCola

- 2.22 There is no evidence that artists perceive the inability to 'transform' existing artworks as a substantial barrier to the production of their art,⁴³ rather, as the Throsby and Zednick report and the DiCola report outlines, most artists identify lack of money to pursue their creative endeavours as the most significant barrier to their work.
- 22.23 Further, the changing business models presented by the internet themselves pose additional reasons why artists' ability to maintain control over their intellectual property ought to be supported. While the internet provides opportunities for artists in providing business models of direct dissemination of cultural production to an audience,⁴⁴ DiCola concludes that for independent artists with some degree of commercial success the internet is perceived as posing a threat rather than an opportunity.⁴⁵

(E) A Framing Principle for creation of new exceptions to infringement in s 51(xxxi) of the Constitution of Australia

Summary:

- 2.24 Arts Law submits that there is a further framing principle that is relevant to creation of new exceptions to infringement and the introduction of new compulsory licences. That framing principle is the possible application of s 51(xxxi) of Constitution and the

⁴⁰ PricewaterhouseCoopers, *The Economic Contribution of Australia's Copyright Industries 1996–97 to 2010–11*, prepared for the Australian Copyright Council (2012), 4.

⁴¹ Centre for International Economics, 'Creative Industries Economic Analysis: Final Report' prepared for the Enterprise Connect and the Creative Industries Innovation Centre (CIIC) (30 June 2009) 51.

⁴² Throsby and Zednick, *ibid* (2010), 9–11, see also Alper and Wassall, *ibid*.

⁴³ Arts Law Centre of Australia, Submission 171, [14.6] noted that "*Arts Law has been asked about music sampling by clients on relatively few occasions: 11 clients in the last two years have asked for advice on music sampling (Arts Law provides approximately 2,500 advices each year). During that same time period Arts Law received 6 inquiries about the fair dealing exception for parody or satire of existing works.*"

⁴⁴ See the later discussion in Section 9.2 of Social Media platforms and the use of copyright material.

⁴⁵ DiCola, *ibid* 42–3.

guarantee of property rights, which is framed by the question as whether there is acquisition of property on just terms.⁴⁶

- 2.25 The case law of the statutory protection of property rights confirms that it is a necessary element of the application of s 51(xxxi) that there is an acquisition of an interest that ‘proprietary in nature’ by the Commonwealth.⁴⁷
- 2.26 The case law on the constitutional protection of property rights establishes that purely statutory rights (for example, the rights granted under the *Copyright Act 1968*) are capable of being altered without engaging the guarantee in s 51(xxxi), where public interest values are involved that justify changes to the scope of property rights or changes that diminishes the ability of the rights holder to generate revenue from those rights. In particular, the *Plain Packaging* case focuses attention on the importance of public interest values in justifying legislative changes that diminish the scope of intellectual property rights or attenuating the economic value of those rights.
- 2.27 Arts Law submits that the guarantee in s 51(xxxi) applies to changes to the *Copyright Act 1968* that introduce copyright exceptions that provide an economic benefit to the Commonwealth (such as an fair use exception for ‘public administration’), or the introduction of free use exceptions that provides a benefit of the Commonwealth or changes to the statutory licensing schemes that reduce the cost of use of copyright material for Commonwealth government purposes. The effect of the constitution protection is that any acquisition of an interest that ‘proprietary in nature’ by the Commonwealth must be made on ‘just terms’ – unless there is a significant public interest value that justifies the acquisition without compensation.

Detail:

- 2.28 The decision of the High Court in *PPCA v Commonwealth*⁴⁸ rejected the claim by PPCA that the fixing of a ‘cap’ on compulsory licence fees in relation to copyright interests infringed s 51(xxxi) of the Constitution of Australia. The judgment of Crennan and Kiefel JJ comments that the creation of new exceptions to infringement of copyright can raise issues in respect of s 51(xxxi):

“[N]ew technology can give rise to both the creation of new copyrights in respect of new subject matter and the creation of new exceptions to infringement, which may be assessed differently in respect of s 51(xxxi). New exceptions to infringement can include, on the one hand, a new fair dealing or free use, covering private, domestic or incidental use of copyright material. On the other hand, compulsory licence schemes frequently provide for payment to copyright owners by users of copyright material for multiple uses, or use which might be said to occur on a commercial scale. That

⁴⁶ *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* [2012] HCA 8, 286 ALR 61. The HCA considered ss 109 & 152, *Copyright Act 1968* (Cth). *JT International SA v Commonwealth of Australia* [2012] HCA 43, (2012) 86 ALJR 1297 (the *Plain Packaging* case). The HCA reject the claim that the Tobacco Plain Packaging Act 2011 (Cth) infringed s 51(xxxi) of the Constitution of Australia.

⁴⁷ See the *Plain Packaging* case and the discussion by French CJ [41], Gummow J [144]-[154] and Hayne & Bell JJ [180]-[189], as to whether there is an acquisition of any benefit of a proprietary character.

⁴⁸ *PPCA v Commonwealth* [2012] HCA 8, 286 ALR 61. The HCA considered ss 109 & 152, *Copyright Act 1968* (Cth).

*distinction in relation to new exceptions to infringement may be relevant in respect of s 51(xxxi). The economic impact of any new exception to infringement on a subsisting statutory monopoly, and the public interest to be served by the creation of a new exception to infringement, may affect the question of whether any acquisition of property which the new exception effects will attract the guarantee in s 51(xxxi)."*⁴⁹

- 2.29 Crennan and Kiefel JJ comment that the considerations relevant to the constitutional issues include the nature of the public interest values, and in relation to the question whether what is acquired is 'proprietary in nature', the capacity of the copyright material to be the subject of licence between a copyright owner and any user.⁵⁰ Crennan and Kiefel JJ also note the role of equitable remuneration in the context of compulsory licence schemes.⁵¹

⁴⁹ Ibid. [110].

⁵⁰ Ibid, [114].

⁵¹ Ibid, [115].

3 Policy Context of the ALRC Inquiry

(A) Digital mechanisms to manage access to copyrighted works – the ‘hubs’ and ‘nodes’ approach

Summary:

- 3.1 The opportunities that the digital environment currently allows for mechanisms that give rights holders’ choices as to how to respond to the use of their work by users of digital technologies were referred to earlier in this submission.⁵² Examples are:
- 3.1.1 the YouTube ‘ID Content’ policy is described as being intended to allow copyright owners to ‘monetize, block or track’ uses that are not fair uses of copyright material;⁵³ or
- 3.1.2 the recent UK initiative to launch the Copyright Hub.⁵⁴
- 3.2 There are effective policy options available as an alternative to the enactment of an open-ended fair use exception for infringement to copyright-protected works which are evaluated in the DP79. Arts Law submits that when considering ‘private and domestic’ use of copyright material and ‘user generated content’ there are copyright management models that are an alternative to copyright exceptions, which copyright management models provide an appropriate balance between the interests of creators of cultural works and the ability of users to access copyright works.⁵⁵

Detail:

- 3.3 DP79 comments that in the digital economy, “*control of copying has ceased to be an effective proxy for control of use*”.⁵⁶ While digital technology results in rights holders ceasing to be able to effectively control copying therefore control use, however digital technologies enable new business models to track, measure and monetize use.
- 3.4 The digital environment has evolved to the point that there are enterprises at which web users congregate, including search engines and social networking platforms. These enterprises are key ‘hubs’ or ‘nodes’ or ‘platforms’ in the architecture of the internet at which:
- 3.4.1 rights holders can track, measure and monetize use of the copyright material; or
- 3.4.2 licencing arrangements can operate where the platform operator licences the use of work on behalf of users of the platform.
- 3.5 The search engines and social networking platforms can, and do, participate in managing compliance with the copyright system. The YouTube ‘ID Content’ policy is an

⁵² Paragraph [2.7]. See also Arts Law Centre of Australia, *Submission 171*, [12.8] & [12.9].

⁵³ See IP42 [101]. The YouTube description of the ‘ID Content’ policy is that “*YouTube has created an advanced set of copyright policies and content management tools to give rights holders control of their content. YouTube provides content management solutions for rights holders of all sizes across the world, and provides tools to cater to the specific needs of various rights owners.*” <http://www.youtube.com/t/contentid>

⁵⁴ <http://www.copyrighthub.co.uk/>

⁵⁵ Arts Law Centre of Australia, *Submission No 171*, 3–4. See the further discussion of ‘private and domestic use’ and ‘user generated content’ in section 9 of this submission.

⁵⁶ Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013) 272 [13.20].

example of a mechanism to track, measure and monetize use of the copyright material, which also allows the rights holder to demand the removal of infringing content.

- 3.6 While the scope of the safe harbour scheme for ISPs is outside the scope of the terms of reference of the ALRC, IP42 noted that *“expanding the permissible use of copyright materials online, may have consequences for the liability of internet platforms and telecommunications providers under copyright law”* and changes to the primary liability of online users for copyright infringement may impact on the *“legal incentives for carriage service providers to cooperate with copyright owners in deterring copyright infringement on their networks”*.⁵⁷
- 3.7 In relation to the operation of the safe harbour scheme for ISPs, Arts Law agrees with the submission of the Copyright Council of Australia to the Attorney-General's Department Consultation Paper, *Revising the Scope of the Copyright ‘Safe Harbour Scheme’* (21 November 2011), which stated *“[t]he rationale for the safe harbour scheme is to provide legal incentives for service providers to work cooperatively with copyright owners to deter copyright infringements that are not initiated or controlled by these service providers, but which occur through their systems or networks. The Council supports the safe harbour scheme and recognises that internet service providers are in the best position to take effective action to deter this kind of unauthorised use of copyright works.”*
- 3.8 Arts Law supports the maintenance of the principle that users are primary liable for infringement of copyright on internet services. The safe harbour scheme provides a pragmatic and reasonably efficient basis for rights holders and service providers to establish mechanisms to manage the unlicensed use of copyright material, such as through the development of codes of practice that operate between the rights holder and the service provider related to unlicensed use of copyright material by users of the service and guidelines as to appropriate use of copyright material that are available to users of the internet services.⁵⁸ However Arts Law notes that the voluntary negotiations have been conducted between entities representing rights holders and the telecommunication service providers without reaching any agreement as to how to manage copyright infringement on their networks.
- 3.9 The digital environment allows for mechanisms that give rights holders' choices as to how to respond to unlicensed use of their work. IP42 described an example of a mechanism that give the rights holders options; the YouTube 'ID Content' policy is described as being intended to allow copyright owners to 'monetize, block or track' uses that are not fair uses of copyright material.⁵⁹ Through such a policy, rights holders have choices as to whether to block the use of their copyrighted works through 'takedown notices'; or track the use (as the rights holders may decide that the reuse is beneficial in that it draws public attention to the copyrighted work, with the rights holders deriving

⁵⁷ IP42 [109].

⁵⁸ e.g. the code of best practices Patricia Aufderheide and Peter Jaszi (Centre for Social Media), which are intended for use by creators of online video material.

⁵⁹ The YouTube description of the 'ID Content' policy is that *“YouTube has created an advanced set of copyright policies and content management tools to give rights holders control of their content. YouTube provides content management solutions for rights holders of all sizes across the world, and provides tools to cater to the specific needs of various rights owners.”* <http://www.youtube.com/t/contentid>

value from the work from some other sources); or the copyright owner can engage with internet service providers and internet content hosts to monetize what is otherwise an unlicensed use of the work through accessing advertising revenue related to the user-generated content.

- 3.10 Mechanisms that give rights holders' choices as to how to respond to unlicensed use of their work allow artists to decide how to engage with the digital environment consistent with their rights as owners. There will be differences in the level of engagement with mechanisms that allow rights holders to 'monetize, block or track' uses to use 'take down' notice procedures as corporate rights holders have the resources and personnel to implement mechanisms to monitor the use of copyrighted material on the web. Whereas an individual artist may not want to allocate time to monitoring the web or engage with the rights management mechanisms. A broad fair use policy erodes those ownership rights and the value of copyright as an asset.

(B) Economic literature on the fair use/fair dealing debate

Summary:

- 3.11 The discussion of the policy context of the ALRC Inquiry in Chapter 3 of DP79 describes the importance of reform being directed to economic efficiency and to achieve a net social and economic benefit for Australia,⁶⁰ and that reform proposals be 'evidence based'.⁶¹
- 3.12 Arts Law submits that two key elements should drive the reform of the *Copyright Act 1968*:
- 3.12.1 analysis of objective evidence; copyright policy development should balance measurable economic objectives against social goals as well as balancing the impact of changes on rights holders against impacts on consumers and other interests; and
 - 3.12.2 the existence of the moral rights regime in Part IX, *Copyright Act 1968*, has the consequence that copyright policy development in Australia must take account of the non-economic factors (such as moral rights) as well as the measurable economic objectives in determining the social welfare consequences of reform proposals.⁶²

⁶⁰ DP79, [3.13] "*The Australian Consumer and Competition Commission (ACCC) submitted that the aim of copyright reform should be the 'pursuit of economic efficiency'*"²⁰ and IP Australia argued that the purpose of copyright law reform is to 'provide a net social and economic benefit for Australia'."

⁶¹ DP79, [3.14]. "A major concern of stakeholders is that reform should be 'evidence-based'. The ACCC considered it important that the ALRC takes into account available economic evidence when considering reform, as well as stakeholder views and economic rationales for reform."

⁶² I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 97.

"11.2 We do not propose any diminution of existing non-economic IP rights, as we take the view that rights granted for non-economic purpose, such as the moral rights of creators to prevent usage of their work in unacceptable contexts, are compatible with the economic goals upon which the Review was asked to focus."

- 3.13 A further problem in the copyright policy development in Australia is the absence of economic analysis of the operation of the organisations that manage the statutory licensing schemes. This lacuna is exacerbated by stakeholders that propose the repeal of statutory licensing provisions, asserting there are high transaction costs and other inefficiencies in the operation of the statutory licensing schemes. However those stakeholders are unable to provide any analysis that quantifies those high transaction costs or other inefficiencies; neither do those stakeholders provide any analysis that quantifies the cost efficiencies of alternative proposals to manage access to copyrighted material by the educational and government sectors and by libraries and archives.

Detail:

- 3.14 The Arts Law submission in response to IP42 identified three obstacles to using evidence on the economic impacts of changes to intellectual property regimes:

“absence of reliable data from which conclusions can be drawn to guide intellectual property policy; evidence relevant to policy questions involving new technologies or new markets, such as digital communications, is problematic as the characteristics of these markets are not well understood or measured; and the data that is available is held by firms operating these new technologies and the data, when it enters the public domain, cannot be independently verified.”⁶³

- 3.15 Arts Law argues that only limited conclusions can be reasonably drawn from the economic literature that is relied upon in DP79. While economic efficiencies and social welfare benefits have been asserted as likely to flow from the adoption of a fair use exception, the economic research said to support that conclusion is either inconclusive or flawed as discussed in more detail later in this section.⁶⁴
- 3.16 DP79 notes⁶⁵ that a key outcome of the Hargreaves Review (UK) was the establishment of the CREATE Centre⁶⁶ that is designed to fund an interdisciplinary team of academics (law, cultural economics, management, computer science, sociology, psychology, ethnography and critical studies) that is intended to investigate issues relating to copyright and new business models in the creative economy.
- 3.17 The work of the CREATE Centre and of the research department of the Intellectual Property Office (IPO)⁶⁷ are IP reform models that could be adopted in Australia in order to provide evidence based reform proposals.
- 3.18 It is significant that the first of the recommendations of the Hargreaves Report is directed to ensuring that reform of the IP System is supported by high quality evidence:

“1. Evidence. Government should ensure that development of the IP System is driven as far as possible by objective evidence. Policy should balance

⁶³ Arts Law Centre of Australia, *Submission 171*, [3.19], citing I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

⁶⁴ Sections 3(E), (F) & (G).

⁶⁵ DP79, [3.16].

⁶⁶ <http://www.create.ac.uk>

⁶⁷ <http://www.ipo.gov.uk/pro-ipresearch.htm>

*measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights.*⁶⁸

- 3.19 The Merrill Report (2013),⁶⁹ which is discussed later, also describes a best practice approach to carrying out research and looks to borrow from the experience of patents policy research.
- 3.20 Arts Law argues that high-quality empirical research is the objective evidence that is necessary to inform the development of copyright policy. Indeed the Hargreaves Report warns of reform inquiries being presented with what is described as ‘lobbyonomics’ rather than research conclusions that can be independently verified.⁷⁰ The response of the Intellectual Property Office (IPO), to the Hargreaves Report recommendation was the publication of ‘Good Evidence for Policy’.⁷¹ This document sets out guidance that describes the standards of evidence that is appropriate for use in the development of policy and is aimed at reports and research carried out in order to inform policy-makers. The guidance as to the presentation of evidence includes clear statements of assumptions and estimations; and the presentation of economic analysis or conclusions that are capable of being verifiable by a third party.

(C) Copyright in the Digital Age – Building Evidence for Policy by Merrill and Raduchel 2013 (the “Merrill Report”)⁷²

- 3.21 Arts Law submits that reform of copyright policy should be undertaken through evidence based processes that meets the standards set out in the Merrill Report, which suggests that research on copyright in the digital age must focus on changes to the incentive calculus for various actors in the copyright system, the impact of the costs of voluntary copyright transactions, the new enforcement challenges and the optimal balance between copyright protection and exceptions.
- 3.22 The Merrill Report argues for the need to improve the availability of data from the main content media on the costs of production, marketing and distribution, product prices and quantities sold, ancillary sources of revenue for creators, consumption behaviour, patterns of access, licensing terms and costs and efficacy of anti-piracy technologies and

⁶⁸ I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 8.

⁶⁹ *Copyright in the Digital Era: Building Evidence for Policy* (2013) Stephen A. Merrill and William J. Raduchel, Editors; Committee on the Impact of Copyright Policy on Innovation in the Digital Era; Board on Science, Technology, and Economic Policy; Policy and Global Affairs; National Research Council http://www.nap.edu/catalog.php?record_id=14686

⁷⁰ Ibid, 18.

⁷¹ *Good Evidence for Policy* (2011) Intellectual Property Office (IPO) <http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf>

⁷² *Copyright in the Digital Era: Building Evidence for Policy* (2013) Stephen A. Merrill and William J. Raduchel, Editors; Committee on the Impact of Copyright Policy on Innovation in the Digital Era; Board on Science, Technology, and Economic Policy; Policy and Global Affairs; National Research Council http://www.nap.edu/catalog.php?record_id=14686

legal enforcement. Currently data is gathered by or on behalf of stakeholders without opportunities for critical review.

- 3.23 The Merrill Report suggests that the studies that have been undertaken are inconclusive as to how infringing copying and distribution affects social welfare or what alternative copyright models would redress the problem without excessive unintended consequences. The Merrill Report seeks to use the example of the patent system in which evidence-based research has guided legislative reforms.
- 3.24 The Merrill Report suggests that research on exceptions should focus on how they affect copyright holders as well as the emergence of innovative technologies. There should also be research on how exceptions affect individual welfare, autonomy and freedom of expression.
- 3.25 The flaws in the economic reasoning in the ALRC Report arise because of a failure to engage in the empirical collection of data and objective evidence in the manner recommended by the Merrill Report.

(D) The literature that provides an economic analysis of adopting a fair use exception

Summary:

- 3.26 Arts Law submits that copyright policy development requires research on the potential for innovation and growth driven by copyright and other IP so that the reform of IP legislation proceeds on an evidence-based approach so as to effectively balance the interests of existing rights holders, potential new entrants to IP markets and consumers.
- 3.27 The economic analysis relied upon by the ALRC is limited in scope, and does not meet the 'best practice' for policy development described in the Hargreaves Report and subsequently developed by IPO (UK).⁷³
- 3.28 Arts Law makes the following comments on the studies as to the economic benefits of fair use in copyright law, which were provided to the ALRC Inquiry:
 - 3.28.1 There is an absence of neutral research-based evidence which does not further the interests of the commissioning entity and thus it is not possible to say either way which model (fair dealing or fair use) provides the optimum social welfare benefits for Australia;
 - 3.28.2 The research-based evidence reviewed so far does not examine the effect on copyright holders and consider individual welfare, autonomy and freedom of expression; and
 - 3.28.3 Research seeking to estimate the benefits or size of the fair use industry do not add to the discussion as they do not explore alternatives or consider equity or efficiency.

⁷³ *Good Evidence for Policy* (2011) Intellectual Property Office (IPO) <http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf>

Detail:

- 3.29 DP79 refers to the “[c]ommissioned research on the economic benefits of fair use in copyright law, using Singapore as a case study, found copyright industries to be ‘relatively unaffected’ by the introduction of fair use although significant stimulation of growth in private copying technology occurred.” (emphasis added)⁷⁴
- 3.30 Contrary to the assertion in DP79, Arts Law would argue that Ghafele and Gibert, the authors of the Singapore study, do not assert that that their study actually ‘proves’ that the change to fair use caused the increase in business activity in the digital sector in Singapore. Ghafele and Gibert set out in the background section and in the section headed ‘Limitations’, their comments as to the limitations of the ‘counterfactual impact methodology’ that the authors apply. In particular the authors note:
- “While this method cannot be used to attribute a causal relationship, DiD can establish correlation between a policy and a given outcome.”*⁷⁵
- 3.31 This statement is a significant as the authors acknowledge that it is not appropriate to find as a conclusion that there is a causal inference, that the change to fair use in the *Copyright Act 1987* (Singapore) caused the increase in business activity in the digital sector in Singapore. That is, Ghafele and Gibert acknowledge that ‘correlation is not causation’;⁷⁶ or “*just because two things occur together does not mean that one caused the other, even if it seems to make sense.*”⁷⁷
- 3.32 In relation to this study the authors go no further than concluding that there is a correlation between the timing of the introduction of the fair use doctrine in the *Copyright Act 1987* (Singapore) and the apparent increase in performance of the ‘elected industry groups in Singapore’. The study does not address the question as to whether the changes in performance of the ‘elected industry groups in Singapore’ can only be the result of the introduction of the fair use exception, rather than from other possible causes (e.g. increase in investment in those ‘elected industry groups’ or changes the use of technology by consumers and other possible causes).⁷⁸
- 3.33 Arts Law provides the following commentary on the LE Report and the Baker Report and the further commentary on the Ghafele and Gibert (Oxford) study.

⁷⁴ DP79, [3.26] citing R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), prepared for Google.

⁷⁵ Ibid, page 15.

⁷⁶ The statement that ‘correlation is not causation’ (or variations) has many authors. A seminal discussion of this problem of proof is provided by Spearman C. *The proof and measurement of association between two things*. Am J Psychol 1904; 15:2-101; Republished in the Int J Epidemiol 2010;39:1137-50.
http://ije.oxfordjournals.org/content/39/5/1137.full?ijkey=11850f45506a31f54f5ae69973ac0d7d67cc15b0&keytype=tf_ipsecsha

⁷⁷ http://www.stats.org/faq_vs.htm

⁷⁸ In relation to proof Spiegelman comments “[w]ith the recent surge of interest in epidemiology and statistics in causal inference, the adage ‘correlation is not causation’ has been repeated so often that another salient feature of the relationship of correlation to causation seems virtually to have been forgotten: that correlation is a necessary (but not sufficient) condition for causation.” Spiegelman D. *Commentary: Some remarks on the seminal 1904 paper of Charles Spearman “The Proof and Measurement of Association Between Two Things”*. Int J Epidemiol 2010;39:1156-59.
http://ije.oxfordjournals.org/content/39/5/1156.full?ijkey=de1cbc9f5568cfd0d13336dcfee59c19505ba8cd&keytype=tf_ipsecsha

(E) Critique of: *Excepting the Future – internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour exceptions* by Houghton and Gruen (Lateral Economics (“LE”)) commissioned by the Australian Digital Alliance (the “ADA”) (August 2012) (the “LE Report”)⁷⁹

- 3.34 The LE Report’s headline finding that a broad fair use exception could over time add \$600 million to the Australian economy is not supported by evidence but is the result of a simulation based on an underlying assumption of 1% growth as a direct result of more flexible fair use exceptions. This assumption has no rational basis and does not consider arguments that more flexible fair use exceptions might in fact have a negative economic impact.
- 3.35 The LE Report estimates the value of the online industry and suggests the internet intermediaries are at risk under Australian law since dealing with digital copies involves copying whereas dealing with physical copies does not necessarily require copying of the physical copy. The LE Report compares Australian law only with the US and Singapore which have adopted a broad fair use policy and fails to consider other significant economies such as the UK which have a different approach.
- 3.36 The LE Report again estimates the transaction costs of internet intermediaries seeking permission from rights owners but fails to recognise economies of scale in reducing the time needed to seek permission since it assumes that the same amount of time would be needed to create what would become standard templates.
- 3.37 The LE Report suggests that a broad fair use would reduce the risk of litigation based on the example in the US where apparently there are few cases under fair use. This is not supported and ignores the cases of copyright infringement brought in the US. This also ignores the factors which influence the occurrence of litigation which does not depend solely on how broadly drafted a statutory provision is written.
- 3.38 The LE Report suggests investment is suffering from the perception of greater risk and that this would be reduced if there was a broad fair use. This ignores the argument that investors in content creation will be put off by a reduction in the value of their investment if there are broader exceptions.
- 3.39 In considering the economic rationale for change the LE Report considers the transaction costs of introducing the change and concludes that since the negligible costs give rise to benefits it should be supported. However this conclusion is not supported by an analysis of the potential costs and benefits.

⁷⁹ Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe Harbour Provisions* (2012).

(F) Critique of: *Estimating the economic effects of fair use and other copyright exceptions: a critique of recent research in Australia, US, Europe and Singapore* by Baker (Centre for Law and Economics Ltd) funded by Village Roadshow (26 November 2012) (the “Baker Report”)⁸⁰

- 3.40 The Baker Report points out the flaws of recent economic reports, such as the LE Report and criticises those reports for ignoring other factors commonly considered in economic assessments such as efficiency and equity.
- 3.41 The Baker Report points out that the LE report:
 - 3.41.1 when claiming \$600 million added value to the Australian economy, does not clarify which areas of fair use not currently covered by the statutory exceptions would produce these gains; and
 - 3.41.2 provides no basis for a 1% increase in value as opposed to 1% decrease. The figure given is arbitrary and the LE analysis is flawed since it does not recognise diminution in the value of copyright to the owner.
- 3.42 The Baker Report suggests economic analyses of a broad fair use change would lead to lower prices and lower demand with more works reclassified as free without any demonstrated public benefit (the current exemptions are confined to those with a public benefit). Lower expected revenues would also lead to lower investment in the arts and creative industries.
- 3.43 The Baker Report also argues that:
 - 3.43.1 making content free will provide benefits in the short term but the dynamic effect would be to reduce output;
 - 3.43.2 the broad fair use is more likely to lead to uncertainty with greater costs and risk on right holders without identifiable benefits; and
 - 3.43.3 The LE report ignores the existing ability of copyright to create incentives for the distribution of works.
- 3.44 The Baker Report concludes that the LE Report erroneously characterises industries which depend on output as part of an exceptions industry when in fact these are industries which rely on copyright works. Whilst these industries might benefit in the short term from free content they would suffer from the lower creative output in the long term.
- 3.45 In summary, the LE Report does not account for the ‘real’ cost of moving to a broad fair use model because it does not take into account the cost impact either of less creative content generation as a result or of reduced revenue to rights holders. Further any increased returns to publishers and intermediaries are erroneously treated as a net gain when in fact it is a redistribution of wealth away from creators to users. If such a policy change is merely redistribution then the cost of effecting that should be justifiable in equitable terms and the LE Report fails to undertake any such analysis.

⁸⁰ G Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore* (2012), Centre for Law and Economics Ltd.

(G) Critique of: *The Economic Value of Fair Use in Copyright Law – Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore* by Ghafele and Gilbert (Oxfirst) commissioned by Google (October 2012) (the “Oxfirst Report”)⁸¹

- 3.46 The Oxfirst Report looks at economic data taken from Singapore before and after the introduction of broad fair use legislation in 2005. The growth in private copying technology industries in Singapore after 2005 is used as evidence in support of the economic benefits of the change. However, the Oxfirst Report did not look at the impact on creators and did not discuss other factors that may have contributed to the improved performance of private copying technology industries such as labour costs, manufacturing costs and consumer preferences.
- 3.47 The Oxfirst Report does not consider the possibility that the growth would have occurred in any event as the technology involved became more popular and more accessible. It does not consider the performance of similar industries in other jurisdictions over the same period which retained the more defined fair use exceptions such as Australia or the UK.
- 3.48 The Singaporean fair use law differs from the US law in adding a test of ‘the possibility of obtaining the work within a reasonable time at an ordinary commercial price.’ The reason suggested for this addition to the US test is that it recognises a principle developed in US case law in allowing for the possibility of obtaining a licence. Seeking to adopt the US fair use system in Australia may be problematic since in the US the courts have developed the fair use doctrine in accordance with US market conditions, which may have different significance in Australia.
- 3.49 The Oxfirst Report fails to analyse the importance of copyright in facilitating the creation of works in the first place and the possibility that striking a balance too much in favour of users may create barriers to the creation of works in the future.

(H) Studies of § 107 (17 U.S.C.) and the flaws in the fair use doctrine

Summary:

- 3.50 The very flexibility of the fair use doctrine is its inherent flaw as a legal and policy tool. Such flexibility comes at a cost - the lack of clarity, certainty and predictability in the application of the four fairness factors. David Nimmer concludes that it is virtually impossible to predict any outcome based on the fairness factors, and it is not the Courts’ fault so much as that of the legislature – as the fair use doctrine set out in § 107 (17 U.S.C.) is inherently uncertain.⁸² These consequences call into question whether it is an appropriate regulatory tool for Australia.

⁸¹ R Ghafele and B Gilbert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012) (Oxfirst).

⁸² Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use* (2006) 66 Law & Contemp Probs 263 at p 281.

- 3.51 DP79 raises a policy question in asking “*whether the risks of uncertainty documented by stakeholders are outweighed by the advantages of the reforms proposed in this Discussion Paper albeit that change requires some adaptation:*

The broader question implicated by these issues—whether fair use is a sound regulatory tool—is one that should certainly engage local policy makers in their deliberations as to the virtues of fair use.”⁸³

Arts Law would respond to this question by reiterating that, as recommended in the Hargreaves Report,⁸⁴ reform of the IP System should be evidence based and there is, as yet, no evidence that fair use is a regulatory tool capable of delivering the economic benefits promised.

- 3.52 The work of Professor Barton Beebe, Professor Pamela Samuelson and Matthew Sag is discussed in DP79⁸⁵ as providing studies of US fair use case law suggesting “*that fair use in the US is not as uncertain as some of its critics have argued*”.⁸⁶ These studies do not address an important policy factor – the cost of fair use litigation and the consequences of those costs for asserting that fair use is a sound regulatory tool.
- 3.53 Well known US academic and author of *Nimmer on Copyright*, a leading American copyright text, does examine that question. He comments that the uncertainty of the fair use doctrine naturally leads to long and costly litigation – with decisions often being overturned at each level. This tends to have a ‘chilling effect’, with users shying away from engaging in plainly fair uses for fear of creating a dispute.
- 3.54 Nimmer also comments that many applications of the fair use factors are conclusory:

‘[T]hey appear to label a use “not transformative” as a shorthand for “not fair,” and correlatively “transformative” for “fair.” Such a strategy empties the term of meaning — for the “transformative” moniker to guide, rather than follow, the fair use analysis, it must amount to more than a conclusory label. One should perform the transformative inquiry on its own merits, bearing in mind that just because a given use qualifies as “transformative” does not even mean that defendants prevail under the first factor, much less that they prevail altogether on the fair use defense.’⁸⁷

- 3.55 David Nimmer directs attention to the fair use doctrine’s lack of clarity, certainty and predictability. In “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, Nimmer examines 60 fair use cases where judges analyse the four fair use factors. Nimmer catalogues the outcome of each factor (fair or unfair) as well as the final outcome. The closest Nimmer comes to finding a pattern is, very broadly, that when at least three of the four factors point one way, the final outcome usually follows. However, Nimmer notes that:

⁸³ DP79, [3.88], citing G Austin, *The Two Faces of Fair Use* (25) New Zealand Universities Law Review 285, 314.

⁸⁴ See Section 3, [3.14] – [3.16] of this submission.

⁸⁵ DP79, [4.124] – [4.127].

⁸⁶ DP79, [4.123].

⁸⁷ Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][1] [b], at 13-168 - 13-169 (2012).

“Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.”⁸⁸

- 3.56 Moreover, Nimmer comments that there are many instances where the outcome doesn’t even align with the factors – some cases have as much as all four factors marked unfair, whilst the final outcome is fair (and vice versa). Nimmer explicitly recognizes that this uncertainty and subjectivity is not the judges’ fault. Rather, it is the legislation itself – the list of factors – that does not provide enough guidance:

“Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions. The courts are not to blame for that state of affairs. Rather, by injecting such a high degree of subjectivity and imprecision into each factor and into their cumulative application, as canvassed above, Congress essentially foreordained that result in the 1976 Act.”⁸⁹

- 3.57 Hirtle, Hudson & Kenyon in ‘Copyright & Cultural Institutions’⁹⁰ describe the benefits provided by the fair use doctrine as flowing from it being an open-ended test that *“can function as a flexible component of copyright law, responding to changes in technology or institutional and creative norms”*.⁹¹ Those scholars also comment that the doctrine *“can also be difficult to understand and apply.”*

- 3.58 Hirtle, Hudson & Kenyon describe the disadvantages of the fair use doctrine as follows:

“[T]his very flexibility can make it difficult to predict how a court will apply the doctrine in any particular case. Commentators try to extrapolate from the specifics of a particular case to other cases, but the truth is that each fair-use case stands on its own specific facts and thus its own merits. That is, although it is possible to analyse existing case law and industry customs, ultimately, each fair-use case is judged on a case-by-case basis. Because the fair use of any particular case is determined by a judge applying an equitable rule of reason, the result is that only five individuals in the United States can say with certainty whether any particular use is fair: a majority of the Supreme Court!”⁹²

⁸⁸ Nimmer, *“Fairest of Them All” and Other Fairy Tales of Fair Use* (2006) 66 Law & Contemp Probs 263 at p 281.

⁸⁹ Ibid, p 281.

⁹⁰ Peter B Hirtle, Emily Hudson & Andrew T Kenyon, *Copyright & Cultural Institutions*, Cornell University Library (2009).

⁹¹ Ibid. 89.

⁹² Ibid.

(I) The problem of determining what is a ‘commercial’ use that impacts on the ‘market’ for the work

- 3.59 Some of the countries that consider adopting the fair use test that is applied under § 107 (17 U.S.C.) have identified problems with the fairness element of ‘whether such use is of a commercial nature’.
- 3.60 Israel and Ireland are two jurisdictions have adopted or are considering the adoption of fair use exception. The *Copyright Act 2007* of Israel adopted a form of fair use exception that did not include the fairness element of ‘whether such use is of a commercial nature’. The Copyright Review Committee of Ireland issued a Consultation Paper in 2012 ‘Copyright and Innovation’,⁹³ which considered a further variation of the fair use doctrine that is applied under the *Copyright Act 1976* (17 U.S.C.) or proposed in DP79.
- 3.61 In Arts Law’s view, the choice of Israel not to adopt the broad US style fair use doctrine and the proposal of the Copyright Review Committee (CRC) of Ireland to consider a further variation of the fair use doctrine show the problems inherent in the fair use doctrine applied under § 107 (17 U.S.C.).
- 3.62 While Section 19 of the *Copyright Act 2007* of Israel applies a fair use exception it avoids the use of the element of ‘whether such use is of a commercial nature’, which is applied under § 107 (17 U.S.C.). Pessach (2010)⁹⁴ argues that this enables the Israeli legislature to avoid some of the hurdles that the American courts had to confront in relation to the element of commercial use.⁹⁵ Pessach comments that in a digitised environment, the scale and scope of so called ‘private’ unauthorised use of copyrighted works is no less threatening to the economic interests of copyright owners than overtly commercial activities, and at times even more so. For example, in *A & M Records Inc v Napster Inc*,⁹⁶ the court stated that private copying of digitised sound recordings by end-users is equivalent to commercial use as “repeated and exploitative unauthorised copies of copyrighted works were made to save the expense of purchasing authorised copies”.⁹⁷ In other words, arguing that fair use does not adversely affect copyright owners’ commercial interests because it largely is directed at facilitating ‘private’ use, fundamentally misunderstands what is the relevant market and the potential impact on the legitimate interests of the rights holders.
- 3.63 Pessach describes a second change to the US fair use doctrine made by the Israeli legislature in that s. 19 of the Israeli *Copyright Act* authorises the Minister of Justice to make regulations prescribing conditions under which a use shall be deemed as fair use. Although statutory regulations could provide certainty and clarity for users of the fair use defence, it could operate conversely in that the minimum safe harbours ceiling

⁹³ Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012), 121-123.

⁹⁴ G Pessach, *The New Israeli Copyright Act: A Case-Study in Reverse Comparative Law* (2010) 41 *International Review of Intellectual Property and Competition Law* 187, 190.

⁹⁵ *Ibid*, 191-192.

⁹⁶ *A & M Records Inc v Napster Inc*, 239 F.3d 1004 (9th Cir. 2001)

⁹⁷ *Ibid*. 1014.

introduced by the provision could become a de-facto ceiling for circumstances that would otherwise find shelter under Section 19.⁹⁸

- 3.64 Pessach argues that one implication of Section 19 is that the Minister of Justice can respond to instances where courts have taken an over-protective, narrow approach in interpreting and applying fair use defense. Pessach highlights a concern about the use of regulations to manage the scope of the fair use exceptions, namely that the drafting of the regulations will be stimulated by disproportionate lobbying by private interest groups to the detriment of copyright owners.⁹⁹
- 3.65 Nimmer also proposes a non-judicial solution to the problems he describes as being inherent in the fair use doctrine as applied under § 107 (17 U.S.C.). *A Modest Proposal to Streamline Fair Use Determinations*,¹⁰⁰ sets out Nimmer's approach to improve the fair use doctrine as applied under § 107 (17 U.S.C.). The solution, as proposed by Nimmer is to introduce a committee who would, at the request of a party, issue an opinion on whether a specific use is fair or not. The process is intended to be expedient and done in a relatively low-cost manner. The committee's decision would not be binding on the parties or a possible future judge – parties would still be free to litigate the matter. The committee's decision would only influence the judicial award of damages (as a potential mitigating factor).
- 3.66 Arts Law does not support Nimmer's proposal to remedy the structural problem in the fair use doctrine as it seems only to add an administrative layer to the already long and costly litigation process surrounding a determination of fair use. It is a band-aid solution in a jurisdiction already lumbered with fair use where it is politically unattractive to dismantle the existing system and does not *solve* the problem of uncertainty and ensuing expense that is inherent in the fair use doctrine. In countries such as Australia that attempt to provide low cost access to justice, copyright law can still provide precise rules, maintain a high level of certainty, and as a consequence, lower costs to both creators and users of copyright.
- 3.67 The CRC of Ireland propose an open-ended fair use exception that leaves the court to determine which of a list of factors are relevant to the fair use determination.¹⁰¹ These factors are discussed in **Annexure A**. The proposed Irish fair use exception then attempts to address the uncertainty as to the potential impact on the market for the work in three ways, which Arts Law submits compounds the complexity of implementing such a fair use provision: s. 48A (b) provides a commercial/non-commercial use test;¹⁰² with s. 48A (e) being direct to the impact on the normal exploitation of the work;¹⁰³ then s. 48A (f) brings in the qualification of whether the

⁹⁸ Pessach, *ibid*, 190.

⁹⁹ *Ibid*, 191.

¹⁰⁰ Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, (2006-07) 24:11 Cardozo Arts & Entertainment 11 at p 16.

¹⁰¹ Proposed as s. 48A *Copyright and Related Rights Act 2000* (Ireland).

¹⁰² S. 48A(b) 'the purpose and character of the use, including whether such use is of a commercial or non-commercial nature'.

¹⁰³ S. 48A (e) 'the impact of the use upon the normal exploitation of the copyrighted work, such as its age, value and potential market'.

works can be licensed ‘within a reasonable time at an ordinary commercial price’.¹⁰⁴ The assessment of the factors in s. 48A sub-ss. (b), (e) and (f) may variously favour the author/owner of the rights or the person asserting the fair use; so that the analysis can produce conflicting conclusions. Section 48A (g) compounds the uncertainty in the application of the fair use exception by allowing the court to consider “*whether the legitimate interests of the owner of the rights in the copyrighted work are unreasonably prejudiced by the use*”.

(J) The problem of reconciling the potential conflict between an open ended fair use exception and the moral rights of authors in the Copyright Act 2007 (Israel) and the Report of the CRC of Ireland)

Summary:

- 3.68 Arts Law argues that neither the *Copyright Act 1981* (Israel) nor the proposed 48A of CRRRA (Ireland) adequately reconciles the potential conflict between the moral rights regime and the application of the fair use doctrine.
- 3.69 Arts Law submits that both the economic rights (the exclusive rights of creators) and non-economic rights (which include the moral rights of creators) are also significant matters when applying the ‘3-step test’ set out in Article 9(2) of the *Berne Convention*,¹⁰⁵ which is the basis on which proposed exceptions to the reproduction of copyright works are to be reviewed.

Detail:

- 3.70 Moral rights were originally introduced into Israeli copyright law as section 4A into the *Copyright Act 1981* (Israel). Section 4A was a direct transposition of Article 6bis of the *Berne Convention*. Section 50 of the 2007 Act introduces a new limitation to the author’s moral rights by acknowledging a safe harbour from legal liability for an infringement of the author’s moral right of integrity. Israeli law does not introduce safe harbour in regards to the right to attribution, though Pessach notes that Israeli courts have since confirmed that attribution of authorship is an element in the fair use analysis.¹⁰⁶
- 3.71 Section 50 of the *Copyright Act 2007* (Israeli) acknowledges a safe-harbor from legal liability for an infringement of the author’s moral right of integrity when the action is ‘reasonable in the circumstances of the case’. However the criticism of a ‘reasonableness’ test is that it give no guidance as to the factors that should be taken into account in the assessment of what is reasonable. The concept of a ‘reasonable’

¹⁰⁴ S. 48A (f) ‘the possibility of obtaining the copyrighted work within a reasonable time at an ordinary commercial price’.

¹⁰⁵ Article 9 of the *Berne Convention* modified by Article 13 of the *TRIPs Agreement*, Article 10 of the *WIPO Copyright Treaty* and the *Australia-United States Free Trade Agreement*.

¹⁰⁶ Pessach discusses the how some Israeli courts have determined that attribution is a firm condition, while others view it as another consideration in the application of the fair use test.

person is a legal fiction and does not provide any assistance in reconciling the conflict between the moral rights of the author and the asserting of users of copyright that a use of copyright work is 'fair'.

- 3.72 The CRC of Ireland fair use exception proposal that would become s 48A (g) of the *Copyright and Related Rights Act (2000)* (CRRRA) of Ireland, refers to the "*legitimate interests of the owner of the rights*".¹⁰⁷ However s 48A does not address the complication of moral rights regime in Chapter 7 CRRRA are the personal rights of the author that are separate to the economic rights related to ownership of the rights; indeed the author of the work may not be the owner of the rights.
- 3.73 Section 48A (h) addresses the moral right of attribution by allowing the court to consider "*whether the use is accompanied by a sufficient acknowledgement*";¹⁰⁸ however the proposed section does not address the potential conflict between the fair use exception and the moral right of the author to prevent derogatory treatment of the work.

(K) The advantages provided by a fair dealing exception in the *Copyright Modernization Act 2012* (Canada)

Summary:

- 3.74 Arts Law argues that the Canadian experience in modernising their copyright legislation shows a pathway using specific fair dealing exceptions to meet consumer exceptions in the digital environment and also the meet the challenge of innovation and competition in the digital economy.
- 3.75 Arts Law submits that the Canadian experience established that specific fair dealing exceptions that are revised to meet the challenges of the digital environment, and the courts in interpreting those specific fair dealing exceptions, can fulfil the task of balancing the differing interests of all participants in the digital economy.

Detail:

- 3.76 Canada declined to adopt a fair use exception in the *Copyright Modernization Act 2012* (Bill C-11), for reasons that are discussed below. The Canadian Parliament passed Bill C-11¹⁰⁹ in November 2012 to modernize the Canadian copyright law¹¹⁰ in light of technological advances and increased recognition of user rights.¹¹¹ Bill C-11 extended the list of fair dealing purposes and exceptions to copyright infringement.¹¹² It did not introduce fair use exception. In fact, neither the Canadian Parliament nor the Supreme

¹⁰⁷ S. 48A (g) 'whether the legitimate interests of the owner of the rights in the copyrighted work are unreasonably prejudiced by the use'.

¹⁰⁸ S. 48A (h) 'whether the use is accompanied by a sufficient acknowledgement'.

¹⁰⁹ Bill C-11.

¹¹⁰ RSC, 1985, c C-42.

¹¹¹ [Balanced Copyright](#) ; [Legislative Summary of C-11](#).

¹¹² Bill C-11, art 29 and following.

Court of Canada (SCC) has ever seriously considered moving away from the clear and effective doctrine of fair dealing.

- 3.77 Bill C-11 added education, parody and satire to the list of fair dealing purposes at article 29, which already comprises research, private study, criticism and review. In introducing these additional public interest-based exceptions, Parliament approved the fairness test established by the SCC in *CCH v Law Society of Upper Canada* ('CCH case').¹¹³ The unanimous Court in the *CCH* case delivered a landmark decision by recognising fair dealing as a user right instead of a mere defence to copyright infringement. It gave fair dealing purposes a "*large and liberal interpretation*."¹¹⁴
- 3.78 The SCC test to determine fair dealing is in two steps. First, the Court must consider whether a dealing is for one of the purposes listed at article 29. This confines the fair dealing exception to activities which fulfil a certain public interest. Second, the Court considers six fairness factors: the purpose, character and amount of the dealing, any alternatives to the dealing, the nature of the copyrighted work and the effect of the dealing on the work. This second step draws upon the factors of the United States' fair use doctrine,¹¹⁵ as well as the English case *Hubbard v Vosper* in which Lord Denning explains how fair dealing must always depend on the facts.¹¹⁶ The Court draws upon these sources to create its own unique and effective analytical framework.
- 3.79 Two SCC decisions have discussed fair dealing since the *CCH* case. These decisions confirm two things: fair dealing purposes are to be interpreted broadly; American copyright law has no place in Canada. Both judgements were released as part of a series of copyright cases in July 2012 – Bill C-11 had received royal assent by then but had not yet been implemented.
- 3.80 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*¹¹⁷ dealt with teachers photocopying short excerpts from copyrighted material in order to distribute them to their students. The SCC split five to four. The majority found these photocopies to be a fair dealing and reasoned that purpose should be assessed from the perspective of the end user, in this case the students. Teachers shared a "symbiotic" purpose with their students, that of facilitating research and private study – a concept that includes group environments like a classroom. The dissent, voiced by Rothstein J, argued that the purpose of a dealing should be viewed from the perspective of the person performing the act – in this case, the teachers, who were not engaging in research or private study but instead simply doing their job.
- 3.81 *Society of Composers, Authors and Music Publishers of Canada [SOCAN] v Bell Canada*¹¹⁸ dealt with online music providers offering short song previews to potential buyers. The SCC found this to be fair dealing for the purpose of the buyers' research, regardless of the provider's commercial purpose. The SCC confirmed that fair dealing purposes must

¹¹³ Legislative Summary, *ibid*, at p 3; *CCH Canada v Law Society of Upper Canada*, SCC 13, [2004] SCR 399, [2004] FSR 871 ('CCH case') at para 47-60.

¹¹⁴ See also D'Agostino, *Healing Fair Dealing?* (2008) 53 McGill LJ 309.

¹¹⁵ *CCH* case, at para 53.

¹¹⁶ *CCH* case at para 52, citing *Hubbard* [1972] 1 All ER 1023 (CA) at p 1027.

¹¹⁷ 2012 SCC 37 [*Alberta (Education)*].

¹¹⁸ 2012 SCC 36 [*SOCAN*].

be given a large and liberal interpretation. Research and private study may be commercial and need not have a creative purpose. The SCC states:

“In mandating a generous interpretation of the fair dealing purposes, including ‘research’, the Court in CCH created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair.”¹¹⁹

- 3.82 Most importantly, the SCC in *SOCAN* makes it clear that American copyright doctrines are not to be transposed into Canadian law because “*fundamental differences*” separate the two:

“This Court has previously cautioned against the automatic portability of American copyright concepts into the Canadian arena, given the ‘fundamental differences’ in the respective legislative schemes: Compo Co. v. Blue Crest Music Inc., [1980] 1 S.C.R. 357, at p. 367. This caution has resonance in the fair dealing context.”¹²⁰

- 3.83 Both official sources of legislative commentary – the Legislative Summary of Bill C-11 and the Industry Canada webpage dedicated to Bill C-11¹²¹ – do not discuss the U.S. fair use model. The parliamentary discussion itself spent little to no time on this topic.¹²² The main issues revolved around the education exception, consumer rights, and the rules surrounding Internet and TPMS.¹²³ Even Bill C-11’s predecessors (C-60, C-61, C-32)¹²⁴ do not propose the fair use doctrine as an alternative to extending the fair dealing provisions.
- 3.84 Nevertheless, a submission by prominent practitioners Barry Sookman and Dan Glover on behalf of over fifty established Canadian arts organizations focused solely on arguing against the adoption of the fair use in doctrine in Canada.¹²⁵ Most if not all of the arguments set forth are relevant to the Australian context. The submissions headnote provides the following summary:

*“Fair use should not be adopted as it leads to **uncertainty, expensive litigation, and leaves important public policy decisions to be made by courts instead of Parliament.** Further, fair use would **reduce revenues available to creators** (which, in turn would reduce the capacity of creators to innovate), while **potentially undermining legitimate collective licensing models.** Fair use may also be **inconsistent with Canada’s international***

¹¹⁹ Ibid at para 27.

¹²⁰ Ibid at para 25.

¹²¹ Balanced Copyright and Legislative Summary, *supra* note 111.

¹²² [Legislative Committee on Bill C-11](#)

¹²³ Legislative Summary, *supra*, at p 9.

¹²⁴ Bill C-60 and C-61: only TPM and WIPO treaty obligations (Performers’ rights); C-32: Bill C-32 is virtually identical to Bill C-11. It was introduced in 2010 but did not pass because of the premature dissolution of parliament.

¹²⁵ Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations* (2009). <http://ohrlp.ca/wp-content/uploads/2012/10/why-canada-should-not-adopt-fair-use.pdf>

treaty obligations. Finally, in light of international experience rejecting the adoption of fair use it would be **imprudent** for Canada to do so.” (emphasis added)

- 3.85 Sookman and Glover also write that “the fair use model is not a panacea for solving difficult problems resulting from digitization and the internet. ‘Fair use’ has been described as an ‘astonishingly bad’ system amounting to little more than ‘the right to hire a lawyer’.”¹²⁶ They further state:

“[T]hese proposals would go in precisely the wrong direction. At a time when most stakeholders are calling for greater certainty and clarity in Canadian copyright law, these proposals to replace the specific fair dealing provisions that Parliament has established with broad, open-ended “user rights” would leave copyright owners and users guessing where copyright ends and “user rights” begin.”¹²⁷

- 3.86 The official website for the *Copyright Modernization Act* addresses the importance of certainty and clarity in the law. Indeed, these attributes of Bill C-11 are promoted in almost every fact sheet – especially in relation to innovation and consumer protection: “The Copyright Modernization Act aims to eliminate some of the uncertainty facing innovative businesses. The Bill’s approach to new consumer exceptions is also designed with innovation and competition in mind”¹²⁸; “The Copyright Modernization Act allows for everyday uses of content and provides clear rules that will better enable Canadians to participate in the digital age.” (underlining added for emphasis).¹²⁹
- 3.87 In answer to the question, *How will this Bill foster creativity and innovation?* Industry Canada assures that:

“For creative industries, this Bill provides a clear, predictable legal framework that allows them to combat online piracy and roll out new online business models.

For high-tech and software companies, this Bill provides the certainty they need to develop new products and services that involve legitimate uses of copyrighted material.” (underlining added for emphasis)¹³⁰

- 3.88 Arts Law argues that Canada did not chose an open-ended fair use exception as it is uncertain in application and would burden the creators, rights holders and copyright users with the task of litigating this uncertainty. Canada chose to have carefully crafted exceptions which will be reviewed and adapted every five years by Parliament. Arts Law argues that Australia must do the same.

¹²⁶ Submission, *ibid* at p 141, citing Lawrence Lessig *Free Culture* (2004) p 187.

¹²⁷ Submission, *ibid*.

¹²⁸ Balanced Copyright, *ibid*, Fact Sheet – What the *Copyright Modernization Act* Means for Business Innovation.

¹²⁹ *Ibid*, Fact Sheet – What the *Copyright Modernization Act* Means for Consumers.

¹³⁰ *Ibid*, FAQs – General.

- 3.89 Canadian scholars have considered the fair use doctrine and ways in which the fair dealing model should be amended. In a comparative analysis between Canada, the US and the UK,¹³¹ D’Agostino states that “Fair use is ill” and the doctrine’s inherent uncertainty can only be resolved by industries developing their own guidelines.
- 3.90 Michael Geist, held out by some as the “poster child for internet activists”¹³², goes so far as to suggest that Canadian courts, that operate within fair dealing provisions, already apply a fair-use like model:

*“[T]he first stage [of the fair dealing test] has become so easy to meet that Canada appears to be inching closer to fair use. Indeed, the breadth of the fair dealing purposes is now so wide—eight purposes covering most imaginable uses—that future Canadian fair dealing analyses are likely to involve only a perfunctory assessment of the first-stage purposes test together with a far more rigorous analysis (what the Court in SOCAN v Bell Canada [Bell] described as “heavy-hitting”) in the second-stage, six factor assessment.”*¹³³

- 3.91 Even Barry Sookman, joint author of the firmly anti-fair use submission, recognizes that “[t]he Copyright Modernization Act creates an unprecedented breadth of the new exceptions.”¹³⁴ However, Sookman warns that “[i]ndividually and cumulatively the exceptions in Bill C-11 could prompt questions about Canada’s compliance with international obligations.”¹³⁵

¹³¹ D’Agostino, *Healing Fair Dealing?* (2008) 53 McGill LJ 309.

¹³² Barry Sookman (2012) *Change and the Copyright Modernization Act*.

¹³³ Michael Geist (2012) *Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use*, at p 3-4.

¹³⁴ Barry Sookman (2012) *Change and the Copyright Modernization Act*.

¹³⁵ *Ibid.*

4. The Case for Fair Use in Australia

4.1 Outline of Section 4

Section 3 of this submission has both addressed policy issues and alternative reform paths that are available as alternatives to the adoption of an open-ended fair use exception. In Section 4 Arts Law responds to the recommendation to introduce an open-ended fair use exception by commenting on the arguments for and against fair use in Australia; then commenting on the Proposals 4-1 to 4-4; following which Questions 4-1 & 4-2 will be considered. DP79 summarises the main arguments for and against fair use in Australia as follows:

Arguments against fair use in Australia

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

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

ALRC's proposals for reform

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

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

4.2 **Argument against fair use in Australia, that it: is unnecessary and no case is made out for it**

4.2.1 The Canadian experience in modernising their copyright legislation shows a pathway using specific fair dealing exceptions both to meet consumer exceptions in the digital environment and also the meet the challenge of innovation and competition in the digital economy, which also promotes the following public interest values:

- a predictable legal test;
- a high degree certainty to as to the rights and duties of creators, rights holders and copyright users; and
- an efficient and cost effective copyright system; and
- the promotion of social welfare through innovation and through the price competition that flows from new products and services - whether directed to utility, education or entertainment.

4.2.2 To the extent that the *Copyright Act 1968* currently impedes innovation in the digital economy then targeted reforms can address non-consumptive uses of works in the operation of internet-related functions such as caching and indexing. Arts Law submits that the operation of internet-related functions needs to be carried out in

such a way as to cause minimal prejudice to the rights of artists and rights holders and that the safe harbour scheme for ISPs (a topic outside the scope of the terms of reference of the ALRC) are also relevant to the development of a copyright policy that will facilitate innovation and growth in the digital economy and through facilitation the operation of internet-related functions. This means that the rights and duties of ISPs and other internet intermediaries need to be considered in a holistic approach.

- 4.2.3 In relation to the perception that the creative arts would gain a benefit from an open-ended fair use exception that is currently unavailable in the operation of specific fair dealing exceptions, it is the experience of Arts Law that there is not a demand within the Australian artistic community for a greater freedom to engage in appropriation techniques. Artists that use appropriation techniques operate within existing fair dealing exceptions for parody or satire (s 41A), criticism or review (s 41),¹³⁶ or they get permission from the rights holders if there is a risk that they would be considered to be infringing copyright by taking a substantial part of the existing work.¹³⁷
- 4.2.4 Arts Law submits that the exclusive rights provided by copyright and the moral rights of artists function together to require that artists should be asked if they want their work to be incorporated in works by other artists. The experience of Arts Law is that Australian artists value the moral rights that acknowledge their authorship of a work.
- 4.2.5 While acknowledging that appropriation art is a well-recognized postmodern art form, Arts Law suggests that the academic school of thought that supports appropriation without attribution and appropriation without reciprocity is not a mainstream school of thought that should be elevated to a public interest value recognised in copyright policy. The appropriation art movement can work within the copyright test as to whether there is a substantial reproduction of a work.
- 4.2.6 Arts Law submits that ‘sampling’ and other ‘appropriation’ techniques involve the use of existing works and raise serious moral rights issues with respect to the failure to attribute authorship of material that is sampled, remixed or used in mashups.
- 4.2.7 In any event Arts Law notes that the treatment of music sampling by U.S courts does not support an expansive role of a ‘transformative uses’ test to permit ‘sampling’, ‘remixes’, and ‘mashups’. The current state of US law in relation to music sampling is that any sampling, regardless of how minute, constitutes copyright infringement.¹³⁸
- 4.2.8 Arts Law submits that the appropriate balance between the interests of creators and users is not achieved through an exception permitting ‘transformative uses’ or an exception ‘permitting private, non-commercial, transformative uses.’ Any exception to copyright should be firmly based in the public policy of fostering the public - not private - discourse; that is, commentary directed to social, political and cultural purposes. This public policy is achieved by permitting reuse of existing works to

¹³⁶ The courts of England and Wales have given an expansive understanding to what is criticism and review in *Time Warner v Channel 4* (2003) IPR 459. A documentary film reviewing the social significance of Stanley Kubrick’s film “A Clockwork Orange” was held to be a fair dealing in extracts from that film.

¹³⁷ The test for copyright infringement has been described in a number of decisions of the High Court of Australia including in *TCN Channel Nine v Network Ten* [2004] HCA 14, 218 CLR 273). The scope of the criticism or review exception was further reviewed in *TCN Channel Nine v Network Ten (No 2)* [2005] FCAFC 53.

¹³⁸ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800–01 (6th Cir. 2005).

create new work that achieves a parodic or satirical purpose or involves criticism or review.

4.2.9 The opportunities that the digital environment allows for mechanisms that give rights holders' choices as to how to respond to the use of their work by users of digital technologies have been referred to earlier:¹³⁹ The examples of digital mechanisms that can manage the interface between creators and users of digital technologies are:

- (1) the YouTube 'ID Content' policy is described as being intended to allow copyright owners to 'monetize, block or track' uses that are not fair uses of copyright material;¹⁴⁰ or
- (2) the recent UK initiative to launch the Copyright Hub.¹⁴¹

4.2.10 The description on YouTube of the 'ID Content' policy is that:

"YouTube has created an advanced set of copyright policies and content management tools to give rights holders control of their content. YouTube provides content management solutions for rights holders of all sizes across the world, and provides tools to cater to the specific needs of various rights owners."

4.2.11 The choices provided to content owners is described by YouTube:

What is Content ID?

YouTube's state-of-the-art technologies let rights owners:

- *Identify user-uploaded videos comprised entirely OR partially of their content, and*
- *Choose, in advance, what they want to happen when those videos are found. Make money from them. Get stats on them. Or block them from YouTube altogether.*¹⁴²

4.2.12 YouTube's 'ID Content' policy preserves the content owners' choices as how to respond to video material, such as fan videos that may not fulfil the requirements of a fair use. The response of a content owner may be to monetise what may otherwise be an unlicensed use of content or to treat the unlicensed use as part of a marketing campaign for other activities of the content owner or to proceed to block an unlicensed use (where it is not a fair use of the content). An example of a sophisticated web strategy of a creator was the response of Gotye (Wally De Backer) to the posting of copies, remixes, parodies and cover versions of '*Somebody That I Used To Know*'.¹⁴³ Gotye's response was to edit some of that material into '*Somebodies: A YouTube Orchestra*', which allowed Gotye to acknowledge his fans,

¹³⁹ Arts Law Centre of Australia, *Submission 171*, [12.8] & [12.9].

¹⁴⁰ <http://www.youtube.com/t/contentid>

¹⁴¹ <http://www.copyrighthub.co.uk/>

¹⁴² <http://www.youtube.com/t/contentid>

¹⁴³ "All audio and video in *Somebodies* is from the YouTube user videos featured, each of them a cover or parody of *Somebody That I Used To Know*." Gotye's *YouTube Orchestra Remix: The Sweetness Of The Open Source Pop Star* (8/26/2012) Forbes <http://www.forbes.com/sites/anthonykosner/2012/08/26/gotyes-youtube-orchestra-remix-the-sweetness-of-the-open-source-pop-star/>

with the video having several pop-ups so that fans can learn about Gotye's tour dates.¹⁴⁴

4.2.13 The recent UK initiative to launch the Copyright Hub,¹⁴⁵ is a further example of how the digital environment allows for mechanisms to manage the interface between creators and user of copyright works. The Copyright Hub is the development of a digital copyright exchange which would assist in reducing transaction costs associated with legal re-use of copyright materials. This initiative implements the concept described by Hooper & Lynch (2012),¹⁴⁶ to provide:

- *Information and copyright education*
- *Registries of rights*
- *A marketplace for rights - licensing solutions*
- *Help with the orphan works problem*

4.2.14 The economic value of this initiative was suggested by the Hargreaves Review as having has the potential to grow the UK economy by over £2 billion. Arts Law would support the development of an Australia digital copyright exchange as it is designed to provide multiple function including providing information and explaining copyright to people; and helping people to licence works for purposes including user generated content (music on the family website or personal video – uses that may not be a fair dealing).

4.2.15 The IPKat blog provides the following description of the Copyright Hub:¹⁴⁷

The Copyright Hub, that is to say the web portal and its network of connected organisations, does three things:

- * Help people find out about copyright and find their way through the complexities of copyright*
- * Be a place where rights holders can, if they so choose, register their rights information via organisations connected to the Hub, so that people can find out who owns what rights to what*
- * Be a place where people can get permission from rights holders to use copyrighted works legally and easily*

These three functions map accurately to the three findings in the feasibility study report Copyright Works: people have difficulty finding their way through the copyright maze; it is difficult to find out who owns what rights to what; it is not always easy for potential rights users to license copyright works or elements of copyright works.

The users/customers of the Copyright Hub are all those individuals, small businesses, charities, educational institutions, larger businesses who want to find

¹⁴⁴ 4 Things Gotye Can Teach You About Savvy Content Marketing (August 16, 2012) The @Steveology Blog - The Forum For Marketing Geeks <http://stevefarnsworth.wordpress.com/2012/08/16/gotye-savvy-content-marketing/>

¹⁴⁵ <http://www.copyrighthub.co.uk/>

¹⁴⁶ The final report for the Feasibility Study into the Digital Copyright Exchange (DCE), *Copyright Works: Streamlining copyright licensing for the digital age*, An independent report by Richard Hooper CBE and Dr Ros Lynch (July 2012) Intellectual Property Office (IPO) <http://www.ipso.gov.uk/hargreaves-copyright-dce>

¹⁴⁷ <http://ipkitten.blogspot.co.uk/2013/07/rub-dub-dub-tri-functional-hub.html>

out about copyright and license works for specific purposes, for example use music on the family website or personal video.

- 4.2.16 Arts Law's position is that a fair use doctrine is unnecessary as the digital environment can provide effective solutions to copyright problems under the existing legal framework. The digital environment allows the development of business models that can resolve what are asserted to be failures of the copyright system. For example: Copyright owners may license users to make multiple copies of copyright material, or otherwise access to copyright material from multiple computers, phones, tablets and other devices. Alternatively subscription music services may allow users to stream music to multiple devices and download music files to their smart phones. Comparable cloud services allow users to watch films and television programs from multiple devices.
- 4.2.17 Arts Law supports the submission of the Australian Copyright Council in response to IP42, which submitted that these models which allow copyright material to be accessed from multiple devices are reducing the need to engage in private copying and that there was no need to extend the private copying exceptions.¹⁴⁸ Indeed, a blanket proposal to allow expansion of the private and domestic use exception in an online environment may reduce the development of authorised online content providers and the capacity for rights-holders to extract value from copyright material in online environments.

4.3 *Argument against fair use in Australia, that it: would create uncertainty and expense*

- 4.3.1 The work of Professor Barton Beebe, Professor Pamela Samuelson and Matthew Sag is discussed in DP79¹⁴⁹ as providing studies of US fair use case law suggesting "*that fair use in the US is not as uncertain as some of its critics have argued*".¹⁵⁰ Arts Law does not challenge the esteem in which these authors are held in the academic community nor does Arts Law challenge that the thoroughness of the research of these authors that leads to the opinions presented by these authors. However, Arts Law would argue that these studies do not address an important policy factor – the cost of fair use litigation and the consequences of those costs for asserting that fair use is a sound regulatory tool.
- 4.3.2 As discussed earlier Arts Law notes that the author of *Nimmer on Copyright*, a leading American copyright text, commented that many applications of the fair use factors are conclusory.¹⁵¹ David Nimmer directs attention to the fair use doctrine's lack of clarity, certainty and predictability.

¹⁴⁸ Australian Copyright Council, *Submission 219* in response to IP42.

¹⁴⁹ DP79, [4.124] – [4.127].

¹⁵⁰ DP79, [4.123].

¹⁵¹ See the quotation at paragraph [3.55] from Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][1] [b], at 13-168 - 13-169 (2012).

- 4.3.3 Nimmer comment that the uncertainty of the fair use doctrine naturally leads to long and costly litigation – with decisions often being overturned at each level.¹⁵² This tends to have a ‘chilling effect’, with users shying away from engaging in plainly fair uses for fear of creating a dispute.¹⁵³
- 4.3.4 As discussed above Nimmer concludes that it is virtually impossible to predict any outcome based on these factors, and that this is not the fault of the US Courts but that of the legislature – as the fair use doctrine set out in § 107 (17 U.S.C.) is inherently uncertain.¹⁵⁴ Arts Law suggests that the uncertainty in the application of the fair use doctrine is apparent in the recent cases of *Morris v Young*¹⁵⁵ and *Cariou v Prince*.¹⁵⁶
- 4.3.5 *Morris v Young* involves a US Federal District Court reviewing whether there is an infringement of copyright in the photographs of Dennis Morris (who photographed the punk rock band the ‘Sex Pistols’), where Russell Young (an artist) used photos of Morris found on the Internet to create pieces of art titled ‘Sex Pistols in Red’ and ‘White Riot + Sex Pistols.’¹⁵⁷ The outcome was that one art work was a fair use of the photograph (as the work was ‘transformed’); however the other art work was an infringement of copyright as the mere changing of the colour of the image to red was not ‘transformative’.¹⁵⁸
- 4.3.6 *Cariou v Prince*¹⁵⁹ involves the US courts reviewing whether there was an infringement of copyright when Richard Prince ‘appropriated’ photographs of Patrick Cariou from his book ‘Yes Rasta’¹⁶⁰ on Rastafarian culture to create artistic works. The outcome was that 5 of Prince’s art works were determined by the 2nd Circuit court to be a fair use of Cariou’s photographs (as the works were ‘transformed’); however a further 25 artworks were remanded back to the district court to assess and determine whether they were a fair use of Cariou’s photographs or an infringement of copyright.¹⁶¹
- 4.3.7 In the 2nd Circuit Judge John Clifford Wallace, agreed with most of the majority’s legal analysis as to the fair use exception, dissented in part, stating that he would have remanded all 30 of Prince’s paintings to the district court to apply the correct

¹⁵² Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, (2006-07) 24:11 Cardozo Arts & Entertainment 11 at p 16.

¹⁵³ Ibid, p 11, 16.

¹⁵⁴ Ibid at p 281.

¹⁵⁵ *Dennis Morris v Russell Young*, Case No. CV 12-00687 DMG (FMOx) (CD Cal. Jan. 28, 2013) Judge Gee.

¹⁵⁶ *Patrick Cariou v Richard Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011) reversed in part, vacated in part, and remanded in Case No. 11 CV 1197 (2nd Circuit, April 25, 2013).

¹⁵⁷ *Here's What Happens When a Judge Evaluates Sex Pistols Art for 'Purpose'*, Jan. 29, 2013 by Eriq Gardner <http://www.hollywoodreporter.com/thr-esq/heres-what-happens-a-judge-416599>

¹⁵⁸ *Dennis Morris v Russell Young*, Case No. CV 12-00687 DMG (FMOx) (CD Cal. Jan. 28, 2013) Judge Gee.

¹⁵⁹ *Patrick Cariou v Richard Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011) reversed in part, vacated in part, and remanded in Case No. 11 CV 1197 (2nd Circuit, April 25, 2013).

¹⁶⁰ PowerHouse Books (2000).

¹⁶¹ *Appropriation Artist Richard Prince Prevails Against Photographer at Appeals Court*, April 25, 2013 by Eriq Gardner <http://www.hollywoodreporter.com/thr-esq/appropriation-artist-richard-prince-prevails-446479>

legal standard. Judge Wallace noted that he is “*not an art critic or expert*,” then commented that he “*fail[ed] to see how the majority in its appellate role can ‘confidently’ draw a distinction between the twenty-five works that it has identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination.*”¹⁶²

- 4.3.8 Arts Law would argue the outcome of the *Morris v Young* case supports the proposition that the fair use doctrine operates at each end of the spectrum of whether there is an infringing (derivative) use of a work and whether there is a non-infringing (transformative) fair use, whereas *Cariou v Prince* provides an example of works spread across the whole spectrum and it is with regard to those works in the undefined middle that there is a high degree of uncertainty as to whether there is a fair use.
- 4.3.9 The existing exceptions (criticism and review, research and study, parody and satire, and reporting the news) provide a clear boundary between an infringing use and a use that satisfies a public-interest purpose. Whereas the fairness factors that are to be considered in determining whether there is a fair use are factors in which there can be a difference of opinion. As a consequence it is likely that courts will have to determine the difference between an infringing derivative work and a ‘fair use’ on a case-by-case basis. As the majority of Australian creators are not in a financial position to spend money on litigation, the proposed adoption of the fair use exception will result in uncertainty as to what is a fair use of an existing work.

4.4 Argument against fair use in Australia, that it: originated in a different legal environment

Summary:

- 4.4.1 Arts Law argues that the fair use exception creates uncertainty as to how to reconcile the moral rights of authors with the fair use of work.
- 4.4.2 Arts Law argues that a significant difference between the Australian environment and the US environment is that Australia has put in place a broad moral rights regime. In contrast there is limited recognition of moral rights under US law,¹⁶³ and creators have difficulty of bringing claims that are in essence moral rights claims (a claim of ‘actionable mutilation’) within theories of law such as copyright, unfair competition, defamation, invasion of privacy, and breach of contract.
- 4.4.3 Arts Law submits that *Morris v Young*¹⁶⁴ and *Cariou v Prince*¹⁶⁵ provide examples of how US law does not take into account the moral rights of authors in the application of a fair use test. That is, the US fair use doctrine does not address the question

¹⁶² Dissent pp. 3-4, *Cariou v Prince* (2nd Cir.) at *13.

¹⁶³ The *Visual Artists Rights Act of 1990* (“**VARA**”) is the only federal regulation which expressly incorporates moral rights to a specific group of authors - visual artists.

¹⁶⁴ *Here's What Happens When a Judge Evaluates Sex Pistols Art for 'Purpose'*, Jan. 29, 2013 by Eriq Gardner <http://www.hollywoodreporter.com/thr-esq/heres-what-happens-a-judge-416599>

¹⁶⁵ *Appropriation Artist Richard Prince Prevails Against Photographer at Appeals Court*, April 25, 2013 by Eriq Gardner <http://www.hollywoodreporter.com/thr-esq/appropriation-artist-richard-prince-prevails-446479>

whether the appropriation of a photographer's work (such as Morris or Cariou) is an infringement of the moral right against derogatory treatment of the photograph or the question whether so that the person who makes a 'fair use' of an existing photograph must provide a credit to the photographer so as to meet the moral right of attribution of authorship

- 4.4.4 In relation to whether a fair use exception is suitable for the Australian legal environment Arts Law does not assert that the fair use doctrine should be rejected because it is intrinsically American – rather Arts Law argues that the fair use doctrine should not be adopted by Australia because the doctrine is intrinsically flawed, as discussed in the previous section.
- 4.4.5 Arts Law agrees with the submission of Screenrights that judicial law making is less predictable and democratic than the parliamentary process to determine the scope of exceptions to copyright.¹⁶⁶

Detail:

- 4.4.6 Australia's adoption of the moral rights in Part IX, *Copyright Act 1968*, has the consequence that copyright policy development in Australia is constrained by the need to take account of the non-economic factors (such as moral rights) when considering exceptions to copyright in the application of 3-step set out in Article 9(2) of the *Berne Convention*.¹⁶⁷
- 4.4.7 Arts Law observes that the US is the last common law copyright system without specific moral rights legislation, with neither the US Copyright Act nor the common law applied by US courts recognising authors' moral rights. The exception to this statement is the introduction of the *Visual Artists Rights Act of 1990* ("VARA"), which is the only federal regulation which expressly incorporates moral rights to a specific group of authors - visual artists.¹⁶⁸
- 4.4.8 DP79 quotes Hart, who implies that US courts and 17 U.S.C. protect the values recognised as moral rights as '*the inherent dignity of creators that these rights*

¹⁶⁶ 'A deferral of judicial law making to the courts', Screenrights submission in response to DP79. Citing *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012) at [99]; and *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16, Justices Gummow and Hayne [[120]].

¹⁶⁷ See Section 2(A) Framing Principles for Reform.

¹⁶⁸ VARA protects only works of visual arts that have been produced in limited editions of 200 or fewer copies.

- The definition of "Visual Artworks" only includes paintings, drawings, print or sculptures, and specifically excludes posters, books and videos;
- VARA also does not cover advertisements and "works made for hire";
- VARA limits protection only to the original embodiments of the work in question; and
- The rights provided by VARA to visual artists are only available for the *life of the author*. As soon as the artist dies, the owners of his work may do with it anything they wish.

United States Copyright Office. *Waiver of Moral Rights in Visual Artworks*.
<http://www.copyright.gov/reports/exsum.html>

¹⁶⁸ U.S. Copyright Law 17 U.S.C § 101 (2007).

protect [is] implicit in many copyright provisions'¹⁶⁹ in the US. Arts Law disagrees on the basis that US courts have more consistently refused to apply the principle of moral rights of artists in their decisions, absent a legislative mandate.

- 4.4.9 While there are some US decisions that provided remedies to litigants asserting what can be described as moral rights claims, such outcomes arose under other theories of law such as copyright, unfair competition, defamation, invasion of privacy, and breach of contract¹⁷⁰ The moral rights described in 6bis of the *Berne Convention* are intended to be a broad protection of the inherent dignity of creators in relation to the integrity of their work and the attribution of the authorship and, as such, are not found in the US system. Rather, such moral values are directly undermined in the application of the fair use doctrine – the treatment of the original works in *Morris v Young*¹⁷¹ and *Cariou v Prince*¹⁷² provide examples.
- 4.4.10 An analysis of the US cases results in the conclusion that if 'moral rights' are expressly preserved in a contract at the point of transfer of a copyright, American authors can make a claim of infringement based on a contractual breach.¹⁷³ Where a contract is silent as to alterations to the works, courts will look to industry trade and custom, and they may also imply the transferee's obligation not to make substantial alterations.¹⁷⁴ However, relying on contractual implications does not always serve an author's moral rights interests. Where the right to alter is expressed in the contract, courts may be extremely deferential to the agreement and will give *great latitude to the party to whom the alteration rights were granted*, at the expense of the author's reputation.¹⁷⁵
- 4.4.11 A key case in this area is *Gilliam v American Broadcasting Companies*.¹⁷⁶ The Monty Python actors sought an injunction to restrain the ABC from broadcasting edited compilation versions of programs originally written and performed by Monty Python. Monty Python claimed the ABC had infringed their copyright and damaged their reputation through the re-edit and broadcast of the programs. The United States Court of Appeals for the Second Circuit held that ABC had breached their

¹⁶⁹ DP79, [4.132], quoting T Hart, *Calculating Copyright: National Research Council Releases Copyright Report* www.copyright.com/2013/05/calculating-copyright-national-research-council-releases-copyrightreport/

¹⁷⁰ See Robert C Bird, *Moral Rights: Diagnosis and Rehabilitation*, University of Connecticut – Department of Marketing (November 27, 2007) at p 15 – 1; Zemer, L. (2011). *Moral Rights: Limited Edition* 91 (4) Boston University Law Review 151.

¹⁷¹ *Here's What Happens When a Judge Evaluates Sex Pistols Art for 'Purpose'*, Jan. 29, 2013 by Eriq Gardner <http://www.hollywoodreporter.com/thr-esq/heres-what-happens-a-judge-416599>

¹⁷² *Appropriation Artist Richard Prince Prevails Against Photographer at Appeals Court*, April 25, 2013 by Eriq Gardner <http://www.hollywoodreporter.com/thr-esq/appropriation-artist-richard-prince-prevails-446479>

¹⁷³ eg *Granz v Harris*, 198 F.2d 585 (2nd Cir. 1952). A jazz concert was re-recorded with a reduced playing time and content. The contract required the defendant to use a credit-line attributing the plaintiff-producer. The Second Circuit decided that it constituted unfair competition and breach of contract. Whether by contract or by tort, the plaintiff could prevent publication.

¹⁷⁴ Pattarozzi, J. *Can the Australian Model be Applied to U.S. Moral Rights Legislation?* (2007) 15 *Cardozo Journal of International and Comparative Law* 423

¹⁷⁵ eg *Vargas v Esquire*, 164 F. 2d 522 (7th Cir. 1942). An artist created a series of illustrations, some of which were published without his signature or credit-line. The Seventh Circuit held that the rights of the parties were determined by the contract. The court rejected theories of implied contract, moral rights, and unfair competition.

¹⁷⁶ 538 F.2d 14 (1976).

contract with Monty Python. The Court discussed other reasons why the edited version might be an “*actionable mutilation*”, however did not examine the proposition that Monty Python’s ‘moral rights’ may have been breached by ABC. The court also noted that artists had the right of protection against misrepresentation that would damage their ability to earn money, and that courts had therefore used laws related to contracts or unfair competition to provide such protection.

4.5 Argument against fair use in Australia, that it: may not comply with the three-step test

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

‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’ (the ‘3-step test’)

Article 9(2) requires any proposal for new exceptions to infringement such as a fair use exception to be:

- A ‘special case’;
- One that doesn’t conflict with a normal exploitation of the work; and
- Measured against the potential prejudice to the ‘legitimate interests of the author’, which interests necessarily include authors’ moral rights.

4.5.2 Arts Law submits that any exception for online use for social, private or domestic purposes is likely to conflict with normal exploitation of the copyright material in relation to the rights of reproduction and communication to the public.

Arts Law also submit that the ‘legitimate interests’ of artists include avoiding prejudice to the moral rights of creators that results from the way in which their work is used, including attribution as the author and not having the work treated in a derogatory way.¹⁷⁷ The creation of a new ‘exemption’ for online uses of copyright works for social, private or domestic purposes results in artists effectively losing the ability to avoid prejudice to their moral rights. The impact on the moral rights of artists is apparent from the decision of the Federal Magistrate’s Court in *Perez v Fernandez*, in which a mashup with new words mixed into a song was held to be an infringement of the rights of reproduction and communication to the public and infringed Mr Perez’s moral rights of the integrity of authorship of the song.¹⁷⁸ In other words, having adopted moral rights, Australia cannot adopt an open-ended fair use exception (Proposal 4-1 to 4-4) and must work within the narrow public interest based exceptions (criticism and review, research and study, parody and satire, and reporting the news) in meeting the challenges in the digital environment.

¹⁷⁷ IP42 [33] & [34].

¹⁷⁸ *Perez v Fernandez* [2012] FMCA 2 (10 Feb 2012) [66].

- 4.5.3 A new exception for online use of copyright work will also impact on the implementation of Australia's obligations to provide protective measures for cultural activities (including Indigenous cultural and intellectual property) under the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005).¹⁷⁹ A new exception will also impact Australia's ability to implement the United Nations' *Declaration on the Rights of Indigenous People* (2007) which states that Indigenous people have a right to control their traditional knowledge and traditional cultural expressions.¹⁸⁰
- 4.5.4 Arts Law submits that freely permitting online uses of copyright works for social, private or domestic purposes is not consistent with Australia's obligations under Article 13 of the TRIPs Agreement, as well as, Article 17.4 and paragraph 1 of the US Australia Free Trade Agreement (2004).

4.6 ALRC conclusion that fair use: is suitable for the digital economy and will assist innovation

- 4.6.1 Economic efficiencies and social welfare benefits have been asserted as likely to flow from the adoption of a fair use exception, however Arts Law submits that the economic research said to support that conclusion is either inconclusive or flawed as discussed in Section 3 of this submission. The Hargreaves Report, which is also discussed earlier in Section 3,¹⁸¹ describes intellectual property rights (IPRs) as being intended to support economic growth and promote innovation. However poorly designed IP rules may impede growth and innovation, so that IPRs "*can also stifle growth where transaction costs are high or rights are fragmented in a way that makes them hard to access.*"¹⁸² The Hargreaves Report goes on to identify that copyright policy development requires an understanding of the transaction costs that are created by the copyright regime; although copyright policy development must also take account of the non-economic factors (such as moral rights) as well as the economic factors relevant to efficiency and social welfare benefits. The Hargreaves Report describes this balancing process as follows:

*"Policy should start from careful assessment of these costs and benefits in the light of evidence and accepted economic theory. At the same time, non-economic factors meriting consideration (such as the important moral rights of authors not to have their work misrepresented) can be weighed in the balance."*¹⁸³

¹⁷⁹ The Convention entered into force three months after Australia became a party on 18 September 2009.

¹⁸⁰ Article 31 of the *UN Declaration on the Rights of Indigenous Peoples* refers *inter alia* to "the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".

¹⁸¹ Section 3. (B) [3.16] – [3.18].

¹⁸² I Hargreaves, *ibid*, Chapter 1 'Intellectual Property and Growth', [1.3], page 10.

¹⁸³ *Ibid*, [1.4].

- 4.6.2 The stakeholders that advocate the repeal of statutory licencing schemes and their replacement by voluntary licencing do not provide any research that quantifies what are claimed as excessive transaction costs in the operation of the statutory licencing schemes. Stakeholders assert there are inefficiencies in the operation of the statutory licencing schemes but fail to provide any explanation as to how the inefficiency has been determined or use the concepts of 'efficiency' and 'effectiveness' in an imprecise way so that it is uncertain as to what is meant by the use of those concepts; which the Productivity Commission suggest have defined meanings.¹⁸⁴ The failure of stakeholders to engage in an economic analysis to support the claims of inefficiencies in the operation of the statutory licencing schemes leaves open the response that what is being criticised as a inefficiency is nothing more than an administrative inconvenience in working with the statutory licencing schemes or a copyright licencing cost that the stakeholder would wish to avoid or reduce.

4.7 ALRC conclusion that fair use: provides a flexible standard

- 4.7.1 DP79 describes an open-ended exception for fair use as being flexible in application and technology neutral, in that the broad statements of factors that indicative of the fairness of the use will be adaptable to new technologies. In DP79 the role of the fair use exception to cover the operation of internet technologies, such as search engines, envisages with the fair use exception being applied to assist in the management of educational uses of copyright material and the operation of libraries and archives. However the impact on an open-ended fair use exception will go far beyond that arguably legitimate public interest.
- 4.7.2 The flexibility provided by a fair use exception is said to operate through the application of fairness factors that are intended to determine whether the use of a work, such as photograph, is a fair use or an infringing use.
- 4.7.3 Arts Law submits that any flexibility benefits that are asserted for the fair use doctrine are outweighed by the detrimental impacts – to the fair use doctrine's lack of clarity, certainty and predictability and the dampening effect on creativity. The lack of clarity, certainty and predictability have the consequence that there are high transaction costs in that there will be more litigation to decide the application of fair use doctrine to particular circumstances.¹⁸⁵

4.8 ALRC conclusion that fair use: is coherent and predictable

- 4.8.1 The coherence and predictability of the fair use doctrine is a matter on which US scholars disagree; while some commentators describe the application of the fairness

¹⁸⁴ On Efficiency and Effectiveness: some definitions, Productivity Commission, Staff Research Note, Canberra (9 May 2013) <http://www.pc.gov.au/research/staff-notes/efficiency-effectiveness>

¹⁸⁵ See above section 4.3.

factors as coherent and predictable,¹⁸⁶ others such as David Nimmer draw the opposite conclusion.¹⁸⁷

- 4.8.2 Arts Law argues the fair use exception is only predictable at the extreme edges of the continuum of circumstances ranging from those uses that are clearly fair through to those uses that are clearly infringing. It is the uses in the middle of the continuum (the vast majority) that tend to be controversial as the correct application of the fairness factors can be a matter of opinion. Some insight into the possibility of differences of opinion as to what is a fair use can be seen in the controversy over the *Cariou v Prince* and *Morris v Young* cases.¹⁸⁸

4.9 ALRC conclusion that fair use: is suitable for the Australian environment

- 4.9.1 Arts Law submits for the reasons discussed above the fair use doctrine is not suitable for the Australian environment and that the question that should be considered is: are there more cost effective alternatives to the adoption of fair use? The existing exceptions (criticism and review, research and study, parody and satire, and reporting the news) provide a clear boundary between an infringing use and a use that satisfies a public-interest purpose.
- 4.9.2 Arts Law argues that the Canadian experience in modernising their copyright legislation shows a pathway using specific fair dealing exceptions to meet consumer exceptions in the digital environment and also the meet the challenge of innovation and competition in the digital economy.
- 4.9.3 The Canadian experience established that specific fair dealing exceptions that are revised to meet the challenges of the digital environment, and the courts in interpreting those specific fair dealing exceptions, can fulfil the task of balancing the differing interests of all participants in the digital economy.

4.10 ALRC conclusion that fair use: is consistent with the three-step test

Summary:

- 4.10.1 Arts Law submits that the consequence of the 3-step test in Article 9(2) of the *Berne Convention* is that in relation to copyright policy development of exceptions, Australia must:
- 3.92 balance all public interest values (including non-economic values such as moral rights) and
- 3.93 limit the scope of exceptions to circumstances in which the moral rights of authors are off-set by a significant public interest value.
- 4.10.2 Arts Law submits that the existing fair dealing exceptions (criticism and review, research and study, parody and satire, and reporting the news) operate within the public interest parameters described above.

¹⁸⁶ Professor Barton Beebe, Professor Pamela Samuelson and Matthew Sag – see above section 4.3.

¹⁸⁷ See above section 4.3.

¹⁸⁸ See above section 4.3.

Detail:

- 4.10.3 DP79 sets out the basis on which the fair use doctrine is consistent with the three-step test,¹⁸⁹ that is set out in Article 9 of the *Berne Convention*, and Article 13 of the *TRIPs Agreement*,¹⁹⁰ and references the submissions and publications that support this proposition; the conclusion is described as being supported by the following:
- ‘historical and normative’ arguments have been made since the WTO Panel decision which challenge a limited interpretation of the test;
 - the US provision has not been challenged in international fora; and
 - other countries have introduced fair use or extended fair dealing exceptions and have not been challenged in international fora.¹⁹¹
- 4.10.4 Arts Law submits that the absence of any challenge to the fair use provisions in § 107, 17 U.S.C. or in the copyright legislation of any other country is, to quote a pre-digital idiom, ‘to put the cart before the horse’. The absence of any challenge can have a number of causes including the indifference of any WTO member country to financing a challenge. Arts Law argues that the primary focus must be on the ‘normative’ arguments as to the appropriate interpretation of the 3-step test and the circumstance in which there would be: ‘conflict with a normal exploitation of the work’ (the 2nd step); and ‘unreasonable prejudice to legitimate interests’ of authors and rights holders (the 3rd step).
- 4.10.5 The challenge to the ‘homestyle’ exemption in the § 110(5) 17. U.S.C.¹⁹² in the *WTO Panel case*¹⁹³ establishes that exemptions can be challenged in the WTO when it can be established that there is ‘unreasonable prejudice to legitimate interests’ of authors and rights holders.
- 4.10.6 There is an argument, as described in a WTO review of copyright legislation in 2006,¹⁹⁴ that US fair use is consistent with Article 13 of TRIPs. However to go on from that proposition to assert that if Australia adopts a fair use doctrine then Australia would be consistent with Article 13 of TRIPs ignores the significance of Australia’s adoption of the moral rights obligations set out in Article 6bis of the *Berne Convention*. In relation to moral rights, it should be noted that the effect of Article 9 of the TRIPs Agreement is that signatories are not obliged to adopt the moral rights obligations set out in Article 6bis of the *Berne Convention*.¹⁹⁵ In other words, the US

¹⁸⁹ Article 9 of the *Berne Convention* modified by Article 13 of the *TRIPs Agreement*, Article 10 of the *WIPO Copyright Treaty* and the *Australia-United States Free Trade Agreement*. See DP79, [485] – [487], footnotes 162 - 165.

¹⁹⁰ *TRIPs Agreement, Article 13 - Limitations and Exceptions* – ‘Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.’

¹⁹¹ DP79, [4.138] (references omitted).

¹⁹² Section 110(5) of the *US Copyright Act of 1976*, as amended by the *Fairness in Music Licensing Act of 1998*.

¹⁹³ Report of the Panel, *US – Section 110(5) Copyright Act*, 15 June 2000, WTO Doc. WT/DS/160/R, § 6.33 et seq., §6.229.

¹⁹⁴ DP79, [4.147].

¹⁹⁵ *TRIPs Agreement, Article 9 - Relation to the Berne Convention* – ‘Members shall comply with Articles 1 through 21 of the *Berne Convention* (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.’

experience cannot be applied to any country with a moral rights regime (such as Australia) without fundamentally undermining the very rights such regimes were designed to protect.

- 4.10.7 Arts Law argues that Australia's enactment of moral rights protections in Part IX, *Copyright Act 1968*, has the consequence that copyright policy development in Australia must take account of the moral rights in determining compliance with Article 9 of the *Berne Convention* in respect to exceptions. That is, the 'legitimate interests' of American creators and rights holders are different to those of Australian resident creators and rights holders and this difference must be taken into account in determining whether an open-ended fair use exception is a policy option that is available or whether Australia must work within the specific fair dealing exceptions.
- 4.10.8 Hugenholtz & Okediji (2012)¹⁹⁶ consider public interest values in relation to the 3-step test as follows:

*"The terms "legitimate" and "reasonable" at last inject a measure of normative meaning into the three-step test. Both terms allow an, in principle infinite, variety of public interests to be factored into the three-step equation. By the same token, these terms allow fundamental rights and freedoms, such as the right to privacy (which might, e.g., justify a freedom to make private copies) or freedom of expression (which could justify an entire spectrum of excepted uses), to be factored into the three-step test."*¹⁹⁷

Moral rights, in the submission of Arts Law, are one of the varieties of public interest values that should be factored in to the 3-step equation as discussed by Hugenholtz & Okediji.

- 4.10.9 The relevance of moral rights to the 3-step test is considered by Ysolde Gendreau (2011) who comments on the 3-step test in the context of the moral rights adopted in Canada:

"The third criterion is 'no unreasonable prejudice to legitimate interests'. Here, one refers to economic prejudice and one may even envisage intellectual prejudice. (...) There is also the issue of the intellectual prejudice. The reasoning behind this notion is that an exception can affect the moral rights of the authors. For instance, with fair dealing for the purpose of criticism or review, the Canadian Act subjects the fairness of the dealing to the mention of the source and, if it is mentioned in the source, of the author's name. There is thus a built-in recognition of the author as part of the working of the exception. This requirement, which exists for that kind of

¹⁹⁶ Hugenholtz, P. B. and Okediji, Ruth, Conceiving an International Instrument on Limitations and Exceptions to Copyright (March 7, 2012). Study supported by the Open Society Institute (OSI), March 6, 2008; Amsterdam Law School Research Paper No. 2012-43; Institute for Information Law Research Paper No. 2012-37. Available at SSRN: <http://ssrn.com/abstract=2017629>

¹⁹⁷ Ibid. Section C. Step 3: 'No Unreasonable Prejudice to Authors/Right Holders', p 23-24 (citations omitted).

*fair dealing, is not included in the fair dealing for the purpose of education.”*¹⁹⁸

- 4.10.10 Senftleben (2004)¹⁹⁹ also states that “it makes sense to include the moral interests of the author in the proportionality test inhering in the third criterion of the three-step test.”²⁰⁰ Senftleben goes on to discuss the relevance of moral rights in the digital environment:

*“The digital environment shows that both facets of article 6bis BC, the right of integrity and the right of attribution, constitute a serious and substantial concern of the authors which is of particular importance, for instance, with regard to reproductions. The integrity right serves as a weapon against manipulations of the work. Digital reproduction techniques encourage the encroachment upon the interest in accuracy of reproduction. They afford users, profiting from limitations, almost unrestricted possibilities of distorting, mutilating and modifying an author's expression. The work or parts thereof can easily be restructured, remodelled or combined with other material. The easiness of manipulations might furthermore lead to carelessness in respect of the author's right of attribution. Therefore, the need for proper acknowledgement of authorship can scarcely be underestimated in the digital environment as well.”*²⁰¹

- 4.10.11 The WTO Panel case,²⁰² is described by Senftleben as addressing the economic value of the works that were impacted by the operation of ‘homestyle’ exception, however Senftleben commented the WTO Panel case did not limit the 3-step equation to economic rights as: “[n]otwithstanding its own focus on the economic value of exclusive rights, however, the Copyright Panel observed that the term ‘legitimate’ also has ‘the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights’.”²⁰³
- 4.10.12 Arts Law argues that the WTO Panel’s general interpretative analysis of the 3-step test that encompasses both economic and non-economic ‘interests’ is a valid approach. The WTO Panel stated these interpretative principles as follows:

We note that the analysis of the third condition of Article 13 of the TRIPS Agreement implies several steps. First, one has to define what are the “interests” of right holders at stake and which attributes make them

¹⁹⁸ Ysolde Gendreau, *Intellectual Property Colloquium Series: Canada and the Three-Step Test: A Step in Which Direction?*, 15 Intellectual Property L. Rev. 309 (2011) 321-22. <http://scholarship.law.marquette.edu/iplr/vol15/iss2/3>

¹⁹⁹ M.R.F. Senftleben, *Copyright, Limitations and the Three-step test: An Analysis of the Three- Step Test in International and EC Copyright Law* (thesis) University of Amsterdam (UvA), Faculty of Law (2004) <http://dare.uva.nl/document/73076>

²⁰⁰ Ibid, p 222.

²⁰¹ Ibid, p 223 (citations omitted).

²⁰² Report of the Panel, US – Section 110(5) Copyright Act, 15 June 2000, WTO Doc. WT/DS/160/R, § 6.33 et seq., §6.229.

²⁰³ P 228, citing WTO Panel - Copyright 2000, § 6.224.

"legitimate". Then, it is necessary to develop an interpretation of the term "prejudice" and what amount of it reaches a level that should be considered "unreasonable". The ordinary meaning of the term "interests"¹⁹⁹ [²⁰⁴] may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property). It may also refer to a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person. Accordingly, the notion of "interests" is not necessarily limited to actual or potential economic advantage or detriment. [Underlining added for emphasis]

6.224 The term "legitimate" has the meanings of

"(a) conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper;

(b) normal, regular, conformable to a recognized standard type."

Thus, the term relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.

- 4.10.13 The WTO Panel case provides the correct general interpretative analysis as to the assessment of 'prejudice' that is encompassed in the 3-step test, described as:

6.225 We note that the ordinary meaning of "prejudice" connotes damage, harm or injury.²⁰⁰ [²⁰⁵] "Not unreasonable" connotes a slightly stricter threshold than "reasonable". The latter term means "proportionate", "within the limits of reason, not greatly less or more than might be thought likely or appropriate", or "of a fair, average or considerable amount or size".²⁰¹ [²⁰⁶]

- 4.10.14 As to the degree of 'prejudice,' that is contemplated in the 3-step test, the WTO Panel opined that "a certain amount of "prejudice" has to be presumed justified as "not unreasonable". In our view, prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."²⁰⁷

²⁰⁴ Ibid. Footnote 199 "Further meanings: "The fact or relation of having a share or concern in, or a right to, something, especially by law; a right or title, especially to a (share in) property or a use or benefit relating to property", "a financial share or stake in something;", "a thing which is to the advantage of someone, a benefit, an advantage", "the relation of being involved or concerned as regards potential detriment or advantage", "a thing that is of some importance to a person, company, state etc."; Oxford English Dictionary, p. 1393."

²⁰⁵ Footnote 200: "Harm, damage or injury to a person or that results from a judgement or action, especially one in which his/her rights are disregarded." Oxford English Dictionary, p. 2333.

²⁰⁶ Footnote 201: Oxford English Dictionary, p. 2496.

²⁰⁷ Report of the Panel, US – Section 110(5) Copyright Act, 15 June 2000, WTO Doc. WT/DS/160/R, § 6.33 et seq., §6.229 (citations omitted).

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

- 4.11.1 Arts Law does not support the introduction of a fair use exception; therefore Arts Law submits that no additional uses or purposes are appropriate.

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

- 4.12.1 Arts Law submits that whether or not a fair use exception is enacted, ss 65–68 *Copyright Act 1968*, which provide exceptions for the use of public art and artistic works should be repealed; as stated in the submission to IP42, “*at the least insofar as they permit commercial uses of any reproductions made under them*”.²⁰⁸
- 4.12.2 Arts Law notes that the repeal of sections 65 and 68, which allow the free copying and publication of public art and artistic works, was recommended in the Myer Report (2002).²⁰⁹
- 4.12.3 The United States, France and other countries do not permit the commercial exploitation of images of sculptures installed in public places.²¹⁰ In October 2012 the Wikimedia Foundation²¹¹ complied with a DMCA notice to take down 59 photographs of images of various publicly-installed sculptures around the world created by Claes Oldenburg and Coosje van Bruggen.²¹²
- 4.12.4 Arts Law submits that exemption given to the exploitation of images of sculptures installed in public places no longer works in the digital environment and that the exception unreasonably prejudices the legitimate interests of Sculptors. Arts Law submits that *Copyright Act 1968* should be amended so as to confirm the right of Australian resident sculptors to control the commercial exploitation of images of their work in accordance with Article 9 of the *Berne Convention*.
- 4.12.5 Arts Law accepts that there should be an exception for ‘non-commercial’ use of images of sculptures installed in public places. The submission of Arts Law to the Myer Inquiry was that “[i]n the public interest, if these acts were undertaken for ‘non-commercial purposes’, such as by tourists or art students it may be better to make them non-infringing acts where a licence would not be required.”

²⁰⁸ Paragraph 4.173, Discussion Paper 79 (DP 79).

²⁰⁹ Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry*, 2002. pp.141-142.

²¹⁰ Also known as the ‘freedom of panorama’ - derived from the German word ‘panoramafreiheit’.

²¹¹ https://commons.wikimedia.org/wiki/Commons:Village_pump#DMCA_Take-Down

²¹² Artists' Studio Wants Photos of Their Work Removed From Wikipedia (DMCA notice from Oldenburg van Bruggen Studio, October 23, 2012) <https://www.chillingeffects.org/N/694827>

5. Third Parties

Summary:

- 5.1 Arts Law submits that both the format shifting and time shifting exceptions should be limited to circumstances in which the copy is created by a natural person for private and domestic viewing by that person.²¹³
- 5.2 Arts Law submits that if a new exception to allow time shifting by means of cloud based personal video recorders (PVRs) were introduced it should be a remunerated exception.²¹⁴ To implement a free exception to allow for such services would be inequitable to rights holders (including artists whose work appears in such broadcasts).
- 5.3 Arts Law submits that there is a difference between an individual carrying out what is a permitted act in relation to copyrighted works, and that individual contracting with third party to carry out some service that facilitates the individual doing that act. The Optus TV Now service is an example of this situation in which there is a copying of copyrighted material for eventual retransmission to the user of the service.

Detail:

- 5.4 The *Optus TV Now* case²¹⁵ is discussed in IP42 as highlighting the issue of whether the time shifting exception should cover copying by a company on behalf of an individual.²¹⁶ In DP79 the *Optus TV Now* case was considered as an example of how many fair dealing exceptions are confined to a particular purpose or set of circumstances, such as *“the time-shifting exception in s 111 of the Copyright Act only applies if the person who makes the copy is the same person for whom the copy is made (to watch at a more convenient time).”*²¹⁷
- 5.5 The Full Federal Court in the *Optus TV Now* case identified the commercial nature of the Optus TV Now service as *“its purpose in providing its service – and, hence in making copies of programmes for subscribers – is to derive such market advantage in the digital TV industry as its commercial exploitation can provide. Optus cannot invoke the s 111 exception.”*²¹⁸ The subsequent application of Singtel Optus for special leave to appeal to the High Court was refused.²¹⁹

²¹³ Information Society Directive 2001/29/EC.

²¹⁴ Screenrights, *Submission 251*, [45].

²¹⁵ *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCAFC 59.

²¹⁶ IP42, Question 9 (a).

²¹⁷ DP79, [5.37].

²¹⁸ *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCAFC 59 [89].

²¹⁹ [2012] HCATrans 214 (7 Sept. 2012).

- 5.6 In its intervention in the *Optus TV Now* case, Screenrights submitted to the court that the Optus TV Now service (with its near live functionality enabling viewers to watch free-to-air broadcasts on certain devices almost simultaneously) was sufficiently similar to a retransmission service so as to potentially undermine the operation of the Part VC *Copyright Act* scheme.
- 5.7 DP79 comments that “[s]ometimes a third party’s use may seem merely to amount to facilitating another person’s fair use; they will have no ulterior purpose themselves. But often there will be some other ulterior purpose.”²²⁰ Arts Law does not support the introduction of an open-ended fair use exception to manage services that facilitate copying and transmission of copyright material to the public. Such services should be analysed to determine whether they involve the exercise of an exclusive right of the copyright holder, whether the operation of the service requires the explicit licence of the copyright holder or whether licensing should be managed through an appropriate statutory licensing scheme.

²²⁰ DP79. [5.41].

6. Statutory licensing schemes

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

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

Summary:

- 6.1 Arts Law opposes Proposal 6-1 to repeal the statutory licensing schemes. The submissions to the ALRC do not establish that the declared collecting societies operate with high transaction costs or are otherwise inefficient or evidence of “*monopoly and market failure*”,²²¹ or that the negotiation of voluntary licences is a cost effective way to manage access to copyright material by governments, educational institutions, and institutions assisting persons with a print disability.
- 6.2 The repeal of the statutory licensing schemes in Parts VA, VB and VII Division 2 of the *Copyright Act 1968*, and the replacement of those provisions with voluntary licensing, should only occur when there is economic analysis of the operation of the organisations that manage the statutory licensing schemes:
 - 6.2.1 that establishes the inefficiency of those schemes; and
 - 6.2.2 that establishes that negotiation of voluntary licences is a cost effective way to manage access to copyright material by governments, educational institutions, and institutions assisting persons with a print disability.
- 6.3 Arts Law submits that the repeal of the statutory licensing schemes in the absence of thorough economic analysis and an analysis of the public interest values relevant to such a legislation response, carries the risks of:
 - 6.3.1 exposing governments, educational institutions, and institutions assisting persons with a print disability to unanticipated cost increases that have not been budgeted for by those entities;
 - 6.3.2 detrimentally impacting the revenues of creators and rights holders; and
 - 6.3.3 creating a conflict with s 51(xxxi) of the Constitution of Australia.²²²
- 6.4 In any event, Arts Law argues that some problems with the drafting of provisions relating to the statutory licensing schemes could be remedied without wholesale change to the existing policy framework so as to:
 - 6.4.1 provide less cumbersome reporting processes that minimise the administrative costs burden; and
 - 6.4.2 introduce reporting processes that are flexible to adapt to technological advances.

²²¹ Submission 231, p 71.

²²² *PPCA v Commonwealth* [2012] HCA 8, 286 ALR 61, per Crennan and Kiefel JJ at [110]. See Section 2. (E) of this submission.

Detail:

6.5 The Arts Law submission in response to IP42 and in relation to Questions 28-31 (education institutions and parts VA and VB) 41-44 (Statutory licences in the digital environment) stated:

- (a) *It is in the interest of artists and rights holders to receive 'fair' remuneration from statutory licensing schemes and that those statutory licensing schemes operate in ways that do not disadvantage artists and rights holders.*
- (b) *At a later stage of the ALRC inquiry Arts Law may respond to submissions on reforms of the current statutory licensing schemes are appropriate to meet the challenges of the digital environment.*

6.6 DP79 [6.52] refers to the Copyright Advisory Group—Schools submission as describing “four fundamental problems with statutory licences that make them unsuited for Australia’s digital economy goals”, which are summarised in DP79 as follows:

- 1. the statutory licences are inherently unsuitable to the digital environment;*
- 2. statutory licences were created in a 'data vacuum'. Efforts by the education sector to use better data access to better manage copyright expenditures are making the licences less efficient for copyright owners and licensees. These inefficiencies are becoming more pronounced with the increased use of new technologies;*
- 3. statutory licences put Australian schools and students at a comparative disadvantage internationally and do not represent emerging international consensus regarding copyright in the digital environment;*
- 4. statutory licensing is economically inefficient.*²²³

6.7 As is implicit in paragraph 6.5 (a) above, and as expressly stated in page 2 of this submission, Arts Law approaches issues related to copyright policy with an ‘artists first’ policy. Arts Law notes that all the declared collecting societies have provided a submission and supplementary submission to the ALRC, including the Copyright Agency,²²⁴ with the Copyright Agency providing a supplementary submission in April 2013;²²⁵ to which the Copyright Advisory Group—Schools responded.²²⁶

6.8 The issues related to the operation of collecting societies are complex and Arts Law is not privy to negotiations related to the operation of statutory licences. Arts Law does view the revenue streams from collecting societies as an important part of the income of creators that are the clients of Arts Law. As stated in paragraph 6.1 (b) Arts Law approaches the present ALRC inquiry with the aim of assisting copyright policy

²²³ DP79, [6.52], citing Copyright Advisory Group—Schools, *Submission* 231.

²²⁴ Copyright Agency, *Submission* 249.

²²⁵ Copyright Agency, *Supplementary Submission* 287.

²²⁶ Copyright Advisory Group—Schools, *Supplementary Submission* 290.

development in order that the *‘current statutory licensing schemes are appropriate to meet the challenges of the digital environment’*.

- 6.9 The discussion of the policy context of the ALRC Inquiry in Chapter 3 of DP79 describes the importance of directing copyright reform achieving economic efficiency so as to achieve a net social and economic benefit for Australia;²²⁷ as well as enduring that reform proposals are ‘evidence based’.²²⁸ In section 3 of this submission Arts Law has supported ‘evidence based’ copyright policy development.
- 6.10 DP79 [6.52] refers to the Copyright Advisory Group—Schools submission in support of four propositions (Set out above in paragraph 6.2), including ‘statutory licensing is economically inefficient’ but failures to provide any economic analysis of the inefficiencies in the operation of the statutory licensing.²²⁹ Arts Law argues that the statutory licensing arrangements in the *Copyright Act 1968* were established to address the market failure arising from the copying of works and the recording and use of broadcasts without licence of the rights holders.²³⁰ *Submission 231* misuses the description of ‘market failure’ to describe the operation of statutory licensing, whereas that concept has a precise meaning in economics, and “[i]t does not simply mean dissatisfaction with market outcomes”,²³¹ or dissatisfaction with the outcome of the statutory licensing schemes that were put in place to manage copying for educational purposes and other uses.
- 6.11 *Submission 231* asserts the existence of various ‘false market for works’ created by the statutory licences. Those examples are: paying for use of freely available internet materials; encouraging website owners to seek payments from Australian schools for content that they do not require anyone else to pay for; creating markets that would not exist ‘but for’ the statutory licences; imposing overly strict processing protocols that result in ‘double dipping’; statutory licensing allows ‘double dipping’ between direct and statutory licences; and statutory licensing causing public funds to be spent on accessing publicly funded content. Arts Law argues that *Submission 231* contains flaws in the discussion of ‘false markets’, notably making erroneous assumptions as to how rights are licenced and educational publications are priced:
- 6.11.1 **payment for use of freely available internet materials:** *Submission 231* asserts that “*freely available internet content that was never intended to be paid for*” is currently being remunerated for use in educational contexts and thus the remuneration represents an unnecessary licence payment,²³² nevertheless, it

²²⁷ DP79, [3.13]. “The Australian Consumer and Competition Commission (ACCC) submitted that the aim of copyright reform should be the ‘pursuit of economic efficiency’ and IP Australia argued that the purpose of copyright law reform is to ‘provide a net social and economic benefit for Australia’.”

²²⁸ DP79, [3.14]. “A major concern of stakeholders is that reform should be ‘evidence-based’. The ACCC considered it important that the ALRC takes into account available economic evidence when considering reform, as well as stakeholder views and economic rationales for reform.”

²²⁹ The ‘best practice’ for economic analysis is discussed in section 3 of this submission.

²³⁰ ‘Derogation from rights holders’ rights’, Submission of Screenrights in response to DP79.

²³¹ NSW Better Regulation Office, GUIDE TO BETTER REGULATION | Appendix A – Types of Market Failure (November 2009) http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0009/16956/Better_Regulation_eGuide_Section_4_-_Appendix_A_-_Types_of_Market_Failure.pdf

²³² *Submission 231*, 71.

does not follow that the statutory licenses create “false markets” or remuneration for a “Non-existent Market” and should thus be dismantled altogether.²³³ The false assumption made in *Submission 231* is that merely because material is published on the internet that it is published with the intention that it can be freely reused for any purpose.²³⁴ The publishers of material on the internet may have chosen to publish the material without cost to the web user but that choice does not mean that they have given up the ability to monetize the use of the material by different classes of web user. The internet allows the adoption of different business models and provides opportunities for rights holders to engage in price discriminate between different classes of readers or users of that material. Internet based business models which operate on the basis that the material is “freely available” still function within a framework of copyright licensing (even if Creative Commons or royalty free) that starts from the traditional premise of the authors’ right to control how the work is reproduced. In other words, material “freely available” on the internet is not ‘free’ for reuse, as internet based business models allows the publication of material to which there is free access to read the material although the publishers may intend to generate revenue in indirect ways such as by accessing advertising revenue or any other revenue streams that are available.²³⁵ Arts Law argues that accessing revenue streams that flow from the operation of statutory licensing schemes related to the educational use of material “freely available” on the internet is a legitimate practice and is not an example of market failure (as discussed above).

- 6.11.2 **encouraging website owners to seek payments from Australian schools for content that they do not require anyone else to pay for:** *Submission 231* asserts “the provisions of Part VB have the effect of encouraging website owners who had intended to make their content available for free to seek payment from Australian schools”.²³⁶ Again, the false assumption made in *Submission 231* is that merely because material is published on the internet that it is published with the intention that it can be freely reused for any purpose.²³⁷ Arts Law argues that accessing revenue streams from the educational use of material “freely available” on the internet is a legitimate practice and is not an example of market failure (as discussed above) – even Australia is the only jurisdiction to provide a revenue stream for such material.

²³³ Delia Browne, *Educational Use and the Internet — Does Australian Copyright Law Work in the Web Environment?* (2009) 6(2) *SCRIPTed* 449, 456.

²³⁴ Material may be intentionally published to allow the ‘free’ reuse; an example is Creative Commons licensing, for which the relevant licence sets out the terms on which the material can be reused.

²³⁵ See DP79, 274 [13.30]: “Of course, a film shown with advertisements on free-to-air television is not really ‘free’. Advertising is also not the only way of selling content without explicitly charging for its use: giving a customer access to a free book, for example, so that the customer enters a content ‘ecosystem’ in which he or she is more likely to buy other books, or indeed films, television shows and other material, is not necessarily the same as giving the book away for free”; see also at 274 [13.28]: quoting Screenrights, *Submission 215*.

²³⁶ *Submission 231*, p 73.

²³⁷ An exception is ‘Creative Commons’ licensing, for which the relevant licence sets out the terms on which the material can be reused.

6.11.3 creating markets that would not exist ‘but for’ the statutory licences:

Submission 231 directs attention to publishers that both licence the educational resource to the schools then seek revenue under the Part VB statutory licence. Again, the internet allows the adoption of different business models and to engage in price discriminate between different classes of readers or users of that material. Arts Law argues that this complaint makes assumptions as to the value of the educational resource. The publisher is entitled to set a value on access to the educational resource and then to derive further revenue based on the level of use of the resource. Again this is not an example of market failure (as discussed above) – even Australia is the only jurisdiction to provide a revenue stream for such material.

6.11.4 overly strict processing protocols also result in ‘double dipping’:

Submission 231 argues that very strict processing protocols also result in ‘double dipping’ and gives the example of Australian schools that pay to use ‘blackline masters’ (BLM)²³⁸ in circumstances where this is a nonremunerable use in comparable countries. It then states “[t]he pricing of BLMs generally reflects the included licence to make multiple copies. It is common educational practice for a school to buy a BLM book (at a commercial price which reflects the intended use of the work) and then make multiple copies of these BLM pages for distribution in class.”²³⁹ Arts Law argues that this makes an assumptions about (1) the pricing of BLMs as included the unlimited reproduction; and (2) the intention of BLM publishers (and authors) that they are not seeking to access the revenue streams under Part VB of the *Copyright Act 1968*. LouisaC, author/artist of BLMs, made the following comment on the ALRC blog, which does not support the assumptions that are made in *Submission 231*:

*“As an author/artist who creates blackline master works exclusively for use in schools, allowing free copying of my books simply because they are used in an educational setting is unfair. It is the equivalent of allowing teachers to go the local coffee shop, buy a \$4 cup of coffee and get free refills for life. The majority of my income comes from copyright payments. If the current copyright protections change I will not be able to continue creating works. At a time when artists, authors and publishers are already suffering because of illegal use and copying, taking away one our few protections is unthinkable.”*²⁴⁰

6.11.5 statutory licensing allows ‘double dipping’ between direct and statutory licences:

Submission 231 describes a publisher that “charges a licence fee for students to access an educational resource. The publisher also reserves its rights to collect remuneration under the Part VB licence for any materials that are

²³⁸ Ibid. ‘The term ‘blackline master’ is a term used throughout the publishing industry to connote a work that is subject to an express licence to make copies for distribution to students.’

²³⁹ Ibid. p 73.

²⁴⁰ ALRC ‘Tell us what you think is “fair” blog’, submitted by LouisaC on 12 July 2013. <http://www.alrc.gov.au/public-forum/copyright-and-digital-economy/tell-us-what-you-think-%E2%80%9Cfair%E2%80%9D-and-what-fair-use-should-lo>

printed from the resource in schools."²⁴¹ As discussed earlier, the publisher is entitled to operate with a business strategy in which a value on access to the educational resource is determined by the publisher, with the publisher deriving further revenue based on the level of use of the resource. This is not an example of market failure (as discussed above).

- 6.11.6 **statutory licensing means public funds are spent on accessing publicly funded content:** *Submission 231* refers to the Federal Government funding of the Australian Broadcasting Corporation (ABC) and SBS and payment of licence fees to Screenrights for television content copied under the Part VA of the Copyright Act 1968 as having the consequence that "[s]tatutory licensing means public funds are spent on accessing publicly funded content".²⁴² While the 'Lateline' program used as the example earlier in the submission,²⁴³ is produced by the ABC (the ABC being the rights holder), this analysis of the 'problem' with Part VA education licencing overlooks that a significant proportion of television content screened on ABC and SBS is licenced from independent producers (both Australian and non-Australian) and it is those independent producers who have the claim to licence fees that flow from the use of that television content in the education sector. That is, statutory licensing does not necessarily mean public funds are spent on accessing publicly funded content. The assumption in the *Submission 231* is only correct in relation to a specific category of programs – publicly funded television programs in which ABC or SBS are the copyright owner. In any event there is a policy argument that the ABC and SBS should be treated the same as other rights holders in relation to the operation of statutory licensing schemes.
- 6.11.7 **off-air copying of pay television programs:** *Submission 231* also refers to the off-air copying of pay television programs and states "[m]any schools pay broadcasters such as Foxtel or Austar to access a subscription television service under an educational licence. This service generally includes an intelligent set top box (such as Foxtel IQ or Austar MyStar) which enables schools to record programs, including using facilities such as 'series link' by which, for example, the set top box can be set to record an entire series of a particular show. This recording is clearly contemplated by – and facilitated by – the provision of the set top box. However schools must then pay for this copying under the Part VA licence, in circumstances where the exact same recording would be free if made in any household in Australia."²⁴⁴ Arts Law argues that this example of a problem with statutory licensing is misconceived. The fee paid by schools to Foxtel or Austar is the subscription to access the pay TV signal – which is the service provided by Foxtel or Austar. Those service provides (1) compile their own channels (both with programs commissioned by Foxtel or Austar and with programs licensed from independent producers); and (2) provide carriage to

²⁴¹ *Submission 231*, p 75.

²⁴² *Ibid.*

²⁴³ *Submission 231*, p 70.

²⁴⁴ *Ibid.* (underlining added for emphasis).

channels that are compiled by independent channel providers (e.g. National Geographic). Foxtel or Austar hold limited rights in programming and channels - the right to communicate to the public - which rights are licensed from third parties (independent producers and channel suppliers). As described above, it is those independent producers that have the claim to licence fees that flow from the use of that television content in the education sector. A further comment can be made that the schools are making a use of the programs that is not with the grant of rights held by Foxtel or Austar and the use of the programming by the schools is different to a use made by an individual subscriber “*in any household in Australia*”. The schools are recording the programming for further communication to students as part of the education service provided by the schools - that is a use that part of the exclusive rights of the copyright owner, which is managed by the Part VA licence. This argument strikes at the very heart of copyright - that the copyright owner has certain exclusive rights, which can be managed to reward the creator/copyright owner by generating an economic return from creative content - for example by charging one licence fee to allow broadcasters to communicate content into private households and another to a different market.

- 6.12 Arts Law agrees with the assessment in DP79 that the repeal of statutory licensing schemes is unlikely to create competitive markets in access to material; in DP79 [6.90] the ALRC state:

*“However, repealing the statutory licence may be unlikely to create a competitive market in collective rights management. Educational institutions and governments are likely to continue to need to enter into collective licensing arrangements with collecting societies, even if the existing statutory licences are repealed. Direct licensing is unlikely to cover all the needs of educational institutions and governments, even if micro-licensing improves considerably and new business models emerge that offer broad, blanket licences.”*²⁴⁵

Arts Law notes the comments by the Copyright Council of Australia, that in current regulatory models: the declared collecting societies are regulated by the Attorney-General, with declarations made subject to guidelines; and declarations may be referred to the Copyright Tribunal of Australia.²⁴⁶ The Australian Competition and Consumer Commission (ACCC) may be involved in Copyright Tribunal proceedings related to both statutory and voluntary licensing schemes retains a general supervisory role under the *Australian Competition and Consumer Act 2010* in relation to agreements in restraint of competition and the misuse of market power.

- 6.13 Arts Law agrees with the views of Screenrights as to the problems inherent in the adoption of voluntary licencing.²⁴⁷ The replacement of statutory licences with voluntary

²⁴⁵ DP79, [6.90].

²⁴⁶ ‘Current regulatory models’, Copyright Council of Australia (CCA) submission in response to DP79.

²⁴⁷ Screenrights submission in response to DP79.

licences will create particular problems for artists in difficult financial times, as individual artists will not have the resources to engage in negotiations with governments, educational institutions, and institutions assisting persons with a print disability. Even with collective licencing arrangements to manage rights, voluntary licencing will be less efficient as compared to the operation of the existing statutory licencing scheme because:

- 6.13.1 users will incur the transaction costs in locating, negotiating and licencing material from individual owners, owners of catalogues of material or material that is collectively managed; and
- 6.13.2 rights holders will face increased rights management costs including monitoring for unlicensed use and enforcing rights as well as the transaction costs of negotiating the voluntary licences.

7. Fair use exception

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 [listed] 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.

- 7.1 Arts Law has set out in section 4 of this submission the arguments against adoption of fair use doctrine in Australia; therefore Arts Law does not support Proposal 7-1.
- 7.2 Arts Law has set out in section 4 of this submission the arguments against adoption of fair use doctrine in Australia; therefore Arts Law does not support the repeal of the existing fair dealing exceptions as described in Proposal 7-2.
- 7.3 Arts Law supports Proposal 7.3.
- 7.4 In relation to Proposal 7.4, Arts Law argues that the indiscriminate application of fairness factors set out in Proposal 4-3 may bring uncertainty to the application of the fair dealing exceptions (e.g. reporting the news, research and study, parody and satire, criticism and review).
- 7.5 Arts Law agrees with the comments of the Copyright Council as a problem with the existing fair dealing provisions, in particular the reporting the news exception, there is a tendency to focus on the purpose of the use and not have regard to the fairness of the use.²⁴⁸ Arts Law submits that in relation to the reporting the news exception,²⁴⁹ the fairness of the use could be addressed in a similar way to the fairness factors that apply to the research or study exception in ss 40 (2) & 103C.
- 7.6 Arts Law submits that a review of the fair dealing provisions can address drafting that results in uncertainty of meaning (including drafting ‘errors’ and ‘mishaps’)²⁵⁰ and address inconsistencies such as, adding a requirement for a ‘sufficient acknowledgment’ as to the use copyright material with respect to the fair dealing provisions for the purpose of reporting news by means of a communication or in a cinematograph film.²⁵¹

²⁴⁸ Copyright Council of Australia, submission in response to DP79 ‘Question 4-1 Illustrative Purposes’ referring to *Mean New Digital World for Freelancers*, ABC Media Watch (17 June 2103) <http://www.abc.net.au/mediawatch/transcripts/s3783641.htm>

²⁴⁹ ss. 42; 103B *Copyright Act 1968* (Cth).

²⁵⁰ As discussed in DP79, [7.53] – [7.61].

²⁵¹ DP79, [7.54], referring to *Copyright Act 1968* (Cth) ss 42(1)(b) and 103B(1)(b).

8. Non-consumptive use

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

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

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

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

- 8.1 Arts Law has set out in section 4 of this submission the arguments against adoption of fair use doctrine in Australia; therefore Arts Law does not support Proposal 8-1 or the repeal of the existing fair dealing exceptions as described in Proposal 8-2, except as part of the implementation of Proposal 8-3.
- 8.2 Arts Law considers that the fairness factors set out in Proposal 4-3 are inherently uncertain in their application; however Arts Law supports implementation of Proposal 8-3 and the introduction of a fair dealing exception for ‘non-consumptive’ use that “*does not directly trade on the underlying creative and expressive purpose of the material*”.²⁵²
- 8.3 Arts Law argues in the submission in response to IP42 that to the extent that internet-related functions ‘reproduce copyright works or assist copyright infringers to access works’, they can prejudice the ability of artists to earn an income.²⁵³ The implementation of a fair dealing exception for ‘non-consumptive’ use needs to operate within a rights management framework that takes account of:
 - 8.3.1 The distinction between ‘non-consumptive’ use (as defined in Proposal 8-3) and internet intermediaries and web based services that facilitate copying and transmission of copyright material to the public - as considered in section 6 above;
 - 8.3.2 The recognition of digital technologies by rights owners to limit access to web sites for purposes of indexing and caching including the operation of ‘robot.txt protocol’ on websites.²⁵⁴
- 8.4 Arts Law’s submission in response to IP42 argues that there should be implementation of protocols for take down notices procedures that require ISPs,

²⁵² Arts Law notes the examples of the specific exemptions provided in Article 13 of the European *E-Commerce Directive* and in s. 92E of the *Copyright Act 1994* (NZ) that provide conditions for the operation of caching and indexing of material including compliance with any terms imposed by the rights holder for accessing that material.

²⁵³ DP79, [8.32].

²⁵⁴ DP79, [8.10], footnote 10.

and internet connection hosts to remove works from caching and indexing services.²⁵⁵ Arts Law notes the discussion of the safe harbour scheme for ISPs.²⁵⁶ Arts Law submits that copyright compliance management of ‘user created content’ can operate through the ‘hubs’ or ‘nodes’ or ‘platforms’ that are located in the architecture of the internet.²⁵⁷ The operation of the safe harbour scheme for ISPs should facilitate rights management mechanisms that:

- 8.4.1 enhance the choices of rights holders, when dealing with unlicensed copyright material, as to whether to block the use of their copyrighted works through ‘takedown notices’; or track the use; or the copyright owner can engage with internet service providers and internet content hosts to monetize what is otherwise an unlicensed use of the work through accessing advertising revenue related to the user-generated content. For example, the YouTube ‘ID Content’ policy;²⁵⁸ or
- 8.4.2 facilitate the operation of either statutory licencing schemes or voluntary licensing arrangements related to the communication of copyrighted material to the public by social networking sites and telecommunications providers under copyright law.²⁵⁹

²⁵⁵ DP79, [8.30].

²⁵⁶ DP79, [8.34] – [8.40].

²⁵⁷ See Section 3. (A) above.

²⁵⁸ ID Content’ policy is described as being intended to allow copyright owners to ‘monetize, block or track’ uses that are not a fair use of the copyright material <http://www.youtube.com/t/contentid>

²⁵⁹ IP42 [109].

9. Private and domestic use

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

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

9.1 What is ‘private and domestic’?

9.1.1 Arts Law opposes Proposals 9-1 and 9-2.

9.1.2 When considering the issue of ‘private copying’, Arts Law submits that the European Union *Information Society Directive* definition of this term should be adopted: “reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial.”²⁶⁰

9.1.3 Arts Law submits that the use of copyrighted works for private or domestic purposes should be distinguished from a use on a social networking site. That is, from the perspective of the artist or creator of the copyright work, it may be one thing to create a family video that incorporates a copyrighted song and share that video with family by email (or any other person to person communication technology). However, it is another to put such a video on a social networking site, such as Facebook or a video aggregation site such as YouTube, where it is available for viewing by a much broader audience and where the video is published to many (whether that is small groups of ‘friends’) or even to any user of the website. This is because content posted on a social networking site (which is an inherently commercial operation by the site owner even if the service provided is one facilitating largely non-commercial social interaction in the digital environment) is generally then widely available as a practical matter for reuse in commercial contexts. If a person’s Facebook friend who has the least restrictive privacy shares a photo they like (but in which they don’t own copyright) with their Facebook audience, it is a simple matter for any user anywhere in the world to download and use that photograph to promote their business and almost impossible for the photographer to do anything about it. While technically such commercial use may infringe copyright, the creator is virtually helpless. The hypothetical example of an Australian visual artist whose artwork image is appropriated from the purchaser’s social media site (where it was uploaded purely for private or domestic purposes to express their delight at acquiring the work) and then used by a European interior designer as the basis for an entire range of decorating soft furnishings at a substantial profit to that interior designer is illustrative. No one doubts that the

²⁶⁰ Defined by the *Information Society Directive* 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJL 167, 22/06/2001, p.0020-0019, Article 5.2(b).

latter use should correctly be identified as infringing. The practical issue is that ‘but for’ publication on social media, this may never have happened. Social media may not in itself be objectionable but it opens the floodgates to potential infringement by others.

- 9.1.4 Arts Law submits that while some internet users engage in creative re-use of copyright material, a significant number of internet users engage in consumption rather than in creative reuse of copyright materials on social networking platforms. The creation of a new exemption for online uses of copyright works for private or domestic purposes will result in a significant loss of control by artists as to the use of copyright material and is likely to substantially prejudice the moral rights of artists.
- 9.1.5 Arts Law submits that defining what is ‘commercial’ or ‘non-commercial’ in the digital environment is problematic. For example, user created content (which incorporates copyrighted works) may be placed on video aggregation websites such as YouTube by the creator for non-commercial motives. However, the YouTube platform operates with commercial motives and monetises user created content through online advertising directed to those that access and view the video material.
- 9.1.6 Defining what is a ‘non-commercial’ use in the digital environment is identified as problematic in the Issues Paper, with the comment, *“especially where a creator of content opts to receive payments from advertising associated with websites.”*²⁶¹ Arts Law submits that the definitional problem as to what is a ‘non-commercial’ use extends beyond the question whether or not the individual derives payment from advertising related to the user-generated content. The websites that host user-generated content are publishing forums that attract advertising based on the number of users of the website, so that social networking websites (such as Facebook) and video aggregation sites (such as YouTube) are intrinsically commercial operations.

9.2 Social media platforms and the use of copyright material

- 9.2.1 More than a billion viewers have accessed Psy’s ‘Gangnam Style’ music video on YouTube,²⁶² YouTube’s ‘ID Content’ policy results in YouTube sharing ad revenue with rights holders.²⁶³ Psy is reported to have gained some \$870,000 from YouTube advertising,²⁶⁴ with further revenue generated from sponsorship arrangements with Samsung and other endorsements. Vivien Lewit, the YouTube music content partnerships director, is reported to have said that “[t]housands of individual

²⁶¹ IP42 [130].

²⁶² 1,711,364,711 (as of 24/7/2013) have viewed PSY-GANGNAM STYLE (강남스타일) M/V. The video is available on different YouTube channels including the Psy-Gangnam Style (Official Music Video) <http://www.youtube.com/user/officialpsy>

²⁶³ “YouTube lets music owners provide reference files of songs that the website uses to scan for matches in uploaded videos. When matches are found, the owner of the music can opt to make money from ads, track where the songs go, or block it.” Glenn Chapman, *Musicians find fame and fortune at YouTube* (May 6, 2013) Agence France-Presse <http://technology.inquirer.net/25165/musicians-find-fame-and-fortune-at-youtube#ixzz2ZupgMnk2>

²⁶⁴ IPKat blog, *IP and Digital Entertainment conference: Part IV* (18 July 2013) <http://ipkitten.blogspot.com.au/2013/07/ip-and-digital-entertainment-conference-3002.html>

creators make more than \$100,000 per year ... Not only do they make money through their own uploads of video, they make money every time a fan uploads.” Lewit is also reported to have stated that YouTube has paid the record industry more than a half billion dollars in the past two years from ad revenue.²⁶⁵

- 9.2.2 Success on a social media platform is measured in millions of paid subscribers to subscription channels on YouTube. For example, comedian Jenna Mourey (aka Jenna Marbles), with 9.2m subscribers and 1.2bn clip views;²⁶⁶ or game critic, reviewer & comedian Toby Joe Turner (aka Tobuscus), 4.5m subscribers and 2.2bn clip views.²⁶⁷
- 9.2.3 Other stars of YouTube have found success in performing cover versions of pop songs or lip-syncing pop songs, such as:

<i>JAYESSLEE</i>	<i>KEENAN CAHILL</i>
<i>(Janice and Sonia Lee)</i>	
<i>Cover artists of pop songs</i>	<i>Lip-syncing pop songs</i>
<i>1.44 million subscribers</i>	<i>450,000 subscribers</i>
<i>220 million clip views</i> ²⁶⁸	<i>450 million clip views</i> ²⁶⁹

- 9.2.4 These stars of YouTube show that social media platforms are both the launching pad for a successful career and the distribution platform from which the performers can generate income. These stars are the apex of the millions of users of YouTube, some of who are prolific contributors of content (described as ‘vlogs’ or video blogs), while others may limit their contribution to a video of their child singing or dancing to a pop song – which may achieve a high level of hits. An example of the occasional up-loading of user created content is considered in the ‘Dancing Baby’ litigation in the United States,²⁷⁰ which considers whether the music publisher misused the take-down notice procedure;²⁷¹ This case was discussed in the Arts Law submission in response to IP42.²⁷²

²⁶⁵ Glenn Chapman, *Ibid.*

²⁶⁶ Peter Vincent, *Webcam gives way to spotlight for YouTube's star performers*, Sydney Morning Herald, July 18, 2013, pages 9 & 10. <http://www.smh.com.au/entertainment/music/bigger-than-psy-youtube-stars-unheard-of-by-the-music-industry-20130717-2q34m.html>

²⁶⁷ Peter Vincent, *ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ Stephanie Lenz's 29-second video shows her son bouncing along to the Prince song ‘Let's Go Crazy’. Lenz uploaded the video to YouTube. Universal Music issued a takedown notice under the DMCA; Lenz subsequently challenged the take down notice.

²⁷¹ *Lenz v. Universal Music Corp.*, 2013 WL 271673 (N.D. Cal. Jan. 24, 2013). Judge Fogel determined that the dispute should go to jury trial. See Eric Goldman, *17 USC 512(f) Is Dead--Lenz v. Universal Music* (January 25, 2013) http://blog.ericgoldman.org/archives/2013/01/17_usc_512f_is_1.htm

“Judge Fogel rejected the summary judgment motions of both parties, sending this case to trial on Universal's scienter when sending the takedown notice. Judge Fogel summarizes the permissible arguments each party can make: Lenz is free to argue that a reasonable actor in Universal's position would have understood that fair use was “self-evident,” and that this

- 9.2.5 The proposal to provide that ‘private and domestic’ is an illustrative purpose of a fair use sits uneasily with the operation of social media platforms that provide users with the ability to publish their content to a world-wide audience (if successful) or to achieve a modest number of clip views where the user generated content fails to become a *meme-of-the-moment*.²⁷³ Arts Law submits that there is no clear public policy justification of creating a fair use exception to facilitate and legitimate common consumer behaviour in using copyrighted material in mashups and other user-generated content.
- 9.2.6 The uncertainty as to whether a specific item of user-generated content is a creative or non-creative reuse – whether it is ‘transformative’ – illustrates the difficulty of framing an exception for online uses for social, private or domestic purposes. In the ‘Dancing Baby’ litigation in the United States. Universal Music as the publisher administering Prince’s song ‘Let’s Go Crazy’ argued that it is not correct for Stephanie Lenz to describe a *“YouTube posting as a “home video,” as though it were a simple family movie available for viewing only by a small circle of family and friends in the confines of a personal residence. The use in question is not making a home video. The use is incorporating the copyrighted work in a posting to YouTube. In 2007, as today, YouTube was a for-profit, commercial website, where postings are available to a mass audience.”*²⁷⁴
- 9.2.7 The ‘Dancing Baby’ case is an example of user-generated content that resulted in arguments as to whether it is a creative or non-creative reuse of the song and also whether the video is ‘transformative’; that is, whether it transforms the Prince song into a new work or is merely derivative of the existing work - as the concept of ‘transformative’ use is explained by the US courts.²⁷⁵ In the ‘Dancing Baby’ litigation, Universal argued that *“[s]ynchronizing music to video is not inherently transformative, but rather the exercise of a right specifically reserved to the composition owner”*.²⁷⁶
- 9.2.8 The argument has been made that a ‘private and domestic’ use exception should it be permitted under copyright law would simply legalize what consumers are already doing. The argument is made that laws that are widely ignored also lower the community’s respect for the law more generally, and particularly other copyright laws. On the other hand, if the public does not know that common practices are illegal, then this is not an argument for law reform, but for a public awareness campaign.

circumstance is evidence of Universal’s alleged willful blindness. Universal likewise is free to argue that whatever the alleged shortcomings of its review process might have been, it did not act with the subjective intent required by §512(f)."

²⁷² Submission 171, [3.11 & 3-12], [11.5 & 11.6].

²⁷³ 5 Secrets of YouTube’s Success, Wired Magazine (March 22, 2010) http://www.wired.com/magazine/2010/03/ff_youtube_5secrets/

²⁷⁴ Lenz v. Universal, Defendants’ Notice of Motion and Motion for Summary Judgment (July 13, 2012) <https://www.eff.org/cases/lenz-v-universal>

²⁷⁵ IP42 [112]-[118].

²⁷⁶ Lenz v. Universal, Defendants’ Opposition to Plaintiff’s Renewed Motion for Summary Judgment (August 24, 2012) <https://www.eff.org/cases/lenz-v-universal>

9.3 Users rights: time shifting and format shifting

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

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

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

Summary:

9.3.1 Arts Law opposes Proposals 9-3 to 9-5. Arts Law supports copyright exceptions that are specifically directed at time shifting and format shifting but only under certain conditions, which are:

- (1) That the material being format shifted is legally acquired or the broadcast being time shifted is not an infringing broadcast;
- (2) That the copy is created by a natural person for private and domestic viewing by that person;
- (3) That if the copy is used for purposes beyond time shifting or format shifting for private and domestic viewing, such as if it was rented or sold or distributed to someone else, it is deemed to be an infringing copy from the time it was made; and
- (4) That artists receive remuneration for the reproduction and communication of their material.

9.3.2 Arts Law submit that an extension to the format shifting exception is unnecessary because the current position meets the legitimate needs of consumers. Further, rights holders have the ability to adopt business models in which the enhanced format shifting can be a competitive advantage to differentiate that rights holder's products from those of other suppliers.²⁷⁷ There should be a specific exception allowing individual consumers to make back-up copyrighted material such as images, ebooks, audio and audio-visual material that have been legally acquired. The sole purpose for the back-up would be in case the source copy is lost, damaged or otherwise rendered unusable as provided, for example, as provided for in the Canadian *Copyright Act*.²⁷⁸

Detail:

9.3.3 Recent and anticipated changes in the digital environment have produced technologies that can carry out format shifting or time shifting or both format shifting and time shifting. These format shift/time shift technologies may exist in a

²⁷⁷ See IP42 [77].

²⁷⁸ Copyright Modernisation Act, C-11 2012 (Canada) s. 29.24.

device that can be purchased or can be provided by a service provider such as a cloud computing service.

9.3.4 Arts Law submits that both the format shifting and time shifting exceptions should be limited to the circumstances in which the copy is created by a natural person for private and domestic viewing by that person.²⁷⁹

9.3.5 Arts Law supports the policy of the current exceptions for format shifting:

- 1) To only operate where the natural person (the owner of the original) makes the copy and the original is not an infringing copy;
- 2) To only permit one copy in each format as that is sufficient to achieve the private purpose of the exceptions; and
- 3) To only permit analog to digital copying of films and not digital to digital copying, so that analog recordings are available for viewing on digital devices.

9.3.6 It is open to rights holders to license copyrighted material on terms that permit more extensive format shifting than provided in the *Copyright Act 1968* and this strikes the right balance between rights holders and users.

²⁷⁹ Defined as “reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial.” *Information Society Directive* 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJL 167, 22/06/2001, p.0020-0019, Article 5.2(b).

10. Quotation

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

Proposal 10–2 The fair use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair use exception.

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

- 10.1 Arts Law does not support the introduction of a fair use exception; therefore Arts Law does not support Proposals 10-1 and 10-2.
- 10.2 Arts Law argues the fairness factors set out in Proposal 4-3 are inherently uncertain in their application. The decision of the 2nd Circuit in *Salinger v Random House, Inc.*²⁸⁰ is an example of the flaws in using fairness factors to determine issues related to quotation.
- 10.3 In any event Arts Law notes that the treatment of music sampling by U.S courts does not support a role of a quotation exception that permits ‘sampling’. The current state of US law in relation to music sampling is that any sampling, regardless of how minute, constitutes copyright infringement.²⁸¹
- 10.4 Arts Law supports the submission of the Copyright Council of Australia that a quotation exception might work better for some types of copyright material than others and that quotation is better mediated by determining the question whether there is the use of a substantial part rather than by a specific exception.²⁸²

²⁸⁰ *Salinger v Random House, Inc.*, 811 F.2d 90 (2nd Cir. 1987).

²⁸¹ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800–01 (6th Cir. 2005).

²⁸² ‘Proposals 10-1 to 10-3 Transformative Use and Quotation’, Copyright Council of Australia response to DP79.

11. Libraries, Archives and Digitisation

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

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

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

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

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

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

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

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

- 11.1 Arts Law does not support a fair use exception or a general fair dealing exception that would apply to libraries and archives as described in Proposals 11-1 to 11-3.
- 11.2 Arts Law supports changes to the *Copyright Act 1968* that facilitate the operation of libraries and archives in the digital environment (including a revision of s 200AB), however Arts Law does not view the application of an open-ended fair use exception as the solution to the specific needs of libraries and archives in relation to the digitisation of their collections.
- 11.3 Arts Law supports the exception as described in Proposals 11-4 to 11.7 that allows those institutions to make copies of copyright material, whether published or unpublished, for the purpose of preservation of that material,²⁸³ provided that the new preservation copying exception operates within commercial licensing arrangements that may be in place for the material for the reproduction and communication to the public of material held by libraries and archives.²⁸⁴
- 11.4 Arts Law acknowledges that libraries and archives fulfil an important role by collecting copyrighted material and making that material available to the public.

²⁸³ Proposals 11-1 to 11-7, DP79.

²⁸⁴ The preservation exception would not apply to 'copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.' (Proposal 11-6).

However, in the digital environment the publication of copyright material online and the communication to the public of copyrighted material by libraries and archives has the potential to impact on the commercial exploitation of the material by the rights holders.

- 11.5 Arts Law argues that where the reproduction of the copyright material is to enable public access to a work in a form other than the original, such as a public art gallery making reproductions available on a computer terminal in the gallery, or making the gallery's collection available online, then the fundamental principle of ensuring remuneration of the creators (or copyright owner) should apply.
- 11.6 Arts Law submits that a distinction can be made between the digitisation of collections for non-commercial access within that institution (by curators and members of the public) and digitisation of collections for publication on the internet. The availability of copyrighted works on the internet will impact on the ability of creators of those works to generate revenue from those works. Therefore the scope of library and archive exceptions needs to be limited to digitisation for archival purposes with protocols, policies and practices limiting access while the work remains subject to copyright.
- 11.7 Arts Law submits that the principle of free, prior and informed consent (FPIC) should guide the digitisation of Indigenous works by museums, archives and other cultural institutions.²⁸⁵ Economic harm is magnified by the potential for significant cultural and other harm that may arise for Indigenous artists through the digitisation of works and the communication of the works to the public in ways that are not culturally appropriate. In consequence, Arts Law advocates that even Indigenous works that are not protected by copyright (for instance, because of duration) ought, in many cases, not be exploited via digitisation without explicit permission (FPIC) from the relevant community. The creation (without FPIC from cultural descendants) of new, copyright protected works by and for non-Indigenous peoples where that work is derived from digitised Indigenous artwork in the public domain may cause cultural as well as economic harm to that particular Indigenous community. Libraries, archives and other cultural institutions therefore need to be careful with their own treatment and uses of Indigenous works and also in terms of how they go about protecting those works and informing the public about their significance and the need to obtain FPIC before any use. Arts Law notes the work that has been done on protocols for digitisation and use of Indigenous material referred to in DP79.²⁸⁶

²⁸⁵ This is in accordance with Article 31 of the *UN Declaration on the Rights of Indigenous Peoples* as well as various protocols, policies and practices within Australia, for example: *Protocols for producing Indigenous Australian visual arts*, Australia Council for the Arts (2007); Terri Janke, *Pathways and Protocols: A guide to protocols for filmmakers working with Indigenous content and Indigenous communities*, Screen Australia (2008).

²⁸⁶ DP79 [3.68] footnote 114, refers to Arts Tasmania, *Submission 150*; M Nakata and others, 'Indigenous Digital Collections: An Early Look at the Organisation and Culture Interface' (2008) 39(4) *Australian Academic and Research Libraries Journal* 137. See also M Nakata and others, 'Libraries, Indigenous Australians and a Developing Protocols Strategy for the Library and Information Sector' in M Nakata and M Langton (ed) *Australian Indigenous Knowledge and Libraries* (2005).

12. Orphan works

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

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

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

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

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

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

Summary:

- 12.1 Arts Law opposes Proposal 12-1 on the basis that the application of an open-ended fair use exception is not the appropriate solution to the problem of managing ‘orphan’ works and other problems created for copyright in the digital environment.
- 12.2 Arts Law provides qualified support for Proposals 12-2 and 12-3 and submits that the preferred model would:
 - provide a definition of ‘orphan works’ that covers copyright owners or relevant performers who cannot be:
 - identified; or
 - located.
 - provides a clear description of the necessary steps that a person must take to attempt to locate and identify the copyright owner;
 - provide for the payment of a licence fee to the appropriate collecting society or government body; and
 - provide that the copyright owner would receive compensation for the use, when the owner is identified or located;
 - include a mechanism to ensure compensation for moral rights infringements; and
 - take account of the special situation facing Aboriginal and Torres Strait Islander artists, communities and rights holders in Australia.
- 12.3 Arts Law notes the discussion of different models for the management of orphan works in DP79. One model involves up-front payment of a licence fee to a collecting society. Another model involves liability management – it limits remedies available to an owner – if an owner subsequently appears. Arts Law submits that the up-front

payment of a licence fee to a collecting society is the preferred model as it manages the potential impact of the market if no fee is paid for orphan works when fees will be paid for works for which the owner can be located, and manages the solvency risk that is inherent in the liability management model.

- 12.4 Arts Law supports the proposition that *“a ‘reasonably diligent search’ is the appropriate test to determine whether the user of an orphan work is entitled to protection.”*²⁸⁷ DP79 refers to *“a copyright register, which may help identify owners of orphan works”* and Arts Law suggests that the Copyright Hub, recently established in the United Kingdom, provides a useful working model of a digital copyright register.

Detail:

- 12.5 Reports published by the IPO (UK) in July 2013 provide valuable insights into the management of orphan works. *‘Copyright, and the Regulation of Orphan Works’* (the ‘Favale Report’) provides a comparative analysis of different regimes.²⁸⁸ The IPO also published a report derived from consultations with interested parties which included the perceived benefits, detriments, and changes in use patterns regarding an orphan work management regime (the ‘Spires & Rooke Report’).²⁸⁹
- 12.6 The ALRC’s view is that *“users should not be required to obtain a licence before using an orphan work in all circumstances. This would be inefficient and burdensome on individual and institutional users, and would overly inhibit the use of orphan works.”*²⁹⁰ The Favale Report concludes that there are a variety of models currently in existence:

*“In Canada, Japan, India, Denmark and France an upfront payment is normally required by the applicant in exchange for using orphan works. In Canada, payment is upfront in approximately two-thirds of cases, whilst it is contingent on the rightholder reappearing in the remaining third. See De Beer and Bouchard (2010). In Hungary the amount is identified but may not be deposited (for non-profit licensees). It will be paid directly to the rightholder, in the event that he or she reappears. In the US, no payment is made until a court decision is issued, following an infringement claim.”*²⁹¹

Arts Law submits that not requiring up-front licence fees for use of an orphan work may have impact on the market for works in which the rights holder could be located.²⁹² Users would prefer orphan works as they would not have to pay an

²⁸⁷ DP79, [12.27].

²⁸⁸ Marcella Favale, Fabian Homberg, Martin Kretschmer, Dinusha Mendis, and Davide Secchi, *Copyright, and the Regulation of Orphan Works* (2 July 2013) independent report commissioned by the Intellectual Property Office (IPO) <http://www.ipo.gov.uk/ipresearch-orphan-201307.pdf>

²⁸⁹ Rod Spires, Matthew Rooke, *Orphan Works in the UK and Overseas* (2 July 2013) An independent report commissioned by the Intellectual Property Office (IPO) <http://www.ipo.gov.uk/ipresearch-orphan-overseas-201307.pdf>

²⁹⁰ DP79, [12.45].

²⁹¹ Favale *et al*, *ibid*. Findings Study I (5).

²⁹² DP79, [12.46].

upfront fee. In the liability management system the user may well never have to pay for the use of the orphan work if no rights holder appears to claim a fee.

- 12.7 Arts Law comments that a model involving liability management carries a solvency risk. That is, a user of orphan works may be insolvent at the time the rights holder has been located so that the rights holder will be unable to recover any licence fees for the use of that work. The Favale Report concludes that:

*“A limited liability system seems to have advantages for archives and other non-profit institutions exposed to orphan works, enabling those organisations to share their stock of orphaned artefacts with the public. In contrast, the up-front rights clearing seems to provide more appropriate incentives for commercial uses of orphaned artefacts, guaranteeing that a re-appearing rightholder will be compensated for the exploitation of any work.”*²⁹³

Arts Law submits that the solvency risk will undermine the operation of the orphan works management scheme as under the liability management model the rights holder will not be able to obtain payment for the use of the works from the insolvent user.

- 12.8 A hybrid model is possible, with libraries, archives and other public institutions may operate with a liability management regime, whereas other users who carry a solvency risk would make a full or partial upfront payment. The Favale Report concludes that high tariffs discourage mass digitisation projects:

*“Per item fees initially appearing very low and thus sustainable turn out to render mass-digitisation unviable for public and non-profit institutions when scaled up under reasonable assumptions. Mass digitisation projects involving 100,000 items may incur annual licensing fees exceeding £1million per year.”*²⁹⁴

- 12.9 Arts Law submits that should a centralised licensing system be chosen to manage orphan works then the obvious choice is one of existing collection societies which have established licensing systems. Arts Law notes the submissions that question whether collecting societies are the appropriate entities to manage funds,²⁹⁵ and that questions the efficiency of the collection societies or refers to the costs of setting up a centralised licensing system.²⁹⁶ As to the questions regarding the efficiency of declared collecting societies, Arts Law comments that there is no available economic analysis that support these criticisms.

- 12.10 In response to submissions that question whether licence fees should be paid “*when there is no guarantee or little likelihood that the money will find its way to the*

²⁹³ Favale *et al*, *ibid*. Findings Study II (6).

²⁹⁴ Favale *et al*, *ibid*. Findings Study II (4).

²⁹⁵ DP79, [12.54], citing Australian Attorney-General's Department, *Works of Untraceable Copyright Ownership—Orphan Works: Balancing the Rights of Owners with Access to Works* (2012).

²⁹⁶ DP79, [12.57].

copyright holder”,²⁹⁷ Arts Law suggests that any unclaimed funds held by the centralised licensing system could be allocated to financing research into copyright policy development including research as to the efficiency of collecting societies and the cost effectiveness of alternative models such as voluntary licensing.

²⁹⁷ DP79, [12.53].

13. Education

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

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

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

Summary:

- 13.1 Arts Law opposes Proposals 13-1 to 13-3. Arts Law opposes the introduction of an open-ended fair use exception for the reasons set out earlier in this submission.
- 13.2 Arts Law opposes the alternative proposal for a new ‘fair dealing for education’ (that would involve having regard to the same fairness factors in the fair use exception) because the potential adverse impact on the ‘public interest’ values of promoting creativity and innovation in the development of educational resources is not justified by the potential benefits to the competing ‘public interest’ values of promoting education.²⁹⁸
- 13.3 The push to expand access to educational resources creates the risk of damaging the incentives that are necessary for the production of works specifically and solely for the use of educational purposes, such as for example traditional textbooks. In response to IP42 many publishers of educational material were opposed to the creation of an extended free-use exception for educational institutions.²⁹⁹ While expanding the educational use exception may have a beneficial effect for educators in giving them greater access to educational resources,³⁰⁰ the corollary effect will be that those creators producing works specifically for the Australian curriculum will face a drying up of income because of the expanded educational use exceptions,³⁰¹ which risks the drying up of the production of educational material as there is less

²⁹⁸ cf Copyright Advisory Group – Schools, *Submission 231*, 4–5, noting that under new technology a process consisting of a teacher 1) saving a scene from a play found on a website to their computer; 2) emailing it to their school email account; 3) uploading it to the school’s learning management system; and 4) then displaying it on an interactive whiteboard would involve 4 separate remunerable activities. A general exception for educational purposes however would result in no remuneration for the creator.

²⁹⁹ DP79 pp 277–8 [13.44]–[13.49]: Spinifex Press, *Submission 125*; Walker Books Australia, *Submission 144*; John Wiley & Sons, *Submission 239*; and the Australian Publishers Association (APA), *Submission 225* oppose an extended free-use exception for educational institutions, stressing the harm to creators, “drying up of income streams” and secondary license fees being able to “give much-needed stability to a creator”, additionally educational materials developed specifically for the Australian curriculum take significant time, resources, skills etc.

³⁰⁰ See DP79, p 273 [13.25]: quoting the submissions of Universities Australia and Society of University Lawyers (*Submissions 246 and 158*).

³⁰¹ See *ibid*, p 277 [13.47] paraphrasing Walker Books Australia, *Submission 144*, to the effect that “[a] reasonably secure source of income was considered particularly important for creators in an industry ‘where sales and therefore royalties tend to decline after a year or so.’” Market for educational resources characterised as particularly reliant on royalties derived from statutory licenses.

incentive to create that material as a result of the lower income generated in the educational market.

- 13.4 Arts law submits that creation of an extended free-use exception for educational creators will have a detrimental impact on creators that produce works specifically for the Australian curriculum will have a far more restricted ability to earn income from such works (the fair use exception will expand the potential 'free' uses with a corresponding restricting effect on the scope of the statutory and non-statutory licensing opportunities available to such creators). In fact coupled with the ALRC's Proposal 6-1 to repeal the statutory licence for educational institutions, the introduction of a fair use exception for education has the capacity effectively to destroy the market in Australia for educational resources.
- 13.5 There is an existing fair dealing exception in the *Copyright Act 1968* for 'research and study' in ss 40 and 103C, in addition to specific education exceptions.³⁰² Arts Law suggests a more appropriate reform would be to revise these exceptions to make them technologically neutral, as in general these exceptions are appropriate to balance the 'public interest' values of promoting education vis-à-vis the 'public interest' values of promoting creativity and innovation in the development of educational resources.
- 13.6 Arts Law opposes the creation of an educational use exception either as an illustrative purpose on an open-ended fair use exception or as a fair dealing exception. Arts Law submits that:
- 13.6.1 a broad educational use exception will have a detrimental effect by introducing greater uncertainty. Educators will not know the boundaries between material that may be copied under a fair use and material that must be licenced. Arts Law supports the submission of the Copyright Council of Australia (CCA), which notes their experience with training educators is the support from educations for the certainty provided by statutory licences;³⁰³ and
- 15.6.2 any new or extended free-use exception for educational institutions will most-likely reduce the incomes of creators and publishers and the reduction in income will have a detrimental impact on the incentives of authors and publishers to create education resources. Arts Law supports the CCA submission that the proposed education use exceptions will have

³⁰² There are exceptions for:

- s 28—performing material, including playing music and films in class;
- s 44—including short extracts from material in a collection;
- ss 135ZG, 135ZMB—copying insubstantial portions;
- s 200—use of works and broadcasts for educational purposes;
- s 200AAA—proxy web caching by educational institutions; and
- s 200AB - a use that is for the purpose of giving educational instruction.

³⁰³ 'Proposal 6-1 Repeal Part VA, VB and VII div 2 Statutory Licences', Copyright Council of Australia (CCA) submission in response to DP79.

implications for the status of the professional creator in Australian society.³⁰⁴

Detail:

13.7 Arts Law notes that the ALRC (Proposal 6.1) also supports the repeal of statutory licensing schemes for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability.³⁰⁵ DP79 refers to the copyright scholars that assert education as “one of the clearest examples of a strong public interest in limiting copyright protection”.³⁰⁶ Arts Law argues that the concept of ‘public interest’ requires a more nuanced evaluation. Arts Law notes that the education sector includes the pre-school, primary, secondary schools and the tertiary sector (universities, colleges and training institutions) with the educational sector consisting of:

- 1) ‘public’ institutions funded by state and territory budgets (with addition funding provided by the Federal Government);
- 2) ‘private’ institutions structured as ‘not-for-profit’ entities; and
- 3) ‘private’ institutions structured as ‘for-profit’ entities.

13.8 Arts Law makes the following comments relevant to the ‘public interest’ values of promoting education vis-à-vis the ‘public interest’ values of promoting creativity and innovation in the development of intellectual property:

- In relation to entities that are ‘non-profit’ for tax purposes, this status does not detract from the usual business function of the entities to providing an educational service on a cost recovery basis;³⁰⁷
- Arts Law notes that state and territory education departments and ‘private’ educational institutions pay commercial rates for goods and services used by that institution. It is therefore appropriate that the test applied by the Australian Copyright Tribunal to determine the equitable remuneration payable by educational institutions to copyright owners for education copying would be the amount paid by a “willing, but not anxious, licensee”.³⁰⁸

³⁰⁴ ‘Proposals 13-1 to 13-3 Proposal Educational Use’ CCA submission.

³⁰⁵ The statutory licensing schemes in pts VA, VB and VII div 2 of the Copyright Act. See Copyright Council of Australia ‘Statutory Licences’ Information Sheet (G0121v01) http://www.copyright.org.au/admin/cms-acc1/_images/97171962851b956916e8df.pdf

³⁰⁶ DP 79, [13.6], quoting K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [9–96].

³⁰⁷ Educational institutions may also budget so as to generate a surplus of income over costs incurred.

³⁰⁸ *Copyright Agency Limited v The Department of Education of New South Wales* [1985] ACopyT 1, (1985) 4 IPR 5 at 15-16.

“[T]he preferred approach is to see first of all whether there is a normal rate of profit or royalty. If the circumstances are comparable, this will establish a going rate which is the best guide to what the parties themselves would have agreed upon if they were treated notionally as a willing, but not anxious, licensor and a willing, but not anxious, licensee. In cases where the evidence does not disclose a going rate of profit or royalty, it may nevertheless be possible to approach the matter upon the basis of a hypothetical bargain. There may be evidence which would enable a court or tribunal to conclude that in the circumstances of the instant case willing but not anxious parties would have arrived at a particular figure for a licence. But the evidence will need to be carefully scrutinised to ensure that comparisons with other cases do not lead to a result which is artificial.”

- 13.9 Arts Law argues that the strong public interest in supporting creators of works is should not be overlooked in this focus on opening access to copyright material for the educational sector.
- 13.10 Statutory licensing and the education sector are discussed in section 6 of this submission.³⁰⁹ Arts Law argues that the submissions supporting the repeal of statutory licensing schemes on grounds of efficiency do not provide any analysis or evidence of higher transaction costs created by the existing statutory licensing schemes nor any analysis of improvements of efficiency that would flow from educational institutions negotiating with rights holders to licence material for educational use.
- 13.11 DP79 describes exceptions to copyright being appropriate for some educational uses of copyright, and proposes that either:
- 1) The fair use exception should be applied when determining whether an educational use infringes copyright. ‘Education’ should be an illustrative purpose in the fair use exception; or
 - 2) If a fair use test is not enacted, the ALRC proposes that a new ‘fair dealing for education’ exception be introduced. This would also require consideration of what is fair; having regard to the same fairness factors in the fair use exception.
- 13.12 An educational purpose should not be regarded as somehow inherently fair. Arts Law note that under the fair use doctrine a ‘use’ is less likely to be fair if it is commercial. The fact that the material will ultimately be used for educational purposes does not necessarily mean the use will be fair, particularly if the use was made for a ‘commercial’ purpose; as was considered in the US case of *Basic Books v Kinko’s Graphics Corp*,³¹⁰ the copying of copyright material to form course packs was found by a District Court not to be fair use. The use was found to have undermined the market for the full texts from which excerpts had been taken. Additionally, in *Princeton University Press v Michigan Document Services Inc.*³¹¹ Michigan Document Services was a commercial copy shop that, without a licence, reproduced substantial segments of copyrighted works and bound and sold them as course packs to students. The Court held that there was not a blanket exemption in the *Copyright Act 1976* (US) for ‘multiple copies for classroom use’; that the “*verbatim duplication of whole chapters and other large portions of the plaintiff-publishers’ books weighed heavily against fair use*”; and that “*the photocopying adversely affected not only the publishers’ book sales but also the photocopying royalties that they would otherwise be paid by a by-then thriving licensing and collecting agency*”.³¹²

See Annexure A, footnote 343, for the description of ‘fair market value’ provided by Judge Cattanaach in *Henderson Estate, Bank of New Year v. M.N.R.*, (1973) C.T.C. 636.

³⁰⁹ DP 79, Proposals 6–1 & 6-2, 13-1 to 13-3, 14-1 to 14-3.

³¹⁰ 758 F.Supp. 1522 (S.D.N.Y 1991).

³¹¹ 99 F.3d 1381 (6th Cir. 1996).

³¹² See J Ginsburg and R Gorman, *Copyright Law* (2012), 194.

- 13.13 Arts Law argues that the Canadian experience of fair dealing provisions show that the appropriate scope of ‘research and study’ can efficiently be determined by the courts. As established in recent case cases, Canada has clearly recognised that the rights of users, as well as the rights of creators, are at the heart of copyright law. In *CCH Canadian Ltd v Law Society of Upper Canada*,³¹³ the Supreme Court of Canada stated that “in order to maintain the proper balance between the rights of a copyright owner and users’ interests, [the Copyright Act] must not be interpreted restrictively.”³¹⁴
- 13.14 The Supreme Court of Canada in *Alberta (Education) v Canadian Copyright Licensing Agency*³¹⁵ considered whether photocopies made by teachers to distribute to students as part of class instruction could qualify as fair dealing under Canadian copyright legislation, Supreme Court concluded that they could.
- 13.15 Further, in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*,³¹⁶ Abella J explained the interaction of an assessment of ‘fairness’ once use of copyright material is classified as within an ‘allowable purpose’.³¹⁷ The Court held that online music service providers who gave customers the ability to listen to free previews of musical works prior to the purchase of those works came within the exception for ‘fair dealing’ for the purpose of ‘research’ - a broad interpretation of this particular purpose.³¹⁸

³¹³ [2004] 1 SCR 399.

³¹⁴ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 399.

³¹⁵ *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada).

³¹⁶ *(Society of Composers, Authors and Music Publishers of Canada v Bell Canada)* (2012) 36 SCC (Canada).

³¹⁷ *Ibid.* [26]–[27].

³¹⁸ *Ibid.*

14. Public administration

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

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

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

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

- 14.1 Art Law does not support the fair use exception in Proposal 14-1. Arts Law argues that there are no ‘public interest’ values that justify undermining the effect of *Copyright Agency Ltd v New South Wales* [2008] HCA 35, (2008) 233 CLR 279 and otherwise exempt aspect of ‘public administration’ that are currently covered by statutory licencing schemes.
- 14.2 Art Law does not support the introduction of a new fair dealing exception for ‘public administration’ in Proposal 14-2. Government agencies should incur costs of using copyright material under the statutory licensing schemes.
- 14.3 Arts Law notes that government departments and entities (state, territory and commonwealth) participate in the Australian economy:
 - they pay commercial rates for goods and services they use. It is therefore appropriate that the test applied by the Australian Copyright Tribunal is to determine the price that a “willing, but not anxious, licensee” would pay for the use of copyright material;³¹⁹
 - they adopt a cost recovery model - charging users of the services provided by the government departments and entities on a ‘user pays’ basis that is designed to recover the costs of providing the service;³²⁰ and
 - in which the taxation system is an integral part of the operation of the ‘business of’ government. In other words, the payment of fees to rights holders (whether direct payments for goods or services or indirect payments through statutory licencing schemes) are taxable income in the hands of the

³¹⁹ *Copyright Agency Limited v The Department of Education of New South Wales* [1985] ACopyT 1, (1985) 4 IPR 5 at 15-16. The ACopyT considered the equitable remuneration payable by educational institutions to copyright owners for education copying. See Annexure A, footnote 343, for the description of ‘fair market value’ provided by Judge Cattanaach in *Henderson Estate, Bank of New Year v. M.N.R.*, (1973) C.T.C. 636.

³²⁰ *CAL v State of New South Wales* [2013] ACopyT 1 (17 July 2013). The ACopyT note “CAL submitted that the State fully recovered its costs of making the plans available to the public through the fees it charges the public and the information brokers.” [60].

Australian resident rights holders³²¹ – government expenditure and income are managed in an integrated way.³²²

14.4 Arts Law does not support the use of the *Copyright Act 1968* by government departments and agencies to acquire copyright by contract in all or in an inappropriately broad class of material and to otherwise assert ownership of artwork that is created during the time the artist has some relationship with a government agency. For example, prison policies regarding the sale of artworks of incarcerated Indigenous and non-Indigenous artists.

14.5 Arts Law submits that government departments and agencies should be subject to the operation of statutory licencing schemes in relation to providing services, such as:

- education and other services
- libraries and archives; and
- public administration (e.g. copying of literary works (such as books and journals) or the reproduction of artistic works (such as building plans and survey plans).³²³

Arts Law has previously discussed the comments of Crennan and Kiefel JJ in *PPCA v Commonwealth* that the creation of new exceptions to infringement of copyright and changes to statutory licensing schemes can raise issues in respect of s 51(xxxi) of the Constitution of Australia.³²⁴

³²¹ In relation to rights holders that are not Australian resident, there are withholding tax laws related to royalty payments.

³²² *CAL v State of New South Wales*, ibid. The ACopyT note that “*The Australian Taxation Office will also incidentally benefit through the additional income tax payable by surveyors...*” [61].

³²³ For example: *Copyright Agency Limited v State of New South Wales* [2013] ACopyT 1 (17 July 2013).

³²⁴ *PPCA v Commonwealth* [2012] HCA 8, 286 ALR 61 [110]. See Section 2. (E) [2.24] – [2.29] of this submission.

15. Retransmission of Free-to-air Broadcasts

- 15.1 Arts Law opposes the repeal of the statutory licensing scheme applying to the retransmission of free-to-air broadcasts (Proposal 15-1, Option 1). Arts Law agrees with and supports the submission of Screenrights in relation to (Proposal 15-1, Option 2) and Proposals 15-2 & 15-3.
- 15.2 Arts Law submits that the public policy of the retransmission licensing scheme is to foster a competitive market for the delivery of audiovisual programming and that the exception to copyright resulting from the operation of the retransmission licensing scheme should be a remunerated exception for which equitable remuneration is paid.
- 15.3 It is in the interest of artists, when they are the 'relevant copyright owner', to receive 'fair' remuneration from the retransmission licensing scheme in Part VC of the *Copyright Act 1968*.

16. Broadcasting

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

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

- 16.1 Arts Law notes the discussion in DP79 about the problems surrounding the existing definition of 'broadcast'. Arts Law agrees with the submission of Screenrights regarding Proposal 16-1 as to the definition of 'broadcast'.³²⁵ Arts Law opposes Proposal 16-2.
- 16.2 The ALRC proposes "*the repeal of the pt VA statutory licensing scheme, because voluntary licences appear to be more efficient and better suited to a digital age. However, if pt VA is not repealed, the ALRC proposes that, like other exceptions discussed above, the scheme should be amended to apply to the transmission of television or radio programs using the internet.*"³²⁶
- 16.3 In section 6 of this submission Arts Law sets out its arguments against the replacement of statutory licences with voluntary licences. Arts Law supports the submissions of Screenrights regarding definition of 'broadcast' and the problems with offering a comprehensive voluntary licence for broadcasts.³²⁷
- 16.4 Arts Law agrees with the submissions of the Copyright Council of Australia regarding the development of broadcasting and copyright policy.³²⁸

³²⁵ 'Definition of "Broadcast"' & 'Part VA', Screenrights submission in response to DP79.

³²⁶ DP79, [16.86].

³²⁷ 'Definition of "Broadcast"' & 'Part VA', Screenrights submission in response to DP79.

³²⁸ 'Proposal 16-1 Broadcasting', Copyright Council of Australia (CCA) submission in response to DP79.

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

- 16.5 Arts Law does not have any submissions of the drafting of broadcast exceptions.³²⁹

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

- 16.6 In relation to the operation of the s 109 statutory licensing scheme, Arts Law agrees with the recommendation of the Intellectual Property and Competition Review Committee (Ergas Committee, 2000), chaired by Mr Henry Ergas, which recommended that the one per cent cap in s. 158(8) be abolished “to achieve competitive neutrality and remove unnecessary impediments to the functioning of markets on a commercial basis”; and the further comment in DP79 that “[t]his recommendation was supported by arguments that the one per cent cap lacks policy justification and distorts the sound recordings market.”³³⁰
- 16.7 Arts Law agrees with the recommendation of the Ergas Committee for the retention of s 152(11), “on the basis that the ABC is not a commercial competitor in the relevant markets, and there is a clear public interest in its operation as a budget-funded national broadcaster.”³³¹

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

- 16.8 Arts Law opposes the replacement of statutory licences with voluntary licences. Arts Law supports the submissions of Screenrights regarding the problems with offering a comprehensive voluntary licence for broadcasts.³³²

³²⁹ DP79, [16.98].

³³⁰ DP79, [16.106].

³³¹ DP79, [16.107].

³³² ‘Definition of “Broadcast” & ‘Part VA’, Screenrights submission in response to DP79.

17. Contracting out

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

- 17.1 Arts Law provides qualified support to Proposal 17-1 on the basis that contract law should not override the fair dealing exceptions provided for in the *Copyright Act 1968*. If a fair use exception is implemented then Arts Law would argue that limitations on contracting out should be limited to copyright exceptions that have a strong public policy basis: research or study; criticism or review;³³³ parody or satire; and reporting news.
- 17.2 The existence of clauses that purport to exclude or modify statutory exceptions to copyright infringement raises the issue of whether copyright is being reduced to an access right. Arts Law submits that using contracts to override the *Copyright Act 1968* is detrimental to the public policy objectives of copyright and is thus at odds with the balancing of differing interests that is the basis of the Act.
- 17.3 It has been Arts Law's experience that creators are in a disadvantageous bargaining position when dealing with their copyright; the inequality in negotiating strength results in agreements in which there is inequitable remuneration in respect of the creator's intellectual skill and effort. For example, it is the practice of investors or purchasers of copyright to acquire all rights or as wide a collection of rights as possible to maximise the return on their investment.
- 17.4 Arts Law submits that the existing copyright exceptions benefit artists, such as the use of existing copyright material for parody and satire, so that it is not in the interests of artists to be deprived of the benefits of the copyright exceptions through the application of contract law in the form of licences to use existing works. Arts Law notes how s. 47H of the *Copyright Act* makes contracts unenforceable where the terms of the agreement excludes the operation of a specific section of Div. 4A (reverse engineering and other computer related exceptions).

³³³ *People of the State of New York v Network Associates*, No. 400590/02 (NYSupCt Jan. 14, 2003). The court struck down a clause in a software licence agreement that restrict a purchaser's rights to conduct benchmark tests or publish product reviews.

18. CONCLUSIONS

Summary:

- 18.1 Arts Law submits that the *Copyright Act 1968* currently provides for copyright users to access material in the digital environment to create original works or to use the work for the public benefit under the existing fair dealing exceptions to copyright that meet public policy purposes of research and study, criticism or review, parody or satire and reporting the news.
- 18.2 Arts Law submits that the problems in the digital environment relate to the inadequacy of the mechanisms for copyright consumers to engage with rights holders; the rights holder (or a copyright clearance entity acting on behalf of the rights holder) should make the decision to either licence or refuse to licence the use of copyright material.

Detail:

- 18.3 Arts Law submits that there are different business models or mechanisms that can mediate the relationship between copyright consumers and rights holders. The introduction of free use exceptions to the exclusive rights provided in the *Copyright Act 1968* denies the rights holder the choice as to how to make work available. Business models that support giving the rights holder the choice as to how works are used by consumers include:
 - 18.3.1 Procedures that allow rights holders to grant an explicit permission and to licence specific users and uses of the work;
 - 18.3.2 The use of technology protection measures (TPMs) to control access to the work;
 - 18.3.3 Creative Commons licensing by which rights holders can make material available in accordance with licencing terms that describe categories of use that are permitted – which may involve free use or payment for use of the work; and
 - 18.3.4 Mechanisms that allow rights holders to engage with internet service providers, search engines and internet content hosts such as effective ‘take down’ notice procedures and mechanisms that allow rights holders to choose to engage with providers of such internet-related functions to monetise uses of their work that are not a ‘fair dealing’ by the copyright consumer, such as accessing the advertising revenue related to the use of the copyrighted material.
- 18.4 Arts Law submits that the problem in the digital environment is not with the fair dealing exceptions; rather the problem is with users not understanding the requirements of a fair dealing exception. Education programs that are directed to guidelines as to what is a fair dealing are part of the solution to this problem. For example, Peter Jaszi and Pat Aufderheide and the Centre for Social Media (American University, Washington DC)³³⁴ publish Fair Use Codes and Codes of Best Practices for

³³⁴ <http://centerforsocialmedia.org/>

documentary filmmakers³³⁵ and online video makers.³³⁶ While guidelines are not legislative instruments, and can create hazards for copyright owners and users of the guidelines;³³⁷ well drafted guidelines can provide a workable compliance standard.³³⁸

- 18.5 Arts Law submits that in addition to education programs and the development of fair dealing guidelines, any problems with user created content that does not fulfil the requirements of a fair dealing exception should be managed through the implementation of protocols, policies and practices that provide artists and rights holders with effective mechanisms to engage with internet service providers, search engines and internet content hosts to have user created content removed if it does not meet the requirements of a fair dealing exception.
- 18.6 Arts Law submits that the existing fair dealing exceptions permit consumers to engage in creative re-use of existing works or the application of existing works for the public benefit such as to achieve a parodic or satirical purpose or achieve a critical purpose. . Further creative re-use is appropriately undertaken only with the permission of the owner and should not be the subject of an open-ended fair use exception.
- 18.7 The problems that exist in the digital environment can be attributed to a lack of awareness of the consequences of the failure to respect artists' creativity and their rights in relation to their work. Arts Law submits that the fair dealing exceptions should not be changed so as to give users of copyright material greater freedom to disregard the rights of artists.
- 18.8 Arts Law submits that the more effective approach to managing the problem would be the implementation of protocols, policies and practices that provide artists and rights holders with effective mechanisms to engage with internet service providers, search engines and internet content hosts to address the problem of user created content that takes copyrighted work and is not a fair dealing in such work; such mechanisms would include effective 'take down notice' procedures that required internet service providers, including search engines, and internet content hosts to remove infringing works from caching and indexing services.
- 18.9 Arts Law supports an education campaign directed at informing Australians of their copyright rights and obligations. There seems to be a lack of public understanding as to how web users can engage with the fair dealing exceptions. Public awareness is essential to the success of our copyright laws. This campaign needs to focus on the rights of Australia's creators and the importance of their creative work to our unique Australian culture.

³³⁵ *Documentary Filmmakers' Statement of Best Practices in Fair Use* (Centre for Social Media, November 18, 2005) <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>

³³⁶ *Code of Best Practices in Fair Use for Online Video* (Centre for Social Media, June 2008) <http://centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>

³³⁷ Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines* (2001) 62 Ohio State Law Journal 602 <http://www.centerforsocialmedia.org/fair-use/related-materials/documents/law-fair-use-and-illusion-fair-use-guidelines>

³³⁸ Aufderheide, Patricia and Peter Jaszi (2011) *Reclaiming Fair Use: How To Put Balance Back In Copyright* (University of Chicago Press).

- 18.10 Arts Law believes that law reform should be driven by a desire to:
- simplify the law,
 - provide certainty in the law,
 - promote accessibility of the law; and
 - maintain the relevance of the law.
- 18.11 Arts Law considers that an open-ended fair use exception would not meet these criteria because:
- 18.11.1 A fair use principle that is not well defined and that ultimately takes its meaning from the court's interpretation of it is in practice complex and complicated;
- 18.11.2 An open-ended exception is necessarily uncertain; and
- 18.11.3 Our clients are usually low income earners who are unlikely to be able to afford to bring or defend a court action to determine if a use is fair or not. In other words, their access to justice both in terms of their wish to use another's copyright material and to protect their own copyright material from infringement is limited. Furthermore, our clients cannot usually afford to pay for legal advice, so they rely on our advice and their own judgment as to what use they can make of a work or what use they can prevent being made of their work. Our clients therefore need clear and precise copyright law so that they can access the law and apply it themselves on a daily basis,
- 18.12 Arts Law accepts that the *Copyright Act 1968* should, as set out in the terms of reference of the ALRC inquiry:
- enhance the objective of providing an incentive to create and disseminate original copyright materials while meeting the interests of all Australians to access, use and interact with that material; and
 - meet the challenges of the digital economy and to promote the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies.

Rather than adopting an open-ended fair use doctrine, the challenges of the digital environment should be addressed by other, targeted means, which Arts Law has set out in this submission.

FURTHER INFORMATION

Please contact Delwyn Everard if you would like us to expand on any aspect of this submission, verbally or in writing. Arts Law can be contacted at artslaw@artslaw.com.au or on (02) 9356 2566.

Yours faithfully,



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Acknowledgement:

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Annexure A

Commentary on Proposed fair use section (121-123) set out in the *Copyright Review Committee (Ireland), Copyright and Innovation: A Consultation Paper (2012)*.³³⁹

48A. Fair Use.

- (1) The fair use of a work is not an infringement of the rights conferred by this Part.*
- (2) The other acts permitted by this Part shall be regarded as examples of fair use, and, in any given case, the court shall not consider whether a use constitutes a fair use without first considering whether that use amounts to another act permitted by this Part.*
- (3) For the purposes of this section, the court shall, in determining whether the use made of a work in any particular case is a fair use, take into account such matters as the court considers relevant including any or all of the following—*
- (a) the extent to which the use is of a nature and extent that is analogically similar to the acts permitted by this Part,*
 - (b) the purpose and character of the use, including whether such use is of a commercial or non-commercial nature,*
 - (c) the nature of the copyrighted work,*
 - (d) the amount and substantiality of the portion used, quantitatively and qualitatively, in relation to the copyrighted work as a whole,*
 - (e) the impact of the use upon the normal exploitation of the copyrighted work, such as its age, value and potential market,*
 - (f) the possibility of obtaining the copyrighted work within a reasonable time at an ordinary commercial price,*
 - (g) whether the legitimate interests of the owner of the rights in the copyrighted work are unreasonably prejudiced by the use, and*
 - (h) whether the use is accompanied by a sufficient acknowledgement.*
- (4) The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding would otherwise be made pursuant to this section.*
- (5) The Minister may, by order, make regulations for the purposes of this section—*
- (a) prescribing what constitutes a fair use in particular cases, and*
 - (b) fixing the day on which this section shall come into operation.*

Comments on the draft section 48A:

- (1) This proposed fair use exception provides an open-ended test as s. 48A leaves the court to determine which of the following factors ((a) to (h)) are relevant to the fair use determination.

³³⁹ Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012), 121-123.

- (2) The factors ((b) and (c) are similar to those provided in DP72 Proposal 4-2 (a) & (b). The proposed Irish fair use exception then attempts to address the uncertainty as to the potential impact of the market of the work in three ways, which Arts Law submits compounds the complexity of implementing such a fair use provision: s. 48A(b) provides a commercial/non-commercial use test;³⁴⁰ with s. 48A (e) being direct to the impact on the normal exploitation of the work;³⁴¹ then s. 48A (f) brings in the qualification of whether the works can be licensed 'within a reasonable time at an ordinary commercial price'.³⁴²
- (3) The assessment of the factors in s. 48A (b), (e) and (f) may variously favour the author/owner of the rights or the person asserting the fair use; so that the analysis can produce conflicting conclusions.
- (4) The assessment of 'commercial price' in section 48 (f) can lead to uncertainty as whether 'ordinary commercial price' is the same as "fair market value" and "market value".³⁴³ The concept of a copyright work as having an 'ordinary' value is uncertain as the value of a work may be determined by the availability of close substitutes for that work.
- (5) Section 48A (g) refers to the "legitimate interests" of the owner of the rights"; it can be argued that this is used in the sense used in Article 9 of the Berne Convention and that this includes both economic and non-economic interests. However the moral rights that are described Chapter 7 of the *Copyright and Related Rights Act (2000)* (CRRRA) of Ireland are personal rights of the author, who may not be the owner of the rights.
- (6) Section 48A (h) addresses the moral right of attribution;³⁴⁴ but not the moral right of the author to prevent derogatory treatment of the work.
- (7) Section 48A (4)³⁴⁵ appears directed to the problem experience in the United States in relation to the assessment of what is a fair use of an unpublished work such as the quotation of the unpublished letters considered in *Salinger v Random House*.³⁴⁶

³⁴⁰ S. 48A(b) 'the purpose and character of the use, including whether such use is of a commercial or non-commercial nature'.

³⁴¹ S. 48A (e) 'the impact of the use upon the normal exploitation of the copyrighted work, such as its age, value and potential market'.

³⁴² S. 48A (f) 'the possibility of obtaining the copyrighted work within a reasonable time at an ordinary commercial price'.

³⁴³ The concept of 'fair market value' was considered by Judge Cattanaach in *Henderson Estate, Bank of New Year v. M.N.R.*, (1973) C.T.C. 636 at p 644 in relation to the US tax statute as follows:

"The statute does not define the expression "fair market value", but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand. These definitions are equally applicable to "fair market value" and "market value" and it is doubtful if the word "fair" adds anything to the words "market value.""

³⁴⁴ S. 48A (h) "whether the use is accompanied by a sufficient acknowledgement".

³⁴⁵ (4) "The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding would otherwise be made pursuant to this section".

³⁴⁶ In 1992 the *Copyright Act 1976* (US) was amended as a result of *Salinger v Random House*, 881 F 2d 90 (2nd Cir. 1987) to include a sentence at the end of § 107 (17 U.S.C.) stating that the fact that a work is unpublished 'shall not itself bar a finding of fair use if such finding is made upon consideration' of all four fair-use factors.

ARGUMENTS FOR AND AGAINST FAIR USE IN IRELAND.

Arts Law submits that an analysis of the Irish Consultation paper leads to the conclusion that most submissions were opposed to the fair use doctrine being adopted in Ireland and overall the submissions were divided as to whether it has had a positive impact in the United States.

The following is Arts Law's summary of the positions described in Chapter 10 of the Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).

Arts Law submits that an analysis of the Irish Consultation paper leads to the conclusion that:

- most submissions were opposed to the fair use doctrine being adopted in Ireland and overall the submissions were divided as to whether it has had a positive impact in the U.S;
- the Copyright Review Committee (Ireland) was not convinced either way by the merits either side of the debate as to whether Ireland should adopt a fair use exception.

Against	For
The fair use doctrine (FUD) is a synonym for widespread infringement and an excuse for unfettered exploitation.	The FUD doctrine presupposes the protection of copyright and simply permits an exception that does not interfere with the copyright owner's normal markets for a copyright work.
For creators, there is nothing fair about fair use.	Creative industries are thriving in the US because of the doctrine.
Fair use undermines the incentive for rights holders to innovate.	FUD fosters the creativity the copyright system is designed to encourage.
Fair use subverts the interests of rights holders.	FUD brings balance to the copyright system and accommodates the interests of other parties.
The FUD is unclear and can undermine existing business models.	The FUD is flexible and can accommodate new technologies and emerging business models.
Due to lack of clarity, the FUD can lead to lengthy and costly legal proceedings.	There are now decided cases on which others can thereafter rely on.
The FUD is founded upon unwelcome vagueness.	The FUD brings desirable versatility.
The FUD is not necessary for Irish law as the CRRA exceptions are ample. The addition of European Union Copyright Directive (EUCD) ³⁴⁷ exceptions would be more than sufficient.	Fair dealing is insufficient to support many aspects of emerging digital business models. An approach that incorporates exceptions (even those of the EUCD) is too inflexible to accommodate technological innovation of the kind that has stimulated the growth of high-tech business in the US.
An alternative is greater use of licenses, voluntary and compulsory to provide access to commercially available content.	There would be limits to such schemes as an overly complex licensing scheme could prove to be a barrier to innovation. Licensing may be inapt in some circumstances.
No evidence that Irish innovation is faltering or that FUD is necessary to encourage it.	Innovators in the US benefit greatly from the doctrine especially in the digital environment. Many business models (on-line and off-line) are possible only

³⁴⁷ Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (2001/29/EC).

	because of the FUD.
Caution is needed in adopting the FUD since few countries have adopted it.	This very fact could provide an early mover advantage.
The application of the FUD doctrine amounts to parasitic larceny in that it allows a user to take unfair commercial advantage of the rights holder.	Better to be bold than to be timid. Copyright law must itself be innovative and introduce an exception permitting reasonable uses of copyrighted works.
The doctrine needs interpretation in the courts. An open standard will, by definition, give rise to open questions.	