

9. Private and Domestic Use

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Summary

9.1 Australia should continue to allow exceptions for certain uses of copyright material for private and domestic purposes. Some of these uses do not greatly affect the market for the material, and will not reduce incentives to create. Private copying and use of copyright material is a common occurrence, and is often factored into the price of the material.

9.2 However, private uses of copyright material are not always fair. Sometimes they may harm a market that a rights holder should be able to exploit. This chapter proposes that the fair use exception should be applied when determining whether a private and domestic use infringes copyright.

9.3 ‘Private and domestic use’ should also be an illustrative purpose in the proposed fair use exception, to signal that many private uses may be fair. This does not mean that all private and domestic uses are fair—the fairness factors in the fair use exception must be considered.

9.4 As discussed in Chapter 5, the fair use exception should also be applied when determining whether a third party who uses copyright material to facilitate a private and domestic use infringes copyright.

9.5 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for private and domestic use.

9.6 Either way, the existing private copying exceptions in the *Copyright Act* for format shifting and time shifting should be repealed. They are too prescriptive and inflexible to keep up with an evolving digital environment.

9.7 Private and domestic use is a much narrower concept than ‘social use’. Some social uses of copyright material—for example in creating and sharing user-generated content—may be fair, particularly when transformative. Such social uses can be considered under the fair use exception. But the ALRC does not propose that ‘social uses’ be an illustrative purpose in the fair use exception, or otherwise be given any special stature in copyright exceptions.

Current law

9.8 Format shifting and time shifting are two types of private-use exception currently provided for in the *Copyright Act*.

9.9 Format shifting exceptions were introduced in 2007. They allow for the copying, in limited circumstances, of books, newspapers and periodicals,¹ photographs,² videotapes,³ and sound recordings.⁴ These exceptions have common elements. For example, the exceptions apply only if the owner of the original makes the copy, and the original is not an infringing copy.

9.10 Some of these conditions may mean the exceptions do not apply to copies stored on remote servers in the cloud. For example, the exception for format shifting of sound recordings only applies if the copy is to be used with a device owned by the user.⁵ Further, the exception for books, newspapers and periodicals only allows users to make one copy in each format, and storing content in the cloud may require multiple copies.⁶

9.11 The format shifting exceptions apply only if the owner of the earlier copy makes the later copy. This raises questions about whether others should be able to make these copies for the owner’s private and domestic use.⁷

9.12 The format shifting exception for films only applies to copies made from films in analog form.⁸ It does not allow digital-to-digital copying. This means the exception does not apply to copies made for example, from DVDs and Blu-Ray discs and digital copies downloaded from the internet. One reason given for this limitation is that

1 *Copyright Act 1968* (Cth) s 43C.

2 *Ibid* s 47J.

3 *Ibid* s 110AA.

4 *Ibid* s 109A.

5 *Ibid* s 109A(1)(b).

6 *Ibid* 43C(1)(e).

7 This is discussed later in this chapter, and more broadly in Ch 5.

8 *Copyright Act 1968* (Cth) s 110AA(1)(a).

‘unrestricted digital-to-digital copying could allow consumers to reproduce the full picture quality and features provided in commercially produced digital film content’.⁹

9.13 Section 111 of the *Copyright Act*, introduced in 2007, provides an exception for the making of ‘a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made’.¹⁰

9.14 This exception is confined to recordings of ‘a broadcast’, defined to mean a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* (Cth). By ministerial determination, a service that makes available television and radio programs using the internet is not a broadcasting service under the *Broadcasting Services Act*.¹¹ This raises the question of whether the time shifting exception in the *Copyright Act* should apply to content made available using the internet or internet protocol television.¹²

9.15 Another important question is how this exception should operate with new technologies and services, such as the cloud. The answer to this question may depend on the nature of the service. Recordings made by consumers using their own technology, but later stored on a remote server, may be distinguished from recordings made by companies and stored on remote servers for their subscribers to access.

Fair use

9.16 The ALRC proposes that the fair use exception should be used to determine whether a private and domestic use of copyright material infringes copyright. The fair use provision should include ‘private and domestic use’ as an example of a fair use—an illustrative purpose. The existing exceptions for time shifting and format shifting in the *Copyright Act* should be repealed.

9.17 If fair use is not enacted, then the ALRC proposes that the *Copyright Act* be amended to provide for a new fair dealing for private and domestic uses. For private and domestic uses, this would essentially have the same outcome as the fair use exception.

9.18 A number of stakeholders submitted that a general fair use or fair dealing exception should be used to determine whether private copying infringes copyright.¹³ For example, the Australian Communications Consumer Action Network submitted that

9 Australian Government Attorney-General's Department, *Copyright Exceptions for Private Copying of Photographs and Films, Review of sections 47J and 110AA of the Copyright Act 1968* (2008), [2.11].

10 *Copyright Act 1968* (Cth) s 111.

11 *Determination under paragraph (c) of the definition of 'broadcasting service'* (No 1 of 2000), Commonwealth of Australia Gazette No GN 38, 27 September 2000.

12 The application of broadcast exceptions to the transmission of television or radio programs using the internet is discussed in Chs 15 and 16.

13 For example, Telstra Corporation Limited, *Submission 222*; EFA, *Submission 258*; iiNet Limited, *Submission 186*; Law Institute of Victoria (LIV), *Submission 198*.

the current private or domestic use exception needs to be replaced with a fair dealing or fair use provision that is technology-neutral and that allows for the increasingly diverse ways that the public might consume and arrange content for their private enjoyment.¹⁴

9.19 It was also submitted that a further purpose-based exception could supplement a more general, open-ended provision.¹⁵ Some stakeholders also submitted that private purposes should be included as an example of a fair use, in part to promote certainty.¹⁶ Others suggested there should be a single, technology-neutral exception for private use, but did not mention fair use or fair dealing.

Social norms

9.20 One of the primary justifications for private and domestic use exceptions relate to public expectations and social norms. In Australia, many private uses of copyright material are commonly thought by members of the public to be fair. This is one factor that suggests that some private uses of copyright material should not infringe copyright.

9.21 Many stakeholders said that Australians do not understand or respect the current copyright laws, and that the law does not reflect community attitudes or practice. The *Copyright Act* is said to be ‘out of sync with consumer behaviour and contemporary attitudes,’ because

technology and the myriad applications available to consumers provide consumers with new, cheap (often free) ways to use and store material, including copyright material, particularly for personal use.¹⁷

9.22 Expanding the private and domestic use permitted under copyright law would simply legalize what consumers are already doing, some said. Many submitted that the law should take account of consumer expectations. Commercial Radio Australia, for example, said:

The current copyright framework cannot be considered fit for the digital age when so many users repeatedly breach copyright, simply by shifting a piece of content from one device to another. Users expect to be able to store content on a variety of devices—including computers, mobile phones, tablets—and in a variety of locations, such as on local servers and in the cloud. Copyright law should recognise these changing use patterns and reflect them, to permit private individuals to take advantage of new technologies and storage devices available.¹⁸

9.23 The ADA and ALCC submitted:

It seems likely that the majority of Australian consumers aren’t aware that many of the ways in which they enjoy and engage with copyright works fall outside of the scope of what is permitted under copyright law. ... If consumers widely believe they have the ‘right’ to copy content they’ve acquired legally for personal enjoyment, and

14 ACCAN, *Submission 194*.

15 ADA and ALCC, *Submission 213*.

16 Eg, Law Institute of Victoria (LIV), *Submission 198*; Telstra Corporation Limited, *Submission 222*.

17 NSW Young Lawyers, *Submission 195*.

18 Commercial Radio Australia, *Submission 132*.

it's generally recognised as acceptable consumer behaviour, copyright laws should reflect this.¹⁹

9.24 Similarly, Ericsson submitted that copyright laws must meet reasonable consumer expectations:

Consumers increasingly expect to be able to consume creative content on demand anytime, any device and anywhere. Thus the ability to shift lawfully acquired content within the private sphere is an integral and necessary step of modern consumer behaviour.²⁰

9.25 Professor Kathy Bowrey submitted that changing technologies, often beyond the consumer's control, can 'effectively frustrate or terminate access to legitimate works'. An e-book bought for one device, for example, will often not work on another. Bowrey said it is 'hard for consumers to understand why they do not have the right to maintain functional access to content they have purchased, because of technical decisions made by third parties'.²¹

9.26 Professor Pamela Samuelson, discussing US law, has said that 'ordinary people do not think copyright applies to personal uses of copyrighted works and would not find acceptable a copyright law that regulated all uses they might make of copyrighted works'.²² Other US scholars refer to research that shows that 'most members of the public ... believe that personal use copying is acceptable as long as the copies are not sold'.²³ There is a core belief, Ashley Pavel argues, that strictly private uses of a purchased copy are 'none of the copyright owner's business'.²⁴

9.27 Laws that are widely ignored also lower the community's respect for the law more generally, and particularly other copyright laws. The force of the message that peer-to-peer file sharing of copyright material between strangers is illegal may be diluted by the message that copying a purchased DVD to a computer for personal use is also illegal. The Explanatory Memorandum for the Copyright Amendment Bill 2006 stated that failure to recognise such common practices as time and format shifting 'diminishes respect for copyright and undermines the credibility of the Act'.²⁵

9.28 Many submissions made these points. The ACCC said that failing to recognise common practices, such as format shifting purchased music or time shifting a broadcast, 'diminishes respect for copyright and undermines the credibility of the Act'.²⁶ Sally Hawkins spoke of restrictions that 'are simply ignored for the most part' and said this 'casts the law in a bad light in so much as it fails to reflect what are

19 ADA and ALCC, *Submission 213*.

20 Ericsson, *Submission 151*.

21 K Bowrey, *Submission 94*.

22 P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537, 2591.

23 A Pavel, 'Reforming the Reproduction Right: The Case for Personal Use Copies' (2009) 24 *Berkeley Technology Law Journal* 1615, 1617.

24 Ibid, 1617. See also A Perzanowski and J Schultz, 'Copyright Exhaustion and the Personal Use Dilemma' (2012) 96(6) *Minnesota Law Review* 2067, 2077.

25 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 6.

26 ACCC, *Submission 165*.

common expectations and standards'.²⁷ The Law Institute of Victoria said there was a 'widespread public expectation that making such copies of legally sourced material should be legally permitted':

if the law significantly diverges from widespread expectation and common community practice, then there is a serious risk that credibility for copyright law will become undermined.²⁸

9.29 Robert Xavier stated that 'imposing unenforceable liability for common acts that cause no conceivable harm will only encourage contempt for copyright law and lead to more infringement'.²⁹

9.30 Some are sceptical about the relevance of social norms to copyright policy. Clearly, the fact that some people shoplift does not suggest that shoplifting should be legalised. Some submissions stressed that consumer expectations and behaviour should not justify changes to the law. For example, Foxtel submitted:

While we understand the Government's desire to ensure that Australian copyright law keeps pace with legitimate consumer practices, simply because digital technology is available which makes copying and storing content easier does not mean that the law should be amended to legitimise infringing conduct.³⁰

9.31 Others said that, 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.³¹

9.32 The ALRC agrees that social norms should not dictate the law. But the law should at least account for social norms. If a practice is very widespread, and commonly thought to be harmless, then this should, at least, be one consideration when determining whether the practice should be prohibited.

Complexity of existing provisions

9.33 The existing specific exceptions in the *Copyright Act* are complex. They may not be understood by members of the public who have not made a study of copyright law. A number of submissions criticised the complexity of the current private copying exceptions, and said this should be simplified. Telstra submitted that it 'believes that the current private and domestic use exceptions should be clarified and simplified, with an emphasis on encouraging the creation and consumption of legally acquired content across technologies and devices'.³² Robin Wright said that having the private and domestic use exceptions 'scattered throughout the Act does not assist non-specialist users to understand what they are permitted to do and encourages individual rule-making decisions by poorly informed users about how copyright law works'.³³

27 S Hawkins, *Submission 15*.

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

29 R Xavier, *Submission 146*.

30 Foxtel, *Submission 245*.

31 COMPPS, *Submission 266*.

32 Telstra Corporation Limited, *Submission 222*.

33 R Wright, *Submission 167*.

9.34 Case law applying fair use may not be widely understood by members of the public either, but at least the concept of fairness is easy to comprehend.

A single, technology neutral provision

9.35 A number of stakeholders agreed that a single, technology-neutral exception for private and domestic use, though not necessarily fair use, would simplify and clarify the *Copyright Act*. The ABC submitted that ‘a single, technology-neutral, format-shifting exception with common restrictions that reflects the underlying policy of the exception would be preferable’.³⁴

9.36 A technology-neutral approach to copyright policy might suggest that whatever users may do using technology in their own home, they should be able to do using technology stored remotely. Individuals are increasingly using cloud computing services to store copies of copyright material, enabling consumers to access their content from multiple computers and devices more easily. This also raises the question, discussed in Chapter 5, of third parties facilitating private uses.

9.37 Some stakeholders said any such exception should focus on the purpose of the use, rather than on any particular technology or on the type of material being used.³⁵ This would allow the law to better adapt to new technology.

9.38 Some called for a more technology-neutral application of time-shifting exceptions, saying that they should not be confined to broadcast material. Ericsson submitted, for example, that a time-shifting exception ‘should apply irrespective of content delivery method or underlying technology’ and that it ‘strongly believes that copyright law should adhere to a technology neutral principle, where the basis or an exception should be the purpose rather than the technology itself’.³⁶

9.39 The type of copyright material used should also not matter, other submitted. Rather, exceptions for time shifting should be content neutral. It should not be about the nature of the content, or the platform on which it is offered, but rather the nature of the activity. Is a service merely a recording and storage facility, or something more?³⁷

9.40 The Internet Industry Association submitted that, if advertiser-supported television content were made available on the internet, without payment of a subscription, then time-shifting exceptions should apply.³⁸ The ABC made a similar point, but said the exception should be confined to ‘ephemeral content’:

The ABC believes the time-shifting exception should apply to ephemeral content made available using the internet, for example, ephemeral content made available by IPTV services. If the ABC were to communicate a scheduled stream of content in an ephemeral manner on a point to point basis, regardless of whether it is simulcast with

34 Australian Broadcasting Corporation, *Submission 210*.

35 For example, K Bowrey, *Submission 94*.

36 Ericsson, *Submission 151*. See also ACCAN, *Submission 194*; ACCC, *Submission 165*.

37 See, eg . Australian Broadcasting Corporation, *Submission 210*.

38 Internet Industry Association, *Submission 253*.

a point to multipoint service, the exception should apply to such internet protocol television if no catch-up service is provided.³⁹

9.41 Other submissions questioned whether the private copying exceptions could usefully be simplified and consolidated. The Association of Learned and Professional Society Publishers said:

It is difficult to see how a single one-size-fits-all exception could provide appropriate protection to the myriad different digital works that are available. It would be clearer, simple and more user-friendly to define specific allowed uses to different categories of work. Scope for confusion would then be removed.⁴⁰

9.42 All works are not created equal, others submitted. The market for digital music operates quite differently from that of digital sheet music, which operates differently from that of e-books and software. One exception for private copying cannot work for all of these markets. Free TV submitted:

Markets for film, music, photographs, books and newspapers are uniquely different and the test of financial harm will differ for each market. Specific exceptions are required to ensure no substantial harm is caused to any particular market and provide greater certainty for consumers and copyright owners.⁴¹

9.43 Similar reasoning was used in a departmental review of the format shifting exceptions for films and photographs in 2008, which recommended that no changes be made at the time. The review considered whether the two exceptions should be made to align with the broader exception for format shifting of music. The Department stated that it recognised the advantages of consistency and simplicity, but also that:

The test of financial harm must be applied to particular markets. Markets for digital music, photographs and films are very different. This will produce differences in exceptions unless they are drafted in a common form which causes no substantial harm to any copyright market.⁴²

9.44 The computer games industry submitted that it ‘understands the demand for format flexibility and continues to adapt their business models to address this demand’, but noted that the introduction of ‘a broader format shifting exception would conflict with the proprietary nature of the major game formats and challenge the effectiveness of technological protection measures’.⁴³

Insofar as format shifting applies to printed music, the economic realities of creating physical editions in a rapidly declining (and already small) market, while at the same time investing significant funds in digital print music services do not warrant any extension in reproductions for private or domestic use.⁴⁴

39 Australian Broadcasting Corporation, *Submission 210*.

40 ALPSP, *Submission 199*.

41 Free TV Australia, *Submission 270*.

42 Australian Government Attorney-General's Department, *Copyright Exceptions for Private Copying of Photographs and Films, Review of sections 47J and 110AA of the Copyright Act 1968* (2008), [3.16], [3.17].

43 iGEA, *Submission 192*.

44 Hal Leonard Australia Pty Ltd, *Submission 202*.

9.45 In the ALRC's view, fair use and fair dealing exceptions with fairness factors considered, are likely to be able to better account for the differences in markets and technologies between types of copyright material and different types of uses. This is one important reason the ALRC prefers these fairness exceptions to a new specific exception that does not allow for a proper consideration of the likely effect of a use on a rights holder's interests.

9.46 The fair use and fair dealing for private and domestic use exceptions proposed in this Discussion Paper are both technology neutral, but when applied, uses with some technologies may be found to be fair, while others are not. The ALRC sees this as a strength of fair use.

9.47 Exceptions should not be confined to copies made or stored on devices owned by the consumer. This is not to say that third parties, such as companies that provide cloud computing services, should necessarily be free to use copyright material for their customers.⁴⁵ However, it seems clear to the ALRC that to confine exceptions explicitly to uses of copyright material made on computers and other devices owned by the user, is to insist on a technology distinction that, in view of cloud computing, is already outdated.

Business models and market harm

9.48 Some private and domestic uses of copyright material are unlikely to have any significant effect on the market for the material, particularly if the material is only used privately and the original or copies are not sold or given away. Few people will buy the same item twice, some might say, because the law prohibits them from making a copy. Members of the public may also be unlikely to seek licences for other purely domestic non-commercial uses.

9.49 This is one reason why private and domestic uses may be a good example of a fair use. However, this does not mean that private and domestic uses will always be fair. Sometimes, a private use of copyright material may well harm a market that rights holders should be able to exploit. The effect of private copying on the market for copyright material may often be greater when third parties facilitate the private copying.

9.50 Copyright owners may license users to make multiple copies of copyright material, or otherwise access copyright material from multiple computers, phones, tablets and other devices. For example, subscription music services,⁴⁶ relatively new to Australia, 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. Films sold on DVD and Blu-ray discs are sometimes sold with a digital file that may be stored and played for example, on, computers and tablets. Books bought on the Kindle store, to take another example, may

45 See Ch 5.

46 Such as Spotify and MOG.

be read by consumers using a Kindle or a Kindle app on a smart phone, computer or other device.

9.51 The provision of these licensed services may suggest there is a market for providing consumers with multiple copies of copyright material, or access to such material from multiple devices, for private and domestic use and that rights holders are increasingly exploiting this market. Some argue that if the market for private copying had ever failed, it has now been corrected. Rights holders can licence private copying; this can give them a competitive advantage over those who do not; therefore the Act should not make any private copying free.

9.52 Such arguments were made by rights holders and others in submissions to this Inquiry. The Australian Copyright Council submitted that ‘business models are reducing the need to engage in private copying’ and that there was no need to extend the private copying exceptions.⁴⁷ The Arts Law Centre submitted that ‘enhanced format shifting can be a competitive advantage to differentiate that rights holder’s products from other suppliers’.⁴⁸ The Software Alliance submitted that ‘a wide variety of rights to copy legally acquired computer programs for private and domestic use is currently provided for in the applicable license agreements for the programs’.⁴⁹

The copying permitted is determined by a range of competitive market factors, and consideration of business model implemented by the rights holder for delivery of and any payment for use of the program.⁵⁰

9.53 Copyright Agency/Viscopy acknowledged that there are ‘reasonable consumer expectations regarding how they may use content that they have purchased’, but that these ‘are often addressed by the terms of use for the content’.⁵¹ ARIA referred to Apple’s iTunes as an example, a program that ‘allows customers to store downloads on five authorized devices at any time, and burn an audio playlist up to seven times for personal non commercial use’:

Against this background, it is clear that s 109A has become a provision of limited utility as many acts of copying are now covered under licensing provisions.⁵²

9.54 Discussing time shifting, the Australian Film and TV Bodies submitted that the commercial development of the legitimate online business models, including ‘licensed cloud based services, online video on demand, and catch-up online television ... are already enabling consumers to watch copyright material at a time that suits them’.

A blanket proposal to allow time-shifting in online environments would diminish the development of authorised online content providers and the capacity for rightsholders to extract value in online environments.⁵³

47 Australian Copyright Council, *Submission 219*.

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

49 BSA, *Submission 248*.

50 *Ibid.*

51 Copyright Agency/Viscopy, *Submission 249*.

52 ARIA, *Submission 241*.

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

9.55 In deciding whether a particular private use is fair, under the fair use exception proposed in Chapter 4, consideration might be given to whether the content was provided with advertising, or upon payment of a fee. Also relevant will be whether the consumer purchased a permanent copy, or whether they were only entitled to have access to the content for a limited period of time. These questions, among others of course, might be considered under the fourth fairness factor, which concerns the effect of the use on the market for the material.

9.56 Some submissions stated that consumers should have the ability to time shift only ‘free’ advertiser-supported content. The ABC submitted that the time shifting exception:

presumes that members of the public have legal access to the broadcast content in order to tape it off-air—they either access it freely, or they have paid their subscription for the pay television broadcast. With the advent of cloud services and the potential for other new technologies to emerge, the issue should be approached in terms of legal *access* and the market for rights.⁵⁴

9.57 The Australian Copyright Council stressed that the source of the content is relevant, that is, the ‘relevant business model and the market is central to determining whether or not making a copy for private purposes would meet the three-step test’.⁵⁵

9.58 The ALRC does not favour confining exceptions for private and domestic uses in the *Copyright Act*. Rather, these matters are best considered when determining whether a particular use is fair. Blanket legislative prohibitions—and endorsements—of specific uses are likely to date quickly.

9.59 In the ALRC’s view, the proposed fair use exception is better suited to account for the effect of a given use on the market for copyright material than specific, closed exceptions. Fair use is a flexible exception that, unlike the existing Australian time and format shifting exceptions, requires consideration of the ‘effect of the use upon the potential market for, or value of, the copyright material’. Where the market offers properly licensed copies, then it may be less likely that a person should be free to make their own private and domestic copies. Where a television station offers an online catch-up service, for example, then a competing service that makes copies of broadcasts for consumers is less likely to be fair.

Piracy

9.60 Some object to exceptions for private copying on the grounds that they may facilitate piracy. It may be fine for the owner of a DVD to make a copy of the film for his or her own use but if this is permitted, it is argued, then the person may be more likely to share the copy with others, including through peer-to-peer networks. Foxtel, while open to the idea of a new single exception for private copying, expressed concern about digital-to-digital copying of films, and the possible facilitation of online piracy.⁵⁶

54 Australian Broadcasting Corporation, *Submission 210*.

55 Australian Copyright Council, *Submission 219*.

56 Foxtel, *Submission 245*. See also News Limited, *Submission 224*.

9.61 However, it seems unlikely that laws prohibiting digital-to-digital copying are having any great effect on preventing piracy. If a person is prepared to infringe copyright laws by sharing a film on a peer-to-peer network, that person will presumably have little regard to laws that prohibit digital-to-digital copying of films.

9.62 On this point, Bowrey submitted that ‘targeting those that facilitate piracy is preferable to restricting arguably legitimate uses of conversion technologies’.⁵⁷

9.63 There is no suggestion that piracy, such as unauthorised peer-to-peer file sharing of music and films, would be fair use or a ‘fair dealing for private and domestic use’.

An illustrative purpose

9.64 The ALRC proposes that ‘private and domestic’ be one of the illustrative purposes listed in the fair use provision. This will signal that a particular use that falls within the broader category of ‘private and domestic use’ is more likely to be fair than a use which does not fall into this or any other illustrative purpose category.

9.65 However, in deciding whether the particular use is fair, the fairness factors must be considered. As discussed in Chapter 4, the fact that a particular use falls into, or partly falls into, one of the categories of illustrative purpose, does not necessarily mean the particular use is fair. In fact, it does not even create a presumption that the use is fair. A consideration of the fairness factors is crucial.

International law

9.66 The fair use exception has been adopted in a number of countries, most notably the US, and is consistent with Australia’s international legal obligations, including the Berne three-step test.⁵⁸

9.67 The Committee of Government Experts that prepared the program for the 1967 Berne Conference, included the following paragraph, which was debated, amended and became art 9(2)—the three-step test:

It shall be a matter for legislation in the countries of the Union to permit the reproduction in such works

- (a) for private use;
- (b) for judicial or administrative purposes;
- (c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work.⁵⁹

9.68 Ricketson and Ginsburg point out that this proposal elicited a wide range of amendments. Some sought to restrict the scope of the exception; others to expand it. France, for example, proposed the substitution of the words ‘for individual or family

57 K Bowrey, *Submission 94*.

58 See Ch 4.

59 Quoted in S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 762.

use' for the words 'for private use', to avoid the possibility of commercial enterprises claiming that their copying was for private purposes. These differences, Ricketson and Ginsburg state, 'perhaps made delegates more ready to consider a proposal advanced by the UK which sought to embrace all possible exceptions within a single generalized exception consisting simply of paragraph (c) of the programme amendment'.⁶⁰

9.69 The provision drafted by the Committee of Government Experts seems to countenance private use exceptions that are not confined by the limitations in paragraph (c)—for example, 'not contrary to the legitimate interests of the author'. The final provision that was later accepted and became art 9(2), and the fair use exception proposed by the ALRC, are both narrower than the provision drafted by the Committee of Government Experts. The ALRC only proposes private uses be excepted where the use is fair, having regard to the fairness factors. However, it is interesting to note that private use has long been considered a likely subject of exceptions to copyright, and sometimes in terms considerably broader than proposed by the ALRC.

Fair dealing and third parties

9.70 If fair use is not enacted, the ALRC proposes that an alternative exception be enacted—fair dealing for private and domestic purposes. This fair dealing exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the general fair use exception. Applying the two exceptions to a private and domestic use should therefore produce the same result.

9.71 The difference between the two options—a general fair use exception and a range of fair dealing exceptions confined to specified purposes—should only affect uses that are not covered by one of the fair dealing provisions.

9.72 As discussed in Chapter 5, the fair dealing exceptions leave less room for unlicensed third parties to use copyright material in circumstances where they facilitate private and domestic uses. This is because the fair dealing exceptions are confined to uses for the specified purposes, and third parties will often have a purpose ancillary to the specified purpose (for example, a profit motive). While many of these third party uses may not be fair, a general fair use exception is preferable to the confined fair dealing exceptions, because with fair use, the question of fairness can at least be considered. Uses for ancillary purposes are not automatically excluded.

9.73 Copyright law that wishes to allow for the development of new technologies and services should not presumptively exclude uses of copyright material for particular purposes, without asking whether the use would be fair. For this reason, the ALRC prefers the general fair use exception. However, a flexible exception that requires consideration of key principles, even if confined to a specified purpose, is still preferable to the current specific exceptions.

60 Ibid, 762.

Contracting out and TPMs

9.74 Copyright owners may sometimes provide their material only to customers who agree not to copy, or use in other prescribed ways, their material. This raises the question of ‘contracting out’ of copyright exceptions.

9.75 Technological protection measures (TPMs) may also be used to enforce these provisions. These contracts and TPMs can work to lock consumers into content ‘ecosystems’. The more a person buys from one company, the more convenient it is to buy other content from that company, and the more difficult or inconvenient it becomes to buy content from another company. This becomes more pronounced, as content providers increasingly offer to store content for their customers in the cloud.

9.76 Exceptions in relation to TPMs are outside the ALRC’s Terms of Reference, and contracting out of copyright exceptions is discussed in Chapter 17. In this chapter, it is sufficient to note that exceptions for private and domestic use will be of less value to consumers, if they cannot circumvent TPMs and they must contract out of the exceptions before being given access to copyright material.

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.

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.

An alternative—a new confined exception

9.77 It has been argued that fair use may not allow for a sufficiently wide range of private and domestic uses—particularly for uses that are non-transformative, for example copying an entire film or television program from one format to another.

9.78 The US Supreme Court has held that transformative works do not ‘merely supersede the objects of the original’, but instead ‘add something new, with a further purpose or different character, altering the first with new expression, meaning, or message’.⁶¹ US copyright academic Ashley Pavel has argued that fair use is ‘inadequate due to the difficulty of proving that a personal copy is transformative’. Although the Supreme Court had ruled that using a video recorder to time shift

61 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579. See Ch 10.

television broadcasts was fair use, ‘many distributors of newer technologies allowing analogous uses have been found to be infringing or sued out of existence’.⁶²

9.79 Furthermore, private and domestic uses are increasingly offered for licence by content owners. Unremunerated uses may harm this market, which may make such uses less likely to be fair. The ALRC argues that this reasoning is one of the benefits of fair use. For others, including Pavel, this unreasonably confines fair use:

With the advance of technology, personal use copies are no longer beyond the reach of copyright owners ... [A]bsent a strong legislative statement that personal use copies should be beyond the reach of copyright liability, it is only a matter of time before the fair use feedback loop consumes personal use copying, and extends the prying eyes of copyright enforcers into the privacy of the user’s home.⁶³

9.80 Pavel recommends that the US Copyright Act be amended to include a specific private use exception in the following terms:

private uses of works protected under this title shall not give rise to any cause of action. Private uses are to include any use of a work in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends. Third parties who enable such private uses are not subject to liability under this title.⁶⁴

9.81 The Law Institute of Victoria submitted that, if a fair use exception is not accepted, ‘then a separate, single exception should be introduced, along the lines of Canada’s *Copyright Modernization Act 2012* (Can)’.⁶⁵ Rather than a separate format shifting exception for each type of work (one for films, one for music, etc), each with its own conditions, Canada’s Copyright Act contains only one exception for reproductions for private purposes. This exception applies to ‘a work or other subject-matter or any substantial part of a work or other subject-matter’.⁶⁶

9.82 Some submissions opposed the introduction of a new private copying exception. The Australian Film and Television Bodies submitted that:

With the existing scale of online copyright infringement, particularly of motion pictures and television programs, the risks associated with an overly permissive, non-conditional and format agnostic private copying exception is likely to result in a free-for-all in Australia and one that has no parallel internationally.⁶⁷

9.83 If neither a fair use, nor a fair dealing for private and domestic use, exception is enacted in Australia, then the ALRC suggests that the existing private copying exceptions in the *Copyright Act* should be consolidated and simplified. Such an exception would not refer to fairness factors, but would instead simply describe the circumstances in which a private or domestic copy might be made.

62 A Pavel, ‘Reforming the Reproduction Right: The Case for Personal Use Copies’ (2009) 24 *Berkeley Technology Law Journal* 1615, 1630.

63 *Ibid.*, 1634.

64 *Ibid.*

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

66 *Copyright Modernization Act, C-11 2012* (Canada) s 29.22(1).

67 Australian Film/TV Bodies, *Submission 205*. See also Screenrights, *Submission 215*; ARIA, *Submission 241*; AMPAL, *Submission 189*.

9.84 However, in the absence of a fairness test, the ALRC fears such an exception may be too broad, and furthermore, likely to date as technology changes. It would also be inflexible, and may hinder the development of new technologies and services.

Social uses

9.85 Some social uses of copyright material would be fair use. However, sharing content outside the domestic sphere is less likely to be fair—particularly if the use is non-transformative and harms a market that rights holders should be entitled to exploit. The ALRC does not propose that ‘social uses’ be included as an illustrative purpose for fair use; nor does the ALRC propose a new fair dealing exception for social uses.

9.86 Transformative uses of copyright material are discussed in Chapter 10. However, many online uses of copyright material are not transformative, and some are clearly not fair. Arguably the ‘sharing’ of copyright content that is most unfair and causes the greatest damage to rights holders is the use of peer-to-peer file sharing networks, digital lockers and other means to exchange entire films, television programs, music and e-books.

9.87 Some submissions stressed that some so-called ‘social’ uses of copyright material must not be confused with true private and domestic uses. The Music Council of Australia said that a ‘clear distinction must be drawn between burning a compilation CD at home to play on the kitchen stereo, on the one hand, and disseminating to 800 “friends” via social media such as Facebook’.⁶⁸

9.88 However, many other ‘sharings’ of copyright material—for example, some sharing of user-generated content⁶⁹—are arguably less harmful and now commonplace. These may even include uses that are unlicensed, not transformative, and feature on commercial platforms.

9.89 Existing exceptions, such as the one for parody or satire,⁷⁰ may apply to some user-generated content that uses copyright materials. However, much user-generated content will not be covered by these existing exceptions—for example, using a copyright sound recording in a home video.

9.90 Some of these uses of copyright material have been called not only an inevitable, but a desirable, feature of a new digital age. Jeff Lynn, chairman of the UK Coalition for a Digital Economy has written that this ‘incidental’ sort of copyright infringement is ‘part and parcel of using the internet and participating in innovation’:

It is simply impossible to confirm the rights to every image, block of text or sound clip that one shares with friends on Facebook or incorporates into a home video to send to the grandparents.

68 Music Council of Australia, *Submission 269*.

69 Content made publicly available over the internet, which ‘reflects a certain amount of creative effort’ and is ‘created outside of professional routines and practices’. User-generated content includes, for example, audio-visual excerpts from copyright material, such as movies or music, perhaps associated with commentary by the individual: Organisation for Economic Co-operation and Development, *Participative Web and User-Created Content* (2007), 9.

70 *Copyright Act 1968* (Cth) ss 41A, 103AA.

And while this sort of copying may not always be innovative itself, its inextricable link with the highly innovative activities associated with Internet use means that quashing it results in quashing a lot of collateral good. At the same time, this type of infringement has no real effect on the rights holders ... any hypothetical loss from the failure of a handful of people to buy a licence to a given work shared casually among a small network is not only negligible but it is almost certainly outweighed by the discovery advantages.⁷¹

9.91 While they may be infringing copyright, individuals who upload copyright material onto social websites—such as YouTube—are not often the subject of legal action by rights holders. The ALRC understands that rights holders increasingly work with internet platforms to manage content by other means. For example, in the case of YouTube, rights holders may choose to ‘monetize, block or track’ the use of their content.⁷²

9.92 The ALRC agrees with the Copyright Council Expert Group’s observation that user-generated content ‘reflects a full spectrum of creative and non-creative re-uses’ and should not automatically qualify for protection under any proposed exception aimed at fostering innovation and creativity.⁷³

9.93 Non-transformative social uses of copyright material that do not fall into one of the categories of illustrative purposes for fair use, proposed in Chapter 4, are less likely to be fair than a transformative use that does fall into one of those categories. However, some of these uses may be fair, and are best considered on a case-by-case basis, applying the fairness factors in the fair use exception. It is doubtful that attempting to prescribe types of social uses that should not infringe copyright would be beneficial. Attempts to distinguish between types of user-generated content without using general fairness principles seem unlikely to be successful.

Back-up and data recovery

9.94 Australians routinely use copyright material, such as computer programs, music, e-books and films, for the purpose of back-up and data recovery.⁷⁴ Many might be surprised to hear that making copies of this material for these purposes may often infringe copyright.

9.95 In the ALRC’s view, using copyright material for back-up and data recovery purposes should often be a fair use of copyright material. Rather than propose new or extended exceptions for this activity, as have recently been enacted in Canada,⁷⁵ the

71 J Lynn, *Copyright for Growth* in Lisbon Council, *Intellectual Property and Innovation: A Framework for 21st Century Growth and Jobs* (2012), Ian Hargreaves (ed.), Paul Hofheinz (ed.), 15.

72 YouTube, *Content ID* <www.youtube.com/t/contentid> at 24 July 2012.

73 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

74 Of course, businesses and other organisations also need to make and store back-up copies of copyright material.

75 Section 29.24 of the *Copyright Modernization Act, C-11 2012* (Canada) applies broadly to ‘a work or other subject-matter’. The person who owns or has a licence to use the source copy may reproduce it ‘solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable’. The copy is limited to personal use, the original must not be an infringing copy, the person must not circumvent a TPM to make the copy, and the person must not give away any of the reproductions.

ALRC proposes that the fair use exception should be used to determine whether such uses infringe copyright.

9.96 Some stakeholders submitted that the fair use exception could expressly refer to reproduction for the purpose of back-up and data recovery.⁷⁶ However, the ALRC does not think that this is a sufficiently broad category of use to justify including it as an illustrative purpose of fair use.

9.97 If fair use is enacted, the existing specific exception in s 47C of the *Copyright Act* for making back-up copies of computer programs should be repealed.

9.98 Many stakeholders submitted that there should be an exception to allow consumers to back-up their digital possessions without infringing copyright. Many stressed the importance of protecting consumers' rights and meeting reasonable consumer expectations.⁷⁷

9.99 The Internet Industry Association submitted that exceptions for back-up should not distinguish between different types of digital content:

Backing up should not require a further permission of the copyright owner and should not be restricted as to the technology used or the place where the stored copy is made or held.⁷⁸

9.100 Many submitted that a fair use exception, rather than new specific exceptions for back-up and data recovery, should be used in these circumstances.⁷⁹ For example, Dr Rebecca Giblin submitted that

a narrow purpose-based exception would be poorly adapted to the changing technological environment and potentially hinder the development and uptake of new back-up and recovery technologies. A flexible exception in the style of fair use would be a far preferable method of achieving the same aims.⁸⁰

9.101 Other submissions expressed concern about exceptions for the purpose of back-up and data recovery. Modern business models often involve contracts with consumers to allow them to make copies of copyright works for the purposes of back-up and data recovery, and so, it was argued, an exception is either not necessary, or would harm the rights holders' interests. The Australian Film and TV Bodies, for example, submitted that there is

substantial evidence of online business models and content delivery services that permit a consumer to re-download or re-stream content if another copy is legitimately required. iTunes is a popular example. The introduction of a right of back-up for any content downloaded from iTunes would undercut existing licensing models and therein licensees' ability to offer specific licence conditions for authorised content (including at different price points).⁸¹

76 See eg, Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria (LIV), *Submission 198*.

77 See eg, R Giblin, *Submission 251*.

78 Internet Industry Association, *Submission 253*.

79 Whether making back-up copies is fair use does not appear to have been properly tested in US courts.

80 R Giblin, *Submission 251*. See also EFA, *Submission 258*.

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

9.102 APRA/AMCOS also expressed concern that a new exception might interfere with established markets.⁸² ARIA submitted that

this concern is already addressed through the commercial models already operating in the market, with download stores allowing consumers to make additional copies of recordings under the terms of the licensed service. Therefore an additional exception for this purpose is unnecessary and unjustified.⁸³

9.103 The computer games industry body submitted that business models are addressing users' desire to back-up content. Users can often re-download a game 'multiple times if for any reason they accidentally, or intentionally, remove the game from their device'.⁸⁴

9.104 Some stakeholders expressed concern that new exceptions for back-up and data recovery might allow users to copy copyright material which they are only entitled to access for a limited time or so long as they pay an ongoing subscription fee. A subscription to a magazine, for example, may come with access to digital copies of the magazine's entire back catalogue. Subscribers should not then be free to copy and keep that entire back catalogue. To take another example, APRA/AMCOS submitted that if exceptions extend to the back-up of tethered downloads, it would have a 'chilling effect on innovation' and 'may lead to the exit from the Australian market of Spotify, Rdio and others'.⁸⁵

9.105 Similarly, Foxtel submitted that it makes content available to its subscribers to stream or download for a limited time, and this period of time is usually determined by the content owner. If copyright exceptions allowed subscribers to copy this content, 'this would conflict with Foxtel's and/or the rights holder's ability to exploit that content at a later time'.⁸⁶

9.106 In the ALRC's view, copying such 'tethered' downloads is unlikely to be fair use. Further, such fine distinctions between fair and unfair copying for private purposes or the purpose of keeping back-up copies, highlights the benefit of having a flexible, principled exception like fair use.

9.107 Third parties increasingly offer data back-up and retrieval services, often allowing users to store their digital belongings on remote servers in the cloud. Some of these services will automatically scan a customer's computer, and upload files to a remote server. Many submissions stated that third parties should be allowed freely to assist with back-up and data recovery. For example, the ADA and ALCC submitted

A number of cloud-based back up services, for example, now offer an automatic back up service ... Any exception must account for consumers and organisations 'making' copies of information for back-up purposes, and service providers who facilitate back up automatically, on their behalf.⁸⁷

82 APRA/AMCOS, *Submission 247*.

83 ARIA, *Submission 241*.

84 iGEA, *Submission 192*.

85 APRA/AMCOS, *Submission 247*.

86 Foxtel, *Submission 245*.

87 ADA and ALCC, *Submission 213*.

9.108 Telstra submitted that exceptions should allow cloud service operators to back-up and store legally-acquired material on behalf of their customers, but should not be able to ‘commercially exploit material under the protection of a private use exception’.⁸⁸

9.109 In the ALRC’s view, the use of copyright material by some back-up and data recovery services may well be fair use. Although commercial, some such services may well be considered transformative and non-consumptive, and may not harm the markets of rights holders. However, other services that do more than merely back-up files, and perhaps offer a service similar to services offered by rights holders, may not be fair.⁸⁹

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.

88 Telstra Corporation Limited, *Submission 222*. See also Music Council of Australia, *Submission 269*.

89 How fair use may apply to third party uses of copyright material is discussed more broadly in Ch 5.