Australian Government
Australian Law Reform Commission

Copyright and the Digital Economy

ISSUES PAPER

You are invited to provide a submission or comment on this Issues Paper

Issues Paper 42 (IP 42)

August 2012

Australian Government
Australian Law Reform Commission

Copyright and the Digital Economy

ISSUES PAPER

You are invited to provide a submission or comment on this Issues Paper

Issues Paper 42 (IP 42) August 2012

This Issues Paper reflects the law as at 17 August 2012

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

The office of the ALRC is at Level 40 MLC Centre, 19 Martin Place, Sydney NSW 2000 Australia.

Postal Address

GPO Box 3708

Sydney NSW 2001

Telephone: within Australia (02) 8238 6333

International:+61 2 8238 6333

Facsimile: within Australia (02) 8238 6363

International:+61 2 8238 6363

E-mail: info@alrc.gov.au

Website: www.alrc.gov.au

ALRC publications are available to view or download free of charge on the ALRC website: www.alrc.gov.au/publications. If you require assistance, please contact the ALRC.

ISBN: 978-0-9871777-6-6

Commission Reference: ALRC Issues Paper 42, 2012

Making a submission

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Issues Paper is 16 November 2012.

Online submission form

The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual questions: www.alrc.gov.au/content/copyright-and-digital-economy-online-submission. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions as you wish. There is space at the end of the form for any additional comments.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6305.

Alternatively, written submissions may be mailed, faxed or emailed to:

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
Email: copyright@alrc.gov.au
Facsimile: +61 2 8238 6363

Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents.

Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a Freedom of Information request. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions. See the ALRC policy on submissions and inquiry material for more information www.alrc.gov.au/about/policies

Discussion Paper and Final Report

After considering submissions to this Issues Paper and further consultations, the ALRC will produce a Discussion Paper with proposals for reform, and call for further submissions. A final Report will then be delivered by 30 November 2013.

Contents

Terms of Reference **3**
Questions **5**

The Inquiry 11
Guiding principles for reform 18
Caching, indexing and other internet functions 22
Cloud computing 26
Copying for private use 28
Online use for social, private or domestic purposes 33
Transformative use 36
Libraries, archives and digitisation 40
Orphan works 44
Data and text mining 48
Educational institutions 51
Crown use of copyright material 54
Retransmission of free-to-air broadcasts 57
Statutory licences in the digital environment 61
Fair dealing exceptions 62
Other free-use exceptions 71
Fair use 71
Contracting out 79

Terms of Reference

ALRC Terms of Reference - Copyright and the Digital Economy

Having regard to:

- the objective of copyright law in providing an incentive to create and disseminate original copyright materials;
- the general interest of Australians to access, use and interact with content in the advancement of education, research and culture;
- the importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies; and
- Australia's international obligations, international developments and previous copyright reviews.

I refer to the ALRC for inquiry and report pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* the matter of whether the exceptions and statutory licences in the *Copyright Act 1968*, are adequate and appropriate in the digital environment.

Amongst other things, the ALRC is to consider whether existing exceptions are appropriate and whether further exceptions should:

- recognise fair use of copyright material;
- allow transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and
- allow appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes.

Scope of Reference

In undertaking this reference, the Commission should:

- take into account the impact of any proposed legislative solutions on other areas of law and their consistency with Australia's international obligations;
- take into account recommendations from related reviews, in particular the Government's Convergence Review; and

- not duplicate work being undertaken on: unauthorised distribution of copyright materials using peer to peer networks; the scope of the safe harbour scheme for ISPs; a review of exceptions in relation to technological protection measures; and increased access to copyright works for persons with a print disability.

Timeframe

The Commission is to report no later than 30 November 2013.

Questions

The Inquiry

Question 1. The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

(a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;

(b) affects the introduction of new or innovative business models;

(c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or

(d) places Australia at a competitive disadvantage internationally.

Guiding principles for reform

Question 2. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

Caching, indexing and other internet functions

Question 3. What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?

Question 4. Should the *Copyright Act 1968* (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

Cloud computing

Question 5. Is Australian copyright law impeding the development or delivery of cloud computing services?

Question 6. Should exceptions in the *Copyright Act 1968* (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

Copying for private use

Question 7. Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

Question 8. The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

Question 9. The time shifting exception in s 111 of the *Copyright Act 1968* (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

(a) should it matter who makes the recording, if the recording is only for private or domestic use; and

(b) should the exception apply to content made available using the internet or internet protocol television?

Question 10. Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

Online use for social, private or domestic purposes

Question 11. How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

Question 12. Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

Question 13. How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Transformative use

Question 14. How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

Question 15. Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

Question 17. Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Question 18. The *Copyright Act 1968* (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

Libraries, archives and digitisation

Question 19. What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

Question 20. Is s 200AB of the *Copyright Act 1968* (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

Question 21. Should the *Copyright Act 1968* (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

Question 22. What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

Orphan works

Question 23. How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

Question 24. Should the *Copyright Act 1968* (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

Data and text mining

Question 25. Are uses of data and text mining tools being impeded by the *Copyright Act 1968* (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?

Question 26. Should the *Copyright Act 1968* (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?

Question 27. Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

Educational institutions

Question 28. Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

Question 29. Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Question 30. Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the *Copyright Act 1968* (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

Question 31. Should the exceptions in the *Copyright Act 1968* (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

Crown use of copyright material

Question 32. Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Question 33. How does the *Copyright Act 1968* (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

Question 34. Should there be an exception in the *Copyright Act 1968* (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

Retransmission of free-to-air broadcasts

Question 35. Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

Question 36 Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

Question 37. Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?

Question 38. Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?

Question 39. What implications for copyright law reform arise from recommendations of the Convergence Review?

Statutory licences in the digital environment

Question 40. What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

Question 41. How can the *Copyright Act 1968* (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

Question 42. Should the *Copyright Act 1968* (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

Question 43. Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

Question 44. Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

Fair dealing exceptions

Question 45. The *Copyright Act 1968* (Cth) provides fair dealing exceptions for the purposes of:

(a) research or study;

(b) criticism or review;

(c) parody or satire;

(d) reporting news; and

(e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

Question 46. How could the fair dealing exceptions be usefully simplified?

Question 47. Should the *Copyright Act 1968* (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

Other free-use exceptions

Question 48. What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

Question 49. Should any specific exceptions be removed from the *Copyright Act 1968* (Cth)?

Question 50. Should any other specific exceptions be introduced to the *Copyright Act 1968* (Cth)?

Question 51. How can the free-use exceptions in the *Copyright Act 1968* (Cth) be simplified and better structured?

Fair use

Question 52. Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

Question 53. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

Contracting out

Question 54. Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

Question 55. Should the *Copyright Act 1968* (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

The Inquiry

The digital economy—the policy challenge

1. For some time the Australian economy has been recognised as increasingly relying on moving from low-efficiency, labour-intensive industries to high-efficiency knowledge-intensive industries involving cultural goods and services. Opportunities for innovation leading to national economic development are created by the emergence of new digital technologies.

2. On 29 June 2012 the Attorney-General of Australia, the Hon Nicola Roxon MP, asked the Australian Law Reform Commission (ALRC) to inquire into and report on current and further desirable uses of copyright material in the digital economy. The final Report is to be delivered by 30 November 2013.

3. This Inquiry takes place in the context of the importance of the emerging digital economy and the Government's objective of ensuring that copyright law provides incentives for investment in innovation and content while also allowing appropriate access to that content so that Australia's needs in the internet age are met, both domestically and internationally. Significant investment is being made in the infrastructure to attain high speed broadband, with a view to securing 'Australia's economic growth and social wellbeing'.[1]

4. The 'digital economy' has been defined by the Australian Government as 'the global network of economic and social activities that are enabled by information and communications technologies, such as the internet, mobile and sensor networks'.[2] This includes conducting communications, financial transactions, education, entertainment and business using computer, phones and other devices. Australia has competitors in the digital economy—comparable countries that have also adopted a focus on promoting a local digital economy. Copyright law is an important part of Australia's digital infrastructure and is relevant to commercial, creative and cultural policy.

5. The National Cultural Policy Discussion Paper, launched by the Minister for the Arts, the Hon Simon Crean MP, in August 2011, noted: 'a creative nation is a more productive nation'.[3] The 2012 review of the Australia Council indicated that the Australian Government has committed to developing a National Cultural Policy that 'aims to place the arts front and centre in the national psyche'.[4] The objective of the policy currently under development is to increase the social and economic dividend from the arts, culture and the creative industries.

---

1 Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions* (2009).
2 Ibid.
3 G Trainor and A James, *Review of the Australia Council* (2012), 9.
4 Ibid, 9.

Purpose of copyright law

6. The purpose of copyright law has been the subject of debate in recent times although historically it may be summarised as included among laws which 'granted property rights in mental labour'.[5] In this tradition, copyright law has been regarded primarily as conferring economic rights in Australia, focusing on the protection of commercial activities designed to exploit material for profit. The introduction of moral rights for authors and creators in pt IX of the *Copyright Act 1968* (Cth) (the *Copyright Act*) in December 2000 was largely to conform to the requirements of the *Berne Convention*[6] and had been recommended against by a majority of the Copyright Law Review Committee (CLRC) in 1988.[7] Any current consideration of copyright law must acknowledge the moral rights of creators. It is also important to consider issues relating to Indigenous culture and cultural practices in the context of digitisation of individual, family and community material.[8]

7. Property rights in the creative effort of 'mental labour' are protected as a result of—among other things—the *Copyright Act* and as recognised in the *Universal Declaration of Human Rights* (art 27(2)). At the same time, the legal tradition of the common law has, since the *Statute of Anne* (1710) recognised the public interest in 'the encouragement of learning and dissemination and knowledge as a means to enhance the general welfare (...) behind the grant of exclusive rights to authors'.[9] Technology has brought new means of copying; digitisation reduces the costs of copying and raises the costs of enforcement. In addition, changes or developments in the attitude of consumers and users of copyright material has led to reduced recognition that copyright is a form of property, that is it owned by a creator (or more usually, the assignee of a creator) and that moral rights and issues of attribution and integrity of works may be significantly compromised in a 'freed up' copyright environment. Copyright law may not always influence individual or private behaviour, and there is constant debate about whether it acts as an incentive to production of new material. Even where copyright is recognised, infringement may be seen as a form of 'cultural heroism' or regarded as an appropriate consumer response to a large, powerful and greedy multinational company.

---

5 B Sherman and L Bently, *The Making of Modern Intellectual Property Law: The British Experience 1760–1911* (1999), 2.

6 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

7 Copyright Law Review Committee, *Report on Moral Rights* (1998).

8 K Bowrey, 'Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights?' in K Bowrey, M Handler and D Nicol (eds), *Emerging Challenges in Intellectual Property* (2011).

9 P Hugenholtz and R Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Final Report (2008).

8. Some would argue that copyright is no longer about property rights, and the concomitant capacity to charge for use of copyright material, but rather about access to material:

> we must focus on the rules for access as well as on the social, interactive way people now relate to each other and to copyrighted works ... Laws and business models rooted in the early eighteenth century cannot be effective in the twenty-first century.[10]

9. Others would claim that neither an 'expansionist' view of copyright nor a 'minimalist' view is correct in that 'copyright's primary goal is not allocative efficiency, but the support of a democratic culture'[11] that will enhance an independent and pluralist civil society. In the emerging technological environment, law should direct copyright 'toward its core understanding of public benefit, that of fortifying our democratic institutions by promoting public education, self-reliant authorship, and robust debate.'[12]

10. In 2011 a Copyright Council Expert Group produced a statement of fundamental principles of Australian copyright law which recognises 'the importance of encouraging the endeavours of authors, performers and creators by recognising economic rights' (and also moral rights) 'subject to limitations' and in a manner which 'takes account of evolving technologies, social norms and cultural values'.[13]

11. In this Inquiry it may be appropriate to reconsider the desirable ends of copyright law and whether the function of copyright in a digital environment is as traditionally understood. For example, William Patry has stated:

> The erroneous belief that copyright laws are the engine of culture and creativity (in the popular sense) is based on a misperception of the role of copyright in the marketplace.[14]

John Perry Barlow argues that copyright cannot be patched or retrofitted to the digital environment and an entirely new way of thinking is required. He describes the United States *Digital Millenium Copyright Act*, for example, as 'ludicrously misguided'.[15] A major review of intellectual property laws and economic development in the United Kingdom (the Hargreaves Report) has noted that it is possible that laws designed 'with the express purpose of creating economic incentives for innovation by protecting creator's rights' may today be 'obstructing innovation and economic growth'.[16]

Background to the Inquiry

12. The Inquiry is part of ensuring that the Australian environment is able to encourage new opportunities within the digital economy ahead of the National Broadband Network rollout. The Terms of Reference require consideration of how

---

10 W Patry, *How to Fix Copyright Law* (2011), 12.
11 N Weinstock Netanel, 'Copyright and Democratic Civil Society' (1996) 106 *Yale Law Journal* 283, 288.
12 Ibid, 291.
13 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011).
14 W Patry, *How to Fix Copyright Law* (2011), 29.
15 JP Barlow, *The Next Economy of Ideas: Will Copyright Survive the Napster Bomb* (2000) <www.wired.com/wired/archive/8.10/download.html> at 12 August 2012
16 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 1.

copyright could be assisting where possible in the development of opportunities for Australian creators and not unduly hindering the development of new business models. This to allow the development of a digital environment which supports creation of copyright material so that 'rights holders benefit from having a population and economy capable of making productive use of ideas and information, thereby generating the income needed to cover the costs of developing new ideas'. [17]

13. The Terms of Reference ask whether amendments to copyright law are required in order to create greater availability of copyright material in ways that will be socially and economically beneficial. Part of the Inquiry is about the most efficient way to achieve this, either through exceptions to copyright—without cost to the user—or through statutory licences. The context and political economy of copyright law is changing as copyright has a more direct impact on disparate users and producers, extending beyond rights holders and institutional rights users.

14. Part of the challenge for copyright law is how it might become better understood and more effectively communicated so as to enable Australians to be lawful digital citizens.

> Law is not everything. But lawyers tend to consider that it is rather important that it should be obeyed and respected. Otherwise, if it is ignored or defied, that fact might bring down the whole edifice of the rule of law.[18]

Irrelevant laws, which do not fit with community practice and seem incapable of change, are not suitable for assisting in the development of an innovation-based economy. Another challenge therefore is the tension between certainty, predictability of outcomes for established practice and understanding and the costs of building new understanding in the light of changes to the law.

15. The division of the *Copyright Act* into 'works' and 'subject-matter other than works' makes the Act segmented and many would say, unnecessarily complex. In addition, some of the *Copyright Act* is untested, under-utilised and in places ineffective in achieving the aims set out. Some of the issues here may include lack of technology neutrality in the language of the Act, and what amounts to prohibitions on activities which limit technical operations in the online environment, without necessarily affecting copyright owners.

16. There is a direct link between international trade and intellectual property law. This link was the explicit basis for the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement).[19] Alongside—and perhaps supplanting—multilateral harmonisation is an emerging environment of bilateral trade negotiations. Australia has entered into or is negotiating free trade agreements, notably with the US, a major exporter of copyright material which will have to be taken into

---

17 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 96.

18 M Kirby foreword to B Fitzgerald and B Atkinson (eds), *Copyright Future, Copyright Freedom* (2011), 5.

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

account in any amendments to copyright law. Having said that, the possibility of interpreting international constraints in a way that allows country-specific guidelines to develop within existing concepts is a matter of live debate. It has been suggested that European Union (EU) copyright, constrained as it is by international treaties, nevertheless leaves 'considerably more room for flexibilities than its closed list of permitted limitations and exceptions suggests'.[20] One of the possibilities for this Inquiry is to consider what flexibility can be found within international constraints and what advice can be provided for future negotiations on international treaties and trade agreements.

Focus of the Inquiry

Exceptions to copyright

17. The history of copyright reform has largely been about carving out 'exceptions' and grafting on new rights, including 'neighbouring rights' and the like. The *Copyright Act* allows for certain uses of copyright material without the need for permission or payment. It has been pointed out that 'even in those countries where there is the most vigorous commitment to the advancement of author's rights, it is recognised that there is a need for restrictions or limitations upon these rights in particular cases'.[21] In Australia these exceptions, or defences to infringement, are for socially useful purposes including the four long-established exceptions of advancing knowledge through research, commentary by way of criticism or review, reporting news and the administration of justice. In 2006 fair dealing for the purpose of parody or satire and time and format shifting were introduced.[22] There are existing exceptions in the *Copyright Act* that deal with educational use of copyright material, but some concerns exist as to whether these are adequate or appropriate in the digital environment.

Statutory licences

18. In addition to the 'free-use exceptions' certain use of copyright material is allowed in return for payment of a fee to the owner, or more usually to a collecting society acting on their behalf. Copyright law provides a basis for the development of industries delivering copyright material and statutory licences provide a model for supporting such industries by allowing access to material in return for centralised administration of fee collection and distribution. The digital environment may be introducing further possibilities where copyright acts as the basis of a distribution model of material in return for suitable payment. At the same time there are concerns that parts of the current system—that allow teachers and educational institutions to copy material under licences and exceptions—are not adequate, and may not accommodate the current digital environment.

---

20 B Hugenholtz and M Senftleben, *Fair Use in Europe: In Search of Flexibilities* (2011), 2.

21 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 756.

22 *Copyright Amendment Act 2006* (Cth).

Matters not included in the Inquiry

19. The ALRC has been asked not to duplicate work relating to certain existing discussions at international level. Reviews currently being undertaken by the Australian Government Attorney-General's Department also deal with exceptions in the *Copyright Act*: the extension of the definition of 'carriage service provider' as it applies to the 'safe harbour' scheme[23] and the extension of the legal deposit scheme in s 201. In addition work is being undertaken by the World Intellectual Property Organization in relation to exceptions for persons with print disabilities.[24] Currently there are international treaty discussions on exceptions in relation to technological protection measures (TPMs) and this Inquiry is not to duplicate such work.[25]

Other inquiries

20. Assistance in defining policy settings may be gained from previous international and domestic inquiries. Internationally, there are several recent and concurrent reviews covering matters related to this Inquiry. These include the UK Hargreaves Report[26] and the current review of Irish copyright legislation.[27]

21. Relevant Australian reviews notably include previous work by the CLRC, including *Simplification of the Copyright Act*[28] and *Copyright and Contract*.[29] Other relevant reviews include the Ergas Report,[30] the Cutler Review[31] and the 2011 Book Industry Strategy Group Report.[32] In its 2005 Fair Use Review, the Attorney-General's Department looked at whether it was appropriate to introduce a general fair use exception into the *Copyright Act*.[33] This resulted in the time shifting, format shifting, parody and satire and flexible fair dealing exceptions being introduced into the Act in 2006.[34]

---

23 The 'safe harbour' scheme refers to the provisions of the *Copyright Act* limiting remedies available against carriage service providers for infringements of copyright relating to carrying out of on-line activities: *Copyright Act 1968* (Cth) pt V, div 2AA.

24 World Intellectual Property Organisation, *Standing Committee on Copyright and Related Rights: Twenty-Fourth Session* (2012).

25 The use of circumvention technology to gain unauthorised access to electronic copyright works led to the amendments contained in the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). See further Australian Government Attorney-General's Department, *Review of Technological Protection Measure exceptions made under the Copyright Act 1968* (2012) <www.ag.gov.au> at 7 August 2012.

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

27 Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).

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

29 Copyright Law Review Committee, *Copyright and Contract* (2002).

30 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).

31 Department of Innovation, Industry, Science and Research, *Powering Ideas: An Innovation Agenda for the 21st Century* (2009).

32 Book Industry Strategy Group, *Final Report* (2011). See also Australian Government, *Government Response to Book Industry Strategy Group Report* (2012).

33 Australian Government Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*, Issues Paper (2005).

34 *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

22. The interaction of copyright and contract is a relevant aspect of the current Inquiry, as the real value of copyright to many comes from arrangements that build on, but are only partly related to, property rights in copyright. One concern is that contractual provisions may unjustifiably restrict practices of users which are otherwise allowed. On the other hand, contractual arrangements may have the capacity to render nugatory the rights of creators.

23. The interaction between copyright and contracts is important in finding the balance between private arrangements and proprietary rights. As the Ergas Report notes, non-legislative alternatives to property rights (such as contractual mechanisms) may be *effective* but they run the risk of not being *efficient* in that social costs 'would almost certainly be higher under such arrangements, than they are under the current panel of protective instruments'.[35] At the same time as this Inquiry the Government is undertaking a review of contract law to increase efficiencies and boost productivity, with a view to improving the attractiveness of Australia as a business and investment destination.[36] It is likely that the 'costs, difficulties, inefficiencies or lost opportunities for business', which that review will look at, will also be relevant to this Inquiry.[37]

24. The Convergence Review[38] examined Australia's communications and media legislation and advised the Government on potential amendments to ensure this regulatory framework is effective and appropriate in the emerging communications environment. The Convergence Review Committee was established to examine the operation of media and communications regulation in Australia and assess its effectiveness in view of the convergence of media content and communications technologies. Although copyright law and media regulation involve different regulatory environments and different industry players and conditions these intersect and are therefore integrally related.

25. The Convergence Review noted that copyright-related issues in general may have implications for investment in the content services market. Advances in technology and evolving business models are providing new ways of accessing and distributing content, which are likely to have implications for content rights holders, and for users, in the converged environment. These changes have been highlighted in recent developments, such as the ruling of the Federal Court on Optus's cloud-based TV Now service.[39] The Convergence Review proposed that the issue of copyright and the retransmission of free-to-air broadcasts be examined as part of this Inquiry and that, in investigating content-related competition issues, the proposed new communications

---

35 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 25.

36 Australian Government Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (2012).

37 Submissions for the contract law review were due on 20 July 2012, http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Review-of-Australian-Contract-Law.aspx at 15 August 2012.

38 Australian Government Convergence Review, *Convergence Review Final Report* (2012).

39 The Federal Court at first instance ruled that this service does not infringe any rights conferred by the *Copyright Act 1968* (Cth) but was a form of 'time shifting' allowed by s 111 of the Act. On appeal, the Full Federal Court overturned this decision: *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147. See below in the section 'Private copying'.

regulator should have regard to copyright implications and be able to refer any resulting copyright issues to the relevant minister for further consideration by the Government.

Question 1. The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

(a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;

(b) affects the introduction of new or innovative business models;

(c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or

(d) places Australia at a competitive disadvantage internationally.

Guiding principles for reform

26. Copyright law has been much criticised for being confused and complex.[40] It has been suggested that much complexity results from reform decisions being reached in an ad hoc manner, in relation to specific exceptions, rather than being underpinned by any widely accepted principles.[41]

27. The ALRC is developing some guiding principles to inform its approach to the Inquiry and, in particular, to help evaluate whether exceptions and statutory licences in the *Copyright Act* are adequate and appropriate in the digital environment or whether new exceptions are desirable.

28. The Terms of Reference provide some guidance in this regard, along with existing laws, international instruments and principles identified in other reviews and reports. Based on these sources, the ALRC puts forward the following principles as a starting point, accompanied by brief explanations. The ALRC welcomes comments on these draft principles and also suggestions for other principles to guide the Inquiry.

40 See eg, S Ricketson, 'Simplifying Copyright Law: Proposals from Down Under' (1999) 21(11) *European Intellectual Property Review* 537; C Bond, 'There's Nothing Worse than a Muddle in All the World: Copyright Complexity and Law Reform in Australia' (2011) 34(3) *UNSW Law Journal* 1145, 1148.

41 See eg;, K Weatherall, 'Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms' (2007) 31 *Melbourne University Law Review* 967; C Bond, 'There's Nothing Worse than a Muddle in All the World: Copyright Complexity and Law Reform in Australia' (2011) 34(3) *UNSW Law Journal* 1145.

Principle 1: Promoting the digital economy

Reform should promote the development of the digital economy by providing incentives for innovation in technologies and access to content.

29. The Terms of Reference refer to the 'importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies'. The ALRC takes this to refer to innovation within Australia and engagement globally in digital opportunities.

30. Copyright law is an important part of the legal infrastructure that supports the development of the digital economy. Sufficient incentives to encourage investment must be in place for desirable innovation to occur. However, 'without open access to appropriate categories of information, Australia may not enjoy the potential innovation in the digital economy'.[42]

Principle 2: Encouraging innovation and competition

Reform should encourage innovation and competition and not disadvantage Australian content creators, service providers or users in Australian or international markets.

31. This is consistent with the Convergence Review principle that the communications and media market should be innovative and competitive, while balancing outcomes in the interest of the Australian public.[43] While too little intellectual property protection will discourage people from innovating, too much may discourage innovation because 'the pathways to discovery are blocked'.[44]

32. An optimal system of copyright law will support enterprises as they establish new ways of doing business and seek out new commercial opportunities. Australia competes with other countries in a global digital economy. If copyright law creates 'a less conducive environment for a digital economy than the law of Australia's competitors, this will put Australia at a disadvantage in attracting and retaining innovative digital companies'.[45]

Principle 3: Recognising rights holders and international obligations

Reform should recognise the interests of rights holders and be consistent with Australia's international obligations.

33. Reform of Australian copyright law needs to take account of Australia's international obligations. The *Universal Declaration of Human Rights*, to which

---

42 Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions* (2009), 12.

43 Australian Government Convergence Review, *Convergence Review Interim Report* (2011).

44 Department of Innovation, Industry, Science and Research, *Powering Ideas: An Innovation Agenda for the 21st Century* (2009), 56.

45 K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 2.

Australia is a signatory, provides for the protection of 'the moral and material interests' of authors in any scientific, literary or artistic production.[46]

34. Australia is bound by treaty obligations requiring the protection of copyright, notably under the *Berne Convention*.[47] There is also a direct link between intellectual property law and international trade obligations—the explicit basis for the TRIPS Agreement. Alongside multilateral harmonisation of copyright law is an emerging environment of bilateral trade agreements[48] and negotiations. This Inquiry may provide an opportunity for suggesting policy parameters within which future international negotiations take place.

Principle 4: Promoting fair access to and wide dissemination of content

Reform should promote fair access to and wide dissemination of information and content.

35. The Terms of Reference refer to 'the objective of copyright law in providing an incentive to create and disseminate original copyright materials' and to the 'general interest of Australians to access, use and interact with content in the advancement of education, research and culture'. There are important economic and social benefits in promoting access to and wide dissemination of information. New business models should be allowed to develop without copyright hindering these benefits. Copyright should assist where possible in the development of opportunities for Australian creators, and in sorting out 'what should be paid for, and what should not be paid for'.[49]

Principle 5: Responding to technological change

Reform should ensure that copyright law responds to new technologies, platforms and services.

36. Copyright is an area of law fundamentally affected by technological developments, which allow copyright material to be used in new ways. Copyright law needs to respond to new technologies, platforms and services. The Terms of Reference refer in particular to the emergence of 'new digital technologies'.

37. Copyright law needs to be able to respond to changes in technology, consumer demand and markets. Copyright also needs to have a degree of predictability so as to ensure sufficient certainty as to the existence of rights and the permissible use of copyright materials, leading to minimal transaction costs for owners of users and avoiding uncertainty and litigation. Uncertainty is created by definitions that become

---

46 *Universal Declaration of Human Rights*, 10 December 1948, GAR 217 A (III) (entered into force on 10 December 1948), Article 27(2).

47 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

48 For example, the Australia–United States Free Trade Agreement.

49 P Banki, 'The Burden of Proof, ALRC Review—The Law Less Trammelled?' (Paper presented at Australian Copyright Council Seminar, Sydney, 17 July 2012).

redundant or differentiate between subject matter or rights holders based on technology rather than underlying principle.

Principle 6: Acknowledging new ways of using copyright material

Reform should take place in the context of the 'real world' range of consumer and user behaviour in the digital environment.

38. Digital technology has, arguably, been accompanied by changed consumer attitudes to copyright—specifically, less willingness to recognise that copyright is a form of property, owned by a creator (or more usually, the assignee of a creator). Even where copyright is recognised, infringement may be seen as justified. There is a spectrum of 'real world' use which ranges from incidental de minimus use of material to transformative, creative use of material. Clarifying which activities infringe copyright now, and whether certain activity should continue to be categorised as infringement, is part of this Inquiry.

39. One concern is that, at present:

> worthy individuals and citizens, many of them children (some maybe even judges), are knowingly, ignorantly or indifferently finding themselves in breach of international and national copyright law. And they intend to keep on doing exactly as before.[50]

40. Laws that are irrelevant and do not fit with community practice are undesirable. This is not to suggest necessarily that the solution is 'free use' for consumer practices (although it might be) but means of licensing or exempting what is currently widespread infringement should be considered.

Principle 7: Reducing the complexity of copyright law

Reform should promote clarity and certainty for creators, rights holders and users.

41. The consequence of reform should not be adding further complications to an already complex statute. The many amendments to the current legislation have resulted in complex numbering and 'a feeling that the Act is unable to be understood by copyright creators and users'.[51]

42. There are two aspects to 'simplification'; one is making that which is complex clearer without substantive change; the other is changing the law to make it simpler and more coherent. This Inquiry is aimed mainly at the second aspect and not at overall simplification. The fear is always that attempting either aspect—let alone both—will result in greater incoherence.[52] However, an incapacity to contemplate reform because it causes uncertainty is undesirable and willingness to develop an understanding of desirable reform by stakeholders should be assumed.

---

50 M Kirby foreword to B Fitzgerald and B Atkinson (eds), *Copyright Future, Copyright Freedom* (2011), 4.

51 A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), 146.

52 S Ricketson, 'Simplifying Copyright Law: Proposals from Down Under' (1999) 21(11) *European Intellectual Property Review* 537.

Principle 8: Promoting an adaptive, efficient and flexible framework

Reform should promote the development of a policy and regulatory framework that is adaptive and efficient and takes into account other regulatory regimes that impinge on copyright law.

43. Within and outside the Terms of Reference for this Inquiry, contemporaneous developments are taking place which impinge on copyright law and practice. Whether or not the Inquiry will deal with these developments in a substantive manner, the broader environment needs to be taken into account. For example, a review of primary infringement by individuals in the context of 'new ways of using copyright material' needs to take into account the effect of any recommendations on the responsibilities for content (if any) of platform providers under safe harbour schemes which are beyond the scope of this Inquiry.

44. On the other hand the Inquiry is directed to consider the Convergence Review and the policy settings recommended there will form part of the ALRC's deliberations.

45. The costs and benefits to the community should be taken into account in formulating options for reform. The *Australian Government Best Practice Regulation Handbook* frames a guiding principle for government regulation being to 'deliver effective and efficient regulation—regulation that is *effective* in addressing an identified problem and *efficient* in terms of maximising the benefits to the community, taking account of the costs'.[53]

Question 2. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

Caching, indexing and other internet functions

46. This section considers whether reforms to the *Copyright Act* are needed to permit the use of copyright material in caching, indexing and other internet-related technical functions that are essential to the operation of the digital environment and the digital economy.

47. Professor Hector MacQueen has written that, in the digital world, copying of protected works occurs 'constantly and necessarily':

> every time a software program is loaded into a computer RAM, or a surfer opens up a webpage, to take two simple examples occurring several million times a day around the world. There is, in other words, a *need* to copy before any and every *use* of digital

53 Australian Government, *Best Practice Regulation Handbook* (2010); *Australian Law Reform Commission Act (1996)* (Cth) s 24(2)(b).

material, whether long or short, commercial or non-commercial, intentional or accidental, serious or casual.[54]

48. Internet service providers, search engines, web hosts and other internet intermediaries rely on indexing and caching for their efficient operation. For example, Google's search engine works by using automated 'web crawlers' that find and make copies of websites on the internet. These copies are then indexed and stored on its 'cache'.[55] When a user enters a search query, Google uses the cached version to judge if the page is a good match for the query, and displays a link to the cached site.[56]

49. Caching improves the internet's performance, allowing search engines to quickly retrieve cached copies on its server, rather than having to repeatedly retrieve copies from remote servers. It is also helpful when the original page is not available due to internet traffic congestion, an overloaded site, or if the owner has recently removed the page from the web.[57]

Current law

50. The copying of works by a search engine for the purposes of indexing or caching may infringe copyright. In addition, when a search engine displays the results from its cache, this may amount to communicating copyright material to the public, a right protected by the *Copyright Act*.[58]

51. Further, where search engine results contain links to sites that contain infringing copyright material, issues may arise as to whether the search engine may be liable for secondary infringement (authorising infringement).

52. There is no specific exception in the *Copyright Act* that permits the copying or reproduction of copyright material for the purposes of caching or indexing. However, there are a number of provisions that deal with temporary reproduction and a specific section that deals with proxy caching by educational institutions.

- Sections 43A and 111A allow for the temporary reproduction of a work, an adaptation of a work or an audio-visual item as part of the 'technical process of making or receiving a communication'.[59]

---

54 H L MacQueen, 'Appropriate for the Digital Age?' Copyright and the Internet: 1. Scope of Copyright' in L Edwards and C Waelde (eds), *Law and the Internet* (3rd ed, 2009), 191.

55 Caching can be described as the copying and storing of data from a webpage on a server's hard disk so that the page can be quickly retrieved by the same or a different user the next time that page is requested. Caching can operate at the browser level (eg, stored on a computer's hard drive and accessed by the browser) or at a system/proxy level by internet intermediaries and other large organisation: see, Webopedia, *Proxy Cache* <www.webopedia.com/TERM/P/proxy_cache.html> at 31 July 2012.

56 Ibid.

57 Google Guide, *Cached Pages* <www.googleguide.com/cached_pages.html> at 30 July 2012. The owner of a website can specifically prevent a crawler from accessing parts of their website which would otherwise be publically viewable, by inserting a piece of code called 'robot.txt protocol'.

58 *Copyright Act 1968* (Cth) ss 31, 85, 86.

59 Ibid s 43A deals with a work, or adaptation of a work and s 111A deals with audiovisual items.

- Section 116AB allows for the reproduction of copyright material on a system or network controlled or operated by or for a 'carriage service provider' in response to an action by a user in order to facilitate efficient access to that material by that user or other users.[60]
- Section 200AAA allows automated caching by computers operated by or on behalf of an educational institution where the system is operated primarily to enable staff and students of the institution to gain online access for educational purposes, to facilitate efficient later access to the works by users of the system.

53. A 2000 review of intellectual property legislation highlighted concerns about whether ss 43A and 111A sufficiently cover proxy caching.[61] The review recommended that if there is evidence that caching is not covered, then the Act should be amended. For example, the review stated, s 43A could be modified to include:

> other works temporarily made merely as an element in and so as to enhance the efficiency of the technical process of making or receiving a communication.[62]

54. These sections have not been amended since 2000, and the question of whether they would cover proxy caching remains a concern. For example, Associate Professor Kimberlee Weatherall has noted that the exceptions only cover copies made 'in the technical process of making or receiving a communication', whereas caching and indexing facilitates communication to other users.[63] Nor do these provisions account for the fact that material may be cached for longer than 'temporary periods'.[64]

55. In relation to s 200AAA, it is unclear why only educational institutions are provided protection for system-level proxy caching.

Options for reform

56. Exceptions to address these issues might take a number of forms. The existing exceptions in the *Copyright Act* might be clarified, or broadened, to apply to a greater range of users. Alternatively, a new exception might be drafted to account for uses of copyright material necessary for technical functions in the digital environment. Finally, a broad and flexible exception that permits such technical copying and communicating might be introduced.[65]

---

60 'Carriage service provider' is defined in s 78 of the *Telecommunications Act 1997* (Cth) to include a party who uses infrastructure provided by a licensed carrier to supply carriage services to the public. Only public internet access providers like Telstra Bigpond would be deemed carriage service providers.

61 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 108-113.

62 Ibid, 113.

63 K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 16.

64 Ibid, noting that for large entities, elements of pages frequently accessed might be in a cache effectively for long periods.

65 See below in the section 'Fair use'.

57. Some have called for the expansion of the safe harbour scheme to internet service providers to protect caching, indexing and communication by search engines.[66] The scope of the safe harbour scheme is outside the ALRC's Terms of Reference.

58. A number of other jurisdictions have specific exceptions that deal with caching and indexing. Article 13 of the European *E-Commerce Directive* provides an exception for caching.[67] The UK has a specific exception—mirroring the *E-Commerce Directive*—that allows a provider to cache copyright material so long as the service provider:

- does not modify the information;
- complies with any conditions on access to, and updating of, the information;
- does not interfere with the lawful use of technology to obtain the data or use the information; and
- acts expeditiously to remove or disable access to the material upon obtaining knowledge that the work has been removed at the initial source, access has been disabled, or a court or administrative body has ordered such removal or disablement.[68]

59. A similar exception for caching exists in New Zealand under s 92E of the *Copyright Act 1994* (NZ).

60. Canada's *Copyright Modernization Act 2012* (Can) introduces a specific exception for caching for those who provide internet-related services and internet location tools.[69] The Act provides that, subject to some exceptions, a person who, in providing services related to the operation of the internet, provides any means for the telecommunication or reproduction of copyright material, does not infringe copyright.[70] The exception appears to cover both the reproduction and communication of cached material.

61. Further, the Canadian Act provides that copyright owners are limited to injunctive relief against a provider of an 'information location tool'[71] found to have infringed copyright by making a reproduction of copyright material, or by communicating that reproduction to the public by telecommunication.[72]

---

66 In particular, a number of submissions to the Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions* (2009) paper including Google and Yahoo! See also, K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance.

67 *Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the internal market* (entered into force on 8 June 2000) ('Directive on electronic commerce').

68 *Electronic Commerce Regulations 2002* (UK) reg 18.

69 *Copyright Modernization Act, C-11 2012* (Canada).

70 Ibid, 31.3. This exception also applies to services related to the operation of other digital networks.

71 This is defined to mean 'any tool that makes it possible to locate information that is available through the Internet or another digital network': Ibid, s 41.27(5).

72 Providers must adhere to certain conditions to benefit from this protection.

62. In the US, caching, indexing and communication of search results may be non-infringing under the fair use doctrine. For example, in *Field v Google Inc*[73] it was held that Google did not infringe copyright by caching a story that the plaintiff had posted to his website. The Court considered that the practice was fair use because, among other things, it was transformative in nature and there was no evidence that Google intended to profit from the caching.[74] It also considered that Google was able to rely on the US safe harbour provisions for intermediate and temporary storage.[75] Similar findings were made in *Parker v Google Inc*.[76]

63. The ALRC seeks comments on whether caching, indexing or other internet-related functions are being impeded by Australia's copyright laws. Should exceptions cover the reproduction and communication of copyright material for the purposes of indexing and caching? How should any such exceptions be framed?

Question 3. What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?

Question 4. Should the *Copyright Act 1968* (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

Cloud computing

64. Many copyright owners are using cloud computing services to deliver copyright material to users.[77] Some of these services provide on-demand access to large libraries of properly licensed music, films, books and other content—whether on a subscription or fee-per-use model, many with TPMs.

65. Individuals may also increasingly use cloud computing services to store copies of copyright material they have copied themselves—such as music files copied from a CD. Storing the copies on remote computer servers can, among other things, enable consumers to access this content from multiple computers and devices, including mobile devices, more easily. However, rights holders may object to this, particularly where they might otherwise license such uses. The Federal Court case in 2012 concerning the Optus TV Now service highlights the potential for new and emerging

73 412 F Supp 2d, 1106.
74 Ibid, 1117–23.
75 Ibid, 1123–25.
76 422 F Supp 2d 492, 497.
77 The US National Institute of Standards and Technology (NIST) defines cloud computing, in part, as: 'a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (eg, networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction': Department of Finance and Deregulation, *Cloud Computing Strategic Directions Paper: Opportunities and applicability for use by the Australian Government* (2011), 10.

cloud computing services to infringe copyright, or enable their customers to infringe copyright.[78]

66. The exceptions discussed below that allow users to make copies of certain content for private and domestic use may not always apply if the copies are stored on remote computer servers that the user does not own.[79] 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. However, such a technology-neutral policy applied to private copying may prevent rights holders from obtaining remuneration for certain uses of their copyright material.

67. Companies that offer cloud computing services may also risk infringing copyright, for example by reproducing or communicating copyright material originally uploaded to their servers by their customers. In performing necessary technical functions, cloud computing service providers may risk infringing copyright, just as internet service providers may risk infringing copyright when they index and cache internet content.[80] It is unclear whether these technical functions would be captured by the existing exceptions in the *Copyright Act* for the making of temporary reproductions 'as part of the technical process of making or receiving a communication' or 'incidentally made as a necessary part of a technical process of using a copy of the material'.[81]

68. Cloud computing represents a major development in the digital environment. Weatherall has written that 'Australia's very technology-specific exceptions inhibit the cloud computing model for individuals and create elevated risks for both consumers and internet intermediaries'.[82] The ALRC is interested in stakeholder views on whether Australian copyright law is impeding cloud computing services, and whether exceptions in the *Copyright Act* should be amended, or new exceptions created, to account for this technology.

69. Cloud services, such as digital lockers, may also be used to store and share copyright material acquired illegally. New or amended exceptions presumably should not permit such activity. Whether companies that provide cloud computing services should have access to the safe harbour schemes for carriage service providers is a question beyond the Terms of Reference.

Question 5. Is Australian copyright law impeding the development or delivery of cloud computing services?

78 *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.
79 See below in the section 'Private copying'.
80 See above in the section 'Caching, indexing and other internet functions'.
81 *Copyright Act 1968* (Cth) ss 43A, 43B (for works) and ss 111A, 111B (subject-matter other than works).
82 K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 22.

Question 6. Should exceptions in the *Copyright Act 1968* (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

Copying for private use

70. Many Australians make copies of copyright material—perhaps most commonly, music, television programs and films—for their own private use. In practice, these copies may be stored on and accessed from home computers, personal video recorders, digital discs, portable devices such as smart phones and tablets, and on other devices. Increasingly, as noted above, copies may be stored on remote computer servers.[83]

71. This section will briefly discuss three types of exceptions now in the *Copyright Act* that relate to copying for private use, consider their operation, and ask whether they need to be amended and whether further exceptions need to be introduced.

72. One policy justification for introducing such exceptions is that Australians routinely make copies for their private use, and do not believe that this should be against the law. The Explanatory Memorandum for the Copyright Amendment Bill 2006, which introduced two important types of exceptions for private copying—time and format shifting—stated that failure to recognise such common practices 'diminishes respect for copyright and undermines the credibility of the Act'. The Explanatory Memorandum also stated that not recognising such practices is 'unsatisfactory for industries investing in the delivery of digital devices and services'.[84]

Format shifting

73. Exceptions were introduced to the *Copyright Act* in 2007 for the 'format shifting' of books, newspapers and periodicals;[85] photographs;[86] videotapes;[87] and sound recordings.[88] These exceptions have common elements. For example, all of the exceptions apply only if the owner of the original makes the copy, and the original is not an infringing copy.

74. As discussed above, some of these conditions may mean the exceptions do not apply to copies stored on remote servers in the cloud.[89] 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.[90] Also, the exception for books, newspapers and periodicals only

83 See above in the section 'Cloud computing'.
84 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 6.
85 *Copyright Act 1968* (Cth) s 43C.
86 Ibid s 47J.
87 Ibid s 110AA.
88 Ibid s 109A.
89 See above in the section 'Cloud computing'.
90 *Copyright Act 1968* (Cth) s 109A(1)(b).

allows users to make one copy in each format, and storing content in the cloud may require the making of multiple copies.[91]

75. All 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. For example, should companies be free to offer a copying service, without the licence of rights holders, if the copies it makes are only to be used for a purpose permitted under the *Copyright Act*, such as for the private and domestic use of the owner of the original copy?

76. The format shifting exception for films only applies to copies made from films in analog form.[92] It does not allow digital-to-digital copying. This means the exception does not apply to copies made from, for example, DVDs and Blu-Ray discs and digital copies downloaded from the internet. One reason given for this limitation is that 'unrestricted digital-to-digital copying could allow consumers to reproduce the full picture quality and features provided in commercially produced digital film content'.[93]

77. 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,[94] 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 on, for example, computers and personal video recorders. Books bought on the Kindle store, to take another example, may be read by consumers using a Kindle or a Kindle app on a smart phone, computer or other device.

78. 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. This might suggest to some that non-remunerated exceptions for private copying are either unnecessary or should be restricted.

79. The format shifting exceptions are complex. One way of simplifying the exceptions might be to consolidate them. 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 Modernization Act 2012* (Can) 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'.[95] This

---

91 Ibid 43C(1)(e).
92 Ibid s 110AA(1)(a).
93 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].
94 For example, Spotify and MOG.
95 *Copyright Modernization Act, C-11 2012* (Canada) s 29.22(1).

has the virtue of simplicity, which may be particularly important for exceptions that need to be understood by members of the public.

80. The Australian Government reviewed the format shifting exceptions for films and photographs in 2008, but 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.[96]

81. The ALRC invites submissions on whether the exceptions for format shifting—or indeed for private copying more broadly—should be simplified, consolidated, and made consistent, and if so, how this might be achieved. Also, if a broad and flexible exception based on 'fair' or 'reasonable' use[97] were introduced to the *Copyright Act*, would a specific exception for format shifting be necessary? The time shifting exception raises similar questions.

Time shifting

82. 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'.[98]

83. The ALRC is interested in how this exception is operating, particularly in light of recent and anticipated changes in the digital environment, and in comments on whether the exception should be extended or confined.

84. The current time shifting 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*.[99] 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.

85. 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

---

96 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].

97 Discussed below in the section 'Fair use'.

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

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

technology but later stored on a remote server may be distinguished from recordings made by companies (not licensed by rights holders) and stored on remote servers for their subscribers to access. The ALRC is interested in whether this distinction is important from a policy perspective, and if so, why.

86. The Full Federal Court considered this relatively new exception in *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd*.[100] Optus has filed an application for special leave to appeal the decision to the High Court of Australia. The case concerns Optus TV Now, a service that enabled a subscriber to:

> have free to air television programmes recorded as and when broadcast and then played back at the time (or times) of the subscriber's choosing on the subscriber's compatible Optus mobile device or personal computer. The system which permits such 'time-shifting' of programme viewing requires the copying and storing of each television broadcast recorded for a subscriber, hence the allegations of copyright infringement in this matter.[101]

87. Section 111 may have been intended to be a technology-neutral exception, but the Full Federal Court observed that the language of the section does, in fact, exclude certain later technological developments in copying. The Court stated that 'no principle of technological neutrality can overcome what is the clear and limited legislative purpose of s 111'.[102] This raises the question of whether the section should be amended to include new technological developments in copying, and the broader question of the merits of technology-neutral policy and law.

88. The Optus TV Now case also highlights the question of whether the time shifting exception should cover copying by a company on behalf of an individual. Importantly, such copying of copyright material by commercial entities may lower the value of rights to distribute the material. Services such as Optus TV Now may be thought of as elaborate digital video recorders, but if such new services have a significant effect on the market for broadcast copyright material, then some will call for s 111 to be confined.

89. To address the complexity of the statutory exceptions, one option for reform of the exception for time shifting might be to integrate it with other permissible free uses under a broader and more flexible general exception, such as the broad and flexible exception based on 'fair' or 'reasonable' use,[103] or a new general exception for private and domestic use.

Back-up and data recovery

90. This section considers whether the *Copyright Act* should permit Australians to copy and store their own collections of copyright material, for the purpose of back-up and data recovery.

---

100 *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.
101 Ibid, [1].
102 Ibid, [96].
103 Discussed below in the section 'Fair use'.

91. There is a specific exception in s 47C for making back-up copies of computer programs, and 'any work or other subject matter held together with the program on the same computer system'. The ALRC is interested in how this exception is operating, and whether it is sufficiently broad. For example, does it allow users to back-up copyright material such as sound recordings, films, images and books that they have legally acquired or licensed and, if not, should this be more freely permitted? This question was raised by the Fair Use Review, but s 47C was not subsequently amended.[104]

92. The new Canadian exception for back-ups applies broadly to 'a work or other subject-matter', and provides that a 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'.[105] 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.[106]

93. This Canadian exception appears to be technology-neutral and to apply to a broad range of copyright material. The ALRC welcomes submissions on whether the Australian *Copyright Act* should contain a similar exception.

94. Other questions include whether the exception in s 47C allows for back-up copies to be copied to and downloaded from remote cloud servers,[107] and the potential for TPMs to prevent users from making copies of the content for their own private and domestic use.

Question 7. Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

Question 8. The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

104 Australian Government Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*, Issues Paper (2005), 28, 29.
105 *Copyright Modernization Act, C-11 2012* (Canada) s 29.24.
106 Ibid s 29.24.
107 See above in the section 'Cloud computing'.

Question 9. The time shifting exception in s 111 of the *Copyright Act 1968* (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

(a) should it matter who makes the recording, if the recording is only for private or domestic use; and

(b) should the exception apply to content made available using the internet or internet protocol television?

Question 10. Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

Online use for social, private or domestic purposes

95. This section discusses the use of copyright materials by individuals for 'social, private or domestic purposes', as referred to in the Terms of Reference.

96. The main example of such uses—and the focus of this discussion—is the uploading and sharing on the internet of non-commercial 'user-generated content' including in social networking.[108] User-generated content may be uploaded onto internet websites by individuals for commercial or non-commercial purposes.

97. The Organisation for Economic Co-operation and Development has defined 'user-created content' as 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.[109]

98. While such content may involve creative use of copyright material, the use is not necessarily 'transformative', as that term is used in the following section, or involve the creation of what may be recognised as cultural works.

---

108 Some uses of copyright materials in practices such as back-up copying and format shifting may also be characterised as social, private or domestic uses: see eg, P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537, 2592, discussing 'personal use' copying. These uses were discussed in the section 'Copying for private use' above.

109 Organisation for Economic Co-operation and Development, *Participative Web and User-Created Content* (2007), 9.

99. The Copyright Council Expert Group observed 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.[110]

Current law

100. Existing exceptions may apply to some user-generated content using copyright materials including fair dealing for the purposes of criticism or review;[111] and parody or satire.[112] However, much user-generated content will not fit within the ambit of these exceptions—for example, using a copyright sound recording in a home video.

101. 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.[113]

Options for reform

102. It has been suggested that a new specific exception should be introduced in the *Copyright Act* to allow individuals to make user-generated content, where this does 'not unjustifiably harm copyright owners'.[114]

103. In the US, fair use doctrine is capable of covering some private or personal use of copyright materials including some not encompassed in the list of six illustrative purposes that may qualify as fair use.[115]

104. It has been suggested that US law should also provide that 'private, non-commercial copies' be presumed fair, and that presumption only be overcome if 'copyright owners bring forward proof that the defendants' use has, in fact, harmed the market for their work or at least poses a meaningful likelihood of such harm'.[116]

105. Any new broad flexible exception based on a concept of 'fair' or 'reasonable' use may also allow individuals more leeway to use copyright materials for social, private or domestic purposes.[117]

---

110 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.
111 *Copyright Act 1968* (Cth) ss 41, 103A.
112 Ibid ss 41A, 103AA.
113 YouTube, *Content ID* <www.youtube.com/t/contentid> at 24 July 2012.
114 K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 5.
115 That is, criticism, comment, news reporting, teaching, scholarship, and research: *Copyright Act 1976* (US) s 107.
116 P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537, 2592.
117 See the section, 'Fair use'.

Discussion

106. Commenting on US law, Professor Pamela Samuelson identifies a number of reasons why 'private and personal uses' of copyright material should either be given a broad scope of fair use (under US fair use doctrine) or excepted from copyright control. These reasons include that private and personal uses:

- generally do not interfere with commercial exploitation of copyright material;
- may be within the 'sphere of reasonable and customary activities' that copyright owners should expect from consumers;
- often involve use of copyright material for the purposes of individual self-expression;
- are generally 'infeasible to regulate' because of the difficulties and costs required to enforce copyright in spaces where these uses often take place; and
- generally preclude the formation of viable markets for copyright licences.[118]

107. Samuelson also suggests 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'.[119]

108. Although this analysis is grounded in US law, and fair use doctrine in particular, the ALRC is interested in comments on whether similar reasons may justify excepting some uses of copyright materials in creating user-generated content from the scope of copyright infringement.

109. One consideration is that such an exception, by expanding the permissible use of copyright materials online, may have consequences for the liability of internet platforms and telecommunications providers under copyright law. In particular, if the scope of primary copyright infringement is narrowed in this way, the legal incentives for carriage service providers to cooperate with copyright owners in deterring copyright infringement on their networks under the 'safe harbour' scheme provided by the *Copyright Act* may be reduced.[120]

110. A range of other questions arise in relation to how any such exception might be framed. For example, how would the concept of 'social' or 'private and personal' use of copyright material be defined? Importantly, assuming the exception were limited to 'non-commercial' use of copyright material, how would this element be defined?

---

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

119 Ibid, 2591.

120 *Copyright Act 1968* (Cth) pt V, div 2AA. The scope of the safe harbour scheme is under review and is a matter outside the Terms of Reference of the ALRC's inquiry: see Australian Government Attorney-General's Department, *Revising the Scope of the Copyright 'Safe Harbour Scheme'* (2011), Consultation Paper.

Question 11. How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

Question 12. Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

Question 13. How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Transformative use

111. The Terms of Reference ask the ALRC is to consider whether exceptions should allow 'transformative, innovative and collaborative' use of copyright materials to create and deliver new products and services.

What is a 'transformative' use?

112. In this Issues Paper, the term 'transformative' is used to refer generally to works that transform pre-existing works to create something new and that is not merely a substitute for the pre-existing work. Works that are considered transformative may include those described as 'sampling', 'remixes' and 'mashups'.

113. Such uses may be commercial—as in the case of music released commercially that uses samples of existing tracks—or non-commercial, such as where copyright material is used in online user-generated content.

114. A number of law reform and other bodies in Australia and overseas have recommended changes to copyright laws that would provide broader exceptions permitting transformative use of copyright materials. These generally apply only to non-commercial use, however defined.

115. The concept of a transformative use is derived from US law concerning the doctrine of fair use, which permits limited use of copyright material without acquiring permission from the rights holders. A key factor in determining fair use is whether the use is transformative—'the more transformative the new work, the less will be the significance of other factors [such as a commercial purpose] that may weigh against a finding of fair use'.[121]

121 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579.

116. In the US cases, acts are considered transformative as opposed to merely 'derivative' when they do more than merely 'supersede the objects' of the original creation and add 'something new, with a further purpose or different character, altering the first with new expression, meaning, or message'.[122]

117. Authors often 'draw upon pre-existing works and transform expression from them in creating new works that criticize, comment upon, or offer new insights about those works and the social significance of others' expressions'—parodies are a classic example of this kind of transformative use.[123]

118. Well-known uses that might be considered transformative include music sampling and mashups. Sampling is the act of taking a part, or sample, of one sound recording and reusing it in a different composition. In music, a mashup is a song created by blending two or more songs, usually by overlaying the vocal track of one song onto the music track of another.[124]

Current law

119. Depending on the facts of any particular case, existing exceptions may apply to some transformative uses. Most obviously, the *Copyright Act* provides that fair dealing for the purposes of criticism or review;[125] and parody or satire,[126] do not constitute an infringement of copyright.

120. However, not all use that might be classed as transformative will be parody, satirical or critical. Nor will sampling and mashups usually fall within the scope of these exceptions. Such uses will constitute infringement provided that a substantial part of the work or other copyright subject-matter is used.[127]

121. Some transformative uses may also infringe an author's moral rights under pt IX of the *Copyright Act*.[128] For example, in *Perez v Fernandez*, the Federal Magistrates Court held that a mashup involving only a few words mixed into a song was prejudicial to the artist's moral right of integrity.[129]

Options for reform

122. A number of reforms have been suggested overseas, and in Australia, that are directly relevant to transformative uses of copyright material.

---

122 K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 33 citing US cases.

123 P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537, 2549.

124 *The Macquarie Dictionary Online*.

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

126 Ibid ss 41A, 103AA.

127 See, eg, *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444.

128 The three moral rights in Australian law are: the right to be attributed as the author; the right against false attribution; and the right of integrity, that is, the right not to have one's work treated in a derogatory way: *Copyright Act 1968* (Cth) pt IX. See further Australian Copyright Council, *Moral Rights: Information Sheet G043v13* (2012) <www.copyright.org.au/find-an-answer/browse-by-a-z> at 15 August 2012.

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

123. In Australia, the Copyright Council Expert Group recommended, in 2011, an exception for non-commercial, transformative use of copyright works. The Group highlighted that this exception is particularly relevant in light of the rise of user-generated content.

124. In Canada, the *Copyright Modernization Act 2012* (Can) created a new exception for content generated by non-commercial users.[130] This exception has been referred to as the 'UGC' (user-generated content) or 'mash-up exception'[131] and provides a right to use, for non-commercial purposes, a publicly available work in order to create a new work.[132]

125. Any new broad flexible exception based on a concept of 'fair' or 'reasonable' use (discussed in the section 'Fair use' below) may also be expected to allow individuals to use copyright materials more freely in transformative uses. In addition, some transformative uses might be covered by a new exception for quotation (discussed in the section 'Fair dealing exceptions' below).

Discussion

126. The Copyright Council Expert Group suggested that an exception 'permitting private, non-commercial, transformative uses would preserve the balance in copyright law between interests of creators and users, and preserve public respect for the relevance and integrity of copyright law'.[133]

127. The Group argued that this exception would legitimise a large number of practices that are already occurring, without harming copyright rights owner interests[134]—in particular, creative uses on the internet characterised as being part of a new 'remix' culture.[135] This remix culture can also be seen as a continuation of a longer tradition of postmodern appropriation.[136]

128. The ALRC is interested in comment on whether individuals should be allowed to use copyright materials more freely in transformative uses, and in creating new cultural works. For example, the *Copyright Act* might be amended to provide that transformative use does not constitute an infringement of copyright.

---

130 *Copyright Act 1985* (Can) s 29.21. The Ireland Copyright Review Committee has invited submissions on whether a similar exception for non-commercial user-generated content should be enacted in Ireland: Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).

131 D Lithwick, M Thibodeau and Parliament of Canada, *Legislative Summary of Bill C-11: An Act to amend the Copyright Act* <www.parl.gc.ca/About/Parliament/LegislativeSummaries> at 16 July 2012.

132 The Ireland Copyright Review Committee has invited submissions on whether a similar exception for non-commercial user-generated content should be enacted in Ireland: Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).

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

134 Ibid, 4.

135 Professor Lawrence Lessig has suggested that non-commercial creative use (which he calls 'amateur remix') should be entirely exempted from the scope of US copyright law: L Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (2008), 245–255.

136 See, eg, E Shimanoff, 'The Odd Couple: Postmodern Culture and Copyright Law' (2002) 11 *Media Law and Policy* 12.

129. Such an exception could be restricted to 'non-commercial' uses, along the lines of the Canadian provision discussed above, or be broader and extend to some commercial uses. For example, the exception could be framed to apply only where the use does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright.[137]

130. Some of the issues that arise include:

- The meaning of transformative use. The Copyright Council Expert Group stated that it implies something more than 'just pasting two things together without any further modification'—for example, using a song as background to a home video posted to a video-sharing website is not 'transformative'.[138] Questions may arise about whether there should be some threshold of originality or innovation.
- The meaning of non-commercial use. Defining non-commercial use in 'a digital environment that monetises social relations, friendships and social interactions'[139] may be problematic—especially where a creator of content opts to receive payments from advertising associated with websites.
- The implications of any exception for non-commercial transformative use in terms of the protection of authors' moral rights.[140] For example, allowing new transformative uses of copyright materials may lead to more frequent assertion of moral rights.

Question 14. How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

Question 15. Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

137 Adopting elements of the three-step test: *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 9(2). That is, the use of the work must: amount to a 'special case'; not conflict with the normal exploitation of the work; and not unreasonably prejudice the legitimate interests of the owner of copyright.

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

139 Ibid, 2.

140 Under *Copyright Act 1968* (Cth) pt IX.

Question 17. Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Question 18. The *Copyright Act 1968* (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

Libraries, archives and digitisation

131. The digital environment is changing the way in which libraries, archives and cultural institutions approach fulfilling their public missions to preserve and provide access to cultural heritage and knowledge.[141] In particular, there is growing expectation that institutions will be able to provide public access to works held in their collections in digital formats—for example, via websites, online databases or online repositories.[142]

132. Digitisation offers avenues for better preservation and wider dissemination of works, in less costly ways than previously possible.[143] Libraries and archives consider access to their material to be in the public interest, as it delivers resources to 'people from all walks of life ... ranging from higher education and schools, through to the research community, business and creative industries'.[144]

133. Digitisation may also offer benefits to copyright owners. For example, out-of-print works may now be able to generate returns that were not possible before.[145] On the other hand, it may also result in a loss of control as to how works may be used, and may be detrimental to the owner's economic interests.[146]

134. Promoting fair access and wide dissemination of copyright works is a framing principle for this Inquiry, and an ongoing aim of copyright policy in Australia. For example, a stated aim of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) was to 'ensure that cultural and educational institutions can access, and promote access

141 Ibid s 10(4) defines an archive to include public museums and galleries which could have collections of documents or material of significant historical significance or public interest that is in custody of the body, and is being maintained for the purposes of conserving and preserving those documents.

142 See E Husdon and A Kenyon, 'Digital Access: The Impact of Copyright on Digitisation Practices in Australia Museums, Galleries, Libraries and Archives' (2007) 30(1) *UNSW Law Journal* 12, 13 and M Dawes, 'Setting the Orphans Free' (2010) 18(4) *Australian Law Librarian* 289.

143 E Derclaye (ed), *Copyright and Cultural Heritage: Preservation and Access to Works in a Digital World* (2010), viii.

144 National and State Libraries Australasia, *Digitisation Research Project* (2011), 3.

145 M Williams and C Andrews, 'Why the Foundations of Copyright Remain Sound in the 21st Century' (Paper presented at 15th Biennal Copyright Law & Practice Symposium, Sydney, 13 October 2011), 12.

146 Ibid.

to, copyright material in the online environment on reasonable terms', having regard to the 'provision of adequate remuneration to creators and investors'.[147]

135. This section asks whether the *Copyright Act* needs to be amended to permit greater digitisation of, and wider access to, works held by libraries and archives.

Digitisation

136. Digitisation of an analog work in digital format is a reproduction and may constitute copyright infringement.[148] Similarly, the communication of a substantial part of a copyrighted work, for example, by showing it on a website, may also constitute copyright infringement. Institutions cannot digitise copyrighted works unless they can rely on a licence or assignment to use the work, or a statutory exception.

137. However, digitisation of out-of-copyright works by Australian libraries and archives is nevertheless occurring. For example, in 2007 the National Library of Australia, in collaboration with state and territory libraries embarked on its first mass digitisation project, the Australian Newspapers Digitisation Program.[149] The program digitised out-of-copyright newspapers and, by 2011, was estimated to comprise 40 million news stories. The Library's wider digital repository, Trove, contains over 304 million resources including books, pictures, music, maps and diaries and letters.[150]

138. Libraries and archives note that a barrier to digitisation lies in the costs of clearing rights and the negotiation of individual licences,[151] especially for mass digitisation projects. These problems may be exacerbated where a collection or archive involves large numbers of 'orphan works', whose copyright owners cannot be located.[152]

139. Digitisation and wider dissemination of material raise particular issues in relation to Indigenous works. For example, Indigenous communities may consider that works are owned by a collective, rather than an individual, as part of an ongoing knowledge tradition.[153] They may also claim ownership of the work in perpetuity.

---

147 *Copyright Amendment (Digital Agenda) Act 2000* (Cth) s 3(d).

148 *Copyright Act 1968* (Cth) ss 31(1), 85(1), 86, 87 and 88. The Act defines 'communicate' to mean 'make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise': s 10(1).

149 National Library of Australia, *Australian Newspapers Digitisation Program* <www.nla.gov.au/ndp/> at 20 July 2012.

150 National Library of Australia, *Trove: Current work counts by zone* <http://trove.nla.gov.au/system/counts> at 2 August 2012.

151 See E Husdon and A Kenyon, 'Digital Access: The Impact of Copyright on Digitisation Practices in Australia Museums, Galleries, Libraries and Archives' (2007) 30(1) *UNSW Law Journal* 12 who alludes to the wider problem of 'gridlock': where multiple copyright owners cannot be located; M Warren, *Getting the Orphans out of the Orphanage: Risk management and orphan works at the State Library of Queensland* (2009).

152 See the section 'Orphan works'.

153 N Nakata and others, *Australian Indigenous Digital Collections: First Generation Issues*, Final Report (2008), 10.

Moral rights issues may also arise.[154] For example, where a traditional painting has been digitised and put on a website, an Indigenous owner may claim that the use is derogatory or a misuse.

Current law

Libraries and archives exceptions

140. There is no specific exception in the *Copyright Act* that covers mass digitisation projects or digitisation for the purposes of providing public access to works. However, there are a number of exceptions that allow libraries and archives to digitise collection items for defined purposes, such as:

- responding to user requests or requests by other libraries for copies of published works for the purposes of research and study;[155]
- certain reproductions, when made by or on behalf of researchers;[156]
- administrative purposes;[157]
- the preservation of manuscripts, artistic works, sound recordings;[158] and
- replacing a published item that is not commercially available.[159]

141. Professor Andrew Kenyon and Emily Hudson argue that the current libraries and archives exceptions cover specific circumstances, and do not 'extend to providing general digital access to institutions' collections'.[160] For example, the exception that allows reproduction of published works acquired in electronic form, in response to user requests, only permits libraries and archives to communicate on their premises via copy-disabled terminals.[161]

Flexible dealing exception

142. Section 200AB permits any use of a work that is made 'for the purpose of maintaining or operating the library of archives'.[162] Section 200AB can only be relied upon if there is no other exception available under the *Copyright Act*, and the use must meet the three-step test under the *Berne Convention*.[163]

---

154 K Bowrey, 'Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights?' in K Bowrey, M Handler and D Nicol (eds), *Emerging Challenges in Intellectual Property* (2011).

155 *Copyright Act 1968* (Cth) ss 49 (relating to user requests), 50 (relating to inter-library loans).

156 Ibid ss 51(1), 110A allow old, unpublished works, sound recordings and films held in publically accessible collections to be reproduced and communicated for the purposes of research and study.

157 Ibid s 51A(2).

158 Ibid ss 51A(1)(a), 110B(1)(a), 2(a).

159 Ibid ss 51A(1)(b)–(c), 110B(1)(b)–(c), 110B 2(b)(c).

160 A Kenyon and E Hudson, *Copyright, Digitisation and Cultural Institutions* (2004), Intellectual Property Research Institute of Australia, Occasional Paper No 3/04, 12.

161 *Copyright Act 1968* (Cth) s 49(5A).

162 Ibid s 200AB(2)(a).

163 Ibid s 200AB(7) in effect incorporates the three-step test found in the TRIPS Agreement and the *Berne Convention*: *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 9(2).

143. While s 200AB might allow certain copying and communication of material necessary for digitisation projects, reliance on it appears to be limited in Australia. For example, the Australian Digital Alliance has argued that:

> Adoption of s 200AB has been slow. In operation, the provision has failed to provide certainty for copying of works by cultural institutions. The provision has not been used to a great extent because it is too limited, and cultural institutions are unsure about how to use s 200AB in accordance with their institutional risk management, relationship management and other policies.[164]

Options for reform

144. The ALRC welcomes comments on whether the libraries and archives exceptions are working effectively in the digital environment. For example, should the *Copyright Act* be amended to permit a wider range of digitisation practices by libraries and archives—for example—mass digitisation of a collection? Are there other practices occurring in the digital environment, beyond digitisation, that should be covered by the current exceptions?

145. If not, is there a need for a specific exception dealing with digitisation for libraries and archives? How should such an exception be framed? For example, should the exception allow libraries and archives to digitise, but not communicate, all of its collection, including orphan works and copyright works? Should the exception be confined to a particular purpose, such as an exhibition?

146. The ALRC also invites submissions on whether a specific exception is required to permit the communication of digitised works by libraries and archives, and if so, on what basis. Should communication be limited to non-commercial use that does not interfere with the copyright owner's market? Would the introduction or use of collective licensing models—for example, as discussed in the orphan works context—provide a solution where digitisation involves commercial use?

147. Another option is for a broad and flexible exception based on a concept of 'fair' or 'reasonable' use that may permit the use of digitised works, especially where the use does not interfere with the copyright owner's market.[165]

148. In considering the issue of digitisation, the ALRC welcomes submissions on what copyright issues may need to be considered in relation to Indigenous works.

Question 19. What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

Question 20. Is s 200AB of the *Copyright Act 1968* (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

---

164 Australian Digital Alliance and the Australian Libraries Copyright Committee, *Response to the Engage: Getting on with Government 2.0 Draft Report* (2009), 9.

165 See the section 'Fair use'.

Question 21. Should the *Copyright Act 1968* (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

Question 22. What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

Orphan works

149. This section considers the problem of 'orphan works', broadly defined as a situation where 'the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner'.[166] Use of a work, without the copyright owner's permission may constitute copyright infringement.[167]

150. Individuals and institutions who wish to use, and make access available to, orphan works assume significant risks. The problem of being unable to identify the author of a work applies equally in the case of older works—in analog forms—and digital works that are created online, and often anonymously. In particular, orphan works present a recognised problem in mass digitisation projects undertaken by public and cultural institutions.[168]

Scope of the orphan works problem

151. Despite widespread acknowledgement that orphan works create significant copyright problems, there is a lack of comprehensive empirical evidence about the economic and social effects of orphan works, or the extent to which the inability to access such works impedes creative efforts. However, studies around the world point to a growing problem, at least in terms of the number of orphan works.

152. The Hargreaves Report suggested that orphan works represent 'the starkest failure of the copyright system to adapt' and that the system is 'locking away millions of works' in this category.[169] In France, the Association des Cinémathèques Européennes suggests that 21% (225,000) works in the European film archives are

166 See, United States Copyright Office, *Report on Orphan Works* (2006), 1. For example, the copyright owner may be deceased, the publisher who owns the copyright may now be defunct, or there is no data that identifies the author of the work.

167 Copyright subsistence in a work does not depend on the author registering the work, and a user will require the permission of the owner to use the work unless a particular exception or statutory licence applies. See *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 5(2). In the Australian context, see *Copyright Act 1968* (Cth) ss 36(1), 101(1).

168 See the section, 'Libraries, Archives and Digitisation'.

169 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 38. See also, N Kom, *In From the Cold: An Assessment of the Scope of "OrphanWorks" and its Impact on the Delivery of Services to the Public* (2009), JISC, 4 suggesting that up to 25 million items across the UK public sector are locked up due to problems associated with orphan works.

presumed to be orphan works.[170] In Australia, the National Film and Sound Archives estimates that about 20% of the national audio-visual collection is abandoned or orphaned.[171]

153. The ALRC invites stakeholder comments about the extent of the orphan works problem in Australia, and how the treatment of orphan works in Australia affects the use, access to and dissemination of copyright works.

> **Question 23.** How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

Existing models and options for reform

154. There are existing models in Canada and the Nordic countries that specifically address orphan works. Growing awareness of the orphan works issue has led to proposals for reform in the UK, the US, the EU,[172] and in Australia.

155. These models and proposals recognise that orphan works—especially those held in archives, libraries and public institutions—have significant cultural, academic and social significance. Access to these works is an important public interest benefit that must be balanced with ensuring that copyright owners are properly compensated for their work. [173]

Centrally-granted licences

156. Since 1998, users in Canada can petition the Copyright Board of Canada for a non-exclusive licence to use an orphan work, after 'reasonable efforts' have been made to locate the copyright owner.[174] The orphan work must be one that is published or fixed.[175]

157. The Board works closely with the Canadian Copyright Licensing Agency (CCLA) in setting the royalty fee and the terms and conditions of the licence.[176] Royalties collected are held in a fund for five years after the expiration of the licence for collection by the copyright owner.[177] If the royalty is not collected, the Board will allow the CCLA to dispose of the fee to its members as it sees fit.[178]

---

170 Association des Cinémathèques Européennes, *Results of the Survey on Orphan Works 2009/10* (2010), 1.
171 National Film and Sound Archive, *Statement on Orphan Works* (2010), 1.
172 In the case of the EU, the existing proposals target digitisation of orphan works and making them available online. See, European Commission, *Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works* (2011).
173 M Dawes, 'Setting the Orphans Free' (2010) 18(4) *Australian Law Librarian* 289, 293.
174 *Copyright Act 1985 (Can)* s 77.
175 Ibid. The *Copyright Act 1985 (Can)* requires that orphan works and sound recordings be 'published' and performances and communication signals to be 'fixed'.
176 *Copyright Act 1985* (Can) s 77(2).
177 Ibid s 77(3).
178 Ibid.

158. Since it was enacted in 1998, the Board has opened 411 files relating to a total of 12,640 orphan works.[179] Similar systems are in place in Japan, South Korea, and India.[180]

Limiting remedies after diligent search

159. In 2006, the US Copyright Office recommended the enactment of legislation that would limit the monetary and injunctive relief available to an owner where a user of an orphan work has conducted a reasonably diligent search.[181] Under the proposal, 'reasonable compensation' from the user would be available where the use of the work is commercial.[182] Injunctive relief would be limited where the work is transformative, and the user pays 'reasonable compensation' for its use.[183]

160. In the UK, the Hargreaves Report recommended that the government should legislate to enable clearance procedures for use of individual works, based upon a diligent search.[184]

161. In response, the UK government announced that it would introduce legislation to enable the use of orphan works after a diligent search confirmed by an independent authorising body.[185] Under the model proposed, commercial and non-commercial uses would be permitted via a non-exclusive licence. A user would be required to pay, in advance, a market price—to the extent that one can be established—for such use and it is assumed that moral rights have not been waived.[186] Importantly, the proposed scheme would not take the form of an exception; rather it would be based on authorisation by an independent body.

Extended collective licensing

162. Several Nordic countries use extended collective licensing (ECL) schemes that allow users to pay licence fees to a collection society comprising a 'substantial number' of rights holders of a certain type of works.[187] A feature of ECL schemes is that the collection societies are authorised by statute to grant licences on behalf of the

---

179 See J de Beer and M Bouchard, *Canada's 'Orphan Works' Regime: Unlocatable Copyright Owners and the Copyright Board* (2009), 31–32.

180 See *Copyright Act 1970* (Japan) s 67; *Copyright Act 1967* (South Korea) s 47; *Copyright Act 1957* (India) s 190. The *Copyright, Patent and Designs Act 1988* (UK) permits licensing only in respect of orphan performances.

181 United States Copyright Office, *Report on Orphan Works* (2006), 92.

182 Ibid, 92–122 for a detailed explanation of the recommendations.

183 Ibid. However, these proposals have not resulted in any legislative amendments concerning orphan works. However, the proposals have been the subject of Bills considered by congress from 2006 to 2008: *Orphan Works Act of 2006*, H.R 5439, 109th Cong. (2006); *Orphan Works Act of 2008*, H.R. 5589, 110th Cong (2008); and *Shawn-Bentley Orphan Works Act of 2008* S. 2193 (2008).

184 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 39–40.

185 UK Government, *Government Policy Statement: Consultation on Modernising Copyright* (2012), 8.

186 Ibid.

187 See J Axhamn and L Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?* (2011), prepared for EuropeanaConnect, 25–59 for an outline of extended collective licensing in Nordic Countries.

copyright owner, even where the owner is not a member of the collective.[188] Some rules allow copyright owners the option to 'opt-out' of the system and instead deal directly with licensees.[189]

163. Under ECL schemes, a licence is granted for specific purposes and gives users a degree of certainty that their use will not risk infringement. However, to the extent that some owners have opted out, the system does not provide complete certainty to prospective users.

Australian reform proposals

164. Australian copyright academics Professor David Brennan and Professor Michael Fraser have proposed a 'non-commercial use exception for natural persons using unpublished subject matter derived from lawfully obtained material'.[190] The proposed exception would apply where the relevant copyright owner is not able to be located after a 'diligent search'.[191] A similar suggestion has been proposed by the Copyright Council Expert's Group.[192]

165. Brennan and Fraser also propose a broader exception for published material where there are missing owners. The proposed exception involves three stages:

- A 'diligent search' followed by lodgment of a notice to a declared collection society. Once accepted, the work would be placed on an orphan works register. If an owner comes forward within three months, no exception would apply in favour of the user.
- If the copyright owner does not present within three months, but supplies a warranty of ownership to the collection society within three years thereafter, the remedies available to the owner are limited in the event that an action is brought against the user.
- If the copyright owner does not supply a warranty to the collection society within the three years, the owner's sole enforcement rights would be through a compulsory licence administered by the collection society.[193]

166. The proposed exception seeks to balance user accountability, predictive certainty for users and fairness to rights holders.[194]

---

188 For example, in the Danish context, *The Consolidated Act on Copyright 2010* (Denmark) ss 51(i)–(iii) prescribes that remuneration under an ECL extends to unrepresented right holders who are: not members of the collective; foreign rights holders and dead authors.

189 For example, *The Consolidated Act on Copyright* 2010 (Denmark) ss 24A, 30, 30A, 35, 50.

190 D Brennan and M Fraser, *The Use of Subject Matter with Missing Owners - Australian Copyright Policy Options* (2012), 7.

191 Ibid. The authors also argue that the exception should apply only to economic rights and not moral rights, or rights found in other legal regimes.

192 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 8–9.

193 D Brennan and M Fraser, *The Use of Subject Matter with Missing Owners - Australian Copyright Policy Options* (2012), 9–12.

194 Ibid.

167. The ALRC invites comment on whether the *Copyright Act* should be amended to create a new exception or to facilitate a collective licensing scheme for the use of orphan works.

Question 24. Should the *Copyright Act 1968* (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

Data and text mining

168. The growth of digital technology and online social networking has seen increasing amounts of data—text, images, numbers—stored in databases and repositories.[195] The UK Government has defined data and text mining as:

> Automated analytical techniques ... [that] work by copying existing electronic information, for instance articles in scientific journals and other works, and analysing the data they contain for patterns, trends and other useful information.[196]

169. Data mining is used across a number of research sectors, including medicine, business, marketing, academic publishing and genomics. Some examples include:

- mining of human DNA sequences to discover the individual risk of developing diseases;
- systematic reviews of literature and text to establish the current state of knowledge in a particular field;[197] and
- mining Twitter feeds to gain knowledge about 'consumer sentiment'.[198]

170. The Terms of Reference refer to the general interests of Australians to 'access, use and interact with content in the advancement of education, research and culture'. Researchers and research institutions have highlighted the value of data mining in paving the way for novel discoveries, increased research output and early identification of problems.[199]

171. At the commercial level, the ability to extract value from data is an increasingly important feature of the digital economy. For example, the McKinsey Global Institute suggests that data has the potential to generate significant financial value across

---

195 S Sirmakessis, *Text Mining and its Applications: Results of the Nemis Launch Conference* (2004).

196 As defined by UK Government Intellectual Property Office, *Consultation on Copyright* (2011), 80. See also, D Sašo, 'Data Mining in a Nutshell' in S Džeroski and N Lavrač (eds), *Relational Data Mining* (2001). Data mining programs are often called data-analytics software.

197 Joint Information Systems Committee, *The Value and Benefit of Text Mining to UK Further Higher Education* (2012), 15.

198 F Filloux, *Datamining Twitter: Making Sense of the Twitter Noise is About to get Easier* (2011) <www.guardian.co.uk/technology/2011/dec/05/monday-note-twitter> at 26 July 2012, referring to companies such as DataSift and Lexalytics that provide data mining software.

199 United Kingdrom Government, *Consultation on Copyright: Summary of Responses* (2012), 17.

commercial and other sectors, and become a key basis of competition, underpinning new waves of productivity growth, innovation and consumer surplus.[200]

Current law

172. There is no specific exception in the *Copyright Act* for data mining. Where the data mining process involves the copying, digitisation, or reformatting of copyright materials without permission, it may give rise to copyright infringement.[201] For example, a researcher who seeks to mine the data from a back catalogue of a journal may need to copy entire works (individual articles) as part of the technical process, but cannot do so without the permission of the copyright owner and publisher.

173. One issue is whether data mining, if done for the purposes of research or study, would be covered by the fair dealing exceptions. The reach of the fair dealing exceptions may not extend to data mining if the whole dataset needs to copied and converted into a suitable format. Such copying would be more than a 'reasonable portion' of the work concerned.[202] Nor is it clear whether copying for data mining would fall under the exception relating to temporary reproduction of works as part of a technical process, under s 43B of the *Copyright Act*.

174. Data mining overlaps with the issue of database protection. The High Court's decision in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* emphasises that copyright protection does not subsist in the underlying data that forms a database, but rather in the particular form of expression.[203] The Court referred to the apparent lack of protection of databases as a gap in the law.[204] This concern raises arguments, for example, that an unremunerated exception would remove incentives to convert data into the right forms, or to develop or provide services to the research sector. However, the scope of copyright protection of databases is outside the ALRC's Terms of Reference.

Reform options

175. The need for a specific data mining exception has been hotly contested in the UK. The Hargreaves Report recommended that the UK Government 'press at EU level for the introduction of an exception allowing uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the

---

200 McKinsey Global Institute, *Big Data: The Next Frontier for Innovation, Competition and Productivity* (2011), Executive Summary. It is suggested that big data equates to financial value of $300 billion (US Health Care); 250 billion Euros (EU Public sector administration); global personal location data ($100 billion in revenue for service providers and $700 billion for end users).

201 See *Copyright Act 1968* (Cth) s 31, giving the copyright owner the exclusive rights to the work.

202 Ibid s 40(5) setting out what is a 'reasonable portion' with respect to different works.

203 *Ice Tv Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458.

204 Ibid, [137]–[139]. For example, *Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases*, OJ L 77, 27.3.1996 (entered into force on 16 April 2006).

work'.[205] The report also recommended that the Government ensure that such an exception cannot be overridden by contract.[206]

176. As a result of the Hargreaves Report, the Joint Information Systems Committee examined the value and benefit of data and text mining to the UK higher education sector. Their report broadly affirmed the potential value of text mining to the UK economy, and that its potential benefits are limited by current copyright law.[207]

177. A follow-up report of the Business, Innovation and Skills Committee of the UK Parliament, in response to the Hargreaves Report, did not endorse a exception to deal with data mining for research. Rather, it hinted that appropriate licensing models may be appropriate:

> We believe that policy ... should also recognise the potential benefits of content mining, the core contribution of researchers and the need for ready access. We believe that publishers should seek rapidly to offer models in which licences are readily available at realistic rates to all bona fide licensees.[208]

178. No jurisdiction appears to have an existing exception specifically dealing with data mining. However, any new broad flexible exception based on a concept of 'fair' or 'reasonable' use may also be expected to cover some data mining processes.[209]

Discussion

179. It appears that copyright issues related to data mining are most prominent in the academic and scientific arenas. The Hargreaves Report suggested that an exception is particularly appropriate to facilitate non-commercial research, because

> the technology provides a substitute for someone reading all the documents—these uses do not compete with the normal exploitation of the work itself—indeed, they may facilitate it. Nor is copyright intended to restrict the use of facts.[210]

180. The legal uncertainty and the transaction costs involved in rights clearance may impede access to data for researchers and this may have an impact on research output. The lack of a data mining exception may also act as a disincentive to the uptake of innovative data mining technology.

181. The ALRC is interested in stakeholder views about how data mining tools are being used in Australia and whether such uses are impeded by the *Copyright Act*. If a specific exception to allow data mining is needed, how should such an exception be framed? Should it be confined to non-commercial research? Or are there other, better ways of providing for the legitimate use of data mining and data analytics software?

---

205 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 47.
206 Ibid, 51. See the section below, 'Copyright and Contracts'.
207 Joint Information Systems Committee, *The Value and Benefit of Text Mining to UK Further Higher Education* (2012), 49.
208 House of Commons Business, Innovation and Skills Committee, *The Hargreaves Review of Intellectual Property: Where next?* (2012), 19.
209 See the section 'Fair use'.
210 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 47.

Question 25. Are uses of data and text mining tools being impeded by the *Copyright Act 1968* (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?

Question 26. Should the *Copyright Act 1968* (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?

Question 27. Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

Educational institutions

182. There are multiple free-use exceptions and statutory licensing schemes that apply to the use of copyright material by students and educational institutions. These exceptions and how they interact are complex. This section provides a short overview and highlights some options for reform. The ALRC seeks comment on these options and welcomes suggestions for other reforms.

The statutory licensing schemes

183. There are two statutory licensing schemes in the *Copyright Act* for the use of copyright material by educational institutions: one relates to the copying and communication of broadcasts (pt VA of the Act); the other concerns the reproduction and communication of works and periodical articles (pt VB of the Act).[211]

184. Under these schemes, educational institutions pay fees or royalties—'equitable remuneration'—to collecting societies for certain uses of copyright material. Collecting societies distribute the royalties to their members—authors, film-makers and other rights holders.

185. Despite early concerns that a statutory licensing scheme for educational institutions 'might seem to favour the interests of education as against the interests of copyright owners',[212] criticisms of these schemes are now more often made by educational institutions.

186. One criticism concerns the range of material for which educational institutions must pay royalties. Fees are now collected from educational institutions for uses of otherwise free and publicly available material on the internet. The Australian education sector has recommended that this material should be removed from the scope of the

211 The pt VA licence is administered by the collecting society, the Audio-visual Copyright Society Ltd (Screenrights); and the pt VB licence is administered by the collecting society Copyright Agency Ltd (CAL). These schemes also apply to institutions assisting persons with a disability, however the Terms of Reference instruct the ALRC not to duplicate work being undertaken on increased access to copyright works for persons with a print disability.

212 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (the Franki Report), [6.63].

licensing schemes.[213] The sector has recommended the introduction of a new exception allowing educational institutions to copy and communicate free and publicly available material on the internet for non-commercial educational purposes.[214]

Fair dealing and the statutory licensing schemes

187. The relationship between the statutory licensing schemes and the fair dealing exception for the purpose of research or study is unclear.[215] That they may overlap was noted by the Federal Court in 1982—although the Court said it is important to the proper working of the sections that 'a distinction be recognized between an institution making copies for teaching purposes and the activities of individuals concerned with research or study'.[216]

188. In 2012, the Supreme Court of Canada considered 'whether photocopies made by teachers to distribute to students as part of class instruction can qualify as fair dealing' under Canadian copyright legislation—and concluded that they could qualify.[217] The Court stated that photocopies made by a teacher and given to students are 'an essential element in the research and private study undertaken by those students.'[218] The Court held that teachers

> have no ulterior motive when providing copies to students. Nor can teachers be characterised as having the completely separate purpose of 'instruction'; they are there to facilitate the students' research and private study.[219]

Flexible dealing in s 200AB and other exceptions

189. There is also a broad exception in s 200AB of the *Copyright Act* for bodies administering an educational institution. The exception covers a use that is for the purpose of giving educational instruction and not for a profit.[220] The use must amount to a special case, must not conflict with a normal exploitation of the material and must not unreasonably prejudice the legitimate interests of the owner of the copyright.[221]

190. The *Berne Convention*'s 'three-step test' has essentially been incorporated in s 200AB. Those wishing to take advantage of the provision, perhaps including small schools, must therefore apply a complex test of uncertain scope.

---

213 D Browne, 'Educational Use and the Internet – Does Australian Copyright Law Work in the Web Environment?' (2009) 6(2) *SCRIPT-ed* 450, 461.

214 Ibid, 461.

215 Exceptions for fair dealing for the purpose of research or study are in *Copyright Act 1968* (Cth) ss 40, 103C, 248(1)(aa). See the section 'Fair dealing exceptions'.

216 See *Haines v Copyright Agency Ltd* (1982) 64 FLR 185, 191. The sections have since been amended, but the distinction noted by the Federal Court appears to continue to be recognised.

217 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada), [1].

218 Ibid, [25].

219 Ibid, [23].

220 *Copyright Act 1968* (Cth) s 200AB.

221 Ibid s 200AB.

191. Section 200AB will not apply if there is a statutory or voluntary licence in place, which may mean the exception will rarely apply to literary, musical, dramatic and artistic works, because these works are subject to the broad 'catch-all' statutory licence in pt VB.[222]

192. There are other free-use exceptions in the *Copyright Act* that concern educational institutions, including exceptions for: performing material, including playing music and films in class (s 28); collections of short extracts of material (s 44); and copying insubstantial portions (ss 135ZG, 135ZMB).[223]

Options for reform

193. The ALRC seeks submissions on the operation of the statutory licensing schemes and the other exceptions for educational institutions. In particular, the ALRC welcomes comments on how the *Copyright Act* might be amended so that these exceptions operate more effectively—that is, achieve desirable policy outcomes—in the digital environment.

194. For example, are the statutory licensing schemes too complex—a criticism often levelled at the *Copyright Act*—and, if so, how might the schemes be simplified? Also, can the multiple, complex free-use exceptions concerning educational institutions be replaced with one, more simple exception for uses by educational institutions?

195. The ALRC is also interested in whether any uses of copyright material by educational institutions now covered by a statutory licence should instead be covered by a free-use exception—either an existing exception, such as fair dealing for research or study, or any new or proposed exception, such as a broad and flexible exception based on 'fair' or 'reasonable' use.[224] In the digital environment, it may be particularly important to clarify when schools and other educational institutions should pay royalties for uses of copyright material on the internet.

196. Alternatively, the *Copyright Act* might need to be amended to clarify that certain uses by educational institutions should be remunerated, and do not amount to fair dealing.

Question 28. Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

222 D Browne, 'Educational Use and the Internet – Does Australian Copyright Law Work in the Web Environment?' (2009) 6(2) *SCRIPT-ed* 450, 454.

223 See also *Copyright Act 1968* (Cth) ss 200, 200AAA.

224 Discussed below in the section, 'Fair use'.

Question 29. Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Question 30. Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the *Copyright Act 1968* (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

Question 31. Should the exceptions in the *Copyright Act 1968* (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

Crown use of copyright material

197. For historical and public policy reasons, 'the Crown'[225]—or a government[226]—is in a privileged position with respect to the creation, ownership and use of copyright material.[227] Two reports have recommended amendment of the *Copyright Act* so that the Crown is on the same footing as other users and creators of copyright material, to accord with principles of competitive neutrality and open government.[228] These recommendations have not been adopted.

198. The Australian Government has stated that it is moving to greater openness and commitment to the release of information it holds[229] through changes to freedom of information (FOI) legislation[230] and to open access licensing of public sector

225 The term 'Crown' is primarily used only in the headings and sub-headings of *Copyright Act 1968* (Cth) pt VII whereas the terms expressly used in the text of many of the provisions in that part are 'the Commonwealth' and 'a State' (which is defined to include the territories). There is some disagreement as to whether the terms 'the Commonwealth' and 'a State' refer only to the executive government or whether the legislature and judicature are also included: Copyright Law Review Committee, *Crown Copyright* (2005), [2.11]–[2.16].

226 These terms are used interchangeably in this Issues Paper.

227 *Copyright Act 1968* (Cth) pt VII. It is unclear whether local government is part of the Crown. See J Bannister, 'Open Government: From Crown Copyright to the Creative Commons and Culture Change' (2011) 34 *UNSW Law Journal* 1080, 1098.

228 Copyright Law Review Committee, *Crown Copyright* (2005), xix, xxii; Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 114.

229 Department of Finance and Deregulation, *Declaration of Open Government* <www.finance.gov.au/e-government/strategy-and-governance/gov2/declaration-of-open-government.html> at 9 August 2012.

230 *Freedom of Information (Amendment) Reform Act 2010* (Cth).

information.[231] The point has been made that ownership of copyright material by the Crown has been 'reconfigured' as 'government investment and public ownership'.[232]

199. In accordance with the Terms of Reference, this Inquiry is focused on government *use* of copyright material belonging to others—through a statutory licence and other exceptions—rather than on its *ownership* of copyright. Government ownership of copyright in material, and any licensing decisions made with respect to it, are more properly viewed as 'rights' than as 'exceptions'. However, principles of openness may conflict with property rights in copyright material owned by third parties.

Current law

200. Governments within Australia may use others' copyright material without such use constituting infringement in any of the following circumstances:

- pursuant to the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the *Copyright Act*;
- by way of an implied licence to make certain uses of material submitted to government—depending on the nature of the material and circumstances of the submission; and
- where a particular statute expressly provides immunity from civil proceedings such as copyright infringement.[233]

Statutory licence

201. There is a statutory licence to use material 'for the services of the Crown'.[234] This does not include educational services[235] and remuneration must be paid, as agreed or as fixed by the Copyright Tribunal.[236] In 1998 the *Copyright Act* was amended to introduce arrangements for the payment of 'equitable remuneration' by governments with respect to 'government copies' where there is a declared copyright collecting society.[237] In such cases, equitable remuneration is determined on the basis of sampling rather than full record keeping.[238]

---

231 Australian Government Attorney-General's Department, *Guidelines on Licensing Public Sector Information for Australian Government Agencies* (2012) <www.ag.gov.au> at 9 August 2012.

232 J Bannister, 'Open Government: From Crown Copyright to the Creative Commons and Culture Change' (2011) 34 *UNSW Law Journal* 1080; J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1.

233 See J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1.

234 *Copyright Act 1968* (Cth) s 183.

235 Ibid s 183(11).

236 Ibid s 183(5).

237 *Copyright Amendment Act (No 1) 1998* (Cth) sch 4.

238 CAL and Screenrights are the two declared collecting societies for the purpose of the government statutory licences.

Implied licence

202. There is no direct infringement in respect of works or subject-matter other than works if the copyright owner has licensed the use.[239] Licences may be express or implied and, in general, need not be in writing.[240]

203. The High Court has held that there is no implied licence for a government to use surveyors' plans that were submitted to it in accordance with regulatory requirements.[241] This has been described as a 'narrow view',[242] particularly when contrasted with the earlier decision of the Full Court of the Federal Court in the same case.[243] As the High Court held that there was no implied licence, the government in question was liable to pay licence fees.[244]

Immunity from civil proceedings

204. A number of Australian jurisdictions have some statutory provisions that expressly provide government with immunity from civil and criminal proceedings, including infringement of copyright.[245] For example, the *Freedom of Information Act 1982* (Cth) provides immunity to the Commonwealth, a minister, an agency or an officer who gives access to a document as required by the Act, or in the bona fide belief that access was required on that basis. The FOI reforms introduced in 2010 extended this immunity with respect to the new requirements for ministers and agencies to publish, on their websites, information that has been released to an FOI applicant.[246]

205. In reviewing various statutory provisions applying in the Commonwealth and the states John Gilchrist suggested that none of the provisions contemplate compensation to the copyright rights holders.[247] With respect to the Commonwealth provisions, Gilchrist stated:

> They operate independently and irrespective of s 183. Neither does s 183 expressly or implicitly refer to these provisions nor do the provisions expressly or implicitly refer to s 183. They have different objects or purposes and are not so wholly inconsistent or repugnant that they cannot stand together. Effect can be given to each provision at the same time. [248]

206. He concluded that each 'should ... be accorded independent operation within their given spheres'.[249]

---

239 *Copyright Act 1968* (Cth) ss 36(1) and 101(1).
240 An exclusive licence is the exception.
241 *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279.
242 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 35–36.
243 *Copyright Agency Ltd v New South Wales* (2007) FCR 213.
244 *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279.
245 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 39.
246 *Freedom of Information (Amendment) Reform Act 2010* (Cth) sch 4 pt 1 item 50. See *Freedom of Information Act 1982* (Cth) s 90.
247 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 40–41.
248 Ibid, 40–41. Internal citations omitted. However, the two cases referred to were *Saraswati v R* (1991) 100 ALR 193, 204 (Gaudron J) and *Rose v Hrvic* (1963) 108 CLR 353, 360.
249 Ibid, 41.

Options for reform

207. There is some doubt as to whether the statutory licence is available to all levels of government.[250] It appears that it may be applicable to two tiers of government only: the Australian Government, and the governments of the states and territories.[251] It appears that the third tier of government—local government—may not be able to avail itself of the convenience of the statutory licence. The ALRC is interested in views on whether the statutory licence should be available to local government.

208. Some aspects of the statutory licensing scheme may be grounded in the analog world. For example, the *Australian Government Intellectual Property Manual*, which provides guidance to Australian Government agencies on a variety of intellectual property matters, states:

> The agreement with CAL covers the reproduction of text, artworks and music (other than material includ[ed] in sound recordings or films). The CAL agreement also contains limited provisions for the electronic communication of copyright material. However, CAL has not been declared under the Act to collect for that use.[252]

209. The ALRC is also interested in clarification of the operation of general free-use exceptions with the statutory licences; the implications of government policy on statutory licensing schemes and exceptions to copyright; and welcomes suggestions for other reform.

Question 32. Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Question 33. How does the *Copyright Act 1968* (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

Question 34. Should there be an exception in the *Copyright Act 1968* (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

Retransmission of free-to-air broadcasts

210. The *Copyright Act* provides that the copyright in a work, sound recording or cinematograph film included in a free-to-air broadcast is not infringed by retransmission of the broadcast, if remuneration is paid under a statutory licensing

250 *Copyright Agency Ltd v New South Wales* (2007) FCR 213.

251 This is because the terms 'the Commonwealth' and 'a State' are used throughout the provisions in s 183 whereas the word 'Crown' only appears in the heading to s 183.

252 Australian Government Attorney-General's Department, *Australian Government Intellectual Property Manual* <www.ag.gov.au> at 9 August 2012, 176–77.

scheme.[253] The licensing scheme allows the retransmission of free-to-air broadcasts without the permission of the broadcaster, and for equitable remuneration to be paid to the rights holders of the underlying content in the broadcast.[254]

211. Retransmission is defined as a retransmission of the broadcast, where the content of the broadcast is unaltered and either simultaneous with the original transmission or delayed until no later than the equivalent local time.[255]

212. The Audio-visual Copyright Society Ltd (Screenrights) collects the licence fees, identifies the programs that are retransmitted and pays royalties to the rights holders. Royalties are generated when free-to-air broadcasts are simultaneously retransmitted by another service.

Current law

213. The retransmission provisions were inserted by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) at the same time as the introduction of a new technology-neutral right of communication to the public.[256] This replaced and extended an existing re-broadcasting right, which only applied to 'wireless' broadcasts and not, for example, to cable or online communication.[257]

214. Retransmission without the permission of the original broadcaster does not infringe copyright in broadcasts, by virtue of provisions contained in the *Broadcasting Services Act 1992* (Cth). The *Broadcasting Services Act* states that no 'action, suit or proceeding lies against a person' in respect of the retransmission by the person of certain television and radio programs[258]—providing immunity against any action for infringement of copyright that might otherwise be able to be brought by the original broadcaster.

215. In 1999, amendments to the *Broadcasting Services Act*[259] changed the operation of the immunity so that it no longer applied to underlying rights holders.[260] In 2000, amendments to the *Copyright Act* introduced a statutory licensing scheme applying to retransmission of copyright works, sound recordings or cinematograph films (pt VC).[261]

216. Section 135ZZJA of the *Copyright Act* provides that the retransmission regime 'does not apply in relation to a retransmission of a free-to-air broadcast if the retransmission takes place over the Internet'.

---

253 *Copyright Act 1968* (Cth) s 135ZZK.
254 Ibid pt VC.
255 Ibid s 10.
256 Ibid s 87.
257 Ibid s 87(c), as enacted.
258 *Broadcasting Services Act 1992* (Cth) s 212.
259 *Broadcasting Services Amendment Act (No.1) 1999* (Cth).
260 *Broadcasting Services Act 1992* (Cth) s 212(3). Except where retransmission is provided by a 'self-help provider'. A self-help provider is defined to cover entities that provide transmission 'for the sole or principal purpose of obtaining or improving reception' in particular places: *Broadcasting Services Act 1992* (Cth) s 212A.
261 *Copyright Amendment (Digital Agenda) Act 2000* (Cth); *Copyright Act 1968* (Cth) pt VC.

217. Consequently, on one view, Australian law makes retransmission of television broadcasts over the internet 'legally impossible'.[262] However, the application of s 135ZZJA to internet protocol television (IPTV) is not clear. In particular, whether retransmission by an IPTV service 'takes place over the Internet' may depend on the functional characteristics of the service.[263]

Options for reform

218. The immunity provided by the *Broadcasting Services Act* was introduced as part of a retransmission regime intended to provide for the distribution of free-to-air broadcast signals to areas which do not receive adequate reception of services.[264]

219. With the introduction of pay TV into Australia in 1995, cable pay TV operators (such as Foxtel) began retransmitting national and commercial television services as 'free additions' to their pay TV channels.[265] While underlying rights holders are remunerated, free-to-air broadcasters are not.

220. Concern has been expressed that, while the retransmission regime was 'designed to facilitate self-help sites to address reception and coverage issues in regional areas—it was not intended to facilitate free and unlimited retransmission for the benefit of third party businesses'.[266]

221. In a submission to the Convergence Review, Free TV Australia called for the retransmission regime to be updated to strengthen broadcasters' rights. In particular, it was suggested that a US-style 'must-carry' regime should be implemented. Under such a regime, free-to-air broadcasters have the option of either requiring that free-to-air services are carried on a cable provider's system, or requiring that the free-to-air broadcaster is remunerated where the cable provider chooses to retransmit the signal.[267]

222. In contrast, Screenrights submitted that a 'must-carry' regime for retransmission would be 'potentially anti-competitive and unfair and should not be introduced in Australia'. Rather, the current system of retransmission 'maximises diversity and competition in Australian media while ensuring fairness'.[268]

223. Screenrights also suggested that the *Copyright Act* should be amended to extend the statutory licence scheme to retransmission on the internet and to require (as a condition of the licence) that 'a retransmitter must apply effective access control technological protection measures to ensure the retransmission is appropriately geoblocked'.[269]

---

262 Screenrights Australia, *Submission to Convergence Review*, 28 October 2011.
263 See, eg, D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.1.
264 Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth).
265 Ibid.
266 Free TV Australia, *Submission to Convergence Review*, 16 February 2012.
267 Australian Government Convergence Review, *Convergence Review Final Report* (2012), 33.
268 Screenrights Australia, *Submission to Convergence Review*, 28 October 2011.
269 Ibid. Geoblocking refers to the practice of preventing users from viewing web sites and downloading applications and media based on location.

Discussion

224. The Terms of Reference specifically request the ALRC take into account the recommendations of the Australian Government's Convergence Review.[270] In particular, the Convergence Review suggested, in light of its recommendation that licences no longer be required to provide any content service,[271] that the retransmission provisions be reviewed as part of the ALRC Inquiry.[272]

225. The retransmission provisions of the *Broadcasting Services Act* operate as an exception to copyright in materials included in television and sound broadcasts. The ALRC is interested in comment on whether this exception remains appropriate, given technological and regulatory change.

226. The reason for excluding internet retransmission from the scheme appears to have been to avoid retransmitted content intended for Australian audiences being disseminated globally without the authorisation of the copyright holders.[273] Reform to extend the statutory licensing scheme to retransmission over the internet would involve a number of complexities, including the need to negotiate amendments to the Australia–United States Free Trade Agreement.[274]

227. At the least, however, it may be desirable to clarify the application of the s 135ZZJA exclusion to retransmission over the internet. For example, it has been suggested that an IPTV retransmission may fall within the operation of the statutory licensing scheme because 'while the retransmission occurs over infrastructure shared by an Internet connection, as a direct feed from ISP to customer at no point is connection to the Internet by either ISP or customer necessitated'.[275]

228. These issues—whether the retransmission of free-to-air broadcasts should continue to operate as an exception to copyright in broadcasts; and whether the statutory licensing scheme should apply in relation to copyright materials retransmitted

---

270 The Convergence Review Committee was established to examine the operation of media and communications regulation in Australia and assess its effectiveness in view of the convergence of media content and communications technologies. The Review covered a broad range of issues, including media ownership laws, media content standards, the ongoing production and distribution of Australian and local content, and the allocation of radiocommunications spectrum: Australian Government Convergence Review, *Convergence Review Final Report* (2012), vii.

271 See Ibid, ch 1, rec 2.

272 Ibid, 33.

273 See, D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?', 60(2) *Telecommunications Journal of Australia*, 26.8, 26.9.

274 *Australia-US Free Trade Agreement*, [2005], (entered into force on 1 January 2005), art 17.4(10)(b). The World Intellectual Property Organization has been actively considering proposals to provide legal protection for broadcasting organisations against unauthorised use of broadcasts, including by retransmission on the internet. See, World Intellectual Property Organization Standing Committee on Copyright and Related Rights, *Elements for a Draft Treaty on the Protection of Broadcasting Organizations* (2011).

275 D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?', 60(2) *Telecommunications Journal of Australia*, 26.9.

over the internet—raise significant communications and competition policy questions.[276]

229. The ALRC is interested in comment on whether this Inquiry is the best forum for considering these questions, or whether these questions are more a matter for the Australian Government to consider within the context of communications policy.

230. The ALRC is also interested in any other implications for copyright reform arising from recommendations of the Convergence Review—for example, from its recommendations that 'the policy framework for communications in the converged environment should take a technology-neutral approach that can adapt to new services, platforms and technologies',[277] and for investigation of content-related competition issues.[278]

Question 35. Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

Question 36. Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

Question 37. Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?

Question 38. Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?

Question 39. What implications for copyright law reform arise from recommendations of the Convergence Review?

Statutory licences in the digital environment

231. Some of the specific statutory licensing schemes in the *Copyright Act* have been discussed above. The ALRC is also interested in the value and operation of statutory licences in the digital environment more broadly. New digital technology and the internet may offer opportunities to improve the operation of these schemes, making them more efficient, and enabling them to facilitate the wide use of copyright material and the fair remuneration of creators and other rights holders.

---

276 For a discussion of the history of the retransmission scheme, copyright and communications policy, see K Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in A Kenyon *TV Futures: Digital Television Policy in Australia*, (2007) 242.

277 Australian Government Convergence Review, *Convergence Review Final Report* (2012), rec 1.

278 Ibid, rec 8.

232. For example, the internet may facilitate micro-licensing—bridging the gap between rights holders and users and lowering the transaction costs that have made direct contracting prohibitively expensive in the past. Collecting societies may have an important role in facilitating micro-licensing, for example by acting as a rights clearinghouse, or by publishing information about the works for which they collect fees.

233. The ALRC seeks submissions on whether the statutory licensing schemes in the *Copyright Act* are adequate and appropriate in the digital environment, and on how these schemes might be improved. For example, are new statutory licensing schemes called for, or should some of the existing ones be consolidated?

Question 40. What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

Question 41. How can the *Copyright Act 1968* (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

Question 42. Should the *Copyright Act 1968* (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

Question 43. Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

Question 44. Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

Fair dealing exceptions

234. Australia's copyright legislation has long provided for 'fair dealing'. Australian legislation first used the expression 'fairly dealing' in its *Copyright Act 1905* (Cth)—the first common law country to do so.[279] Subsequent Acts—the *Copyright Act 1912* (Cth) which declared the *Copyright Act 1911* (Imp) to be in force in Australia[280] and the current *Copyright Act* which replaced the 1912 Act—use the term 'fair dealing'. These latter two Acts, including amendments to the current *Copyright Act*,[281] have instituted a list of very specific exceptions under the 'fair dealing' rubric.

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

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

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

235. Fair dealing limits the boundaries of copyright and, accordingly, the fair dealing exceptions are not simply defences to infringement.[282]

Current law

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

- research or study;[283]
- criticism or review;[284]
- parody or satire;[285]
- reporting news;[286] and
- a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.[287]

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

- literary, dramatic, musical or artistic works;[288]
- adaptations of literary, dramatic or musical works;[289] and
- audio-visual items[290]—defined as sound recordings, cinematograph films, sound broadcasts or television broadcasts.[291]

238. Where the use of a 'substantial part'[292] or more[293] of the work, adaptation, or audio-visual item constitutes a 'fair dealing', there is no infringement of the copyright in that specific copyright material. Further, in the case of an audio-visual item, there is

---

282 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.01].
283 *Copyright Act 1968* (Cth) ss 40(1), 103C(1).
284 Ibid ss 41, 103A.
285 Ibid ss 41A, 103AA.
286 Ibid ss 42, 103B.
287 Ibid s 43(2). Note s 104(c), which could be seen as the equivalent provision for subject-matter other than works, does not in fact use the term 'fair dealing'. Similarly, ss 43(1), 104(a) (anything done for the purposes of a judicial proceeding or a report of a judicial proceeding) and 104(b) (someone seeking professional advice from a legal practitioner, registered patent attorney or registered trade marks attorney) do not use the term 'fair dealing'. All of these exceptions are broader than the fair dealing exceptions.
288 Ibid s 40(1) (research or study), s 41 (criticism or review), s 41A (parody or satire), s 42 (reporting news), s 43(2) (the giving of professional advice by certain individuals).
289 Ibid s 40(1) (research or study), s41 (criticism or review), s 41A (parody or satire), s 42 (reporting news).
290 Ibid s 103C(1) (research or study), s 103A (criticism or review), s 103AA (parody or satire), s 103B (reporting news).
291 Ibid s 100A.
292 Ibid s 14.
293 As Professor Sam Ricketson and Chris Creswell have observed, 'acts done in relation to insubstantial parts do not constitute infringement of copyright and the defences of fair dealing only come into operation in relation to substantial parts or more': Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.15].

no infringement of the copyright in any work or other audio-visual item that is included in that audio-visual item.[294]

239. Additionally, the *Copyright Act* provides that certain direct or indirect sound recordings or cinematograph films of performances, which constitute fair dealing for specified purposes, are outside the scheme affording protection to performers in their live performances.[295] That is, the use of those recordings and films of the performances are permitted as exceptions.

When will a use be a 'fair dealing'?

240. As the Australian Copyright Council explains:

> The first step in determining whether a fair dealing defence applies is to look at the purpose; the use must be for one of the ... [specific] purposes set out in the Copyright Act. The second step is to determine whether the use is fair.[296]

241. Whether a particular use is fair will depend on the circumstances of the case.

Requirement to provide sufficient acknowledgement

242. The fair dealing provisions for the purpose of criticism or review, and those for the purpose of, or associated with, the reporting of news in a newspaper, magazine or similar periodical contain an additional requirement for a 'sufficient acknowledgment' of the work or audio-visual item.[297]

Quantitative test

243. The fair dealing exception for the purpose of research or study with respect to works and adaptations contains a quantitative test that deems the use of certain quantities of copyright material to be fair.[298] The concept of 'reasonable portion' is fixed by reference to chapters or 10% of the number of pages or number of words.

General guidance as to fairness

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

- the purpose and character of the dealing or recording;

---

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

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

296 Australian Copyright Council, *Fair Dealing in the Digital Age: A Discussion Paper* (1998), 20.

297 *Copyright Act 1968* (Cth) ss 41 and 103A (criticism or review); ss 42(1)(a) and 103B(1)(a) (reporting news).

298 See Ibid s 40(3)–(8).

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

245. The 1976 report of the Copyright Law Committee (the Franki Committee) on reprographic reproduction had recommended that this list of matters—with respect to works and adaptations—be included in s 40.[299] The matters listed are based to a large extent on principles derived from the case law on fair dealing.[300]

246. In order to assess the fairness of a use that is made for one of the other fair dealing purposes, it is necessary to consider the case law.[301] The CLRC suggested that it is 'reasonable to assume' that the matters listed 'are also relevant in determining the fairness of a dealing for purposes other than research or study'.[302] This is because the matters in s 40(2) were derived from principles in the case law and because those principles were not limited to a specific purpose.[303]

247. The list of matters in ss 40(2) and 103C(2) are not the only relevant matters for assessment of the fairness in any of the fair dealing exceptions as these are inclusive rather than exclusive lists.[304] The Franki committee observed that it is for the courts to decide whether particular uses of copyright material constitute 'fair dealing' and it was

---

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

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

301 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.15].

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

303 Ibid, [4.09].

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

of the opinion that it would be 'quite impracticable' to attempt to remove this duty entirely.[305]

To whom do the exceptions apply?

248. Unlike some other exceptions in the Act and the statutory licences, the fair dealing exceptions appear on their face to be available to any user of copyright material provided that their particular use—or 'dealing'—falls within the bounds of one of those exceptions. That is, the dealing is for one of the permitted purposes and is 'fair'. However, the relationship between the fair dealing exceptions and the statutory licences—particularly whether the former can be relied upon where provision is made for the latter—is a contentious issue for copyright rights holders and users.

Options for reform

249. The ALRC's Terms of Reference direct it to inquire into whether existing exceptions such as the fair dealing exceptions are adequate and appropriate in the digital environment.

250. One issue is that the use of 'number of words' in the test to determine a reasonable portion for the purpose of research or study may be a problematic unit of measurement.[306] Professor Sam Ricketson and Chris Creswell have commented:

> While it is usually possible to ascertain quite quickly the number of pages in a hard copy version of work, counting the number of words is far more difficult and time consuming, if not completely unrealistic. With a work in electronic form, this can, of course, be swiftly executed if there is a word count mechanism ... But for this to be done, it will normally be necessary for the whole work to be downloaded into the RAM of the user's computer, which will mean that the whole of the work will be copied electronically before it is possible to work out how much (word by word) can be lawfully copied under s 40(5).[307]

251. The ALRC is interested in comment about what problems there are with the fair dealing exceptions in the digital environment.

Simplification

252. In 1996 the Australian Government asked the CLRC to inquire into and report on how the *Copyright Act* could be simplified 'to make it able to be understood by people needing to understand their rights and obligations'.[308] In 1998 the CLRC recommended, among other things, a number of changes to the fair dealing provisions.[309] The CLRC recommended that the Act be simplified by:

---

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

306 For example, see Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.53]– [6.63].

307 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.43].

308 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [1.03] citing paragraph 1(a) of its Terms of Reference.

309 Ibid, [2.01]–[2.26].

- consolidating the current fair dealing provisions (ss 40, 41, 42, 43(2), 103A, 103B and 103C) into a single section;
- absorbing the provisions relating to the acts done for the purpose of professional advice in relation to subject matter other than works (ss 104(b) and 104(c)) within fair dealing;
- removing the fair dealing provisions that specifically apply to external students (ss 40(1A) and 40(1B));
- removing the provisions that require sufficient acknowledgment in relation to fair dealings for the purpose of reporting news (ss 42(1)(a) and 103B(1)(a)); and
- adopting a modified quantitative test (s 40(3)).[310]

253. The main part of the CLRC's proposed consolidated statutory provision was as follows:

> (1) Subject to this section, a fair dealing with any copyright material for any purpose, including the purposes of research, study, criticism, review, reporting of news, and professional advice by a legal practitioner, patent attorney or trade mark attorney, is not an infringement of copyright.
>
> (2) In determining whether in any particular case a dealing is a fair dealing, regard shall be had to the following:
>
> (a) the purpose and character of the dealing;
>
> (b) the nature of the copyright material;
>
> (c) the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price;
>
> (d) the effect of the dealing upon the potential market for, or value of, the copyright material;
>
> (e) in a case where part only of the copyright material is dealt with—the amount and substantiality of the part dealt with, considered in relation to the whole of the copyright material.[311]

254. The text of this draft provision addresses the first of the two bullet points listed above.[312] The CLRC recommended that the non-exclusive list of factors in s 40(2) specifically apply to all fair dealings.[313] It considered that 'this should not make a major change to the current operation of fair dealing'.[314]

255. A key aspect of the proposed reform was the expansion of the fair dealing purposes to an open-ended model.[315] This meant that while the exclusive purposes

---

310 Ibid, [2.01].
311 Ibid, [6.143].
312 With respect to the substance of the other points see Ibid, [6.106]–[6.110] (removing certain provisions which are specifically applicable to external students); [6.118]–[6.126] (removing the requirements for sufficient acknowledgment); and [6.45]–[6.86] (a modified quantitative test).
313 See also Ibid, [2.04], [6.36]–[6.44].
314 Ibid, [6.36].
315 Ibid, [2.03].

were to be specified in the provision (in the first sub-section extracted above), it was not to be confined to those purposes. This aspect of the CLRC's model is addressed in the section 'Fair use'.

256. The Australian Government has not formally responded to the recommendations made in this CLRC report. In its Fair Use Review, the Attorney-General's Department noted that the CLRC's recommendations 'need to be examined against subsequent developments, including the AUSFTA obligations and implementing legislation'.[316]

257. The Fair Use Review asked whether the *Copyright Act* should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC.[317]

258. The Government did not issue a final report of the Fair Use Review. However, specific amendments to the *Copyright Act* were introduced. The *Copyright Amendment Act 2006* (Cth) changed the fair dealing exceptions by:

- introducing new fair dealing exceptions for the purpose of parody or satire;[318] and
- repealing the former s 40(3) and (4) and substituting new s 40(3)–(8)[319] in order to improve clarity and certainty with respect to the quantitative test in s 40.[320]

259. Notwithstanding this change, the fair dealing exceptions remain complex. For example, there is still validity in the CLRC's comment that

> [m]uch of the present complexity in the fair dealing provisions ... is due to the fact that they operate on the basis of a particular technology or in relation to dealings with copyright materials in a particular material form.[321]

260. The ALRC is interested in hearing views on whether the fair dealing exceptions would benefit from simplification—including consolidation of some aspects and repeal of provisions which are considered unnecessary.[322] For example, Ricketson and Creswell have stated that it is 'unclear what s 40(1A) adds to what is already allowed under s 40(1), in the absence of any deeming effect'.[323]

261. The ALRC invites comments on how the fair dealing exceptions might be usefully simplified or made more coherent.

---

316 Australian Government Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*, Issues Paper (2005), [6.8].

317 Ibid, [6.8].

318 *Copyright Amendment Act 2006* (Cth) sch 6 pt 3 items 9A and 9B.

319 Ibid sch 6 pt 4.

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

321 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.01].

322 Recently the High Court of Australia observed that another provision—not a fair dealing exception—'appears to provide protection where none is required' and was 'seemingly enacted from an abundance of caution'. *Roadshow Films Pty Ltd v iinet Ltd* [2012] 16 HCA, [26] (French CJ, Crennan and Kiefel JJ) and [113] (Gummow and Hayne JJ) referring to *Copyright Act 1968* (Cth) s 112E.

323 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.32].

Quotation

262. There have been suggestions that art 10(1) of the *Berne Convention*—which imposes a mandatory obligation to provide a specific exception for quotation—could be usefully employed in Australia as the basis for an exception for non-commercial transformative use; an exception permitting the quotation of copyright works in commercial works;[324] or an exception for fair dealing for the purpose of quotation.[325] Article 10(1) provides:

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.[326]

263. The 'quotation right' provided for in the *Berne Convention*[327] is not limited to text-based copyright material. Rather, the word 'work' is used so presumably it encompasses all the types of works that are listed in art 2. That is, literary and artistic works (including, for example, dramatic works, choreographic works, cinematographic works and photographic works), derivative works (including translations, adaptations and arrangements of music) and collections of works such as anthologies and encyclopaedias.

264. Ricketson has commented:

> Although article 10(1) does not define 'quotation', this usually means the taking of some part of a greater whole—a group of words from a text or a speech, a musical passage or visual image taken from a piece of music or a work of art—where the taking is done by someone other than the originator of the work. ...
>
> No limitation is placed on the amount that may be quoted under article 10(1), although as suggested above, 'quotation' may suggest that the thing quoted will always be a part of a greater whole rather than the whole itself.[328]

265. The text of art 10(1) makes it clear that a quotation must meet three requirements to be permitted under the provision.[329]

---

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

325 E Adeney, 'Fair Dealing for the Purposes of Quotation: What is a Quotation Exception and Should Australia Have One?' (Paper presented at Australasian Intellectual Property Academics Conference, Adelaide, 13–14 July 2012).

326 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

327 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 783, 788–9. Ricketson has noted that due to the mandatory character of the exception, 'article 10(1) is the one Berne exception that comes closest to embodying a "user right" to make quotations'.

328 Ibid, 788.

329 As Professor Ricketson has summarised, 'First, the work in question must have been "lawfully made available to the public". ... Second, the making of the quotation must be "compatible with fair practice". ... The third condition is that the extent of the quotation must "not exceed that justified by the purpose".' Ibid, 785–6.

266. The litigation over whether EMI's recordings of the Men at Work song 'Down Under' had infringed the copyright in 'Kookaburra Sits in the Old Gum Tree' has generated significant interest in Australia.[330] In the words of one journalist:

> The catchy hit Down Under turned 1980s band Men at Work into global superstars. But three decades on, the legal battle over the song's famous flute riff would give the rock'n'roll fairytale a bitter end.[331]

267. On appeal, Emmett J expressed his 'disquiet' in finding copyright infringement in the circumstances of the case.[332] He stated:

> The better view of the taking of the melody from Kookaburra is not that the melody was taken ... in order to save effort on the part of the composer of Down Under, by appropriating the results of Ms Sinclair's efforts. Rather, the quotation or reproduction of the melody of Kookaburra appears by way of tribute to the iconicity of Kookaburra, and as one of a number of references made in Down Under to Australian icons.[333]

268. The ALRC is interested in comments about whether there should be a fair dealing exception for the purpose of quotation or any other specific fair dealing exceptions.

Question 45. The *Copyright Act 1968* (Cth) provides fair dealing exceptions for the purposes of:

(a) research or study;

(b) criticism or review;

(c) parody or satire;

(d) reporting news; and

(e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

Question 46. How could the fair dealing exceptions be usefully simplified?

Question 47. Should the *Copyright Act 1968* (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

---

330 For example, it was the subject of a feature article in the Sydney Morning Herald *Good Weekend*. See D Leser, 'The Biggest Hit', *The Sydney Morning Herald (online)*, 23 July 2012, <http://www.smh.com.au/entertainment/music/the-biggest-hit-20120716-224x7.html>.

331 Ibid.

332 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444, [98].

333 Ibid, [99].

Other free-use exceptions

269. This paper outlines some of the key issues to which the ALRC has been alerted early in its Inquiry. However, the ALRC also welcomes comment on other exceptions in the *Copyright Act*—particularly submissions that consider how the exceptions might be amended to operate more effectively in the digital environment. Should some exceptions be removed entirely? Should other exceptions be introduced?

270. The suite of statutory exceptions, like much of the rest of the *Copyright Act*, has been criticised for being unnecessarily complex. This is particularly unfortunate for laws which need to be understood by members of the public and small-to-medium size businesses who create and use copyright material. The ALRC is also interested in views on how new and existing free-use exceptions in the *Copyright Act* might be simplified and better structured so as to contribute to a more straightforward and comprehensible copyright regime for Australia.

Question 48. What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

Question 49. Should any specific exceptions be removed from the *Copyright Act 1968* (Cth)?

Question 50. Should any other specific exceptions be introduced to the *Copyright Act 1968* (Cth)?

Question 51. How can the free-use exceptions in the *Copyright Act 1968* (Cth) be simplified and better structured?

Fair use

271. The Terms of Reference specifically direct the ALRC to consider whether existing exceptions are appropriate and whether further exceptions should recognise 'fair use' of copyright material. Australian legislation has long provided for exceptions to copyright based on what is understood now to be a closed list of permitted purposes for 'fair dealing'. By contrast, since 1976, the United States legislation has provided for a broad exception to copyright based on an open list of permitted purposes for 'fair use'.

272. The legislative provisions for 'fair dealing' that are found in countries such as the UK and Australia, and for the US-style 'fair use' share the same common law source: early English cases that were often concerned with an exception for abridgments.[334]

334 For example, see W Patry, *Patry on Fair Use* (2012), 9–10; M Sag, 'The Prehistory of Fair Use' (2011) 76 *Brooklyn Law Review* 1371; A Sims, 'Appellations of Piracy: Fair Dealing's Prehistory ' (2011) *Intellectual Property Quarterly* 3; M Richardson and J Bosland, 'Copyright and the New Street Literature' in C Arup (ed) *Intellectual Property Policy Reform: Fostering Innovation and Development*

273. Robert Burrell has argued that Australia's *Copyright Act 1905* (Cth) 'provided for a fair use defence in unambiguous terms'[335]—despite the provision using the expression 'fairly dealing'. Burrell has argued that the historical evidence suggests that the introduction of the 'fair dealing' provisions in the *Copyright Act 1911* (Imp)[336] and the *Copyright Act 1912* (Cth) was not intended to result in less flexibility.[337] Rather, he argues that the evidence suggests that the fair dealing provisions were intended to codify the existing common law—that is, 'a general fair use defence'.[338] His thesis is that

> subsequent cases and the commentaries invariably emphasised the restrictive parts of earlier judgments or chose to read ambiguous judgments in a restrictive way, leaving ways of expanding protection for users unexplored.[339]

274. Regardless of any early history of 'fair use' in Australia,[340] it is clear that Australia's current *Copyright Act* provides for specific fair dealing exceptions to copyright that are based on a closed list of permitted purposes.

Fair use internationally

275. A number of countries now provide for 'fair use' or interpret 'fair dealing' broadly.

276. For example s 107 of the US *Copyright Act* provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
>
> (2) The nature of the copyrighted work;
>
> (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) The effect of the use upon the potential market for or value of the copyrighted work.
>
> 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 the above factors.

(2009) 199, 199; R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 253–264; Copyright Law Review Committee, *Copyright and Contract* (2002), 25.

335 R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 257.

336 As previously noted, the *Copyright Act 1912* (Cth) declared the provisions of this Imperial Act to be in force in Australia.

337 R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 257–8.

338 Ibid, 257–9.

339 Ibid, 260.

340 See also K Bowery, *On Clarifying the Role of Originality and Fair Use in 19th Century UK Jurisprudence: Appreciating 'The Humble Grey which Emerges as the Result of Controversy'*, UNSW Law Research Paper No 58 (2008).

277. Like Australia, the US provides for other exceptions to copyright as well.[341]

278. Some points to note:

- The US Act does not define 'fair use'. As is the case in Australia with respect to 'fair dealing', it is a matter for the courts to determine.
- The preamble lists some—not all—of the purposes that may be permitted.[342] For this reason, the provision is sometimes described as 'open-ended'.
- Just because a purpose is listed in the preamble does not mean that such a use will be a fair use—rather, all uses must be analysed according to the four factors and any additional factors that are relevant.[343]
- The listed purposes are relevant in court decisions on fair use. Pamela Samuelson has argued that the six purposes listed in the preamble are based upon three main policies: 'promoting free speech and expression, interests of subsequent authors and the public, the ongoing progress of authorship, and learning'.[344]
- The four enumerated factors in the US provision are similar to four of the five matters to which regard is to be had in determining the fairness of a dealing for the purpose of research or study in the *Copyright Act*.[345]

279. The four factor test requires consideration of the following matters.[346]

- *First factor—'the purpose and character of the use'*. This factor encompasses two issues. First, was the defendant's use commercial? Secondly, was the use 'transformative'?[347]
- *Second factor—'the nature of the copyrighted work'*. Again there are two separate matters to be considered. First, was the plaintiff's work creative? Secondly, was that work published?
- *Third factor—'the amount and substantiality of the portion used in relation to the copyrighted work as a whole'*. This consists of an evaluation of two matters. First, how much is the defendant alleged to have taken? Secondly, how important was that taking in the context of the plaintiff's work?
- *Fourth factor—'effect upon the market for or value of the copyrighted work'*. What is the market effect of the defendant's conduct?

---

341 For example, see *Copyright Act 1976* (US), 17 USC, s 108(a)–(i).
342 See further W Patry, *Patry on Fair Use* (2012), 79–80.
343 Ibid, 83–4. Matthew Sag has observed that the 'four factors were not intended to be exclusive, nor were they intended to be so specific as to freeze judicial development of the doctrine': M Sag, 'Predicting Fair Use' (2012) 73 *Ohio State Law Journal* 47, 54.
344 P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537, 2544.
345 *Copyright Act 1968* (Cth) ss 40(2), 103C(2) and 248A(1A).
346 See M Sag, 'Predicting Fair Use' (2012) 73 *Ohio State Law Journal* 47, 54–5.
347 See earlier section, 'Transformative use'.

280. Fair use doctrine has continued to evolve. For example, it has been argued that 'in fundamental ways, fair use is a different doctrine today than it was ten or twenty years ago'.[348]

281. Other countries whose legislatures have adopted an open list of permitted purposes under the rubric of 'fair use' include Israel[349] and the Philippines.[350]

282. Canada and India retain the expression 'fair dealing' in their legislation but have arguably moved toward a fair use approach, largely because the judiciary in these countries have interpreted the 'fair dealing' exceptions broadly.[351]

283. For example, on 12 July 2012, the Supreme Court of Canada handed down five copyright decisions.[352] In one of the two cases concerning fair dealing, Abella J explained the interaction of an assessment of 'fairness' once use of copyright material is classified as within an 'allowable purpose'.[353] 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.[354]

284. There have been some recent legislative developments in these two jurisdictions. In the case of India, the *Copyright (Amendment) Act 2012* (India), which came into force on 21 June 2012, has been said to introduce 'an expanded fair dealing exception that goes a very long way down the road to a fair use doctrine'.[355] In the case of Canada, the *Copyright Modernization Act 2012* (Can) will expand fair dealing for the purposes of education, parody and satire. In the Australian Copyright Council's view, these new exceptions will have an even 'greater' impact following the broad interpretation of fair dealing in two of the decisions handed down on 12 July.[356]

---

348 N Weinstock Netanel, 'Making Sense of Fair Use' (2011) 15 *Lewis and Clark Law Review* 715, 719.

349 *Copyright Act 2007* (Israel) s 19. See 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.

350 *Intellectual Property Code of the Philippines* Republic Act No 8293 (the Philippines) s 185.

351 India has 'a seemingly closed list of exceptions but interpreted by courts in ways very similar to fair use': W Patry, *Patry on Fair Use* (2012), 544.

352 *Re:Sound v Motion Picture Theatre Associations of Canada* (2012) 38 SCC (Canada); *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada); *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* (2012) 36 SCC (Canada); *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada* (2012) 35 SCC (Canada); *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* (2012) 34 SCC (Canada). The *Alberta v Access Copyright* case and the *Bell Canada* case are the two concerning fair dealing.

353 *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* (2012) 36 SCC (Canada) [26]–[27].

354 See in particular Ibid, [22].

355 Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012), 114. Note that the committee made this comment with respect to the Bill.

356 Australian Copyright Council, *Implications for Fair Dealing in the Supreme Court of Canada* (2012) <www.copyright.org.au/news-and-policy/details/id/2133/> at 18 July 2012.

Reviews that have considered fair use

Key reviews in the UK and Ireland

285. The Hargreaves Review was specifically asked to investigate the benefits of 'fair use' exceptions and how these might be achieved in the UK.[357] The review was advised that there would be 'significant difficulties' in attempting to transpose US-style 'fair use' into European law.[358]

286. The Hargreaves review did not recommend that the UK promote a fair use exception to the EU.[359] Rather, partly in view of the perceived limitations of the EU context,[360] it made other recommendations which it believed would be more likely to deliver practical economic benefits.[361]

287. At the time of this Inquiry there is also a review of Irish copyright law taking place, to examine the 'optimum' copyright law for Ireland, including consideration of whether a 'fair use' doctrine would be appropriate in the Irish/EU context.[362]

Australian reviews

288. This Inquiry is not the first Australian review to consider whether the *Copyright Act* should recognise the fair use of copyright material.[363] The most recent reviews are the CLRC's simplification review in 1996–98 and the Australian Government's Fair Use Review which commenced with the release of an issues paper in May 2005 and concluded with the passage of certain legislative reforms in December 2006.

The CLRC simplification review

289. In 1998 the CLRC recommended the expansion of fair dealing so that there would be an open list of permitted purposes.[364] The CLRC explained that it 'had adopted a model that is concise, sufficiently flexible to accommodate new uses that may emerge with future technological developments, but also contains enough detail to provide valuable guidance to both copyright owners and users'.[365]

290. The CLRC was concerned that fair dealing be adaptable to changing technology and comprise 'a more precise and recognisable concept than US-style 'fair use' so as to build upon existing jurisprudence concerning fair dealing.[366]

---

357 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 101.
358 Ibid, 46.
359 Ibid, 52.
360 Some scholars have challenged the view that a Member State of the EU cannot introduce flexible copyright norms. For example, see B Hugenholtz and M Senftleben, *Fair Use in Europe: In Search of Flexibilities* (2011).
361 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 52.
362 Copyright Review Committee (Ireland), *Copyright and Innovation: A Consultation Paper* (2012).
363 For an overview of the history see M Wyburn, 'Higher Education and Fair Use: A Wider Copyright Defence in the Face of the Australia-United States Free Trade Agreement Changes' (2006) 17 *Australian Intellectual Property Journal* 181.
364 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.10], [6.29].
365 Ibid, [6.08].
366 Ibid, [6.12]–[6.13].

Intellectual Property and Competition Review Committee

291. In September 2000 the Ergas Committee considered the CLRC's recommendation for expansion of the fair dealing purposes. It reported that it did 'not believe there is a case for removing the elements of the current *Copyright Act*, which define certain types of conduct as coming within the definition of fair dealing'.[367] In the context of reviewing copyright in terms of competition policy, the Ergas Committee did not believe that there was sufficient benefit identified to justify bearing the costs and uncertainties that changing the *Copyright Act* would entail. The Committee stated, 'we believe that the current arrangements reduce the transaction costs involved in operating the copyright system, and make for enhanced efficiencies'.[368]

The Attorney-General's Department's Fair Use Review

292. The Attorney-General's Department's Fair Use Review considered both the CLRC's open-ended fair dealing model, as well as a recommendation that had been made by the Joint Standing Committee on Treaties (JSCOT). JSCOT had recommended replacing fair dealing with 'a doctrine that resembles the United States' open-ended defence of fair use' so as 'to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting'.[369] Accordingly, the Issues Paper for the Fair Use Review asked:

- should the *Copyright Act* be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?[370] and
- should the *Copyright Act* be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in US copyright law?[371]

293. The submissions contain a number of arguments for and against Australia adopting an open-ended model for US-style fair use. As the Fair Use Review noted, the main difference between a provision which is open-ended compared with one that comprises a closed list is that the former is more likely to provide flexibility and the latter certainty.[372] Views differed as to which was preferable.

Arguments in favour of an open-ended model

- *Provides flexibility.* An open-ended model would be more responsive to rapid technological change.

---

367 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 15.
368 Ibid, 129.
369 The Joint Standing Committee on Treaties—Parliament of Australia, *Report 61: The Australia-United States Free Trade Agreement* (2004), Rec 17.
370 Australian Government Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*, Issues Paper (2005), [6.8].
371 Ibid, [7.12].
372 Ibid, [1.5].

- *Assists innovation.* The closed list approach automatically 'outlaws' new uses and acts as a disincentive for technological development in Australia, especially when compared to the US.
- *The current system is far from certain.* Current exceptions are being under-utilised due to uncertainty and risk aversion.
- *Fair use is not too uncertain*. As the US fair use provision does contain certain determinative criteria, the argument was made that owners, users and courts do have something to work with.

Arguments against an open-ended model

- *Uncertainty of application*. A lack of clear and precise rules would result in misunderstanding and misapplication. Uncertainty was also seen as the root cause for many of the other problems noted below.
- *Likelihood of higher transaction costs.* Some of those who were opposed to uncertainty considered that it would make things harder for users as it would increase the costs of compliance as they would need to seek legal advice. However, others considered that uncertainty would increase owners' costs of enforcement (as infringing conduct would be encouraged) and would create new licensing difficulties.
- *The need for litigation to determine the scope of permitted uses*. This was seen as undesirable from a policy perspective, and because of the increase in costs to the judicial system and parties to litigation.
- *Potential access to justice problems*. Particular concerns were expressed with respect to artists, musicians and other creators who may be affected on both sides of their practice (being both creators and users of copyright material), and in respect of individuals and others who do not have sufficiently 'deep pockets' for litigation.
- *Possible over-claiming by owners and/or an overly cautious response by users.* There was concern about a possible 'chilling effect' in respect to the use of copyright material.
- *Lack of jurisprudence.* There would be no precedents (at least at the beginning); that it would take many years to develop jurisprudence (especially given that Australia is not as populous or litigious a society as the US); and that all of the existing jurisprudence in respect to fair dealing would be open to re-interpretation.
- *The problem of transposing a doctrine from a different legal system*. Some concerns were expressed about Australian courts being more restrained and concerned with statutory interpretation than US courts, and less likely to find a broad purpose behind a 'fair use' provision without the sort of guidance that, for example, the US Bill of Rights provides.

- *May not comply with Australia's international obligations with respect to the three-step test*. There was concern that an open-ended exception would not meet the first limb of the test.

Outcome of the Fair Use Review

294. While the Government enacted a number of reforms in response to the Fair Use Review, it did not enact an open-ended, fair use exception. This appears to have been for two reasons. First, the Government stated that in the public consultation phase of the Fair Use Review, 'no significant interest supported fully adopting the US approach'.[373] Secondly, it appears that the Australian Government may have been concerned about compliance with the three-step test.

Options for reform

295. There has been a noticeable degree of change with respect to technology and social uses of it, even since the Fair Use Review. In its preliminary discussions with some stakeholders and others with an interest in copyright, the ALRC heard that there may now be more of an appetite for a broad, flexible exception to copyright—perhaps based on US-style fair use—than in late 2006.

296. In January 2008, Barton Beebe's empirical study of US fair use case law through to the year 2005 was published.[374] He argued that the results 'show that much of our conventional wisdom about that case law is mistaken'.[375] In 2009, Samuelson published her 'qualitative assessment' of the fair use case law, which was built upon Beebe's study.[376] Samuelson has argued that 'fair use is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns'.[377] Earlier in 2012, Matthew Sag published his work that built upon these two studies.[378] He went further than Samuelson and 'assesse[d] the predictability of fair use in terms of case facts which exist prior to any judicial determination'.[379] He argued that his work

> demonstrates that the uncertainty critique is somewhat overblown: an empirical analysis of the case law shows that, while there are many shades of gray in fair use

---

373 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 10. However, it should be noted that a number of submissions—presumably defined as coming before 'the public consultation phase'—did argue in favour of a broad, flexible exception. Further, 'personal consumers' had supported an open-ended exception: Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 12.

374 B Beebe, 'An Empirical Study of US Copyright Fair Use Opinions, 1978–2005' (2008) 156 *University of Pennsylvania Law Review* 549. Note that Beebe has updated the results 'through 2011' but this work has not yet been published. B Beebe, 'An Empirical Study of US Copyright Fair Use Cases, 1978–2011' (Paper presented at Fordham Intellectual Property Law Institute and Emily C and John E Hansen Intellectual Property Institute 20th Annual Intellectual Property Law and Policy Conference, New York, 12–13 April 2012).

375 B Beebe, 'An Empirical Study of US Copyright Fair Use Opinions, 1978–2005' (2008) 156 *University of Pennsylvania Law Review* 549, 550.

376 P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537, 2542–43.

377 Ibid, 2541.

378 M Sag, 'Predicting Fair Use' (2012) 73 *Ohio State Law Journal* 47.

379 Ibid, 51.

> litigation, there are also consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection.[380]

297. The ALRC is interested in hearing views on whether the *Copyright Act* should be amended to include a broad, flexible exception and whether such an exception should be based on 'fairness', 'reasonableness' or something else. The ALRC is also interested in comments on what assistance may be gained from the US's experience of fair use.

298. One critical issue that would need to be determined if Australia were to amend the *Copyright Act* to provide for a broad, flexible exception, is whether such an exception should replace all or some of the existing exceptions or whether it should be in addition to existing exceptions. It might be said that the issue of how fair use would fit with the existing exceptions and statutory licences was considered 'very little' during the earlier debates.[381]

Question 52. Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

Question 53. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

Contracting out

299. The digital environment, and the continuing development of e-commerce, facilitates the use of contracts to set terms and conditions on access to and use of copyright materials.

300. A matter closely related to the ALRC's consideration of existing and possible new exceptions to copyright is the extent to which copyright owners and users should be permitted to contract out of the operation of an exception.

301. For example, agreements with online publishing companies may contain clauses that prevent libraries and archives from reproducing and communicating extracts of works as would otherwise be permitted by the library and archives exceptions. Agreements may exclude or modify the fair dealing exceptions, the statutory licence scheme for educational and other institutions, and the exception for the use of copyright materials for the services of the Crown.[382]

---

380 Ibid, 49.

381 M Wyburn, 'Higher Education and Fair Use: A Wider Copyright Defence in the Face of the Australia-United States Free Trade Agreement Changes' (2006) 17 *Australian Intellectual Property Journal* 181, 208.

382 Copyright Law Review Committee, *Copyright and Contract* (2002), ch 4.

Current law

302. The *Copyright Act* contains no provisions that prevent agreements from excluding or limiting the operation of exceptions providing for access to copyright material, except in relation to the reproduction of computer programs.[383] Therefore, for example:

- copyright owners of filmed recordings of sport events may make it a condition that their customers do not provide the film to others who might exercise a fair dealing exception (for example, news reporting) or make use of the film other than as specified by contract; but
- software licensees cannot contract out of provisions allowing reverse engineering to make interoperable products or back-ups and licensors, therefore, make these uses an exception to the restrictions in licences.

303. The *Copyright Act* statutory licensing provisions establish schemes under which the capacity for copyright rights holders to receive remuneration, and users to obtain licences, for uses of works is enhanced in situations where market failure would otherwise make this difficult. These provisions allow expressly for voluntary licensing.[384]

304. Agreements that exclude or limit the operation of exceptions may be unenforceable due to the operation of common law, equity or legislative provisions outside the *Copyright Act*. For example, the agreements may be affected by the doctrine of unconscionable conduct, the application of other equitable doctrines or considerations of public policy, and by consumer protection or competition legislation.[385]

Options for reform

305. In 2002, the CLRC released its report *Copyright and Contract*.[386] Among other things, the report examined 'the extent to which electronic and other trade in copyright works and other subject matter is subject to agreements which exclude or modify the copyright exceptions and the nature of any differences between online and offline trade'.[387] The CLRC considered whether or not it should be possible to displace the exceptions set out in the Act by contractual means.

---

383 *Copyright Act 1968* (Cth) s 47H relating to agreements that exclude or limit the reproduction of computer programs for technical study, back-up, security testing and error correction: *Copyright Act 1968* (Cth) ss 47B(3), 47C, 47D, 47E, 47F.

384 For example, *Copyright Act 1968* (Cth) ss 135Z (pt VA); 135ZZF (pt VB); 135ZZZC (pt VC); 135ZZZY (pt VD).

385 See Copyright Law Review Committee, *Copyright and Contract* (2002), ch 5.

386 Ibid.

387 Ibid, 7.

306. The CLRC concluded that agreements were being used to exclude or limit copyright exceptions and that this practice 'undermines the copyright balance established by the *Copyright Act*'.[388]

307. The CLRC considered a range of options for reform. These included mandating all exceptions (except where there are practical reasons not to do so) to only mandating some of the exceptions, for example, particular instances of fair dealing.[389] The CLRC recommended:

> the traditional fair dealing defences and the provisions relating to libraries and archives which permit uncompensated copying and communication to the public within specified limits, and which embody the public interest in education, the free flow of information and freedom of expression, should be made mandatory.[390]

308. The CLRC also considered that 'exceptions introduced in recent years relating to technological developments should also be made mandatory'—specifically provisions allowing for temporary reproductions.[391]

309. In relation to the remaining exceptions in the *Copyright Act*, the CLRC recommended encouraging the development of codes of conduct and model licences, where relevant.[392]

Discussion

310. The conclusions of the CLRC have been criticised. The Australian Copyright Council, for example, has stated that the CLRC's recommendations were based on a flawed view that 'a contractual provision is necessarily unfair if it purports to prohibit the doing of something allowed under a copyright exception, irrespective of the context of the provision (including the benefits to the licensee from the contract as a whole) and of the circumstances in which the contract was made'.[393]

311. The justification and rationale for creating separate categories of exceptions—that is, exceptions that may, and may not, be contracted out of—may also be questioned. While the CLRC argued that the fair dealing exceptions should be mandatory as these are 'an integral component of the copyright interest',[394] the reasons for including other exceptions is not as clear.

312. Existing provisions of the *Competition and Consumer Act 2010* (Cth) may be sufficient to deal with issues arising from contractual terms excluding the operation of exceptions.

---

388 Ibid, 142.
389 Other options considered included deeming certain contracts unconscionable; mandating exceptions only in relation to 'mass-market licences': Ibid, 271.
390 Ibid, 266. See recommendation at [7.49].
391 *Copyright Act 1968* (Cth) ss 43A, 111A.
392 Copyright Law Review Committee, *Copyright and Contract* (2002), 266. See recommendation at [7.52].
393 Copyright Council, *Response to report of Copyright Law Review Committee on Copyright and Contracts* (2003).
394 Ibid, 266.

313. For example, the *Competition and Consumer Act* prohibits contracts between competitors which contain exclusionary provisions or provisions which have the purpose or effect of substantially lessening competition; contracts between competitors which contain provisions in relation to prices; and misuse of market power.[395] These provisions are subject to a limited exemption applicable to certain dealing in intellectual property rights, including copyright.[396]

314. The ALRC is interested in information about current practices in the marketplace concerning contracts and licensing, and about relevant changes since the report of the CLRC. In particular, the CLRC report highlighted issues arising in relation to online mass market contracts. These may be seen as unfair or invalid because the drafting party imposes the terms—including in relation to the operation of copyright exceptions.[397]

315. On the other hand, mass market contracts may 'reduce transaction costs and are a convenient means of doing business for both parties'; and market forces may provide a disincentive to the imposition of one-sided terms.[398] The digital environment also may facilitate 'micro-licensing', where conditions of access can be cost-effectively individualised for different users.

Question 54. Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

Question 55. Should the *Copyright Act 1968* (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

395 *Competition and Consumer Act 2010* (Cth) pt IV. The Act also contains general protections against misleading or deceptive conduct and unconscionable conduct in trade or commerce, and unfair contract terms: *Competition and Consumer Act 2010* (Cth) ch 2. The Australian Competition and Consumer Commission may also have a role in some Copyright Tribunal of Australia proceedings concerning licences: *Competition and Consumer Act 2010* (Cth) ss 157A, 157B.

396 *Competition and Consumer Act 2010* (Cth) s 51.

397 Copyright Law Review Committee, *Copyright and Contract* (2002), 109–110. The Australian Attorney-General's Department is currently conducting a review of Australian contract law, which includes consideration of 'challenges relating to internet contracting': Australian Government Attorney-General's Department, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (2012), 9.

398 See Copyright Law Review Committee, *Copyright and Contract* (2002), 110.