Australian Government
Australian Law Reform Commission

Copyright and the Digital Economy

FINAL REPORT

ALRC Report 122

November 2013

This Final Report reflects the law as at 30 November 2013.

The Australian Law Reform Commission 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).

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Australian Government

Australian Law Reform Commission

The Hon George Brandis QC MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

29 November 2013

Dear Attorney-General

ALRC Terms of Reference—Copyright and the Digital Economy

On 21 June 2012, the Australian Law Reform Commission received Terms of Reference to undertake a review into Copyright and the Digitial Economy. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996*, I am pleased to present you with the Final Report on this reference, *Copyright and the Digital Economy*.

Yours sincerely,

Professor Rosalind Croucher
President

Professor Jill McKeough
Commissioner in Charge

Contents

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.

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The Hon Justice John Middleton (from December 2012)

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Ishtar Vij, Policy Counsel, Public Policy and Government Affairs, Google Australia and New Zealand

Associate Professor Kimberlee Weatherall, University of Sydney

The Hon Justice David Yates, Federal Court of Australia

Recommendations

4. The Case for Fair Use

Recommendation 4–1 The *Copyright Act 1968* (Cth) should provide an exception for fair use.

5. The Fair Use Exception

Recommendation 5–1 The fair use exception should contain:

(a) an express statement that a fair use of copyright material does not infringe copyright;

(b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and

(c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair use ('the illustrative purposes').

Recommendation 5–2 The non-exhaustive list of fairness factors should be:

(a) the purpose and character of the use;

(b) the nature of the copyright material;

(c) the amount and substantiality of the part used; and

(d) the effect of the use upon the potential market for, or value of, the copyright material.

Recommendation 5–3 The non-exhaustive list of illustrative purposes should include the following:

(a) research or study;

(b) criticism or review;

(c) parody or satire;

(d) reporting news;

(e) professional advice;

(f) quotation;

(g) non-commercial private use;

(h) incidental or technical use;

(i) library or archive use;

(j) education; and

(k) access for people with disability.

Recommendation 5–4 The *Copyright Act* should be amended to repeal the following exceptions:

(a) ss 40, 103C—fair dealing for research or study;

(b) ss 41, 103A—fair dealing for criticism or review;

(c) ss 41A, 103AA—fair dealing for parody or satire;

(d) ss 42, 103B—fair dealing for reporting news;

(e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and

(f) ss 104(b) and (c)—professional advice exceptions.

The fair use or new fair dealing exception should be applied when determining whether one of these uses infringes copyright.

6. The New Fair Dealing Exception

Recommendation 6–1 If fair use is not enacted, the *Copyright Act* should be amended to provide that a fair dealing with copyright material for one of the following purposes does not infringe copyright:

(a) research or study;

(b) criticism or review;

(c) parody or satire;

(d) reporting news;

(e) professional advice;

(f) quotation;

(g) non-commercial private use;

(h) incidental or technical use;

(i) library or archive use;

(j) education; and

(k) access for people with disability.

This provision should also provide that the fairness factors should be considered when determining whether the dealing is fair, along with any other relevant matter.

Note: This consolidates the existing fair dealing exceptions and provides that fair dealings for certain new purposes ((f)-(k)) also do not infringe copyright. Importantly, unlike fair use, this exception can only apply to a use of copyright material for one of the prescribed purposes. The purposes are not illustrative.

8. Statutory Licences

Recommendation 8–1 The *Copyright Act* should be amended to clarify that the statutory licences in pts VA, VB and VII div 2 do not apply to a use of copyright material which, because of another provision of the Act, would not infringe copyright. This means that governments, educational institutions and institutions assisting people with disability, will be able to rely on unremunerated exceptions, including fair use or the new fair dealing exception, to the extent that they apply.

Recommendation 8–2 The *Copyright Act* should be amended to clarify that the statutory licences in pts VA, VB and VII div 2 do not apply to a use of copyright material where a government, educational institution, or an institution assisting people with disability, instead relies on an alternative licence, whether obtained directly from rights holders or from a collecting society.

Recommendation 8–3 The *Copyright Act* should be amended to remove any requirement that, to rely on the statutory licence in pt VII div 2, governments must notify or pay equitable remuneration to a declared collecting society. Governments should have the option to notify and pay equitable remuneration directly to rights holders, where this is possible.

Recommendation 8–4 The statutory licences in pts VA, VB and VII div 2 of the *Copyright Act* should be made less prescriptive. Detailed provisions concerning the setting of equitable remuneration, remuneration notices, records notices, sampling notices, and record keeping should be removed. The Act should not require sampling surveys to be conducted. Instead, the Act should simply provide that the amount of equitable remuneration and other terms of the licences should be agreed between the relevant parties, or failing agreement, determined by the Copyright Tribunal.

9. Quotation

Recommendation 9–1 The fair use or new fair dealing exception should be applied when determining whether a quotation infringes copyright.

10. Private Use and Social Use

Recommendation 10–1 The exceptions for format shifting and time shifting in ss 47J, 109A, 110AA and 111 of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether a private use infringes copyright.

11. Incidental or Technical Use and Data and Text Mining

Recommendation 11–1 The exceptions for temporary uses and proxy web caching in ss 43A, 111A, 43B, 111B and 200AAA of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether incidental or technical uses infringes copyright.

12. Libraries and Archives

Recommendation 12–1 Section 200AB of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether uses by libraries and archives infringes copyright.

Recommendation 12–2 The exceptions for preservation copying in ss 51A, 51B, 110B, 110BA and 112AA of the *Copyright Act* should be repealed. The *Copyright Act* should provide for a new exception that permits libraries and archives to use copyright material for preservation purposes. The exception should not limit the number or format of copies that may be made.

13. Orphan Works

Recommendation 13–1 The *Copyright Act* should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

(a) a reasonably diligent search for the rights holder had been conducted and the rights holder had not been found; and

(b) as far as reasonably possible, the user of the work has clearly attributed it to the author.

Recommendation 13–2 The *Copyright Act* should provide that, in determining whether a reasonably diligent search was conducted, regard may be had to, among other things:

(a) the nature of the copyright material;

(b) how and by whom the search was conducted;

(c) the search technologies, databases and registers available at the time; and

(d) any guidelines, protocols or industry practices about conducting diligent searches available at the time.

14. Education

Recommendation 14–1 The exceptions for educational use in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether an educational use infringes copyright.

15. Government Use

Recommendation 15–1 The parliamentary libraries exceptions in ss 48A, 50(1)(aa) and 104 of the *Copyright Act* should be extended to apply to all types of copyright material and all exclusive rights.

Recommendation 15–2 The *Copyright Act* should provide for a new exception for the purpose of the proceedings of a tribunal, or for reporting those proceedings.

Recommendation 15–3 The *Copyright Act* should provide for a new exception for the purpose of the proceedings of a royal commission or a statutory inquiry, or for reporting those proceedings.

Recommendation 15–4 The *Copyright Act* should provide for a new exception for uses where statutes require local, state or Commonwealth governments to provide public access to copyright material.

Recommendation 15–5 The *Copyright Act* should provide for a new exception for use of correspondence and other material sent to government. This exception should not extend to uses that make previously published material publicly available.

16. Access for People with Disability

Recommendation 16–1 The fair use or new fair dealing exception should be applied when determining whether a use for access for people with disability infringes copyright.

18. Retransmission of Free-to-air Broadcasts

Recommendation 18–1 In developing media and communications policy, and in responding to media convergence, the Australian Government should consider whether the retransmission scheme for free-to-air broadcasts provided by pt VC of the *Copyright Act* and s 212(2) of the *Broadcasting Services Act 1992* (Cth) should be repealed.

Note: This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

Recommendation 18–2 If the retransmission scheme is retained, the scope and application of the internet exclusion in s 135ZZJA of the *Copyright Act* should be clarified.

19. Broadcasting

Recommendation 19–1 In developing media and communications policy, and in responding to media convergence, the Australian Government should consider whether the following exceptions in the *Copyright Act* should be repealed:

(a) s 45—broadcast of extracts of works;

(b) ss 47, 70 and 107—reproduction for broadcasting;

(c) s 109—broadcasting of sound recordings;

(d) ss 65 and 67—incidental broadcast of artistic works; and

(e) s 199—reception of broadcasts.

Recommendation 19–2 The Australian Government should also consider whether the following exceptions should be amended to extend to the transmission of linear television or radio programs using the internet or other forms of communication to the public:

(a) s 47A—sound broadcasting by holders of a print disability radio licence; and

(b) pt VA—copying of broadcasts by educational institutions.

20. Contracting Out

Recommendation 20–1 The *Copyright Act* should provide that any term of an agreement that restricts or prevents the doing of an act, which would otherwise be permitted by specific libraries and archives exceptions, is unenforceable.

Recommendation 20–2 The *Copyright Act* should not provide statutory limitations on contracting out of the fair use exception. However, if fair use is not enacted, limitations on contracting out should apply to the new fair dealing exception.

Executive Summary

Contents

Background

This Report is the result of an inquiry into whether the exceptions and statutory licences in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital environment. Among other things, the ALRC was asked to consider whether further exceptions should recognise fair use of copyright material.

Policy makers around the world are actively reconsidering the relationship between copyright and innovation, research, and economic growth. A comprehensive review of copyright law in the United States was announced in April 2013 and is now under way. Recent reviews in the United Kingdom and Ireland have recommended changes to copyright law.

Reform of copyright law poses a number of challenges. The law must be relevant to a complex and changing digital environment, but must also be clear and broadly understood in the community. The law must produce reasonably certain and predictable outcomes, but should be flexible and not inhibit innovation.

Reforms must also not lose sight of the fundamental objectives of copyright law—to stimulate creation and learning by increasing the incentives to create and distribute copyright material such as books and blogs, music and mash-ups, films, photos and television programs.

Framing principles for reform

The ALRC identified five framing principles to guide the Inquiry. The principles are derived from existing laws, other relevant reviews and government reports, international policy discussions and the many invaluable submissions to this Inquiry.

The principles are not the only considerations in copyright reform, but they generally accord with other established principles, including those developed for the digital environment in international discussions.

The framing principles are:

- acknowledging and respecting authorship and creation;
- maintaining incentives for creation and dissemination;
- promoting fair access to content;
- providing rules that are flexible, clear and adaptive; and
- providing rules consistent with international obligations.

The Inquiry in context

The broader context, within which the ALRC conducted this Inquiry, included the following.

The concept of the digital economy: The digital economy is the global network of economic and social activities that are enabled by information and communications technologies, such as the internet, computers, the cloud, search engines and smart devices. Digital technologies provide efficiency and savings for individuals, businesses and governments to increase wealth and drive further economic growth. Reform of copyright exceptions may promote the more effective functioning of the digital environment.

Innovation and productivity: Copyright is an essential aspect of innovation in the digital environment. This includes new ways of developing creative material and new ways of legally accessing, distributing, storing and consuming copyright material. At present, copyright law gets in the way of much innovative activity which could enhance Australia's economy and consumer welfare. Reform of copyright law could promote greater opportunities for innovation and economic development.

Trends in consumer use of copyright material: Many people innocently infringe copyright in going about their everyday activities. Reforms are recommended to legalise common consumer practices which do not harm copyright owners. The same discussions are taking place around the world as respect for copyright law is diminishing.

The complexity of copyright law: Copyright legislation is extremely complex and detailed, and also technology-specific. Reducing legislative complexity and introducing flexibility creates a better environment for business, consumers, education and government.

Cultural policy and copyright reform: Many stakeholders in this Inquiry are at the forefront of cultural life in Australia. It is clear that copyright law directly affects a broad range of cultural activity, often impeding access to material for no good policy reason. The ALRC recommends reform that is beneficial for Australians in terms of accessing and interacting with culture.

Statutory licensing in the digital economy: The *Copyright Act* provides for guaranteed access to copyright material for the education, government and disability sectors. The ALRC has investigated whether the statutory licensing provisions of the *Copyright Act* are achieving their aims and has recommended reforms to improve the system.

Competition issues and copyright reform: Copyright law and competition law are largely complementary in that both seek to promote innovation, higher living standards, and expand choices and benefits to society. The ALRC's reform recommendations seek to foster efficient and competitive markets for copyright material.

Evidence and law reform in the digital economy: Around the world, the need to quantify the contribution of copyright exceptions to non-core copyright industries, including interdependent and support industries, is under discussion. Stakeholders referred to the need for proper evidence before law reform is introduced. However, the available economic evidence is incomplete and contested. The ALRC considers that, given it is unlikely that reliable empirical evidence will become available in the near future, law reform should proceed, based on a hypothesis-driven approach.

Current regulatory models: The ALRC reviewed whether the current legal and institutional structures in copyright law offer an effective, efficient and functional model for dealing with copyright issues in the digital environment, and what alternatives might apply. Reform recommendations are designed to allow for a more principles-based model to reduce existing regulatory burdens.

A flexible fair use exception

The ALRC recommends the introduction of fair use. Fair use is a defence to copyright infringement that essentially asks of any particular use: Is this fair? In deciding whether a particular use of copyright material is fair, a number of principles, or 'fairness factors', must be considered.

The case for fair use made in this Report is based on several arguments, including:

- Fair use is flexible and technology-neutral.
- Fair use promotes public interest and transformative uses.
- Fair use assists innovation.
- Fair use better aligns with reasonable consumer expectations.
- Fair use helps protect rights holders' markets.
- Fair use is sufficiently certain and predictable.
- Fair use is compatible with moral rights and international law.

An important feature of fair use is that it explicitly recognises the need to protect rights holders' markets. The fourth fairness factor in the exception is 'the effect of the use upon the potential market for, or value of, the copyright material'. Considering this

factor will help ensure that the legitimate interests of creators and other rights holders are not harmed by the fair use exception. If a licence can be obtained to use copyright material, then the unlicensed use of that material will often not be fair. This is vital to ensuring copyright law continues to fulfil its primary purpose of providing creators with sufficient incentive to create.

Many have expressed concern that fair use may harm rights holders because it is uncertain. The ALRC recognises the importance of having copyright exceptions that are certain in scope. This is important for rights holders, as confidence in exploiting their rights underlies incentives to creation. It is also important for users, who should also be confident that they can make new and productive use of copyright material without a licence where this is appropriate.

Concern about uncertainty comes from an important and positive feature of fair use—its flexibility. Fair use differs from most current exceptions to copyright in that it is a broad standard that incorporates principles, rather than a detailed prescriptive rule. Law that incorporates principles or standards is generally more flexible than prescriptive rules, and can adapt to new technologies and services. A fair use exception would not need to be amended to account for the fact that consumers now use tablets and store purchased copies of copyright material in personal digital lockers in the cloud.

Although standards are generally less certain in scope than detailed rules, a clear principled standard is more certain than an unclear complex rule. This Report recommends replacing many complex prescriptive exceptions with one clear and more certain standard—fair use.

The standard recommended by the ALRC is not novel or untested. Fair use builds on Australia's fair dealing exceptions, it has been applied in US courts for decades, and it is built on common law copyright principles that date back to the eighteenth century. If fair use is uncertain, this does not seem to have greatly inhibited the creation of films, music, books and other material in the world's largest exporter of cultural goods, the United States.

Fair use also facilitates the public interest in accessing material, encouraging new productive uses, and stimulating competition and innovation. Fair use can be applied to a greater range of new technologies and uses than Australia's existing exceptions. A technology-neutral open standard such as fair use has the agility to respond to future and unanticipated technologies and business and consumer practices. With fair use, businesses and consumers will develop an understanding of what sort of uses are fair and therefore permissible, and will not need to wait for the legislature to determine the appropriate scope of copyright exceptions.

Fair use is technology neutral, and it is not confined to particular types of copyright material, nor to particular rights. However, when it is applied, fair use can discriminate between technologies, types of use, and types of copyright material. Uses with some technologies may be found to be fair, while uses with other technologies—perhaps that unfairly encroach on rights holders' markets—may not. This is one of the strengths of fairness exceptions. Fair use is a versatile instrument, but it is not blunt.

Fair use promotes what have been called 'transformative' uses—using copyright material for a different purpose than the use for which the material was created. This is a powerful and flexible feature of fair use. It can allow the unlicensed use of copyright material for such purposes as criticism and review, parody and satire, reporting the news and quotation. Many of these uses not only have public benefits, but they generally do not harm rights holders' markets, and sometimes even enlarge them. Fair use is also an appropriate tool to assess whether other transformative uses should be permitted without a licence, such as data mining and text mining, caching, indexing and other technical functions, access for people with disability, and a range of other innovative uses.

In the final days of writing this Report, a US District Court ruled that Google Books was a highly transformative and fair use. There will no doubt be much debate about this landmark decision. But one thing seems clear to the ALRC: with a fair use exception, the right questions could be asked. Is this fair? Does this use unfairly harm the interests of rights holders? Is the use for a public benefit, and is it transformative?

Contrast this with the questions that would now be raised under Australian copyright law. Was Google using this service for its own research or study, criticism or review, parody or satire, or to report the news? Was this private format shifting, and if so, were copies stored on more than one device?

This case highlights two problems with Australian law. First, it does not permit, without possibly unobtainable licences, what many would consider a service of great social and economic value. More importantly, Australian law does not even allow the right questions to be asked to determine whether a service such as this infringes copyright.

Copyright protection is vital in allowing creators and rights holders to exploit the value of their materials, and to increase the incentive to create those materials—but this monopoly need not extend indefinitely or into markets which the creator had no real interest in exploiting. Copyright must leave 'breathing room' for new materials and productive uses that make use of other copyright material.

By appropriately limiting the ambit of copyright, exceptions can increase competition and stimulate innovation more generally, including in technologies and services that make productive use of copyright material. The ALRC considers that fair use finds the right balance. It protects the interests of rights holders, so that they are rewarded and motivated to create, in part by discouraging unfair uses that harm their traditional markets. It can also stimulate innovation, particularly in markets that rights holders may not traditionally exploit.

Of course, innovation depends on much more than copyright law, but fair use would make Australia a more attractive market for technology investment and innovation. Increasingly, the introduction of fair use into copyright law is being looked to as something that 'technologically ambitious small countries' might adopt. It has been introduced in Israel, Singapore and the Republic of Korea and it is gaining support across Europe.

An Australian copyright law review committee recommended the introduction of fair use in 1998. Would Australia have been better placed to participate in the growth of the nascent digital economy, had this recommendation been implemented at that time?

Fair use also better aligns with reasonable consumer expectations. It will mean that ordinary Australians are not infringing copyright when they use copyright material in ways that do not damage—and may even benefit—rights holders' markets. The public is also more likely to understand fair use than the existing collection of complex specific exceptions; this may increase respect for and compliance with copyright laws more broadly.

Almost 30 existing exceptions could be repealed, if fair use were enacted. In time, others might also be repealed. Replacing so many exceptions with a single fairness exception will make the *Copyright Act* considerably more clear, coherent and principled.

Much of this Report discusses the application of fair use to particular types of use. The ALRC recommends that some of these uses be included as 'illustrative purposes' in the fair use provision, namely: research or study; criticism or review; parody or satire; reporting news; professional advice; quotation; non-commercial private use; incidental or technical use; library or archive use; education; and access for people with disability.

While these purposes do not create a presumption that a particular type of use will be fair, it will signal that certain uses are somewhat favoured or more likely to be fair. Many private uses, for example, will not be fair, perhaps because licences can be obtained from rights holders—but even so, a purely private non-commercial use is more likely to be fair than a non-private use. Including this list of purposes will provide useful guidance, but the fairness factors must always be considered.

Despite the fact that the US has had a fair use exception for 35 years, it is sometimes argued that fair use does not comply with the three-step test under international copyright law. This argument is discussed and rejected in this Report.

The introduction of fair use to Australia is supported by the internet industry, telecommunications companies, the education sector, cultural institutions and many others. However, it is largely opposed by rights holders. In light of this opposition, the ALRC recommends an alternative, second-best exception.

An alternative: a new fair dealing exception

An alternative exception, should fair use not be enacted, is also recommended: a 'new fair dealing' exception that consolidates the existing fair dealing exceptions and provides that fair dealings for certain new purposes do not infringe copyright.

This exception is similar to fair use, but crucially, it is confined to a set of prescribed purposes. The purposes listed in the fair use exception are illustrative—examples of types of use that may be fair. The purposes listed in the new fair dealing exception, on the other hand, confine the exception. This exception would only apply when a given use is made for one of the prescribed purposes.

The purposes in the new fair dealing exception are the same as those the ALRC recommends should be referred to in the fair use exception. Using copyright material for one of these purposes will not necessarily be fair—the fairness factors must be considered—but these uses are favoured.

Many of the benefits of fair use would also flow from this new fair dealing exception. Both exceptions are flexible standards, rather than prescriptive rules. They both call for an assessment of the fairness of particular uses of copyright material. In assessing fairness, they both require the same fairness factors to be considered, and therefore they both ask the same important questions when deciding whether an unlicensed use infringes copyright. Both exceptions encourage the use of copyright material for socially useful purposes, such as criticism and reporting the news; they both promote transformative or productive uses; and both exceptions discourage unlicensed uses that unfairly harm and usurp the markets of rights holders.

Despite the many benefits common to both fair use and fair dealing, a confined fair dealing exception will be less flexible and less suited to the digital age than an open-ended fair use exception. Importantly, with a confined fair dealing exception, many uses that may well be fair will continue to infringe copyright, because the use does not fall into one of the listed categories of use. For such uses, the question of fairness is never asked.

In the ALRC's view, Australia is ready for, and needs, a fair use exception now. However, if fair use is not enacted, then the new fair dealing exception will be a considerable improvement on the current set of exceptions in the *Copyright Act*.

Specific exceptions

This Report also recommends retaining and reforming some existing specific exceptions, and introducing certain new specific exceptions. These are exceptions specially crafted for a particular type of use. Although they are less flexible and adaptive than fair use, they can serve a useful function if properly framed.

Specific exceptions are recommended for unlicensed uses for which there is a clear public interest, and for some uses that are highly likely to be fair use anyway, making a case-by-case assessment of fairness unnecessary. Preservation copying by libraries and archives is one example. The ALRC also recommends that specific exceptions for parliamentary libraries and judicial proceedings should be retained. New specific exceptions are recommended for use of copyright material in royal commissions and statutory inquiries, to allow public access to material when required by a statute, and to allow use of correspondence and other material sent to government.

The new exceptions are intended to promote good and transparent government. They will not have a significant impact on the market for material that is commercially available. If the use is essential to the functioning of the executive, the judiciary or the parliament, or to the principle of open government, it is likely that the use would be considered fair.

Reform of statutory licences

The education sector and various governments expressed dissatisfaction with the statutory licensing schemes for education and the Crown. There were strong calls for the licences to be repealed.

The ALRC has concluded that there is, at least for now, a continued role for these statutory licences. The enactment of fair use and new exceptions for government use should address many of the criticisms of the statutory licences. If new exceptions such as these are not enacted, then the case for repealing the statutory licences becomes considerably stronger.

The licensing environment has changed in recent decades, and the statutory licences should be reformed to ensure they fulfil their objectives. They need to be streamlined and made less rigid and prescriptive. The terms of the licence should be agreed on by the parties, not prescribed in legislation.

The *Copyright Act* should also be clarified to ensure the statutory licences are truly voluntary for users, as they were intended to be. It should also be made clear that educational institutions, institutions assisting people with disability and governments can rely on fair use and the other unremunerated exceptions that everyone else can rely on, to the extent that the exceptions apply.

These reforms of the licences and the enactment of fair use will ensure copyright law does not inhibit education and governments in the digital environment.

Orphan works

A wealth of copyright material is now neglected and wasted because the owners of the relevant rights cannot be found, and therefore permission to use the material cannot be given. To encourage the use of these ‘orphan works’, the ALRC recommends that the remedies available for copyright infringement be limited where a reasonably diligent search for the rights holder has been made and, where possible, the work has been attributed to the author. These reforms will promote the wider use of orphan works, without harming rights holders.

Broadcasting

The ALRC reviewed a range of exceptions that concern free-to-air television and radio broadcasting, including the statutory licensing scheme for retransmission of free-to-air broadcasts and other exceptions that refer to the concept of a ‘broadcast’ and ‘broadcasting’. In a changing media environment, distinctions currently made in copyright law between broadcast and other platforms for communication to the public may require justification.

The ALRC suggests approaches to reform of broadcasting exceptions, including changes to the retransmission scheme and the statutory licensing scheme applying to broadcasting of music; and the extension of some other exceptions to the transmission of linear television or radio programs using the internet. These exceptions raise complex questions at the intersection of copyright and communications policy. The

Australian Government needs to give further consideration to these issues in developing media and communications policy, in response to media convergence.

Contracting out

Consideration of limits on the extent to which parties may effectively contract out of existing, and recommended new, exceptions to copyright law raises fundamental questions about the objectives underlying copyright protection. At present, there are few express limitations on contracting out.

The ALRC recommends that the *Copyright Act* should be amended to provide that contractual terms restricting or preventing the doing of any act which would otherwise be permitted by the libraries and archives exceptions are unenforceable. Further, if the fair use exception is not enacted, limitations on contracting out should apply to the new fair dealing exception. However, broader limitations on contracting out—for example, extending to all exceptions, or to all fair uses—would not be practical or beneficial.

Overall effect of the recommendations

The overall effect of the recommendations in the Report will be a more flexible and adaptive copyright framework. The introduction of fair use will mean Australian copyright law can be applied to new technologies and new commercial and consumer practices, without constant recourse to legislative change. Fair use will promote innovation and enable a market-based response to the demands of the digital age.

The reforms will enhance access to cultural material, without undermining incentives to create. The recommended exceptions are also intended to be more consistent with public standards of fairness.

What do the recommendations have in common? The ALRC considers that exceptions to copyright, whether in the form of a specific rule or a general standard, should only permit the unlicensed use of copyright material where this would be fair. It should therefore not be surprising that fair use and each of its illustrative purposes, and the handful of specific exceptions recommended in this Report, have much in common. Generally, they permit the unlicensed use of copyright material if this would:

- serve an important public purpose;
- stimulate the creation of new works and the use of existing works for new purposes; and
- not harm rights holders' markets—ensuring exceptions do not undermine the crucial incentive to create and publish copyright material.

1. Introduction to the Inquiry

Contents

Introduction

1.1 This Report is the result of an inquiry into whether the *Copyright Act 1968* (Cth) needs amendment to allow Australia to fully participate in a modern, digital economy. The Terms of Reference were released for public comment before the Inquiry began, and attracted over 60 submissions. Following consideration of this feedback, the Attorney-General released the final Terms of Reference on 1 June 2012.

1.2 Chapters 1–3 provide an overview of the policy framework and the background to the Inquiry. They set out in detail the issues raised by the Terms of Reference, the research behind the recommendations, analysis and discussion of stakeholder views.

1.3 In considering whether changes are needed to the *Copyright Act*, and options for reform, the ALRC is required to consider whether existing exceptions to copyright are appropriate, and whether further exceptions should be introduced. In doing so the ALRC has to take into account the impact of proposed changes on other areas of law, consistency with Australia's international obligations and recommendations from other reviews.

Scope of the Inquiry

1.4 The Terms of Reference for this Inquiry focus on exceptions to copyright law. Exceptions allow certain uses of copyright material that would otherwise be infringements of copyright. Stakeholder input has been highly relevant in identifying the focus of investigation for this Inquiry, and not all exceptions have received consideration. The recommendations in this Report are intended to make the *Copyright Act* more accessible and better suited to the digital environment, but do not attempt overall redrafting or simplification of the legislation.

1.5 In performing its functions in relation to this Inquiry, the ALRC was asked not to duplicate work being undertaken in four areas of importance to the digital economy, namely:

- unauthorised distribution of copyright material using peer-to-peer networks;
- the scope of a safe harbour scheme for internet service providers;
- exceptions in relation to technological protection measures; and
- increased access to copyright works for persons with a print disability.

1.6 The items listed are under discussion at government level or are the subject of separate processes. The first refers to concerns about controlling the unauthorised distribution of copyright material using the internet as a file sharing network. This type of sharing was originally typified by the Napster music file sharing service and is now perhaps most commonly associated with the use of the BitTorrent peer-to-peer file sharing protocol. However, the Terms of Reference place the focus of the ALRC Inquiry on legal exceptions to copyright rather than on measures to combat copyright infringement.

1.7 The second and third matters listed above concern work the ALRC is 'not to duplicate'. This refers to work being undertaken by the Australian Government Attorney-General's Department on the safe harbour scheme for internet service providers (ISPs)[1] and technological protection measures (TPMs)[2] respectively. The Attorney-General's Department Consultation Paper, *Revising the Scope of the Copyright Safe Harbour Scheme*, was released in 2011.

1.8 The fourth matter above refers to initiatives to facilitate access to published works by persons with a print disability, including through the World Intellectual Property Organization (WIPO). WIPO discussed an instrument providing access to copyright works for persons with a print disability at its 24th Session in Geneva, July 2012 and subsequently concluded a Treaty in 2013.[3]

Related inquiries

1.9 Policy makers around the world are actively reconsidering the relationship between copyright exceptions and innovation, research, and economic growth, with a

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1 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 online activities: *Copyright Act 1968* (Cth) pt V, div 2AA. See Australian Government Attorney-General's Department, *Revising the Scope of the Copyright 'Safe Harbour Scheme'*, Consultation Paper (2011).

2 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).

3 World Intellectual Property Organization, *Standing Committee on Copyright and Related Rights: Twenty-Fourth Session* (2012); *Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled*, (adopted by the Diplomatic Conference, Marrakesh, 27 June 2013).

view to ensuring that their economies are capable of fully utilising digital technology to remain competitive in a global market.[4]

1.10 Relevant Australian reviews include previous work by the Copyright Law Review Committee, particularly *Simplification of the Copyright Act*[5] and *Copyright and Contract* in 2002.[6] Other relevant reviews include the *Review of Intellectual Property Legislation under the Competition Principles Agreement* (Ergas Report),[7] the *Powering Ideas: An Innovation Agenda for the 21st Century*[8] and the 2011 Book Industry Strategy Group Report.[9]

1.11 In its 2005 review of fair use, the Australian Government Attorney-General's Department considered whether it was appropriate to introduce a general fair use exception into the *Copyright Act*.[10] This review resulted in exceptions being introduced into the Act in 2006, for time shifting, format shifting, parody and satire and flexible fair dealing.[11]

1.12 The Convergence Review 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.[12]

1.13 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 in the converged environment, which are likely to have implications for content rights holders, and for users. These changes have been highlighted in recent developments, such as the ruling of the Federal Court on the Optus cloud-based TV Now service.[13]

1.14 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, a new communications regulator

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4 See, for example, World Economic Forum, *Global Agenda Council on the Intellectual Property System Digital Copyright Principles* <www3.weforum.org/docs/WEF_GAC_CopyrightPrinciples.pdf> at 1 February 2013.

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

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

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

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

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

10 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).

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

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

13 *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147. See Ch 10.

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.[14]

1.15 In July 2013, in its report on radio simulcasts the Senate Environment and Communications References Committee, commented on the many related broadcasting and copyright issues identified in numerous reviews—of which this Inquiry is one.[15]

1.16 Also in July 2013, the House of Representatives Standing Committee on Infrastructure and Communications released its report on price differentials for Australian business and consumers for products including computer software, hardware, music, films, ebooks and games.[16] The report made a number of recommendations relating to creating a more open and competitive market environment for the supply of IT products to business, the community and government.

1.17 Copyright reform has been pursued in overseas jurisdictions, notably in the UK through the Hargreaves Review, which was intended to reshape copyright to be 'fit for purpose' in the digital environment.[17] In its response to the Hargreaves Review the UK Government agreed that 'the IP framework is falling behind and must adapt'.[18]

1.18 The Hargreaves Review has been favourably received by the UK Government, which has responded with a number of legislative initiatives. Stakeholders in this Inquiry generally have approved of the Hargreaves Review. However, a House of Commons committee has also criticised it as 'likely to cause irreparable damage'[19] to the UK economy, and considered 'the existing law works well'.[20] Professor Hargreaves has refuted this criticism of his report.[21] The disjunction between those who state that there is no need for reform, and others who see a critical need to update copyright law, is also a characteristic of this ALRC Inquiry.

1.19 In January 2013, the European Commission announced seven new priorities for the European Digital Economy and Society. One of these steps is to ensure the EU copyright framework 'remains fit for purpose in the digital context'.[22] Among the proposals are new EU Directives concerning the activities of collecting societies in order to facilitate introduction of new business models that enhance online distribution of music.

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14 See Ch 18.

15 Parliament of Australia, Senate Environment and Communications References Committee, *Inquiry into the Effectiveness of Current Regulatory Arrangements in Dealing with Radio Simulcasts* (2013). See further Ch 15.

16 House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (2013).

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

18 UK Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011), 2.

19 House of Commons Culture, Media and Sport Committee, *Supporting the Creative Economy* (2013), 55.

20 Ibid, 68.

21 I Hargreaves, 'MPs Have Missed the Mark in Copyright Reform', *The Conversation*, 30 September 2013, <http://theconversation.com/mps-have-missed-the-mark-in-attacking-copyright-reform-18703>.

22 European Commission, *Orientation Debate on Content in the Digital Economy* (2012).

1.20 The Copyright Review Committee (Ireland) reported in October 2013,[23] after considering submissions received in response to an earlier discussion paper.[24] The Review made a number of recommendations, including the establishment of a copyright council and specialist courts for copyright matters, as well as exceptions for innovation and fair use.

1.21 In April 2013, the US House of Representatives announced 'a comprehensive review of US copyright law'.[25]

1.22 In 2012, Canada enacted the *Copyright Modernization Act* 2012 (Can).[26] It included an amendment to address the issue of user-generated content and specifically recognises fair dealing for educational purposes, as well as a number of other matters under consideration in the ALRC Inquiry.

Matters outside the Terms of Reference

1.23 This Inquiry is defined by its Terms of Reference. A number of stakeholders raised issues of wider concern which the ALRC did not, or could not, address. Despite exclusion from the Terms of Reference, and work being done elsewhere, a number of stakeholders have been critical of the ALRC for not considering infringement and enforcement matters.[27]

1.24 A number of submissions pointed out that enforcement, ISP safe harbour schemes and TPMs are matters of importance to many stakeholders, and highlighted the difficulty of making recommendations on matters within the Terms of Reference without taking account of the issues the ALRC is directed not to inquire into.[28]

1.25 The Australasian Performing Right Association and Australasian Mechanical Copyright Owners Society (APRA/AMCOS), for example, noted that to 'maximise the potential contribution of content industries in the digital economy there are a number of significant challenges which will need to be overcome'. These include 'the ease with which digital content can be distributed and copied' and 'meaningful regulation of the

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23 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013).

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

25 US House of Representatives, Committee on the Judiciary, 'Chairman Goodlatte Announces Comprehensive Review of Copyright Law' (Press Release, April 24, 2013).

26 *Copyright Modernization Act, C-11 2012* (Canada). See further M Patterson, R McDonald, Fraser Milner Casgrain LLP, *The Copyright Modernization Act: Canada's New Rights and Rules* <www.lexology.com/library> at 22 March 2013.

27 See, eg, News Corp Australia, *Submission 746*; Australian Film/TV Bodies, *Submission 739*.

28 The Copyright Licensing Agency, *Submission 766*; News Corp Australia, *Submission 746*; Australian Film/TV Bodies, *Submission 739*; NRL, *Submission 732*; ARIA, *Submission 731*; COMPPS, *Submission 634*; COMPPS, *Submission 266*; iGEA, *Submission 192*. See also Australian Film/TV Bodies, *Submission 205*; Motion Picture Association of America Inc, *Submission 197*; Music Rights Australia Pty Ltd, *Submission 191*.

ISP industry'.[29] Other stakeholders also raised the need to consider ISP and intermediary liability.[30]

1.26 The Arts Law Centre of Australia raised a matter relating to protection of Indigenous cultural heritage in the form of *sui generis* legislation and asked the ALRC to consider the engagement of the *Copyright Act* with Indigenous artists, arts organisations and Indigenous communities where copyright law does not recognise aspects of Indigenous customary law.[31]

1.27 The Australian Directors Guild requested amendment to s 98 of the *Copyright Act* to delete the words 'commissioned film' in that section to enhance the rights of film directors and access to revenue streams 'as an equal creator of audiovisual works'.[32] The Screen Producers Association of Australia opposed this suggestion.[33] The ALRC acknowledges the concerns of film directors but considers that this issue does not fall within the Terms of Reference for this Inquiry.

1.28 The question of copyright protection for newspaper headlines and internet links was raised by some including the Combined Newspapers and Magazines Copyright Committee.[34] Newspaper publishers submitted that press aggregators' practice of 'free riding', by so called 'abstracting' of newspaper or magazine articles should be prohibited under the *Copyright Act* until the eighth day after the original publication first appears. An attempt to redress this sort of activity and redress the loss of revenues suffered by newspaper companies as a result of free online news aggregators has apparently been discussed in Germany, but has not proceeded.[35]

1.29 Refusal to supply electronic resources to libraries in a timely manner, at a fair and affordable price and under licences that acknowledge copyright law exceptions for libraries is a matter of concern.[36] Library access to ebooks and elending has become an issue and the subject of 'national think tanks' as to securing equitable access to information in digital formats. These concerns, relating to refusal to supply and contractual matters, are outside the Terms of Reference.

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29 APRA/AMCOS, *Submission 247* citing also International Federation of the Phonographic Industry, *Digital Music Report 2012: Expanding Choice, Going Global* (2012).

30 Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; COMPPS, *Submission 266*; AFL, *Submission 232*; AMPAL, *Submission 189*; Arts Law Centre of Australia, *Submission 171*.

31 Arts Law Centre of Australia, *Submission 171* citing *T Janke, Our Culture Our Future: Report on Australian Indigenous Culture and Intellectual Property Rights (1998).* An outline of recommendations for *sui generis* protection or extended moral rights for Indigenous culture is provided in A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), [9.9]. See also Australian Society of Archivists Inc, *Submission 156*; Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*. See also Australia Council for the Arts, *Submission 860*.

32 Australian Directors Guild, *Submission 226*.

33 SPAA, *Submission 281*.

34 News Corp Australia, *Submission 746*; MEAA, *Submission 652*; C Snow, *Submission 254*; Combined Newspapers and Magazines Copyright Committee, *Submission 238*.

35 H Bakhshi, I Hargreaves and J Mateos-Garcia, *A Manifesto for the Creative Economy* (2013), 82. An industry solution seems to be underway with Google paying 65 million euro into a fund to assist newspapers develop digital models.

36 ALIA, *Submission 859*.

1.30 eBay raised an issue of exhaustion rights and parallel importation and supported amendment of the *Copyright Act* to effect removal of all barriers to the importation and sale in Australia of products manufactured under the authority of the legitimate copyright owner.[37] This would have the effect of facilitating the sale of second-hand digital media. Some aspects of this issue are currently under discussion by consumer advocates.[38]

The Inquiry process

1.31 Since 1975 the ALRC has had a history of independent inquiry into law reform, and over that time has developed a well-established, rigorous process, the results of which have gained a considerable degree of public respect and recognition of high quality outcomes.[39] Within that established framework the process for each law reform project may differ according to the scope of inquiry, the range of key stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. While the exact procedure needs to be tailored to suit each topic, the ALRC usually works within a particular framework when it develops recommendations for reform.

Stakeholder consultation

1.32 As is usual, in this Inquiry the ALRC consulted with relevant stakeholders, including the community and industry, and engaged in widespread public consultation.

1.33 The first stage of the Inquiry included the release of the Issues Paper[40] in August 2012, to identify the issues raised by the Terms of Reference and suggest principles which could guide proposals for reform, as well as to inform the community about the range of issues under consideration, and invite feedback in the form of submissions. The Issues Paper generated 295 submissions.

1.34 On 30 May 2013 a Discussion Paper was released[41] and the ALRC again called for submissions to inform the final stage of deliberations leading up to this Report. In total, the ALRC received 870 public and 139 confidential submissions to the Inquiry.[42]

1.35 The ALRC also undertook 109 consultations.[43] Key stakeholders were invited, and took the opportunity, to advise on the composition of industry roundtable meetings. In addition, industry-specific roundtable meetings, consultations and visits were conducted on numerous occasions.

1.36 Consultations and submissions included those with and from:

- academics (individuals and groups);

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37 eBay, *Submission 751*.

38 Choice, *Own What You Download* (2013) <www.choice.com.au/consumer-action/consumer-protection/digital-rights-copyright/fair-use.aspx> at 25 October 2013.

39 D Weisbrot, 'The Future for Institutional Law Reform' in B Opeskin and D Weisbrot (ed) *The Promise of Law Reform* (2005), 25.

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

41 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013).

42 The public submissions are available on the ALRC website at: www.alrc.gov.au.

43 Consultations are listed in Appendix 1.

- creators and organisations (authors, directors, photographers and others);
- the education sector;
- the GLAM (galleries, libraries, archives and museums) sector;
- government authorities, (Australian Competition and Consumer Commission; the Australian Communications and Media Authority; IP Australia; Standards Australia and many others);
- media and broadcasting and related organisations and industry bodies;
- music organisations;
- online service providers;
- publishers and publisher organisations; and
- rights management organisations.

1.37 Internet communication tools—including an enewsletter and online forums—were used to provide information and obtain comment. The ALRC also made use of Twitter to provide information on relevant media reports, as well as to provide a further avenue for community engagement.

1.38 The ALRC acknowledges the contribution of all those who participated in the Inquiry consultation rounds and the considerable amount of work involved in preparing submissions. It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries and the ALRC records its deep appreciation for this contribution.

Appointed experts

1.39 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of its Advisory Committees and the appointment of part-time Commissioners. While the ultimate responsibility for the Report and recommendations remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee is an aspect of ALRC inquiries. Advisory Committees assist in the identification of key issues and provide quality assurance in the research and consultation aspects of the Inquiry. The Advisory Committee for this Inquiry was unusually large at 24 members, listed at the front of this Report, and met in Sydney on 19 July 2012, 11 April 2013 and 26 September 2013.

1.40 In this Inquiry the ALRC was able to call upon the expertise and experience of its standing part-time Commissioners, all judges of the Federal Court of Australia: the Hon Justice Susan Kenny, the Hon Justice John Middleton and the Hon Justice Nye Perram. All are experienced intellectual property judges, and Justice Perram was President of the Copyright Tribunal of Australia at the time of the Inquiry.

1.41 In this Inquiry the Advisory Committee also included the Hon Justice David Yates. As well as four Federal Court judges, the Advisory Committee benefited from a

number of senior legal practitioners who have represented all manner of copyright owners and large copyright interests, a former member of the Copyright Tribunal of Australia, two regulatory economists and the Chief Executive of the peak body of copyright owners. The role of the Advisory Committee is to advise on coherence and structure of the ALRC process and recommendations; it does not formulate reform recommendations, and members are invited in their individual capacity. They are explicitly asked not to act in any representative capacity.

1.42 The ALRC acknowledges the contribution made by the part-time Commissioners, Advisory Committee and expert readers in this Inquiry and expresses gratitude to them for voluntarily providing their time and expertise.

Outline of the Report

1.43 Chapter 1 outlines the background to the Inquiry, analyses the scope of the Inquiry as defined by the Terms of Reference, and describes previous and related inquiries. It also describes and comments on the Inquiry process and on the development of the evidence base supporting the law reform response reflected in the recommendations of this Report.

1.44 Chapter 2 identifies and discusses five framing principles, which define the policy settings for this Inquiry.

1.45 Chapter 3 discusses some of the broader context within which the ALRC conducted this Inquiry and comments on the Terms of Reference, drawing out some concerns of stakeholders about the scope of the Inquiry, and identifying aspects of the needs and expectations of Australian business and consumers.

1.46 Chapters 4 and 5 make the case for introducing a broad, flexible exception for fair use into the *Copyright Act*. Chapter 4 locates fair use in Australia's longstanding fair dealing tradition. The move from closed-ended fair dealing to open-ended fair use represents a move from prescriptive categories to a more principled approach. In Chapter 4, the ALRC explains how fair use can encourage public interest and transformative uses, and promote innovation, while at the same time respecting authorship and protecting rights holders' markets.

1.47 Chapter 5 outlines key elements of the recommended fair use exception. These are a non-exhaustive list of four fairness factors, which should be considered in assessing whether use of copyright material is fair use, and a non-exhaustive list of eleven illustrative purposes. It also discusses how the interpretation and application of the fair use exception may be guided by existing Australian case law, other jurisdictions' case law, and the development and use of industry guidelines and protocols. The ALRC also recommends that the existing fair dealing exceptions, as well as broader exceptions for professional advice, be repealed.

1.48 Chapter 6 considers an alternative to an open-ended fair use exception, namely, a new fair dealing exception that consolidates the existing fair dealing exceptions in the *Copyright Act* and introduces new prescribed purposes. The ALRC recommends that, if fair use is not enacted, this new fair dealing exception be introduced.

1.49 Chapter 7 examines 'third party' uses of copyright material, where an unlicensed third party copies or otherwise uses copyright material on behalf of others. These are unlicensed uses to deliver a service, sometimes for profit, in circumstances where the same use by the end user would be permitted under a licence or unremunerated exception. The ALRC concludes that such uses should be considered under the fair use or new fair dealing exceptions, in determining whether the use infringes copyright.

1.50 Chapter 8 discusses statutory licences, which allow for certain uses of copyright material, without the permission of the rights holder, subject to the payment of reasonable remuneration. The ALRC has concluded that there is a continued role for the statutory licences in pts VA, VB and VII div 2 of the *Copyright Act*, but they should be made less prescriptive. Many of the criticisms of the statutory licences are better directed at the scope of unremunerated exceptions, and would be largely addressed by the introduction of fair use.

1.51 The ALRC recommends that a fair use exception should be applied when determining whether quotation infringes copyright and that 'quotation' should be an illustrative purpose in the fair use exception. Chapter 9 considers various uses of copyright material in quotation, and describes examples of quotation that may be covered by fair use but are, in at least some circumstances, not covered by existing fair dealing exceptions. It also explains how the concept of quotation can be expected to be interpreted under a fair use exception.

1.52 In Chapter 10, the ALRC recommends that the existing exceptions for time shifting broadcasts and format shifting other copyright material be repealed. Instead, fair use or the new fair dealing exception should be applied when determining whether a private use infringes copyright. These fairness exceptions are more versatile, and are not confined to technologies that change rapidly. 'Non-commercial private use' should be an illustrative purpose in the fair use exception.

1.53 Incidental or technical uses—such as caching and indexing—are essential to the operation of the internet and other technologies that facilitate lawful access to copyright material. Chapter 11 considers incidental or technical uses of copyright material and data and text mining. The ALRC concludes that current exceptions in the *Copyright Act* are uncertain and do not provide adequate protection for such uses, and should be repealed. The ALRC recommends that such uses should be considered under the fair use exception and that 'incidental technical use' should be an illustrative purpose of fair use. Similarly, the fair use exception should also be applied in determining whether data and text mining constitute copyright infringement.

1.54 Chapter 12 considers uses of copyright material by libraries and archives in the digital environment. The ALRC recommends that 'library and archive use' should be an illustrative purpose of the fair use exception or, if fair use is not implemented, the *Copyright Act* be amended to introduce a new fair dealing exception, including 'library and archive use' as a prescribed purpose. The ALRC also recommends a new preservation exception for libraries and archives that does not limit the number of copies or formats that may be made. As a consequence of the new exception, a number of existing exceptions should be repealed.

1.55 Chapter 13 discusses orphan works—copyright material with no owner that can be identified or located by someone wishing to obtain rights to use the work. The ALRC recommends that the *Copyright Act* be amended to provide that remedies available for copyright infringement be limited where the user has conducted a 'reasonably diligent search' for the copyright owner, and, where possible, has attributed the work to the author. The chapter also discusses options for the establishment of an orphan works or copyright register, which could be the subject of further consideration by the Australian Government.

1.56 Chapter 14 concludes that new exceptions are needed to ensure educational institutions can take full advantage of the wealth of material and new technologies and services now available in a digital age, and that these exceptions should be fair use or the new fair dealing exception. These exceptions would permit some unremunerated use of certain copyright material for educational purposes, without undermining the incentive to create and publish education material. 'Education' should also be included as an illustrative purpose in the fair use exception.

1.57 Chapter 15 considers government use of copyright material and recommends that the current exceptions for parliamentary libraries and judicial proceedings should be retained, and further exceptions for government use added. These new exceptions should cover use for public inquiries, uses where a statute requires public access, and use of material sent to governments in the course of public business. Governments should also be able to access the general fair use exception, and other exceptions in the *Copyright Act*, and exceptions should be available to Commonwealth, state and local governments.

1.58 The *Copyright Act* provides for a statutory licence for institutions assisting people with disability. Chapter 16 examines this licence, which has limited scope, onerous administrative requirements and has not facilitated the establishment of an online repository for people with print disability. The ALRC recommends that access for people with disability should be an illustrative purpose listed in the fair use exception. Many uses for this purpose will be fair, as they are transformative and do not have an impact on the copyright owner's existing market.

1.59 Chapter 17 discusses exceptions for computer programs and for backing-up all types of copyright material. The ALRC concludes that the use of legally-acquired copyright material for the purpose of back-up and data recovery will often be fair use, and should be considered under the fair use exception. There may also be a case for repealing or amending the existing exceptions for computer programs, if fair use is enacted, but further consultation may need to be conducted.

1.60 Chapters 18 and 19 examine exceptions that relate to free-to-air television and radio broadcasting. Chapter 18 examines exceptions that apply to the retransmission of free-to-air broadcasts and whether they are adequate and appropriate in the digital environment. This raises complex questions at the intersection of copyright and communications policy. The ALRC recommends that, in the light of media convergence, the Australian Government should consider whether aspects of the retransmission scheme for free-to-air broadcasts should be repealed.

1.61 Chapter 19 discusses other exceptions that refer to the concept of a 'broadcast' and 'broadcasting'. In a changing media environment, distinctions currently made in copyright law between broadcast and other platforms for communication to the public require justification. Innovation in the digital economy is more likely to be promoted by copyright provisions that are technologically neutral. The ALRC recommends that, in developing media and communications policy, and in responding to media convergence, the Australian Government give further consideration to reform of these broadcast exceptions.

1.62 Chapter 20 discusses 'contracting out'—agreement between owners and users of copyright material that some or all of the statutory exceptions to copyright are not to apply. The ALRC recommends that the *Copyright Act* should not provide any statutory limitations on contracting out of the new fair use exception. However, if the fair use exception is not enacted, limitations on contracting out should apply to the new consolidated fair dealing exception. The ALRC also recommends that, in either case, the *Copyright Act* should provide statutory limitations on contracting out of the libraries and archives exceptions.

2. Framing Principles for Reform

Contents

Summary

2.1 The ALRC has identified five specific framing principles to define the policy settings for this Inquiry. The principles are derived from existing laws, other relevant reviews and government reports, international policy discussions and reviews. They are also principles stakeholders have identified in response to the Issues Paper and Discussion Paper.

2.2 As changes in the context of the digital economy are difficult to anticipate, there is a need for regulation that can be adaptive to changes in the copyright environment. The framing principles allow for flexibility in the application of copyright rules, while being anchored in an understanding of policy goals that can remain more constant over time.

2.3 The principles outlined are not necessarily the only considerations in copyright reform, but they generally accord with other established principles, including those developed for the digital environment in international discussions.

2.4 Submissions to this Inquiry demonstrated that most stakeholders agreed with the framing principles discussed below. However, the application of copyright law and possible reform to copyright law in pursuit of achieving these principles, is highly contested.

Principle 1: Acknowledging and respecting authorship and creation

2.5 In the past, the Australia copyright law focused more on economic interests than moral rights, in contrast to European systems, which paid more attention to the personal rights of authors and creators. Moral rights were introduced into Australian copyright law in December 2000, with a scheme allowing for the right of attribution—

to be named as author or creator—and the right of integrity—to prevent the alteration or other treatment of work in a way that affects the author's reputation.[1] A number of stakeholders consider recognition of moral rights and in particular recognition of 'authorship' as being the paramount consideration in any copyright discussion.[2]

2.6 The ALRC recommendations for reform to copyright law should be framed in a way that acknowledges and respects the rights of authors, artists and other creators. In this Report, the recommendations are tested against this and the other framing principles. Part of an assessment of the fairness of copyright exceptions includes the effect on authors and creators, including their moral rights and cultural considerations.

2.7 Moral rights and cultural considerations, in particular issues relating to Indigenous culture[3] and cultural practices, need always to be considered, alongside economic rights.[4] All reform recommended in this Report is consistent with the requirements of Indigenous artists, custodians and communities as they can incorporate, as appropriate, Indigenous cultural protocols.[5] This is particularly relevant in the context of digitisation of individual, family and community material.[6]

2.8 An important aspect to be made explicit is the general principle of the rights of authors and makers of copyright material to determine how their works are exploited 'while at the same time acknowledging the rights of consumers to engage with content in a manner which does not adversely impact the rights of creators'.[7]

2.9 Regardless of the status of economic infringement of rights, 'a creator should always be able to assert their moral rights and seek removal from the internet of derivative works considered to violate these rights'.[8]

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1 *Copyright Amendment (Moral Rights) Act 2000* (Cth).

2 See, eg, Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

3 See T Janke and R Quiggin, *Indigenous Culture and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006* (2006), prepared for the Aboriginal and Torres Strait Islander Arts Board and Australia Council.

4 The Australia Council considers 'the protection of moral rights and economic incentives for the creation of work to be paramount considerations for copyright reform': Australia Council for the Arts, *Submission 860*.

5 Ibid; AIATSIS, *Submission 762*; Viscopy Board, *Submission 638*.

6 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): ' the digitisation and/or dissemination of "traditional cultural expressions", including secret and sacred Aboriginal cultural heritage by museums, archives or other cultural institutions, should be subject to the free, prior and informed consent of Indigenous artists, custodians or communities': Arts Law Centre of Australia, *Submission 171*; K Bowrey, *Submission 94*. See also J Anderson, 'Anxieties of Authorship in the Colonial Archive' in C Chris and D Gerstner (eds), *Media Authorship* (forthcoming 2013); T Janke, *Ethical Protocols from Deepening Histories of Place: Exploring Indigenous Landscapes of National and International Significance* (2013) <www.deepeninghistories.anu.edu.au> at 10 April 2013.

7 State Library of New South Wales, *Submission 168*.

8 Australian Major Performing Arts Group, *Submission 212*.

2.10 Some stakeholders preferred that the term 'rights holders' not be used in a manner which obscures the importance of authorship and creation of copyright material.[9]

2.11 'Authorship' is not to be interpreted in a manner that is too narrow or culturally specific. It needs to be noted that the concept of the author is specifically left undefined in the *Copyright Act*, allowing for an enormous range of expressive and pedestrian works to be encompassed.

2.12 On a point of terminology, one stakeholder pointed out that the *Copyright Act* does not refer to 'creators', but rather to 'authors' of works and 'makers' of other subject matter, although the term 'author' is the only expression used in the relevant international conventions, such as the *Berne Convention* and the World Intellectual Property Organization Copyright Treaty.[10] In this Report 'creator' is used at times as a generic term referring to authors or makers of copyright material.

2.13 Moral rights were formally incorporated into Australian copyright law in 2000.[11] These are personal rights centred around the author or creator of material and are independent of the author's economic rights. Consideration of moral rights is additional to and separate from consideration of economic rights, although may be a factor is assessing the fairness of the use of copyright material.[12]

2.14 Questions of authorship, moral and cultural rights are also discussed under the next framing principle.

Principle 2: Maintaining incentives for creation and dissemination

2.15 The Terms of Reference for this Inquiry refer to 'the objective of copyright law in providing an incentive to create and disseminate original copyright materials'. The ALRC considers that reform proposals in this Report recognise and facilitate this objective.

2.16 This principle is taken to mean that copyright reform should ensure the maintenance, and indeed, enhancement of incentives to create works and other subject matter, and to allow the dissemination of that material. In many submissions, ranked equally with (or above) the recognition of authorship and creation, was recognition of copyright as a form of property—specifically property that provides remuneration as a critical component of ongoing creative effort.[13]

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9 Law Council of Australia, *Submission 263*. The Copyright Review Committee (Ireland) referred to authors and rights holders together, albeit noting that the 'situation of the individual author or artist is a dominant trope in copyright lore': Copyright Review Committee (Ireland), *Copyright and Innovation*, Consultation Paper (2012), 33.

10 Law Council of Australia, *Submission 263*.

11 *Copyright Act 1968* (Cth) Pt IX.

12 See further Ch 5.

13 'The purpose of copyright law is to provide incentive for creation of works for the benefit of society as a whole, and it is essential that any reform process takes account of that fact': APRA/AMCOS, *Submission 247*; Australian Industry Group, *Submission 179*. See also News Corp Australia, *Submission 746*; Cricket Australia, *Submission 700*.

2.17 The objective of Australia's 2013 *Cultural Policy* is to increase the social and economic dividend from the arts, culture and the creative industries. This ALRC Inquiry is referred to in the Cultural Policy as being:

> designed to ensure Australian copyright law continues to provide incentives for investment in innovation and content in a digital environment, while balancing the need to allow the appropriate use of both Australian and international content.[14]

2.18 In this Inquiry, most submissions espoused the 'innovation incentive' theory of copyright but views differed as to how far the incentive reached. The Centre of Excellence for Creative Industries and Innovation noted, for example, that 'the evidence points to the need for caution in assessing claims that copyright as it currently operates is central to the ability of creators to earn a living from their creative works'.[15]

2.19 However, it is generally accepted that: 'the incentive theory (for creativity and innovation) underlies and continues to drive copyright law'.[16] Universities Australia submitted that the guiding principle for this Inquiry should be 'to ensure that copyright law does not result in over regulation of activities that do not prejudice the central objective of copyright, namely the provision of incentives to creators'.[17]

2.20 Historically, copyright has been included among laws that 'granted property rights in mental labour'.[18] In this tradition, Australian copyright law has been regarded primarily as conferring economic rights focusing on the protection of commercial activities designed to exploit material for profit.[19] Indeed, the *Copyright Act* refers to copyright as 'personal property'.[20]

2.21 It is generally, although not universally,[21] assumed that creation of personal property underlies the incentive to creation of copyright material.[22] While copyright ownership does play a role in the incentives of commercial producers of copyright

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14 Australian Government, *Creative Australia: National Cultural Policy* (2013), [7.3.2]. News Corp submitted that the ALRC needs to fully appreciate 'the importance of legal protections for copyright and intellectual property encompassed in Government policy': News Corp Australia, *Submission 746*.

15 Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

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

17 Universities Australia, *Submission 246*. See also Australia Council for the Arts, *Submission 860*.

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

19 *Copyright Act 1968* (Cth) s 196(1). 'IP laws create property rights and the goods and services produced using IP rights compete in the market place with other goods and services': ACCC, *Submission 165*. See also A Stewart, P Griffith and J Bannister, *Intellectual Property in Australia* (4th ed, 2010), [1.26].

20 *Copyright Act 1968* (Cth) s 196(1).

21 See NSW Young Lawyers, *Submission 195*.

22 'Today, this is the standard economic model of copyright law, whereby copyright provides an economic incentive for the creation and distribution of original works of authorship': J Litman, *Digital Copyright* (2001), 80. There is a body of commentary which doubts the link between copyright as a form of property as an incentive to create, and doubts the 'blind belief in the necessity of copyright to power activity': G Moody, *European Commission Meeting on Copyright* <http://blogs.computerworlduk.com/open-enterprise/2012/12/european-commission-meeting-on-copyright/index.htm> at 10 April 2013. See also W Patry, *How to Fix Copyright Law* (2011), 12; N Weinstock Netanel, 'Copyright and Democratic Civil Society' (1996) 106 *Yale Law Journal* 283. Nevertheless, for the purposes of this Inquiry, stakeholders have confirmed this principle as one fundamental to Australian copyright law.

works, who provide employment for creators, [23] 'the extent of this role has not been extensively studied and may be less than is commonly thought'.[24]

2.22 The general proposition, however, is: 'the purpose of granting rights of property in the products of creative labour is to reward and encourage creativity'.[25] Indeed, the 'objectives of copyright regulation are to support an environment that promotes the creation of new content for the benefit of Australian society as a whole'.[26]

2.23 The proprietary analysis was expressed by a number of stakeholders as a 'need to correctly frame the discussion as one sensitive to the notion of property', that is, the starting point in a discussion about copyright reform should not be 'that consumers are entitled to use and exploit the products or property of another person who has privately invested in them'.[27]

2.24 It has been said that to talk of copyright as property is to employ a different 'dominant metaphor' than the traditional 'bargain between authors and the public'.[28] However, 'this proprietary approach' is seen as the basis of encouragement to create copyright material, albeit that motivation will 'vary from industry to industry'.[29]

2.25 While the link between encouraging creativity and ownership of property rights is not inevitable, most stakeholders believe the property rights created by Australian copyright legislation provide the major incentive to creativity and production of new material. The ALRC considers that maintaining incentives for creation through appropriate recognition of property rights in copyright material is an important aspect of copyright reform.

2.26 Some submissions emphasised that creation without dissemination is of little value, Pandora, for example, submitted:

> the financial return to creators and rights owners only comes from distribution through successful and viable businesses—the benefits for creators and rights owners cannot sensibly be considered in isolation from the need to also deliver a commercial benefit to those companies investing in making the creators' works commercially available. As such, we consider that there is a pressing need to also deliver a commercial benefit to those companies investing in making the creators' works commercially available.[30]

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23 News Limited, *Submission 224*.

24 Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208* citing J Cohen, 'Copyright as Property in the Post-Industrial Economy' (2011) *Wisconsin Law Review* 141.

25 APRA/AMCOS, *Submission 247*. See also International Publishers Association, *Submission 256*; Telstra Corporation Limited, *Submission 222*; ABC, *Submission 210*; Australian Industry Group, *Submission 179*.

26 Copyright Agency/Viscopy, *Submission 249*. See also News Limited, *Submission 224*.

27 APRA/AMCOS, *Submission 247*. See also Walker Books Australia, *Submission 144*.

28 J Litman, *Digital Copyright* (2001), 81.

29 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

30 Pandora Media Inc, *Submission 329*.

2.27 In similar vein other submissions emphasised the importance of intermediaries in that promotion of the continued production of original copyright material was significantly due to 'industry's role in the development, discovery and dissemination of scholarly communication that fuels innovation, job creation, and economic growth'.[31]

2.28 The interests of creators and disseminators are not always the same. Professor Kathy Bowrey noted, 'care needs to be taken not to conflate the position of original content creators with that of copyright owners'.[32]

2.29 It was argued that the intermediaries involved in the dissemination of cultural products (such as record labels and music publishers) engage in 'commercial cultural production', which is less desirable than 'individual and independent cultural production' and furthermore 'potentially consumes a much larger proportion of the revenue from copyright protections than goes towards the originators of intellectual property'.[33]

2.30 The Australian Society of Authors describes publishers and intermediaries as 'part of the cost of business' for an author, being the 'margin that goes to publishers where they act as a form of agent for the author in control, management and exploitation of their copyright'.[34]

2.31 However, in this Inquiry, the ALRC notes that the arguments against reform advanced by disseminators and intermediaries are also adopted by, or on behalf of, creators.[35] One such argument is that introducing fair use to Australian copyright law 'will impact negatively on artists' income'.[36]

2.32 Research shows that many creators 'earn very low incomes with considerable numbers living below the poverty line'.[37] In fact, actual remuneration to creators is 'negotiated outside the copyright statute' and is 'much more a contractual arrangement issue than a copyright issue'.[38] The alleged threat to creators, culture and creativity from copyright reform is not supported by evidence presented to the ALRC.

2.33 An alleged 'pro-author' approach that sees a narrow role for unremunerated exceptions may be said to benefit existing rights holders, but it may also hinder the activities of new creators, for example, by limiting the scope of permissible derivative works, or increasing licensing costs. Indeed, it has been argued that exceptions should

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31 International Association of Scientific Technical and Medical Publishers, *Submission 560* citing News Limited, *Submission 224*.

32 K Bowrey, *Submission 94*.

33 Arts Law Centre of Australia, *Submission 706*, Citing D Throsby and A Zednik, *Employment Output for the Cultural Industries* (2007), Macquarie Economics Research Papers No 5.

34 Australian Society of Authors, *Submission 712*.

35 See, for example, Copyright Agency, *Submission 727*; Australian Society of Authors, *Submission 712*;Arts Law Centre of Australia, *Submission 706*; Australian Copyright Council, *Submission 654*.

36 Arts Law Centre of Australia, *Submission 706*.

37 K Bowrey, *Submission 94* citing D Throsby and A Zednik, 'Multiple Job-holding and Artistic Careers: Some Empirical Evidence' (2010) 20(1) *Cultural Trends* 9.

38 Ericsson, *Submission 597*.

be seen as protective of authors and authorship, rather than antithetical to these concepts.[39]

2.34 No property rights are ever completely unconstrained and it was noted in the UK Hargreaves Review that property principles cannot alone form the basis for copyright law as protection of creator's rights may today be 'obstructing innovation and economic growth'.[40] The ACCC similarly points out that, paradoxically, too much copyright protection can reduce the number of works created; for example if materials are prevented from entering the public domain, where this would be appropriate.[41]

2.35 The ACCC pointed to the important role that copyright plays in 'establishing incentives for creation of copyright material' but also noted the costs associated with placing too much weight on incentives, resulting in an inefficient copyright system 'which could place Australia at an economic disadvantage in relation to the copyright industries as compared with countries that have a more efficient system'.[42]

2.36 The ACCC considers that competition in markets for copyright material will generally maintain incentives for the wide dissemination and efficient use of copyright material and that 'there may be significant costs for economic efficiency and consumer welfare if protections for IP rights are too extensive and not balanced by appropriate exceptions'.[43]

2.37 An aspect of recognising that copyright reform should do nothing to disturb innovation and creativity is understanding what does, or does not, impose 'substantial harm' to the incentives of copyright owners.[44] It is quite clear that a great many uses of copyright material would not harm the incentive to create: 'copyright treats and protects equally works of economic value as well as those of no economic value'.[45]

2.38 The ACCC considers that there are some uses of copyright material that do not necessarily result in extraction of additional value, and may even work against benefits flowing to the copyright owner or rights holder, while at the same time exposing users to possible infringement proceedings. The ACCC submitted that in such circumstances an unintended effect of disrupting efficiency in the digital economy could be occurring.[46] These circumstances include 'incidental' use of copyright material,[47]

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39 E Hudson, 'Implementing Fair Use in Copyright Law: Lessons From Australia' (2013) 25 *Intellectual Property Journal* 201; L Bently, 'R v The Author: From Death Penalty to Community Service' (2008) 32 *Columbia Journal of Law and the Arts* 1.

40 Cited in NSW Young Lawyers, *Submission 195*. B Scott submits that 'the only people I have ever encountered who have discussed copyright as property are those with a vested interest in that characterisation': B Scott, *Submission 166*.

41 ACCC, *Submission 165*.

42 Ibid.

43 ACCC, *Submission 658*.

44 N Suzor, *Submission 172*.

45 Australian War Memorial, *Submission 720*.

46 ACCC, *Submission 165*.

47 See Ch 11.

private use,[48] and some 'unauthorised copying' as much of this activity tends to boost the demand for copyright products.[49]

2.39 There is an increasing weight of research indicating that 'new technologies and innovations have been a key industry growth engine for the creative sector, as they have resulted in increased market reach and consumption opportunities, and introduced new types of creative products that all contribute to increased consumer spending'.[50]

2.40 Reform should encourage innovation and creation to enhance the participation of Australian content creators in Australian and international markets. Incentives to creation and dissemination of copyright material will be enhanced by the introduction of flexible and adaptive copyright rules, as recommended by the ALRC.

Principle 3: Promoting fair access to content

2.41 The Terms of Reference refer to the 'general interest of Australians to access, use and interact with content in the advancement of education, research and culture'. The principles of access, use and interaction with content are to be considered on the basis that this is done in a manner which is fair to copyright creators and owners, and intermediaries controlling the rights.

2.42 There are important economic and social benefits in promoting access to information. Stakeholders articulated different aspects of the public interest including: advancing education and research;[51] developing and supporting culture; public participation in decision making;[52] and promoting a transparent and accountable democracy.[53]

> According to review after report after second reading speech, Australian copyright law exists to serve the public interest in both the creation and the dissemination of new works of knowledge and culture.[54]

2.43 A fundamental value in Australia is freedom of expression[55] and this is inherent in any principle concerning dissemination of information.[56] Furthermore, it is essential to recognise that 'the digital economy is not measured purely by financial indicators, but also that cultural benefits play a significant part in the digital economy'.[57] A wide

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48 See Ch 10.

49 UK Strategic Advisory Board for Intellectual Property, *The Economics of Copyright and Digitisation: A report on the literature and need for further research* (2010), 31 and PricewaterhouseCoopers, *Outlook: Australian Entertainment and Media 2012–2016* (2013), p 147.

50 Ericsson, *The Tide is Turning: Now is the Time to Reform Copyright for the Digital Era* (2013) 3.

51 ADA and ALCC, *Submission 213*; Universities Australia, *Submission 246*.

52 Art Gallery of New South Wales (AGNSW), *Submission 111*.

53 National Archives of Australia, *Submission 155*; State Records NSW, *Submission 160*.

54 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

55 As reflected in the *International Covenant on Civil and Political Rights*, 16 December 1966, ATS 23 (entered into force on 23 March 1976), article 19 (2).

56 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; News Limited, *Submission 224*; ABC, *Submission 210*; Civil Liberties Australia, *Submission 139*.

57 ABC, *Submission 210*; see also Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*; Arts Tasmania, *Submission 150*; National Gallery of Victoria, *Submission 142*; K Bowrey, *Submission 94*.

variety of content and platforms for delivering content 'services our pluralistic society and allows for the ability for niche groups to express themselves through media and consumer media'.[58]

2.44 A number of stakeholders pointed out that availability of content is vitally important to creation[59] of new copyright material:

> To fulfil its public policy role, copyright needs to be consistent with, and promote, relevant individual rights, in particular the right to freedom of expression, as well as the public interest in ensuring the importance of education and research, and in safeguarding the functioning of public institutions which promote preservation of and public access to knowledge and culture, such as libraries, museums, galleries and archives ... Creation depends on access to existing cultural material, education, and freedom to express ourselves creatively.[60]

2.45 Some stakeholders refer to a concept of 'users rights', the view being that these are in fact 'a central aspect of copyright'.[61] In economic terms, 'the exclusive rights that copyright law grants to encourage creativity can impose costs in terms of reduced access and cumulative creativity. The exceptions and limitations to copyright can be understood as attempts to contain these costs and maintain an overall balance in copyright policy'.[62]

2.46 In line with the principle of fair access to material, one submission urged as a leading principle that copyright law should 'focus on the end-user and their ability to access copyright material and not be used to unreasonably restrict the ability of end-users to view or use material that they otherwise have a legitimate right to view or use'.[63]

2.47 However, allowing access on terms decided by the content owner is also considered fundamental by many stakeholders, even in circumstances 'which may not be wide' and to some may not appear 'fair' or 'free'.[64]

2.48 In this Inquiry the ALRC has been made aware of the introduction of many innovative services and licensing solutions to making content available to consumers. The music industry in particular 'has responded to the developing market and related services with innovative licensing models that have resulted in increased access to music for consumers'.[65] APRA/AMCOS pointed to the dozen or so digital music

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58 AIMIA Digital Policy Group, *Submission 261*.

59 See, eg, ADA and ALCC, *Submission 213*: 'Our understanding of "creativity" does not merely encompass new copyright works, but new ways of accessing and engaging with content'. See also Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

60 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*. See also R Xavier, *Submission 531*; N Suzor, *Submission 172*.

61 Universities Australia, *Submission 246*, citing R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 279.

62 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 42.

63 Optus, *Submission 183*. See also Civil Liberties Australia, *Submission 139*.

64 News Limited, *Submission 224*.

65 Music Victoria, *Submission 771*.

services which have been launched in Australia almost contemporaneously with, or even ahead of overseas launch, since 2010.[66]

2.49 Innovation in the licensed delivery of content has also occurred in the games[67] and film[68] industries, and under statutory licensing for educational use.[69] The fear that market-based solutions to providing access will be undermined by fair use is discussed below in this Report.[70]

2.50 Inherent in the notion of 'fair access' is providing appropriate remuneration to copyright owners[71] and attribution and other 'key social norms' need to be observed.[72] The National Archives of Australia submitted that:

> in addressing fairness, it is relevant to consider that much copyright material held in archives, and especially in government archives, could be disseminated widely to the great benefit of the community and with no real harm to the commercial interests of the copyright owners.[73]

2.51 A variety of views is evident in determining the basis of appropriate remuneration. Understandably, rights owners organisations, on behalf of their constituents, argued for remuneration attaching to whatever is determined to be within the copyright owner's exclusive rights. This raises questions about who should bear the cost of equitable remuneration: 'should the cost be borne by the user, or, in effect, the content creator'.[74]

2.52 A key issue in this Inquiry is whether unremunerated use exceptions should apply 'if there is a licensing solution' applicable to the user. On one view, 'in principle, no exception should allow a use that a user can make under a licensing solution available to them'.[75] This approach assumes that the content creator is inevitably de-incentivised by not being paid, and that there is no middle ground between 'someone paying for it', either the creator or the user. This is a different question from 'what should be paid for, and what should not,' which is 'at the heart of all this'.[76]

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66 APRA/AMCOS, *Submission 247*. See also Australian Independent Record Labels Association, *Submission 752*; ARIA, *Submission 241*. Note, however, that Pandora submitted that Australia is regularly behind the rest of the developed world in gaining access to music subscription services: Pandora Media Inc, *Submission 329*.

67 iGEA, *Submission 192*.

68 Australian Film/TV Bodies, *Submission 205*; Australian Film/TV Bodies, *Submission 739*.

69 See, eg, the Clickview Service licensed by Screenrights: Screenrights, *Submission 215*; Pearson Australia, *Submission 645*.

70 See Ch 4.

71 Music Council of Australia, *Submission 269*; Copyright Agency/Viscopy, *Submission 249*; News Limited, *Submission 224*; iGEA, *Submission 192*; ACIG, *Submission 190*.

72 News Limited, *Submission 224*. See also Australia Council for the Arts, *Submission 860*.

73 National Archives of Australia, *Submission 155*.

74 Copyright Agency/Viscopy, *Submission 249* (with respect to the statutory licensing scheme for various cultural institutions).

75 Ibid.

76 P Banki, 'Copyright and the Digital Economy: So Many Issues; So Little Time' (2012) 30 *Copyright Reporter* 66, 67.

2.53 In this Report the ALRC considers the interests of Australians in availability of content in the digital environment and makes recommendations designed to achieve fair access to copyright material, taking into account social and economic benefits for all stakeholders.

Principle 4: Providing rules that are flexible, clear and adaptive

2.54 The Terms of Reference refer to the emergence of 'new digital technologies' as relevant in copyright reform. Stakeholders strongly endorsed the principle that copyright law should be responsive to new technologies, platforms and services and be drafted to recognise that the operation of the law is fundamentally affected by technological developments, which allow copyright material to be used in new ways.[77]

2.55 Adaptability and technological neutrality as a framing principle is to be weighed up against other objectives. While not an end in itself, the ALRC considers technological neutrality should be a highly relevant consideration. Stakeholders note that it is 'an important principle' as long as benefits exceed costs and the aim of neutrality does not override the rights of creators and owners of copyright material.[78]

2.56 As far as possible, the *Copyright Act* should be technology-neutral and predictable in application in such a way as to minimise and avoid unnecessary obstacles to an efficient market, and avoid transaction costs. To this end, the ACCC stated that 'reforms should be in pursuit of economic efficiency'.[79] However, the ACCC acknowledged that economic efficiency is only one facet of the broader policy and legal framework and other policy considerations that need to be taken into account.

2.57 Some stakeholders submitted that the existing legislation is increasingly imposing costs through being out of date and unsuited to the digital environment. For example, rapid change in technology and consumer behaviour is creating a 'growing rift between platform-specific provisions of the *Copyright Act* and the ways in which Australians are increasingly using copyright materials'.[80] The Australian Interactive Media Industry Association submitted that, despite all the opportunity offered by the digital economy, 'the *Copyright Act* is too technology specific and inflexible and as a result is unable to support today's and tomorrow's innovations'.[81]

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77 See, eg, Internet Industry Association, *Submission 744*; ADA and ALCC, *Submission 586*; ADA and ALCC, *Submission 213*; Law Institute of Victoria, *Submission 198*; Australian Industry Group, *Submission 179*; ACCC, *Submission 165*; Ericsson, *Submission 151*; Commercial Radio Australia, *Submission 132*; eBay, *Submission 93*. The Law Council submitted that 'a guiding principle of exceptions reform should be that stated in the Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999: ensuring that the technical processes which form the basis of the operation of new technologies such as the Internet are not jeopardised': Law Council of Australia, *Submission 263*.

78 Australian Copyright Council, *Submission 219*.

79 ACCC, *Submission 165*.

80 ABC, *Submission 210*.

81 AIMIA Digital Policy Group, *Submission 261*.

2.58 In a converged media environment, where a multitude of different technologies can be used to create and distribute content, it is imperative that regulation does not restrict or impede technological innovation and investment because of artificial and outdated technological limitations.[82] It is 'absolutely critical to our success that the Act operates effectively in a converged environment'.[83]

2.59 The desirability of technological neutrality in copyright reform and, inherent in this concept, notions of simplicity and accessibility to the law has been recognised in previous reform discussions.[84] It is still a concern: 'The complexity of existing copyright laws makes it really difficult to innovate with content'.[85]

2.60 Technological neutrality is regarded as an important policy basis underpinning reform to copyright law at the international level[86] and indeed, has motivated much review and some reform in Australia.[87] However, technology-neutral law is not necessarily simple to draft,[88] and drafting laws of enduring relevance in the face of changing technology may be a good concept but difficult to achieve in practice. Even attempting technology-neutral law may enshrine 'issues that are peculiar to this point in time, thereby stifling incentives for copyright owners to develop new business models'.[89]

2.61 While copyright law needs to be able to respond to changes in technology, consumer demand and markets, it also needs to have a degree of predictability to ensure sufficient certainty as to the existence of rights and the permissible use of copyright materials, leading to minimal transaction costs for owners and users and avoiding uncertainty and litigation. Uncertainty is created by definitions that become redundant or differentiate between subject matter or rights holders based on technology rather than underlying principle. As noted by the Copyright Review Committee (Ireland) in its consultation paper:

> If copyright law were unclear, or if there were widespread misunderstanding about its scope, then this would certainly create barriers to innovation. Moreover, as has often been observed, predictions are difficult, especially about the future. Hence, as many of the submissions emphasised, it is important that copyright law be as technology-neutral as possible. It is equally as important that it be capable either of adapting or of

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82 Google, *Submission 217*. 'The *Copyright Act* should not seek to draw distinctions between uses of copyright material merely because it is accessed via one technology over another. The underlying technology should be agnostic in defining whether a right exists to use or not use material. In any event, in a converged environment the differences between technologies are becoming increasingly blurred and technological boundaries are harder to define': Optus, *Submission 183*. See also eBay, *Submission 93*.

83 Foxtel, *Submission 245*.

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

85 ABC, *Submission 210*.

86 iiNet Limited, *Submission 186* citing F Gurry, *Keynote Speech at Blue Sky Conference: Future Directions in Copyright Law* (2011) <www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html> at 29 May 2012.

87 See, eg, the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) and Australian Copyright Council, *Submission 219*.

88 See Cyberspace Law and Policy Centre, *Submission 201*.

89 Australian Copyright Council, *Submission 219*.

> being easily adapted to unforeseen technological innovations. These are standards by which to judge both existing copyright law and any possible amendments.[90]

2.62 Stakeholders also strongly argued that 'reform should not distinguish between technologies but should instead focus on the intention or purpose for which activities are undertaken.[91] Copyright should not be dictating the direction of technological innovation or hampering the development of more efficient systems.[92]

2.63 The recommendations for reform in this Report are intended to enhance the flexibility and coherence of Australian copyright law, within the context of considering how copyright rules impact on those affected and more broadly within the Australian community.

Principle 5: Providing rules consistent with international obligations

2.64 Australia is bound by treaty obligations requiring the protection of copyright, notably under the *Berne Convention*.[93] There is also a direct link between intellectual property law and international trade obligations—the explicit basis for the TRIPs Agreement.[94] Alongside multilateral harmonisation of copyright law is an emerging environment of bilateral trade agreements[95] and negotiations. The Terms of Reference refer to 'having regard to Australia's international obligations, international developments and previous copyright reviews'.

2.65 As the Copyright Law Review Committee observed:

> The permissible scope of any statutory exceptions to those rights must also be determined by reference to the exceptions allowed for in those international agreements.[96]

2.66 A number of these agreements contain provisions which 'delineate the acceptable contours'[97] of any limitations or unremunerated exceptions.[98] The ALRC is mindful that its proposals for new copyright exceptions or amendments to existing exceptions must be consistent with the three-step test of the *Berne Convention*.[99]

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90 Copyright Review Committee (Ireland), *Copyright and Innovation*, Consultation Paper (2012).
91 Telstra Corporation Limited, *Submission 222*.
92 ADA and ALCC, *Submission 213*; Grey Literature Strategies Research Project, *Submission 250*.
93 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).
94 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, ATS 38 (entered into force on 1 January 1995).
95 For example *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005).
96 Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [B.1].
97 E Hudson, 'Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia', *Thesis*, University of Melbourne, 2011, 21.
98 See Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [B.5], [B.11], [B.20]–[B.22], [B.25], [B.28].
99 See Ch 4.

2.67 International consistency is a major factor in 'allowing Australian businesses to participate in global activities and industries; and Australian consumers to benefit from use of those global activities and industries'.[100] Australia needs to ensure that our copyright laws harmonise with those of our trading partners to facilitate export and import of copyright material.[101] For example, difficulties in the lack of reciprocity with regard to rights for foreign film directors means that Australian film directors are unable to benefit from certain collecting schemes in other countries.[102]

2.68 One stakeholder submitted that: 'key elements of Australia's international reciprocal agreements are overlooked in the transactional models available ... many collection societies will boast about their 'impressive' income to administrative expense ratios, but there is near silence on the accuracy of repatriation'.[103]

2.69 One aspect of international consistency, which many stakeholders commented on, was that 'all free exceptions must be viewed from within the prism of our international treaty obligations',[104] in particular the 'three-step test' from the *Berne Convention*. The ALRC does not consider the three-step test to be itself a 'framing principle'[105] but it is said to be 'the central plank underlying exceptions to copyright in international law'.[106]

2.70 Some submissions raised the three-step test as an impediment to introducing reform into Australian copyright law. Others pointed out that focusing on the three-step test should not be at the expense of other important international instruments supporting human rights, the development of science and culture and freedom of expression.[107]

2.71 The ALRC considers that proposals made in this Report are consistent with Australia's international obligations. However, this Inquiry may also provide an opportunity for suggesting policy parameters within which future international negotiations may take place.[108] This might include an interpretation of the three-step test in the *Berne Convention* which allows for greater flexibility in the 'general interest of Australians to access, use and interact with content in the advancement of education,

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100 Optus, *Submission 183*.

101 See further National Impact Analysis, *Regulation Impact Statement Australia-United States Free Trade Agreement* (2004), 13.

102 Australian Directors Guild, *Submission 226*.

103 Nightlife, *Submission 657*.

104 Screenrights, *Submission 215*; 'Australia's international treaty obligations must be the starting point for any consideration of copyright law and policy': APRA/AMCOS, *Submission 247*.

105 Music Rights Australia Pty Ltd, *Submission 191*; Australian Copyright Council, *Submission 219*.

106 Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*. See also Pearson Australia/Penguin, *Submission 220*; Australian Film/TV Bodies, *Submission 205*; Motion Picture Association of America Inc, *Submission 197*.

107 Civil Liberties Australia, *Submission 139*.

108 This point has been made with respect to a review of patent extensions for pharmaceuticals: Australian Government, *Pharmaceutical Patents Review: Draft Report* (2013). See also Civil Liberties Australia, *Submission 139*.

research and culture', as set out in the Terms of Reference for this Inquiry.[109] As the UK Government has noted in response to the Hargreaves Review:[110]

> Having accepted the general case for broader copyright exceptions within the existing EU framework, the UK will be in a stronger position to argue that other flexibilities are needed now and in the future.[111]

109 See further Ch 4.
110 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).
111 UK Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011), 8.

3. Copyright Reform in Context

Contents

Summary

3.1 This chapter discusses some of the broader context within which the ALRC is conducting this Inquiry and comments on the Terms of Reference, drawing out some concerns of stakeholders and identifying aspects of the needs and expectations of Australian business and consumers. This will set the scene for the case for fair use, discussed in Chapter 4.

The concept of the digital economy

3.2 The Terms of Reference for this Inquiry 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'.

3.3 The digital economy has been defined 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'.[1] It is not separate from the general economy, and is intrinsic not only to commercial transactions but also to education, health services, social services, paid and unpaid work.[2]

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

2 National Library of Australia, *Submission 218*.

3.4 Australia has made a commitment to becoming a leading digital economy.[3] Digital technology, including search functions, cloud-based solutions and other digital platforms, provides savings and efficiencies for individuals, businesses and governments, increasing wealth in real terms and driving further economic growth.[4] Stakeholders generally agreed that 'participation in the digital economy is likely to be a critical source of innovation for Australian firms and consumers'.[5]

3.5 A Department of Innovation, Industry, Science and Research Report has called for Australia to remove barriers to digital content and service uptake, or 'risk falling behind the rest of the world'.[6]

3.6 It is not possible to anticipate what new technologies will emerge over coming years and decades. What is clear is that copyright will have a direct and indirect impact. Copyright law is an important part of Australia's digital infrastructure, and has a profound influence in 'regulating access to education, culture, social interaction, commercial innovation and the provision of essential government services'.[7]

3.7 Copyright law requires reform in order to facilitate the commercial and cultural opportunities of the digital economy. Universities Australia submitted:

> It is therefore imperative that Australia puts in place an intellectual property framework that supports rather than hinders investment in the digital economy and that is sufficiently flexible to provide breathing space for the research and development that is essential to innovation without the need for constant readjustment.[8]

3.8 Economists have warned of the

> moral hazard effect on incumbent firms; that copyright in itself can create an incentive for existing industries to rely on law enforcement to protect their business model, rather than to adopt new technologies.[9]

3.9 The recommendations in the Report are aimed at equipping Australian copyright law to serve more effectively the needs of Australia and Australians in the digital environment.

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3 Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions* (2009), 2. See also K Henry, 'The Shape of Things to Come: Long Run Forces Affecting the Australian Economy in Coming Decades' (Address to Queensland University of Technology Business Leaders' Forum, Brisbane, 22 October 2009), cited in ADA and ALCC, *Submission 213*.

4 AIMIA Digital Policy Group, *Submission 261*. See also AIIA, *Submission 211*.

5 Australian Industry Group, *Submission 179*. Google submitted that 'Copyright needs to be "future-proofed", making it more flexible and technology neutral. This will generate an economic benefit of $600m per annum in Australia': Google, *Submission 217*.

6 Department of Innovation, Industry, Science and Research (DISSR) (2011), *Australian Innovation System Report* 2011, 3, referred to in Australian Industry Group, *Submission 179*.

7 ADA and ALCC, *Submission 213*. See also Foxtel, *Submission 245*, Ericsson, *Submission 151*.

8 Universities Australia, *Submission 246*. See also Google, *Submission 217*; Powerhouse Museum, *Submission 137*; Pandora Media Inc, *Submission 104*.

9 R Towse, 'What We know, What We Don't Know and What Policy Makers Would Like Us to Know About the Economics of Copyright' 8(2) *Review of Economic Research of Copyright Issues* 101, cited in Ericsson, *Submission 151*. See also Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

Innovation and productivity

3.10 Copyright is an essential aspect of innovation in the digital environment. Productivity is lifted by innovation, which includes 'creation of new copyright works and innovation in legal access, distribution, storage and consumption of those works',[10] as well as 'new ways of producing or distributing goods and services' or new ways of managing existing processes to do so.[11]

3.11 Copyright law is fundamentally concerned with motivating the creation and distribution of new copyright material, by giving rights holders a limited monopoly over the use of their material. It is generally accepted that without this monopoly, there would be fewer new works, and less innovation.

3.12 However, innovation generally thrives where there is competition; therefore, by limiting the copyright monopoly, *exceptions* can also increase competition and stimulate innovation. Reforming copyright exceptions may therefore be seen as an attempt to find the optimum point at which creation and innovation is maximised. This is an elusive point, but it is important to recognise the conflict and the trade-offs.

3.13 Douglas Lichtman has written that the 'central challenge facing copyright law over many years to come' will be 'the difficulty of balancing copyright's role in encouraging authors with its possibly unintentional but also unavoidable role in influencing the development of related technologies.' There is 'no formula for any of this, and a purely economic approach fails for lack of data,' he writes. However:

> The key to getting the analysis right is to honestly account for the trade-offs between these two categories of innovation, recognizing three fundamental truths: society wants both, authors provide input that makes many of the relevant technologies more valuable, and technological advancement, in turn, typically makes copyrighted work more valuable too.[12]

3.14 The Business Council of Australia has stated:

> We need to have the right innovation systems and environment in place to ensure that creative people and businesses in Australia are allowed to thrive and create value from new ways of doing things ... A successful innovation system is one that is robust, adaptable and capable of evolving over time.[13]

3.15 In the European context, Professor Ian Hargreaves has written that:

> A mechanism put in place to promote creation by ensuring fair rewards to creators is becoming, in important respects, a hindrance to deeper development of Europe's digital economy, a stain on the online experience of so many consumers and an impediment to promoting the innovation Europe so desperately needs.[14]

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10 Telstra Corporation Limited, *Submission 602*.

11 S Eslake and M Walsh, *Australia's Productivity Challenge* (2011).

12 D Lichtman, 'Copyright as Innovation Policy: Google Books Search from a Law and Economics Perspective' (2009) 9 *Innovation Policy and the Economy* 55, 73.

13 Business Council of Australia, *Action Plan for Enduring Prosperity* (2013), 132.

14 I Hargreaves and B Hugenholtz, 'Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework' (2013) 13 *Lisbon Council Policy Brief* 1, 1.

3.16 In further research conducted since the publication of the Hargreaves Review, Professor Ian Hargreaves noted that 'research has shown that much of the innovation and productivity growth in advanced economies comes from the smaller, technology-rich firms which characterises the new, internet-based service economy'.[15]

3.17 Australian firms and entrepreneurs face barriers to innovation through the operation of market conditions which adversely affect the price of key digital infrastructure. The House of Representatives Inquiry into IT Pricing coined the phrase 'Australia tax' to illustrate the fact that Australians pay a great deal more than citizens in other developed countries for electronic material including books, games and computer software and this includes 'apparently vastly higher costs to Australian consumers to access digitally downloaded music'.[16]

3.18 Copyright law is a key element in these market conditions:

> Clearly the increased presence of a digital IT environment has created challenges for interpretation of the balance of rights of access by consumers, protections for the artists, and the ability to generate financial benefits. It has also meant that ideas of appropriate competition are contested.[17]

3.19 A number of stakeholders expressed concern about the effect of technological innovation on traditional business models, and implicit in their submissions is the implication that the ALRC recommendations need to protect existing business models.[18] The tension is about managing risks associated with shifts in the value chain and necessary transformation of business models brought about by the introduction of new technology and innovation.[19]

3.20 However, innovation provides emerging and expanding opportunities for creators and owners of copyright material. In a generally vibrant and growing entertainment and media economic outlook, the print consumer and educational book market is expected to decline by 5.2% and 1.5% respectively over 2013–2017, with 19.1% and 19.2% growth in digital/electronic books in those sectors respectively over the same period.[20]

3.21 All copyright reviews, it seems, face the same arguments from stakeholders on all sides, and the argument that 'only copyright protection—and not exceptions—can drive innovation'[21] was strongly claimed by stakeholders in this Inquiry and in the 2013 Irish review of copyright law. The Copyright Review Committee (Ireland) noted that '[t]o assert that only one group of copyright stakeholders can drive innovation, to

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15 Ibid, 3.

16 House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (2013), 3.63.

17 Ibid, 4.10. See further the submission of the Treasury to the IT Pricing Inquiry, 4.7.

18 See for example News Corp Australia, *Submission 746*;Australian Society of Authors, *Submission 712*;Combined Newspapers and Magazines Copyright Committee, *Submission 619*; MEAA, *Submission 652*; AIPP, *Submission 564*.

19 Ericsson, *The Tide is Turning: Now is the Time to Reform Copyright for the Digital Era* (2013), 3.

20 PricewaterhouseCoopers, *Outlook: Australian Entertainment and Media 2012–2016* (2013), 43-44.

21 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 73.

the exclusion of innovation from any other quarter, simply claims too much,' and concluded 'exceptions facilitate a great scope for beneficial user innovation'.[22]

3.22 The recommendations in this Report are intended to facilitate a copyright framework in which innovation and productivity are enhanced as Australians participate in the digital economy and diversify areas of economic development for the future.

Consumer use of copyright material

3.23 The Terms of Reference for this Inquiry direct the ALRC to consider whether the *Copyright Act* needs reform to allow:

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

3.24 Many stakeholders agree that law reform should be driven by a desire to 'provide certainty, promote accessibility and maintain the relevance of the law'.[23] Choice warns that the content industries are 'by and large playing catch-up' with changes in technologies and consumer behaviour.[24]

3.25 Clarifying which activities infringe copyright now, and whether certain activity should continue to be categorised as infringement, is part of this Inquiry. This context is an integral part of reform discussions taking place around the world. In the EU, for example:

> Citizens increasingly voice concerns that copyright laws hinder what they view as their freedom to access and use content. Experience shows that many of them would rather pay for legal offers than use illegal content, but they often do not know whether what they download, stream or share is illegal. Businesses increasingly argue that the current copyright model is a barrier to developing the business models they consider necessary for the digital economy. These consumers and businesses agree, for different reasons, that copyright rules have to be made more flexible.[25]

3.26 In Australia, the House of Representatives Inquiry into IT Pricing noted that consumer perceptions of copyright law as unfair 'can generate infringement and undermine the copyright system as a whole'.[26]

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22 Ibid.

23 Arts Law Centre of Australia, *Submission 171*. 'Copyright law needs to be in step with common, established community practice. This is important to promote public perception of copyright law as a constructive, flexible and sensible framework for governing protection and access to content': Law Institute of Victoria, *Submission 198*.

24 Choice, *Submission 745*.

25 European Commission, *Orientation Debate on Content in the Digital Economy* (2012), 1.

26 House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (2013), 4.44.

3.27 In his book, *Making Laws for Cyberspace,* Chris Reed points out:

> Attempting to impose rules which clash with strongly established norms, or making law in such detail that the cyberspace user is not able to understand or comply with it, are not the only ways in which laws can be rendered meaningless. Law needs to regulate the reality which is faced by those who are subject to the law.[27]

3.28 The ACCC referred to 'consumer empowerment over consumption' where consumers wish to organise use of copyright material around their own preferences in terms of time, location and method of consumption.[28] This could lead to a situation where

> 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.[29]

3.29 ACCAN observed that:

> Currently multiple everyday activities without any commercial implications are likely to breach copyright. Indeed, many consumers would be surprised to learn they were breaking the law by privately copying and recording in a way that has been commonplace for decades and in using devices that have been marketed to them vigorously.[30]

3.30 Some stakeholders expressed concern about the extent to which consumer attitudes and practices may influence law reform.[31] In this context some stakeholders stated that it is preferable for law to shape consumer behaviour, rather than for consumer behaviour to shape the law.[32] This would include educating consumers about copyright and 'why the legislation is in place'.[33]

3.31 Laws that are almost universally ignored are not likely to engender respect for the more serious concerns of copyright owners: '[p]eople don't obey laws they don't believe in'.[34] The Australian Research Council Centre of Excellence for Creative Industries and Innovation submitted that research indicates:

> The wide gap between law and norms in terms of private use is not desirable for copyright law. It is possible that widespread, pervasive disregard for copyright rules in terms of private use may support a broader legitimacy problem in copyright. It

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27 C Reed, *Making Laws for Cyberspace* (2012), 151.

28 ACCC, *Submission 165*.

29 M Kirby foreword to B Fitzgerald and B Atkinson (eds), *Copyright Future, Copyright Freedom* (2011), 4. See also NSW Young Lawyers, *Submission 195*; I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) on this point.

30 ACCAN, *Submission 194*.

31 Foxtel, *Submission 245*. See also Music Council of Australia, *Submission 647*; Music Council of Australia, *Submission 269*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; ALPSP, *Submission 199*. Some stakeholders noted that consumers do not generally consider 'infringement of copyright is justified': AFL, *Submission 232*; Cricket Australia, *Submission 228*.

32 APRA/AMCOS, *Submission 247*.

33 ALPSP, *Submission 199*.

34 J Litman, *Digital Copyright* (2001), 112. See also EFA, *Submission 258*; R Xavier, *Submission 146*.

> seems clear that the gap between social norms and the law should be reduced where possible.[35]

3.32 The Australian Communications and Media Authority (ACMA) has conducted research which shows that Australians are

> pragmatic about the limited capacity to regulate content distributed over the internet and, with the exception of illegal content, expected that much of the content available online would not be regulated. These expectations may be helpful in framing individual rights and responsibilities for copyright material.[36]

3.33 Not all infringing behaviour is regarded as 'piracy' or 'theft'.[37] The Chief Justice of Australia, the Hon Justice Robert French, has stated that 'messages equating copyright infringement with theft do not always compute' due to 'the difficulty in trying to attach a moral purpose' to laws that do not make sense to people.[38]

3.34 There is clearly an understanding among stakeholders that some infringing use of copyright material is 'fair enough'[39] and other use is more egregious. There is also a distinction between consumers who may (or may not) erroneously believe that certain practices constitute copyright infringement, and those who would blatantly infringe, steal or engage in piracy.[40]

3.35 One way of taking consumer preferences into account is through market responses in providing copyright content as consumers wish to consume it. The ALRC is aware that new services and business models are increasingly meeting consumer demand for some types of personal use, for example format shifting and time shifting.[41] Indeed, the digital environment creates new market opportunities and 'more sophisticated, flexible and efficient means for companies to measure and charge for usage'.[42]

3.36 As discussed in Chapter 2, a framing principle for this Inquiry is recognition of the role of copyright as an incentive to creation. The ALRC does not intend in any way to undermine property rights or a fair reward to copyright creators, owners and distributors. However, questions of recognising ways in which individuals use and

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35 Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

36 Australian Communications and Media Authority, *Digital Australians—Expectations about Media Content in a Converging Media Environment* (2011).

37 See a distinction made between individual infringing behaviour and piracy in C Geiger, 'Counterfeiting and the Music Industry: towards a criminalisation of end users? The French 'HADOPI' example' in C Geiger (ed) *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (2012) 386;P Yu, 'Digital Copyright and Confuzzling Rhetoric' (2011) 13 *Vanderbilt Journal of Entertainment and Technology Law* 881, 887.

38 Hon Justice R French, *Justice in the Eye of the Beholder* (2013).

39 For example, consumers who believe they have the 'right' to copy material legally acquired: ADA and ALCC, *Submission 213*. See also Choice, *Submission 745* for examples of what is considered acceptable use of copyright material by consumers.

40 AFL, *Submission 232*; Cricket Australia, *Submission 228*; Australian Industry Group, *Submission 179*; ALAA, *Submission 129*.

41 Australian Industry Group, *Submission 179*. See also Cricket Australia, *Submission 228*.

42 Australian Industry Group, *Submission 179*. See also AIMIA Digital Policy Group, *Submission 261*.

communicate ideas and experiences, without damaging the economic interests of the copyright owner, are relevant and have been taken into account in reform recommendations.

Complexity of copyright law

3.37 Aligned with principle 4 discussed in Chapter 2, the ALRC considers that one aspect of this Inquiry should be to reduce, where possible, the complexity of the current *Copyright Act* and, with that, transaction costs for users and rights holders.

3.38 Reform should not add further complications to an already complex statute.[43] Ideally, reform should promote clarity and certainty for creators, rights holders and users.

3.39 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'.[44] Aspects of the Act are 'pointlessly narrow' and there are 'obvious deficiencies in drafting'.[45]

3.40 Chief Justice French regards the complexity of copyright law as obscuring concepts of 'what is just and fair' and this makes enforcement difficult:

> the complexity of law today can deprive it of moral clarity and thus detach it from concepts of what is just and fair. To that extent, the perceived legitimacy of the law may depend more upon the fact that it has been enacted through democratic process than because people think it is a good law. That may be sufficient for most. However it makes the job of securing compliance more difficult.[46]

3.41 Reducing complexity can have a number of dimensions. Certainly, stakeholders are largely in favour of the concept of not making the statute more complex than it already is. Many went further and suggested overall simplification of what is already there. The fear is always that attempting either aspect—let alone both—will result in even greater incoherence.[47]

3.42 For law to be meaningful, 'first, the law must be understandable, and if understood it must appear to the user to be reasonably possible to comply with its requirements'.[48] Setting out compliance requirements in exhaustive detail may seem to avoid uncertainty, but is not easy to understand, and may not further the law's aims. The Internet Industry Association noted that the *Copyright Act*

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43 NSW Government, *Submission 294*; Australian Copyright Council, *Submission 219*; National Library of Australia, *Submission 218*. ACMA, *Submission 613* submitted that certain proposed changes to broadcast copyright might have had the effect of adding complexity to the regulatory environment. The ALRC has taken this into account in this Report, see Chs 15 and 16.

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

45 P Knight, *Submission 182*.

46 Hon Justice R French, *Justice in the Eye of the Beholder* (2013).

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

48 C Reed, *Making Laws for Cyberspace* (2012), 23. See also Copyright Agency, *Submission 727*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; EFA, *Submission 714*.

> contains many provisions designed for specific cases and circumstances that appear to apply similar fundamental principles. This makes the Act difficult to penetrate, even for specialists.[49]

3.43 ACANN pointed to complexity that results from having 'exceptions confined to particular devices'.[50] Similarly, News Corp and Foxtel would welcome having four separate format shifting exceptions replaced by one.[51]

3.44 The National Archives of Australia considered that the complexity of copyright law was an impediment to providing 'fair access to archival material'[52] and State Records of South Australia asked for 'simplification and consolidation of exceptions' as the 'complexity and piecemeal nature of the Act makes the provision of access to information difficult for both the public and archival institutions'.[53] While 'a degree of complexity may be unavoidable',[54] a number of stakeholders submitted that there is considerable scope for changing copyright law to make it more accessible:

> Copyright law needs to be in step with common, established community practice. This is important to promote public perception of copyright law as a constructive, flexible and sensible framework for governing protection and access to content.[55]

3.45 APRA/AMCOS pointed to the undesirability of having 'comprehensibility of a statute' as an underlying principle for law reform, recognising, however, that unnecessary complexity results from the current confusion and redundancy in the legislation.[56]

3.46 Some stakeholders considered that reform for the purposes of simplification and clarity may be a 'Trojan horse' for substantive change in the law—there is opposition to using a 'reducing complexity argument to support the introduction of a broad "fair use" exception'.[57]

3.47 Others argued that any reform necessarily causes increased complexity, as adaptation is needed to the alterations.[58] While accepting that lawyers will always be needed to interpret complex legislation,[59] the ALRC considers that willingness to develop an understanding of desirable reform by stakeholders should be assumed.

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49 Internet Industry Association, *Submission 253*.
50 ACCAN, *Submission 673*.
51 Foxtel, *Submission 245*; News Limited, *Submission 224*.
52 National Archives of Australia, *Submission 155*.
53 State Records South Australia, *Submission 255*.
54 Law Council of Australia, *Submission 263*.
55 Law Institute of Victoria, *Submission 198*; Arts Law Centre of Australia, *Submission 171*—'Law reform should be driven by a desire to simplify the law, provide certainty, promote accessibility and maintain the relevance of the law'. See also Cricket Australia, *Submission 700*; IP Australia, *Submission 681*.
56 APRA/AMCOS, *Submission 247*.
57 News Limited, *Submission 224*. See also AAP, *Submission 206*.
58 News Corp Australia, *Submission 746*; ARIA, *Submission 731*; Arts Law Centre of Australia, *Submission 706*; Screenrights, *Submission 646*;MEAA, *Submission 652*; Pearson Australia, *Submission 645*; COMPPS, *Submission 634*.
59 Thomson Reuters, *Submission 592*; Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*.

3.48 Many stakeholders endorse the view that a working understanding of copyright law should be more accessible so as to reduce transaction costs and facilitate more efficient transactions for business,[60] the public[61] and other users.[62]

3.49 This Inquiry is not aimed at overall simplification of the *Copyright Act,* despite the concern of many stakeholders over the complexity and difficulty of the legislation. However, the ALRC considers that the reforms recommended do not add to that complexity, but rather provide a clearer and more adaptive framework.

3.50 Recommendations in this Report are designed to reduce legislative complexity and create a better environment for business, consumers, education and government. For example, the recommendations relating to statutory licensing are aimed at removal of much of the overly-prescriptive rules relating to the operation of the licenses, which are increasingly irrelevant in a digital environment. The ALRC considers that the introduction of fair use will create a more flexible, adaptive and relevant copyright environment.

Cultural policy and copyright reform

3.51 Many stakeholders in this Inquiry are at the forefront of cultural life in Australia, and it is clear that copyright law directly affects a broad range of cultural activity. The ALRC considers that the reform recommendations in this Report will enhance local cultural production, access to culture, and opportunities for Australian creators.

3.52 The Terms of Reference specifically refer to 'the general interest of Australians to access, use and interact with content in the advancement of ... culture'. The ALRC has been urged 'not to think about copyright law solely or primarily in terms of trade and economic policy but to recall its central role in cultural policy'.[63]

3.53 Following extensive feedback from organisations, community groups and individuals, a National Cultural Policy was launched on 13 March 2013.[64] It explicitly recognises the importance of copyright law—and the ALRC Inquiry—in reform aimed at providing

> incentives for investment in innovation and content in a digital environment, while balancing the need to allow the appropriate use of both Australian and international content.[65]

3.54 The objective of the National Cultural Policy is to increase the social and economic dividend from the arts, culture and the creative industries. In this context, a

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60 iiNet Limited, *Submission 186*; ACCC, *Submission 165*.

61 See Internet Industry Association, *Submission 253*; Evolution Media Group, *Submission 141*.

62 Including cultural and community groups: State Library of New South Wales, *Submission 168*; State Records NSW, *Submission 160*; Blind Citizens Australia, *Submission 157*; National Archives of Australia, *Submission 155*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*.

63 Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*.

64 Australian Government, *Creative Australia: National Cultural Policy* (2013).

65 Australian Government, *National Cultural Policy Discussion Paper* (2011), 83.

number of stakeholders point to desirable reform of copyright law to allow greater digitisation and communication of works by public and cultural institutions.[66]

3.55 Some stakeholders considered the National Cultural Policy to be mainly about the economic interests of copyright owners,[67] and suggested that reform recommendations intended to enhance cultural activities are not in the interests of copyright owners.[68]

3.56 The National Film and Sound Archive stated that a number of the reforms recommended by the ALRC will provide greater legislative support for cultural institutions to undertake their statutory functions and allow Australia, as a net importer of copyright,[69] not to be overwhelmed by more dominant cultures.[70]

3.57 In this Inquiry, the ALRC has reviewed the various ways in which the *Copyright Act* provides for galleries, libraries, archives and museums—collectively, the 'GLAM sector'. In considering reform that is beneficial for Australians in terms of accessing and interacting with culture: 'we need to keep in mind the particular kind of cultural products we want to have access to and craft rights to support culturally meaningful forms of engagement with copyright works'.[71]

3.58 Greater access to cultural material in a way that does not impede incentives to innovate and the capacity for a creator to be fairly rewarded is a common theme in submissions. For example, digitisation of material for library and archival purposes, for 'non-commercial access' during the copyright term is regarded as being of a different order to digitising collections for access on the internet.[72]

3.59 The Australian Children's Television Foundation expressed concern about possible loss of statutory licensing income, which is used to subsidise creation of new material. Recouping costs from the Australian audience is more difficult compared with the economies of scale for producers of screen content with larger domestic markets from which to recoup costs, predominantly the US but also the UK.[73]

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66 Australian War Memorial, *Submission 720*; National Archives of Australia, *Submission 595*; ADA and ALCC, *Submission 213*; Australian War Memorial, *Submission 188*.

67 News Corp Australia, *Submission 746* 'The policy contains 17 references to references to copyright—the vast majority of which associated with economic value, contribution to GDP, and providing incentives for investment and innovation in content'; SPAA, *Submission 768*; Screenrights, *Submission 646*.

68 SPAA, *Submission 768*; News Corp Australia, *Submission 746*; Arts Law Centre of Australia, *Submission 706*; Kultour, *Submission 688*; Screenrights, *Submission 646*; Australian Copyright Council, *Submission 654*.

69 PricewaterhouseCoopers, *The Economic Contribution of Australia's Copyright Industries 1996–97–2010–11* (2012), prepared for Australian Copyright Council, 31.

70 NFSA, *Submission 750*; Department of Broadband, Communications and the Digital Economy, *Advancing Australia as a Digital Economy: Update to the National Digital Economy Strategy* (2013).

71 K Bowrey, *Submission 94*.

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

73 Australian Children's Television Foundation, *Submission 724*. The ACTF pointed, however, to the targeted support received from government and the ALRC notes that in terms of economic efficiency, direct subsidy is the most appropriate form of funding for valuable endeavours, such as ensuring quality Australian content.

3.60 The Screen Producers Association of Australia emphasised the audiovisual trade deficit of $1.1Billion 'of which two-thirds comes from the import of US film and television content'.[74]

3.61 One aspect of access to cultural heritage, which has attracted a great deal of comment from Australian cultural institutions, is the extension of the term of copyright protection.[75] Although extension of the term from 50 to 70 years has not in itself created the issues cultural institutions face in preserving and using material donated and otherwise acquired, it exacerbates them.[76] One issue here is that the copyright term commences from first publication of a work or other subject matter. For older material this means an even more extended time before it enters the public domain.[77]

3.62 Difficulties in clearing rights in digital material leads to skewed representation of cultural aspects and history, and creates what has been termed 'blockbuster skew' or 'digital skew':[78]

> The sense of history which comes with access to the whole, or a substantial part, of an archive, is of much greater cultural value than a small selection curated through the random prism of copyright clearance. … There is a danger that in the digital age the publicly available cultural history of broadcasting will skew: we will remain familiar with ubiquitous blockbuster programs which are available everywhere more than we will remember local Australian programs left in the archives.[79]

3.63 The 'cultural value' of works with no economic value is often high but 'copyright protects equally works of economic value as well as those of no economic value'[80] and there can be onerous costs of compliance with copyright law, but with no resulting benefit to any creator or owner. Perhaps this could amount to circumstances where

> the policy rationale for any new exception should be based on the *purpose* for which content can be used without permission. This purpose should, as a matter of public interest, be more important than a content creator's right to manage the use of their work.[81]

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74 SPAA, *Submission 768*. See also Australian Children's Television Foundation, *Submission 724*;Australian Society of Authors, *Submission 712*; Price Waterhouse Coopers, *Making the Intangible Tangible: The Economic Contribution of Australia's Copyright Industries* (2008), prepared for Australian Copyright Council.

75 See discussion in M Rimmer, *Digital Copyright and the Consumer Revolution* (2007) particularly Chapter 1 'The Dead Poets Society: The Copyright Term and the Public Domain', 24; see also Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 80−84.

76 M Rimmer, *Submission 127*.

77 National Library of Australia, *Submission 218*.

78 J Given, *Submission 185*;J Given, *Submission 185* citing E Hudson and A Kenyon, 'Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions' (2007) 4(2) *SCRIPT-ed* 197 and S McCausland, 'Getting Public Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use' (2009) 14 *Media Arts Law Review* 21.

79 S McCausland, 'Getting Public Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use' (2009) 14 *Media Arts Law Review* 21, 24. See also Australian War Memorial, *Submission 188*.

80 Australian War Memorial, *Submission 188*.

81 Copyright Agency/Viscopy, *Submission 249*.

3.64 Even those advocating an approach to copyright law reform based on economic evidence note that copyright exceptions and limitations applicable to the role of libraries and archives as 'cultural custodians' have important effects on 'individual welfare, autonomy and freedom of expression which are harder to quantify but nonetheless critical'.[82]

3.65 It is clear that particular protocols and considerations may apply to Indigenous cultural material, whether within copyright protection or not.[83] Considerable work has been done on developing and implementing protocols for digitisation and use of Indigenous material.[84] The moral rights regime introduced into the *Copyright Act* in 2002 has deficiencies but also possibilities in recognising the importance of cultural and religious sensitivities.

3.66 Moral rights can assist in 'distinguishing between the two situations of the Aboriginal artist and the non-Aboriginal artist', including around the very act of unauthorised reproduction itself.[85] One existing exception in the *Copyright Act*, relating to parody and satire, may in particular set up a tension between moral rights and 'the public interest in expressive freedom' which is 'a matter which would have to be worked out on a case by case basis in the courts'.[86]

3.67 Concerns relating to Indigenous material do not centre only on outsiders using cultural material. Sometimes the issues are the reverse, where copyright can prevent access by Indigenous people to their own heritage.[87]

3.68 The ALRC considers that the reforms recommended in this Report will enhance the capacity of cultural institutions to fulfil their mandates, will allow creators to access copyright material in an understandable and fair manner, without damaging the interests of copyright owners, and will enhance the capacity of copyright law to fulfil national cultural aims.

Statutory licensing in the digital economy

3.69 Questions about the benefits of statutory licensing are explicitly raised by the Terms of Reference. Australia's statutory licensing schemes for education, government and persons with disabilities were established to facilitate access to copyright material in circumstances where market failure would otherwise occur.

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82 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 8.

83 ADA and ALCC, *Submission 213*; Arts Law Centre of Australia, *Submission 171*; State Library of New South Wales, *Submission 168*.

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

85 P Loughlan, 'The Ravages of Public Use: Aboriginal art and moral rights' (2002) 17 *Media and Arts Law Review* 24.

86 Ibid, 25, discussing parody of work albeit before the exception for parody and satire was introduced in 2006.

87 Arts Tasmania, *Submission 150*.

3.70 The benefits and detriments of the current system are heavily contested as between licensees and licensors. The TAFE sector submitted that statutory licensing for TAFE is not economically efficient or streamlined, and does not provide easy access to copyright material.[88] Other educational licensees have been more blunt, suggesting that 'Australia's statutory licences are unsuitable for a digital age and must be repealed'.[89]

3.71 The ACCC considered that relevant factors in reviewing statutory licences include the transaction costs associated with the licences—said to be considerable by education and government stakeholders—and the potential for the extent and use of the rights conferred by copyright to restrict competition and create market power.[90]

3.72 Some stakeholders submitted that there are ways in which the statutory licensing system could work better, both in terms of the legislative framework and the way the rights are managed in practice.[91]

3.73 The Australian Society of Authors, while stating that pt VB of the *Copyright Act* 'works well for educational institutions and creators'[92] also noted that 'there could be more transparency in the process—particularly how much money is paid to which publishers and authors'.[93] The Society also submitted that:

> The central reasons for some statutory licence schemes should be revisited and reassessed ... these schemes are paying massive amounts of money to foreign publishers of educational materials, with only a small amount trickling to Australian creators. This goes against the original intent.[94]

3.74 The Australian Writers' Guild pointed to the inflexibility of audiovisual statutory licensing and some 'conflation' of rights streams and lack of transparency in use of data.[95] Even many of those advocating retention of statutory licensing in its current form often commented on the small returns[96] and lack of transparency in current collective licensing arrangements.

3.75 The digital environment provides an opportunity for greater licensing as markets develop to satisfy consumer needs. Furthermore, markets can be seen as being about 'fairness and opportunity' as negotiated between parties, along with a 'reasonable level of regulation'.[97]

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88 Copyright Advisory Group—TAFE, *Submission 230*. See also Universities Australia, *Submission 246*, but see Screenrights, *Submission 215*; Copyright Agency/Viscopy, *Submission 249*.

89 Copyright Advisory Group—Schools, *Submission 231*. See also Universities Australia, *Submission 246*.

90 ACCC, *Submission 165*.

91 Copyright Agency/Viscopy, *Submission 287*.

92 Australian Society of Authors, *Submission 169*.

93 Ibid; see also ALAA, *Submission 129*.

94 Australian Society of Authors, *Submission 169*.

95 Australian Writers' Guild & Australian Writers' Guild Authorship Collecting Society, *Submission 265*.

96 M Woods, *Submission 829*; The Copyright Licensing Agency, *Submission 766* ; Australian Major Performing Arts Group, *Submission 648*;Allen & Unwin, *Submission 582*;Australian Major Performing Arts Group, *Submission 212*; citing PwC research 'An Economic Analysis of Copyright, Secondary Copyright and Collective Licensing' (2011).

97 R Murdoch, 'Markets Radiate Morality', *The Weekend Australian*, April 6-7 2013, 19.

3.76 Statements that introducing fair use would lead to 'no licensing'[98] of educational material are grossly over-stated; on the contrary, the education sector is adamant that 'fair use is not free use'.[99] Universities Australia has provided evidence of the important continuing role for collective licensing.[100]

3.77 The ALRC was provided with evidence of the large amounts of money spent on educational and library resources by the university sector alone, expenditure which would be unaffected by changes to statutory licensing.[101]

3.78 Universities Australia submitted that 'a competitive commercial licensing model'[102] makes it appropriate that copyright legislation should operate to create markets based on the rights given under copyright legislation and determined by agreement between parties, rather than a statutory licence.

3.79 Recommendations in this Report support a continuing role for statutory licences, provided they incorporate more flexibility and be made less prescriptive.

Competition issues and copyright reform

3.80 Copyright law and competition law are largely complementary in that both seek to promote innovation, higher living standards, and expand the choices and benefits to society.[103]

3.81 The ACCC considered that competition in copyright markets will generally maintain incentives for the creation of copyright material and promote fair licensing schemes for the wide dissemination and efficient use of copyright material.[104]

3.82 The ACCC considers the uncertainty created by s 51(3) of the *Competition and Consumer Act 2010* (Cth) which undermines the capacity of competition law to regulate anti-competitive conduct, including unilateral exercise of market power, to be detrimental to the proper operation of copyright licensing.

3.83 Section 51(3) of the *Competition and Consumer Act 2010* provides an exception to some of the restrictive trade practices provisions of that Act in relation to intellectual property licensing. The ACCC submitted that s 51(3) of the *Consumer and*

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98 Australian Society of Authors, *Submission 712*; Copyright Agency, *Submission 727*.

99 Copyright Advisory Group—Schools, *Submission 861*.

100 Universities Australia, *Submission 754*.

101 In 2011, university libraries spent $256.7 million on library resources, mainly through direct subscription to electronic resources. This money flows directly to rights holders and will continue to do so: Ibid. The Australian school education sector currently spends upwards of $665 million dollars per annum on purchasing educational resources for Australian schools, this is in addition to over $80 million on copyright licensing fees paid to collecting societies: Copyright Advisory Group—Schools, *Submission 707*.

102 Universities Australia, *Submission 293*.

103 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 6. See also H Bakhshi, I Hargreaves and J Mateos-Garcia, *A Manifesto for the Creative Economy* (2013), 91.

104 ACCC, *Submission 658*.

Competition Act[105] should be repealed, noting that in other jurisdictions, such as the United States, intellectual property rights are subject to the same competition laws as all other property rights, without apparent impact on the rights of creators or incentives for production of copyright material:

> In order to fully exploit the substantial potential benefits arising in the digital economy, it is important that competition laws are able to complement IP laws, including copyright laws, by preventing anti-competitive conduct associated with copyright usage that is not in the public interest.[106]

3.84 The ACCC has a long-standing position in favour of repealing s 51(3), on the basis that this would simply prevent copyright owners from imposing conditions in relation to the licence or assignment of their intellectual property rights for an anti-competitive purpose or where the provisions had an anti-competitive effect. All other uses would be unaffected.[107]

3.85 The Ergas Committee regarded s 51(3) as seriously flawed and unclear and noted that the National Competition Council had previously recommended repeal of s 51(3). The repeal and replacement of s 51(3) of the *Trade Practices Act* (now *Consumer and Competition Act*) was recommended.[108]

3.86 In 2013 repeal of s 51(3) was again recommended, by the House of Representatives Standing Committee on Infrastructure and Communications in its July 2013 report, *At What Cost? IT Pricing and the Australia Tax*.[109] The Committee recommended the repeal of s 51(3) on the basis that it constrains the ACCC unjustifiably from investigating restrictive trade practices in relation to intellectual property rights.[110]

3.87 The ACCC considers that intellectual property should be regarded in the same light as other property and that the authorisation process in the *Consumer and Competition Act* is appropriate in assessing whether licensing activity confers benefits that outweigh anti-competitive effects:

> It is now accepted that, generally, IP laws do not create legal or economic monopolies. IP laws create property rights and the goods and services produced using IP rights compete in the marketplace with other goods and services.[111]

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105 *Competition and Consumer Act 2010* (Cth) s 51(3) provides a limited exception for certain licence conditions from some competition provisions of the Act.

106 ACCC, *Submission 165*. See also ACCC, *Submission 658*. This recommendation was made previously by the Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000) and is discussed further in Ch 17.

107 See also Copyright Advisory Group—Schools, *Submission 707*.

108 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 203.

109 House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (2013).

110 Ibid, Recommendation 8.

111 ACCC, *Submission 165*; See also ACCC, *Submission 658*.

3.88 The ALRC is aware of a number of 'user friendly'[112] licensing arrangements that demonstrate a dynamic marketplace able to address consumer needs. Rights holders consider this removes the need for government intervention by way of amendments to copyright law, for example, in the form of exceptions allowing greater private copying. It is clear that many licensing practices are pro-competition and pro-consumer, and presumably the application of a general competition test, in the absence of s 51(3), would pose no problems.

3.89 The ALRC is recommending that voluntary collective licensing arrangements be allowed to develop alongside statutory licensing.[113] At present, collecting societies administering collective copyright licences are not necessarily open to the full gaze of Australian competition law. In 2000, the Intellectual Property Competition Review Committee (Ergas Committee) took the view that all collecting societies 'whether declared or not, should generally be subject to the scrutiny that ... authorisation procedures allow'.[114]

3.90 Small publishers may face serious problems with the exercise of market power in the context of voluntary collective licensing of educational material.[115] Collecting societies offering voluntary licences are currently subject to authorisation proceedings and this would also apply to new and developing licensing arrangements.

3.91 An aspect of copyright markets is the tendency to market failure where there is widespread use of copyright material with no way of tracking that use. This is a situation that collective and statutory licensing is designed to address, as discussed elsewhere in this Report.[116]

3.92 However, the mere existence of a licensing situation, particularly a statutory licence, does not create a market. As the Australian War Memorial pointed out, licensing creates a false value for some material which has no economic value.[117] Similarly, the Council of Australasian Museum Directors does not support the concept that certain unremunerated use exceptions should operate only when the use cannot be licensed: 'this allows for future forms of licensing which may add unnecessary cost and complexity to the copyright system'.[118]

3.93 Choice points out that 'the right of creators to be commercially rewarded for their works is not the same as a right to endless commercial exploitation of a work'.[119]

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112 APRA/AMCOS, *Submission 247*;iGEA, *Submission 192*. See also APRA/AMCOS, *Submission 247*;Australian Film/TV Bodies, *Submission 205*.

113 See Ch 8.

114 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 126.

115 Endeavour Education, *Submission 870*.

116 Ch 8.

117 Australian War Memorial, *Submission 720*.

118 CAMD, *Submission 719*.

119 Choice, *Submission 745*.

3.94 To facilitate licensing of copyright material around the EU, a digital hub has been recommended in the UK.[120] The ACCC submitted that efficient licensing might be facilitated by a digital hub, as recommended by the UK Hargreaves Review. The ALRC notes the 2013 proposal by Professor Michael Fraser and David Court[121] for an Australian Copyright Registry.

3.95 The ALRC makes no specific recommendations for a digital hub for Australia, but notes that technological solutions could be used to lower transaction costs and, importantly, to ensure accurate recording of actual usage of copyright material. Technological solutions can be tailored for particular uses. Examples of this include the Clickview system for facilitating the licensing of broadcast material in education,[122] and the Nightlife system for facilitating licensing of music in entertainment venues, which uses proprietary software and hardware to track, register and update music used so as to ensure 'transactional transparency'.[123]

3.96 The ACCC noted that there is a lack of economic research regarding the magnitude of transaction costs of licensing in the Australian context, especially regarding these costs in relation to the digital economy.[124] The ACCC submitted that the ALRC Inquiry may result in the submission of valuable evidence regarding transaction costs and inefficiencies for both creators and users from those who participate in the assignment or licensing of copyright material. 'Where costs of licensing exceed benefits, this may affect overall production of copyright material especially where users are increasingly creators'. [125]

3.97 One of the themes in this Inquiry is that licensing solutions should be used wherever possible to allow creators to control their material, and to gain maximum revenue. The ALRC considers that licensing arrangements for copyright licensing should be assessed against the same general competition law framework that applies to other transactions across the Australian economy.

3.98 The ALRC notes that, given the relevance of s 51(3) of the *Consumer and Competition Act* to the other recommendations in this Report, that the repeal of s 51(3) should be considered, as an integral aspect of equipping copyright law for the digital economy.

Evidence and law reform in the digital economy

3.99 A major concern of stakeholders is that reform should be 'evidence-based'.[126] The ACCC considered it important that the ALRC takes into account available

120 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).
121 D Court and M Fraser, *Call for 21st Century Copyright Register* (2013).
122 Screenrights, *Submission 288*; Screenrights, *Submission 646*.
123 Nightlife, *Submission 657*.
124 See discussion of possible economic evidence in assessing copyright law in Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).
125 ACCC, *Submission 165*. These current transaction costs are commented on in other Chapters.
126 Combined Newspapers and Magazines Copyright Committee, *Submission 238*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; News Limited, *Submission 224*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; Newspaper Works, *Submission 203*.

economic evidence when considering reform, as well as stakeholder views and economic rationales for reform.[127]

3.100 One of the main criticisms made by copyright owners in this Inquiry is that there is 'no evidence' for reform of copyright law. Stakeholders cited the view of Professor Hargreaves in insisting that 'IP reform takes place in the light of the best available economic evidence'.[128] A perceived lack of evidence was said to militate against any reform, unless it constituted greater enforcement or stronger rights. In doing so the stakeholders who cited the Hargreaves Review tended to overlook the fact that the overall thrust of Hargreaves was to 'call for a more adaptive IP framework'.[129]

3.101 A number of submissions to the ALRC Inquiry asserted that giving owners and publishers total control over use of copyright material is the only way to create value.[130] Asserting that copyright law must entrench 'orderly management'[131] of copyright material through permitting only the exercise of monopoly control by the copyright owner, is not a valid argument. Indeed, those most avidly asserting the need for total control rely most heavily on existing exceptions, and extensively use the copyright material of others. For example, publishers, broadcasters, newspapers and authors are the main users of copyright material provided under document supply and interlibrary loan provisions of the *Copyright Act*.[132]

3.102 In the UK, perhaps the main outcome of the Hargreaves Review has been the setting up of the CREATe Centre, to investigate issues relating to copyright and new business models in the creative economy. A major concern of the Centre is to investigate the question of what constitutes evidence for the purposes of copyright policy.[133]

3.103 In the US, a major report on building evidence for copyright policy in the digital era noted that 'not all copyright policy questions are amenable to economic analysis. In some cases, it may be possible to determine only the direction of the effect of policy change, not the magnitude'.[134] The report further noted that copyright policy research can use a variety of methods, including 'case studies, international and sectoral comparisons, and experiments and surveys'.[135]

3.104 In Australia, the ARC Centre of Excellence for Creative Industries (CCI) focuses on research into the contribution of creative industries and their constituent disciplines to a more dynamic and inclusive innovation system and society. The CCI submission stated that 'there are substantial costs and inefficiencies for creators associated with current copyright arrangements that adversely affect public access to

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127 ACCC, *Submission 165*.
128 H Bakhshi, I Hargreaves and J Mateos-Garcia, *A Manifesto for the Creative Economy* (2013), 91.
129 Ibid, 91.
130 News Corp Australia, *Submission 746*; Australian Publishers Association, *Submission 629*.
131 News Corp Australia, *Submission 746*.
132 ADA and ALCC, *Submission 868*.
133 M Kretschmer and R Towse, *What Constitutes Evidence for Copyright Policy?* (2013).
134 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), 2.
135 Ibid, 2.

new and original creative works'. CCI recommended 'a broadened concept of fair use that permits unlicensed use of copyright material ... in socially beneficial ways'.[136]

3.105 With respect to theoretical research, one submission noted that it is simply too early to tell what the economic effect of the digital environment is for many sectors, particularly creators. Therefore 'proposals for new exceptions to copyright should be based on clearly identified policy grounds as the economic analysis of the digital environment is contentious'.[137] Pointing to the Hargreaves Report, the Arts Law Centre of Australia identified three obstacles to using evidence on the economic impacts of changes to intellectual property regimes:

> absence of reliable data from which conclusions can be drawn to guide intellectual property policy; evidence relevant to policy questions involving new technologies or new markets, such as digital communications, is problematic as the characteristics of these markets are not well understood or measured; and the data that is available is held by firms operating these new technologies and the data, when it enters the public domain, cannot be independently verified.[138]

3.106 While many stakeholders urged caution in making changes that may disrupt the emerging digital economy, the ACCC supported 'a review of the use and extent of copyright across the digital economy to ensure that the benefits continue to exceed the costs'.[139] The ACCC applied an economic analysis to the incentives to create and produce copyright material in the digital environment and evaluated economic literature and the presumptions upon which the literature relies. The ACCC concluded that the 'available literature mainly focuses on the impact of digital technologies on copyright holders and submits that such analysis is incomplete, as the interests of consumers and intermediate users must also be considered'.[140]

3.107 The ACCC noted that most of the empirical, rather than theoretical, economic evidence available is focused overseas and relates to particular industries, particularly unauthorised copying in the music industry, and that the results can be 'inconclusive'.[141]

3.108 There is some economic evidence regarding the economic contribution of Australia's copyright industries, notably a PricewaterhouseCoopers (PwC) Report which demonstrates that copyright content industries in 2010–11 generated the equivalent of 6.6% of gross domestic product and employed 8% of the Australian workforce.[142] The PwC report is a snapshot of economic activity in the copyright sector, and does not comment on likely effects of any reform.

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136 Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*. The CCI also considers that development of a digital exchange would assist in reducing transaction costs associated with legal re-use of copyright materials.

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

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

139 ACCC, *Submission 165*.

140 Ibid.

141 Ibid.

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

3.109 A report by Lateral Economics takes the approach of looking at the contribution of a wider group of industries described as 'exceptions industries' including 'education and research'. Taking into account the economic contribution of industries using this expanded methodology, in 2009−10 they were responsible for 14% of gross domestic product and employed 21% of Australia's workforce.[143]

3.110 WIPO is promoting the need to quantify the contribution of 'non-core' copyright industries including interdependent and support industries.[144]

3.111 It is clear that the economic contribution of Australia's copyright industries is significant. What is contentious is how to increase that contribution to the benefit of copyright owners, users and the community, and what reform, if any, would effect this.

3.112 It is recognised that a number of industries claim that they 'would not exist, or be much smaller, but for the limitations and exceptions to copyright law' including 'Internet publishing and broadcasting, Internet service providers and search engines, data services, computer equipment and components, computer services, telecommunications, and other industry segments'.[145] Indeed, it is suggested that 'valuable research could build upon initial attempts to quantify the benefits of exceptions and limitations in terms of the economic outputs and welfare effects of those individuals, businesses, educational institutions and other entities that rely on them'.[146]

3.113 Commissioned research on the economic benefits of fair use in copyright law, using Singapore as a case study, found copyright industries to be 'relatively unaffected' by the introduction of fair use although significant stimulation of growth in private copying technology occurred, with overall benefits for economic activity.[147] This research has been endorsed by some stakeholders[148] and criticised by others.[149]

3.114 Professor Hargreaves has written further on copyright law since his review was completed, and stated:

> The review rejected adoption of the fair use approach as technically too difficult in the EU legal context at this stage. Instead, the review advocated reforms ... with the aim

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143 Lateral Economics, *Exceptional Industries: The Economic Contribution of Australian Industries Relying on Limitations and Exceptions to Copyright* (2012), prepared for the Australian Digital Alliance, 6. See favourable comments on this research: Google, *Submission 217*; eBay, *Submission 93*; iiNet Limited, *Submission 186*.

144 World Intellectual Property Organization, *WIPO Studies on the Economic Contribution of the Copyright Industries* (2012).

145 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013).

146 Ibid, 42. A number of stakeholders overlooked what the ALRC said in the Discussion Paper about building policy for economic evidence, based on this report. See Australian Film/TV Bodies, *Submission 739*; News Corp Australia, *Submission 746*.

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

148 American Library Association and Association of Research Libraries, *Submission 703*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; iiNet Limited, *Submission 186*.

149 News Corp Australia, *Submission 746*; Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; Arts Law Centre of Australia, *Submission 706*; G Barker and I Png, *Submission 507*.

> of securing specific benefits of flexibility comparable with those afforded by fair use.[150]

3.115 The emphasis on creating licensing solutions in Hargreaves was taken to mean that owners' rights should be enhanced, overlooking the emphasis in the Hargreaves Review on collaboration to reduce deadweight costs in the economy through the waste of resources on, for example, the HADOPI legislation.[151] The ALRC agrees that a commercially-focused, market-based approach to dealing with IP rights is entirely appropriate, and considers that fair use has the potential to enhance negotiated outcomes in the developing digital economy.

3.116 Those advocating for greater enforcement have little or no evidence for the efficacy of increased legislative measures.[152] The ALRC notes that the report of the House of Representatives in the IT Pricing Inquiry, relied on economic research to conclude that the impact of infringement on copyright owners was 'less severe than rights holders claim' and that 'household spending on entertainment, and growth in employment in the entertainment industry, and ... the number of creative works being produced has grown at a tremendous rate'.[153] The Committee cited with approval a 2012 Report demonstrating growth in worldwide box office receipts for the film industry and also growth in the global music industry:

> you wouldn't know it, just listening to the entertainment industry talk about how much the entertainment industry is 'dying', but data from PricewaterhouseCoopers (PwC) and iDATE show that from 1998 to 2010 the value of the worldwide entertainment industry grew from $449 billion...to $745 billion. That's quite a leap for a market supposedly being decimated by technological change.[154]

3.117 One stakeholder pointed out: 'the 'no evidence' position[155] is 'very self-serving, and is counter to the contents within submissions of a number of major organisations within the IT sector that Australian copyright law would better accommodate the development of the digital economy by the adoption of the proposed fair use test'.[156]

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150 I Hargreaves and B Hugenholtz, 'Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework' (2013) 13 *Lisbon Council Policy Brief* 1, 4. One of the arguments common to a number of stakeholders was to suggest that the ALRC had misstated or misread the Hargreaves Review. However, on reading that document, it is clear that a number of stakeholders selectively quoted from it to support their position, but without giving the correct impression of what was actually said by Hargreaves.

151 S Datoo, 'France Stops Controversial 'Hadopi law' after Spending Millions', *The Guardian*, Wednesday 10 July 2013, <www.theguardian.com/technology/2013/jul/09/france-hadopi-law-anti-piracy>.

152 Ericsson, *The Tide is Turning: Now is the Time to Reform Copyright for the Digital Era* (2013). See also H Bakhshi, I Hargreaves and J Mateos-Garcia, *A Manifesto for the Creative Economy* (2013); Sarah Laskow, *Does copyright law work?* (2013) Columbia Journalism Review <http://www.cjr.org/cloud_control/empirical_ip.php?page=all> at 6 November 2013. See also R Giblin, *Evaluating Graduated Response* (2013): 'there is little to no evidence that that graduated responses are either successful or effective. The analysis casts into doubt the case for their future international roll-out and suggests that existing schemes should be reconsidered'.

153 House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (2013), [4.39] citing M Masnick and M Ho, *The Sky is Rising* (2012), 2.

154 M Masnick and M Ho, *The Sky is Rising* (2012).

155 See also Australian Society of Authors, *Submission 712*.

156 Internet Industry Association, *Submission 744*.

3.118 The polarisation of views about 'evidence' and research is evident elsewhere. A House of Commons Committee, despite the favourable reception given to the Hargreaves Review by the UK Government, had this to say:

> Following all the evidence we have received, we think Hargreaves is wrong in the benefits his report claims for his recommended changes to UK copyright law. We regret that the Hargreaves report adopts a significantly low standard in relation to the need for objective evidence in determining copyright policy. We do not consider Professor Hargreaves has adequately assessed the dangers of putting the established system of copyright at risk for no obvious benefit. We are deeply concerned that there is an underlying agenda driven at least partly by technology companies (Google foremost among them) which, if pursued uncritically, could cause irreversible damage to the creative sector on which the United Kingdom's future prosperity will significantly depend.[157]

3.119 Professor Hargreaves has responded critically to these comments,[158] and so have other commentators:

> The creative industries are innovating to adapt to a changing digital culture and evidence does not support claims about overall patterns of revenue reduction due to individual copyright infringement. The experiences of other countries that have implemented punitive measures against individual online copyright infringers indicate that the approach does not have the impacts claimed by some in the creative industries.[159]

3.120 The ALRC considers that, given the impossibility of obtaining empirical research informing most aspects of copyright reform, it is appropriate to adopt a hypothesis-driven approach. This is explicitly approved of with respect to copyright reform in the European context:

> Despite the evident stakes, there is a shortage of reliable data that directly addresses the relationship between copyright reform and economic growth. Forecasting the relationship between specific acts of reform and quantified economic outcomes is, therefore, and assumptions-based exercise. There have, however, been a number of reports which clearly show the significant scale advantages for Europe of developing its digital economy, and there is a clear line of logic in suggesting that a more flexible copyright regime, better adapted to digital circumstances, would add to these economic benefits.[160]

3.121 The ALRC considers that there will be minimal free riding from the recommendations in this Report, and the micro-economic changes envisaged will encourage innovation and creation of copyright material, without harm to the interests of copyright owners.

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157 House of Commons Culture, Media and Sport Committee, *Supporting the Creative Economy* (2013), 55.

158 I Hargreaves, 'MPs Have Missed the Mark in Copyright Reform', *The Conversation*, 30 September 2013, <http://theconversation.com/mps-have-missed-the-mark-in-attacking-copyright-reform-18703>;I Hargreaves, 'MPs Have Missed the Mark in Copyright Reform', *The Conversation*, 30 September 2013, <http://theconversation.com/mps-have-missed-the-mark-in-attacking-copyright-reform-18703>.

159 B Cammaerts, R Mansell, B Meng, *Copyright & Creation: A Case for Promoting Inclusive Online Sharing* (2013).

160 I Hargreaves and B Hugenholtz, 'Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework' (2013) 13 *Lisbon Council Policy Brief* 1, 2.

Current regulatory models

3.122 Reform should promote the development of a policy and regulatory framework that is adaptive and efficient. The costs and benefits to the community should be taken into account in formulating options for reform. The *Australian Government Best Practice Regulation Handbook* requires law reform 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'.[161]

3.123 The ACCC endorsed a regulatory framework in which negotiating an understanding of acceptable uses of copyright material may be more effective and efficient in reducing inefficiencies than a strict enforcement regime which potentially inhibits innovation:

> where the parameters can be set so that the rights of copyright holders are able to be preserved and protected commensurate with the objectives of providing incentives to create copyright material ... balanced against the potential for innovative business practices to meet and develop consumer expectations and practices.[162]

3.124 A number of stakeholders pointed to uncertainty in applying current copyright law, due to the complexity or inadequacy of current legislation that deters innovation and promotes risk-averse behaviour.[163] For example, State Records NSW advised that it is constrained in 'exploring new digital means of access to government archives due to uncertainty in how to apply the many exceptions provided in the *Copyright Act*'.[164]

3.125 A number of submissions questioned whether the current legal and institutional structures in copyright law offer an effective, efficient and functional model for dealing with digital content copyright issues, and what alternatives might apply. For example, the ACMA pointed to the need for 'a mix of regulatory strategies' for dealing with digital content issues in any revised copyright framework. These include: direct regulation with an emphasis on compliance and enforcement of rights and obligations; industry co-regulation and self-regulation; technology applications to assist with content management; and cultural and behavioural changes needed to promote and protect access to content.[165]

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

162 ACCC, *Submission 658*.

163 See for example Yahoo!7, *Submission 276*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; Australian War Memorial, *Submission 188*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

164 State Records NSW, *Submission 160*.

165 ACMA, *Submission 214*.

3.126 One theme that emerged from submissions was the desirability of 'principles-based' drafting of the Act,[166] with details and examples supplied by regulations to the Act, supplemented by industry codes, guides to best practice, and the like.[167] However, despite Australians generally being concerned about over-regulation, many submissions revealed a desire for even more copyright regulation, on the basis that this would increase certainty.

3.127 Stakeholders also noted that this Inquiry is not dealing with the whole picture of reform, and piecemeal amendment 'may not reflect the policy underlying the copyright regime'.[168] Furthermore, copyright is just one aspect of digital media markets which are themselves 'a construction of the interplay of media, telecommunications and copyright law'.[169] In this context and 'in accordance with historical jurisprudential tradition, the *Copyright Act* should be confined to expressing legal principles that affect us all, in a manner that assists in generating the required normative framework that allows it to be broadly understood'.[170] The statute alone cannot achieve clarity and certainty without the capacity to capture relevant policy and context factors.

3.128 The Australian Copyright Council seemed to cast doubt on a 'standards' approach on the basis that a 'rules' approach is more appropriate for Australia, given the different constitutional and legal tradition in which Australian and US jurisdictions operate.[171] Uncertainty of application, lack of precedent and the existence of satisfactory exceptions are also reasons given for not recommending a fair use exception in Australian law, views shared by a number of stakeholders. However, alternative views expressing the desirability of introducing fair use into Australian copyright law have been expressed by a number of other stakeholders.

3.129 The ACCC agreed that principles or standards-based legislation is a 'pragmatic approach to meeting the demands on copyright law in the context of a fast-developing digital economy' and would lessen the dampening effect on business practices and innovation of delays between market developments and legislative change.[172]

3.130 The ACCC stated that 'standards-based legislation has the ability to provide the degree of flexibility required for meeting the demands of users and rights holders as changes occur in the digital economy'.[173]

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166 Drawing on experience as a regulator, the ACMA pointed out that increasingly 'current regulatory schemes provide standards-setting arrangements': Ibid. See also Members of the Intellectual Property Media and Communications Law Research Network at the Faculty of Law UTS, *Submission 153*, citing authorities on the 'expressive function of law'. Civil Liberties Australia recommended 'the development of a general objects clause for the Copyright Act': Civil Liberties Australia, *Submission 139*; K Bowrey, *Submission 94*.

167 See NAVA, *Submission 234*.

168 APRA/AMCOS, *Submission 247*, expressing a concern also that the Terms of Reference may result in 'particular stakeholders' having disproportionate influence.

169 K Bowrey, *Submission 94*.

170 Ibid.

171 Australian Copyright Council, *Submission 219*.

172 ACCC, *Submission 658*.

173 Ibid.

3.131 With respect to developing an understanding of legislative principles, the Arts Law Centre of Australia pointed to the usefulness of the *Fair Use Codes* and *Codes of Best Practice* guidelines, developed in the US by Peter Jaszi and Pat Aufderheide. The Guidelines were designed to educate users on fulfilling the requirements of copyright legislation.[174] A number of stakeholders commented on the possible uses of guidelines agreed between owners and users to find 'common ground' in terms of practices relating to copyright material.[175]

3.132 Guidelines for 'diligent search' for orphan works have been developed in Europe and are referred to by the International Federation of Reproductive Rights Organisations (IFFRO), which 'strongly suggested' that such guidelines could be established in Australia. IFFRO sees this operating in conjunction with an orphan works registry.[176]

3.133 The Department of Science, Information Technology, Innovation and the Arts (Qld) pointed out the many 'legally ambiguous' areas in the *Copyright Act* at present, and stated that 'the business community would benefit from greater clarity in relation to copyright and acceptable practices, and the formulation of clear guiding principles'.[177]

3.134 Consult Australia, representing design, architecture, technology, survey, legal and management services firms, considered that reforming the law to allow adaptation to technological change is a strong reason for introducing fair use, and submitted that:

> any legislative change be accompanied by the development of non-binding guidance material made available to business and other stakeholders, to assist in raising their awareness of their rights and the limitations to their use of copyright material.[178]

3.135 Sporting bodies are concerned that changes to copyright law may impact more harshly on them than other sectors. In particular, sporting bodies which rely mostly on broadcast copyright due to lack of copyright protection for their underlying 'spectacles', use contract and industry arrangements to regulate their business, and fear the disruption that changes in copyright law may cause.[179]

3.136 Sporting bodies are concerned that the existing exception for the reporting of news is being exploited and relied on by third parties to use an excessive amount of content (such as footage of sporting events) for a purpose other than the reporting of

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174 Arts Law Centre of Australia, *Submission 171* referring to work done by Peter Jaszi and Pat Aufderheide at the Centre for Social Media (American University, Washington, DC): P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011). See, however, comments on these studies in J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

175 Copyright Agency/Viscopy, *Submission 249*. See also APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*, PPCA, *Submission 240*.

176 IFFRO, *Submission 481*. See further discussion in Ch 12 on codes of practice for use of orphan works.

177 DSITIA (Qld), *Submission 277*.

178 Consult Australia, *Submission 555*.

179 NRL, *Submission 732*; COMPPS, *Submission 634*; Cricket Australia, *Submission 228*. Arguments were made for exclusion of sporting events from, for example, extension of statutory licensing schemes to internet transmission. See, however, discussion of the retransmission provisions in Ch 15.

news, without a licence.[180] The exception, it is argued, is being used for other purposes, such as driving traffic to particular websites.[181]

3.137 Submissions urged greater definition of 'news' and 'reporting the news' as part of the current fair dealing exception.[182] It was argued that '[t]he exception for the purpose of news reporting should include whether the purpose of the use has an impact on the market or potential market for the content'.[183] This is an aspect of the fair use factors proposed by the ALRC.[184]

3.138 However, News Ltd pointed to the undesirability of legislation defining too closely what 'reporting the news' is, and also what volume of material should be included in the concept. Rather, negotiations between news organisations and sports organisations, with the ACCC assisting, have led to a code of practice for sports news reporting.[185]

3.139 Development of an industry code is recommended by the *Book Industry Strategy Group Report* to be adopted 'in accordance with the legislative framework' in order to combat book piracy, with the government acting as an intermediary in negotiations. In responding to the report, the Government noted that a number of meetings had already taken place with the Attorney-General's Department and industry to find an acceptable way forward.[186]

3.140 Although these 'inter-industry compacts' do not always proceed as quickly as some parties would like, 'privately negotiated arrangements will continue to emerge as new technologies make access, re-use, and distribution of content an inherent part of our culture and economy'.[187]

3.141 The ALRC noted in the Discussion Paper[188] that talks relating to curbing piracy through industry agreement with respect to ISP activities had faltered following the iiNet case,[189] but raised the possibility that agreements and industry codes relating to 'purposes' in the *Copyright Act* could be provided for in the legislation. This approach is endorsed by the possibility that the government could 'write into law an industry

180 NRL, *Submission 732*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*.
181 AFL, *Submission 717*.
182 NRL, *Submission 732*; AFL, *Submission 717*; COMPPS, *Submission 634* .
183 AFL, *Submission 717*.
184 See Ch 5.
185 News Limited, *Submission 286*. Note that, in contrast, Major Professional and Participation Sports would prefer a 'reporting the news' exception that is more prescriptive: COMPPS, *Submission 266*. See also Cricket Australia, *Submission 228*.
186 Australian Government, *Government Response to Book Industry Strategy Group Report* (2012).
187 Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), citing, eg, the 2007 User Generated Content Principles as used in YouTube's UGC portal, voluntary best practice codes for payment services where sites sell counterfeit goods and the flexible Copyright Alert System to discourage infringing distribution of copyright material, among others.
188 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), [3.78].
189 *Roadshow Films Pty Ltd v iinet Ltd* [2012] 16 HCA.

code on online piracy'[190] as part of renewed government commitment to copyright issues.

3.142 In the educational context, the report commissioned by Screenrights from the Kernochan Center for Law, Media and the Arts of Columbia University[191] usefully reviewed the principal US copyright exceptions relevant to educational uses and commented on the possibility for Australia of such a provision. An important aspect of the fair use environment in the US is the development of guidelines as to how it should operate. Universities Australia submitted that in determining whether a particular use amounts to fair use/fair dealing or requires a licence 'universities would adopt guidelines or similar instructions to staff that assist in making such decisions' as in comparable jurisdictions.[192]

3.143 Copyright Agency submitted that the Attorney-General's Department Guidelines for the 'declared' collecting societies could be reviewed and updated for example to make specific reference to the digital environment and new forms of content:

> The current guidelines were developed for the education statutory licences, and have not been reviewed since being adopted in 1990. Similar guidelines could be developed for the government statutory licence, including its application to cultural institutions.[193]

The ACCC also pointed to its role in drafting guidelines to which the Copyright Tribunal is required to have regard in determining licence conditions that are the subject of determinations by the Copyright Tribunal.[194]

3.144 In their submission to this Inquiry, APRA/AMCOS urged that any such codes or guidelines 'should be mandated by law, should take into account the views of both owners and users, and should be subject to the jurisdiction of the Copyright Tribunal'.[195] Copyright Agency/Viscopy had a positive view of the role that Copyright Tribunal processes could play generally in streamlining issues identified in this Inquiry, including, for example:

> reviewing the principles and processes for identifying uses of internet content that are excluded altogether as a factor in compensation negotiations, and assessing the value of those that are not excluded. If necessary, this can be assisted by the Copyright Tribunal.[196]

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190 M Bingemann, 'Brandis Calls Time on Online Piracy', *The Australian*, 28 October 2013, 23.

191 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

192 Universities Australia, *Submission 293*.

193 Copyright Agency, *Submission 727*. This submission was put in the context of using existing mechanisms to promote understanding of licensing in the digital economy, without the need for statutory intervention in the current licensing schemes. The ALRC notes that the review of guidelines as submitted is also relevant in the context of the reform recommendations in this Report.

194 *Copyright Act 1968* (Cth) s 157A.

195 APRA/AMCOS, *Submission 664*.

196 Copyright Agency, *Submission 866*.

3.145 Both statutory and voluntary licence schemes may be referred to the Copyright Tribunal, with amendments made in 2006 to expand this jurisdiction. The ACCC may be made a party to proceedings relating to voluntary licence schemes, in circumstances relating to failing to provide a licence or on unreasonable terms.[197]

3.146 An important aspect of the discussion in the Kernochan Center report concerns the divergence of views on fair use and the length of time disputes take to resolve, despite the development of various sets of guidelines. However, the Standing Council on School Education and Early Childhood explicitly referred to the time and resources taken up in dealing with the inefficiencies of the current educational copyright licensing environment.[198] The Council also stated that it is not correct to assume that the current environment creates greater certainty than an open-ended flexible exception.[199]

3.147 However, 'statements and codes of Best Practices created by and for various communities (including libraries and educators) have shown considerable potential as a tool to promote both understanding and relative predictive certainty'.[200]

3.148 Universities Australia further submitted[201] that 'the potential for industry guidelines and codes of practice as an appropriate policy tool in copyright law, has been recognised for many years' and pointed to a number of statements of best practice for fair use in the movie industry and by other rights holders, which have been lauded by the US Department of Commerce.[202]

3.149 The education sector expressed a strong commitment to working to develop guidelines and codes of practice to inform the use of educational material.[203]

3.150 In May 2013, Productivity Commission Chair, Mr Peter Harris, called for a policy-making structure that reinforces the expectation of change:

> a mechanism under which continuous reform is invited ... An integrated approach, where the voice of any one affected sector or region may not dominate; and where the breadth of necessary changes and the combined potential for economy-wide gains can be clearly set against any costs ... a generic way forward. But clearly there is scope in this idea for a regular, wide-ranging review of productivity-oriented reforms ... This is not a concept that can be created overnight.[204]

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197 s 155(2)(d), 157. See with respect to music licensing, eg, Reference by APRA and AMCOS [2009] A Copy T 2 under s 154.

198 Copyright Advisory Group—Schools, *Submission 290*.

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

200 G Hinze, P Jaszi and M Sag, *Submission 483*. Screenrights stated that principles-based regulation is 'an academic approach' that fails to acknowledge the value of the forty-five years of investment by copyright owners and copyright users in the interpretation and operation of the current regime'.

201 Universities Australia, *Submission 754*.

202 US Department of Commerce Internet Policy Taskforce, *Copyright Policy, Creativity and Innovation in the Digital Economy* (2013).

203 Copyright Advisory Group—Schools, *Submission 861*; Universities Australia, *Submission 754*; CAG Tafe, *Submission 708*; Copyright Advisory Group—Schools, *Submission 707*.

204 P Harris, *The Productivity Reform Outlook* <www.pc.gov.au/speeches/peter-harris/reform-outlook> at 1 May 2013.

Creation of this understanding can come through industry guidelines matched with consumer expectations.

3.151 The ALRC proposes that in the digital environment, a standard—a general rule based on principle—provides the flexibility to respond to technological change in a principled manner.[205]

3.152 The ALRC's recommendations are designed to allow copyright policy and practice to develop within a framework that is sensible, flexible and adaptable and allows for negotiation between parties, the development of industry understanding, the operation of market forces and the creation of certainty for business and confidence for consumers.

205 See discussion of 'principles based' legislation in Ch 5.

4. The Case for Fair Use

Contents

Summary

4.1 The ALRC recommends the introduction of a fair use exception into Australian copyright law. This chapter briefly explains what fair use is, and makes the case for enacting fair use in Australia. It sets out some of the important arguments for and against introducing this exception.

4.2 Fair use is a defence to copyright infringement that essentially asks of any particular use: Is this fair? In deciding whether a use is fair, a number of principles, or 'fairness factors', must be considered. These include the purpose and character of the use and any harm that might be done to a rights holder's interests by the use.

4.3 Importantly, fair use differs from most current exceptions to copyright in Australia in that it is a broad standard that incorporates principles, rather than detailed prescriptive rules. Law that incorporates principles or standards is generally more flexible and adaptive than prescriptive rules. Fair use can therefore be applied to new technologies and new uses, without having to wait for consideration by the legislature.

4.4 The factors in the fair use exception ask the right questions of particular uses of copyright material. Does this use unfairly harm a market the rights holder alone should be able to exploit, and so undermine the incentive to create? If so, it is unlikely to be fair. Is this use for an important public purpose, or perhaps for a different purpose than that for which the creator or rights holder intended? If so, the use is unlikely to harm the rights holder and should be permitted, facilitating the public interest in accessing material, encouraging new productive uses, and stimulating competition and innovation.

4.5 Fair use is not a radical exception. It largely codifies the common law, and may be seen as an extension of Australia's fair dealing exceptions. Guidance on its meaning and application can be found in the case law on fair dealing in Australia, the United Kingdom and other countries with fair dealing exceptions. Arguably more helpful will be case law applying the very similar fair use provision in the United States, and industry guidelines and codes that would be prepared if fair use were enacted.

4.6 Copyright exceptions need to be certain and predictable, in part so that rights holders and users have the confidence to invest in innovation. Although standards may generally be more flexible and less certain than detailed rules, the ALRC considers that a clear and principled standard like fair use is sufficiently certain in scope—and arguably more certain than much of Australia's highly complex, sometimes nearly indecipherable, *Copyright Act*.

4.7 Finally, this chapter discusses whether fair use—an exception codified by the US over 30 years ago—is consistent with international law. The ALRC concludes that it is.

What is fair use?

4.8 Fair use is a statutory provision that provides that a use of copyright material does not infringe copyright if it is 'fair', and that when considering whether the use is fair, certain principles or 'fairness factors' must be considered. The provision also includes a list of 'illustrative purposes'.

4.9 Most fair use provisions around the world list the same four fairness factors. These are also factors that appear in the current Australian exceptions for fair dealing for the purpose of research or study.[1] The four fairness factors are non-exhaustive; other relevant factors may be considered.

4.10 In other jurisdictions, fair use provisions set out illustrative purposes—these are examples of broad types or categories of use or purposes that may be fair. A particular use does not have to fall into one of these categories to be fair. This is one of the key benefits of fair use. Unlike the fair dealing provisions, fair use is not limited to a set of prescribed purposes.

1 *Copyright Act 1968* (Cth) ss 40(2), 103C(2), 248A(1A).

4.11 Further, just because a use falls into one of the categories of illustrative purpose, does not mean that such a use will necessarily be fair. It does not even create a presumption that the use is fair. In every case, the fairness factors must be 'explored, and the results weighed together, in light of the purposes of copyright'.[2]

4.12 Fair use largely codifies the common law and shares the same common law sources as fair dealing.[3] One stakeholder stated that fair use has 'always been an integral part of copyright law in the common-law world, and it is the notion of an exhaustive list of statutory exceptions that is foreign'.[4] Fair use has been enacted in a number of countries,[5] most notably in the US.[6]

4.13 The codification of fair use in the US took effect in 1978. The intention was to restate copyright doctrine—'not to change, narrow, or enlarge it in any way'.[7] There was no intention 'to freeze the doctrine in the statute, especially during a period of rapid technological change'.[8] Section 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.

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2 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 577.

3 See, eg, 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* (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.

4 A Katz, *Submission 606*. See also K Bowrey, *Submission 554* ('Twentieth century copyright legislation, which utilised the term fair dealing instead of fair use, was not designed to ... constrain flexible approaches to judicial interpretation of rights').

5 See, eg, *Copyright Act 1967* (South Korea) art 35–3; *Copyright Act 2007* (Israel) s 19; *Intellectual Property Code of the Philippines*, Republic Act No 8293 (the Philippines) s 185.

6 *Copyright Act 1976* (US) s 107.

7 United States House of Representatives, Committee on the Judiciary, *Copyright Law Revision (House Report No. 94-1476)* (1976), 5680.

8 Ibid.

Reviews that have considered fair use

4.14 The Terms of Reference direct the ALRC to take into account recommendations from related reviews. A number of reviews, in Australia and in other jurisdictions, have considered the merits, or otherwise, of introducing fair use.

Recent international reviews

4.15 In the UK, the Hargreaves Review was specifically asked to investigate the benefits of a fair use exception and how these benefits might be achieved.[9] Professor Hargreaves found that the current state of European Union (EU) law meant that there would be considerable difficulties in introducing a fair use exception into the UK.[10] For this reason, Professor Hargreaves did not recommend fair use, 'the big once and for all fix',[11] but instead considered how the benefits of fair use could be achieved through other means.

4.16 The Copyright Review Committee (Ireland) also released a report in late October 2013. It took a different view from the Hargreaves Review, in that it considered that 'there is scope under EU law for member states to adopt a fair use doctrine as a matter of national law' and recommended the enactment of a fair use exception.[12]

4.17 The Ireland Review considered that a fair use exception should be enacted in that jurisdiction for two reasons. First, it considered that 'it is simply not possible to predict the direction in which cloud computing and 3D printing are going to go, and it is therefore impossible to craft appropriate *ex ante* legal responses'.[13] Secondly, 'it will send important signals about the nature of the Irish innovation ecosystem' and 'it will provide the Irish economy with a competitive advantage in Europe'.[14]

4.18 The fair use exception recommended in the Ireland Review differs from the US provision, and from the exception recommended in this Report, in that it provides for the existing exceptions to be regarded as examples of fair use and for the fairness of other uses to be assessed on the basis of up to eight separate factors.[15]

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9 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 101.

10 Ibid, 46. Some scholars have challenged the view that a member state of the EU cannot introduce flexible copyright norms. See, eg, B Hugenholtz and M Senftleben, *Fair Use in Europe: In Search of Flexibilities* (2011). More recently, Professor Hargreaves has described fair use as 'the backbone of a healthy Internet-economy ecosystem in the US': I Hargreaves and B Hugenholtz, 'Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework' (2013) 13 *Lisbon Council Policy Brief* 1.

11 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 52.

12 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 91.

13 Ibid, 93.

14 Ibid. It was also considered beneficial because it would 'give Irish law a leadership position in EU copyright debates'.

15 Ibid, 11, 89–97.

Australian reviews

4.19 This Inquiry is not the first Australian review to consider whether the *Copyright Act* should recognise the fair use of copyright material,[16] although some stakeholders consider that it has not been given 'a sufficiently thorough examination in Australian law reform processes' to date.[17]

The CLRC simplification review

4.20 In 1996, the Australian Government asked the Copyright Law Review Committee (CLRC), chaired by Professor Dennis Pearce, to consider how the *Copyright Act* could be simplified 'to make it able to be understood by people needing to understand their rights and obligations'.[18]

4.21 In its 1998 report, the CLRC recommended the introduction of fair use—or at least, an open-ended fair dealing provision that is largely indistinguishable from fair use.

4.22 The CLRC recommended the consolidation of the fair dealing provisions into a single section[19] and the expansion of fair dealing to an 'open-ended model' that would not be confined to the 'closed-list' of fair dealing purposes.[20] The CLRC recommended that the non-exhaustive list of five fairness factors in s 40(2) of the *Copyright Act* specifically apply to all fair dealings.[21]

4.23 The CLRC recommended the following text for the consolidated statutory provision:

> (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;

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16 For an overview of the history of the review, 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.

17 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

18 Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [1.03].

19 However, the CLRC recommended that the quantitative test be included in 'a stand-alone provision separate from the new fair dealing provision': Ibid, [6.10].

20 Ibid, [2.01]–[2.03].

21 See also Ibid, [2.04], [6.36]–[6.44].

> (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.[22]

4.24 The CLRC considered that its model was 'sufficiently flexible to accommodate new uses that may emerge with future technological developments' and that it also contained 'enough detail to provide valuable guidance to both copyright owners and users'.[23] The model was described as a 'neat and elegant one that will bring the existing multiplicity of exceptions into a coherent and orderly relationship'.[24] The Australian Government did not formally respond to the CLRC's recommendations.

4.25 It is interesting to reflect on whether Australia might have been better placed to participate in the growth of the nascent digital economy, had the CLRC's fair use exception been enacted in 1998.

Intellectual Property and Competition Review Committee

4.26 In September 2000 the Intellectual Property and Competition Review Committee, chaired by Henry Ergas (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'.[25] In the context of reviewing copyright in terms of competition policy, the Ergas Committee considered that, at that time, the transaction costs of introducing fair use would outweigh the benefits.[26]

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

4.27 The Australian Government Attorney-General's Department's Fair Use Review (AGD Fair Use Review) considered the CLRC and Ergas Committee's respective relevant recommendations, as well as a recommendation that had been made by the Joint Standing Committee on Treaties (JSCOT) in considering whether the *Australia–United States Free Trade Agreement* (AUSFTA) would be in the national interest.

4.28 JSCOT had recommended replacing fair dealing with something closer to the US fair use doctrine 'to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting'.[27]

4.29 A final report was not issued. However, after the Review, a number of reforms were enacted—notably exceptions for time and format shifting and fair dealing for parody and satire.

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22 Ibid, [6.143].
23 Ibid, [6.08].
24 S Ricketson, 'Simplifying Copyright Law: Proposals from Down Under' (1999) 21(11) *European Intellectual Property Review* 537, 549.
25 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 15.
26 Ibid, 129.
27 The Joint Standing Committee on Treaties—Parliament of Australia, *Report 61: The Australia-United States Free Trade Agreement* (2004), Rec 17.

4.30 The Australian Government did not enact a fair use exception, stating that, in the public consultation phase, 'no significant interest supported fully adopting the US approach'.[28]

Fair use builds on Australia's fair dealing tradition

4.31 Far from being a 'radical' exception, fair use is an extension of Australia's longstanding and widely accepted fair dealing exceptions. The principles encapsulated in fair use and fair dealing exceptions also have a long common law history, traced back to eighteenth century England.[29]

4.32 Many of the benefits of fair use, discussed in this chapter and throughout the Report, are also benefits of the fair dealing exceptions. Both require an assessment of fairness in light of a set of principles.

4.33 The crucial difference between the exceptions is that fair dealing is confined to prescribed purposes—or types of use—while fair use is not. The ALRC considers that there is no need to confine fairness exceptions to a set of prescribed purposes. By recommending fair use, the ALRC may, in essence, merely be removing an unnecessary restriction on Australia's existing fair dealing exceptions.[30]

4.34 Australian legislation first used the expression 'fairly dealing' in its *Copyright Act 1905* (Cth)—the first common law country to do so.[31] There are five fair dealing exceptions in the current *Copyright Act*, one for each of the following purposes:

- research or study;[32]
- criticism or review;[33]
- parody or satire;[34]
- reporting news;[35] and
- a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.[36]

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28 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.

29 For example, see M Sag, 'The Prehistory of Fair Use' (2011) 76 *Brooklyn Law Review* 1371.

30 A fairness exception like fair use, but confined to a set list of prescribed purposes, is the ALRC's second best option for reform—a new fair dealing exception, discussed in Ch 6.

31 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.

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

33 Ibid ss 41, 103A.

34 Ibid ss 41A, 103AA.

35 Ibid ss 42, 103B.

36 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.

4.35 Applying a fair dealing exception is a two-step process. First, the use must be for one of the specific purposes listed in the *Copyright Act*. Secondly, the use must be fair. Fairness factors are specified in the statute for uses for research and study, but for other fair dealings, fairness is left to the common law.[37] Fair use removes this first step—the purposes listed in the fair use exception are merely illustrative. This means that fair use can be applied to a much larger range of use of copyright materials. For some, this makes fair use too broad and uncertain. The ALRC considers that this makes the provision more flexible, and that the question of fairness in light of the fairness factors sufficiently confines the exception. Fair use may permit more unlicensed uses than the existing fair dealing exceptions, but only fair uses—transformative uses, and uses that will not unfairly harm rights holders.

4.36 Fair use improves upon the current fair dealing exceptions in other respects. For example, not all of the current fair dealing exceptions are available for all types of copyright material. Fair use, however, could be applied to any copyright material. This does not mean that fair use will have the same outcome for all types of copyright material. Differences in markets mean that this would not be fair. But fair use at least has the flexibility to ask the question of fairness of any type of use, and any type of copyright material.

4.37 Additional requirements must also be met for some fair dealing exceptions to apply. For example, some require sufficient acknowledgement of the material used.[38] Others include a quantitative test that deems the use of certain quantities of copyright material to be fair.[39] The concept of 'reasonable portion' is fixed by reference to chapters, or 10% of the number of pages or number of words.[40] Although such additional requirements could, in theory, be incorporated in a fair use exception, the ALRC favours a less prescriptive provision, with these matters being considered as part of an assessment of fairness. For example, some uses of copyright material are less likely to be fair, if the author or owner of the copyright material is not acknowledged. In this way, fair use accords with the first framing principle, 'acknowledging and respecting authorship'.

4.38 Fair use builds on Australia's current fair dealing exceptions, retaining the focus on fairness, but removing unnecessary limitations to particular types of use and clarifying that important factors should be considered when assessing whether any type of use is fair.

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37 The fairness factors specified for research and study (ss 40, 103C) are likely to be relevant when considering the fairness of dealings for other purposes: Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.09]. See further Ch 5.

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

39 See Ibid s 40(3)–(8) (research or study).

40 Ibid ss 10, 40, 135ZMDA.

Fair use is flexible and technology-neutral

4.39 Fair use is a standard, rather than a rule. It requires the consideration of principles or factors in an assessment of fairness, rather than setting out in detail the precise circumstances in which the exception will apply. This makes fair use considerably more flexible and better able to adapt to new technologies and new commercial and consumer practices. It is an important feature and benefit of both fair use and, to a lesser extent, fair dealing exceptions, including the new fair dealing exception recommended in Chapter 6. It is also consistent with the fourth framing principle—'providing rules that are flexible, clear and adaptive to new technologies'.

4.40 New technologies, services and uses emerge over time—rapidly in the digital environment. Many submissions suggested that a broad, principles-based exception, which employs technology-neutral drafting such as fair use, would be more responsive to rapid technological change and other associated developments than the current specific, closed-list approach to exceptions.[41]

4.41 A technology-neutral open standard such as fair use has the dynamism or agility to respond to 'future technologies, economies and circumstances—that don't yet exist, or haven't yet been foreseen'.[42] That is, fair use may go some way to futureproof the *Copyright Act*.[43] As the Law Council of Australia saw it, a flexible fair use provision 'will enable the Act to adapt to changing technologies and uses without the need for legislative intervention'.[44]

4.42 Fair use is also better able to respond to the challenges of convergence. The Convergence Review recommended:

> a shift towards principles-based legislation to ensure the policy framework can respond to the future challenges of convergence ... [A] principles-based approach would provide increased transparency for industry and users [and] moves away from detailed 'black-letter law' regulation, which can quickly become obsolete in a fast-changing converged environment and is open to unforeseen interpretations.[45]

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41 See, eg, Internet Industry Association, *Submission 744*; NSW Government and Art Gallery of NSW, *Submission 740*; Optus, *Submission 725*; ACCC, *Submission 658*; Telstra Corporation Limited, *Submission 602*; Google, *Submission 600*; BSA, *Submission 598*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; Yahoo!7, *Submission 276*.

42 Telstra Corporation Limited, *Submission 222*. See also R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Law Institute of Victoria, *Submission 198*.

43 Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; ABC, *Submission 210*.

44 Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*. See also Choice, *Submission 745*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

45 Australian Government Convergence Review, *Convergence Review Final Report* (2012), Executive Summary, xii.

4.43 eBay submitted that a principles-based approach is 'likely to lessen the need to make ongoing statutory amendments in order to accommodate changing user expectations'.[46] Choice commented similarly:

> Fair use is best equipped to address use of works on social media precisely because it is so nuanced. A rigid set of exceptions or limitations would be ill equipped to find the right balance for the various interests at play, and would be likely to age quickly.[47]

4.44 Many stakeholders suggested that specific exceptions will inevitably reflect the circumstances that prevailed at the time of their enactment, while a general exception can respond to a changing environment. Telstra noted:

> the current exceptions are generally created in response to existing technologies, economies and circumstances. As a result, they tend to have a narrow 'patchwork' application to circumstances existing at the time the exception is introduced.[48]

4.45 Yahoo!7 submitted that 'the existing exceptions under the Act are no longer sufficient by themselves to protect and support the new services introduced by Internet and technology companies'.[49] For example:

> In Australia, the absence of a robust principle of fair use within the existing fair dealing exceptions means that digital platforms offering search tools are not able to provide real time high quality communication, analysis and search services with protection under law.[50]

4.46 Stakeholders were also concerned about the lengthy delay between the emergence of a new use and the legislature's consideration of the need for a specific exception.[51] At present, 'each new situation needs to be considered and dealt with in separate amending legislation which usually occurs well after the need is identified'.[52] A copyright exception permitting time shifting was not enacted in Australia until 22 years after time shifting had been found to be fair use in the US. The exception for parody and satire came 12 years later, and for reverse engineering of computer programs, seven years.[53] Electronic Frontiers Australia submitted that the inflexibility of the current purpose-based exceptions, together with the increasingly rapid pace of technological change, ensure that 'the law now lags years behind the current state of innovation in technology and service delivery'.[54]

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46 eBay, *Submission 751*.
47 Choice, *Submission 745*.
48 Telstra Corporation Limited, *Submission 222*.
49 Yahoo!7, *Submission 276*.
50 Ibid.
51 For example, Intellectual Property Committee, Law Council of Australia, *Submission 284*; Yahoo!7, *Submission 276*; Law Council of Australia, *Submission 263*; R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Google, *Submission 217*.
52 Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*.
53 Time shifting: *Sony Corp of America v Universal City Studios, Inc* (1984) 464 US 417 and *Copyright Act 1968* (Cth) s 110AA; parody: *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569 and *Copyright Act 1968* (Cth) ss 41A, 103AA; reverse engineering: *Sega Enterprises v Accolade Inc* (1992) 977 F.2d 1510 and *Copyright Act 1968* (Cth) s 47D. See further R Giblin, *Submission 251*.
54 EFA, *Submission 258*.

4.47 One submission noted that policy makers 'simply cannot be expected to identify and define *ex ante* all of the precise circumstances in which an exception should be available'.[55] It was said that no legislature can anticipate or predict the future. Google submitted that 'innovation and culture are inherently dynamic' and that 'you cannot legislate detailed rules to regulate dynamic situations; you can only set forth guiding principles'.[56]

4.48 With a fair use standard, innovation and other new expressive purposes need not wait for Parliament to reconsider the appropriate scope of copyright exceptions. Australian Film/TV Bodies noted that Australia has implemented specific provisions in almost every major policy area resolved by fair use litigation in the US, and suggested that this indicates that the existing provisions are working.[57] However, they did not mention the extensive time lag between the US fair use decisions and the Australian amendments. Fair use will save the legislature from constant law reform to 'catch up' with new technologies and uses, although of course the legislature could still act if needed to respond to particular developments.

4.49 Some stakeholders argued that the legislature—and not the judiciary—should determine the scope of the exceptions.[58] They considered that important decisions such as whether a new purpose is fair should be decided by Parliament, because parliamentary processes allow public consideration of community priorities, and create an opportunity for public scrutiny and debate.[59] By contrast, judicial decision making in this context was seen as less democratic, as only the views of the parties are presented to the court,[60] and the 'economic strength of litigants is unduly significant'.[61] One stakeholder thought that 'Australian courts will struggle to determine how to give content to an open ended defence'.[62]

4.50 The ALRC agrees that standards do place a greater emphasis on judicial decision making. However, in this area of the law, the better role for Parliament is to set out the principles on which decisions should be made. The application of principles to specific fact situations is the role of the courts. Chapter 5 of this Report discusses how courts will perform this function in a way that contributes to certainty and predictability.

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55 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

56 Google, *Submission 217*. See also Yahoo!7, *Submission 276*.

57 Australian Film/TV Bodies, *Submission 739*.

58 See, eg, Free TV Australia, *Submission 865*; ABC, *Submission 775*; ARIA, *Submission 731*; Copyright Agency, *Submission 727*; Cricket Australia, *Submission 700*; Australian Institute of Architects, *Submission 678*; Australian Copyright Council, *Submission 654*; Screenrights, *Submission 646*; APRA/AMCOS, *Submission 247*; Australian Publishers Association, *Submission 225*; NSW Young Lawyers, *Submission 195*.

59 ABC, *Submission 775*; Australian Institute of Architects, *Submission 678*.

60 ABC, *Submission 775*; Arts Law Centre of Australia, *Submission 706*; Screenrights, *Submission 646*.

61 Australian Institute of Architects, *Submission 678*.

62 Australian Film/TV Bodies, *Submission 739*. See also ARIA, *Submission 731*.

4.51 Some stakeholders queried the argument that fair use provides flexibility to respond to changing conditions.[63] The Viscopy Board stated that copyright law in the US is 'regularly under review by the legislature in spite of their longstanding fair use provision'.[64] Others said there was no need for greater flexibility, and that more flexibility comes at too high a cost. Some submitted that the existing fair dealing defences were sufficiently flexible to respond to technological change.[65]

4.52 Fair dealing exceptions are generally more flexible than specific prescribed exceptions—like fair use, they need not be confined to particular technologies and they require a consideration of fairness, in light of a set of principles. But fair dealing exceptions, including the new fair dealing exception recommended in this Report as an alternative to fair use, are confined to uses of copyright material for prescribed purposes.

4.53 For many stakeholders, closed-ended fair dealing exceptions are too confined and inflexible. For example, the CSIRO submitted that it was not always clear whether some activities were for 'research or study', one of the prescribed fair dealing purposes, and that this can mean

> uses that facilitate dissemination and communication of scientific and technical information may be avoided despite there being no or marginal impact on the legitimate interests of a copyright owner. If a more general purpose exception applied this concern may be alleviated, the focus then being on the key issue of the impact of the use on the legitimate interests of the copyright owner.[66]

Rules and standards

4.54 The flexibility of fair use largely comes from the fact that it is a standard, rather than a rule. This distinction between rules and standards is commonly drawn in legal theory. Rules are more specific and prescribed. Standards are more flexible and allow decisions to be made at the time of application, and with respect to a concrete set of facts.[67] Further, 'standards are often based on concepts that are readily accessible to non-experts'.[68]

4.55 Rules and standards are, however, points on a spectrum. Rules are 'not infinitely precise, and standards not infinitely vague'.[69] The legal philosopher H L A Hart wrote that rules have 'a core of certainty and a penumbra of doubt'.[70] The distinction is nevertheless useful.[71]

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63 Foxtel, *Submission 748*; Australian Education Union, *Submission 722*; Queensland Law Society, *Submission 644*; Springer Science and Business Media, *Submission 639*; Viscopy Board, *Submission 638*.

64 For example, Viscopy Board, *Submission 638*.

65 APRA/AMCOS, *Submission 664*.

66 CSIRO, *Submission 242*.

67 F Schauer, 'The Convergence of Rules and Standards' (2003) (3) *New Zealand Law Review* 303.

68 E Hudson, 'Implementing Fair Use in Copyright Law' (2013) 25 *Intellectual Property Journal* 201, 220.

69 F Schauer, 'The Convergence of Rules and Standards' (2003) (3) *New Zealand Law Review* 303, 309.

70 H Hart, *The Concept of Law* (3rd ed, 2012) 123.

71 See also E Hudson, 'Implementing Fair Use in Copyright Law' (2013) 25 *Intellectual Property Journal* 201 who uses a standards and rules analysis to revisit some of the claims about the merits of different styles of drafting of copyright exceptions.

4.56 Another way of talking about standards is to refer to 'principles-based' legislation. In 2002, a study by Australian academic Professor John Braithwaite concluded that, as between principles and rules:

> 1. When the type of action to be regulated is simple, stable and does not involve huge economic interests, rules tend to regulate with greater certainty than principles.
> 2. When the type of action to be regulated is complex, changing and involves large economic interests:
>
> (a) Principles tend to regulate with greater certainty than rules;
>
> (b) Binding principles backing non-binding rules tend to regulate with greater certainty than principles alone;
>
> (c) Binding principles backing non-binding rules are more certain still if they are embedded in institutions of regulatory conversation that foster shared responsibilities.[72]

4.57 Standards are becoming more common in Australian law, including, for example, in consumer protection and privacy legislation. As Universities Australia submitted, there is 'nothing new or novel about courts construing open-ended standards such as fairness'.[73]

4.58 The well-known prohibition on 'misleading or deceptive conduct', previously in s 52 of the *Trade Practices Act 1974* (Cth) and now contained in s 18 of the Australian Consumer Law,[74] is an example of this kind of legislative drafting—that is, providing a broad standard that can be applied flexibly to a multitude of possible situations.

4.59 Similarly, the unfair contracts provisions of the Australian Consumer Law provide a simple formulation of when a term of a consumer contract is 'unfair'. Under that law, a term is unfair when:

> (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
>
> (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
>
> (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.[75]

4.60 Such standards are sometimes accompanied by factors a court may, or must, take into account in applying the standard, or examples of when the standard may have been breached, or complied with.

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72 J Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47, 75.

73 Universities Australia, *Submission 754*.

74 *Competition and Consumer Act 2010* (Cth) sch 2, s 18.

75 Ibid sch 2, s 24(1).

4.61 Again, the Australian Consumer Law provides illustrations of these approaches. The unconscionable conduct provisions contain an extensive, but non-exhaustive, list of factors to which a court may have regard in determining unconscionable conduct.[76] The unfair contracts provisions contain examples of unfair terms.[77]

4.62 In another field, the *Privacy Act 1988* (Cth) is an example of principles-based legislation. The National Privacy Principles and Information Privacy Principles provide the basis for regulating the handling of personal information by private sector organisations and public sector agencies.[78] The principles provide broad standards, such as obligations: not to collect personal information unless the information is 'necessary'; not to use personal information other than for the 'primary purpose' of collection; and to take 'reasonable steps' to protect personal information from misuse.

4.63 Principles-based regulation was considered the best approach to regulating privacy for several reasons, including that principles have greater flexibility in comparison to rules. That is, being high-level, technology-neutral and generally non-prescriptive, principles are capable of application to all agencies and organisations subject to the *Privacy Act*, and to the myriad of ways personal information is handled in Australia. Further, principles allow for a greater degree of futureproofing and enable the regulatory system to respond to new issues as they arise without having to create new rules.[79] In the ALRC's view, these rationales can also be seen as applying to the concept of fair use in copyright law.

4.64 The introduction of fair use is consistent with these current approaches to best practice principles-based regulation.

Fair use promotes public interest and transformative uses

4.65 Copyright has always been concerned with promoting the public interest. The first copyright statute, the *Statute of Anne*, was 'an Act for the encouragement of learning ... and for the encouragement of learned men to compose and write useful books'.[80] The monopoly granted was not only to preserve the property rights of the publishers, but to ensure that useful books were written for the public to read. The preamble to the *World Intellectual Property Organization Copyright Treaty* recognised 'the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the *Berne Convention*'.[81] The third framing principle for this Inquiry requires recommendations to 'promote fair access to content'.

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76 Ibid sch 2, s 22.
77 Ibid sch 2, s 25.
78 From 12 March 2014, the Australian Privacy Principles will replace the National Privacy Principles and Information Privacy Principles: *Privacy Amendment (Enhancing Privacy Protection) Act 2012.*
79 See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).
80 1710, 8 Anne c 19.
81 *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002).

4.66 It has been said that fair use 'counterbalances what would otherwise be an unreasonably broad grant of rights to authors and unduly narrow set of negotiated exceptions and limitations'.[82] In the words of one group of commentators:

> Given expansions to owner rights, the inclusion of 'large and liberal' exceptions in copyright legislation is essential to promote important public interest values associated with research and education, access to information, new authorship, fair competition, technological and scientific progress, and cultural, economic and social development.[83]

4.67 One of the notable public interests that fair use will arguably better serve is education. Parts of the educational sector called for a 'fairer' policy balance in the *Copyright Act*.[84] Copyright Advisory Group (CAG) Schools compiled a table comparing a number of differences between the copyright laws that apply to schools in Australia, the US and Canada and submitted that the results suggest that the 'balance struck in the Australian *Copyright Act* does not adequately recognise the public interest in allowing limited free uses of copyright materials for educational purposes'.[85]

4.68 Universities Australia stated that Australian universities were in a 'worse position' than large commercial enterprises in terms of being able to use third party copyright material for socially beneficial purposes.[86] Commercial news organisations can rely upon the fair dealing exceptions for news reporting but there is no equivalent specific exception for universities for fair use for educational purposes. Universities Australia submitted that, from a policy perspective, 'this makes little sense'.[87]

4.69 The 2013 *Google Books* case demonstrates the potential of fair use to advance education and learning and to benefit authors and content owners.[88] Google scanned books and made them available for searching on its website, without seeking rights holders' permission. A search in Google Books returns a list of books in which the search term appears, a 'snippet' (one eighth of a page) from the book, and links to sellers of the books and libraries. In the judgment, the benefits of Google Books were said to be 'a new and efficient way for readers and researchers to find books', the facilitation of data and text mining, access for people with print disability, the preservation of old and out of print books, and (because the search results include links to book sellers) increased sales for authors and publishers.[89] The court concluded that the use was transformative, served educational purposes, and did not serve as a market replacement for books, but in fact enhanced the sales of books, and was therefore fair use.

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82 ADA and ALCC, *Submission 213*, citing P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537, 2618.

83 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

84 See, eg, Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*.

85 Copyright Advisory Group—Schools, *Submission 231*. See also arguments made in Copyright Advisory Group—Schools, *Submission 707*.

86 Universities Australia, *Submission 754*.

87 Ibid.

88 *The Authors Guild, Inc. v Google, Inc.*, (SDNY, Civ 8136, 14 November 2013).

89 Ibid.

4.70 There will be debate about this decision and an appeal is likely. However, it is important to note that under current Australian law, Google would have been very limited in its ability to establish such a database—even though it does not appear to undermine the position of rights holders. Under fair use, there is scope to use copyright material in an innovative way that can serve the public interest while respecting markets.

4.71 Fair use also promotes, and Australia's current exceptions now largely neglect, what have been called 'transformative' uses. As discussed in Chapter 5, this refers to the use of copyright material for a different purpose than the use for which the material was created.

4.72 This is a powerful and flexible feature of fair use. It can allow the unlicensed use of copyright material for such purposes as criticism and review, parody and satire, reporting the news and quotation. Many of these uses not only have public benefits, but they generally do not harm rights holders' markets, and sometimes even enlarge them. Fair use is also an appropriate tool to assess whether other transformative uses should be permitted without a licence, such as data mining and text mining, caching, indexing and other technical functions, and a range of other innovative uses.

4.73 The monopoly provided by copyright is vital to allowing creators and rights holders to exploit the value of their works, so as to increase the incentive to create those works—but this monopoly need not extend indefinitely or into markets which the creator had no real interest in exploiting. Copyright must leave 'breathing room' for new works and new productive uses that make use of other copyright material.

4.74 This Report discusses the merits of permitting a range of unlicensed uses of copyright material—uses that the ALRC considers benefit the public and neither harm rights holders nor reduce the incentive to create. The following examples of such uses that Australia's current exceptions may unnecessarily prohibit or stifle were provided by stakeholders:[90]

- accessible formats of texts for blind or vision impaired persons;
- caching and indexing by search engines and internet service providers;
- the sparing and appropriate incorporation of third party copyright material into educational course content delivered via massive open online courses (MOOCs);
- placing development applications, including architects' plans, surveys, and environmental impact statements, on a website for the purpose of public consultation;

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90 Examples were provided by many stakeholders, including: Universities Australia, *Submission 754*; NSW Government, *Submission 294*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Law Council of Australia, *Submission 263*; Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*; Vision Australia, *Submission 181*; State Library of New South Wales, *Submission 168*; Blind Citizens Australia, *Submission 157*; National Archives of Australia, *Submission 155*; Powerhouse Museum, *Submission 137*; M Rimmer, *Submission 122*.

- the communication to the public of the datasets underlying research results that could assist in independent verification of those results, particularly for online qualitative research;
- use of copyright material with no owner that can be identified—known as 'orphan works';
- use of technologies that analyse copyright material looking for patterns and trends—known as 'data mining';
- copying legally acquired copyright material between computers and other devices for personal use;
- storing legally acquired copyright material on remote servers;
- using material to satisfy personal curiosity, rather than to undertake formal research;
- the communication to the public of works created by students and researchers using museum collections;
- use of third party images or text in a presentation to illustrate the point being made;
- use of short quotations in academic publications;
- a university's creation of an open digital repository of theses and other research publications;
- sharing copyright works with colleagues for the purpose of discussion, including a university's reproduction and distribution of reference material to a research team;
- the use by a student of extracts from a state Hansard or state government media releases in a play;
- the reproduction of a passage from a book in a review of a film based on the book;
- copying portions of a confidential document, such as a Cabinet minute, for the purpose of commenting on a matter of public importance;
- use of material to support commentary or the expression of opinion rather than reporting of events—for example, humorous topical news programmes or some types of newspaper opinion piece;
- some practices that go beyond parody or satire, such as pastiche or caricature;
- professional legal or law-related services such as preparing and executing agreements, preparation of trade mark or patent applications, mediation, alternative dispute resolution, or arbitration;
- 3D printing; and
- copying for the purpose of back-up and data recovery.

Fair use assists innovation

4.75 Exceptions such as fair use that are flexible and technology-neutral can stimulate innovation, particularly in 'transformative markets'—that is, markets that rights holders do not traditionally exploit, but that may nevertheless include the use of copyright material.

4.76 Australia has been called a 'hostile regulatory environment for technology innovators and investors'.[91] This has been said to have 'long discouraged innovation and investment by technology providers and content owners alike'.[92]

4.77 Increasingly, the introduction of fair use into copyright law is being looked to as something that innovative, technology-focused countries have adopted and it is gaining support across Europe.[93]

4.78 The Australian Industry Group submitted that the current *Copyright Act* does not provide the optimal foundation for Australia to succeed in the digital economy, and supported the ALRC's movement towards a more flexible and less technology specific model for copyright law.[94]

4.79 Yahoo!7 submitted:

> Under Australia's existing copyright regime, very many socially useful and economically beneficial technological innovations would simply have no breathing space to emerge. They would be blocked at the first post by a copyright regime that is insufficiently flexible to accommodate technological innovation.[95]

4.80 Yahoo!7 provided an example of a technology that was 'only possible due to the flexibility offered by the US copyright regime'.[96] One of its innovative mobile applications reproduces less than two seconds of the audio stream of a television program that a user is watching and matches that thumbprint against a database of thumbprints in order to inform the user what program they are watching.

4.81 Universities Australia referred to a LexisNexis commercial database which uses legal briefs and motions filed with US courts. The marketing to lawyers is that this product will enable them to 'research how other litigators have framed similar, successful arguments' and to 'gain a better understanding of emerging issues or unfamiliar areas of law'.[97] Universities Australia submitted that the publisher could 'not have created this useful research tool in Australia: it needed a fair use exception to do so'.[98]

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91 R Giblin, *Submission 251*.
92 Ibid.
93 I Hargreaves and B Hugenholtz, 'Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework' (2013) 13 *Lisbon Council Policy Brief* 1, 4.
94 Australian Industry Group, *Submission 728*.
95 Yahoo!7, *Submission 276*.
96 Ibid.
97 Universities Australia, *Submission 754*.
98 Ibid.

4.82 Similarly, Google stated that it could not have created and started its search engine in Australia under the current copyright framework, as 'innovation depends on a legal regime that allows for new, unforeseen technologies'.[99] The AIMIA Digital Policy Group noted the adverse effect that the Australian copyright regime was having on the Australian digital industry's ability to innovate and compete globally.[100] Other stakeholders shared the view that the current copyright regime puts Australian companies, universities, schools and individuals at a disadvantage compared with those in the US, or other countries that have a fair use exception.[101]

4.83 Universities Australia submitted that Australian copyright law is limiting the way Australian universities can deliver course content via MOOCs[102] and take advantage of text and data technologies in research.[103] In its view, Australian universities are at a comparative disadvantage to their counterparts in fair use jurisdictions in this respect. It asked, '[w]ho knows what new technologies will emerge in the years and decades to come that would be blocked by inflexible copyright exceptions?'[104]

4.84 Some stakeholders said that the current legal arrangements are not impeding innovation, pointing to the 'rapid and continued growth of the digital economy in Australia'.[105] A number of submissions noted that the technology sector, companies such as Google and Facebook, and start-ups, are operating or even 'thriving' in Australia under existing copyright laws.[106] The Australian Film/TV Bodies submitted that:

> The list of innovative online platforms that have successfully launched in Australia, and which operate free of any active threats of litigation, is extensive and continuing to grow while the Inquiry is taking place.[107]

4.85 The ALRC considers that it is not sufficient that innovative businesses 'operate free of active threats of litigation'. They should be able to operate confident in the knowledge that they may use copyright material, if that use is fair.

4.86 The Law Institute of Victoria considered that fair use 'would promote a framework to encourage innovation and investment in technological development in Australia'.[108] eBay submitted that a fair use exception 'would enhance the environment for e-commerce in Australia',[109] and both Google and Yahoo!7 considered that a

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99 Google, *Submission 217*.
100 AIMIA Digital Policy Group, *Submission 261*.
101 See, eg, Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*; Universities Australia, *Submission 246*; Google, *Submission 217*.
102 A point also made by Copyright Advisory Group—Schools, *Submission 707*.
103 See Ch 11 for a discussion of text and data mining.
104 Universities Australia, *Submission 754*.
105 For example Cricket Australia, *Submission 700*.
106 For example, Foxtel, *Submission 748*; Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*; Foxtel, *Submission 245*.
107 Australian Film/TV Bodies, *Submission 739*.
108 Law Institute of Victoria, *Submission 198*.
109 eBay, *Submission 93*.

regime based upon a flexible, broad, principles-based exception would assist local start-ups:[110]

> Application development can thrive in Australia if there is a broader approach to how content can be used by others while still ensuring that such use does not deprive the rights holder of a legitimate revenue stream or impact the market value of the underlying work. Given the relatively low barrier of entry to the digital innovation marketplace, it would also provide software and application developers the ideal regulatory environment to capitalize on the roll-out of the National Broadband Network.[111]

4.87 CAG Schools stated:

> The flexibility of the fair use exception in the US has in effect operated as innovation policy within the copyright system because it creates incentives to build innovative products, which yield complementary technologies that enhance the value of the copyright works.[112]

4.88 The ACCC submitted that flexible regulations can help avoid unnecessarily 'curtailing innovation and the creation of new copyright material'.[113] Another stakeholder submitted that there is 'real world evidence that fair use is economically advantageous'.[114]

> The copyright industries in the United States remain without peer. These industries have achieved global dominance against the backdrop of a domestic fair use defence. It is, of course, possible that this has occurred despite—rather than with the assistance of—fair use, but it is down to opponents of fair use to make this case.[115]

4.89 In contrast, ARIA argued that fair use has only played a minor role in supporting innovation in the US, noting fair use has been successfully invoked to permit innovative technological uses in only a few cases.[116]

4.90 An advantage of fair use, however, is that a person wishing to make an innovative use of copyright material does not need to ask the permission of the court, or the rights holder—as long as the use is fair. There are many innovative uses that have never been the subject of litigation in the US or in Australia. But in Australia, if infringement proceedings were commenced, the user would not be able to argue that the use was fair (unless it was within one of the existing fair dealing purposes).

4.91 The conditions for innovation 'depend on much more than the details of copyright law, including everything from tax law to the availability of an educated workforce to matters of business culture'.[117] Nevertheless, an appropriate regulatory framework is a key aspect of promoting innovation. The ALRC considers that the

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110 Yahoo!7, *Submission 276*; Google, *Submission 217*.
111 Yahoo!7, *Submission 276*.
112 Copyright Advisory Group—Schools, *Submission 231* citing Fred von Lohmann, 'Fair Use as Innovation Policy' (2008) 23 *Berkeley Technology Law Journal* 289.
113 ACCC, *Submission 165*.
114 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.
115 Ibid.
116 ARIA, *Submission 731*.
117 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

enactment of fair use would contribute to such an environment and help make Australia a more attractive market for technology investment and innovation.

4.92 The Hargreaves Review stated that, while the economic benefits of fair use 'may sometimes have been overstated', intellectual property issues are important for the success of innovative, high technology businesses.[118] The Hargreaves Review considered that the 'very protracted political negotiations'[119] that would be necessary to introduce fair use in the UK, given the constraints of EU law, made it unfeasible. This does not detract from the substantive merits of fair use for Australia.

4.93 Professor Hargreaves has written subsequently that fair use 'has proven the backbone of a healthy Internet-economy ecosystem in the US' and also observed that 'several technologically ambitious small countries, including Israel, Singapore and South Korea' have adopted a version of fair use.[120]

4.94 Some stakeholders submitted that the argument that fair use assists innovation takes a narrow view,[121] and fails to recognise rights holders' innovations,[122] licensing opportunities,[123] innovations that are occurring which are not reliant on fair use,[124] the economic contribution of the creative industries,[125] and 'the need for such innovations to be protected by strong and predictable copyright laws'.[126]

4.95 Overly broad copyright exceptions can arguably undermine the incentive not only to create, but to publish and distribute on new platforms and in other innovative ways. The digital environment presents new ways for rights holders to exploit their material; if rights holders benefit from these new digital business models, this should stimulate further creativity.

4.96 Copyright assists innovation by giving rights holders a limited monopoly, thereby increasing the incentive to create, publish and distribute their material. The confidence that rights holders will be able to exploit their rights is therefore also important to innovation. If rights holders are unsure whether they will be able to exploit their rights exclusively, this could inhibit creation and distribution. Certainty has been called 'the cornerstone for encouraging business investment and innovation'.[127] A number of stakeholders submitted that the uncertainty of fair use

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118 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), [5.16], [5.17].

119 Ibid, [5.18].

120 I Hargreaves and B Hugenholtz, 'Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework' (2013) 13 *Lisbon Council Policy Brief* 1, 4.

121 SPAA, *Submission 768*; Viscopy Board, *Submission 638*; Australian Publishers Association, *Submission 629*; Motion Picture Association of America Inc, *Submission 573*.

122 Foxtel, *Submission 748*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*. The Irish Review heard argument to similar effect: Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 32.

123 Viscopy Board, *Submission 638*.

124 Foxtel, *Submission 748*; Viscopy Board, *Submission 638* (citing the Google Art Project).

125 Copyright Agency, *Submission 727*; Australian Publishers Association, *Submission 629*; AIPP, *Submission 564*.

126 Cricket Australia, *Submission 700*. See also Foxtel, *Submission 748*.

127 COMPPS, *Submission 634*.

would be a disincentive to innovation.[128] NAVA said it could 'kill off the golden goose'.[129]

4.97 The ALRC considers that fair use is sufficiently certain to ensure rights holders are confident that they will be able to exploit their rights, and so to stimulate creation. It has long been recognised that the copyright monopoly must have its limits, in order to avoid restricting the creation of new works.

4.98 Further, as noted in Chapter 3, by limiting the copyright monopoly, exceptions can also increase competition and stimulate innovation more generally, including in technologies and services that make productive use of copyright material. The ALRC considers that fair use finds the right balance. It protects the interests of rights holders, so that they are rewarded and motivated to create, in part by discouraging unfair uses that harm their traditional markets. But importantly, fair use also promotes 'transformative uses'. Many of the innovative uses discussed above—uses that many argue are fair and should not require a licence—are 'transformative uses' that operate in 'transformative markets'. As discussed above, fair use promotes transformative use, as well as important public interest uses.

Fair use better aligns with reasonable consumer expectations

4.99 Fair use will mean that ordinary Australians are not infringing copyright when they use copyright material in entirely harmless ways that in no way damage—and may even benefit—the market of rights holders. This aligns better with consumer expectations. The public is more likely to understand fair use than the existing collection of complex specific exceptions; the exception will seem more reasonable; and this may even increase respect for and compliance with copyright laws more broadly.[130]

4.100 The Hargreaves Review identified the 'growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people' as a 'significant problem'.[131] A number of stakeholders in this Inquiry held similar views.[132] The mismatch was said to be undermining the copyright system and bringing the law into disrepute.[133]

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128 Flemish Book Publishers Association, *Submission 683*; Music Council of Australia, *Submission 647*; Queensland Law Society, *Submission 644*; Motion Picture Association of America Inc, *Submission 573*; British Copyright Council, *Submission 563*; ALPSP, *Submission 562*.

129 NAVA, *Submission 655*. See also ARIA, *Submission 731*.

130 Choice, *Submission 745*; IP Australia, *Submission 681*; ACCAN, *Submission 673*; Cyberspace Law and Policy Centre, *Submission 640*; Google, *Submission 217*.

131 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), [5.10].

132 Choice, *Submission 745*; EFA, *Submission 714*; EFA, *Submission 258*; Google, *Submission 217*.

133 Choice, *Submission 745*; Google, *Submission 217*. See also EFA, *Submission 714*; EFA, *Submission 258*.

4.101 More recently, the Copyright Review Committee (Ireland) commented that

> Accommodating basic and genuine user expectations alongside the legitimate interests of rights owners makes copyright law stable and sustainable, thereby contributing generally to cultural and economic development and innovation.[134]

4.102 Some submissions gave examples of common practices which run foul of the law but which consumers may mistakenly consider to be lawful and which, arguably, are unlikely to harm copyright holders. For example, consumers expect to be able to post a photo of goods on eBay in order to sell them. However, eBay stated that those using its services may infringe copyright when the photograph includes an artistic work on the cover of a book or a garment bearing an artwork.[135] In its view, a copyright owner does not suffer loss or damage in such a case. It submitted that within its business, and 'a wide range of markets', a fair use exception would provide 'an opportunity to prevent the occurrence of repeated technical infringement of copyright'.[136]

4.103 Similarly, Kay & Hughes submitted:

> the use of images of artistic works to advertise the resale of [those] artworks on the secondary market is, our clients would submit, exactly the kind of non-competing, good-faith, legitimate use of copyright that statutory exceptions (including fair use) are designed to protect.[137]

4.104 The Viscopy Board observed that Viscopy has offered licences for 'many years' to cover the sort of use referred to by eBay.[138] However, some stakeholders view arrangements of this type as 'rent seeking' or similar.[139] Speaking in the context of consumer technologies and licensing, Choice stated that 'the right of creators to be commercially rewarded for their works is not the same as a right to endless commercial exploitation of a work':

> Just because a creator *can* charge a consumer to copy a CD to a smartphone doesn't mean that they have the irrevocable right to do so. Restricting a practice such as this would not undermine the market for the work, as a consumer would have to buy it in the first instance.[140]

4.105 This is not an argument for legalising piracy. Choice noted that infringing activities, such as piracy, create the least confusion for Australian consumers. That is, consumers do not generally expect the law to allow free copying of music, television and movies. By contrast, the survey results suggest that there was greater confusion about activities which are currently illegal but which could potentially become legal

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134 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 59.

135 eBay, *Submission 93*. See also Viscopy Board, *Submission 638*.

136 eBay, *Submission 93*.

137 Kay and Hughes, *Submission 631*.

138 Viscopy Board, *Submission 638*.

139 Kay and Hughes, *Submission 631*: 'our clients have raised concerns that some Dealers are exercising their power as the Agent of an Artist, and resulting ability to withhold consent for publication of artistic works in auction catalogues in a potentially anti-competitive, manipulative or restrictive manner, outside of the intentions of the *Copyright Act*'.

140 Choice, *Submission 745*.

under a fair use exception—for example, copying a (legally acquired) video to a personally owned device. Choice observed that 'the large number of consumers that do not know, or incorrectly identify, the legality of uses which are currently illegal in Australia is evidence of our out-dated and restrictive copyright laws'.[141]

4.106 Some stakeholders raised concerns that introducing fair use would serve to normalise and increase infringing conduct.[142] Like the claim that fair use would improve respect for copyright law, these matters are difficult to measure or test. The ALRC expects that the introduction of a fair use test would be accompanied by efforts to educate consumers about fair use. Public education is easier when the law is coherent, internally consistent and reasonable.[143]

4.107 The ALRC agrees that consumer expectations are sometimes unreasonable, or based on a poor understanding of copyright law.[144] Fair use does not align with the expectations of those consumers who want to get their music, television, and movies for free.

4.108 Some stakeholders noted that the market can, and is, providing services that meet legitimate consumer expectations.[145] For example, Foxtel submitted that it was already offering its customers access to copyright material on flexible terms that meet its customers' reasonable expectations.[146] As noted earlier, the effect of a use on a market is a highly significant factor in determining fair use. Content providers can have a substantial effect on the scope of fair use, by responding to market demand.

Fair use helps protect rights holders' markets

4.109 Fair use explicitly recognises the need to protect rights holders' markets. When determining whether a particular use is fair, under fair use and fair dealing exceptions, consideration must be given to 'the effect of the use upon the potential market for, or value of, the copyright material'. Considering this factor will help ensure that the legitimate interests of creators and other rights holders are not harmed by the introduction of fair use.[147] If a licence can be obtained for a particular use of copyright material, then the unlicensed use of that material will often not be fair. This is vital to ensuring copyright law continues to fulfil its primary purpose in providing creators with sufficient incentive to create.

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141 Ibid.

142 Foxtel, *Submission 748*;AFL, *Submission 717*; Pearson Australia, *Submission 645*; Combined Newspapers and Magazines Copyright Committee, *Submission 619*; Thomson Reuters, *Submission 592*.

143 Cyberspace Law and Policy Centre, *Submission 640*; Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

144 Copyright Agency, *Submission 727*;Viscopy Board, *Submission 638*.

145 Foxtel, *Submission 748*; Copyright Agency, *Submission 727*.

146 Foxtel, *Submission 748*.

147 See Ch 2, second framing principle.

4.110 Many rights holders and others submitted that the introduction of fair use to Australia would harm rights holders' interests.[148] Fair use was said to reduce the scope of rights, undermine the ability to control how content is used, and undermine licensing arrangements and other revenue streams.[149]

4.111 Particular concerns were expressed with respect to the likely harm to creators[150] such as artists,[151] and book publishers[152]—particularly small and medium-sized publishers.[153] Sporting organisations also submitted that copyright is a crucial source of their funding.[154] Others were concerned that some users would assert 'an implausible fair use defence in the hope of avoiding liability or at least extracting favourable settlement terms'.[155]

4.112 However, some stakeholders submitted that fair use would not necessarily cause economic harm to rights holders.[156] Many businesses are both owners and users of copyright materials and the experience in the US is that businesses and individuals make use of the fair use exception[157] and such use has not 'eclipsed or displaced' the sale or licensing of particular copyright content, for example, educational materials.[158] Google submitted that:

> The idea that fair use somehow reduces copyright owners' rights is belied by the regular practice of large US media companies applying fair use in their every day commercial decisions.[159]

4.113 Similarly, Universities Australia submitted that 'many of the same publishers who have raised concerns about fair use in Australia are themselves beneficiaries of fair use in their own commercial activities here and in the US'.[160]

4.114 Research in Australia and elsewhere indicates that a fair use model would not 'open the floodgates' and encourage disrespect and noncompliance with copyright

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148 For example, Australia Council for the Arts, *Submission 860*; AIATSIS, *Submission 762*; Australian Independent Record Labels Association, *Submission 752*; NRL, *Submission 732*; Australian Society of Authors, *Submission 712*; Australian Guild of Screen Composers, *Submission 687*; Alberts, *Submission 672*; MEAA, *Submission 652*; Country Press NSW, *Submission 651*.

149 For example, Australian Independent Record Labels Association, *Submission 752*; Foxtel, *Submission 748*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; Hillsong, *Submission 671*; Australian Major Performing Arts Group, *Submission 648*; Music Council of Australia, *Submission 647*; Screenrights, *Submission 646*; Pearson Australia, *Submission 645*; COMPPS, *Submission 634*; Community Newspapers Australia, *Submission 489*.

150 AMPAL, *Submission 557*.

151 Australia Council for the Arts, *Submission 860*; Viscopy Board, *Submission 638*.

152 Federation of Indian Publishers, *Submission 736*; Australian Literary Agents' Association, *Submission 579*.

153 ALPSP, *Submission 199*.

154 For example, Cricket Australia, *Submission 700*.

155 ARIA, *Submission 241*.

156 For example, Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*; G Hinze, P Jaszi and M Sag, *Submission 483*.

157 Universities Australia, *Submission 754*; Google, *Submission 217*; Motion Picture Association of America Inc, *Submission 197* (although note they are opposed to the introduction of fair use in Australia).

158 G Hinze, P Jaszi and M Sag, *Submission 483*. See also Copyright Advisory Group—Schools, *Submission 707*.

159 Google, *Submission 217*.

160 Universities Australia, *Submission 754*.

law.[161] On the contrary, fair use would appeal to consumers who would be more persuaded to pay for content, particularly when coupled with innovative business models.[162]

4.115 Even stakeholders who were opposed to the introduction of fair use in Australia, such as the Motion Picture Association of America, acknowledged the workability of such a regime for businesses which are both content creators and users.[163] It acknowledged that its members depend upon fair use in their business and creative operations and that a fair use system can provide a supportive environment for creators and for legitimate users of copyright material.[164]

4.116 The fair use exception requires a balancing of competing interests with respect to a particular use. In particular, the fourth fairness factor in the ALRC's recommended fair use exception is designed to protect copyright owners' markets.[165] If a use will have a significant effect on a rights holder's market; if it unfairly robs them of licensing revenue to which they should be entitled, then the use will probably not be fair. The introduction of a broad, flexible exception for fair use into Australian law should allow flexible and fair mediation between the interests of owners and users in the digital environment.

Fair use is sufficiently certain and predictable

4.117 Standards are generally less certain in scope than detailed rules. However, a clear principled standard is more certain than an unclear complex rule. This Report recommends replacing a number of complex prescriptive exceptions, with a clear and more certain standard, namely, fair use. The standard recommended by the ALRC is not novel or untested. Fair use builds on Australia's fair dealing exceptions, it has been applied in US courts for decades, and it is built on common law copyright principles that date back to the eighteenth century.

4.118 Nevertheless, the most significant concern raised by stakeholders opposed to fair use was that the lack of clear and precise rules would result in uncertainty about what uses are fair.[166] It was argued that the uncertainty would create a need for both rights

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161 Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208* relying on H Varian, 'Copying and Copyright' (2005) 19 *Journal of Economic Perspectives* 136 and J Karaganis, *Media Piracy in Developing Countries* (2011), Social Science Research Council. Hal Leonard Australia suggested that in the context of print music 'copyright law has had zero impact on the introduction of new and innovative business models': Hal Leonard Australia Pty Ltd, *Submission 202*.

162 Cyberspace Law and Policy Centre, *Submission 640*, citing D Vaile 'Shifting Sands? The moderate impact of Australia's 2006 copyright exceptions' in J Malcolm, *A2K for Consumers: Reports of Campaigns and Research 2008-2010* (2010).

163 Motion Picture Association of America Inc, *Submission 573*.

164 Ibid. It also submitted that a non-fair use system could do likewise.

165 The fairness factors are discussed further in Ch 5.

166 See, eg, Free TV Australia, *Submission 865*; ABC, *Submission 775*; Foxtel, *Submission 748*; News Corp Australia, *Submission 746*. The Ireland Review heard argument to similar effect when it inquired about changing its fair dealing provisions from closed-ended to open-ended exceptions: see Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 59.

holders and users to obtain legal advice, thus increasing transaction costs.[167] Where agreement cannot be reached on what is fair, litigation would be required to determine the scope of permitted uses.[168] Some stakeholders were concerned about a 'chilling' effect, as those who could not afford legal advice or the risk of litigation would avoid using material in a way that might in fact be fair.

4.119 Certainty is important for both rights holders and users of copyright material. Without the certainty that rights can be exploited, or about the extent to which they can be exploited, rights holders might not invest in innovative business models, and some potential creators might not create. Without certainty, the risk of investment can become too great. Uncertainty can therefore undermine a core purpose of copyright.

4.120 Users of copyright material also need some degree of certainty in the scope of exceptions. Not only will consumers value the certainty of knowing that they can make certain unpaid uses of material without infringing copyright, but businesses that make transformative uses of copyright material also need certainty, so that they have the confidence to invest in new business models and services. Optus would presumably not have invested in the development of its TV Now service, if the scope of the current time shifting exception were clearer.[169] CAG Schools submitted that complex copyright laws were preventing or discouraging Australian schools from using modern teaching methods.[170]

4.121 In the ALRC's view, fair use is sufficiently certain and predictable, and in any event, no less certain than Australia's current copyright exceptions. Chapter 5 describes how owners and users of copyright material will be guided by the fairness factors, the list of illustrative purposes, existing Australian case law, other relevant jurisdictions' case law, and any industry guidelines and codes of practice that are developed.

4.122 The test of fairness is also not novel in Australian law. The existing fair dealing exceptions require the application of a fairness test and the fairness factors that the ALRC is recommending are substantially the same as those currently provided in the fair dealing exceptions for research or study.[171] In addition, substantial guidance can be obtained from overseas case law and academic commentary.

4.123 The evidence that is available, from recent research, suggests that fair use in the US is not uncertain.[172] In 2009, Professor Pamela Samuelson published her 'qualitative assessment' of the fair use case law.[173] Samuelson argued that 'fair use is both more coherent and more predictable than many commentators have perceived once one

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167 See, eg, News Corp Australia, *Submission 746*; NRL, *Submission 732*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*; Combined Newspapers and Magazines Copyright Committee, *Submission 619*.

168 See, eg, Copyright Agency, *Submission 866*; Free TV Australia, *Submission 865*; Australia Council for the Arts, *Submission 860*.

169 This service was found to infringe copyright: *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.

170 Copyright Advisory Group—Schools, *Submission 707*.

171 See further Ch 5.

172 See, eg, R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Google, *Submission 217*.

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

recognizes that fair use cases tend to fall into common patterns'.[174] She explained that it is generally possible to predict whether a use is likely to be fair use by analysing previously decided cases in the same policy cluster.[175]

4.124 In 2012, Matthew Sag went further than Samuelson and 'assesse[d] the predictability of fair use in terms of case facts which exist prior to any judicial determination'.[176] 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 litigation, there are also consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection.[177]

4.125 US experience and empirical research suggest that certainty can come from guidelines developed by peak bodies, industry protocols, and internal procedures and documentation.[178] As discussed in Chapter 3, the Australian Communications and Media Authority points to the benefits of industry co-regulation and self-regulation in setting standards and developing understanding of practices.[179]

4.126 A number of stakeholders point to the capacity of business, consumers and government to develop an understanding of acceptable practices. In the words of one stakeholder:

> To suggest that legal change leads to insurmountable business difficulties in understanding legal obligations ignores that a new, more open-ended exception leaves entirely in place the established power of large private and institutional actors to continue to negotiate their copyright practices on the terms that they think are appropriate and reasonable.[180]

4.127 The Australian Content Industry Group discussed the benefits of an industry code being developed between the Australian Government and relevant industry participants for a 'graduated response' to unauthorised downloading.[181] This has not been concluded, but the process shows how an understanding of a principle of law might develop in specific industries and sectors.

4.128 It is important for individuals, institutions and business to know what uses they can make of copyright material, and it is important for rights holders to know when their rights are exclusive. However, concerns about certainty can be overstated. The ALRC does not agree with claims that 'the vast majority of uses' will be controversial.[182] Most everyday uses will not be in question. As Robert Xavier noted 'practically all economically significant forms of infringement will be just as unlawful

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174 Ibid, 2541.
175 Ibid, 2542.
176 M Sag, 'Predicting Fair Use' (2012) 73 *Ohio State Law Journal* 47, 51.
177 Ibid, 49.
178 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; Copyright Advisory Group—Schools, *Submission 707*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.
179 ACMA, *Submission 214*. See also News Limited, *Submission 286*.
180 K Bowrey, *Submission 554*.
181 ACIG, *Submission 190*. See also Music Rights Australia Pty Ltd, *Submission 191*.
182 See Arts Law Centre of Australia, *Submission 706*.

under fair use as they are now'.[183] Uncertainty is more likely to arise when a new use emerges, and such a use is more likely to be subject to litigation. The ACCC observed that it is in the newer areas of copyright use where flexibility is most necessary.[184]

4.129 The opponents of fair use have pointed to research indicating that the outcome of fair use cases is unpredictable.[185] The outcome of litigation is never completely predictable—if it were, the parties would not have commenced litigation, or would likely have settled. This is also true of recent litigation over the fair dealing exceptions and specific exceptions.

4.130 The closed-ended nature of the fair dealing exceptions creates uncertainty, because it can be difficult to determine if a particular use falls into one of the specified purposes.[186] A number of stakeholders pointed out that *TCN Channel Nine v Network Ten Ltd* ('the Panel case')[187] focused on the question of whether the use of clips in an entertainment show was for the purpose of reporting news or the purpose of criticism and review.[188] Fair use would avoid this problem, by not confining the exception to a set of prescribed purposes.

Fair use is compatible with moral rights

4.131 The Arts Law Centre stated that the introduction of fair use would undermine moral rights. However, the ALRC considers that fair use is compatible with recognising the moral rights of creators. Further, it is no less compatible with moral rights than many existing exceptions, such as the fair dealing exceptions for parody and satire.[189]

4.132 The application of moral rights themselves depend upon a range of factors determining reasonableness in particular circumstances.[190] The right of attribution afforded by the Australian legislation specifically takes this into account. For example, s 193 of the *Copyright Act* refers to the traditional legal concepts of author and work. It does not prescribe a narrower construction, but confers a right of attribution on all authors of copyright works. Section 195 requires that the author of the work may be identified by any reasonable form of identification, noting that what is reasonable will depend on the circumstances. It may be reasonable not to identify the author, depending on a range of factors.[191] The condition of reasonableness was specifically included to take into account the reality that cultural practices and economic contexts where attribution may be possible will vary.[192]

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183 R Xavier, *Submission 146*.
184 ACCC, *Submission 658*.
185 ARIA, *Submission 241*.
186 Universities Australia, *Submission 754*; CSIRO, *Submission 242*.
187 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235.
188 Universities Australia, *Submission 754*; NSW Government and Art Gallery of NSW, *Submission 740*; Copyright Advisory Group—Schools, *Submission 707*.
189 *Copyright Act 1968* (Cth) s 41A.
190 See, for example, Ibid ss 195AR; 194AS; 195AT; 195VA; 195AXD; 195AXE; 195AXH.
191 Ibid s 195AR.
192 Second Reading Speech, Copyright Amendment (Moral Rights) Bill 1999 (Cth).

4.133 Fair use does not dispense with moral rights, any more than the current fair dealing provisions do. Guidelines and jurisprudence may also be expected to be developed to clarify what is good practice in regard to respecting moral rights.

Fair use complies with the three-step test

4.134 Despite the fact that the US has had a fair use exception for 35 years, a frequent argument against the introduction of fair use in Australia is that it may not comply with the three-step test under international copyright law.[193]

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

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.[194]

4.136 The three-step test has become the international standard for assessing the permissibility of copyright exceptions generally. For example, in 1994 the three-step test was incorporated into the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs).[195] With respect to copyright, it now applies to exceptions to an author's exclusive right of reproduction and to all economic rights under copyright excluding moral rights and the so-called related or neighbouring rights. Another obligation which should be noted is the AUSFTA, which requires Australia to employ the three-step test for exceptions to all exclusive rights of the copyright owner.[196]

4.137 As its name suggests, the test consists of three cumulative steps or conditions. Limitations or exceptions to exclusive rights must be confined to

(1) 'certain special cases';

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193 Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; AFL, *Submission 717*; Arts Law Centre of Australia, *Submission 706*; APRA/AMCOS, *Submission 664*; Queensland Law Society, *Submission 644*.

194 The three-step test was retained in this form in the Paris Act of 24 July 1971, the latest Act of the *Berne Convention*: M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004), 52.

195 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, ATS 38 (entered into force on 1 January 1995). The three-step test was incorporated in a number of ways. First, the three-step test is included in TRIPs in respect of copyright, in respect of patents (albeit a modified version of the test) and arguably there are certain elements of the test present in respect of the general article relating to exceptions for trade marks. See M Ficsor, 'How Much of What? The "Three-Step Test" and its Application in Two Recent WTO Dispute Settlement Cases' (2002) 192 *Revue Internationale du Droit D'Auteur* 110, 111, 113. Secondly, in respect copyright, the three-step test was incorporated by way of a 'double insertion'. The first insertion is by operation of art 9(1) of *TRIPs* which incorporates art 9(2) of the *Berne Convention* into TRIPs. The second insertion is by operation of art 13 of TRIPs.

196 *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005) art 17.4.10(a).

(2) which do 'not conflict with a normal exploitation' of the copyright material;[197] and

(3) do 'not unreasonably prejudice the legitimate interests' of the rights holder.[198]

4.138 The precise meaning of each step of the test is far from certain. There has been only one World Trade Organization (WTO) Panel report on the three-step test as it relates to copyright under TRIPs.[199] In this report, the Panel explained

> there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.[200]

4.139 The ALRC considers that fair use is consistent with the three-step test. This conclusion is based on an analysis of the history of the test, an analysis of the words of the test itself, and on the absence of any challenge to the US and other countries[201] that have introduced fair use or extended fair dealing exceptions.

The history and context of the three-step test

4.140 The three-step test was first incorporated into international copyright law during the 1967 Stockholm revision of the *Berne Convention*.[202] This revision also saw the introduction of the right of reproduction. Those developing the revised treaty text thought it necessary to have a provision setting out a general standard that exceptions to the right of reproduction must meet in order to be permissible.

4.141 As some national laws already contained various exceptions to the right of reproduction, that members to the *Berne Convention* wanted to retain, those developing the text were mindful that it would be necessary 'to ensure that this provision did not encroach upon exceptions that were already contained in national laws' and that 'it would also be necessary to ensure that it did not allow for the making of wider exceptions that might have the effect of undermining the newly recognized right'.[203]

4.142 Some stakeholders submitted that the origins of the three-step test suggest that it was not intended to be a rigid prohibition on copyright exceptions.[204] Some

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197 The broad term 'copyright material' is used here rather than the particular works or subject matter other than works that are used in the treaties.

198 Article 9(2) of the Berne Convention uses the word 'author' whereas TRIPs uses the word 'right holder'.

199 World Trade Organization, *Panel Report on United States–Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).

200 Ibid, [6.108].

201 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, 192–193.

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

203 S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003), prepared for the World Intellectual Property Organization Standing Committee on Copyright and Related Rights Ninth Session, 20.

204 International IP Researchers, *Submission 713*; G Hinze, P Jaszi and M Sag, *Submission 483*.

stakeholders referred to Dr Martin Senftleben's comprehensive study of the three-step test published in 2004.[205] For example, CAG Schools submitted:

> Dr Senftleben has shown that the three-step test was intended to reconcile the many different types of exceptions that already existed when it was introduced, and to be an abstract, open formula that could accommodate a 'wide range of exceptions'.[206]

4.143 Some academics submitted that subsequent international agreements and state practice confirm that it is an open formula capable of encompassing a wide range of exceptions.[207]

4.144 In 1996, the three-step test was incorporated into the *WIPO Copyright Treaty* (WCT)[208] and *WIPO Performances and Phonograms Treaty* (WPPT),[209] both sometimes collectively referred to as the WIPO Internet treaties. The Diplomatic Conference that adopted the WCT and WPPT texts, adopted the following agreed statement in respect of art 10 of the WCT, which applies mutatis mutandis to art 16 of the WPPT:[210]

> It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the *Berne Convention*. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.[211]

4.145 One commentator observed:

> Pursuant to article 31(2)(a) of the *Vienna Convention* [*on the Law of Treaties*], 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' forms part of the context for the purpose of interpretation. The agreed statement concerning article 10 WCT is thus a relatively strong source of interpretation. ... [I]t must be considered directly in connection with the treaty text itself.[212]

4.146 The CLRC took the view that its open-ended fair dealing model would be consistent with the three-step test, in part because it considered that its model would be

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205 M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004).

206 Copyright Advisory Group—Schools, *Submission 231*. See also G Hinze, P Jaszi and M Sag, *Submission 483*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Universities Australia, *Submission 246*; Google, *Submission 217*.

207 G Hinze, P Jaszi and M Sag, *Submission 483*.

208 *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002). There was another 'double insertion'. The first insertion is by operation of art 1(4) of the WCT which incorporates art 9(2) of the *Berne Convention* into the *WCT*. The second insertion is by operation of art 10 of the *WCT*.

209 *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, ATS 27 (entered into force on 20 May 2002).

210 *Agreed statements concerning WIPO Performances and Phonograms Treaty*, adopted by the Diplomatic Conference on December 20, 1996, concerning art 16.

211 *Agreed Statements Concerning the WIPO Copyright Treaty*,, adopted by the Diplomatic Conference on 20 December 1996, concerning art 10.

212 M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004), 106.

'one such appropriate extension into the digital environment' and so would be 'in the spirit of art 10' of the WCT in light of the agreed statement.[213]

Interpreting the three-step test

4.147 Many copyright scholars have endorsed the interpretation of the three-step test in the *Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law*, sometimes referred to as the Munich Declaration.[214] Among other things, signatories to this Declaration are of the view that:

> The Three-Step Test's restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent
>
> (a) legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable …

4.148 A submission to this Inquiry—signed by 51 international intellectual property researchers—stated that fair use can operate in a manner that is sufficiently foreseeable for rights holders and third parties and that the three-step test does not preclude the introduction of open-ended exceptions like fair use.[215] This submission referred to the analysis of the history of the three-step test referred to above and also expressly approved of specific parts of the Munich Declaration.

4.149 If the 'special case' requirement necessitated identification of the special cases in advance by the legislature, then Australia would already be in breach of its international obligations, because s 200AB is not confined to particular purposes.[216]

4.150 Associate Professor Jani McCutcheon submitted that a fair use exception would be a 'special case' because fairness itself is a special case. In her view, 'the fact that many types of uses may be fair is irrelevant and does not prevent compliance'.[217]

4.151 The question of whether fair use is compatible with the three-step test is really a question of whether it meets the first step.[218] The ALRC has no reason to conclude that a new fair use exception would breach the second or third steps of the test. Some stakeholders were also of this view.[219] One submission explained:

> Fair use could only conflict with a normal exploitation of the work and could only unreasonably prejudice the legitimate interests of the right holder if it were applied incautiously by the judiciary. The same is true of the existing exceptions.[220]

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213 Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), 54.

214 C Geigher et al, *Declaration: A Balanced Interpretation of the 'Three-Step Test' in Copyright Law* (2008).

215 International IP Researchers, *Submission 713*.

216 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716* ('the fact that s 200AB has been made expressly subject to the three-step test does not sidestep this issue, since this does nothing to spell out the uses that are permitted in advance of a judicial determination').

217 J McCutcheon, *Submission 528*.

218 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716* citing S Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (2002), 153.

219 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

220 Ibid.

4.152 The third limb of the three-step test provides only that limitations or exceptions must not 'unreasonably' prejudice the 'legitimate' interests of the rights holder. The test does not say an exception must never prejudice any interest of an author.

4.153 Some stakeholders submitted that the three-step test should be given a more limited interpretation.[221] Copyright Agency noted that while the three-step test has been the 'subject of discussion in the academic community, there has been no revision process at the international level under the auspices of the WIPO.[222] Further, some submissions noted that arguments for a more flexible interpretation have only been made recently and are controversial.[223]

No challenges in international forums

4.154 The fact that the US and other countries that have introduced fair use or extended fair dealing exceptions consider their exceptions to be compliant, and have not been challenged in international forums, suggests that fair use complies with the three-step test.

4.155 A number of stakeholders observed that the US has never seriously been challenged about the consistency of its fair use exception with the three-step test.[224] Opportunities for such challenge included the steps taken to adhere to the *Berne Convention*—'years of public hearings before the US Congress, as well as numerous consultations with WIPO and foreign experts'[225]—where transcripts of hearings reveal that not once was there considered to be a problem with fair use and the three-step test.[226]

4.156 Further, other countries which have introduced an exception for fair use such as The Philippines, Israel and the Republic of Korea, or an exception for extended fair dealing such as Singapore, have not been challenged in international forums about the enactment of such provisions. Like Australia, all of these countries are party to the *Berne Convention*, the WCT and the WPPT, among other WIPO treaties, and are WTO members.

4.157 A number of rights holders and their advocates criticised this argument, submitting that such an argument does not necessarily lead to the conclusion that fair use is consistent with the three-step test.[227] Some of these stakeholders raised the possibility that there may be other reasons for the absence of challenges in international forums. For example, APRA/AMCOS and Screenrights observed that the US was

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221 Australian Film/TV Bodies, *Submission 739*; Copyright Agency, *Submission 727*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*.

222 Copyright Agency, *Submission 727*.

223 APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*.

224 R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*.

225 W Patry, *Fair Use and Fair Dealing* (2008), 8.

226 Ibid.

227 ARIA, *Submission 731*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; Screenrights, *Submission 646*.

unique and enjoys a vast position of strength in international forums.[228] ARIA submitted that it would make little sense for a WTO member to challenge the 'abstract concept' of fair use; rather, there would only be a challenge if a particular application of fair use by US courts so aggrieves a member that the member considers it sufficiently significant to challenge.[229]

4.158 The ALRC is not persuaded by these arguments to abandon the recommendation for fair use. It is clear that the US and the other countries mentioned consider that their provisions are consistent with the three-step test. The Ireland Review was satisfied that a fair use doctrine, such as that existing in the US, is compatible with the three-step test.[230] One submission to this Inquiry suggested that the countries which have introduced exceptions for fair use had accepted that the 'special case' requirement may be fulfilled by the judiciary identifying special cases after the event.[231]

4.159 With respect to the US, one stakeholder referred to correspondence with the US Trade Representative, Ambassador Ronald Kirk, in September 2012, confirming that:

> The United States takes the position that nothing in existing US copyright law, as interpreted by the federal courts of appeals, would be inconsistent with its proposed three-step test [for the Trans Pacific Partnership Agreement].[232]

4.160 Similarly, another submission referred to a WTO review of copyright legislation in 2006 where, in response to a question about the consistency of US fair use with art 13 of TRIPs, the US replied:

> The fair use doctrine of US copyright law embodies essentially the same goals as Article 13 of TRIPS, and is applied and interpreted in a way entirely congruent with the standards set forth in that Article.[233]

4.161 Three US-based academics suggested that it was unlikely that the US would have both acceded to the *Berne Convention* and promoted the incorporation of the three-step test into TRIPs, the WCT and into bilateral free trade agreements, if there were concerns about the fair use doctrine being fundamentally at odds with that test.[234]

4.162 Universities Australia made a similar point:

> Hugenholtz and Senftleben have noted that the Minutes of Main Committee for the 1996 WIPO Diplomatic Conference (that led to the adoption of the WIPO Internet Treaties) provide evidence of 'the determination to shelter use privileges', including determination on the part of the US to 'safeguard the fair use doctrine'.[235]

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228 APRA/AMCOS, *Submission 664*; Screenrights, *Submission 646*.

229 ARIA, *Submission 731*.

230 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 91–2.

231 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

232 G Hinze, P Jaszi and M Sag, *Submission 483*. The correspondence is available at infojustice.org/wp-content/uploads/2012/09/PIJIP-letter-to-Kirk-September-8-2012.pdf.

233 R Giblin, *Submission 251*. See W Patry, *Patry on Fair Use* (2012), 554–57. Giblin notes the response was accepted.

234 G Hinze, P Jaszi and M Sag, *Submission 483*.

235 Universities Australia, *Submission 246* citing B Hugenholtz and M Senftleben, *Fair Use in Europe: In Search of Flexibilities* (2011), 22.

4.163 The fact that the US has already been subject to challenge in the WTO with respect to one provision of its copyright statute[236] suggests that the US is not so 'unique' as to be immune from challenge in the WTO if its fair use provision was thought to be inconsistent with the three-step test.

4.164 To deny Australia the significant economic and social benefits of a fair use exception, the arguments that fair use is inconsistent with international law should be strong and persuasive, particularly considering other countries are enjoying the benefits of the exception. The ALRC does not find these arguments persuasive, and considers fair use to be consistent with international law.

Recommendation 4–1 The *Copyright Act 1968* (Cth) should provide an exception for fair use.

236 World Trade Organization, *Panel Report on United States–Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).

5. The Fair Use Exception

Contents

Summary

5.1 The ALRC recommends a fair use exception with a non-exhaustive list of four fairness factors to be considered in assessing whether use of another's copyright material is fair and a non-exhaustive list of eleven illustrative purposes. This chapter outlines these key aspects of the fair use exception, including the ALRC's conclusions on how the fairness factors and illustrative purposes should be interpreted.

5.2 The structure and interpretation of s 107 of the United States *Copyright Act 1976* provides an appropriate model for an Australian fair use exception, in providing a broad, flexible standard based on fairness factors.

5.3 This chapter also discusses sources of guidance for courts and users about the application of the fair use exception. The relevance of existing Australian case law, case law in other jurisdictions, and the development and use of industry codes and protocols are discussed.

5.4 The framing of the new exception, existing case law in Australia and other jurisdictions, and the development of industry codes and protocols should counter concerns about possible uncertainty and transaction costs associated with implementing fair use.

5.5 If fair use is enacted, many of the existing specific exceptions will be repealed as the fair use exception, or the new fair dealing exception recommended in Chapter 6, should be applied when determining whether relevant uses infringe copyright. The ALRC recommends the repeal of the existing fair dealing exceptions and the exceptions for professional advice. Recommendations for repeal of other exceptions are discussed in other chapters, and this chapter provides a summary of the recommended changes.

The structure of the fair use exception

5.6 The ALRC considers that the fair use exception should contain three elements:

- an express statement that a fair use of another's copyright material does not infringe copyright;
- a non-exhaustive list of four fairness factors to be considered in determining whether use of that copyright material is fair; and
- a non-exhaustive list of illustrative uses or purposes.

5.7 Many stakeholders supported the proposed structure of a fair use exception.[1] For example, Communications Alliance submitted that the four fairness factors 'represent a reasonable way in which to consider the circumstance of use of copyright material', ensuring that consideration is given to why the material was copied.[2]

5.8 Professor Kathy Bowrey considered that the fairness factors and illustrative purposes would be mutually supportive:

> The former primarily serve to better elucidate motivational factors related to the creation of the defendant's work and allow for critical reflection on the significance of that evidence, in view of current cultural and economic practices. The non-exhaustive list of illustrative purposes document established cultural practices that might generally be indicative of fair use, where the fairness factors are also met.[3]

5.9 In her view, the advantage of this approach is that, by separating out the fairness factors from the illustrative purposes, it is 'easier for the public to identify the normative factors they need to consider to determine the legitimacy of their use, regardless of any idiosyncrasies associated with their individual practice'.[4]

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1 For example, Intellectual Property Committee, Law Council of Australia, *Submission 765*; eBay, *Submission 751*; Choice, *Submission 745*; Optus, *Submission 725*; Australian War Memorial, *Submission 720*; CAMD, *Submission 719*; EFA, *Submission 714*; Copyright Advisory Group—Schools, *Submission 707*; National Library of Australia, *Submission 704*; IP Australia, *Submission 681*; Communications Alliance, *Submission 653* National Archives of Australia, *Submission 595*; K Bowrey, *Submission 554*.

2 Communications Alliance, *Submission 653*.

3 K Bowrey, *Submission 554*.

4 Ibid.

5.10 The fairness factors and illustrative purposes provide adequate guidance for users of copyright material and the courts.[5] This model of fair use was considered to meet the challenge of moving from the existing law to a principles or standards-based approach, by 'building on the existing understanding of key concepts rather than starting from scratch',[6] providing stability and certainty for industry participants, as well as guidance to the courts.[7]

Recommendation 5–1 The fair use exception should contain:

(a) an express statement that a fair use of copyright material does not infringe copyright;

(b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and

(c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair use ('the illustrative purposes').

The fairness factors

5.11 The fair use exception should contain four fairness factors that will serve as a checklist of factors to be considered in a given case. The fairness factors recommended by the ALRC are based upon the four factors that are common to both the US fair use provision and the existing Australian provisions for fair dealing for the purpose of research or study.

Existing fairness factors

5.12 The existing fair dealing exceptions for the purpose of research or study are found in ss 40, 103C and 248A. They list five factors to be considered when determining whether a use constitutes a fair dealing. These factors include, but are not limited to:

- the purpose and character of the dealing or recording;
- the nature of the work, adaptation, audiovisual item or performance;
- the possibility of obtaining the work, adaptation, audiovisual 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, audiovisual item or authorised recordings of the performance; and

5 For example, Universities Australia, *Submission 754*; eBay, *Submission 751*; ACCC, *Submission 658*; Telstra Corporation Limited, *Submission 602*.
6 eBay, *Submission 751*.
7 ACCC, *Submission 658*.

- in a case where part only of the work, adaptation, audiovisual 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.

5.13 In 1976, the Copyright Law Committee that considered reprographic reproduction (the Franki Committee) recommended that this list of factors—with respect to works and adaptations—be included in s 40.[8] The factors listed are based to a large extent on principles derived from the case law on fair dealing.[9] The Franki Committee's recommendations were influenced by the then proposed fair use exception in s 107 of the US Act.[10]

5.14 The list of matters in ss 40(2) and 103C(2) are not the only relevant matters for assessment of the fairness of a dealing for the purpose of research or study, as these are non-exhaustive lists.[11] The Franki Committee observed that the courts have a duty to decide whether particular uses of copyright material constitute fair dealing and that it would be 'quite impracticable' to attempt to remove this duty.[12]

5.15 The approach with respect to the other fair dealing exceptions has been to leave it to the courts to determine what factors are relevant to determining the fairness of a use in a particular case. As stakeholders noted, there is limited guidance to be gleaned from the Australian case law[13] and, in effect, one is 'forced to look to old English precedents to try to determine what factors a court would be likely to look to when deciding whether a use would be fair'.[14]

5.16 The Copyright Law Review Committee (CLRC) suggested that it was reasonable to assume that the matters listed in s 40(2) 'are also relevant in determining the fairness of a dealing for purposes other than research or study'.[15] 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.[16]

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8 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (Franki Report), [2.60].

9 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].

10 Copyright Advisory Group—Schools, *Submission 707*. See Copyright Law Committee, *Report on Reprographic Reproduction* (1976), [1.33], [2.06], [2.60], [2.64], [11.52]–[11.54], [11.66].

11 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.

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

13 Intellectual Property Committee, Law Council of Australia, *Submission 765*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

14 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

15 Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.09].

16 Ibid, [4.09].

5.17 The current situation, where fairness factors are expressly stated only in the research or study fair dealing exceptions, makes 'little sense'. As Professor Bowrey put it:

> There is no logical reason why the fairness factors should be limited to certain nominated kinds of fair dealing or be only considered or addressed in fair dealing cases in an ad hoc fashion.[17]

5.18 The Law Council of Australia's Intellectual Property Committee (Law Council) welcomed the potential of a fair use exception 'to re-focus attention on the fairness analysis in light of the limited discussion of fairness considerations in cases such as the *Panel* case'.[18]

5.19 The Australian Copyright Council stated that 'people sometimes find the case-by-case nature of fair dealing difficult to apply' and submitted that applying a general set of fairness factors, such as those already existing with respect to the research or study exceptions, may assist.[19]

5.20 A key advantage of a fair use exception, or the alternative recommendation for a new fair dealing exception,[20] is that the *Copyright Act* will clearly provide that fairness factors must be considered in determining the fairness of any use or dealing. Users and courts would have more statutory guidance than they currently have with respect to fair dealing (other than for research or study).[21]

Support for the four fairness factors

5.21 Many stakeholders expressed support for the four fairness factors proposed in the Discussion Paper.[22] Reasons given in support of a fair use exception incorporating these factors included:

- the factors derive from the common law;[23]

17 K Bowrey, *Submission 554*.

18 Intellectual Property Committee, Law Council of Australia, *Submission 765*, referring to *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235.

19 Australian Copyright Council, *Submission 219*.

20 See Ch 6.

21 Copyright Advisory Group—Schools, *Submission 707*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; K Bowrey, *Submission 94*.

22 For example, Universities Australia, *Submission 754*; NFSA, *Submission 750*; NSW Government and Art Gallery of NSW, *Submission 740*; Optus, *Submission 725*; CAMD, *Submission 719*; EFA, *Submission 714*; National Library of Australia, *Submission 704*; Pirate Party Australia, *Submission 689*; IP Australia, *Submission 681*; ACCC, *Submission 658*; Communications Alliance, *Submission 652*; Telstra Corporation Limited, *Submission 602*; National Archives of Australia, *Submission 595*; ADA and ALCC, *Submission 586*; K Bowrey, *Submission 554*.

23 Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*; Telstra Corporation Limited, *Submission 602*; K Bowrey, *Submission 554*; Universities Australia, *Submission 246*.

- the four factors in the US and Australia are substantially the same,[24] so Australian courts are familiar with them[25] and so are 'academics and students who have relied on the fair dealing exception to undertake their own research and study';[26]
- they are easy to read and understand,[27] so would 'assist users to feel confident making their own evaluation of how they are able to use copyright material in their own specific circumstance';[28]
- they are already being applied by some institutions with respect to orphan works and other copyright material in the mistaken belief that Australia already provides a fair use exception;[29]
- they are substantially the same as those used in some other countries;[30] and
- Australian courts, copyright owners and users would be able to have regard to extensive US jurisprudence,[31] as well as that of other countries, who have adopted a similar flexible, fairness-based model.[32]

5.22 However, some stakeholders—those who opposed the enactment of fair use in Australia—criticised the four factors as 'nebulous'[33] or 'uncertain', and 'complex' because they involve consideration of multiple issues.[34] Some considered that the factors do not provide enough guidance.[35]

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24 Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*; Telstra Corporation Limited, *Submission 602*. Some stakeholders called for an exact copy of the words of the US provision: R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; R Giblin, *Submission 251*; Grey Literature Strategies Research Project, *Submission 250*; S Hawkins, *Submission 15*. However, the ALRC does not consider that this would be an appropriate course of action for Australia nor does it consider it to be necessary. As Associate Professor Matthew Sag has argued, there is 'nothing magical or sacrosanct' about the particular language used in the US statute. Rather, the language is a product of its time and place: See M Sag, *The Imaginary Conflict Between Fair Use and International Copyright Law* <http://matthewsag.com/> at 25 March 2013; M Sag, 'Copyright Reform for the Digital Age: Is Fair Use Too Unpredictable?' (Paper presented at Embracing the Digital Economy: Creative Copyright for a Creative Nation, the 2013 Australian Digital Alliance Copyright Forum, Canberra, 1 March 2013).

25 NSW Government and Art Gallery of NSW, *Submission 740*; ADA and ALCC, *Submission 586*; ADA and ALCC, *Submission 213*.

26 Universities Australia, *Submission 246*. See also NSW Government and Art Gallery of NSW, *Submission 740*.

27 NSW Government and Art Gallery of NSW, *Submission 740*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; ACCAN, *Submission 673*; ADA and ALCC, *Submission 586*; R Wright, *Submission 167*.

28 R Wright, *Submission 167*. See also ACCAN, *Submission 673*.

29 ADA and ALCC, *Submission 213*.

30 Universities Australia, *Submission 246*.

31 Communications Alliance, *Submission 653*; Telstra Corporation Limited, *Submission 602*; R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria, *Submission 198*.

32 Communications Alliance, *Submission 653*; R Giblin, *Submission 251*; Universities Australia, *Submission 246*.

33 Australian Education Union, *Submission 722*.

34 COMPPS, *Submission 634*.

35 Arts Law Centre of Australia, *Submission 706*; COMPPS, *Submission 634*.

5.23 The ALRC is not persuaded by such characterisations. The four fairness factors may be standard-like (that is, broad and principles-based), but this does not mean that they are inherently uncertain or devoid of meaning. A number of stakeholders spoke favourably of the standard-like nature of the fairness factors. In the words of one stakeholder:

> The fairness factors are general in character, inclusive and forward looking. As such they provide a key for the law to accommodate for social and technological change, whilst allowing for consistency and justice in treating analogous cases alike.[36]

5.24 Others referred to the four fairness factors as striking 'an appropriate balance between familiarity, certainty and flexibility',[37] and providing clear guidance about determining fairness and going 'a long way to addressing perceived uncertainties'.[38] Some stakeholders also approved of the 'balance' inherent in the four fairness factors between the interests and needs of rights holders and the public[39]—countering any arguments that fair use equates to 'free riding'.[40]

Interpreting the fairness factors

5.25 In the ALRC's view, all four fairness factors need to be considered and balanced and a determination made in view of all of them. As in the US, no one factor is to be more important than another.[41]

5.26 This approach was supported in submissions,[42] along with some concern that courts may treat the factors as threshold tests, rather than as factors to be balanced.[43] The latter approach to interpretation of the fairness factors would clearly not be appropriate. It is not intended and is not how existing fair dealing factors are interpreted.

5.27 The following section introduces each of the four fairness factors, explains the wording and discusses aspects of how the factors may be expected to be interpreted.

First factor—purpose and character of use

5.28 The ALRC recommends that the first fairness factor be expressed as 'the purpose and character of the use'.

5.29 This wording is identical to the first of the existing Australian fairness factors, except the word 'use' is used instead of 'dealing'.

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36 K Bowrey, *Submission 554*.
37 ADA and ALCC, *Submission 586*.
38 Telstra Corporation Limited, *Submission 602*.
39 Copyright Advisory Group—Schools, *Submission 707*; IP Australia, *Submission 681*; Telstra Corporation Limited, *Submission 602*.
40 Telstra Corporation Limited, *Submission 602*.
41 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569.
42 Copyright Advisory Group—Schools, *Submission 707*; ACCC, *Submission 658*; R Xavier, *Submission 531*.
43 R Xavier, *Submission 531*.

5.30 This wording is also used in the first fairness factor in the US provision where the words are followed by the additional text: 'including whether such use is of a commercial nature or is for nonprofit educational purposes'.

5.31 Bill Patry has commented that this language at the end of the first US fairness factor was added at 'the 11th hour' as a 'sop' to educators.[44] He and other commentators have observed that this element of the first US factor has caused difficulties for the US courts over the years.[45] In his opinion:

> It is the greatest of ironies that a cosmetic amendment intended purely as a political gesture to nonprofit educators has been misconstrued both as a statement of the nature of the factor as a whole and as a judgment by Congress that commercial uses (which were referred to only to make the gesture to educators less obvious) are to receive unfavourable treatment.[46]

Interpretation

5.32 Interpretation of this factor in the US encompasses two issues.[47] First, was the use 'transformative'? That is, was the use for a different purpose than the use for which the material was originally created? On some analyses, whether a use is transformative in this sense is the key question in US fair use doctrine. Secondly, was the defendant's use commercial?

Transformative use

5.33 Some stakeholders called for the Australian fairness factors to acknowledge recent developments in US law specifically, such as the transformative use doctrine,[48] and suggested that a requirement to show 'transformative use or purpose' should be included in the Act.[49] Others were opposed to this idea.[50]

5.34 In the ALRC's view, whether a use is transformative should be a key question when applying the fair use exception—or the new fair dealing exception. The case for introducing a stand-alone transformative use exception, however, has been considered and rejected.[51] In the ALRC's view, transformative uses of copyright material would be better considered under a fair use exception, where a range of factors can be balanced in determining whether a particular use is permitted.

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44 W Patry, *Patry on Fair Use* (2012) 93.

45 W Patry, *Fair Use, Israel and the IIPA* <http://williampatry.blogspot.com.au/2007/02/fair-use-israel-and-iipa.html> at 3 May 2013; 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, 191.

46 W Patry, *Patry on Fair Use* (2012), 93. Israel did not include these words in its fair use provision, which also simply refers to the purpose and character of the use.

47 See generally M Sag, 'Predicting Fair Use' (2012) 73 *Ohio State Law Journal* 47, 54–5.

48 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

49 Play It Again International Research Team, *Submission 494*.

50 Screenrights, *Submission 646* (supporting the Australian Copyright Council's submission); Australian Copyright Council, *Submission 654* ('Our answer is a categorical: no'); AIPP, *Submission 564*.

51 See Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Ch 10.

5.35 A much greater emphasis on transformativeness in US case law followed the influential 1990 *Harvard Law Review* article by Judge Pierre N Leval, 'Toward a Fair Use Standard'. The first fairness factor, the purpose and character of the use, Judge Leval said, 'raises the question of justification':

> I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely 'supersede the objects' of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.
>
> Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.[52]

5.36 This transformative use doctrine was adopted by the US Supreme Court in 1994, in *Campbell v Acuff-Rose* (*Campbell*), and may now be 'the prevailing view in fair use case law'.[53] In *Campbell*, the Court stated:

> Although such transformative use is not absolutely necessary for a finding of fair use, ... the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright ... and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[54]

5.37 Some commentators have suggested that US jurisprudence on transformative use is not altogether coherent.[55] However, others have found the trend in US court decisions much more consistent. Professor Neil Weinstock Netanal's review of several empirical studies and his own analysis of US case law led him to conclude that, since 2005, 'the transformative use paradigm has come to dominate fair use case law and the market-centered paradigm has largely receded into the pages of history'.

> Today, the key question for judicial determination of fair use is not whether the copyright holder would have reasonably consented to the use, but whether the defendant used the copyrighted work for a different expressive purpose from that for which the work was created.[56]

5.38 It is important to note the phrase 'different expressive purpose'. On 14 November 2013, a US court found the digital scanning of entire books so that book text

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52 P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105, 1111.
53 N Weinstock Netanel, 'Making Sense of Fair Use' (2011) 15 *Lewis and Clark Law Review* 715, 746.
54 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579 (citations omitted).
55 J Ginsburg and R Gorman, *Copyright Law* (2012), 187.
56 N Weinstock Netanel, 'Making Sense of Fair Use' (2011) 15 *Lewis and Clark Law Review* 715, 768.

could facilitate search, through the display of snippets, to be 'highly transformative'.[57] In the Court's view, Google Books 'uses words for a different purpose—it uses snippets of text to act as pointers directing users to a broad selection of books'.[58]

5.39 Some have expressed concern that the transformative use doctrine can undermine rights holders' derivative rights, if it suffices to show that the secondary use has merely had a different 'character' from the original. However, Netanel stressed that empirical studies of US cases on fair use in the period 1995–2010 suggest that this concern is not warranted and that the 'purpose' of the use is vital:

> In case after case decided since *Campbell*, courts have made clear that what matters for determining whether a use is transformative is whether the use is for a different *purpose* than that for which the copyright work was created. It can help if the defendant modifies or adds new expressive form or content as well, but different expressive purpose, not new expressive content, is almost always the key.[59]

5.40 The ALRC favours this emphasis on the question of whether a use has a different expressive purpose from that of the original.

5.41 Similar thinking is also evident in the United Kingdom Hargreaves Review, which expressed support for exceptions that do not 'trade on the underlying creative and expressive purpose on which traditional rights holders in music, publishing, film and television rely'.[60]

5.42 The ALRC considers that the property rights granted to creators and rights holders are important and may be necessary to provide an incentive to create, publish and distribute copyright material.[61] But this should not be extended further than necessary. Rights holders should not be entitled to all conceivable value that might be taken from their material. The incentive to create will not be undermined by the unlicensed use of copyright material for entirely different purposes from the purpose for which copyright material was created, and in markets that do not compete with rights holders. Rather, such uses will stimulate further creativity, and increase competition.

5.43 Under the fair use and new fair dealing exceptions recommended in this Report, a transformative use will be more likely to be fair than a non-transformative use. In fact, a finding that a use is transformative should be one of the more persuasive factors, when considering whether a particular use is fair.

5.44 Uses of copyright material vary in the degree to which they are likely to be transformative. There are uses for purposes different than those for which the material was created. The use of copyright material for criticism or review, parody or satire, reporting the news and for quotation will often be transformative. Where copyright

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57 *The Authors Guild, Inc. v Google, Inc.*, (SDNY, Civ 8136, 14 November 2013).

58 Ibid , 20.

59 N Weinstock Netanel, 'Making Sense of Fair Use' (2011) 15 *Lewis and Clark Law Review* 715, 747 (emphasis added).

60 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 5.

61 See the second framing principle in Ch 2: 'maintaining incentives for creation and dissemination of material'.

material is cached or indexed, or electronic publications are mined,[62] these uses will also be transformative, as the material was not created for these purposes.

5.45 However, like all other factors in the fair use and fair dealing exceptions, the ALRC considers that 'transformativeness' should not be considered determinative, but should be weighed along with other relevant matters. A use is not required to be transformative to be found fair.[63] Some exceptions discussed in this Report are less likely to be transformative—notably, private and educational uses. Such uses may be less likely to be fair for this reason, but other reasons for finding fair use may be found.

Commercial use

5.46 Some stakeholders expressed concerns about the possibilities of a fair use exception permitting the unlicensed use of copyright material for commercial purposes.[64] The AFL exemplified this view in stating that a fair use exception would need to 'explicitly acknowledge that a commercial/profit making purpose or use by third parties cannot be a "fair use"'.[65] However, stakeholders in favour of a fair use exception considered it important that commercial uses not be automatically excluded.[66] Universities Australia, for example, submitted that the ability for a new fair use exception to apply to commercial uses was 'particularly important in the digital environment'.[67]

5.47 In the ALRC's view, a use is less likely to be a fair use if it is commercial, but this does not mean that all commercial uses will be unfair. This approach accords with the interpretation of the existing fair dealing exceptions. For example, news organisations are permitted under the existing fair dealing exceptions to make some commercial use of copyright material for the purpose of reporting news.

5.48 Under fair use, while commerciality is relevant, it is also important to focus on the related questions of whether the use is transformative or harms the market of the rights holder. Aspects of US law illustrate this approach.

5.49 In the US, the 'character of the activity' is more important than whether the use is commercial or not: 'the commercial or nonprofit educational element of a given use is but one aspect of its more general, multifaceted purpose and character'.[68] This interpretation was applied in *Sony Corp of America v Universal City Studios Inc*,[69] in which the Supreme Court said that 'the commercial or nonprofit character of an

62 See Ch 11 ('Incidental or Technical Use and Data and Text Mining').
63 This is also the position under US law: W Patry, *Patry on Fair Use* (2012), 115.
64 For example, AFL, *Submission 717*; Cricket Australia, *Submission 700*; Australian Institute of Architects, *Submission 678*.
65 AFL, *Submission 717*.
66 For example, Universities Australia, *Submission 754*.
67 Ibid. Referring, in particular, to universities forging closer relationships with industry in line with the Australian Government's innovation policy.
68 W Patry, *Patry on Fair Use* (2012), 95.
69 *Sony Corp of America v Universal City Studios, Inc* (1984) 464 US 417.

activity' is to be weighed in any fair use decision, along with other factors. However, the fact that a use is commercial may 'weigh against a finding of fair use'.[70]

5.50 In *Campbell*, the Supreme Court observed that essentially all fair use claims are made in the for-profit context of publishing and broadcasting. Commercial use does not lead to a presumption that the use is not fair; and, conversely, the fact that something is non-profit or educational does not lead to a presumption that the use is fair.[71]

5.51 Cases following *Campbell* have tended to downplay the impact of commercial use, especially where the use is deemed to be transformative. In *Kelly v Arriba Soft Corp* it was said that, because the use was 'not highly exploitative, the commercial nature of the use weighs only slightly against a finding of fair use'.[72] It has been observed that commerciality can be placed on a continuum, with use for a 'transformative, scholarly purpose' at one extreme, and 'verbatim, wholesale copying for resale to others', at the other.[73]

5.52 Other US courts have limited adverse rulings on commerciality to 'commercial exploitation', defined as a situation where 'the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material'.[74]

5.53 Some guidance may also be obtained from case law in the fair dealing jurisdictions of the UK and Canada. In the UK, the most important factor, in assessing whether commercial use is fair dealing, is the extent to which the use competes with the exploitation of the copyright work by the owner.[75] However, cases of fair dealing for purposes of criticism, review and the reporting of current events are said to 'raise more difficult problems than cases of non-commercial research and private study'.[76] This is because there may be a risk to the 'commercial value of the copyright', but it does not follow that any damage or any risk makes any use of the material unfair:

> If it did then there could be no use of copyright material in criticism or review if it could be said that that use might damage the value of the material to the copyright owner. That would be inconsistent with the purpose of the section which is to balance the interests of the copyright owner and the critic.[77]

5.54 Although much criticism, review and reporting of the news is for a 'commercial purpose', where this does not directly compete with the copyright owner's market, it is likely to be 'fair', particularly where

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70 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539.

71 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 584. See also *Infinity Broadcasting Corp v Kirkwood*, 150 F 3d 104 (2nd Cir, 1998) which noted that most secondary uses of copyright material were commercial.

72 *Kelly v Arriba Soft Corporation*, 336 F 3d 811 (9th Cir, 2003), 818.

73 W Patry, *Patry on Fair Use* (2012), 105.

74 *American Geophysical Union v Texaco Inc*, 60 F 3d 913 (2nd Cir, 1994) 922, citing *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 562–3. See also *Blanch v Koons*, 467 F 3d 244 (2nd Cir, 2006) 253.

75 *Ashdown v Telegraph Group Ltd* [2002] Ch 149. See also *SAS Institute Inc v World Programming Ltd* [2011] RPC 1.

76 *SAS Institute Inc v World Programming Ltd* [2011] RPC 1, [194].

77 *Fraser-Woodward Ltd v BBC* [2005] EMLR 22, [64].

> there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on.[78]

5.55 In Canada, as in the US and UK, a commercial use is not determinative, but one of the factors to be taken into account in determining fairness. The Canadian courts also recognise that the nature of commerciality varies, and where the use is to generate revenue in competition to the copyright holder, the use is less likely to be fair.[79] However, if the purpose of the use 'produces a value to the public interest' that weighs towards fairness. If commercial returns to the user outweigh any such public benefit, the use may not be fair.[80]

Second factor—nature of the copyright material

5.56 The ALRC recommends that the second fairness factor be expressed as 'the nature of the copyright material'.

5.57 The ALRC's recommended wording is the same as the second of the existing Australian fairness factors, except that the term 'copyright material' is used instead of 'work or adaptation' or 'audio-visual item'.

Interpretation

5.58 In considering the nature of the copyright material used, US courts have looked at factors including whether the work has been published, whether it is in print, and whether the content is factual or entertainment.

5.59 Whether a work is unpublished is a 'key, though not necessarily determinative factor' against fair use, as the scope of fair use is narrower with respect to unpublished works.[81] One reason is that the 'the author's right to control the first public appearance of his undisseminated expression' will normally mean that it is not 'fair' to publish what is not yet before the public.[82]

5.60 An out of print work may, on the other hand, be more likely to be made available under a fair use analysis. Material that is unavailable for purchase through normal channels is unlikely to harm any market for that use.[83]

5.61 If a work is about to be published, or is unavailable due to preparation of a new edition or version, it is not considered likely to be fair to make substantial use of an

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78 *Ashdown v Telegraph Group Ltd* [2002] Ch 149, [70], quoting H Laddie and others, *The Modern Law of Copyright and Designs* (3rd ed, 2000), [20.16].

79 *Century 21 Canada Ltd Partnership v Rogers Communications Inc* (2011) Carswell BC 2348.

80 Ibid.

81 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 564. See also *Peter Letterese and Associates, Inc v World Institute of Scientology Enterprises, International*, 533 F 3d 1287 (11th Cir, 2008).

82 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 555.

83 W Patry, *Patry on Fair Use* (2012), 444.

existing version or edition,[84] particularly where this would impair the copyright owner's ability to market the new version.[85]

5.62 The converse of the principles governing unpublished works does not follow: 'the fact that a work is published does not mean that the scope of fair use is broader'.[86]

5.63 Factual works are considered more apt to be available for use under a fairness test: '[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy'.[87] This seems to be because protection of creative endeavour is valued more than compilation of factual material:

> Works that are 'closer to the core of intended copyright protection', and thus merit greater protection, include original as opposed to derivative works; creative as opposed to factual works; and unpublished as opposed to published works.[88]

5.64 In the UK, preventing the publication of material is regarded as an important aspect of the copyright owner's rights.[89] Although unpublished material is not exempted from fair dealing, the nature of the material is highly relevant to a decision as to whether it is fair to use such work.[90] This is particularly true when copyright infringement is also a breach of confidence,[91] although it may be fair to inform the public about important matters—even where 'leaked' material is used.[92]

5.65 In *Commonwealth v John Fairfax & Sons Ltd*,[93] a case concerning leaked documents, the High Court of Australia considered whether unpublished material could be published under the fair dealing exception for reporting the news. The litigation concerned a book entitled *Documents on Australian Defence and Foreign Policy 1968–1975*, which included documents produced by the Department of Foreign Affairs, as well as unpublished government memoranda, assessments, briefings and cables.

5.66 Injunctions to prevent instalments of this book being published in the defendant's newspaper were granted to the Australian Government, on the basis of breach of copyright in the documents. Mason J held that any dealing with unpublished work would not normally be fair within s 41, if an author had not released it to be the subject of public criticism or review.[94]

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84 See *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539.

85 W Patry, *Patry on Fair Use* (2012), 445.

86 Ibid, 441.

87 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 563.

88 *Peter Letterese and Associates, Inc v World Institute of Scientology Enterprises, International*, 533 F 3d 1287 (11th Cir, 2008), 1313.

89 *Ashdown v Telegraph Group Ltd* [2002] Ch 149.

90 *Nora Beloff v Pressdram Ltd* [1973] FSR 33.

91 *Ashdown v Telegraph Group Ltd* [2002] Ch 149. This is also the case in Canada: *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

92 *Ashdown v Telegraph Group Ltd* [2002] Ch 149.

93 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

94 Ibid, 56–7. In the US, the application of a 'strong' presumption to this effect has generated considerable controversy, with historians and biographers arguing that they cannot work effectively without being able to draw on the unpublished letters, manuscripts etc of public figures. It has been claimed that the practical effect of decisions such as *Salinger v Random House, Inc*, 811 F 2d 90 (2nd Cir, 1987) and *New Era Publications International ApS v Henry Holt and Co, Inc*, 873 F 2d 576 (2nd Cir, 1989) has merely been to enrich the estates of such figures since they can demand payment for use of those writings.

5.67 Section 107 of the US *Copyright Act* concludes with a paragraph stating, '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'. Some submissions expressed concern that the ALRC's proposed fair use exception did not contain an equivalent statement.[95] The ALRC does not consider this additional wording to be necessary, if the second fairness factor is interpreted in a way similar to that in the US.

Third factor—amount and substantiality of the part used

5.68 The ALRC recommends that the third fairness factor be expressed as 'the amount and substantiality of the part used'.

5.69 This factor parallels the fifth factor in the Australian fair dealing exceptions for the purpose of research or study, which is more fully expressed as: 'in a case where part only of work or adaptation is reproduced—the amount and substantiality of the part taken in relation to the whole work or adaptation'.[96]

5.70 It was suggested that the opening conditional words of the existing factor are not suitable, because of their limiting effect.[97] That is, this factor may have to be 'disregarded where the entirety of the material is used, while fair use requires each factor to be weighed in every case'.[98] In the ALRC's view, it is important that this factor does not imply that use of the whole of copyright material can never constitute fair use.

Interpretation

5.71 In the US, interpretation of this factor consists of an evaluation of two matters. First, how much is the defendant alleged to have taken? Second, how important was that taking, in the context of the plaintiff's work?

5.72 Fair use may allow the taking of the whole of a work, where this would be fair.[99] Where the purpose of the use is parody, then taking a large amount of the original may not be excessive: 'in parody, as in news reporting, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original'.[100]

5.73 In *Commonwealth v John Fairfax & Sons Ltd*, the fairness of using the leaked documents was rejected, as the purpose (criticism or review) was 'merely a veneer', since the reproduction of the plaintiff's documents was to occur on a large scale with little actual comment and in several instalments.[101]

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95 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; R Xavier, *Submission 531*.

96 See *Copyright Act 1968* (Cth) ss 40(2)(e).

97 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; R Xavier, *Submission 531*.

98 R Xavier, *Submission 531*.

99 For another example, see *The Authors Guild, Inc. v Google, Inc.*, (SDNY, Civ 8136, 14 November 2013).

100 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569.

101 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39. Cf *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation Plc* (1993) 28 IPR 439, where a documentary including clips of the film, *A Clockwork Orange*, was held to be fair dealing, since the length of extracts was balanced by commentary. Furthermore, the film had been in the public domain despite being restricted in the UK, and it was not unfair to review it in that way.

5.74 In *Hubbard v Vosper*, Lord Denning observed that stating what amount of copyright material could be considered a fair dealing was 'impossible to define', and that it 'must be a question of degree' to be decided in all the circumstances of the case. These circumtances include the amount considered in the context, and what is appropriate for the purpose, and, 'after all is said and done, it must be a matter of impression'.[102]

5.75 US case law follows a line of English authorities beginning with the case *Bramwell v Halcomb*, in saying that: 'It is not only quantity but value that is always looked to'.[103] US cases refer to considerations of quantity in terms of quality: 'essentially the heart of the book'; containing the 'most powerful passages'; and 'the dramatic focal points'.[104]

5.76 The context of the use will continue to be important when interpreting this factor. As the National Film and Sound Archive observed:

> making a copy of a film for research and study is likely to require copying the whole item, a criticism or review of a visual artwork is more likely to use the whole item, but a criticism or review of a book is likely to use smaller proportions of the item. Rather than just considering the 'amount and substantiality', a factor might be whether the use of the material is appropriate for the purpose, for example, it may be fair to include the whole artwork in a review but not a large size high resolution copy.[105]

Fourth factor—effect of the use upon the potential market or value

5.77 The ALRC recommends that the fourth fairness factor be expressed as 'the effect of the use upon the potential market for, or value of, the copyright material'.

5.78 The ALRC's recommended fourth fairness factor parallels the fourth factor in the Australian fair dealing exceptions, with minor changes: the factor again refers to 'copyright material' and the word 'use' is used instead of 'dealing'.

Interpretation

5.79 In the US, this factor requires consideration of the market effect of the use. A number of stakeholders in favour of a fair use exception considered this factor important in protecting the interests of rights holders.[106] Copyright Advisory Group (CAG) Schools stated:

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102 *Hubbard v Vosper* [1972] 2 QB 84, 94. See also *Ashdown v Telegraph Group Ltd* [2002] Ch 149; *Sony Corp of America v Universal City Studios, Inc* (1984) 464 US 417, 460; *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

103 *Bramwell v Halcomb* (1836) 3 My & Cr (Ch) 737, 738.

104 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 565. See also *WPOW, Inc v MRLJ Enterprises*, 584 F Supp 132 (DCDC, 1984), 136; *Ringgold v Black Entertainment Television, Inc*, 126 F 3d 70 (2nd Cir, 1997), 76.

105 NFSA, *Submission 750*.

106 Copyright Advisory Group—Schools, *Submission 707*; Telstra Corporation Limited, *Submission 602*.

> The requirement to consider market harm as part of a fairness assessment is a significant protection to ensure that copyright owner markets are clearly and properly preserved when determining the limits of fair use.[107]

5.80 However, rights holders were concerned at the complexity inherent in the wording of the fourth factor, about likely disputes over meaning and the consequent cost, especially as rights holders may have an onus to establish market effects.[108] Cricket Australia, for example, stated that

> this factor imposes an unreasonable burden on copyright owners as it is likely to require copyright owners to obtain and lead complicated evidence regarding the markets for copyright material, the value of the material and the impacts of particular uses.[109]

Market harm

5.81 If a licence can be obtained for a particular use of copyright material, then the unlicensed use of that material will often not be fair. The availability of a licence is an important consideration in determining whether a use is fair, and will weigh against a finding of fair use. This factor helps ensure that copyright exceptions do not unreasonably damage rights holders' markets or undermine the incentive to create and distribute copyright material.

5.82 US Judge Leval has written concerning the fourth fairness factor:

> A secondary use that interferes excessively with an author's incentives subverts the aims of copyright. Hence the importance of the market factor. ... When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user.[110]

5.83 However, the availability of a licence does not settle the question of fairness. Market harm should not be equated with *any* diminution of licence fees, otherwise this factor would always favour the rights holder.[111] For this factor to weigh against fair use, the harm to the market from the use should be substantial.

5.84 Any harm must also be weighed along with the other fairness factors. Some damage to a rights holder's market may be justified, for a use that is transformative or has an important social value, particularly if the damage is minor or remote.

5.85 When considering this fairness factor, courts should consider the harm that might result if the use were widespread. One photocopy of a book that displaces one paid copy of the book will not greatly damage the publisher's market. If the book were photocopied widely, however, the damage may then be substantial.

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107 Copyright Advisory Group—Schools, *Submission 707*.
108 AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*.
109 Cricket Australia, *Submission 700*.
110 P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105, 1124.
111 'By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties': Ibid, 1124.

5.86 When considering harm to the rights holder's markets, the relevant markets are those that are 'traditional, reasonable or likely to be developed'. If a use fills a 'market niche' that the rights holder 'simply had no interest in occupying',[112] then the fourth factor may not disfavour fair use.

5.87 This interpretation given to the US fair use provision should address the concern expressed by the Australian Competition and Consumer Commission (ACCC) that the word 'market' in this fairness factor might be given an overly broad interpretation, and that rights would be 'extended in ways where they effectively create monopoly-type characteristics in markets that are ancillary to the primary market for the copyright materials':

> The conceptual problem with a definition of markets that captures all ancillary markets is likely to be most evident in the consideration of 'potential markets,' where copyright holders may not be best placed, skilled or incentivised to innovate and create potential markets.[113]

5.88 Some argue that unremunerated exceptions to copyright should only be available when there is market failure, and that if a licence is available, an unlicensed use should *never* be fair. International copyright agreements do not mandate such a principle. The three-step test provides that free-use exceptions should not '*unreasonably* prejudice the *legitimate* interests of the author'.[114] It does not say an exception must never prejudice any interest of an author.

5.89 In the UK, certain exceptions do not apply if a licence can be obtained for the use, however these provisions are now being amended. The UK Government has concluded that, while the existence or otherwise of a licence may be an important factor in deciding fair dealing, other factors are also important, such as 'the terms on which the licence is available, including the ease with which it may be obtained, the value of the permitted acts to society as a whole, and the likelihood and extent of any harm to right holders'. For this reason, the UK Government rejected the argument that the 'mere availability of a licence should automatically require licensing a permitted act'.[115]

5.90 The fourth fairness factor can also act as an incentive for rights holders to offer reasonable and convenient licences for the use of their material. Where such licences are not offered, it will more difficult to argue that an unpaid use harmed the rights holder's market. In *Cambridge University Press v Becker*, a US court found that publishers who did not offer licences for electronic excerpts of their books, could not claim that the unpaid use of electronic excerpts harmed the publishers' markets.[116]

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112 *Princeton University Press v Michigan Document Services, Inc*, 99 F 3d 1381 (6th Cir, 1996), (citations omitted).

113 ACCC, *Submission 658*.

114 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972) art 9(2) (emphasis added).

115 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 13.

116 *Cambridge University Press v Becker*, 863 F Supp 2d 1190 (ND Ga, 2012).

5.91 Finally, it is important to recognise that the harm this factor is concerned with is harm that comes from a use that usurps the market of the original material. Judge Leval explains:

> Not every type of market impairment opposes fair use. An adverse criticism impairs a book's market. A biography may impair the market for books by the subject if it exposes him as a fraud, or satisfies the public's interest in that person. Such market impairments are not relevant to the fair use determination. The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute, or, in Story's words 'supersede[s] the use of the original.' Only to that extent are the purposes of copyright implicated.[117]

5.92 The US Supreme Court stated in *Campbell* that the 'market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop'.[118] The concept of a 'transformative market', which has emerged in US jurisprudence, is also helpful:

> A non-transformative use that competes directly in the rights-holder's traditional market, or that seeks to avoid a traditional licensing arrangement, will not be favoured by this factor. A transformative use that falls within a 'transformative market' (rather than a 'traditional, reasonable or likely to be developed market') probably will be. Crucially, US courts do not allow a rights-holder to pre-empt a transformative market through conjecture about impairment of the possibility of licensing the transformative use.[119]

Additional factors?

5.93 A number of other fairness factors have been suggested and are discussed below. In the ALRC's view, the new fair use exception should not include these, or any other, additional fairness factors.

Ordinary commercial price

5.94 An additional factor specified in the Australian fair dealing exceptions for the purpose of research or study refers to 'the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price'.[120]

5.95 Some stakeholders expressed concern at the omission of this factor.[121] Media, Entertainment & Arts Alliance submitted that including this factor would 'at least demonstrate some recognition of the rights of copyright creators and owners'.[122] The Print Music Publishers Group was concerned that omitting this factor would send the wrong message to consumers.[123]

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117 P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105, 1125.
118 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 592.
119 R Xavier, *Submission 531*.
120 See *Copyright Act 1968* (Cth) s 40(2)(c).
121 For example, MEAA, *Submission 652*; Print Music Publishers Group, *Submission 627*.
122 MEAA, *Submission 652*.
123 Print Music Publishers Group, *Submission 627*.

5.96 Some went further, submitting that fair use should not apply where a use may be licensed on reasonable terms.[124] That is, the legislation 'should squarely state that if something is commercially available—including under a licence—then it is immediately disqualified' from fair use.[125] This view can be challenged, however, because such an assessment would essentially be a 'one factor test'.[126]

5.97 The Australian Copyright Council submitted that an 'ordinary commercial price' factor should be a fundamental part of any fair use exception. The Council considered that this factor is not subsumed by the fourth factor—'the effect of the use upon the potential market for, or value of, the copyright material'—but rather, is complementary:

> the former factor deals with the existing market and the latter deals with future markets. The former factor provides a concrete means of assessing the effect on the existing market and therefore provides an insight into what might be a 'normal exploitation' of the relevant copyright material.[127]

5.98 Other stakeholders submitted that an 'ordinary commercial price' factor should not be included in the fair use exception.[128] The ALRC takes this view for a number of reasons.

5.99 First, it is unnecessary. This factor is related to, or possibly a 'subset'[129] of, the fourth factor—concerning market effect. So, to the extent that it is relevant, it will be considered as part of a fairness determination.

5.100 A related consideration is that advances in digital technology are increasingly facilitating the licensing of low value uses. This has led to claims by collecting societies that a fair use exception 'conflicts with a normal exploitation of the work' and 'unreasonably prejudices the legitimate interests of the rights holder'.[130] CAG Schools observed:

> If these claims are accepted, fair use would have little if any role to play in a digital environment where a licence can be sought and granted with relative ease. Taken to its logical conclusion, this is an entirely circular argument: any use which a rights holder is prepared to licence would be *per se* 'unfair' if done without permission.[131]

5.101 Secondly, the US and other jurisdictions, which have adopted a fair use exception, do not expressly include this factor in their legislation.

5.102 Singapore is the only jurisdiction which includes an 'ordinary commercial price' factor in its open-ended fair dealing provision. The factor was added as part of amendments in 2004. When Singapore extended its fair dealing regime, a number of

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124 AIPP, *Submission 564*; Copyright Agency/Viscopy, *Submission 287*.
125 AIPP, *Submission 564*.
126 See Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*.
127 Australian Copyright Council, *Submission 654*.
128 R Xavier, *Submission 816*; Intellectual Property Committee, Law Council of Australia, *Submission 765*.
129 Copyright Advisory Group—Schools, *Submission 231*.
130 Copyright Advisory Group—Schools, *Submission 707*.
131 Ibid. See also Universities Australia, *Submission 754*.

rights holder interests opposed the introduction of this factor.[132] One commentator explained:

> There is a view that the presence of this new factor weighs against the copyright owner in that it embodies an 'implication that a copyright owner's pricing and distribution decisions could somehow convert an infringement into a fair dealing'.[133]

5.103 The Copyright Review Committee (Ireland) has recommended the inclusion of a factor referring to 'the possibility of obtaining the work, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case'[134] in its fair use exception. However, the fair use exception recommended for Ireland is substantially different from that in the US,[135] involving the determination of fairness by reference to up to eight factors.

5.104 Thirdly, an 'ordinary commercial price' factor may not be appropriate in determining the fairness of a range of uses including, for example, 'criticism or review' and 'parody or satire'.

5.105 Finally, while such a factor is said to be derived from case law on fair dealing, there is little such case law, compared with that concerning the other fairness factors.

Other factors?

5.106 Other factors that were suggested as desirable included the existing requirement for sufficient acknowledgement;[136] and 'the non-financial impact of the use on the copyright owner', such as damage to reputation or brand.[137]

5.107 Whether sufficient acknowledgement was made can be considered in the context of the first fairness factor,[138] and an assessment of fairness could include consideration of damage to reputation or brand—although this is not traditionally considered when determining whether there has been infringement of copyright.

5.108 In any case, the ALRC recommends that the list of fairness factors should be non-exhaustive. Other relevant factors may be considered in a given case. For example, principles of justice, equity and perhaps acknowledgement of moral rights may also be relevant in determining fairness.

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132 N Wee Loon and A Leck, 'Protection of Intellectual Property Rights' in TK Sood (ed) *Singapore Academy of Law Conference 2006: Developments in Singapore Law Between 2001 and 2005* (2006) 242, 249, citing submissions from the US-based International Intellectual Property Alliance (IIPA), the Copyright Licensing and Administration Society of Singapore Ltd, and a Singaporean law firm.

133 Ibid, 249, quoting from the IIPA's submission.

134 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 94.

135 Ibid, 11.

136 APRA/AMCOS, *Submission 664*.

137 Cricket Australia, *Submission 700*. See also COMPPS, *Submission 634*.

138 In US jurisprudence, the propriety of a defendant's conduct is considered in the context of the first fairness factor. Sufficient acknowledgement or attribution may favour a finding of fair use: *Williamson v Pearson Education, Inc*, Civ No 8240(AGS) (SDNY, 19 October 2001). Some stakeholders referred to the desirability of considering attribution in determining fairness: Pirate Party Australia, *Submission 689*.

5.109 While some stakeholders who opposed a fair use exception criticised the non-exhaustive nature of the list as exacerbating the subjectivity, vagueness and imprecision they considered inherent in the fair use concept,[139] others acknowledged that this would enable other relevant public policy factors to be taken into account.[140]

Recommendation 5–2 The non-exhaustive list of fairness factors should be:

(a) the purpose and character of the use;

(b) the nature of the copyright material;

(c) the amount and substantiality of the part used; and

(d) the effect of the use upon the potential market for, or value of, the copyright material.

The illustrative purposes

5.110 The fair use exception should contain a non-exhaustive list of illustrative uses or purposes. The fair use exceptions in the US and other countries that have enacted fair use or extended, open-ended fair dealing exceptions, all include illustrative purposes or examples. The ALRC's recommended list of illustrative purposes would be specifically Australian, but has parallels to those listed in other jurisdictions' statutes.

5.111 The illustrative purposes in the US fair use exception are set out in the preamble to the *Copyright Act*. The preamble provides, in part:

> 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.[141]

5.112 The US Supreme Court has said that:

> The text employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given ... which thus provide only general guidance about the sorts of copying the courts and Congress most commonly found to be fair uses.[142]

5.113 In *Harper & Row v Nation*, the US Supreme Court commented further on the function of the preamble:

> News reporting is one of the examples enumerated in §107 to 'give some idea of the sort of activities the courts might regard as fair use under the circumstances'. This listing was not intended to be exhaustive, or to single out any particular use as presumptively a 'fair' use. The drafters resisted pressures from special interest

139 News Corp Australia, *Submission 746*; ACCESS Ministries, *Submission 596*.
140 Australian Copyright Council, *Submission 654*.
141 *Copyright Act 1976* (US) s 107.
142 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 577.

> groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis. '[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence'.[143]

5.114 The ALRC intends the illustrative purposes in an Australian fair use exception to serve this same function. The listed purposes are illustrative, not exhaustive. The fact that a particular use falls within one of the broader categories of 'illustrative purposes' will tend to favour a finding of fair use. But this does not necessarily mean the particular use is fair. It does not even create a presumption that the use is fair. A consideration of the fairness factors is crucial.

5.115 A number of stakeholders approved including a list of illustrative purposes in the fair use exception.[144] For these stakeholders, the illustrative purposes were seen to provide helpful guidance on the application of the provision[145] and to reduce uncertainty.[146] In the Discussion Paper, the ALRC proposed nine illustrative purposes.[147] Some stakeholders supported the content of this list,[148] or at least some of the illustrative purposes listed.[149]

5.116 The ALRC's list of illustrative purposes includes purposes that are:

- currently the subject of purpose-based exceptions—for example, the existing fair dealing purposes; and
- not currently the subject of express unremunerated use exceptions in the *Copyright Act*—for example, quotation.

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143 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 561.

144 For example, Universities Australia, *Submission 754*; Optus, *Submission 725*; ACCC, *Submission 658*; Communications Alliance, *Submission 652*; BSA, *Submission 598*; ADA and ALCC, *Submission 586*; K Bowrey, *Submission 554*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*; Grey Literature Strategies Research Project, *Submission 250*; Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Law Institute of Victoria, *Submission 198*; R Wright, *Submission 167*; M Rimmer, *Submission 122*.

145 Universities Australia, *Submission 754*; ACCC, *Submission 658*; ADA and ALCC, *Submission 586*; K Bowrey, *Submission 554*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*; National Library of Australia, *Submission 218*.

146 ACCC, *Submission 658*; Telstra Corporation Limited, *Submission 602*.

147 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 4–4. These were: (a) research or study; (b) criticism or review; (c) parody or satire; (d) reporting news; (e) non-consumptive; (f) private and domestic; (g) quotation; (h) education; and (i) public administration.

148 Intellectual Property Committee, Law Council of Australia, *Submission 765*; NSW Government and Art Gallery of NSW, *Submission 740*; Optus, *Submission 725*; CAMD, *Submission 719*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; EFA, *Submission 714*; National Library of Australia, *Submission 704*; Pirate Party Australia, *Submission 689*; William Angliss Institute, *Submission 614*; Telstra Corporation Limited, *Submission 602*; National Archives of Australia, *Submission 595*; K Bowrey, *Submission 554*.

149 iGEA, *Submission 741* (the existing fair dealing purposes); BSA, *Submission 598* (all but 'private and domestic').

5.117 Stakeholders supported this approach, particularly with respect to consolidating the existing fair dealing provisions into a more general fair use exception.[150] For example, the Law Council approved of a fair use model that 'would include reference to the existing specific copyright exceptions which would then act as examples to courts of the types of activities that constitute fair use'.[151]

Concerns about certainty

5.118 Some stakeholders expressed concern about lack of certainty. Those who opposed the enactment of fair use in Australia criticised the proposed illustrative purposes and submitted that a non-exhaustive list does not promote certainty.[152] Others suggested some ways in which more certainty could be obtained.[153]

More detailed illustrative purposes

5.119 Some suggested that more detail should be included in the illustrative purposes.[154] For example, the ACCC submitted that more detailed illustrative purposes should be developed that

> are able to reflect the value of ensuring the efficient operation of markets for copyright material and which encourage a careful consideration of relevant factors to ensure that copyright rights are not extended in a manner which creates monopoly characteristics in ancillary markets.[155]

5.120 There were many suggestions for additional illustrative purposes:

- professional advice[156]—specified as 'the preparation of legal advice',[157] 'the giving of professional advice',[158] and 'providing or seeking professional advice';[159]

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150 For example, Australian War Memorial, *Submission 720* ('the ALRC's proposed list of illustrative uses must be as clear and at least as encompassing as the current fair dealing exceptions'); Telstra Corporation Limited, *Submission 602*; BSA, *Submission 598*; Telstra Corporation Limited, *Submission 222*; National Library of Australia, *Submission 218*; Law Institute of Victoria, *Submission 198*; M Rimmer, *Submission 122*.

151 Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*.

152 Australian Film/TV Bodies, *Submission 739*; AFL, *Submission 717*; Cricket Australia, *Submission 700*. Other objections included, first, that the purposes are too broad: see Australian Film/TV Bodies, *Submission 739*; Australian Copyright Council, *Submission 654*; Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*; Screenrights, *Submission 646*; Motion Picture Association of America Inc, *Submission 573*. Secondly, it was suggested that the illustrative purposes lack a coherent policy basis: Australian Copyright Council, *Submission 654*. Thirdly, the new illustrative purposes are untested: APRA/AMCOS, *Submission 664*.

153 One suggestion was to draw upon the Israeli model, which empowers the relevant Minister to 'make regulations prescribing conditions under which a use shall be deemed a fair use': *Copyright Act 2007* (Israel) s 19(c). Some stakeholders suggested that the ALRC consider a similar mechanism so that more illustrative purposes could be added over time: Pirate Party Australia, *Submission 689*; Cyberspace Law and Policy Centre, *Submission 640*.

154 Telstra Corporation Limited, *Submission 602*; Communications Alliance, *Submission 652*. For example, Telstra submitted that the illustrative purposes 'non-consumptive' use and 'public administration' should 'each be defined to provide guidance as to their scope'.

155 ACCC, *Submission 658*.

156 CSIRO, *Submission 774*; Telstra Corporation Limited, *Submission 602*.

- legal proceedings;[160]
- amateur photographers and audiovisual makers' use of digital images where used in the context of a photographic competition or display, including where held within a club and open to public viewing;[161]
- transformative uses;[162]
- 'system-level caching';[163]
- specification of 'digital remedial processes' such as 'conversion or reformatting of records and data';[164]
- use for studying and testing the operation of computer software,[165] that is, 'for public interest reasons such as making a back up copy, security testing, reverse engineering for making interoperable products and error correction';[166]
- software preservation and archiving;[167]
- uses for cultural heritage, cultural enrichment or similar purposes;[168]
- the sharing of public collections, to allow galleries, libraries and museums to share works in their collection online;[169]
- 'using unpublished works deposited in cultural institutions for over 50 years to enable digital preservation and public access online';[170]
- 'education, science and research';[171]
- teaching, or research or study (including multiple copies for classroom use);[172]
- public administration, including 'public use of copyright works held by the government';[173]

157 Communications Alliance, *Submission 652*.
158 CSIRO, *Submission 774*. At least one submission used a narrower construction. See Intellectual Property Committee, Law Council of Australia, *Submission 765* ('professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney').
159 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.
160 Telstra Corporation Limited, *Submission 602*. However, Telstra's preference was for this to be retained as a blanket exception. See also Communications Alliance, *Submission 653* ('the use of copying in legal proceedings').
161 Victorian Association of Photographic Societies Inc, *Submission 312*.
162 Internet Industry Association, *Submission 774*; EFA, *Submission 714*.
163 Communications Alliance, *Submission 652*.
164 National Archives of Australia, *Submission 595*.
165 Google, *Submission 600* (note that the introduction of an additional illustrative purpose in this regard was just one option proposed).
166 ADA and ALCC, *Submission 586*.
167 Play It Again International Research Team, *Submission 494*.
168 NFSA, *Submission 750*; National Archives of Australia, *Submission 595*.
169 NSW Government and Art Gallery of NSW, *Submission 740*; Museum Victoria, *Submission 522*.
170 Australian War Memorial, *Submission 720*.
171 M Rimmer, *Submission 550*.
172 Intellectual Property Committee, Law Council of Australia, *Submission 765*.
173 M Rimmer, *Submission 550*.

- 'other non-commercial uses, such as in the government or non-profit sectors';[174]
- uses for 'disadvantaged groups, such as elderly and/or those with a disability';[175]
- 'third-party uses on behalf of an end-user where the third-party use is facilitating an otherwise fair use by the end-user';[176]
- 'lack of supply';[177] and
- uses for the purpose of advertising the sale of an artwork.[178]

Professional advice exceptions

5.121 A number of stakeholders called for an illustrative purpose referring to the giving of professional advice, expressed in differing ways.[179]

5.122 The current provisions relating to the use of works and subject matter other than works in the context of professional advice, were described as 'a mess'.[180] In 1998, the CLRC identified these inconsistencies between subject matter and modes of advice, for which it could see no basis, and recommended that the distinctions be removed.[181] Similarly, in this Inquiry, the Law Council submitted that it is 'not aware of any particular reason why subject matter should be treated more favourably than original works'.[182]

5.123 Some stakeholders considered that listing professional advice—however described—as an illustrative purpose would ensure that the new fair use exception works as intended, in clarifying that a fair use for the purpose of professional advice does not infringe copyright.[183] Telstra submitted that it 'seems inconsistent' not to

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174 EFA, *Submission 714*.

175 Vic's Flicks, *Submission 301*. The latter—'disability'—was expressed in a number of different ways in submissions. See, eg, R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716* ('facilitating access to works for persons with a print disability'); Google, *Submission 600* ('assistance for persons with a visual impairment'); National & State Libraries Australasia, *Submission 588* ('provision for disabled users'); ADA and ALCC, *Submission 586* ('uses to assist people with a disability'); M Rimmer, *Submission 581* ('use by or for a person with a disability').

176 Optus, *Submission 725*.

177 Museum Victoria, *Submission 522*.

178 Kay and Hughes, *Submission 631*.

179 CSIRO, *Submission 774* (professional advice); Intellectual Property Committee, Law Council of Australia, *Submission 765* ('professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney'); R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716* ('providing or seeking professional advice'); Communications Alliance, *Submission 652*; Telstra Corporation Limited, *Submission 602* ('Professional Advice'). In the US, relevant cases have 'tended to cluster around legal advice and the preparation of documents for litigation': R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716* (citing *Tavory v NTP, Inc*, 495 F Supp 2d 531 (ED Va, 2007) and referring to the cases cited in P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537).

180 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

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

182 Intellectual Property Committee, Law Council of Australia, *Submission 765*

183 Ibid; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

include this as an illustrative purpose, given that the ALRC proposed a fair dealing exception for this purpose.[184]

5.124 The ALRC recommends that 'professional advice' be specified as an illustrative purpose in a fair use exception or new fair dealing exception. The term 'professional advice' should be adopted, rather than other expressions which may confine the purpose to advice given by a legal practitioner, registered patent attorney or registered trade marks attorney. Further, the ALRC does not consider that the *Copyright Act* needs to specify whether the exception be for seeking, giving or providing of advice. This is for three reasons.

5.125 The use of the term 'professional advice' is broad in scope. This is appropriate, and broadly expressed. This addresses concerns that 'there is no reason of principle why advice provided by other professional groups such as accountants and doctors should not be treated in a broadly similar way', especially given that the user will, in any case, always have to demonstrate that the use was fair.[185]

5.126 Stakeholders held a spectrum of views on this issue. Some stakeholders sought a specific exception with respect to 'giving and seeking advice' with inclusion as an illustrative purpose seen as a second best option.[186] The Law Council considered that 'fair use is the appropriate standard rather than a blanket defence'.[187]

5.127 The ALRC's recommended approach will result in some narrowing of the current exceptions applying to professional advice in s 104(b) and (c) of the *Copyright Act* (in that a fairness determination will be required), but there will also be some broadening of the fair dealing exceptions in s 43(2), because the exception will not be confined to the 'giving' of professional advice.

The eleven illustrative purposes

5.128 The ALRC recommends eleven illustrative purposes. The rationale for including these illustrative purposes in the fair use exception is explained in a number of other chapters in this Report.[188]

5.129 For present purposes, it is sufficient to note that:

- some of the illustrative purposes that were proposed in the Discussion Paper have been recast: 'incidental or technical use' replaces 'non-consumptive' use and 'non-commercial private use' replaces 'private and domestic' use;

184 Telstra Corporation Limited, *Submission 602*. See Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposals 7–3, 7–4.
185 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.
186 Telstra Corporation Limited, *Submission 602*.
187 Intellectual Property Committee, Law Council of Australia, *Submission 765*.
188 See Ch 9 ('quotation'); Ch 10 ('non-commercial private use'); Ch 11 ('incidental or technical use'); Ch 12 ('library or archive use'); Ch 14 ('education'); Ch 15 (decision not to include 'public administration'); and Ch 16 ('access for people with disability').

- the ALRC is not recommending the inclusion of an illustrative purpose for 'public administration', instead the ALRC recommends amendment, and enactment, of a number of specific exceptions; and
- three new illustrative purposes have been added since the Discussion Paper: 'professional advice', 'library or archive use' and 'access for people with disability'.

5.130 With respect to arguments that there should be more detail in the description of each illustrative purpose, the ALRC notes that the existing purpose-based exceptions in the *Copyright Act*—the fair dealing exceptions—are cast at a similar level of generality. Relevant chapters in this Report contain further guidance in respect of particular illustrative purposes. The ALRC has responded to stakeholder input concerning previously proposed illustrative purposes, such as 'non-consumptive' use and 'public administration', which may not have been as easily understood as acceptable uses of copyright material.

5.131 The list includes some, but not all, of the purposes that may tend to favour a finding of fair use. It is important that the non-exhaustive nature of the list be well understood. In the ALRC's view, the list of purposes is not so lengthy as to suggest that flexibility has been compromised.[189]

5.132 Academics stated that the proposed list of illustrative purposes was 'comprehensive and consistent with comparative law in other jurisdictions'[190] and 'very much in the tradition of s 107 of the US *Copyright Act*: it tries to map the contours of fair use, without attempting to set its future boundaries'.[191] They approved broadly of the illustrative purposes not currently the subject of exceptions, submitting that these were 'broad enough to meet temporary expectations of kinds of fair use'[192] but do not foreclose further common law development.[193]

Recommendation 5–3 The non-exhaustive list of illustrative purposes should include the following:

(a) research or study;

(b) criticism or review;

(c) parody or satire;

(d) reporting news;

189 See Australian Copyright Council, *Submission 654* ('In our submission, a lengthy list of illustrative purposes compromises [the flexibility of a standards-based approach]').
190 K Bowrey, *Submission 554*.
191 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.
192 K Bowrey, *Submission 554*.
193 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

(e) professional advice;

(f) quotation;

(g) non-commercial private use;

(h) incidental or technical use;

(i) library or archive use;

(j) education; and

(k) access for people with disability.

Guidance to counter uncertainty and expense

5.133 While it could be said that 'the uncertainty associated with fair use has been greatly overstated',[194] to counter concerns about uncertainty and expense, stakeholders considered there should be sufficient guidance on the application of a fair use exception.

5.134 The fair use exception itself contains some guidance for users of copyright material and the courts based on the fairness factors and illustrative purposes. Further guidance may be found in:

- existing Australian case law;
- other relevant jurisdictions' case law; and
- any industry guidelines or codes of practice that are developed.

Relevance of existing Australian case law

5.135 If a new fair use exception is enacted, existing Australian case law, particularly that pertaining to fair dealing, would be of relevance and provide guidance to the courts. A number of stakeholders shared this view.[195] The Law Institute of Victoria, for example, submitted that, given the 'similarity of the US fair use factors with the Australian factors for determining fair dealing, our jurisprudence on when a dealing is fair may also be of assistance'.[196]

5.136 While drawing on existing authority, a new fair use exception should not be seen as merely codifying the state of the law:

> An approach that sought to shackle a fair use defence to the pre-fair-use state of the law would be regrettable, given the manifold problems we and others have

194 Copyright Advisory Group—Schools, *Submission 707*. See also Communications Alliance, *Submission 652*.

195 For example, NSW Government and Art Gallery of NSW, *Submission 740*; ACCC, *Submission 658*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Yahoo!7, *Submission 276*; Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria, *Submission 198*.

196 Law Institute of Victoria, *Submission 198*.

> identified with both the current drafting of the defences and their interpretation by Anglo-Australian courts.[197]

5.137 Some were concerned that the enactment of fair use 'may result in arguments that the current fair dealing exceptions have been relaxed'.[198] SBS, Commercial Radio Australia and the ABC expressed concern that any proposal to include the fair dealing exceptions for the purposes of reporting news, criticism or review, and parody or satire within a fair use provision would mean that these exceptions would be 'open to re-litigation' and their operation may be restricted.[199]

5.138 The ALRC considers these concerns to be overstated. First, any review of Australian fair dealing jurisprudence shows that such litigation occurs from 'time to time',[200] but is relatively scare,[201] with some of the exceptions, such as those concerning parody or satire, never having been litigated at all. The ALRC is not convinced that the 'floodgates' will be opened and uncertainty will ensue. Secondly, concerns that the scope of the existing fair dealing exceptions may be restricted seem to be predicated on a misunderstanding of the role that a fairness assessment already plays in determining the application of the existing fair dealing exceptions.

Relevance of other jurisdictions' case law

5.139 It is well-established that foreign case law may be used by Australian courts, to the extent that the reasoning of such decisions is persuasive.[202] If fair use is enacted, the ALRC would expect that Australian courts would look to US case law, in particular, as one source of interpretative guidance, but would not be bound by such decisions.

5.140 A number of stakeholders submitted that it would be helpful for Australian courts to draw upon US jurisprudence and, to a lesser extent, other countries' jurisprudence.[203] The Law Council submitted:

> as a relatively small country, the amount of litigation in relation to copyright should also be relatively small. Drawing upon the jurisprudence of the United States would

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197 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*. See also 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.

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

199 SBS and others, *Submission 295*. See also Commercial Radio Australia, *Submission 864*.

200 Telstra Corporation Limited, *Submission 602*.

201 Intellectual Property Committee, Law Council of Australia, *Submission 765*; BSA, *Submission 598*.

202 For example, in *Tabet v Gett* (2010) 240 CLR 537, a negligence case, the High Court referred to case law in England, Canada, the United States, France, the Netherlands, Italy, Portugal, Spain, Germany, Austria, Greece, Norway, Estonia and Lithuania. See also *Hancock v Nominal Defendant* [2002] 1 Qd R 578, another negligence case, in which the Queensland Court of Appeal referred to case law from England, Canada, New Zealand, South Africa, Scotland, the United States and Ireland. Byrne J alone cited more than 60 US cases.

203 For example, Intellectual Property Committee, Law Council of Australia, *Submission 765*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; Pirate Party Australia, *Submission 689*; Telstra Corporation Limited, *Submission 602*; ADA and ALCC, *Submission 586*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Law Council of Australia, *Submission 263*; Universities Australia, *Submission 246*; Google, *Submission 217*.

> permit Australia to take advantage of the intellectual and financial investment in the creation of that jurisprudence over many years without the disadvantage of having to expend significant judicial resources in the development of a completely stand alone Australian view of fair use.[204]

5.141 However, some stakeholders objected to the use of other jurisdictions' case law in this way. In their view:

- it would be a difficult task, given that US jurisprudence reflects different legal frameworks than those found in Australia;[205] and
- the scope and applicability of the guidance will be limited as 'a fair use exception has been introduced in only a small handful of countries throughout the world'.[206]

5.142 Specific differences identified included that the US has:

- a Bill of Rights, which expressly protects freedom of speech;[207]
- express articulation in the *US Constitution* of the purpose of copyright;[208] and
- no express moral rights protection akin to that in Australia.[209]

5.143 The Motion Picture Association of America (MPAA) submitted that, 'whether, and to what extent, the Australian courts, in applying a new "fair use-like" provision, should be guided by US precedent' was 'the inescapable question'.[210] Other stakeholders expressed concern over what they referred to the 'transplantation' of US law, [211] and future Australian 'dependence' on US law.[212]

5.144 Such comments misunderstand the jurisprudential implications of introducing a fair use exception. Australian courts will be able to draw upon approaches taken in other relevant jurisdictions, primarily that of the US, but would not, in any way, be bound by them.[213] Some stakeholders understood this. Google submitted:

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204 Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*.

205 For example, Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; International Publishers Association, *Submission 670*; Screenrights, *Submission 646*; AMPAL, *Submission 557*.

206 Cricket Australia, *Submission 700*. See also Association of American Publishers, *Submission 611*.

207 Free TV Australia, *Submission 865*; Foxtel, *Submission 748*; Australian Film/TV Bodies, *Submission 739*; APRA/AMCOS, *Submission 664*; Flemish Book Publishers Association, *Submission 683*; International Publishers Association, *Submission 670*; IFFRO, *Submission 481*; Screenrights, *Submission 215*; Arts Law Centre of Australia, *Submission 171*.

208 News Corp Australia, *Submission 746*; Music Council of Australia, *Submission 647*; Australian Copyright Council, *Submission 654*; ARIA, *Submission 241*; Australian Publishers Association, *Submission 225*.

209 Arts Law Centre of Australia, *Submission 706*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; AMPAL, *Submission 557*.

210 Motion Picture Association of America Inc, *Submission 573*; Motion Picture Association of America Inc, *Submission 197*.

211 Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*.

212 IFFRO, *Submission 481*.

213 See also E Hudson, 'Implementing Fair Use in Copyright Law: Lessons From Australia' (2013) 25 *Intellectual Property Journal* 201, 218: 'Utilization of US case law does not mean Australia would be tethering any domestic fair use exception to approaches in the US, or that judges would be required to

> This is not to say, of course, that US or other foreign jurisprudence would be exported in its entirety to Australia; but rather that Australian judges would not necessarily be starting with a blank slate when deciding fair use cases.[214]

5.145 Australia would not necessarily be adopting the outcome of every US court case:

> Australian courts will no doubt continue to benefit from seeing how their American counterparts have dealt with similar questions in the past. However, United States jurisprudence will only persuade to the extent that it is persuasive.[215]

5.146 Some rights holders took the view that this would mean there would be 'uncertainty' because '[t]he law of Australia would need to make that decision on what is fair or not, regardless [of] what another jurisdiction has proclaimed'.[216]

5.147 Australian courts look to, and at times draw from, precedent developed in other jurisdictions where they consider it to be helpful.[217] As one stakeholder observed:

> Federal Court and High Court justices routinely consider leading United States cases in the process of deciding Australian law according to Australian standards. In areas where standards of fairness are relatively similar, we would expect divergence to be minimal. ... However, it would not be surprising if Australian courts diverged from American ones in cases that pitted moral rights against freedom of expression.[218]

5.148 The Law Council submitted that it is 'imperative' that courts and practitioners be given 'strong encouragement' to look to how fair use is applied in other jurisdictions, particularly in the US.[219] Some submitted that it would be helpful for this to be specified,[220] possibly by an express statement in the relevant Explanatory Memorandum.[221]

5.149 In the Discussion Paper, the ALRC expressed its view that an express statement about the extent to which US or other countries' jurisprudence should be taken into

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adopt statements from US cases uncritically and without considering local conditions. Instead, it would give judges (and users) a bank of authority to provide greater rule-like guidance to the fair use standard'.

214 Google, *Submission 217*.

215 G Hinze, P Jaszi and M Sag, *Submission 483*.

216 ALPSP, *Submission 562*. See also Free TV Australia, *Submission 865*; International Publishers Association, *Submission 670*.

217 Examples abound in the copyright context. See E Hudson, 'Implementing Fair Use in Copyright Law: Lessons From Australia' (2013) 25 *Intellectual Property Journal* 201, 218 ('numerous English cases were cited in relation to fair dealing by Beaumont J in *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99 and Conti J in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235' and referring to use of a US case in an Australian fair dealing case: 'Bennett J using the language of "transformative use" to describe aspects of a news summary service' in *Fairfax Media Publications Pty Ltd v Reed International Books Australia Ptd Ltd* (2010) FCR 109); G Hinze, P Jaszi and M Sag, *Submission 483* (referring to the use of leading US cases in *Roadshow Films Pty Ltd v iiNet Ltd* [2012] 16 HCA and *Ice TV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458).

218 G Hinze, P Jaszi and M Sag, *Submission 483*.

219 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

220 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*; Universities Australia, *Submission 246*.

221 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; ADA and ALCC, *Submission 213*.

account by Australian courts is unnecessary. While some submissions agreed with this approach,[222] others had concerns.

5.150 Some stakeholders took the view that an express statement in extrinsic materials would:

- help to direct judges to the extensive fair use jurisprudence that has been developed in the US;
- provide legal advisors with 'a greater degree of comfort' when advising clients in the absence of Australian case law directly on point; and
- help clarify, referring to ss 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth), that the purpose of introducing fair use is to afford a flexible, open-ended defence focusing on fairness and is 'not obscure, or bound up with intractable questions of the overarching purpose of copyright law'.[223]

5.151 One possible model is the Explanatory Memorandum to the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth), which expressly stated that some concepts introduced by that Act into patent law were adopted from and intended to be interpreted in accordance with UK or US developments.[224]

5.152 The ALRC considers that it would be helpful for the Explanatory Memorandum to contain an express statement that the scope of the Australian provision can be informed by US and related foreign law. This would assist in countering concerns about uncertainty.

Industry codes of practice and guidelines

5.153 Another way in which some certainty could be sought in a fair use regime is by the development of industry guidelines and codes of practice.[225] Some stakeholders, including the MPAA, supported this idea.[226] Google observed that the *Documentary Filmmakers' Statement of Best Practices in Fair Use*, which has been developed in the US, has provided enough certainty for major insurance companies to accept the statement as a basis for errors and omissions insurance for fair use claims.[227]

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222 Pirate Party Australia, *Submission 689*.

223 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

224 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

225 There is precedent for such use in the US, although views diverge as to the assistance such documents provide: J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights; P Aufderheide and P Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011); K Crews, 'The Law of Fair Use and the Illusion of Fair-Use Guidelines' (2001) 62 *Ohio State Law Journal* 599.

226 For example, Copyright Advisory Group—Schools, *Submission 861*; NSW Government and Art Gallery of NSW, *Submission 740*; Copyright Advisory Group—TAFE, *Submission 708*; Copyright Advisory Group—Schools, *Submission 707*; Google, *Submission 600*; National & State Libraries Australasia, *Submission 588*; ADA and ALCC, *Submission 586*; Motion Picture Association of America Inc, *Submission 573*; G Hinze, P Jaszi and M Sag, *Submission 483*.

227 Google, *Submission 600*.

5.154 Some stakeholders put the opposite view: that industry guidelines and codes of practice cannot play a useful role in creating additional certainty about the operation of fair use. In their view:

- the need for guidelines is evidence of the complexity and uncertainty inherent in a fair use exception;[228]
- protocols[229] and guidelines may not be useful, given that they are not binding[230] or enforceable,[231] particularly when parties are not located or regulated in Australia;[232]
- the negotiation of such guidelines in Australia would be difficult,[233] with some sports bodies noting their own experience in this regard,[234] a number of stakeholders noting the fact that negotiations between copyright owners and carriage service providers had not yet resulted in an industry code of practice in respect of infringement on their networks,[235] and some submitting that it is unclear to what extent parties would be able to agree on the application of fair use,[236] given their view that 'fair use allows very substantial latitude for disagreement';[237] and
- experience in the US suggests that attempts to agree on guidelines to facilitate certainty about the application of fair use have been of limited success.[238]

5.155 However, some stakeholders who were opposed to the enactment of fair use in Australia, nevertheless saw some role for codes to play in the copyright context,[239] including with respect to fair use.[240]

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228 Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*; COMPPS, *Submission 634*.

229 A number of stakeholders, however, expressed concerns about protocols or guidelines developed by users without rights holders. See ARIA, *Submission 731*; Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649* ; Cricket Australia, *Submission 700*.

230 AFL, *Submission 717*; COMPPS, *Submission 634*.

231 AFL, *Submission 717*; Screenrights, *Submission 646*.

232 Cricket Australia, *Submission 700*.

233 Free TV Australia, *Submission 865*; Copyright Agency, *Submission 727*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; Screenrights, *Submission 646*; COMPPS, *Submission 634*.

234 AFL, *Submission 717* ('it is the AFL's experience that the introduction and implementation of industry guidelines to negotiate the use of content is a difficult process and the results can be unsatisfactory ... Experience shows there is little appetite by media companies to agree to restrictions in this area'); Cricket Australia, *Submission 700* ('In Cricket Australia's experience, binding and meaningful industry codes are extremely difficult, time consuming and costly to negotiate and implement').

235 Copyright Agency, *Submission 727*; APRA/AMCOS, *Submission 664*; Screenrights, *Submission 646*.

236 Free TV Australia, *Submission 865*; Copyright Agency, *Submission 727*.

237 Free TV Australia, *Submission 865*.

238 iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*.

239 Copyright Agency, *Submission 727* ('we do think there is scope for industry guidelines on the operation of section 200AB that would increase its usefulness for the cultural sector'); NAVA, *Submission 655* (identifying the development of a copyright code of conduct to guide users in best practices as one way to protect creators' rights).

240 Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*; Motion Picture Association of America Inc, *Submission 573*.

5.156 Further, submissions from two American entities expressed the view that guidelines can play a positive role with respect to fair use.[241] For example, the Kernochan Center for Law and Media and the Arts within the Columbia Law School submitted that 'guidelines can be useful, provided they are developed with input from rightsholders and users, are reasonably clear, and not unduly rigid'.[242] In its view, the development of such guidelines was 'a worthwhile goal', and noted that 'recent developments indicate that it is possible to arrive at multilateral agreements concerning the use of copyrighted works'.[243]

5.157 There were differing views about the form such guidelines or codes should take. APRA/AMCOS submitted that they 'should be mandated by law, should take into account the views of both owners and users, and should be subject to the jurisdiction of the Copyright Tribunal'.[244] However, some sports bodies submitted that negotiating binding industry codes can be 'extremely difficult', time consuming,[245] and that the results can be unsatisfactory.[246] The AFL submitted that:

> The 'compromises' reached as part of industry arrangements are often a function of bargaining power, timing and political pressure, rather than an appropriate balancing of rights.[247]

5.158 Some US-based copyright academics observed that:

> The United States experience under the *Copyright Act* of 1976 indicates voluntary guidance documents can be a means by which to achieve greater levels of certainty, and provide predictability and normative guidance to users.[248]

5.159 The ALRC considers that it is best left to the market to develop relevant guidelines as industry participants consider necessary.[249] This aligns with a number of the ALRC's recommendations for reform, which are premised on the value of market-based, deregulatory solutions.

5.160 Many stakeholders have already reached agreed understandings or developed guidelines in respect of the use of copyright material in view of certain exceptions. For example, National and State Libraries Australasia submitted that it has been developing standard practices and industry guidelines 'for several years',[250] and Google observed

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241 Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*; Motion Picture Association of America Inc, *Submission 573*.

242 Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*.

243 Ibid, citing the activities of the Section 108 Study Group in the US.

244 APRA/AMCOS, *Submission 664*. See also R Xavier, *Submission 531* ('Industry codes may be appropriate if genuinely negotiated among all affected parties, or of negotiated with government for self-regulation to benefit third parties'); M Aronson, *Submission 317*.

245 Cricket Australia, *Submission 700*.

246 AFL, *Submission 717*.

247 Ibid.

248 G Hinze, P Jaszi and M Sag, *Submission 483* (noting, however, that negotiated guidelines often fail).

249 For example, the ADA and ALCC stated :'Our members, such as universities and libraries, have indicated that they would be supportive of codes of best practice that would provide some clarity and certainty to day to day operations in this area': ADA and ALCC, *Submission 586*. See also Ch 3 in relation to the commitment of the education sector to develop guidelines and codes of practice to inform the use of educational material.

250 National & State Libraries Australasia, *Submission 588*.

that guidance was developed on the operation of s 200AB after the commencement of that provision.[251] Free TV Australia submitted that:

> In the areas where broadcasters rely on the fair dealing provisions there is a strong and well-established understanding between various stakeholders as to the balance that the current system provides between the interests of copyright owners and users.[252]

Relationship with existing exceptions

5.161 If Australia adopts the new fair use exception, then it is critical to determine the relationship with exceptions currently in the *Copyright Act*. It has been 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.[253]

5.162 One rationale for retaining specific exceptions is a desire to retain certainty, which can reduce transaction costs, although care should be taken not to create problems of statutory interpretation where an illustrative purpose and a specific exception may seem to overlap.[254] The merits of retaining particular specific exceptions in certain areas are detailed in other chapters.[255]

5.163 Some stakeholders opposed to fair use generally, also opposed the repeal of certain exceptions.[256] However, others took the view that, if fair use were enacted, the existing fair dealing exceptions,[257] or other specific exceptions such as s 200AB,[258] should be repealed.

5.164 ARIA observed that, in some cases, exceptions in Australian law are more generous than those found in US law.[259] In this context, the Australian Copyright Council stated:

> If the ALRC's thesis is that flexibility will make exceptions to copyright more appropriate for the digital economy, then this flexibility should clearly apply in both directions. That is, while a flexible standard may be broader than existing exceptions, it may also be narrower in some instances.[260]

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251 Google, *Submission 600*.
252 Free TV Australia, *Submission 865*.
253 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.
254 E Hudson, 'Implementing Fair Use in Copyright Law: Lessons From Australia' (2013) 25 *Intellectual Property Journal* 201, 226.
255 See Ch 12 ('Libraries and Archives') and Ch 15 ('Government Use').
256 For example, Australian Film/TV Bodies, *Submission 739*; Hillsong, *Submission 671* ('the suggested repealing of many of the provisions is an overreaction and will create more uncertainty around the law than currently exists'); Screenrights, *Submission 646*; Print Music Publishers Group, *Submission 627*.
257 For example, Cricket Australia, *Submission 700*; Australian Copyright Council, *Submission 654*. However, others were opposed and submitted that the fair dealing exceptions should be retained alongside any fair use exception: Free TV Australia, *Submission 865*.
258 Australian Copyright Council, *Submission 654*.
259 ARIA, *Submission 241*.
260 Australian Copyright Council, *Submission 654*.

5.165 The ALRC considers that it is preferable to introduce a model that replaces many of the existing exceptions, particularly where it is anticipated that these existing excepted uses would be covered by the new fair use exception. Repeal of specific exceptions is proposed, in part, in the expectation that most uses now covered would remain permitted under a developing Australian fair use law.

5.166 The ALRC considers that its approach would reduce the length and detail of the *Copyright Act* and should assist in mitigating statutory interpretation problems.[261] Some stakeholders agreed.[262] For example, Communications Alliance submitted that 'it would be confusing and unnecessary to have two separate parts of the *Copyright Act* providing exceptions to copyright'.[263] Another stakeholder expressed concern about a 'hybrid' approach,[264] in which fair use is merely added to the existing suite of specific exceptions:

> With so many detailed exceptions, would it be anticipated that these be the primary focus for judges and users, with fair use as an occasional back-up? Or would fair use have more of a meaningful role? We support the emergence of fair use as the predominant exception in Australia and are concerned that excessive doubling up between fair use and other exceptions might cause confusion about the interaction between different provisions, and only serve to muddy the signals from government as to the role for fair use.[265]

5.167 It was also suggested that problems of statutory interpretation might be avoided through the use of a 'no-limitation' provision—'a provision stating that fair use does not limit, and is not limited by, any other exception'.[266]

Repeal of the existing fair dealing and professional advice exceptions

5.168 The ALRC recommends the repeal of the existing fair dealing exceptions and the professional advice exceptions in ss 104(b) and (c) and the application of either the fair use exception, or the new fair dealing exception, if fair use is not enacted. The ALRC considers the fair use exception should be applied when determining whether a use for one of the existing fair dealing purposes, and 'professional advice' more broadly, infringes copyright.

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261 See the fourth framing principle in Ch 2: 'providing rules that are flexible, clear and adaptive to new technologies'.

262 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; Communications Alliance, *Submission 653*; R Xavier, *Submission 531*.

263 Communications Alliance, *Submission 653*.

264 The ABC favoured a hybrid model: 'the ABC considers there may be some benefit in a hybrid model. That is, a model where specific fair dealing and free exceptions are articulated, but also where there is a residual open ended exception for developing uses of copyright material where the use does not conflict with the normal exploitation of the material and does not unreasonably prejudice the legitimate interests of the copyright owner. This would allow new fair dealing and free use exceptions to develop in the future'. ABC, *Submission 210*.

265 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

266 R Xavier, *Submission 531*.

Recommendation 5–4 The *Copyright Act* should be amended to repeal the following exceptions:

(a) ss 40, 103C—fair dealing for research or study;

(b) ss 41, 103A—fair dealing for criticism or review;

(c) ss 41A, 103AA—fair dealing for parody or satire;

(d) ss 42, 103B—fair dealing for reporting news;

(e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and

(f) ss 104(b) and (c)—professional advice exceptions.

The fair use or new fair dealing exception should be applied when determining whether one of these uses infringes copyright.

5.169 Elsewhere, this Report contains recommendations to repeal a range of specific exceptions, if fair use is enacted. The exceptions are as follows:

- in Chapter 10 ('Private Use and Social Use'): ss 47J, 109A, 110AA, 111;
- in Chapter 11 ('Incidental or Technical Use and Data and Text Mining'): ss 43A, 111A, 43B, 111B, 200AAA;
- in Chapter 12 ('Libraries and Archives'): ss 51A, 51B, 110B, 110BA, 112AA; and
- in Chapter 14 ('Education'): ss 28, 44, 200, 200AAA, 200AB.

5.170 On further review by the Australian Government, there may be other exceptions, including in other statutes,[267] which should also be repealed, if fair use is enacted.[268]

267 One submission suggested *Patents Act 1990* (Cth) s 226: R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

268 Some submissions gave considerable thought to which exceptions could be repealed if fair use is enacted, and which could be retained. See Ibid (revised lists including their rationale); R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278* (earlier lists).

6. The New Fair Dealing Exception

Contents

Summary

6.1 This chapter considers an alternative to an open-ended fair use exception, namely, a 'new fair dealing exception' that consolidates the existing fair dealing exceptions in the *Copyright Act* and introduces new purposes. The ALRC recommends that this fair dealing exception be introduced, if fair use is not enacted.

6.2 This exception is similar to fair use, but it is confined to certain prescribed purposes. The purposes listed in the fair use exception are illustrative—examples of types of use that may be fair. The purposes listed in the new fair dealing exception, on the other hand, confine the exception. This exception will only apply when a given use is made for one of the prescribed purposes.

6.3 Like fair use, a confined fair dealing exception is more flexible and adaptive than detailed, prescribed exceptions. It requires certain factors to be considered in an assessment of fairness. This flexibility is necessary to allow for innovative and productive uses of copyright material in a digital age.

6.4 Fair dealing also asks the right questions of a given use of copyright material. It promotes socially beneficial and transformative uses, and disfavours uses that unfairly harm the markets of creators and other rights holders. In this way, fair dealing encourages and rewards the creation of new copyright material.

6.5 Fair dealing shares many of the benefits of fair use. The benefits of the specific fairness factors are discussed in Chapter 4. The merits of the specific prescribed purposes, such as educational use, are discussed in separate chapters concerning those types of use.

The new consolidated fair dealing exception

6.6 In the Discussion Paper, the ALRC proposed that if fair use were not enacted, a number of new fair dealing exceptions should be introduced into the *Copyright Act*. The ALRC also proposed that the fairness factors be included in each fair dealing exception. Another, simpler, way of achieving this outcome is to consolidate the existing fair dealing exceptions into one provision, and introduce new purposes. This would be a closed-ended fairness exception, confined to uses of copyright material for the following purposes:

(a) research or study (existing);

(b) criticism or review (existing);

(c) parody or satire (existing);

(d) reporting news (existing);

(e) professional advice (existing);

(f) quotation (new);

(g) non-commercial private use (new);

(h) incidental or technical use (new);

(i) library or archive use (new);

(j) education (new); and

(k) access for people with disability (new).

6.7 These are the same as the illustrative purposes listed in the fair use exception recommended in Chapter 4.

Differences between new fair dealing and fair use

6.8 What is the difference between fair use and this new fair dealing exception? Under fair use, the list of purposes, or types of use, is merely illustrative. The fact that a particular use is not for one of the illustrative purposes does not mean that the use cannot be found to be fair. Fair use essentially asks one question: Is this use fair, considering the fairness factors?

6.9 The new fair dealing exception, on the other hand, can only apply to a use of copyright material if the use is for one of the prescribed purposes. If a given use does not fall into one of the categories of use, then it cannot be found to be fair. This confined fair dealing exception asks two questions: 1. Is this use for one of the listed purposes? 2. If so, is this use fair, considering the fairness factors? The exception only applies if the answer to both questions is 'Yes'. Therefore the new fair dealing exception is a narrower defence to infringement than fair use.

6.10 Although confined to prescribed purposes, this new fair dealing exception also expands the range of purposes currently provided for in the existing fair dealing exceptions in the *Copyright Act*.

6.11 The word 'use' in 'fair use' is intended to have the same meaning as 'dealing' in 'fair dealing'. No difference comes from the fact that one exception uses the word 'use' and the other 'dealing'.

6.12 In discussing the meaning of the word 'dealing' in the existing fair dealing exceptions, Professor Sam Ricketson argues that it does not refer only to the making of reproductions, but that rather, it was

> reasonable to regard a dealing with a work for the purposes of ss 40–43 as extending to the doing of any act which falls within the scope of the copyright owner's rights, ie not only the making of reproductions, but also the public performance, communication to the public, adaptation or even publication of a work.[1]

6.13 This Report refers to 'fair dealing' because this is the expression used in the *Copyright Act* and because it is most commonly associated with fairness exceptions confined to prescribed purposes.

Common benefits

6.14 Many of the benefits of fair use would also apply to a confined fair dealing exception. They are both flexible standards, rather than prescriptive rules. They both call for an assessment of the fairness of particular uses of copyright material. In assessing fairness, they both require the same fairness factors to be considered, and therefore they both ask the same important questions of any given unlicensed use, when deciding whether it infringes copyright.

6.15 Both exceptions encourage the use of copyright material for socially useful purposes, such as criticism and reporting the news; they both promote transformative or productive uses; and both exceptions discourage unlicensed uses that unfairly harm and usurp the markets of rights holders.

6.16 Fair use and fair dealing are also more flexible and adaptive to new technologies and services than detailed, prescriptive exceptions, such as the time shifting exception. An exception for fair dealing for non-commercial private use, for example, would not need to be amended to account for the fact that consumers now use tablets and store purchased copies of copyright material in personal digital lockers in the cloud.

6.17 Parliament does not need to predict or approve new technologies and services that use copyright material. Instead, the Australian Parliament can enact one exception based on principles that can be used to evaluate whether almost any unlicensed use infringes copyright.

Advantages of fair use over fair dealing

6.18 This Report recommends the introduction of a fair use exception, which has a number of advantages over a confined fair dealing exception.

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1 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* [11.20].

6.19 Despite the many benefits common to both fair use and fair dealing, a confined fair dealing exception will be less flexible and less suited to the digital age than an open-ended fair use exception. Importantly, with a confined fair dealing exception, many uses that may well be fair will continue to infringe copyright, because the use does not fall into one of the listed categories of use. For such uses, the question of fairness is never asked.

6.20 Some submissions stressed that, while an improvement on the current law, the alternative fair dealing exceptions are very much a second-best option and that fair use was preferred. Universities Australia submitted that fair use properly focuses on whether or not a given use is fair and would 'greatly reduce the uncertainty that has resulted from having to pigeonhole a particular use into one of the purposes' in the existing fair dealing exceptions.[2]

6.21 The Law Council of Australia broadly supported some alternative fair dealing exceptions, if fair use were not enacted, but it warned that:

> this piecemeal approach is a very poor alternative which is likely to lead to much greater uncertainty and expense from the need to identify a particular category or pigeon hole in which to fit a contested use and argument over whether the use meets the criteria for that category.[3]

6.22 It can also be argued that the new fair dealing exception is more certain than fair use, because it is clear that any use not for one of the listed purposes, cannot be found to be fair. However, those who prefer an adaptive, flexible approach to copyright exceptions will agree with the copyright academics who submitted that:

> Australia's current system of exceptions only provides 'certainty' in the sense that we can be confident that a whole raft of socially desirable re-uses of copyright material are prohibited.[4]

6.23 The ALRC agrees with some of these criticisms of confined exceptions, and prefers the open-ended fair use exception. However, in response to stakeholder feedback the ALRC is recommending an alternative in the event that fair use is not enacted. This alternative builds upon the existing fair dealing regime and may even prepare the way for fair use at a later time.

6.24 Although fair dealing is necessarily narrower than fair use, the scope of the purposes in the new fair dealing exception need not be given a narrow construction. Rather, they should be given a wide construction. In considering the UK's fair dealing exception for criticism or review, Lord Justice Walker stated:

> 'Criticism or review' and 'reporting current events' are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries is doomed to failure. They are expressions which should be interpreted liberally ... However it can be said that the nearer that any particular derivative use of copyright material comes to the

2 Universities Australia, *Submission 754*.
3 Intellectual Property Committee, Law Council of Australia, *Submission 765*. See also
4 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

> boundaries, unplotted though they are, the less likely it is to make good the fair dealing defence.[5]

6.25 Many of the other purposes listed in the new fair dealing exception recommended in this Report also have a wide and indefinite scope. The ALRC considers they should also be interpreted liberally, so that the focus can be on whether a given use is fair, rather than on whether a given use falls into one of the prescribed categories of purpose.

6.26 If a particular use is only on the margins of one of the purposes, then it may be less likely to be fair. This would seem to be true when applying both fair use and fair dealing, though the question will be more important when applying fair dealing.

6.27 Fair dealing could be made more like fair use by adding additional uses to the list of purposes in the new fair dealing exception, and by drafting the purposes more broadly. A confined fair dealing exception with many broad categories of permitted purpose would be more like fair use than the same exception with only a few narrow categories of permitted use. The more purposes that are listed in a fair dealing exception, the more similar it will be to fair use.

6.28 However, the new fair dealing exception is recommended in this Report as an *alternative* to fair use—the two exceptions cannot be the same. The ALRC does not list in the new fair dealing provision every type of use that it believes should be considered under a fairness exception. However, if fair dealing is enacted instead of fair use, then consideration might be given to including 'back-up and data recovery' and 'interoperability, error correction and security testing'[6] in the fair dealing exception.

Fairness factors

6.29 The ALRC recommends that the new fair dealing exception should explicitly state that the fairness factors must be considered when determining whether a given use is fair. These are the same fairness factors that the ALRC recommends should appear in the fair use exception.[7] The factors are:

(1) the purpose and character of the use;

(2) the nature of the copyright material;

(3) the amount and substantiality of the part used; and

(4) the effect of the use upon the potential market for, or value of, the copyright material.

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5 *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605.

6 This was recommended by R Xavier, *Submission 531*. See Ch 17.

7 See Ch 5.

6.30 Currently, only the fair dealing exceptions for research or study explicitly include fairness factors. However, it is likely that these same factors should, as a question of law, also be considered when applying the other fair dealing exceptions.[8]

6.31 Some have suggested that courts have on occasion given insufficient regard to the fairness factors, when applying Australia's fair dealing exceptions.[9] Including the factors in the new fair dealing exception should ensure that the factors are considered in future cases. This should not affect the scope of the existing fair dealing exceptions, because they already impliedly require the fairness factors to be considered.

6.32 Robert Xavier considered there may be a problem with requiring the fairness factors to be considered when applying fair dealing exceptions:

> in fair use the presence of any of the fair dealing purposes would weigh the first factor in favour of fairness. In the proposed fair dealing exceptions, it seems that the fairness factors could only be considered once the purpose of the dealing had already been identified as one of the specified purposes—suggesting either that the first factor must always weigh in favour of fairness (making it somewhat superfluous, so I'm not sure a court would accept this interpretation), or that it might sometimes weigh against fairness even if the threshold test of purpose had already been passed.[10]

6.33 In the ALRC's view, the function of, and relationship between, the first fairness factor and the listed purposes should be the same, under both fair use and fair dealing. William Patry has written that the role of the preamble to the US fair use provision, which contains the illustrative purposes, 'may best be understood by appreciating the preamble in relation to the first factor, the purpose and character of the use'.[11] In this respect, Patry writes that:

> while the preamble directs the courts to determine whether the use is of a *type* potentially qualifying as a fair use, the first factor directs the courts to examine whether the particular use made of copyrighted material was necessary to the asserted purpose of criticism, comment, etc, [ie, one of the illustrative purposes] or instead, whether defendant's purpose could have been accomplished by taking unprotectable material such as facts, ideas, or less expression. ... Courts must therefore look not only at the justification for defendant's work as a whole (as the preamble directs) but also at the justification for each use within the whole (as the first factor directs).[12]

6.34 Patry then quotes Judge Pierre Leval on this matter:

> In analysing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the

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8 See 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 Copyright Law Review Committee referred to comments to similar effect made by Professors Ricketson and Lahore in each of their loose-leaf services.

9 For example, 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.

10 R Xavier, *Submission 816*.

11 W Patry, *Patry on Fair Use* (2012), 84.

12 Ibid, 90.

> justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.[13]

6.35 The new fair dealing exception should be approached in this same way. The first step would be to consider whether the use in question comes within one of the listed purposes. This would be to test whether justification exists. The second step would be to consider whether the use was fair, having regard to the fairness factors. Even if justification exists, the first factor may not necessarily favour a finding of fairness, for example because the particular use in question was not at all transformative.

6.36 For example, photocopying an entire textbook for 30 students in a university class may be an educational use and so pass the first step in the new fair dealing exception. But because the use is not transformative, and because the university harmed the publisher's market by not buying additional copies of the textbook, the use would be unfair and would not pass the second step. In this example, when considering the first fairness factor, the court may note that the use was for education, favouring a finding of fair dealing, but this would be unpersuasive, considering the photocopies are not transformative and act as an unfair substitute for the original textbook.

Objections to fair use

6.37 Despite the many advantages of fair use over a confined fair dealing exception, the Australian Government may prefer to enact the new fair dealing exception. Arguments could include that fair dealing may appear to be more consistent with the three-step test. Another relevant consideration may be the unpopularity of fair use among many rights holders.

6.38 Some stakeholders have argued that fair use is not consistent with international law, in particular the three-step test in the *Berne Convention*.[14] In the ALRC's view, fair use is consistent with the three-step test.[15] The ALRC's view is shared by a group of 50 academics—including many leading international and Australian intellectual property lawyers and academics. This is evidently also the view of Israel, the Republic of Korea, the Philippines, and the United States.[16] However, the argument that the new fair dealing exception is consistent with the three-step test may be even stronger, because it is explicitly confined to certain 'special cases'—the listed purposes.

6.39 Another reason the Australian Government may prefer to enact a confined fair dealing exception is the widespread, and often strong, objections among rights holders to introducing fair use in Australia. On the whole, the ALRC has not found these arguments convincing, but the fact that there is such widespread objection may suggest to some that fair use should not be introduced at this stage. Professor Hargreaves found it 'politically impossible' to recommend fair use for the UK.

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13 P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105, 1111, quoted in W Patry, *Patry on Fair Use* (2012), 91.

14 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 9(2).

15 International IP Researchers, *Submission 713*.

16 See Ch 4.

6.40 The ALRC notes that many of those who opposed fair use will also oppose the new fair dealing exception. Some rights holders told the ALRC that copyright exceptions did not need to be reviewed, and that the existing law just needs to be more strongly enforced. However, the ALRC considers that the new fair dealing exception is a pragmatic second-best option. It has many of the same benefits of fair use, but it is considerably confined by its prescribed purposes.

6.41 A new fair dealing exception could be a step towards fair use. The Australian Government could introduce the exception recommended in this chapter, and then later consider whether to remove the limitation to the listed purposes, so that the exception became an open-ended fair use exception.[17]

6.42 However, in the ALRC's view, Australia is ready for, and needs, a fair use exception now. It might profitably have been enacted some time ago, perhaps when the CLRC recommended it in 1998.[18] A new fair dealing exception does not need to be introduced as a preliminary stage to enacting fair use. However, if fair use is not enacted, then the new fair dealing exception recommended below will be a considerable improvement on the current set of exceptions in the *Copyright Act*.

Recommendation 6–1 If fair use is not enacted, the *Copyright Act* should be amended to provide that a fair dealing with copyright material for one of the following purposes does not infringe copyright:

(a) research or study;

(b) criticism or review;

(c) parody or satire;

(d) reporting news;

(e) professional advice;

(f) quotation;

(g) non-commercial private use;

(h) incidental or technical use;

(i) library or archive use;

(j) education; and

(k) access for people with disability.

17 However, an intermediate stage might bring additional costs and uncertainty. There would be two changes in the law, rather than one. Further, some of the work done on settling the scope of the purposes for the fair dealing exception—in agreements, protocols and possibly litigation—would be less important if fair use were enacted later. Strictly demarcating the boundaries of the purposes is not necessary with fair use as the purposes are merely illustrative.

18 See Ch 4.

This provision should also provide that the fairness factors should be considered when determining whether the dealing is fair, along with any other relevant matter.

Note: This consolidates the existing fair dealing exceptions and provides that fair dealings for certain new purposes ((f)-(k)) also do not infringe copyright. Importantly, unlike fair use, this exception can only apply to a use of copyright material for one of the prescribed purposes. The purposes are not illustrative.

7. Third Parties

Contents

Summary

7.1 This chapter considers ‘third party’ uses of copyright material—that is, the unlicensed use of copyright material by third parties to deliver a service, sometimes for profit, in circumstances where the same use by the ‘end user’ would be permitted under a licence or unremunerated exception.

7.2 The ALRC concludes that such uses should be considered under fair use or the new fair dealing exception. These fairness exceptions are well suited to judge whether third party copying and other uses should be held to infringe copyright.

7.3 Using copyright material might sometimes be considered more likely to be fair when a third party merely facilitates a permitted use. However, other factors, such as whether the use is transformative or harms the rights holder’s market, will usually be more important.

7.4 Despite objections to commercial organisations ‘free riding’ on the investment and creative effort of others, in the ALRC’s view, if a use is for a different expressive purpose than the original and does not harm a rights holder’s market, then the use should often be fair, even if it is commercial. Such an approach to copyright exceptions better serves an innovative digital economy.

Examples of third party uses

7.5 Many organisations, businesses and technologies facilitate uses of copyright material. To varying degrees, computers, home recording devices, many software programs and popular apps—the internet itself—all facilitate copying.

7.6 Some businesses sell machines, computers, or software programs that enable their customers to make copies in their homes; other businesses make, store and communicate the copies more directly. Some services help people copy material they

already own; others copy and collect material the consumer may only be free to access, such as so-called 'free' web and broadcast content, and books in libraries.

7.7 The spectrum of these activities is wide. At one end may be pure storage services. Many companies offer cloud storage facilities, that allows customers to store and access their own digital files, including copyright material, on remote servers.[1] A number of stakeholders submitted that merely providing a digital storage facility, such as a cloud locker, should not infringe copyright.[2]

7.8 Other services on this spectrum may include:

- educational institutions copying material for students;
- a photocopying company copying material for students;
- remotely scanning a customer's computer, copying the files and storing them for the customer's personal use, including for backup;
- taking a customer's collection of music CDs and making digital copies for the customer to use;
- scanning hardcopies of a customer's books, and giving the customer electronic versions;
- a web application that allows users to copy and collect web pages and other digital content, perhaps stripping the content of advertisements and images to make the text easier to read; and
- a web application for managing research resources that allows users to store copies of web pages, journal articles and other copyright material in the cloud.

7.9 These are all existing services, some with millions of customers around the world, that arguably involve a third party using copyright material for a customer, in a way that the customer may be permitted to use themselves. Many more examples could be provided.

Fair use

7.10 The ALRC considers that fair use is a suitable exception to apply to determine whether a third party use of copyright material infringes copyright. These third parties should not be precluded from relying on fair use. Many third party uses of copyright material may be transformative—that is, for a different purpose than that for which the material was created—and fair. Others will not be transformative, and will unfairly compete in the markets of rights holders.

7.11 Some stakeholders submitted that third parties should never be able to rely on fair use, while others submitted that third party uses should necessarily be fair if they

1 Digital lockers can also be used for piracy. This chapter does not concern the question of third party liability for copyright infringement, which is outside the Terms of Reference.

2 For example, Telstra Corporation Limited, *Submission 602*; Law Institute of Victoria, *Submission 198*.

merely facilitate another fair use. However, the ALRC agrees with those who said that unlicensed third party uses will sometimes be fair, and other times not, and that the fair use exception is well equipped to settle the question. For example, Telstra submitted that applying fair use in this context is 'a balanced way to support and encourage the continued development and adoption of content technologies with respect for content ownership and commercial licensing practices'.[3]

7.12 Is a third party use of copyright material *more likely* to be fair than it otherwise would be, if the use is simply for another person who would be entitled to make the same use? The ALRC considers that it is, but that this factor is not as important as the four fairness factors set out in the fair use exception. As discussed below, it will usually be more instructive to focus on whether the use is transformative, and whether the use harms the rights holder's market.

7.13 Many stakeholders noted the difficulty of precisely defining the boundaries of what third party uses should be permitted under unremunerated copyright exceptions, and which should not. In the ALRC's view, this highlights the danger of setting those boundaries in legislation, and the value of enacting a flexible exception.

7.14 Fair use can also be applied to determine whether copyright is infringed by a third party use that facilitates a use permitted under a specific exception. Specific exceptions should not limit the application of fair use.

7.15 The following section highlights why encouraging transformative uses of copyright material is important for stimulating competition and innovation.

Innovation and transformative use

7.16 As noted above, innovative services, such as many cloud-based services, may involve third parties using copyright material on behalf of their patrons or customers. Many stakeholders stressed that if third parties were prohibited from using copyright material in this way, without a licence, then this would inhibit innovation.

7.17 Many of these third party services are 'cloud' based. Many stakeholders stressed the social and economic benefits of such services. The ACCC said that 'innovation in services, such as cloud services, are important to the emergence and sustainability of competitive digital services industries'.[4] The Internet Industry Association submitted that:

> Cloud computing offers enormous social and economic advantages by allowing sharing of computing resources and thereby achieving economies of scale and minimising power and hardware requirements. It also reduces the need to transport information and the device required by the user to achieve the same result.[5]

3 Telstra Corporation Limited, *Submission 602*. See also Choice, *Submission 745*.
4 ACCC, *Submission 658*.
5 Internet Industry Association, *Submission 744*.

7.18 Although it did not support the introduction of fair use, Free TV submitted:

> The transition of electronic services from the personal computer and at home devices to online services in 'the cloud' is a major shift and should be accommodated by the Act. It seems anomalous that activities that would be legal if conducted in the home on storage devices owned by a consumer might not be permissible if the same consumer purchases cloud storage to do exactly the same activity.[6]

7.19 Ericsson submitted that the 'success of the digital economy, enabled primarily by the IT and telecommunications sectors, has been based on sustained and continuous innovation':

> This has driven continuous improvement of technologies and services and has provided a competitive incentive for differentiation amongst competing players across different industries. Therefore, using [information and communications technology] to simplify or differentiate services or offerings should not be prohibited by law.[7]

7.20 Some comments were made in response to the 2012 decision of the Full Federal Court in a case about Optus TV Now, a type of cloud-based personal video recorder.[8] In this case, the question of who made the relevant copies of the broadcasts—Optus or its customers—was important.

7.21 The internet service provider, iiNet, submitted that it should not matter who makes a recording from a broadcast, if it is made 'in a domestic setting' and 'if the underlying purpose of the recording is fair'. In this way, iiNet said, 'competition between technologies will be promoted'.[9]

7.22 eBay said the *Optus TV Now* decision 'creates serious disincentives for the development of cloud services in Australia'.[10] It added:

> Existing law seems to have the unfortunate result that for a certain class of offering, the more useful a cloud service, the more likely it will involve copyright infringement by the provider. ... eBay provides all its services online and is itself a form of cloud service. eBay considers it vital for the development of cloud services, and technological change generally, that the law not discriminate between activities on the basis of the technology that is used carry them out.[11]

7.23 Some stakeholders drew a distinction between 'pure copying' and 'value-added services'. The ACCC said there was potential for growth in products and services that enabled consumers to use copyright material for personal use. If confined 'purely to copying, as opposed to transforming or value-adding', the ACCC said, 'these markets should be opened to parties other than copyright owners':

> Limiting the development of such services risks reducing the incentives for copyright owner to innovate to meet consumer demands.[12]

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6 Free TV Australia, *Submission 865*.
7 Ericsson, *Submission 151*.
8 *National Rugby League v Singtel Optus* [2012] FCAFC 59 (27 April 2012).
9 iiNet Limited, *Submission 186*.
10 eBay, *Submission 93*.
11 Ibid.
12 ACCC, *Submission 165*.

7.24 The ACCC submitted that third party use that merely facilitated legitimate use by others are 'likely to be key to innovation and the development of emerging markets and services'.[13] They can stimulate innovation in other markets and help meet consumer demands. Caution should therefore be exercised when considering the degree to which copyright limits this potential.[14]

7.25 The ACCC submitted that the Optus TV Now service was 'an example of a cloud service that was unable to operate due to Australia's current copyright laws', but that even its brief existence had an effect on innovation in the market:

> Following the *Optus TV Now* case, Telstra, the incumbent owner of the AFL rights, has made available (for a fee) the AFL live app to any user of a mobile device, when this service was previously only available to Telstra customers. The ACCC considers this is an example of how an investment by a third party appears to have stimulated a competitive response from a rights holder.[15]

7.26 It is not clear whether the Optus TV Now service would be found to be fair use or not, particularly without properly considering the potential for harm to rights holders' markets. The importance of considering market harm is discussed further below, and more generally in Chapter 5. However, introducing a flexible exception to copyright, such as fair use, will allow the right questions to be asked of a third party use, and should make Australia more fit for a digital age in which remote cloud technologies are becoming increasingly common.

7.27 Fair use provides a better environment for innovative third party uses, in part by encouraging transformative uses of copyright material. 'A transformative or productive use is one where the defendant has created something new, repurposed the original work, or otherwise added value'.[16] Crucially, if it is transformative, the secondary use will be for a different purpose than that for which the material was originally created.

7.28 Transformative uses are more likely to be fair, under the fair use and fair dealing exceptions recommended in this Report.[17] Some third party uses may be transformative, and will therefore be more likely to be fair. Those that are not transformative—those that merely repackage or republish the original, unfairly competing with the original—may be less likely to be fair.[18]

7.29 Flexible exceptions that permit unlicensed transformative uses of copyright material stimulate further creativity and create a better environment for innovation.[19]

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13 ACCC, *Submission 658*.
14 Ibid.
15 Ibid.
16 J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights, 16.
17 See Ch 5.
18 This draws on the language of US Judge Pierre Leval in P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105. See Ch 5.
19 See Chs 4 and 5.

Whose purpose?

7.30 Unlike fair use, many exceptions to copyright are confined to a particular purpose. For example, the time shifting exception in s 111 of the *Copyright Act* only applies if the person who makes the copy is the same person for whom the copy is made (to watch at a more convenient time). Considering the Optus TV Now service, the Full Federal Court stated:

> There is nothing in the language, or the provenance, of s 111 to suggest that it was intended to cover commercial copying on behalf of individuals. Moreover, the natural meaning of the section is that the person who makes the copy is the person whose purpose is to use it as prescribed by s 111(1). Optus may well be said to have copied programmes so that others can use the recorded programme for the purpose envisaged by s 111. Optus, though, makes no use itself of the copies as it frankly concedes. It merely stores them for 30 days. And its purpose in providing its service—and, hence in making copies of programmes for subscribers—is to derive such market advantage in the digital TV industry as its commercial exploitation can provide. Optus cannot invoke the s 111 exception.[20]

7.31 The new fair dealing exception recommended in this Report is confined to a set of prescribed purposes. The current fair dealing exceptions are also confined to prescribed purposes, such as the purpose of research or study. Fair dealing exceptions do not prohibit third party uses. The difficulty for the third parties comes from having to establish that the purpose of their use is one of the purposes listed in the exception. In *De Garis v Neville Jeffress Pidler*, the Federal Court stated the relevant purpose required by the fair dealing for the purpose of research or study exception, in s 40 of the *Copyright Act*, was that of the defendant, a news clipping service, not that of its customers.[21] The news clipping service was not copying for the purpose of research or study, even if the copies were to be used by its customers for that purpose.[22]

7.32 This distinction was criticised in some submissions to this Inquiry. Professor Robert Burrell and others submitted that it is

> entirely artificial to privilege acts of reproduction or copying that can be done by a researcher themselves over acts that require the involvement of a third party, such as an intermediary to assist with the copying or a publisher to disseminate the research output.[23]

7.33 Universities Australia submitted that it was 'absurd' that a university student can copy for his or her own research purposes, but that a university cannot copy the very same work on behalf of the student, even if this were fair use.[24]

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20 *National Rugby League v Singtel Optus* [2012] FCAFC 59 (27 April 2012), [89].

21 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99.

22 The 'strict approach applied in *De Garis* was not adopted in the very different circumstances of the Panel case (*TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at [100]–[101]). As the case law has developed in the USA, however, the courts have been able to rely on the flexibility inherent in the defence and the fairness factors to make a better informed assessment of whether a third party can legitimately rely on the defence': Intellectual Property Committee, Law Council of Australia, *Submission 765*.

23 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

24 Universities Australia, *Submission 754*.

7.34 Universities Australia said that introducing fair use—which is not confined to prescribed purposes—would remove 'an artificial distinction between dealings by a person for their own research or study and dealings by a person undertaking the very same copying on their behalf'.[25] The University of Sydney submitted that it may like to rely on fair use to 'solicit the services of a third party service provider (such as a cloud server or document digitisation service) to make or store copies in a format that is accessible across a range of technological platforms (tablets, intranet, other)'.[26]

7.35 Google submitted that often cloud service providers operate merely to 'stand in the shoes' of their consumers, for example, to 'to back up content on a customer's behalf, to store a document the consumer has created in a cloud drive so they can access it from multiple devices, or to provide cloud-based hosting of IT systems':

> In these circumstances, even where the provider may receive some commercial benefit from providing the storage, it is the user who is making the copy, and deciding what is copied. The purpose of making the copying should therefore be seen as identical to the customers' purpose. If the purpose of the consumer in using copyright material is fair, so too should the purpose of the provider in facilitating that use.[27]

7.36 The NSW Government submitted that fair use promotes 'more principled statutory interpretation, and more predictable law, by focusing attention on whether or not a use is "fair" rather than on whether it can be brought within one or other of a group of rigid, pre-ordained categories'.[28]

> To see why this is an improvement, one need look no further than *TCN Channel Nine v Network Ten* ('The Panel case'), in which the Federal Court, the Full Federal Court and the High Court all grappled with the question whether the use in a humorous and satirical TV program of a number of clips from a rival broadcaster's programs was, in the case of each clip, a fair dealing for the purpose of reporting news or of criticism or review.[29]

7.37 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' for research or private study under Canadian copyright legislation, and concluded that they could qualify.[30] 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'.[31] 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.[32]

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25 Ibid.
26 University of Sydney, *Submission 815*.
27 Google, *Submission 600*.
28 NSW Government and Art Gallery of NSW, *Submission 740*. See also R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278* and Copyright Advisory Group—Schools, *Submission 707*.
29 NSW Government and Art Gallery of NSW, *Submission 740*.
30 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada), [1].
31 Ibid, [25].
32 Ibid, [23].

7.38 Not all third parties share such a 'symbiotic purpose' with the persons for whom they may use copyright material.

7.39 Some stakeholders suggested that the *Copyright Act* should expressly provide that a third party use that merely facilitates another use that would either be fair use or would be permitted under another unremunerated exception either necessarily does not infringe copyright, or should be an illustrative purpose in a fair use exception.[33] It was also submitted that the Act be amended to make clear that there was 'no *per se* restriction on a third party relying on fair dealing to undertake uses on behalf of persons who were themselves entitled to rely on the exception'.[34]

7.40 However, in the ALRC's view, the fair use exception is sufficiently flexible to allow for third party uses to be considered fair in appropriate circumstances. But such uses do not seem to warrant particular emphasis by including them in the list of examples in the fair use provision. It is important that third parties are not precluded from relying on fair use or fair dealing. It is less clear that a third party use is a particularly noteworthy example of fair use.

7.41 The new fair dealing exception limits the types of third party uses that may be considered under a fairness exception. This is one reason why the ALRC favours fair use. It is preferable at least to consider whether any particular use is fair, rather than to automatically exclude uses not for prescribed purposes.

7.42 To say that these additional third party uses should at least be considered under the fair use exception is not to say the uses would be fair. But copyright law that is conducive to new and innovative services and technologies should at least allow for the question of fairness to be asked.

Commercial free riding and market harm

7.43 A common objection to allowing unlicensed third party use of copyright material is that this is commercial free riding that harms the markets of copyright owners. In the ALRC's view, rather than automatically exclude all commercial uses, these matters—particularly market harm—should be considered as part of an assessment of fairness.

7.44 Many stakeholders objected to unlicensed commercial use of copyright material by third parties. These businesses were 'free riders'. For example, the Coalition of Major Professional and Participation Sports said that there is a

> fundamental distinction between recordings made by consumers but later stored on a remote server and recordings made by companies, for commercial gain, and stored on remote servers for their subscribers to access. The latter can significantly impact on the ability of content owners to exploit their rights and should not be allowed without the consent of the rights holder.[35]

33 For example, Optus, *Submission 725*.
34 Universities Australia, *Submission 754*. See also ACCC, *Submission 658*.
35 COMPPS, *Submission 266*.

7.45 Commercial Radio Australia said consumers should be able to take full advantage of technology, but commercial gain should be reserved for rights holders.[36] Free TV Australia similarly submitted that broadcasters 'are entitled to control the exploitation of their signals and should be appropriately compensated by third parties reaping commercial gain from their broadcast signals'.[37]

7.46 Foxtel stated that to allow unlicensed third parties to 'share in the rewards' or 'profit at the expense of those who invest in the creation of content would be entirely inequitable'.[38]

> As Foxtel's subscription service allows our customers to access content for a limited period of time, unlicensed copying by third parties will undermine our business model and will also hurt those from whom we acquire content. Distributors who make their content available on a temporary basis and to a limited audience must have the ability to determine how their content is accessed, used and stored.[39]

7.47 Some stakeholders also submitted that it was important to consider whether the rights holders offer a comparable service. It was said that if a rights holder has already created a scheme through which consumers can view broadcast television programs at a later time, for example, then personal or third-party time shifting should not be allowed. The ABC submitted that:

> Where the cloud service is being offered in competition with the true rights holder, then it is important to consider what legal access to the content is already available to the public. If the content is already accessible on demand by way of a catch-up service by a legitimate rights holder, then the competing cloud service should not be able to offer that content.[40]

7.48 Taking this argument further, some might ask whether exceptions for time shifting free to air broadcasts are now fair, when the programs can be watched at a later time through online catch-up services. ARIA noted that Australia's time shifting exception had its origins in 'an era of analogue broadcasts where programming and time constraints meant that the opportunities to catch up on a missed broadcast program were limited'.[41]

7.49 Many of these arguments concern two related but distinct questions: the commerciality of a secondary use, and the harm a secondary use may do to a rights holder's market. Both questions are considered in determining whether a use is fair, under fair use, but it should be stressed that the second question is more important.

7.50 Commercial uses are not presumptively unfair under the fair use and new fair dealing exceptions.[42] A commercial use may be less likely to be fair than a non-

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36 Commercial Radio Australia, *Submission 132*. See also Tabcorp Holdings Ltd, *Submission 164*; ARIA, *Submission 731*.
37 Free TV Australia, *Submission 270*.
38 Foxtel, *Submission 748*; Foxtel, *Submission 245*.
39 Foxtel, *Submission 748*.
40 ABC, *Submission 210*.
41 ARIA, *Submission 241*.
42 See Ch 5.

commercial use, but other factors are also relevant. The ACCC submitted that third party commercial uses may not always undermine the incentives of rights holders:

> Services offered by third parties should not be prohibited simply because a third party may profit from offering a new and innovative service to facilitate otherwise legitimate consumer use. By increasing the value of such use, third party commercial activities may in fact increase the returns to, and incentives for, investment in copyright material.[43]

7.51 The ACCC also submitted that in considering fairness, commercial benefit to third parties 'should not be a central or determinative factor in establishing whether the use is fair'.[44] If commerciality were determinative under existing fair dealing exceptions, then commercial news reporting would not be fair. US Judge Pierre Leval has written, concerning the US fair use provision:

> The proposition that commercial uses are unfair is extraordinarily inappropriate and harmful. The heart of fair use lies in commercial activity. Most undertakings in which we expect to find well-justified instances of fair use are commercial. These include, of course, commentary, criticism, parody, and history. Even the publication of scholarly analysis is often commercial. If these are presumptively unfair, then fair use is to be found only in sermons and classroom lecture.[45]

7.52 Although commerciality is relevant to the question of fairness, it is more important to focus on the related questions of whether the use is truly transformative and whether the use harms the market of the rights holder.

7.53 Whether a given use harms a rights holder's market is an important factor to consider under both fair use and the new fair dealing exception. Some copying by third parties may not harm rights holders' markets, and may even develop new markets for rights holders to exploit. Prohibiting such unlicensed copying through overly-confined exceptions, even if technology neutral, may inhibit the development of the digital economy.

Who made the copy?

7.54 The question of whether a use is fair can sometimes be avoided altogether by arguing that the material was not in fact used by the third party at all—that it was not the third party, but only the end user, who used the material. The threshold question will often be: who made the copy? In other cases, the question might be whether the material was communicated to the public.

7.55 These and related questions were considered in the Federal Court cases about the Optus TV Now service,[46] noted above, and in the United States in *Cartoon*

43 ACCC, *Submission 658*.
44 Ibid.
45 P Leval, quoted in W Patry, *Patry on Fair Use* (2012), 101.
46 *Singtel Optus v National Rugby League Investments (No 2)* [2012] 34 FCA (1 February 2012); *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.

Network LP v CSC Holdings[47] and *WNET, Thirteen, Fox Television Stations, Inc v Aereo, Inc, USCA*.[48]

7.56 A number of stakeholders expressed concern about the implications of the decision of the Full Federal Court in Optus TV Now. For example, the Internet Industry Association said it had 'serious reservations regarding the finding that the provider of an online service can be the maker or the joint maker of a copy when the process of selecting the content and causing the technology to make the copy is undertaken entirely by the user'.[49]

> The traditional approach provided a 'bright line' that was easy to determine and, in our view, deliberately supported the creation of new and innovative products provided they did not have the sole purpose or function of facilitating the infringement of copyright.[50]

7.57 However, how this question of who made the copy should be approached is largely outside the Terms of Reference. This Inquiry is about exceptions to copyright, rather than the threshold question of whether copyright has been exploited at all.

Safe harbours

7.58 The exceptions recommended in this Report are not intended to replace the safe harbour scheme in pt V div 2AA of the *Copyright Act*. The purpose of the safe harbour scheme, as Robert Xavier explained, is to give carriage service providers 'some protection from the otherwise unavoidable risk of liability for inadvertently hosting or communicating infringing material on behalf of their users'.[51]

7.59 This chapter is not about third parties facilitating or authorising copyright infringement, for example, by hosting user generated content that infringes copyright or by providing a digital locker that some customers might use to illegally share pirated music with strangers. A safe harbour may provide appropriate protection from secondary liability, where such protection is warranted and subject to conditions.[52] The scope of this protection is being reviewed, and is outside the Terms of Reference for this Inquiry.

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47 District Court, 2nd Circuit, 2008.

48 District Court, 2nd Circuit, 2013. See also ALRC Discussion Paper, Ch 5.

49 Internet Industry Association, *Submission 744*.

50 Ibid; See also eBay, *Submission 751*.

51 R Xavier, *Submission 531*. See also Australian Government Attorney-General's Department, *Revising the Scope of the Copyright 'Safe Harbour Scheme'*, Consultation Paper (2011).

52 See, eg, Telstra Corporation Limited, *Submission 602*; Google, *Submission 600*: 'online service providers provide a wide range of services, and host a diverse range of content, which may involve copies that would not be covered by a fair use provision. This may include hosted user generated content (for example, videos on YouTube or 'memes' shared on a social network like Google Plus) which contains content which would not be covered by a fair use provision. ... Google believes that the expansion of the existing safe harbours to online service providers is an important reform in the interests of the Australian digital economy.'

7.60 Instead, the focus of this chapter is on third parties facilitating uses of copyright material that, if performed by the end user, would be covered by an exception—for example, by providing a digital locker that some customers might use to store legally obtained music for private use.

7.61 Although a safe harbour may protect third parties from both types of potential copyright infringement, in the ALRC's view, the Act should also provide for exceptions to copyright for some types of third party activities, and that fair use is best suited for these purposes.

7.62 Some stakeholders suggested that the safe harbour scheme was either sufficient for, or the preferred method of dealing with, third party facilitators.[53] However, the ALRC agrees with those who suggested that suitable exceptions and a safe harbour scheme were both necessary.[54] The safe harbour scheme does not provide an absolute defence to infringement, and it places certain obligations on service providers, such as an obligation to remove infringing content when given notice.[55]

7.63 In the ALRC's view, third parties should not need to rely on a safe harbour scheme to make fair use of copyright material, although they may need to rely on the safe harbour scheme for unfair uses.[56] The safe harbour scheme may be necessary for other activities, but not for fair use or otherwise non-infringing activity. In fact, some third party fair uses will be highly productive and transformative, and should therefore be encouraged, rather than merely tolerated.

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53 Law Institute of Victoria, *Submission 198*: 'If an operator is purely hosting a cloud based digital locker service—that is, providing a cloud based facility for customers to store digital content—this of itself should not trigger any liability for copyright infringement. In the LIV's opinion, the hosting of such a service should be exempted from liability, and consider that this is most appropriately dealt with under the safe harbour provisions.'

54 For example, Telstra Corporation Limited, *Submission 602*.

55 See *Copyright Act 1968* (Cth) s 116AH.

56 The fact that a particular third party use is not fair use does not imply that that use should not be protected by a safe harbour scheme.

8. Statutory Licences

Contents

Summary

8.1 Statutory licences allow for certain uses of copyright material, without the permission of the rights holder, subject to the payment of reasonable remuneration. They are a type of compulsory licence. Where the licence applies, rights holders cannot choose not to license their material.

8.2 The statutory licences in pts VA, VB and VII div 2 of the *Copyright Act* were criticised by educational institutions and governments during this Inquiry. There were strong calls for the licences to be repealed. However, the ALRC has concluded that there is, at least for now, a continued role for these statutory licences.

8.3 Retaining the statutory licences will ensure educational institutions, institutions assisting people with disability, and governments are not inhibited from performing their important functions. This may also benefit rights holders, who strongly opposed their repeal, despite the fact that in theory the statutory licences detract from their rights.

8.4 Further, many of the criticisms of the statutory licences seem better directed at the scope of unremunerated exceptions. The enactment of fair use and new exceptions for government use should address many of the criticisms of the statutory licences. If new exceptions such as these are not enacted, then the case for repealing the statutory licences becomes considerably stronger.

8.5 The *Copyright Act* should be clarified to ensure the existence of the statutory licences does not imply that educational institutions, institutions assisting people with disability and governments cannot rely on unremunerated exceptions, including fair use.

8.6 The ALRC also recommends other reforms of the statutory licences. The licences were not intended to be compulsory for licensees wishing to use copyright material. This should be clarified in the *Copyright Act*. The ALRC also concludes that the statutory licences should be made less prescriptive.[1]

What is a statutory licence?

8.7 Compulsory licences grant broad rights to use copyright material 'subject to the payment of a fixed royalty and the fulfilment of certain other conditions'.[2] Rights holders cannot opt out of the statutory licence. Professors Ricketson and Creswell write that compulsory or statutory licences represent 'a form of "forced taking" or compulsory acquisition from the copyright owner'.[3]

8.8 A leading UK work on copyright law identifies seven factors which have seemed to influence when the UK legislature has favoured non-voluntary licences:

> (i) where a change in the law (such as extension of the term of copyright, or the addition of new rights) alters the assumptions upon which owners may have acquired copyright and potential users planned their activities;
>
> (ii) where in the light of technological change (such as the emergence of sound recordings), the refusal to license the use of copyright works might impede the emergence of certain industries or activities, or a negotiated price might give the copyright owner an unjustified windfall;
>
> (iii) where the copyright owner has failed to supply the needs of the public and other producers and distributors are available;
>
> (iv) where copyright owners have refused to license use of their works or have imposed conditions which do not reflect the purposes for which copyright is granted;
>
> (v) where there is evidence of abuse of monopoly;
>
> (vi) where there exist otherwise insuperable transaction costs or delays;
>
> (vii) where a negotiated price would be too high and it is deemed desirable to subsidise users, for example those which are public institutions.[4]

8.9 The most common policy justification for imposing a statutory licence seems to be market failure due to prohibitively high transaction costs—that is, where 'the costs of identifying and negotiating with copyright owners outweigh the value of the

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1 This chapter concerns the statutory licences for educational and other institutions and the licences for government. The statutory licences for retransmission of broadcasts and for broadcasting of published sound recordings in s 109 is discussed in Chs 18 and 19 respectively.

2 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.0].

3 Ibid, [12.0].

4 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [28-08].

resulting licence'.[5] The Franki Committee, which recommended the introduction of the statutory licences for educational institutions, stated that it was usually not practicable for educational institutions to obtain specific permission in advance from individual copyright owners to make copies. It said that

> very often the administrative costs involved in seeking permission would be out of all proportion to the royalties reasonably payable in respect of the reproduction of the work.[6]

8.10 Professor Jane Ginsburg has expressed reservations about such transaction cost analyses, in part because 'in many cases transaction costs may be subdued by voluntary collective licensing'.[7] Ginsburg finds the purpose of compulsory licences elsewhere:

> The effect, and, I would argue, the real purpose of a compulsory license is to reduce the extent to which copyright ownership of the covered work conveys monopoly power, so that the copyright owner must make the work available to all who wish to access and exploit it. Imposition of a compulsory license reflects a legislative judgment that certain classes or exploitations of works should be more available to third parties (particularly 'infant industries') than others.[8]

8.11 Statutory licences are largely enacted for the benefit of certain licensees, such as educational institutions. If the licensees claim they do not want or need a statutory licence, because they are inefficient and costly, then this may suggest the statutory licences should be repealed.

Australian statutory licences

8.12 There are two statutory licensing schemes in the *Copyright Act* for the use of copyright material by educational institutions and institutions assisting people with a print disability: one relates to the copying and communication of broadcasts, in pt VA; the other concerns the reproduction and communication of works and periodical articles, in pt VB.[9]

8.13 The pt VB licence applies to all copies and communications of text and images, including digital material, from any source, including the internet, but 'in some cases, the licence does not allow the use of an entire work that is available for purchase'.[10]

8.14 The statutory licensing scheme for Crown or government use is contained in pt VII div 2 of the *Copyright Act*.[11] Under this scheme, copyright is not infringed by a

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5 E Hudson, 'Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia', *Thesis*, University of Melbourne, 2011, 56.

6 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (the Franki review), [6.29].

7 J Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865, 1926.

8 Ibid, 1926.

9 Exceptions and statutory licences for people with disability are discussed in Ch 16.

10 Copyright Agency/Viscopy, *Submission 287*.

11 Sections 183 and 183A refer to 'the Crown', 'the Commonwealth or a State' and 'a government'. These phrases appear to be interchangeable. The position of local government is discussed in Ch 15.

government use of copyright material if that use is 'for the services of the Commonwealth or State'.[12]

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

8.16 Copyright Agency is the declared collecting society for text, artworks and music (other than material included in sound recordings or films). Screenrights is the declared collecting society for the copying of audiovisual material, including sound recordings, film, television and radio broadcasts.[13]

8.17 The *Copyright Act* mandates various administrative requirements for each scheme. For example, it requires that notice be given to rights holders or collecting societies when copyright material is used.

8.18 The Spicer Committee recommended the introduction of a statutory licence for government in 1959. The majority were of the view that

> the Commonwealth and the States should be empowered to use copyright material for any purpose of the Crown, subject to the payment of just terms to be fixed, in the absence of agreement, by the Court. ... The occasions on which the Crown may need to use copyright material are varied and many. Most of us think that it is not possible to list those matters which might be said to be more vital to the public interest than others. At the same time, the rights of the author should be protected by provisions for the payment of just compensation.[14]

8.19 The statutory licensing schemes for education were a response to widespread photocopying in educational institutions. In *University of New South Wales v Moorhouse*,[15] the High Court of Australia

> established the potential liability of universities for authorising infringements of copyright that occurred on machines located on their premises, and this gradually led to a greater awareness, on the part of these institutions, of the need for them to comply with copyright laws.[16]

8.20 Soon after *Moorhouse*, the Franki Committee recommended the introduction of a statutory licence for educational establishments:

> the very considerable element of public interest in education, together with the special difficulties that teachers and others face in Australia in obtaining copies of works

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12 *Copyright Act 1968* (Cth) s 183(1).

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

14 Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959), 77. Two members of the Committee considered that governments' rights to use copyright material without the rights holder's consent should be confined to use for defence purposes.

15 *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

16 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.100].

> needed for educational instruction, justifies the institution of a system of statutory licences in non-profit educational establishments.[17]

8.21 The Franki Committee made this recommendation despite concerns that a statutory licensing scheme for educational institutions 'might seem to favour the interests of education as against the interests of copyright owners'.[18] It is therefore surprising that some thirty or so years later, educational institutions called for the statutory licences to be repealed.

8.22 The Australian Publishers Association submitted that 'the basis on which statutory licensing was initially introduced for the educational sector was a matter of pragmatics, and not high principle', and referred to the Franki Committee's discussion of the practical difficulties and high transaction costs of educational institutions licensing material voluntarily.[19]

Repeal of the statutory licences?

8.23 In the Discussion Paper, the ALRC proposed the repeal of the statutory licences for government, educational institutions and institutions assisting people with disability. Australian schools, universities and TAFEs called for the statutory licences to be repealed.[20] Licences should instead be negotiated voluntarily, they submitted.

8.24 The Copyright Advisory Group—Schools (CAG Schools) expressed their objection to the statutory licences in strong terms:

> This submission should be read as a strong statement on behalf of every Government school in Australia, and the vast majority of non-Government schools, that the current system for educational copyright use in Australia, based on statutory licensing, is broken beyond repair and must be replaced with a more modern and fair system.[21]

8.25 CAG Schools submitted that the statutory licences are economically inefficient and 'inherently unsuitable to the digital environment'.[22] They also said the licences 'put Australian schools and students at a comparative disadvantage internationally and do not represent emerging international consensus regarding copyright in the digital environment'.[23] Various government agencies also made strong criticisms of the statutory licences. Criticisms of the statutory licences are discussed further below.

8.26 However, the ALRC has decided not to recommend the repeal of the statutory licences. The ALRC maintains that voluntary licences would be more efficient and better suited to a digital age. The mere fact that the very institutions the statutory licences were designed to help have called for their repeal, highlights that the licences should be reformed. However, in light of widespread opposition to outright repeal of

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17 Copyright Law Committee, *Report on Reprographic Reproduction* (1976) (the Franki Report), [6.40].
18 Ibid, [6.63].
19 Australian Publishers Association, *Submission 225*.
20 Copyright Advisory Group—Schools, *Submission 231*; Copyright Advisory Group—TAFE, *Submission 230*; Universities Australia, *Submission 246*; ADA and ALCC, *Submission 213*.
21 Copyright Advisory Group—Schools, *Submission 231*.
22 Ibid.
23 Ibid.

the statutory licences, particularly by rights holders and collecting societies,[24] the ALRC instead makes recommendations designed to encourage and facilitate voluntary licensing. These recommendations are made later in this chapter.

8.27 Importantly, many of the arguments for repeal of the statutory licences are better and more directly addressed, first, through new exceptions to permit the fair use of copyright material,[25] and second, by clarifying that the statutory licences do not operate to make institutions pay for or otherwise licence these fair uses. This Report recommends new exceptions for certain government uses and the introduction of a fair use or new fair dealing exception. This Report also recommends that the Act be clarified to ensure that payment for these uses are not required under the statutory licences.

Arguments for and against repeal

8.28 Many of the arguments for repeal of the statutory licences are discussed later in this chapter, in the context of specific changes to licences. This section focuses on arguments presented to the ALRC for retaining the statutory licences.

8.29 However, it is important to first note a fundamental criticism of statutory licences—that they compel rights holders to license their material. 'In general, if copyright owners choose not to allow others to exploit their rights then that is their prerogative.'[26] The Australian Film/TV Bodies submitted that compulsory licences undermine rights holders exclusive right to authorise the reproduction or communication of a copyrighted work.[27]

8.30 For this and other reasons, international standards are said to be 'generally antipathetic' to compulsory licences.[28] Ginsburg has written that compulsory licences are 'administratively cumbersome, unlikely to arrive at a correct rate, and contrary to copyright's overall free market philosophy'.[29]

8.31 The United States is wary of statutory licences, preferring licences to be negotiated on the free market. A 2011 report of the US Copyright Office about mass digitisation stated:

> Congress has enacted statutory licenses sparingly because they conflict with the fundamental principle that authors should enjoy exclusive rights to their creative works, including for the purpose of controlling the terms of public dissemination ... Historically, the Office has supported statutory licenses only in circumstances of genuine market failure and only for as long as necessary to achieve a specific goal. In fact, Congress recently asked the Office for recommendations on how to eliminate

24 See, eg, Free TV Australia, *Submission 865*; ABC, *Submission 775*; ARIA, *Submission 731*; Australian Copyright Council, *Submission 654*.

25 Whether under fair use, fair dealing, or specific exceptions.

26 L Bentley and B Sherman, *Intellectual Property Law* (3rd ed, 2008), 270.

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

28 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [28–06].

29 J Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865, 1872.

> certain statutory licenses that are no longer necessary now that market transactions can be more easily accomplished using digital tools and platforms.[30]

8.32 The same report also noted the 'frequent complaint that statutory licenses do not necessarily provide copyright owners with compensation commensurate with the actual use of their works or the value of those uses'.[31]

8.33 Discussing the Australian statutory licence for retransmission of broadcasts, the Motion Picture Association of America submitted:

> No matter how fairly or efficiently they are administered, statutory licenses inevitably harm copyright owners by limiting their control over their works and denying them the market level of compensation for their exploitation. As such, even when applicable international norms would permit governments to cut back on exclusive rights and substitute a system of equitable remuneration, sound policy dictates that they be avoided or strictly limited to situations in which there is a demonstrable market failure.[32]

8.34 However many stakeholders submitted that in Australia, rights holders support the statutory licences and do not object to losing some of their rights. Submissions from the Australian Society of Authors, the National Association of the Visual Arts, the Arts Law Centre of Australia and the Australian Directors Guild, among others, all supported the statutory licences. The Australian Copyright Council said the licences were 'well-established in Australia, and have achieved a high level of acceptance amongst rights holders'.[33] Copyright Agency/Viscopy said Australia has 'a long tradition of statutory licences, and both content creators and licensees have adjusted their practices accordingly'.[34]

> While there are uses allowed by statutory licences that some content owners would like to prevent, or license on their own terms, content creators by and large accept that the statutory licences enable efficient use of content by the education sector on terms that are generally fair.[35]

8.35 The ABC said that, as a rights holder, it was 'more than satisfied with the way the licences are administered and the remuneration it receives':

> Such licences provide ease, flexibility, economies of scale, certainty, guaranteed repertoire and lower compliance costs. They are an effective way of licensing content which might not otherwise be available to the education and other sectors. Further, the Corporation understands that the independent television production sector is of the same view.[36]

8.36 The Association of Learned and Professional Society Publishers emphasised that 'the benefits of statutory licensing to small, independent authors, creators, societies and

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30 United States Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document* (2011), 38.
31 Ibid, 39.
32 Motion Picture Association of America Inc, *Submission 573*.
33 Australian Copyright Council, *Submission 654*.
34 Copyright Agency/Viscopy, *Submission 287*.
35 Ibid.
36 ABC, *Submission 775*.

publishers cannot be underestimated'.[37] Income from collective licensing was said to underpin these businesses: 'taking this away will put those creators and publishers in jeopardy and remove a thriving portion of the digital economy'.[38]

8.37 Although there was support for the existing statutory licences, there was little call for new or extended statutory licences. For example, BSA—The Software Alliance submitted that statutory licensing and Crown use provisions

> should not apply to computer programs, because there is no market failure of access and availability to address with respect to software. Commercial licensing and distribution of computer programs is already widely available and accessible. This should continue to be a market-based commercial arrangement between vendors and Government customers.[39]

8.38 ARIA stated that statutory licences should not be expanded: 'increasingly, as content is moved into the digital environment, innovative licensing models are being used which more and more obviate the need for statutory licences'.[40]

8.39 Perhaps the most common justification for the statutory licences in submissions was the importance of providing fair remuneration to publishers, creators and other rights holders. For example, Screenrights submitted that a recent survey of its members showed that more than half regard the Screenrights royalties as 'important to the ongoing viability of their business, and close to 20 per cent said this money was essential'.[41]

8.40 Television producers rely on Screenrights revenue to fund program production, it was submitted.[42] If this revenue were reduced, there would be a noticeable effect on the quality and quantity of television programs. The ABC submitted:

> A weakening of the independent production sector would reduce the quality and creative diversity of Australian television culture and would affect all broadcasters, including the ABC, as well as potentially undermining the growth of the digital economy.[43]

8.41 Firefly Education said that the 'strength of the education statutory licence is that it offers authors and publishers fair remuneration for their intellectual property'.[44] Oxford University Press Australia likewise submitted:

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37 ALPSP, *Submission 562*.
38 Ibid.
39 BSA, *Submission 248*
40 ARIA, *Submission 241*. See also APRA/AMCOS, *Submission 247*: APRA/AMCOS also expressed some concern about extending statutory licences, noting that 'voluntary licensing arrangements between APRA/AMCOS and educational institutions demonstrate that there is an existing market for licensing beyond the limits of the statutory licences'.
41 Screenrights, *Submission 215*.
42 See, eg, ABC, *Submission 775*; Screen Australia, *Submission 767*.
43 Ibid. See also M Green, *Submission 618*: 'The removal of the statutory licence schemes would likely skew availability of repertoire to those well-resourced providers of material and exclude small and medium niche creators. It would also interrupt valuable revenue streams which have led to the creation of Australian and international content of unique value to Australian educators.'
44 Firefly Education, *Submission 71*.

> The statutory licensing scheme has served the education community, and educational authors and publishers well in the print environment; it has compensated creators of intellectual property adequately so that we have been motivated and supported to continue to invest time, money and energy into the creation of materials that support teaching and learning in educational environments.[45]

8.42 The statutory licences are also considered an important way to ensure educational institutions and governments disclose their use of copyright material. It was submitted that, without the licences, there would be widespread infringement.[46]

8.43 The statutory licences provide a mechanism to monitor usage and so prevent infringement, it was submitted, and repealing the licences would 'shift the burden of enforcement squarely onto rights holders'.[47] Thomson Reuters submitted that if the statutory licences were repealed, educational users were unlikely to enter into licences voluntarily, and it would then be 'extremely difficult for owners to identify infringing activity'.[48] Thomson Reuters said this had been their experience in America.[49]

8.44 APRA/AMCOS submitted that educational institutions and governments 'conduct their activities within relatively closed communities such that it is certainly not open to APRA/AMCOS to observe use of copyright materials'.[50] Without the statutory licences, the collecting society said it might be 'forced to resort to legal remedies to compel disclosure of the use of copyright materials'.[51]

8.45 However, similar concerns might also be expressed about corporate and personal uses of copyright material. It is not clear to the ALRC why the use of copyright material by educational institutions and governments should be placed under greater scrutiny.

8.46 Some stakeholders also submitted that teachers and other users valued the statutory licences. Educators were said to 'favour the certainty of the statutory licences over having to examine whether what they want to do is covered by a particular licence or by exceptions such as s 200AB or what would otherwise be considered fair'.[52] The licences were called a 'safety net' for users.[53] The ALPSP stated:

> Repealing statutory licences will also introduce considerably more uncertainty for teachers as to whether they are now appropriately licensed for a particular use and for using a particularly work.[54]

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45 Oxford University Press Australia, *Submission 78*.

46 See, eg, Screenrights, *Submission 646*: 'The other impetus for the introduction of the licence was the fact that in the absence of a licence, educational copying was an infringement, and was occurring routinely as evidenced by the indemnity payments Screenrights received when it first entered agreements with the education sector... Rightsholders are aware that one reason for the introduction of the statutory licences was to correct the infringing copying by educational institutions that was occurring.'

47 ABC, *Submission 775*. See also Screenrights, *Submission 646*.

48 Thomson Reuters, *Submission 592*

49 Ibid

50 APRA/AMCOS, *Submission 664*.

51 Ibid.

52 Australian Copyright Council, *Submission 654*.

53 Copyright Agency/Viscopy, *Submission 287*.

54 ALPSP, *Submission 562*.

8.47 Over 400 teachers wrote to the ALRC, many using a form letter prepared by a collecting society. These teachers said that the educational statutory licences make their jobs easy. They said they relied on the licence, they valued it highly, and strongly opposed 'any change to the current system that will create any further burden on my time' and create 'uncertainty about what I can and cannot share with my students'. In these letters, many teachers also said that they found it 'reassuring to know that the people who create the educational content I use receive payment for their skill, time and effort'.[55]

8.48 Others submitted that the statutory licences were 'an efficient and cost effective way for instructors and institutions to legally access and reproduce very significant amounts of print and digital content'.[56] It was submitted that complying with the terms of the licences is administratively easy for users, while voluntary licences are more administratively burdensome for both users and rights holders.[57]

8.49 Conversely, the education sector submitted that voluntary licensing and fair use would in fact be 'easier for teachers'.[58] The sector expressed confidence in the effectiveness of codes and guidelines for teachers and other educators. For example, CAG Schools submitted:

> Experience in Australia and internationally suggests that significant certainty can be achieved in practice when principles-based regulation is supported by the development of guidelines and industry codes. ... CAG, through the [National Copyright Unit], has a strong history of providing reliable, comprehensive and fair guidance to teachers, to make certain their obligations under the *Copyright Act*.[59]

8.50 Some also expressed concern about the effect of repealing the statutory licences on government timeframes and administrative costs.[60] The NSW Government submitted that, if the statutory licence for government were repealed, this might 'limit the ability of governments to carry out important projects, in particular related to providing public access to important information'. It might be difficult or impossible to obtain permission for a government use.[61]

8.51 Another argument was that, without the statutory licences, collecting societies would not have sufficient repertoire to offer a comprehensive blanket licence. Licences would then have to be negotiated with multiple collecting societies and rights holders,

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55 See, eg, L Frawley, *Submission 462*. There are many similar letters on the ALRC website.

56 Pearson Australia/Penguin, *Submission 220*.

57 For example, ABC, *Submission 775*. ARIA submitted that a voluntary licence for the use of sound recordings 'would put users in a more complex and onerous situation, given that they are unlikely to have advance knowledge of the recordings contained in such broadcasts in order to secure the licences as and when they need them. It would also result in the requirement for multiple licensing arrangements with different classes of creators, in place of the single statutory licence currently available from Screenrights': ARIA, *Submission 731*.

58 Copyright Advisory Group—Schools, *Submission 707*.

59 Ibid. See also Universities Australia, *Submission 754*, and the discussion of the role of guidelines in Ch 5.

60 Australian Copyright Council, *Submission 654*.

61 NSW Government and Art Gallery of NSW, *Submission 740*.

which would be administratively less efficient.[62] It was submitted that if such voluntary licences could not be obtained, education and the digital economy would suffer.[63]

8.52 It was particularly stressed that the statutory licence in pt VA was needed to secure the many underlying rights in broadcasts—rights that would otherwise be difficult to secure voluntarily. Screenrights described the current statutory licence for broadcasts in pt VA as 'simple, flexible, innovative and certainly not broken'.[64]

8.53 As discussed above, the ALRC has decided not to recommend the statutory licences be repealed. Instead, a number of reforms are recommended that are intended to address criticisms of the statutory licences. These criticisms and reforms are discussed below.

Licensing uses permitted by exceptions

8.54 Like all other users of copyright material, educational institutions, institutions assisting people with disability, and governments should not need to obtain a licence for a use of copyright material that is permitted under an unremunerated exception. This should be clarified in the *Copyright Act*, particularly if fair use or the new fair dealing exceptions recommended in this Report are enacted.

8.55 The *Copyright Act* now explicitly provides that certain exceptions do not apply to uses that may be licensed. The exception in s 200AB does not apply if, 'because of another provision of this Act: (a) the use is not an infringement of copyright; or (b) the use would not be an infringement of copyright assuming the conditions or requirements of that other provision were met'.[65]

8.56 It may be rare for some exceptions, as currently framed, to apply to educational institutions and governments. For example, it should not be surprising that governments cannot rely on the current time-shifting exceptions, because that exception was only intended to be for private and domestic use.[66]

8.57 Some stakeholders submitted that the *Copyright Act* should clarify that educational institutions and governments may rely on unremunerated exceptions. For example, CAG Schools submitted that if the statutory licences were not repealed, 'the *Copyright Act* should be amended to make clear that schools do not require a licence for any use that would otherwise be subject to an exception, including any new fair dealing exceptions'. CAG Schools said it should be 'made abundantly clear that the

62 Eg, ABC, *Submission 775*: 'the replacement of statutory licences with a voluntary regime would give rise to the administrative burden and cost of the ABC having to negotiate agreements with numerous licensing bodies and/or reduced access by educational institutions to essential educational content.'

63 Ibid: 'the repertoire available for ... cultural and educational activities under a voluntary licence would be much narrower than under a statutory licence'.

64 Screenrights, *Submission 646*.

65 *Copyright Act 1968* (Cth) s 200AB(6).

66 Ibid s 111(1). Whether educational institutions and governments could rely on fair use to time-shift broadcasts is another question.

mere existence of a licence—whether statutory or voluntary—will not be determinative of whether a use can be covered by a fair dealing provision'.[67]

8.58 Likewise, the NSW Government submitted that the Act should 'clarify that Governments can rely on fair dealing and other free licences where applicable, and the statutory licence in s 183 is relevant only where no other exception is applicable'.[68]

8.59 It is sometimes argued that where a licence is available, unremunerated exceptions should not apply. If market failure were the only proper justification for unremunerated exceptions, then the availability of a collective licence might suggest that unremunerated exceptions should necessarily not be available. In the ALRC's view, the availability of a licence is an important consideration, both in crafting exceptions and in the application of fair use—but it is not determinative. Other matters, including questions of the public interest, are also relevant.

8.60 The ALRC considers that it would be unjustified and inequitable if educational institutions, institutions assisting people with disability, and governments could not rely on unremunerated exceptions such as fair use. Statutory licences should be negotiated in the context of which uses are permitted under unremunerated exceptions, including fair use and the new fair dealing exception. If the parties agree, or a court determines, that a particular use is fair, for example, then educational institutions and governments should not be required to buy a licence for that particular use. Licences negotiated on this more reasonable footing may also be more attractive to other licensees.

8.61 This reform, combined with the ALRC's recommendations for the enactment of fair use and other exceptions, does not imply that the ALRC considers that all uses now licensed under the statutory licences would instead be free under new unremunerated exceptions. There are many uses of copyright material under the statutory licences that would clearly not be fair use or permitted under other exceptions, and for which users will need to continue to obtain a licence.

8.62 It should also be noted that although it is not necessary to obtain a licence for uses that do not infringe copyright, this does not necessarily mean that parties to a licence must agree on the scope of fair use and other copyright exceptions. As Professor Daniel Gervais has written, in a collective licence, 'rights holders and users could *agree to disagree* on the exact scope of fair use, yet include some of the marginal uses in the scope of the license and reflect that fact in the price'.[69]

8.63 The *Copyright Act* provides that if the parties cannot agree on the amount of equitable remuneration, then this can be determined by the Copyright Tribunal. The Act should be amended to provide that, when determining equitable remuneration, the Copyright Tribunal should have regard to uses made in reliance on unremunerated exceptions, including fair use.

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67 Copyright Advisory Group—Schools, *Submission 707*.

68 NSW Government, *Submission 294*.

69 D Gervais, *The Landscape of Collective Management Schemes*, 34 Colum J L & Arts 591 2010–2011, 614 (emphasis in original).

Recommendation 8–1 The *Copyright Act* should be amended to clarify that the statutory licences in pts VA, VB and VII div 2 do not apply to a use of copyright material which, because of another provision of the Act, would not infringe copyright. This means that governments, educational institutions and institutions assisting people with disability, will be able to rely on unremunerated exceptions, including fair use or the new fair dealing exception, to the extent that they apply.

Market power of collecting societies

8.64 Calls for reform or repeal of the statutory licences stem in part from the market power of collecting societies. Collecting societies have been said to have a 'de facto monopolistic nature'.[70] Although this can be grounds for criticism, it also has its benefits. As a rule, it has been written, 'there should be only one organisation for any one category of rights owner open for membership to all rights owners of that category on reasonable terms'.[71]

8.65 The ACCC stated that while collective licensing can improve efficiency in licensing, it also has costs, particularly in relation to competition.[72] Without collecting societies, rights holders might compete with one another. Without competition, users may have no alternative means of obtaining a licence for the copyright material they need. This gives collecting societies market power, which could be used to set excessive fees or to impose 'otherwise restrictive terms and conditions in the blanket licensing of their repertoire'.[73] The ACCC submitted that there may be

> a trade-off between the efficiency benefits that collecting societies offer by lowering licensing transaction costs and the possible lessening of competition in the licensing of material arising from the collecting society's market power.[74]

8.66 As discussed in Chapter 3, the ACCC has considered measures to control the market power of collecting societies and called for the repeal of s 51(3) of the *Competition and Consumer Act* (Cth), which provides a limited exemption from some of that Act's prohibitions on restrictive trade practices for contraventions resulting

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70 K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (16th ed, 2011), [27–15].

71 Ibid, [27–12]: 'The existence of two or more organisations in the same field may diminish the advantages of collective administration for both rights owners and users. For the rights owners, competing societies lead to duplication of function and reduction in economies of scale in operation and thus are unlikely to bring benefits to their members. For the user, a multiplicity of societies representing a single category of rights owner would also cause uncertainty, duplication of effort and extra expense. The user would have to check, for each work he wished to use, which society controlled it and whether he had the appropriate licence. For both parties, administration costs would be greater, reducing the revenue available for distribution to rights owners and increasing the overall cost of obtaining licences for the user.'

72 ACCC, *Submission 658*.

73 Ibid. See also ACCC, *Submission 165*: 'This may raise concerns about the potential creation and exercise of market power. Competition concerns may arise from collecting societies' market power and the likelihood that a collecting society would have both the ability and incentive to exercise that market power (leading to higher licence fees) in its dealings with both its members and potential licensees.'

74 ACCC, *Submission 165*.

from copyright licensing.[75] The repeal of this provision has previously been recommended by the Ergas Committee.[76] The ACCC submitted that 'a blanket exemption for conditions imposed in IP licensing and assignment arrangements is not justified' and the licensing or assignment of intellectual property IP rights 'should be subject to the same treatment under the CCA as any other property rights'.[77] Repeal of s 51(3) would

> prevent copyright owners imposing conditions in relation to the licence or assignment of their IP rights for an anticompetitive purpose or where the conditions had an anticompetitive effect. All other uses would be unaffected.[78]

8.67 The focus of this Inquiry has been on exceptions and statutory licences, rather than the related question of the adequacy of measures to regulate the market power of collecting societies. But the ALRC agrees that s 51(3) of the *Competition and Consumer Act* should be repealed.[79]

8.68 The *Copyright Act* also requires the Copyright Tribunal, if asked to do so by a party to a proceeding, to have regard to any relevant guidelines issued by the ACCC.[80] The Copyright Tribunal may also make the ACCC party to proceedings, if the ACCC applies.[81]

8.69 The ACCC has been a party to proceedings before the Tribunal and is currently drafting guidelines for consultation. The guidelines will relate to matters the ACCC considers relevant to the determination of reasonable remuneration and other conditions of licences which are the subject of determination by the Copyright Tribunal. The ACCC may play a greater role in Copyright Tribunal proceedings in the future.

8.70 Another way to reduce the market power of collecting societies may be to ensure that users may choose to obtain licences directly from rights holders, rather than through collecting societies under a statutory licence. This is discussed in the following section.

Statutory licences not compulsory for users

8.71 Educational institutions and governments should not be required to rely on the statutory licences. Statutory licences were intended to be compulsory for rights holders, not for licensees. The *Copyright Act* should be amended to make this clear.

8.72 Arguably, the statutory licences are already, as a matter of law, 'voluntary for users'. Some stakeholders pointed out that educational institutions and governments can choose not to rely on the licences by not using copyright material when such uses

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75 Ibid.
76 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).
77 ACCC, *Submission 165*.
78 Ibid.
79 See further in Ch 3.
80 *Copyright Act 1968* (Cth) s 157A.
81 Ibid s 157B.

are covered by a licence.[82] Screenrights submitted that the education sector has the option 'simply not to take out a licence'.[83]

8.73 However, others suggested that, in practice, educational institutions and governments have no choice about whether to use certain copyright material, and therefore must rely on the statutory licences. Some also submitted that collecting societies have not offered educational institutions and governments any other type of collective licence, and so the only licences these users have available to them are the statutory licences.

8.74 Some stakeholders submitted that the statutory licences were becoming 'increasingly irrelevant', and could therefore be repealed. Although the ALRC does not recommend the licences be repealed at this time, it should be made clear in the Act that educational institutions and governments are not required to rely on the statutory licences, if they choose not to. They should instead be free to seek to obtain a licence for the use directly from rights holders, or to negotiate alternative licences with collecting societies outside the terms of the statute.[84]

8.75 Some have suggested that direct licences are meeting almost all the needs of some licensees, removing much of the need for the statutory licences. Most of the copyright material that is licensed to educational institutions and governments is licensed directly, rather than through a collecting society. Often, these licences include certain limited rights to copy and otherwise use the material. Digital technologies are making such licences more comprehensive and flexible, for example, by better monitoring usage.

8.76 CAG Schools submitted that in 2012, the Australian school sector spent over $665 million buying educational resources, in addition to over $80 million in licensing fees to collecting societies.[85] Universities Australia submitted that the 'vast majority of educational content used for teaching purposes in Australian universities is purchased directly via commercial licences'.[86] NSW Government departments spend millions of dollars annually on licences obtained directly from publishers, and the range of material covered by the government statutory licence is diminishing:

> Books, journals and similar material are increasingly delivered online under agreements that include copyright licences, as noted above. Digital technology and the

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82 ARIA, *Submission 731*: 'As it is our understanding that the statutory arrangements are not compulsory for users, and co-exist with any other commercial arrangements the educational institution wishes to negotiate.'

83 Screenrights, *Submission 646*.

84 As discussed above, they should also be able to rely on unremunerated exceptions, if the exceptions apply.

85 Copyright Advisory Group—Schools, *Submission 707*: 'To put this in context, the amount spent by schools and others on purchasing educational content is more than seven times the amount Screen Australia received from the government in 2012 and more than three times the amount the Australia Council for the Arts received from the government in 2012.'

86 Universities Australia, *Submission 754*. For example, in 2011, 'university libraries spent $256.7 million, the majority of which was on electronic resources (ie, journals and ebooks). It can be expected that this direct spending will increase over time, especially as a result of the increasing penetration of e-books and their associated add-ons.'

> advance of ebooks have changed the shape of the publishing industry, and major publishers have incorporated many of the smaller publishing houses. The combined effect is that Governments increasingly deal directly with publishers, and those agreements now cover most of the External Material used by Government staff.[87]

8.77 If a government or educational institution does not need a blanket licence—if they can obtain licences for what they need directly from publishers—then they should not be compelled to rely on a statutory licence.[88]

8.78 Educational institutions and governments should also seek, and collecting societies should offer, licensing solutions outside the terms of the statutory licence, if voluntary licences are indeed more flexible and useful than statutory licences. Later in this chapter the ALRC recommends the statutory licences be made less prescriptive and more flexible. But some of these benefits may not need to wait for legislative change. Collecting societies should be able to offer flexible commercial licences to educational institutions and governments. Such licences may not need to have onerous survey requirements, or seek payment for purely incidental copying. The ACCC might encourage collecting societies to offer such alternative licences.

8.79 Although the ALRC recommends legislative amendment to ensure the Act is clear that collecting societies can offer licences to educational institutions and governments outside the terms of the statute, the ALRC encourages the parties to seek to make such agreements now. It is clear from submissions to this Inquiry that the educational institutions and governments are unhappy with the current terms of the statutory licences.

8.80 In some limited circumstances, it may also be appropriate for educational institutions and governments to 'risk manage' their copyright responsibilities. This would involve using copyright material without permission, while setting aside funds should a rights owner seek payment. Such an approach may be appropriate where:

- information about the use is open and public;
- the use is not one for which rights holders traditionally seek remuneration;
- obtaining permission from all rights holders (for example, for a mass digitisation project) is impossible or impractical; and
- if a rights holder does seek remuneration, the means for obtaining remuneration are readily available.

8.81 These may be government uses that are in the margins of fair use, or otherwise not clearly covered by an unremunerated exception, and not traditionally offered for licence. The existence of the statutory licences should not preclude educational

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87 NSW Government, *Submission 294*.

88 ABC, *Submission 775*: 'Availability of direct licensing: If it is the case that government users must only licence through the statutory licensing scheme in Part VII of Division 2, then the ABC supports such users being given the freedom to licence outside that scheme, as it understands is the case for educational users.'

institutions and governments from managing their copyright liabilities in such ways.[89] The downside to this approach for educational institutions and governments will be that they do not avail themselves of the protection of the statutory licence, and therefore expose themselves to potential liability for copyright infringement.

Recommendation 8–2 The *Copyright Act* should be amended to clarify that the statutory licences in pts VA, VB and VII div 2 do not apply to a use of copyright material where a government, educational institution, or an institution assisting people with disability, instead relies on an alternative licence, whether obtained directly from rights holders or from a collecting society.

Notifying rights holders directly

8.82 The statutory licences should also be amended to allow governments to deal directly with rights holders, rather than with collecting societies, where they choose to and where this is possible. Collective rights administration can offer many advantages and efficiencies, but in some cases, it may be more appropriate for users and rights holders to negotiate directly.

8.83 Under the statutory licence for governments, governments must inform the owner of the copyright, as prescribed, of the use of the copyright material, 'furnish him or her with such information as to the doing of the act as he or she from time to time reasonably requires'.[90] The terms of the use, such as the amount of remuneration, are then to be agreed upon by the rights holder and the government.[91]

8.84 However, following amendments made in 1998, the *Copyright Act* provides that if there is a declared collecting society, the government does not need to notify or make an agreement with the rights holder. Instead, it must pay a declared collecting society 'equitable remuneration' worked out using a method agreed upon by the government and collecting society, or the Copyright Tribunal.[92] This means that governments cannot choose whether to deal directly with a collecting society or with the rights holder. The collecting societies also have automatic powers to carry out sampling, subject to certain limitations and objections from government.[93]

8.85 The NSW Government submitted that governments should not be 'compelled to make agreements with collecting societies'.[94]

> Unlike other copyright users, Government agencies are not entitled to make a commercial decision on how to manage their copyright liabilities, but must enter

89 The NSW Government submitted that it should not be required under the *Copyright Act* to enter licensing arrangements with collecting societies, but rather, governments should be able to make a 'commercial decision on how to manage their copyright liabilities': NSW Government, *Submission 294*.
90 *Copyright Act 1968* (Cth) s 183(4).
91 Ibid s 183(5).
92 Ibid s 183A(1).
93 Ibid s 183C.
94 NSW Government, *Submission 294*.

> agreements with the collecting societies in accordance with s 183A or face litigation. The legal obligation remains even if a Government does no copying under s 183.[95]

8.86 In the ALRC's view, governments should be able to choose to deal directly with rights holders, even if in most cases it will be more efficient to deal with the relevant collecting society. Governments now rely more heavily on direct licences. If they rely less on statutory licences—perhaps only for a relatively few additional uses for which they are unable to obtain a direct licence, that is, simply to 'fill the gaps'—then governments should not automatically be required to make an agreement with a collecting society. In such circumstances, collecting societies should also not be given automatic powers, such as the power to conduct surveys of government uses.

8.87 Like companies and other organisations, educational institutions and governments should be able to manage their own licensing arrangements, without the additional oversight of collecting societies.

Recommendation 8–3 The *Copyright Act* should be amended to remove any requirement that, to rely on the statutory licence in pt VII div 2, governments must notify or pay equitable remuneration to a declared collecting society. Governments should have the option to notify and pay equitable remuneration directly to rights holders, where this is possible.

Making the statutory licences more flexible

8.88 While the ALRC does not recommend the statutory licences be repealed, the statutory licences should be amended so that they are more flexible and less prescriptive. For example, determining equitable remuneration should not necessarily require surveys to be conducted, particularly considering new electronic monitoring technologies and other less intrusive methods for determining equitable remuneration are available. If surveys are conducted, the methodology need not be set out in the *Copyright Act*. Other detailed requirements, such as for record keeping and providing notices, should also be removed from the Act. This detail should not be moved to regulations, but rather the terms of the licences should be agreed upon by the parties to the licence, and failing agreement, by the Copyright Tribunal.

8.89 In its draft report on the jurisdiction and procedures of the Copyright Tribunal, the Copyright Law Review Committee recommended repeal of some of 'the prescriptive nature of aspects of the statutory licences', including details of terms and conditions of those licences. The CLRC also made a draft recommendation that the detailed requirements for record keeping in pts VA and VB and s 47A be repealed 'in favour of a provision that those details should be left to the agreement of the parties, or, failing agreement, determination by the Copyright Tribunal'. The CLRC said that:

> the Tribunal's jurisdiction in respect of particular statutory licences could usefully be extended as part of a simplification of aspects of the Act. Greater emphasis should be

95 Ibid.

> placed on agreement being reached between the parties, with recourse to the Copyright Tribunal failing that agreement.[96]

8.90 The CLRC also made a draft recommendation that the detailed provisions with respect to remuneration notices, survey notices and related provisions for record keeping should be repealed and substituted with a single provision, which would provide that the parties should agree both on the level of equitable remuneration and the method for assessing it, and failing agreement, these things should be determined by the Copyright Tribunal.[97]

8.91 In its final report, the CLRC said that submissions supported the 'general approach of seeking to simplify the statutory schemes and encourage broader agreement between the parties through an expansion of the Tribunal's jurisdiction'.[98] But the Committee decided not to recommend that the detailed requirements for marking, record keeping and inspection of records be removed from pts VA and VB of the Act, noting that the collecting societies and the university peak body did not support the changes. The provisions of the statutory licence were said to be 'a matter of some sensitivity between the parties that rely on them' and 'despite their complexity, the provisions are at least well known to the parties'.[99]

8.92 The ALRC considers that this question should be revisited, and the detail in the Act removed. The statutory licences are clearly too complex and rigid. They should be amended so that more commercial and efficient agreements can be made between the parties. The following section outlines a few of the many criticisms made of the statutory licences. These criticisms may be partly addressed by making the licences considerably less prescriptive.

8.93 In the face of disagreements between the collecting societies and licensees, it is tempting to recommend that the Act resolve the disagreements. If the parties cannot agree on a method of conducting a survey, then the Act should set out a method. If the parties cannot agree on equitable remuneration, then the Act should set out how this should be settled. However, the ALRC does not favour this approach. These are not matters that Parliament should be expected to settle. There does not seem to be a case here for greater regulation.

8.94 Instead, the parties should agree on these matters. They should agree on whether a survey of use needs to be conducted, and if it does, how often and what methodology should be used. The parties should also agree on the amount of equitable remuneration. If the parties cannot agree, then the parties may seek to have the Copyright Tribunal settle the dispute. The ALRC does not recommend that more detail on these matters be set out in the Act.

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96 Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal—Draft Report* (2000), [11.17].

97 Ibid, 71.

98 Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal—Final Report* (2000), [11.25].

99 Ibid, [11.27].

8.95 The arguments for less prescription in the statutory licences have parallels with the arguments for less prescription in defining the scope of unremunerated exceptions. Less prescriptive statutory licences allows for greater flexibility, as does fair use. The criticism will be that this reduced prescription comes at a cost—namely, uncertainty and litigation. However, as discussed below, the excessive prescription and complexity of the existing statutory licences also come at a cost.

8.96 If the Act is less prescriptive about the terms of the statutory licence, then there may indeed be a greater role for the Copyright Tribunal in settling disputes between licensees and collecting societies. The jurisdiction of the Copyright Tribunal to determine equitable remuneration under statutory licensing schemes was referred to approvingly by a number of stakeholders.[100] Michael Green submitted that the fact that voluntary schemes have never flourished in Australia where there are statutory licences in place 'indicates that the work of the Copyright Tribunal in setting levels of equitable remuneration has been effective and efficient'.[101] APRA/AMCOS also submitted that not only is the Tribunal an effective price regulator, but that the Tribunal can act as a 'constraint against the setting of unreasonable prices by reason of the expense, time and risk of proceedings'.[102]

8.97 However, others submitted that proceedings before the Tribunal can be unnecessarily protracted, and that statutory provisions should be amended to streamline proceedings.[103] There may also be a case for amending the *Copyright Act* to provide that mediation must be undertaken before initiating proceedings in the Copyright Tribunal.

Complexity

8.98 The statutory licences, particularly pt VB, have been called complex and prolix.[104] This complexity was criticised by stakeholders. Robin Wright said that the scheme in pt VB of the *Copyright Act* 'consists of highly complex media and format specific rules which are increasingly difficult to administer in the digital environment'.

> The complex drafting style and structure of the provisions makes the section almost impossible to understand, even for regular users, without an external interpretive layer. The different rules applicable to hard copy works and works in electronic form are increasingly difficult to apply or explain in a convergent world.[105]

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100 Copyright Agency, *Submission 727*; Macmillan Education, *Submission 711*; Arts Law Centre of Australia, *Submission 706*; Australian Copyright Council, *Submission 654*; Association of Consulting Surveyors Victoria, *Submission 643*; M Green, *Submission 618*; SIBA, *Submission 612*; Allen & Unwin, *Submission 582*; RIC Publications Pty Ltd, *Submission 456*; Nightlife, *Submission 657*; Australian Publishers Association, *Submission 225*; Federation Press Pty Ltd, *Submission 177*; PPCA, *Submission 240*.

101 M Green, *Submission 618*.

102 APRA/AMCOS, *Submission 247*.

103 For example, Pandora Media Inc, *Submission 329*; Commercial Radio Australia, *Submission 132*; Tasmanian Government, *Submission 196*.

104 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.280].

105 R Wright, *Submission 167*.

8.99 CAG Schools submitted examples of provisions of the *Copyright Act* that it called 'overly technically complex' and that make the statutory licences unsuited to the digital environment.[106]

8.100 However, it was also submitted that copyright licensing is generally complex and that freedom of contract has led to 'a diverse universe of licensing practices'.[107] The fact that the statutory licences are also complex should not therefore be surprising, considering 'the legislature's intent to strike a balance in relation to facilitating lawful use by educational institutions of otherwise foreclosed copyright works'.[108]

8.101 Copyright Agency/Viscopy submitted that it was 'open to exploring whether some of the detail regarding requirements under statutory licences could be covered in regulations rather than in the legislation', which would allow for more flexibility to respond to technological and other developments.[109]

What gets counted and paid for under the licences

8.102 Many of the criticisms of statutory licences essentially concern what gets counted and paid for under the licences. One of the main advantages of a statutory licence, namely that it allows licensees considerable freedom to use a large range of copyright material without permission, in practice may also mean that far more of what a licensee does will be counted and paid for.[110]

8.103 The statutory licences may therefore provide a mechanism for educational institutions and governments to pay for uses that no one else pays for. So called 'technical copies' and freely available content on the internet are perhaps the two most commonly cited examples of content that gets counted under the statutory licences, but is ignored in most other organisations.

8.104 Digital technologies allow for new, innovative, and efficient uses of copyright material. Many of these uses rely on multiple acts of copying and communication—with copies being stored and effortlessly moved between multiple computers and devices, some local, some stored remotely in the cloud. To the extent that the *Copyright Act* requires these acts of copying and communication to be strictly accounted for and paid for, then it may prevent licensees from taking full advantage of the efficiencies of new digital technologies.

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106 Some examples, including *Copyright Act 1968* (Cth) ss 135ZMD, 135KA and 135ZXA, are set out in the ALRC Discussion Paper and in Copyright Advisory Group—Schools, *Submission 231*.

107 M Green, *Submission 618*.

108 Ibid.

109 Copyright Agency/Viscopy, *Submission 249*.

110 The objection that some uses are 'zero-rated' and that institutions pay a flat fee per student or per employee does not seem to undermine the key objections, that the uses are nevertheless counted and that payment for the uses can be sought and negotiated and may go to the final per person flat rate.

8.105 Schools and universities submitted that while they are being encouraged to use new digital technologies, there is a 'direct financial and administrative disincentive to do so':

> The simple act of using more modern teaching methods potentially adds up to four remunerable activities under the statutory licence in addition to the potential costs incurred by more traditional 'print and distribute' teaching methods ... The requirements of the statutory licence to record in a survey (and potentially pay for) every technological copy and communication involved in teaching simply do not reflect the realities of modern education in a digital age.[111]

8.106 The statutory licences are not suitable for a digital age, CAG Schools submitted, in part because rates, even when set on a per student basis, are largely derived by reference to the volume of past and anticipated copying and communication. That is, 'volume is still a critical element of rate negotiations'.[112] Universities Australia likewise submitted:

> This 'per copy' method of determining remuneration may well have made sense in a print environment, but it has become highly artificial in a digital environment. In a digital environment, copying is ubiquitous. The existence of the statutory licence provides an opportunity for CAL [Copyright Agency] to seek a price hike for every technological advance that results in digital 'copies' being made.[113]

8.107 CAG Schools criticised the 'overly prescriptive and technical requirements of the statutory licence',[114] and said that voluntary licences have proven 'more efficient and simpler to negotiate'.[115]

8.108 However, a more direct approach to this problem may be to ensure that the Act provides for suitable unremunerated exceptions, such as fair use, and that those who rely on the statutory licences can also rely on the unremunerated exceptions. Fair uses of copyright material, or uses otherwise covered by an unremunerated exception, such as certain technical copying, should not need to be licensed.

8.109 Voluntary contracts for digital services appear to be more flexible and do not require such strict accounting of copies and communications. This is one of the reasons why the ALRC recommends earlier in this chapter that the Act be clarified to ensure educational institutions and governments can obtain alternative voluntary collective licences (that is, licences not under the terms set out in the Act).

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

112 Ibid: 'While a 'cost per use' model may have made sense in the age of the photocopier and the VHS recorder, it makes much less sense in an internet age. It is a reality of modern technology that many copies and transmissions are made during the use of distributed technologies.'

113 Universities Australia, *Submission 246*. See also ADA and ALCC, *Submission 213*.

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

115 Ibid. For example, in the voluntary agreements between schools and music collecting societies, 'it was possible to negotiate a commercial rate for a licence that allows schools to store musical works and sound recordings on a school intranet server, without entering into technical discussions and survey/record keeping requirements about the number of copies and communications that might entail on a practical basis when a variety of technologies are used to access that stored music by teachers and students. This is in stark contrast to the highly complex and burdensome administrative and technical issues required to be taken into account in similar negotiations under statutory licences': Copyright Advisory Group—Schools, *Submission 231*.

8.110 Some stakeholders suggested that the statutory licences facilitate an overly strict accounting of usage that leads to unreasonably high fees. For example, Universities Australia submitted that the 'statutory licensing model for determining remuneration is firmly based in a "per-copy-per-view-per-payment" paradigm'.[116] This 'takes no account of the realities of the modern educational environment'.[117] The number of articles a lecturer uploads onto an e-reserve or otherwise makes available to students was called a 'highly artificial measure' and a poor proxy for student use:

> The dilemma that universities face is: do we take full advantage of digital technology to provide our students with access to the widest possible array of content (knowing that [Copyright Agency/Viscopy] will seek payment based on the number of articles etc made available multiplied by the number of students who could have accessed that article) or do we revert to the old print model of selecting a small range of articles etc for each class because this will inevitably cost less under the statutory licence? The very fact that universities are having to ask these questions underscores the unsuitability of the statutory licence to a digital educational environment.[118]

8.111 Universities Australia would instead prefer that remuneration be determined on a 'commercial basis' and 'without direct reference to the amount of copying and communication that has actually occurred'.[119]

8.112 Screenrights submitted that the statutory licence for broadcasts in pt VA are not based on 'one-copy-one-view-one-payment',[120] but rather, 'Screenrights and the schools have agreed fixed per student amounts every year since the statutory licence was created in 1990'.[121]

8.113 In the ALRC's view, a good collective licence must allow for some flexibility and should not be a disincentive to the use of new and efficient digital technologies. Nor are licensees likely to be attracted to licensing models that equate the availability of material with the use of the material. Few would wish that the fee for using a new music service like Spotify were set by reference to the amount of music the service makes available to customers (many millions of songs). As Copyright Agency/Viscopy submitted, 'there is a limit to the total amount of content a student can reasonably consume in the course of their studies'.[122]

8.114 The *Copyright Act* should not prescribe a method of settling equitable remuneration that results in an overemphasis on the volume of material made available to—as opposed to actually used by—students, educational institutions, and government. As discussed below, this may mean reconsidering the role of surveys in setting the amount of remuneration.

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116 Universities Australia, *Submission 246*.
117 Ibid.
118 Ibid.
119 Ibid.
120 Screenrights, *Submission 646*.
121 Ibid.
122 Copyright Agency/Viscopy, *Submission 249*.

Surveys

8.115 Governments, educational institutions, and some collecting societies reportedly often fail to agree on a methodology for conducting surveys of usage. Such surveys are used to determine the amount of equitable remuneration to be paid and to whom collected funds should be distributed. There are mechanisms in the Act for seeking a ruling from the Copyright Tribunal on the operation of a sampling system,[123] but this is rarely sought by either party. In the ALRC's view, the solution to this problem is *not* to set out a survey methodology in the Act.

8.116 A number of state governments submitted that the sampling required by s 183A of the *Copyright Act* is problematic.[124] The NSW Government submitted that, in practice, 'the scheme established by s 183A has proved to be cumbersome, burdensome and costly, and insufficiently flexible to adapt to technological advances'.[125] The Queensland Government said that surveys 'should be as unobtrusive and inexpensive as possible and measure only remunerable copying'.[126] The Tasmanian Government likewise submitted that:

> The requirement to develop, negotiate and administer a survey has imposed a substantial burden, created an ongoing source of tension in dealings between governments and declared collecting societies, and increased the cost and resources required by governments to discharge their copyright liabilities.[127]

8.117 Governments and collecting societies have not been able to agree on a method for conducting surveys, and therefore a survey has not been conducted since 2002–03.[128] Neither side has asked the Copyright Tribunal to determine a method of conducting a survey. Instead, payments are made based on survey results from 2002–03. However, governments point out that, since that time, there has been increased use of direct licences, for example for subscriptions to online journals.[129] Because the material that is now directly licensed was included in the 2002–03 survey, governments say that it is likely that they are now paying twice for a range of materials.[130]

> Because of the difficulty of designing a practicable sampling survey for copyright works, the fees paid by NSW in recent years have not been based on estimates of the number of Government copies made. It is likely that some of the amounts Governments have paid under s 183A are attributable to licensed material for which they have already paid under direct licence agreements with the publishers.[131]

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123 For example, *Copyright Act 1968* (Cth) s 135ZW(3).
124 DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.
125 NSW Government, *Submission 294*.
126 DSITIA (Qld), *Submission 277*.
127 Tasmanian Government, *Submission 196*.
128 DSITIA (Qld), *Submission 277*.
129 Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255* (who suggest remunerable copying is about 3% of all government copying); Tasmanian Government, *Submission 196*.
130 Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.
131 NSW Government, *Submission 294*.

8.118 Copyright Agency/Viscopy agreed that sampling for the government statutory licence 'has not operated as intended' and suggested that the *Copyright Act* specify a method to be used where no method has been agreed upon or determined. Copyright Agency/Viscopy proposed that the method should be the same as that for the education statutory licence.[132]

8.119 Universities Australia submitted that one shortcoming of the statutory licence is that 'there is no option for educational institutions to operate under a record-keeping scheme with respect to electronic copying and communication':[133]

> This significantly limits the opportunity for universities to seek to ensure that they are not paying under the statutory licence for content that is not strictly remunerable. It also deprives universities of an administratively simple solution to measuring the amount of copying and communication that must be paid for under the statutory licence.[134]

8.120 However, surveys of educational use, collecting societies submitted, were not overly burdensome. Copyright Agency/Viscopy submitted that, except for 'the small number of teachers involved in surveys of usage from time to time, compliance requirements are negligible'.[135]

> For most teachers and students, the statutory licence is practically invisible. A very small proportion of teachers participate in annual surveys of usage, for a limited period of time.[136]

8.121 Schools provide information about their usage and the collecting society processes the data according to agreed protocols.[137] Copyright Agency/Viscopy acknowledged that the current mechanism for measuring digital usage (electronic use surveys) is imprecise, but 'technological advances are enabling new methods of measuring usage':

> Two important initiatives are automated data capture from multi-function devices (machines that print, scan, photocopy, fax and email), and tools for reporting content made available from learning management systems. As with current measurement methods, the objective is to estimate the extent to which content is consumed by students.[138]

8.122 Screenrights submitted that data management under its licence is 'exceptionally simple'. Many educational institutions have zero reporting requirements, while others are only surveyed for a short time.

> Universities conduct a very easy online survey where they simply record details of the program and whether it was copied, put online or emailed. Schools take part in a similar survey to universities, only it is paper-based. Each sector pays on a per-head basis. The system is efficient for both licensees and for Screenrights' distribution

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132 Copyright Agency/Viscopy, *Submission 249*.
133 Universities Australia, *Submission 246*.
134 Ibid.
135 Copyright Agency/Viscopy, *Submission 287*.
136 Ibid.
137 Ibid.
138 Ibid. See also Copyright Agency, *Submission 727*.

> purposes. The sample system means that universities are surveyed every three to four years and schools are surveyed on average once every 100 years. Moreover, Screenrights has moved in recent years to obtaining records of usage from intermediary bodies and this is increasingly replacing the need for surveys.[139]

8.123 The ALRC considers that, while surveys can be a useful method of measuring usage for the purpose of setting the rate of equitable remuneration and for distributing royalties to rights holders, such surveys may not always be necessary. To make the statutory licences less prescriptive and more flexible, the *Copyright Act* should not provide that surveys must be conducted, although this may in practice often be necessary. The ALRC considers that methods of conducting surveys should not be set out in the *Copyright Act* or in regulations.

Recommendation 8–4 The statutory licences in pts VA, VB and VII div 2 of the *Copyright Act* should be made less prescriptive. Detailed provisions concerning the setting of equitable remuneration, remuneration notices, records notices, sampling notices, and record keeping should be removed. The Act should not require sampling surveys to be conducted. Instead, the Act should simply provide that the amount of equitable remuneration and other terms of the licences should be agreed between the relevant parties, or failing agreement, determined by the Copyright Tribunal.

139 Screenrights, *Submission 646*.

9. Quotation

Contents

Summary

9.1 The *Copyright Act* does not provide a stand-alone exception for quotation, or the taking of some part of copyright material, usually for the purpose of supporting an intellectual commentary or artistic idea.

9.2 This chapter considers various uses of copyright material in quotation, and describes examples of quotation that may be covered by fair use but are, in at least some circumstances, not covered by existing fair dealing exceptions. It also explains how the concept of quotation can be expected to be interpreted under a fair use exception.

9.3 The ALRC recommends that a fair use exception should be applied when determining whether quotation infringes copyright and that 'quotation' should be an illustrative purpose in the fair use exception.

9.4 The arguments in favour of including quotation as an illustrative purpose parallel those for introducing a fair use exception more generally (see Chapter 4). These include that fair use provides a standard that is flexible and technology-neutral, promotes transformative uses, assists innovation and better aligns with reasonable consumer expectations.

9.5 While the extent to which a particular use constitutes quotation can be important in assessing fair use in relation to the other illustrative purposes, the ALRC considers that it is important to signal that quotation may be fair use, without the need to be for any defined purpose.

9.6 In addition, expressly providing more scope for quotation in Australian copyright law will also ensure that Australia meets obligations under art 10(1) of the *Berne Convention*, while continuing to comply with the three-step test under art 9(2).[1]

9.7 The ALRC also recommends that, if fair use is not enacted, the *Copyright Act* should be amended to introduce a new fair dealing exception, including quotation as a prescribed purpose, which may be held to be fair dealing. The chapter discusses how such an exception should be framed.

Quotation and copyright law

9.8 In international copyright law, quotation refers to 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 creator of the work.[2]

9.9 However, in Australian copyright law, quotation is not a term of art.[3] The *Copyright Act* does not provide a stand-alone exception for quotation. Rather, other concepts are used to govern whether a quotation infringes copyright.

Substantiality and fair dealing

9.10 The Act provides that an act will infringe copyright only if the act is done in relation to a 'substantial part' of a work or other subject matter.[4] The phrase 'substantial part' has been held to refer to the quality of what is taken rather than the quantity, and courts have refused to prescribe any particular proportion as amounting to a substantial part.[5] In determining whether the part taken is 'substantial', the most important question is whether the part is an 'essential', 'vital' or 'material' part, in relation to the work as a whole.[6]

9.11 If a substantial part of the copyright material is 'quoted', infringement will generally occur unless the quotation is covered incidentally by the fair dealing exceptions for criticism or review; parody or satire; or news reporting.[7] While in some cases, the copying of the whole of a work may be regarded as a fair dealing for the purpose of research or study,[8] this is unlikely in other cases, such as criticism and review.

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

2 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 788, commenting on the quotation right provided for in the *Berne Convention*.

3 E Adeney, 'Appropriation in the Name of Art: Is a Quotation Exception the Answer?' (2013) 23(3) *Australian Intellectual Property Journal* 142, 143.

4 *Copyright Act 1968* (Cth) s 14(1)(a).

5 See Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [9.20].

6 Ibid, [9.20], citing *Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396.

7 *Copyright Act 1968* (Cth) ss 41, 41A, 42.

8 Ibid s 40(2).

9.12 Some fair dealing exceptions list matters to be considered when determining whether the use constitutes a fair dealing.[9] These matters include 'the amount and substantiality of the part copied, taken or recorded in relation to the whole work, adaptation, item or performance'. In addition, 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.[10]

Fair use and quotation

9.13 The ALRC recommends that a fair use exception should be applied when determining whether quotation infringes copyright and that 'quotation' should be an illustrative purpose in the fair use exception.

9.14 Some examples of quotation that may be covered by fair use but are, in at least some circumstances, not covered by existing fair dealing exceptions, include:

- 'use of images in a presentation or seminar to illustrate the point being made';[11]
- 'use of short quotations in academic publications';[12]
- reproduction of 'an extract from a book in the course of reviewing a film' of that book;[13]
- reproduction of 'an extract from a play in the course of reviewing a performance of a play';[14]
- use of quotations in exhibition catalogues or publicity material for museums and art galleries;
- use of quotations as epigrams at the beginning of novels; and
- use of quotations in a range of artistic practices such as 'sampling', 'mashups' and 'remixes'.[15]

9.15 Arguably, the reason some of these uses are not covered by existing fair dealing exceptions may be more drafting oversight or lack of foresight, rather than principled outcome. For example, the reason a quotation from a book cannot be used in the course

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9 Ibid ss 40 (fair dealing for purpose of research or study); 248A(1A) (indirect sound recording of a performance).

10 See Ibid s 40(3)–(8). The concept of 'reasonable portion' is fixed by reference to chapters, or 10% of the number of pages or number of words.

11 Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*.

12 R Wright, *Submission 167*.

13 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

14 Ibid.

15 Sampling is the act of taking a part, or sample, of a work and reusing it in a different work. The concept is most well-known in relation to music, where samples of one or more sound recordings are reused in a different composition. A mashup is a composite work comprising samples of other works. 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. Remixes are generally a combination of altered sound recordings of musical works: See *The Macquarie Dictionary Online*; APRA/AMCOS, *Submission 247*.

of reviewing a film is that the relevant fair dealing exception only applies where the criticism or review is of that work or another work, and 'work' specifically does not include a 'cinematograph film'.[16]

9.16 In other cases, the problem lies with the purpose-based, or closed-ended nature of the fair dealing exceptions. For example, in many cases quotations will not be directly for 'criticism or review' or 'research or study', but for other purposes, such as academic publication, that serve important public interests.

9.17 In the context of artistic practice, several stakeholders referred to the case of *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*[17] (the Kookaburra case) as illustrating a gap in the law.[18] In the Kookaburra case, EMI's recordings of the Men at Work song 'Down Under' were found to have infringed the copyright in the song 'Kookaburra Sits in the Old Gum Tree'.

9.18 In the Full Federal Court decision, Emmett J expressed his 'disquiet' in finding copyright infringement in the circumstances of the case:[19]

> 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.[20]

9.19 The judgment was seen by some as 'draconian in its decision that the referencing of an earlier, culturally iconic, work by a later creative work was an illegitimate activity'.[21] Fair dealing exceptions were not available, or even mentioned, in the judgment—the fact that the part of work taken was found to be substantial was sufficient to show infringement. Elizabeth Adeney observes that

> In everyday speech, what Men at Work had done could probably best be described as 'quotation', and indeed it was described as such repeatedly by the judges who heard the case.[22]

9.20 Fair use in relation to quotation may provide more room for some artistic practices, including the sampling, mashup and remixing of copyright material in musical compositions, new films, art works and fan fiction.[23] More broadly, some artistic practices based on appropriation, including collage, where images or objects are 'borrowed' and re-contextualised might be covered by fair use.

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16 See *Copyright Act 1968* (Cth) s 41; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.
17 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444.
18 For example, R Wright, *Submission 167*; R Xavier, *Submission 146*; M Rimmer, *Submission 143*.
19 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444, [98].
20 Ibid, [99].
21 E Adeney, 'Appropriation in the Name of Art: Is a Quotation Exception the Answer?' (2013) 23(3) *Australian Intellectual Property Journal* 142, 142.
22 Ibid, 143.
23 See examples cited in ADA and ALCC, *Submission 213*.

9.21 It is not possible to say, however, whether or not the Kookaburra case would have been decided differently under a fair use (or fair dealing for quotation) exception. In the ALRC's view, however, it would have been better for fairness factors to have been available for consideration.

Interpreting fair use

9.22 The concept of quotation is central to fair use doctrine in the United States. Even before the codification of fair use in the US, fair use was considered to cover the quotation of excerpts in a review or criticism for purposes of illustration or comment, and the quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations.[24]

9.23 The *Copyright Act 1976* (US) provides that one of the factors determining fair use is 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole'.[25] US case law establishes that the amount of the copyright work quoted is not always determinative of fair use, and will depend on the application of other fair use factors.[26] It has been held that there is both a quantitative and qualitative element to determining whether a quotation is fair use.[27]

9.24 The ALRC's third fairness factor is phrased in an almost identical way to the US provision, that is, in referring to 'the amount and substantiality of the part used'. Some existing Australian fair dealing exceptions already include 'the amount and substantiality of the part' as a matter to be considered when determining whether use constitutes a fair dealing.[28]

9.25 In interpreting the application of the fairness factors to the use of any particular quotation, guidance would be found in existing Australian case law and, as discussed in Chapter 5, case law in the US and other relevant jurisdictions.

9.26 In applying fairness factors to the use of quotations, some considerations would be as follows:

The purpose and character of the use. The commercial use of a quotation will weigh against fair use. This may cover, for example, uses of sampling in the music industry. The extent to which the use is 'transformative' is also relevant—for example, where a quotation from a book is used as dialogue in a movie.[29]

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24 United States House of Representatives, Committee on the Judiciary, *Copyright Law Revision (House Report No. 94-1476)* (1976), 5678–5679.

25 *Copyright Act 1976* (US) s 107(3).

26 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 586–587.

27 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539.

28 *Copyright Act 1968* (Cth) ss 40 (fair dealing for purpose of research or study); 248A(1A) (indirect sound recording of a performance).

29 See, eg, *Faulkner Literary Rights LLC v Sony Picture Classics Inc* (Unreported, US District Court for the Northern District of Mississippi, Mills CJ, 18 July 2013): 'The copyrighted work is a serious piece of literature lifted for use in a speaking part in a movie comedy, as opposed to a printed portion of a novel printed in a newspaper, or a song's melody sampled in another song. This transmogrification in medium tips this factor in favour of transformative, and thus, fair use', 9. The case concerned the Woody Allen film *Midnight in Paris*.

The nature of the copyright material used. The extent to which the use of a quotation is creative may be relevant. The choice of a photograph of an artistic work in an exhibition catalogue is less creative than, for example, the use of an epigram in a novel—and less likely in the former case to be fair use. If a quotation is taken from an unpublished source it may be considered less likely to be fair than if the quotation is from a well-known work.

The amount and substantiality of the part used. The amount used in a quotation, both in relation to the original and the new material, is relevant to fair use. If, for example, in the Kookaburra case, the music taken was 'practically the whole melody',[30] this would dictate against fair use. On the other hand, in some contexts, the use of the whole of a work may be permitted—as where the whole of a short poem is used.[31]

Effect of the use upon the market. The effect of a quotation on the market for the original will be a relevant factor. For example, where use of a quotation may easily be licensed, this may dictate against fair use—as, for example, in the case of sports highlights. Sometimes a quotation may be likely to increase the market value of the original material, which will weigh in favour of fair use.[32]

9.27 In the ALRC's view, there are strong arguments that Australian copyright law should provide more scope for the quotation of copyright material—particularly where there is little or no effect on the potential market for, or value of, the copyright material.

9.28 The idea of including 'quotation' as an illustrative purpose in the fair use exception received express support from many stakeholders[33]—in addition to support for a fair use exception generally. The Intellectual Property Committee, Law Council of Australia stated that quotation should be an illustrative purpose and that this should not be further constrained by quotation for one or more specified purposes:

> The specification of one or particular 'approved' purposes will lead to arguments that other unspecified purposes were not intended to be protected. Instead, it would be preferable for the nature, purpose and the extent of use to be assessed under the fairness criteria.[34]

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30 E Adeney, 'Appropriation in the Name of Art: Is a Quotation Exception the Answer?' (2013) 23(3) *Australian Intellectual Property Journal* 142, 144.

31 See *Hubbard v Vosper* [1972] 2 QB 84, 98 concerning fair dealing for criticism or review, in which Megaw LJ referred to an epitaph on a tombstone.

32 The *Midnight in Paris* decision stated: 'The court, in its appreciation for both William Faulkner as well as the homage paid him in Woody Allen's film, is more likely to suppose that the film indeed helped the plaintiff and the market value of [the book *Requiem for a Nun*] if it had any effect at all': *Faulkner Literary Rights LLC v Sony Picture Classics Inc* (Unreported, US District Court for the Northern District of Mississippi, Mills CJ, 18 July 2013), 13.

33 CSIRO, *Submission 774*; Intellectual Property Committee, Law Council of Australia, *Submission 765*; AIATSIS, *Submission 762*; NFSA, *Submission 750*; NSW Government and Art Gallery of NSW, *Submission 740*; EFA, *Submission 714*; Pirate Party Australia, *Submission 689*; National Archives of Australia, *Submission 595*; K Bowrey, *Submission 554*; R Xavier, *Submission 531*. Some stakeholders also expressed support for a fair dealing for quotation exception: AIATSIS, *Submission 762*; NFSA, *Submission 750*; National Archives of Australia, *Submission 595*; International Association of Scientific Technical and Medical Publishers, *Submission 560*.

34 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

9.29 The Australian War Memorial submitted that the 'capacity to quote from published and unpublished works is a use not adequately covered by specific libraries and archives exceptions' and should be included under a fair use exception.[35]

Objections to a quotation exception

9.30 Stakeholders who opposed any new exception applying to quotation did so for a range of reasons,[36] including on the basis that such an exception would:

- be unnecessary as existing exceptions adequately cover quotation;[37]
- present significant drafting problems and produce uncertainty;[38]
- interfere with existing licensing practices;[39] and
- conflict with the three-step test under the *Berne Convention*.[40]

9.31 Stakeholders emphasised the existing role of the concept of substantiality and the fair dealing exceptions in determining whether quotation is permissible, which were said to provide sufficient coverage.

9.32 News Corp Australia, for example, stated that while existing fair dealing exceptions are 'limited to purposes of use which are socially beneficial or which do not detract from the commercial competitiveness of the copyright owners' work', an exception for quotation 'focuses on the type of use—with no consideration of the purpose of the use—the implication of which would be significant copyright appropriation'.[41]

9.33 The iGEA suggested that quotation would be 'better addressed through the concept of "substantial part" as a test for infringement rather than through a specific quotation exception' as is permitted through existing fair dealing exceptions. Similarly, Australian Film/TV Bodies stated that 'existing fair dealing provisions already exempt quotations of a substantial part of a copyrighted work in legitimate circumstances'.[42]

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35 Australian War Memorial, *Submission 720*.

36 News Corp Australia, *Submission 746*; iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; MEAA, *Submission 652*; Music Council of Australia, *Submission 647*; Screenrights, *Submission 646*; Pearson Australia, *Submission 645*; COMPPS, *Submission 634*; ALPSP, *Submission 562*.

37 News Corp Australia, *Submission 746*; iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*; Arts Law Centre of Australia, *Submission 706*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; NAVA, *Submission 655*; MEAA, *Submission 652*; Screenrights, *Submission 646*; ALPSP, *Submission 562*.

38 Cricket Australia, *Submission 700*; Music Council of Australia, *Submission 647*.

39 iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; Pearson Australia, *Submission 645*; APRA/AMCOS, *Submission 664*; COMPPS, *Submission 634*.

40 Australian Film/TV Bodies, *Submission 739*; Australian Copyright Council, *Submission 219*.

41 News Corp Australia, *Submission 746*.

42 Australian Film/TV Bodies, *Submission 739*.

9.34 The Australian Copyright Council observed that a quotation exception might work better for some types of copyright material than others.

> For example, quotation has a natural meaning when applied to literary works. For other types of copyright material, licensing models exist for quotations. Music and film sampling are examples that come readily to mind. In our submission, this issue is better mediated by the concept of substantial part than by a specific exception.[43]

9.35 Stakeholders raised general concerns about uncertainty being produced by a new exception. The MCA, for example, stated that there is 'already sufficient uncertainty in the nature of the application of the tests concerning a "substantial part" without including a further similar flexible (and thereby inherently uncertain) concept into the fair dealing exception'. The MCA considered that 'any exception drafted on that basis may raise more problems than it purports to solve'.[44] Similarly, Cricket Australia submitted that a new fair dealing exception for quotation would be 'uncertain and open to interpretation, particularly as to when a particular use amounts to quotation'.[45]

9.36 Stakeholders highlighted possible harm to existing (and potential) markets for copyright material, including in music, computer games, publishing and sport. The music industry provided information about existing commercial licensing solutions for the use of sound recordings and musical works as samples.[46] The licensing of sampling was said to be a significant part of music publishers' and composers' income.[47]

9.37 ARIA submitted that the introduction of a quotation exception would have a 'detrimental impact on the creators and owners of sound recordings and musical works'—particularly if the exception was extended to sampling. ARIA strongly recommended that the ALRC consider the 'inevitable disruption to existing licensing practices and the harm that such changes will bring to artists and copyright owners if such an exception is introduced'.[48] Australian Copyright Council observed that

> creating a new fair dealing exception for quotation to facilitate mashups and other user-generated content would need to be justified on significant public policy grounds. For example, freedom of expression. In our submission, an exception simply to legitimate common consumer behaviour would sit oddly as a fair dealing.[49]

9.38 The iGEA considered that an exception for quotation would, for example, damage developing markets for 'clip licensing' of video games.[50] Particular concerns were expressed about the impact of a quotation exception on other markets for audiovisual content. Australian Film/TV Bodies stated that to allow for quotation outside the existing fair dealing purposes, for example to 'use an extract from a television broadcast in another television broadcast, is likely to significantly curtail

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43 Australian Copyright Council, *Submission 654*.
44 Music Council of Australia, *Submission 269*.
45 Cricket Australia, *Submission 700*.
46 ARIA, *Submission 731*; APRA/AMCOS, *Submission 664*; APRA/AMCOS, *Submission 247*.
47 APRA/AMCOS, *Submission 247*.
48 ARIA, *Submission 731*.
49 Australian Copyright Council, *Submission 219*.
50 iGEA, *Submission 741*.

rights holders' legitimate licensing markets' as most content licensed between TV stations 'consists of short extracts of footage that is less than 60 seconds'.[51]

9.39 COMPPS expressed specific concerns that a broad interpretation of what amounts to a 'quotation' might permit unlicensed third parties to communicate highlights of sporting events 'under the guise of fair dealing for quotation' and submitted that this would 'detrimentally and unreasonably impact upon the exploitation of such rights by COMPPS' members'.[52] Individual sporting organisations also opposed a quotation exception on this basis.[53]

9.40 Some stakeholders considered that a quotation exception may be inconsistent with the three-step test provided by the *Berne Convention*.[54] Australian Film/TV Bodies submitted

> If free usage of short 'quotations' becomes permissible, then rights holders operating in the sector are likely to lose their main source of revenue. Such an outcome is not consistent with the second and third steps of the Three-Part Test.[55]

9.41 The ALRC does not find the arguments against a quotation exception to be convincing. As discussed below, there are many examples of uses that may be considered fair but are not covered by existing exceptions, and the substantiality principle is insufficient to protect these uses. Complaints that a quotation exception would interfere with licensing models and conflict with the *Berne Convention* disregard the effect of the application of the fairness factors.

Quotation as an illustrative purpose

9.42 Arguments may be raised that it is unnecessary to include quotation as an illustrative purpose because it is fundamental to assessing fair use, including in relation to the other illustrative purposes. However, the ALRC considers that it is important to signal that quotation may be fair use, without having to be shown as being for any defined purpose.

9.43 The arguments in favour of including quotation as an illustrative purpose parallel those for introducing a fair use exception more generally. These include that fair use provides a standard that is flexible and technology-neutral, promotes transformative uses, assists innovation and better aligns with reasonable consumer expectations .[56]

9.44 Chapter 4 discusses how introducing fair use is consistent with the framing principles that have informed this Inquiry. Quotation lies at the heart of the concept of fair use and the recommendation to include quotation as an illustrative purpose is also consistent with these principles.

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51 Australian Film/TV Bodies, *Submission 739*.
52 COMPPS, *Submission 634*.
53 AFL, *Submission 717*; Cricket Australia, *Submission 700*.
54 Australian Film/TV Bodies, *Submission 739*; Australian Copyright Council, *Submission 219*.
55 Australian Film/TV Bodies, *Submission 739*. The three-step test is discussed in Ch 4.
56 See Ch 4.

9.45 While quotation is not listed as an illustrative purpose in the US *Copyright Act 1976* (US), it is listed in the Israeli fair use provision,[57] and the term is used in the proposed United Kingdom quotation exception, without being limited to a particular purpose.[58]

9.46 Expressly providing more scope for quotation in Australian copyright law will ensure that Australia complies with art 10(1) of the *Berne Convention*, while continuing to comply with the three-step test.[59]

9.47 Providing quotation as an illustrative purpose may also be criticised on the basis that without further reference to a particular purpose, such as criticism or review, the term quotation may lack sufficient meaning. That is, without further context it may refer simply to the act of using any part, rather than the whole, of a work.

9.48 This point echoes fears that the concept of quotation may, in some way, supersede that of substantiality as the threshold for infringement. In the ALRC's view, however, this should not be a concern.

9.49 The High Court, in *Network Ten Pty Ltd v TCN Channel Nine*, in considering the appropriate scope of copyright protection of a television broadcast, reaffirmed the importance of keeping separate the concepts of substantial part and fair dealing. That is, copying does not constitute an infringement, and the defences of fair dealing do not come into operation, unless a substantial part is copied.[60] This reasoning would apply to a fair use or fair dealing exception where a quotation is at issue.

9.50 The 'quotation right' provided for by the *Berne Convention*[61] is not limited to text-based copyright material. Professor Kathy Bowrey observed that the 'ordinary meaning of quotation is primarily understood in relation to textual and verbal practice' and suggested that the wording of the illustrative purpose should be extended to state 'quotation and illustration'.[62]

9.51 The ALRC considers that it is unnecessary to introduce the term 'illustration' as courts will be readily able to adapt understandings of quotation to non-literary material—in the same way that the High Court observed that questions of the quality of what is taken can include the 'potency' of images or sounds.[63]

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57 *Copyright Act 2007* (Israel) s 19(a).

58 Intellectual Property Office (UK), *New Exception for Quotation* (2013).

59 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 9(2). The implications of art 10(1) are discussed in more detail below, in relation to a fair dealing for quotation exception.

60 *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273, [21].

61 Ricketson has noted that due to the mandatory character of the exception, 'article 10(1) is the one *Berne Convention* exception that comes closest to embodying a "user right" to make quotations': S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 788–789.

62 K Bowrey, *Submission 554*.

63 *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273, [47].

9.52 The ALRC recommends that 'quotation' be one of the illustrative purposes listed in the fair use provision. This will signal that a use for quotation is more likely to be fair than a use not for quotation. However, all the fairness factors must be considered in determining whether a particular use is fair. As discussed in Chapter 5, the fact that a particular use falls into, or partly falls into, one of the categories of illustrative purpose, does not necessarily mean the particular use is fair. It does not even create a presumption that the use is fair. A consideration of all the fairness factors remains necessary in determining whether the use is fair.

Fair dealing for the purpose of quotation

9.53 The ALRC recommends that, if fair use is not enacted, the *Copyright Act* should be amended to introduce a new fair dealing exception. This would combine existing fair dealing exceptions and introduce new prescribed purposes, including 'quotation', which may be held to be fair dealing.

9.54 The following section discusses whether, in view of the *Berne Convention* and in the light of proposed Australian and UK formulations of a quotation exception, any additional matters should be included in a fair dealing for quotation provision.

The *Berne Convention* and quotation

9.55 Article 10(1) of the *Berne Convention* 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.[64]

9.56 Commentators have suggested previously that art 10(1) of the *Berne Convention* could be considered as the basis for new exceptions permitting quotation in commercial works;[65] or fair dealing for the purpose of quotation.[66]

9.57 Article 10(1) is generally considered to impose an obligation to provide an exception for fair quotation.[67] That is, unlike the other exceptions provided for under the *Berne Convention*, fair quotation is framed as a mandatory provision, as 'something that must be provided for under national laws, rather than as something that may be done at the discretion of national legislators'.[68]

9.58 The *Berne Convention* does not place any limitation on the amount that may be quoted under art 10(1), provided it does not exceed that justified by the purpose.

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

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

66 E Adeney, 'Appropriation in the Name of Art: Is a Quotation Exception the Answer?' (2013) 23(3) *Australian Intellectual Property Journal* 142.

67 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 783. This interpretation was contested by some stakeholders: ARIA, *Submission 241*.

68 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [16.100].

Ricketson and Ginsburg state that, in some circumstances, quotation of a whole work may be justified.[69]

9.59 The 'quotation right' provided for by the *Berne Convention*[70] is not limited to text-based copyright material. The word 'works' is used to encompass 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.

9.60 In contrast, COMPPS and the AFL considered that a fair dealing exception for quotation should not apply to all copyright material. COMPPS stated, for example, that there is 'no legitimate reason for unlicensed third parties to be able to use audio, audio visual or photographic content for quotation purposes'.[71]

9.61 The text of art 10(1) makes it clear that a quotation must meet three requirements to be permitted under the provision.[72] These are, first, that the work in question must have been 'lawfully made available to the public'; secondly, that the making of the quotation must be 'compatible with fair practice'; and, thirdly, that the extent of the quotation must 'not exceed that justified by the purpose'. Questions may be raised about whether these criteria should be incorporated in any new exception covering quotation.

9.62 The first requirement, that the work be 'lawfully available to the public', is not a requirement of existing fair dealing exceptions under the *Copyright Act*. The art 10(1) requirement includes the making available of works by any means, not simply through publication.[73]

9.63 Ricketson and Creswell observe that, while the fair dealing for criticism or review exception in s 41, for example, does not distinguish between published and unpublished works as 'it seems clear from the cases that an unauthorised dealing with an unpublished work will not often be regarded as "fair", particularly if the greater part or the whole of the work is reproduced'.[74]

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69 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 788. For example, representative pictures of particular schools of art in a text on the history of art, or cartoons or short poems where quoted in a wider work of commentary or review: 788.

70 Ricketson has noted that due to the mandatory character of the exception, 'article 10(1) is the one *Berne Convention* exception that comes closest to embodying a "user right" to make quotations': Ibid, 788–789.

71 AFL, *Submission 717*; COMPPS, *Submission 634*.

72 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 785–786.

73 'Thus, if a dramatic or musical work is performed in public or broadcast, Article 10(1) should permit the making of quotations from it by a critic or reviewer who takes down passages verbatim for use in his or her review': S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003), prepared for the World Intellectual Property Organization Standing Committee on Copyright and Related Rights Ninth Session, 12.

74 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.50].

9.64 In any case, there seems to be no need to limit a fair dealing for quotation exception to material lawfully available to the public, as the requirement under the *Berne Convention* should be seen as providing the minimum scope of a quotation exception. There is nothing to prevent a broader exception, within the confines of the three-step test.[75]

9.65 The second and third requirements are, in the ALRC's view, satisfied by the recommended fairness factors, whether these are incorporated in fair use or new fair dealing exceptions. As discussed in Chapter 4, the ALRC considers that its recommended fair use exception (and fairness factors) are consistent with the three-step test.

9.66 The concept of 'fair practice' can be seen as essentially applying the three-step test. Ricketson observes that these criteria, in art 9(2), appear to be equally applicable in determining whether a particular quotation is 'fair'.[76] The requirement that the extent of the quotation must 'not exceed that justified by the purpose' is implicit in the fairness factors. In this regard, Ricketson observes that art 10(1) could cover 'much of the ground' that is covered by fair use in the US.[77]

Framing a quotation exception

9.67 A number of models for framing an Australian quotation exception have been suggested. For example, in 2011, the Copyright Council Expert Group discussed an exception permitting the quotation of copyright material in commercial works, before recommending the development of a non-commercial transformative use exception.[78]

9.68 Associate Professor Elizabeth Adeney has proposed draft clauses providing fair dealing exceptions for quotation.[79] The exceptions would provide that a use would not constitute copyright infringement if:

- it is for the purpose of quotation;
- the quotation constitutes a fair dealing with the quoted material; and
- sufficient acknowledgement of the quoted material is made.

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75 The Australian Copyright Council observed that, if a new fair dealing exception for quotation went beyond the parameters of art 10(1) of the *Berne Convention*, it would still be necessary to establish that it was for 'certain special cases' within the meaning of the first limb of the three-step test: Australian Copyright Council, *Submission 219*.

76 See, eg, S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003), prepared for the World Intellectual Property Organization Standing Committee on Copyright and Related Rights Ninth Session, 13.

77 See, eg, Ibid, 13.

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

79 E Adeney, 'Appropriation in the Name of Art: Is a Quotation Exception the Answer?' (2013) 23(3) *Australian Intellectual Property Journal* 142, 156. Her model provides for separate exceptions in relation to: (i) reproductions and communications of works; and (ii) and performances of works.

9.69 Both provisions would also provide a list of discretionary matters to consider in determining whether the use of a 'quotation' satisfies 'fair dealing'. These include:

- whether the quotation has been used in good faith;
- the extent of the quotation and whether or not this exceeds the purpose for which the quotation is used;
- the degree to which the quotation interferes with the commercial interests of the copyright owner of the quoted work; and
- whether the use of the quotation furthers the community interest in free speech and the freedom of artistic expression.[80]

9.70 Adeney considers that any exception for quotation would have to address a number of complexities, including whether the provisions should apply only to published works; how 'quotation' is to be defined; and how an exception for quotation would interact with other fair dealing exceptions.[81] She states that specific exceptions for quotation

> would support or extend other fair dealing arguments in the areas of scholarship and debate and, like the recently implemented exception for parody and satire, it would have the capacity to soften the impact of copyright in the arts sphere. This capacity would be strengthened if a consideration of the freedom of art were to be mandated, going to the question of fair dealing in the quotation context. The defence would also bring Australian copyright law into closer alignment with both the European jurisdictions and the *Berne Convention*/TRIPS requirements.[82]

9.71 A simpler model is provided by a proposal in the UK, released in the form of draft legislation by the Intellectual Property Office in 2013.[83] The UK Government intends to amend its fair dealing exception for criticism and review, reframing it as a quotation exception for purposes such as, but not limited to, criticism and review.

9.72 The stated aim is to ensure that copyright 'does not unduly restrict the use of quotations for reasonable purposes that cause minimal harm to copyright owners, such as academic citation or hyperlinking, without undermining the general protection provided for copyright works'.[84]

> The exception permits the use of a quotation from a work for purposes such as criticism and review. In one dimension this slightly narrows the current criticism and review exception by permitting use only for the purpose of quotation. In another it slightly widens it by allowing such quotations to be used for purposes other than, but similar to, criticism and review.[85]

9.73 The proposed UK model would be narrower in some respects than the Australian fair dealing for criticism or review exception—in requiring that the

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80 Ibid, 156.
81 Ibid, 158.
82 Ibid, 159.
83 Intellectual Property Office (UK), *New Exception for Quotation* (2013), [1].
84 Ibid, [2].
85 Ibid, [5].

copyright material has already been 'lawfully made available to the public'; and excluding uses not 'in accordance with fair practice' or beyond the extent required by the specific purpose. As discussed above, these requirements are set out in art 10(1) of the *Berne Convention*.[86]

9.74 Australian Film/TV Bodies considered the UK proposal to be 'unsatisfactory', and stated that without limits on the purposes for, and extent to which, quotations may be used, the model 'runs the risk of exempting, on [a] discretionary fairness basis, any act of using part, rather than the whole, of a work'.[87]

9.75 Other stakeholders also expressed concern about the scope of a quotation. The National Association for the Visual Arts stated that a quote should be defined to relate to a part, and not the whole of a work.[88] In contrast, Adeney states that her exceptions would allow the taking of the whole material under certain circumstances because 'where the source material is short, or where what is quoted is a picture or photograph, quotation of only part of the material is unlikely to fulfil the purpose that the quoting party wishes to achieve'.[89]

9.76 The Queensland Law Society noted that the ordinary meaning of quotation involves 'no purposive, qualitative or quantitative limitation'. The Society submitted that without some context, an exception based on quotation 'might evolve to be broader than may be intended' and that any defence should be 'framed by reference to a quantitatively and qualitatively reasonable act which is for the purpose of acknowledging the original or some circumstance or person connected with the original'.[90]

9.77 In contrast, Associate Professor Mathew Rimmer has written that the term 'quotation' alone may be too restrictive. He stated that the term is 'somewhat anachronistic, and does not necessarily capture a full range of transformative uses—such as forms of digital sampling, remixes, and mash-ups'.[91]

9.78 Some formulations of the concept of a quotation attempt to provide more clarity. Adeney defines 'quotation' for the purposes of her proposed quotation exception as being 'for the purpose of supporting an intellectual commentary or artistic idea contained in the quoting work or other subject matter'.[92] She explains that the idea of the quotation 'supporting an intellectual commentary' covers the use of quotations in most contexts and states that the 'notion of supporting an artistic idea expresses the

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86 See also art 5(d) of the EU *Copyright Directive*: *Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, (entered into force on 22 June 2001).

87 Australian Film/TV Bodies, *Submission 739*.

88 NAVA, *Submission 655*.

89 E Adeney, 'Appropriation in the Name of Art: Is a Quotation Exception the Answer?' (2013) 23(3) *Australian Intellectual Property Journal* 142, 156.

90 Queensland Law Society, *Submission 644*.

91 M Rimmer, 'An Elegy for Greg Ham: Copyright Law, the Kookaburra Case, and Remix Culture' (2012) 17(2) *Deakin Law Review* 383, 405.

92 E Adeney, 'Appropriation in the Name of Art: Is a Quotation Exception the Answer?' (2013) 23(3) *Australian Intellectual Property Journal* 142, 156. That is, the quotation 'must be distinguishable as such within the quoting work or subject matter and must be subsidiary to the quoting work or subject matter'.

need for the quoting work to have its own artistic logic and intellectual structure into which the quotation is interpolated in a supportive role'.[93]

9.79 A final issue in framing a fair dealing for quotation exception concerns the role of acknowledgement. The existing fair dealing exceptions in ss 41, 42, 44, 45, 103A and 103B of the *Copyright Act* require 'sufficient acknowledgement' to be made of the copyright material used. The models for a quotation exception discussed above include such a requirement.

9.80 Some stakeholders submitted that any new fair dealing for quotation exception should also require sufficient acknowledgement.[94] In contrast, Robert Xavier suggested that there should not be any 'express requirement for attribution as a threshold test' in a quotation exception, because

> Attribution will be required by the moral rights provisions and it is appropriate that the attribution requirement be subject to the reasonableness defence, as it is not always necessary to provide express attribution (for example, where the identity of the original author will be obvious to the audience of the work in which the quote is used).[95]

Fair dealing and quotation

9.81 Quotation should be considered under the recommended fair use exception where a range of factors can be balanced in determining whether a particular use is permitted.

9.82 The ALRC also recommends that, if fair use is not enacted, the *Copyright Act 1968* (Cth) should be amended to introduce a new fair dealing exception that would combine existing fair dealing exceptions with new fair dealing provisions.[96] This new fair dealing exception should include quotation as a prescribed purpose, which may be held to be fair dealing. This quotation exception should supplement, and not replace, any of the existing fair dealing purposes, such as criticism or review.

9.83 The exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the fair use exception. Applying the two exceptions to instances of quotation should, therefore, produce the same result. However, there will be some transformative uses of copyright materials that are not quotation, in that there is no attempt to reference the original work. These may be protected by the fair use exception, but not by a fair dealing quotation exception.

9.84 The ALRC does not consider that it is necessary or desirable to further define the term 'quotation'. The term alone is adequately understood and any attempt to define it would run the risk of introducing new complexity without any additional

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93 Ibid, 156–157.

94 NAVA, *Submission 655*; International Association of Scientific Technical and Medical Publishers, *Submission 560*.

95 R Xavier, *Submission 531*.

96 See Ch 6.

benefit. Neither the UK proposal nor the Israeli fair use provision provide any further definition of the term.

9.85 The ALRC considers that a new fair dealing for quotation exception does not need to expressly include a requirement of sufficient acknowledgement. Acknowledgement is a matter that can be taken into account under the fairness factors.

9.86 As discussed in Chapter 5, whether or not the source of the copyright material used is acknowledged, and the extent of the acknowledgement, may be a factor in a fair use determination—for example, in considering the 'purpose and character of the use' under the first fairness factor. The moral rights provisions also require attribution of authorship and performership in many circumstances.

Recommendation 9–1 The fair use or new fair dealing exception should be applied when determining whether a quotation infringes copyright.

10. Private Use and Social Use

Contents

Summary

10.1 The fair use and new fair dealing exceptions are suitable exceptions to apply to determine whether an unlicensed private use of copyright material infringes copyright.

10.2 These fairness exceptions are considerably more versatile than the existing exceptions for private use, and they are not confined to technologies or practices that change rapidly. They also allow for the consideration of social norms, and permit productive uses that do not harm rights holders by usurping their markets.

10.3 The existing exceptions for time shifting broadcasts and format shifting other copyright material should be repealed.

10.4 The ALRC also recommends that ‘non-commercial private use’ should be an illustrative purpose in the fair use exception, to signal that many private uses may be fair. This does not mean that all private uses are fair, nor will it create a presumption that a private use is fair. Sometimes, a private use will harm a market that a rights holder alone should be entitled to exploit, and will not be fair. But a private use is more likely to be fair than a non-private use. Some unlicensed private uses are also very

common, and widely thought to be fair. 'Non-commercial private use' is therefore a suitable purpose to include in the list of purposes in fair use.

10.5 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception that includes 'non-commercial private use' as a prescribed purpose. Applied to a private use, this fair dealing exception will have the same outcome as fair use.

10.6 Private use is a much narrower concept than social use. Some social uses of copyright material—for example, in creating and sharing user-generated content—may be fair in some circumstances, particularly when transformative. Social uses can also be considered under the fair use exception. However, the ALRC does not recommend that 'social uses' be an illustrative purpose in the fair use exception, because often social uses will harm rights holders' markets and will not be fair use.

10.7 Importantly, piracy—such as exchanging music, films and television programs with strangers—is neither private use, nor fair use. The exceptions in this Report do not permit or condone piracy.

Current law and criticisms

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

10.9 Format shifting exceptions were enacted in 2006. They allow for the copying, in limited circumstances, of books, newspapers and periodicals,[1] photographs,[2] videotapes,[3] and sound recordings.[4] These exceptions have common elements. For example, the exceptions apply only if the owner of the original makes the copy, and the original is not an infringing copy. This raises questions about whether others should be able to make these copies for the owner's private use.[5]

10.10 Some of these conditions may mean the exceptions do not apply to copies stored on remote servers in 'the cloud'. For example, the exception for format shifting of sound recordings only applies if the copy is to be used with a device owned by the user.[6] Further, the exception for books, newspapers and periodicals only allows users to make one copy in each format, and storing content in the cloud may require multiple copies.[7]

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

1 *Copyright Act 1968* (Cth) s 43C.
2 Ibid s 47J.
3 Ibid s 110AA.
4 Ibid s 109A.
5 This is discussed later in this chapter, and more broadly in Ch 7.
6 *Copyright Act 1968* (Cth) s 109A(1)(b).
7 Ibid s 43C(1)(e).
8 Ibid s 110AA(1)(a).

picture quality and features provided in commercially produced digital film content'.[9] Many consumers find it surprising that the law prohibits them from copying a film they own from one computer or device to another, without a licence.

10.12 The time shifting exception in s 111 of the *Copyright Act*, which was also enacted in 2006, provides an exception for the making of 'a cinematograph film or sound recording of a broadcast solely for private use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made'.[10]

10.13 This exception is confined to recordings of 'a broadcast', defined to mean a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* (Cth). By ministerial determination, a service that makes available television and radio programs using the internet is not a broadcasting service under the *Broadcasting Services Act*.[11] This raises the question of whether the time shifting exception in the *Copyright Act* should apply to some content made available online.[12] Another important question is how this exception should operate with new technologies and services, such as the cloud.[13]

10.14 The ADA and ALCC submitted that 'the fact that the provisions introduced in 2006 are already technologically redundant and do not address current consumer practices argues in favour of a flexible, technology neutral private copying provision'.[14]

10.15 The existing exceptions for time shifting and format shifting have also been criticised for their complexity.[15]

Fair use

10.16 The ALRC recommends that fair use or the new fair dealing exception should be used to determine whether an unlicensed private use of copyright material infringes copyright. Both of these exceptions call for an assessment of the fairness of a particular use of copyright material and the consideration of relevant fairness factors. Applied to a particular private use, both exceptions should have the same result.

10.17 The benefits of fairness exceptions are discussed more generally in Chapter 4. For private uses, they have the particular benefit of being flexible and technology neutral, and better able to account for social norms.

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

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

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

12 The application of broadcast exceptions to the transmission of television or radio programs using the internet is discussed in Chs 18 and 19.

13 See Ch 7.

14 ADA and ALCC, *Submission 213*.

15 For example, Telstra Corporation Limited, *Submission 222*; R Wright, *Submission 167*.

10.18 The fair use provision should include 'non-commercial private use' as an illustrative purpose. This is a suitable purpose to include, because many private uses of copyright material are unlikely to have a significant effect on rights holders' markets. Where they do, they are unlikely to be fair.

10.19 Proposals similar to these recommendations were made in the Discussion Paper.[16] On the whole, stakeholders who supported the introduction of fair use agreed that private uses should be considered under the exception, and supported the inclusion of a private use illustrative purpose.[17] eBay submitted that the ALRC's approach was 'a practical solution to the difficult problem created by the existing framework'.[18] Telstra observed that current exceptions for private use of copyright material are

> complex, difficult to navigate and out of step with current and likely future customer expectations and practices. Telstra believes that allowing consumers fair access to legal content—in a format, on a device, using a technology and at a time that suits them—will stimulate innovation and continue to grow the content market.[19]

10.20 The Australian Communications Consumer Action Network submitted that

> the current private or domestic use exception needs to be replaced with a fair dealing or fair use provision that is technology-neutral and that allows for the increasingly diverse ways that the public might consume and arrange content for their private enjoyment.[20]

10.21 Stakeholders who did not support the introduction of fair use, also said there should not be a private use illustrative purpose in the fair use provision.[21] These stakeholders submitted that fair use or a fair dealing for private use would be too broad and too uncertain; the current exceptions are adequate, and strike the right balance; Parliament should decide on the scope of exceptions, not courts; and exceptions for private use should be carefully prescribed and confined.

10.22 Stakeholders who did not support fair use generally did not discuss what the exception should look like if it were to be enacted, but some expressed particular concern about including private and domestic use as an example in the provision. Some

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16 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013) Ch 9.

17 For example, ADA and ALCC, *Submission 868*; Intellectual Property Committee, Law Council of Australia, *Submission 765*; eBay, *Submission 751*; Choice, *Submission 745*; Optus, *Submission 725*; Electronic Frontiers Australia, *Submission 714*; ACCAN, *Submission 673*; Communications Alliance, *Submission 652*; Cyberspace Law and Policy Centre, *Submission 640*; Telstra Corporation Limited, *Submission 602*; Google, *Submission 600*; National Archives of Australia, *Submission 595*; Museum Victoria, *Submission 522*. See also: Telstra Corporation Limited, *Submission 222*; EFA, *Submission 258*; iiNet Limited, *Submission 186*; Law Institute of Victoria, *Submission 198*. iGEA members had differing views on whether there should be a fair use exception, but were reportedly unanimous is opposing having 'private and domestic use' as an illustrative purpose: iGEA, *Submission 741*.

18 eBay, *Submission 751*.

19 Telstra Corporation Limited, *Submission 222*.

20 ACCAN, *Submission 194*.

21 For example, ABC, *Submission 775*; Foxtel, *Submission 748*; News Corp Australia, *Submission 746*; iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; AFL, *Submission 717*; Arts Law Centre of Australia, *Submission 706*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; COMPPS, *Submission 634*.

of the arguments for and against fairness exceptions for private uses are discussed further below. In considering these arguments, the ALRC also discusses the application of fair use to private uses.

10.23 Including 'non-commercial private use' in the list of illustrative purposes in the fair use provision will signal that a particular use that is non-commercial and private is more likely to be fair than a use which is not. While not determinative, a finding that a use is private will favour fair use.

10.24 However, this does not create a presumption that the use is fair. It will be crucial to consider the fairness factors. These factors may often weigh against a finding of fair use. For example, failing to pay for a private use that is commonly licensed by a rights holder may harm the rights holder's market. Also, many private uses of copyright material may not be transformative. These factors may weigh against a finding of fair use.

10.25 Nevertheless, generally a private use will be more likely to be fair than a non-private use. Further, as discussed below, there are widespread community expectations that some private uses of legally acquired copyright material should not infringe copyright. In the ALRC's view, 'non-commercial private use' is a suitable illustrative purpose to include in the fair use provision.

10.26 Some called for the scope of the private use concept to be made clear in the Act. However, the ALRC considers that the meaning of the phrase is sufficiently clear, and should not need to be defined in the Act. For both fair use and fair dealing, the listed purposes should be given a broad interpretation, and the focus of the fairness analysis should be on whether the use is fair, having regard to the fairness factors.

10.27 In the Discussion Paper, the ALRC proposed an illustrative purpose for 'private and domestic use'. The ALRC now recommends that the purpose be 'non-commercial private use', without the word 'domestic'. The ALRC does not see a great difference in the two phrases; they are intended to capture the same type of use. However, although many private uses will no doubt continue to occur in the domestic sphere—in the home—many may not. Omitting the word domestic should avoid the suggestion that a private use must occur on domestic premises.[22] The popularity of remote and mobile computing would make such a limitation anachronistic.

10.28 By omitting the word 'domestic' from this illustrative purpose, the ALRC also does not mean to imply that domestic uses among family members or members of the same household cannot be, or are unlikely to be, fair use. The word 'private' is intended to differentiate the use from public uses, rather than to privilege uses that are confined entirely to the one person.[23]

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22 *Copyright Act 1968* (Cth) s 10 defines 'private and domestic' to mean 'private and domestic use on or off domestic premises', but the ALRC considers this should be clear on the face of the fair use and new fair dealing exceptions.

23 Some stakeholders also submitted that if the word domestic were included, the purpose should read 'private *or* domestic', rather than 'private *and* domestic'. This would make the purpose more consistent with the other listed purposes, and ensure the purpose was not given an overly confined interpretation: For example, Google, *Submission 600*; ADA and ALCC, *Submission 586*.

10.29 Fair use could be enacted without including an illustrative purpose for private use. The US fair use provision and the fair use provisions in other countries do not have an illustrative purpose for private use. Private uses can be considered under these fair use exceptions anyway, and some have been held to be fair. Perhaps most notably, the private copying of broadcast television on home video recorders was held to be fair in the US Supreme Court in 1984,[24] 22 years before a time shifting exception was enacted in Australia.

10.30 For reasons set out below, the ALRC considers that including 'non-commercial private use' in the list of illustrative purposes would represent an important clarification of the fair use doctrine. It is not intended to substantially broaden the scope of fair use, as it applies in the United States.

International law

10.31 Fair use has been adopted in a number of countries, most notably the US, and is consistent with Australia's international legal obligations.[25]

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

> It shall be a matter for legislation in the countries of the Union to permit the reproduction in such works
>
> (a) *for private use*;
>
> (b) for judicial or administrative purposes;
>
> (c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work.[26]

10.33 Professors Sam Ricketson and Jane Ginsburg pointed out that this proposal elicited a wide range of amendments. Some sought to restrict the scope of the exception; others to expand it. France, for example, proposed the substitution of the words 'individual or family use' for the words 'private use', to avoid the possibility of commercial enterprises claiming that their copying was for private purposes. These differences, Ricketson and Ginsburg stated, 'perhaps made delegates more ready to consider a proposal advanced by the UK which sought to embrace all possible exceptions within a single generalized exception consisting simply of paragraph (c) of the programme amendment'.[27]

10.34 The provision drafted by the Committee of Government Experts seems to countenance private use exceptions that are not confined by the limitations in paragraph (c)—for example, 'not contrary to the legitimate interests of the author'. The

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24 *Sony Corp of America v Universal City Studios, Inc (1984) 464 US 417*.

25 See Ch 4.

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

27 Ibid.

final provision that was later accepted and became art 9(2), and the fair use exception recommended by the ALRC, are both narrower than the provision drafted by the Committee of Government Experts. The ALRC only proposes that unlicensed private uses be permitted where the use is fair, having regard to the fairness factors. However, it is interesting to note that private use has long been considered a likely subject of exceptions to copyright, and sometimes in terms considerably broader than recommended by the ALRC.

Social norms, user rights and new technologies

10.35 Many common private uses of legally acquired copyright material infringe Australian copyright law. Some of these private uses are widely thought by the public to be fair. This is one factor that suggests that some private uses of copyright material should not infringe copyright.

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

> technology and the myriad applications available to consumers provide consumers with new, cheap (often free) ways to use and store material, including copyright material, particularly for personal use.[28]

10.37 Expanding private use exceptions would simply legalise what consumers are already doing, some said. Many submitted that the law should take account of consumer expectations. Commercial Radio Australia, for example, said:

> The current copyright framework cannot be considered fit for the digital age when so many users repeatedly breach copyright, simply by shifting a piece of content from one device to another. Users expect to be able to store content on a variety of devices—including computers, mobile phones, tablets—and in a variety of locations, such as on local servers and in the cloud. Copyright law should recognise these changing use patterns and reflect them, to permit private individuals to take advantage of new technologies and storage devices available.[29]

10.38 The ADA and ALCC submitted that the current private use exceptions 'draw arbitrary lines not consistent with ordinary consumer behaviour: making the law ridiculous'.[30]

10.39 Professor Kathy Bowrey submitted that changing technologies, often beyond the consumer's control, can 'effectively frustrate or terminate access to legitimate works'. An ebook bought for one device, for example, will often not work on another. Bowrey said it is 'hard for consumers to understand why they do not have the right to maintain

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28 NSW Young Lawyers, *Submission 195*.

29 Commercial Radio Australia, *Submission 132*.

30 ADA and ALCC, *Submission 586*. Also, ADA and ALCC, *Submission 213*: 'It seems likely that the majority of Australian consumers aren't aware that many of the ways in which they enjoy and engage with copyright works fall outside of the scope of what is permitted under copyright law. ... If consumers widely believe they have the 'right' to copy content they've acquired legally for personal enjoyment, and it's generally recognised as acceptable consumer behaviour, copyright laws should reflect this.'

functional access to content they have purchased, because of technical decisions made by third parties'.[31]

10.40 Ericsson submitted that consumers 'increasingly expect to be able to consume creative content on demand, anytime, any device and anywhere' and the ability to copy lawfully acquired content within the private sphere is an 'integral and necessary step of modern consumer behaviour'.[32]

10.41 Professor Pamela Samuelson, discussing US law, has said that 'ordinary people do not think copyright applies to personal uses of copyrighted works and would not find acceptable a copyright law that regulated all uses they might make of copyrighted works'.[33] Other US academics refer to research that suggests that 'most members of the public ... believe that personal use copying is acceptable as long as the copies are not sold'.[34] There is a core belief, Ashley Pavel argues, that strictly private uses of a purchased copy are 'none of the copyright owner's business'.[35]

10.42 Laws that are widely ignored also lower the community's respect for the law more generally, and particularly other copyright laws. The force of the message that peer-to-peer file sharing of copyright material between strangers is illegal may be diluted by the message that copying a purchased DVD to a computer for personal use is also illegal. The Explanatory Memorandum for the Copyright Amendment Bill 2006 stated that failure to recognise such common practices as time and format shifting 'diminishes respect for copyright and undermines the credibility of the Act'.[36]

10.43 Many stakeholders made these points. The ACCC said that failing to recognise common practices, such as format shifting purchased music or time shifting a broadcast, 'diminishes respect for copyright and undermines the credibility of the Act'.[37] The Law Institute of Victoria said that, 'if the law significantly diverges from widespread expectation and common community practice, then there is a serious risk that credibility for copyright law will become undermined'.[38] Similarly, eBay submitted:

> The respect for copyright and the credibility of the Act depend on its ability to accommodate the ordinary use and enjoyment of legally obtained digital material by ordinary members of the public.[39]

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31 K Bowrey, *Submission 94*.
32 Ericsson, *Submission 151*.
33 P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537, 2591.
34 A Pavel, 'Reforming the Reproduction Right: The Case for Personal Use Copies' (2009) 24 *Berkeley Technology Law Journal* 1615, 1617.
35 Ibid, 1617. See also A Perzanowski and J Schultz, 'Copyright Exhaustion and the Personal Use Dilemma' (2012) 96(6) *Minnesota Law Review* 2067, 2077.
36 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 6.
37 ACCC, *Submission 165*.
38 Law Institute of Victoria, *Submission 198*.
39 eBay, *Submission 751*.

10.44 Choice suggested that many consumer expectations with respect to private copying were 'perfectly reasonable'.[40]

> If consumers feel like copyright law is out-of-touch or even unjust, then their respect for it will diminish. This may make it easier for consumers to justify other activities, such as piracy, as they already feel that copyright law is nothing to be taken seriously. This ultimately undermines the rights of copyright owners and also the benefits to consumers of ensuring the creators of copyright material are properly rewarded.[41]

10.45 However, other stakeholders were sceptical of the relevance of social norms to copyright policy. Some stressed that consumer expectations and behaviour should not justify changes to the law. The Australian Directors Guild said it was alarming and simplistic to consider community standards: 'It may be common practice for people to smoke Marijuana but should we make it legal? It may be common practice for teenagers to drink underage but should it be made legal?'[42] Foxtel submitted:

> While we understand the Government's desire to ensure that Australian copyright law keeps pace with legitimate consumer practices, simply because digital technology is available which makes copying and storing content easier does not mean that the law should be amended to legitimise infringing conduct.[43]

10.46 Others said that, if the public does not know that common practices are illegal, then this is not an argument for law reform, but for a public awareness campaign.[44]

10.47 The ALRC agrees that social norms should not dictate the law. But the law should at least account for social norms—policy makers must consider community standards. If a practice is very widespread, and commonly thought to be harmless, then this should be considered when determining whether the practice should be prohibited. It may also be a relevant factor to consider when applying fair use or fair dealing.

10.48 By appealing to fairness and requiring consideration of real market harm, fair use and the new fair dealing exception better account for these social norms than the existing prescriptive and confined private copying exceptions.

A single, technology-neutral provision

10.49 Australia's private copying exceptions should be less complex and more flexible. Currently, they are complex, prescriptive, and tied too closely to specific technologies.

10.50 A number of stakeholders agreed that a single, technology-neutral exception for private use, though not necessarily fair use, would simplify and clarify the *Copyright Act*. The ABC, for example, submitted that 'a single, technology-neutral, format

40 Choice, *Submission 745*.
41 Ibid.
42 Australian Directors Guild, *Submission 594*.
43 Foxtel, *Submission 245*.
44 COMPPS, *Submission 266*.

shifting exception with common restrictions that reflects the underlying policy of the exception would be preferable'.[45]

10.51 A technology-neutral approach to copyright policy might seem to suggest that whatever users may do using technology in their own home, they should be able to do using technology stored remotely. Individuals are increasingly using cloud computing services to store copies of copyright material, enabling consumers to access their content from multiple computers and devices more easily. This also raises the question, discussed in Chapter 7, of third parties facilitating private use.

10.52 Some stakeholders said that private copying exceptions should focus on the purpose of the use, rather than on any particular technology or the type of material being used.[46] This, it was said, would allow the law to adapt to new technologies.

10.53 Some called for a more technology-neutral application of time shifting exceptions, saying that they should not be confined to broadcast material. Ericsson submitted, for example, that a time shifting exception 'should apply irrespective of content delivery method or underlying technology' and that it 'strongly believes that copyright law should adhere to a technology neutral principle, where the basis of an exception should be the purpose rather than the technology itself'.[47]

10.54 The focus should be on the nature of the activity, others submitted, rather than the type of content or platform. Is a service merely a recording and storage facility, or something more?[48]

10.55 The Internet Industry Association submitted that, if advertiser-supported broadcast television content were made available on the internet, without requiring payment of a subscription fee to access, then time shifting exceptions to copyright should apply.[49] The ABC made a similar point, but said the exception should be confined to 'ephemeral content'—a scheduled stream of content, rather than content that can be watched on demand.[50]

10.56 The fair use and new fair dealing exceptions are both technology neutral. They are also not confined to particular types of copyright material, nor to particular rights. In these respects, they are considerably better suited for application to private uses that will use technologies and digital practices that change rapidly, often in unforeseen ways. But these technology-neutral exceptions need not apply equally to all similar technologies, just as they may not apply equally to all types of copyright material (as discussed in the following section). When fair use and fair dealing are applied, uses with some technologies may be found to be fair, while uses with other technologies may not. This is one of the strengths of fairness exceptions.

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45 ABC, *Submission 775*.
46 For example, K Bowrey, *Submission 94*.
47 Ericsson, *Submission 151*. See also ACCAN, *Submission 194*; ACCC, *Submission 165*.
48 For example, ABC, *Submission 775*.
49 Internet Industry Association, *Submission 253*.
50 ABC, *Submission 775*.

10.57 Fair use is also less complex than Australia's current private copying exceptions. Case law applying fair use may not be widely understood by members of the public, and opinions about what is fair will vary, but at least the concept of fairness is relatively easy to comprehend.

Business models and market harm

10.58 Some private uses of copyright material are unlikely to have any significant effect on the market for the material, provided the original or copies are not sold or given away. Members of the public may be unlikely to seek licences for purely private, non-commercial uses of copyright material that they may feel they have already paid to use as they please. ACCAN submitted that it was:

> not merely 'unlikely' that the public would seek out the fine print governing non-commercial use of content already paid for in order to find out what kind of private copying is allowed—it is entirely unrealistic.[51]

10.59 However, some unlicensed private uses of copyright material may well harm a market that rights holders alone should be able to exploit. Copyright owners may offer licences for making multiple copies, or license access to copyright material from multiple computers, phones, tablets and other devices. For example, subscription music services may allow users to stream music to multiple devices. Films sold on DVD and Blu-ray discs are sometimes sold with a digital file that may be stored and played on computers and tablets. Similar licensed services are available for ebooks and other copyright material.

10.60 Some argue that if the market for private copying had ever failed, it has now been corrected, and that exceptions for private copying will undermine existing and emerging business models. Such arguments were made by many rights holders and others in submissions to this Inquiry.[52] The Australian Copyright Council submitted that 'business models are reducing the need to engage in private copying' and that there was no need to extend the private copying exceptions.[53] The iGEA said that a new fairness exception

> would interfere with the development and continued operation of a number of technology driven licensing models that satisfy consumer demand for format shifting and backup as well as innovative business models for game content delivery.[54]

10.61 BSA—The Software Alliance submitted that 'a wide variety of rights to copy legally acquired computer programs for private and domestic use is currently provided for in the applicable license agreements for the programs'.[55]

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51 ACCAN, *Submission 673*.

52 For example, Foxtel, *Submission 748*; News Corp Australia, *Submission 746*; iGEA, *Submission 741*; ARIA, *Submission 731*.

53 Australian Copyright Council, *Submission 219*.

54 iGEA, *Submission 741*: 'The proposed exception risks interfering with the operation of such licensing models to the detriment of Australian consumers.'.

55 BSA, *Submission 248*.

10.62 ARIA referred to Apple's iTunes as an example of a program that 'allows customers to store downloads on five authorized devices at any time, and burn an audio playlist up to seven times for personal non commercial use'. Not only should new exceptions not be introduced, but the existing exception for copying music in s 109A of the Act is now 'of limited utility as many acts of copying are now covered under licensing provisions'.[56]

10.63 Discussing the time shifting of broadcast television content, the Australian Film and TV Bodies submitted that the commercial development of legitimate online business models, including 'licensed cloud based services, online video or demand, and catch-up online television ... are already enabling consumers to watch copyright material at a time that suits them'. New exceptions would diminish the capacity for rights holders to extract value in online environments.[57]

10.64 Foxtel submitted that it was 'very concerned' that any loosening of the existing provisions will undermine its ability to market and benefit from the catch-up television services it offers its customers.[58]

10.65 The ALRC does not recommend a blanket exception for private use, or an exception that treats all copyright material and all copyright markets in the same way. The recommended fair use exception is better suited to account for the effect of a given use on the market for copyright material than specific, closed-ended exceptions. Fair use is a flexible exception that, unlike the existing Australian time and format shifting exceptions, requires consideration of the 'effect of the use upon the potential market for, or value of, the copyright material'. Where the market offers properly licensed copies, then it may be less likely that making private copies will be fair. Where a television station offers an online catch-up service, for example, then a competing service that makes copies of broadcasts for consumers may be less likely to be fair.

10.66 Many of the other factors that rights holders said should affect the scope of copyright exceptions can also be considered in determining whether a use is fair. For example, in deciding whether a particular private use is fair, under fair use, consideration might be given to whether the content was provided with advertising, or upon payment of a fee. Whether the consumer purchased a permanent copy, or whether they were only entitled to have access to the content for a limited period of time, will also be relevant.

Different markets

10.67 Others stressed that private copying may harm the market for some works more than others. Recorded music, sheet music, films and books all have considerably different markets. For some stakeholders this suggested that a single technology-

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56 ARIA, *Submission 241*.

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

58 Foxtel, *Submission 748*: 'Foxtel refreshes this content regularly and the period of time such content is available to stream or download varies, although is rarely longer than 28 days. It is unclear how a new exception for private and domestic use would operate in the context of such services.' See also News Corp Australia, *Submission 746*.

neutral exception for private use would be inequitable, and that specific exceptions are needed to ensure no substantial harm is caused to any particular market.[59] For example, it was submitted that exceptions for private copying might particularly harm the audiovisual sector[60] and publishers of printed music.[61]

10.68 Concerns about the differing effects of exceptions on different markets also informed the conclusions of a 2008 review of the format shifting exceptions. The Australian Government Attorney-General's 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.[62]

10.69 The ALRC appreciates these concerns of copyright owners, but considers that the fair use and new fair dealing exceptions can account for these differences in markets, copyright materials and technologies. This is one important reason the ALRC prefers these fairness exceptions to a new specific exception that does not allow for a proper consideration of the likely effect of a use on a rights holder's interests.

10.70 The flexibility of the fairness exceptions recommended in this Report allow for a use of one type of content to be fair, and another unfair, because the two uses have different effects on rights holders' markets. This is one of the benefits of fair use and fair dealing. The Act need not distinguish between the markets, because the exceptions are flexible and can distinguish between types of copyright material in their application.

10.71 Much of the discussion of the ALRC's proposal about private and domestic use seemed to ignore the fact that, for the exception to apply, a particular use would have to be fair, having regard to fairness factors which include any harm to the rights holder's market. Some stakeholders seemed almost to suggest that all a user would need to establish was that their use was private, for the exception to apply. This is not how fair use or fair dealing work. These exceptions are not blanket exceptions for private use.

Commercial use

10.72 Private uses of copyright material that will be fair use will also usually be non-commercial. Arguably, a private use will necessarily be a non-commercial use. Although it may be possible for a truly private use to be commercial, this will be rare.

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59 For example, ASTRA, *Submission 747*; Free TV Australia, *Submission 270*.

60 Australian Film/TV Bodies, *Submission 739*: 'The model proposed is inappropriately broad and likely to result in significant harm to rights holders, particularly those in the audio visual sector.'

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

62 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].

10.73 Some stakeholders submitted that non-commerciality should be a mandatory condition of any private use exception (that is, if the use is commercial, the exception necessarily does not apply).[63] The draft private copying exception being considered in the UK only applies if the copy is made 'for that individual's private use for ends that are neither directly nor indirectly commercial'. Many stakeholders were particularly concerned about people posting material to commercial social networks and thinking that this was private.[64] As discussed below, sharing content online with large groups of people should not be considered a private use.

10.74 Under fair use, a commercial use is less likely to be fair, but the commerciality is not determinative. The ALRC recommends that the illustrative purpose for this type of use be 'non-commercial private use'. The possible tautology is intended to remove doubt about the kind of activity the ALRC considers a good example of fair use.

10.75 This does not mean that time shifting and format shifting by commercial enterprises can never be fair. Such uses will not be private or non-commercial, and so are less likely to be fair, but in some circumstances they may be fair.

10.76 Many commercial third parties facilitate non-commercial private uses.[65] The fact that a commercial third party facilitator is not itself acting for a private non-commercial purpose, and so will not be covered by the illustrative purpose for private use, does not mean that such uses will necessarily be unfair. Unlike fair dealing exceptions, fair use is not confined by the listed purposes.

Other factors

Permanent copies

10.77 Some submitted that private copying exceptions should only apply where someone has legally acquired a permanent copy of the copyright material.[66] The new private copying exception being considered in the UK only applies where the individual had lawfully acquired, on a permanent basis, the copy from which further copies are made.

10.78 The ALRC agrees that a private use will be more likely to be fair, where the user owns a permanent copy of the original. It would rarely, if ever, be fair use for a person to make digital copies of films and CDs the user has borrowed from friends or from a library. But it may be fair use to make a copy of a broadcast television program, so that the user may look at the material at a more convenient time (currently permitted under the *Copyright Act*). It also may be fair use in some circumstances to keep a copy of a page of a website for later reference.

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63 For example, Foxtel, *Submission 748*; Australian Film/TV Bodies, *Submission 739*; Cricket Australia, *Submission 700*. However, these bodies did not support new private copying exceptions.

64 For example, AFL, *Submission 717*; Arts Law Centre of Australia, *Submission 706*.

65 See Ch 7.

66 For example, Foxtel, *Submission 748*; Australian Film/TV Bodies, *Submission 739*.

10.79 The ALRC does not recommend that a rule about this be set in the Act. This matter is better considered along with other relevant matters, in determining whether a use is fair.

Own device or in the cloud

10.80 It is now commonplace to use remote servers in 'the cloud' for private storage and use of copyright material. Many computer programs and internet browser add-ons also allow users to copy and store internet content such as web pages for later viewing, often storing the content in the cloud and giving users access from multiple devices.

10.81 Private copying exceptions should not be confined to copies stored on a computer or device owned by the person making the copy. If private copying exceptions cannot apply to the use of copyright material using cloud-based technologies, then Australian copyright law will not be fit for the digital age.

10.82 This is not to say that third parties, such as companies that provide cloud computing services, should necessarily be free to use copyright material for their customers in all circumstances. Such third parties, including cloud service providers, offer a range of services across a wide spectrum. Pure storage in digital lockers may be on one end of the spectrum and, in the ALRC's view, should be fair use.[67]

Disposal of original

10.83 Private copying will be much less likely to be fair if the user gives the new or original copy to someone else. Sharing copyright material in this way can clearly harm a rights holder's market, reducing the incentive to create and distribute copyright material. A person should not be free to 'rip' their CD collection and then sell their CDs. For this copying to be fair, the CDs should either be stored or destroyed.

10.84 The existing private copying exceptions feature an explicit limitation, providing for example that the exception 'is taken never to have applied if the owner of the original photograph disposes of it to another person'.[68] This seems too strict. If a person copies a CD, listens to a copy on his or her iPod for a few years, then later wishes to sell the CD or give it away, then the person should simply be required to delete the copies before disposing of the original.[69]

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67 Third party facilitators and cloud technologies are discussed in Ch 7.

68 *Copyright Act 1968* (Cth) s 47J(6).

69 See further, R Xavier, *Submission 146*: 'Also, a problem with some of the existing format-shifting exceptions is the way that the act of format-shifting is retrospectively deemed to have been an infringement if the original copy is disposed of to someone else (see eg s 47J(6)). This seems to mean that if a copy is made for the purposes of format-shifting, the original can never be dealt with again even if the format-shifted copy is destroyed. ... This retrospectivity should be fixed throughout the Act, as it appears several times.'

Fair dealing and third parties

10.85 If fair use is not enacted, the ALRC recommends that an alternative new fair dealing exception be introduced.[70] This exception should include 'non-commercial private use' as one of the prescribed purposes.

10.86 This fair dealing exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the general fair use exception. Applying either of the two exceptions to a private use should therefore produce the same result.[71]

10.87 As discussed in Chapter 6, the new fair dealing exception leaves less room for unlicensed third parties to use copyright material in circumstances where they facilitate private uses. This is because the new fair dealing exception is confined to uses for specified purposes. Sometimes the purpose of a third party use will be nearly indistinguishable from the purpose of the end user. At other times, the third party use may be quite different.

10.88 Some stakeholders were concerned that fair use might permit third parties to make copies on behalf of their customers, for their customer's private use. This would 'allow unlicensed entities to profit at the expense of those who have invested in the creation of Australian content'.[72] ASTRA said it would 'strongly oppose' reforms that permitted such third parties 'to build a business model using copyright material based on exceptions specifically created only for private or domestic use'.[73]

10.89 While many of these third party uses may not be fair, a general fair use exception is preferable to the new fair dealing exception, because with fair use, the question of fairness can at least be considered. Uses for purposes not listed in the provision are not automatically excluded.

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

Contracting out and TPMs

10.91 Copyright owners may sometimes provide their material only to customers who agree not to copy, or use in other prescribed ways, the material. This raises the question of 'contracting out' of copyright exceptions, discussed in Chapter 20. Technological protection measures (TPMs) may also be used to enforce these provisions.

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70 See Ch 6.
71 The difference between the two exceptions should only affect uses not for one of the listed purposes.
72 Foxtel, *Submission 748*.
73 ASTRA, *Submission 747*.

10.92 These contracts and TPMs can work to lock consumers into content 'ecosystems'. The more a person buys from one company, the more convenient it is to buy other content from that company, and the more inconvenient it becomes to buy content from another company. This becomes more pronounced, as content providers increasingly offer to store content for their customers in the cloud.

10.93 Exceptions for private use will be of less value to consumers, if they cannot circumvent TPMs and they must contract out of the exceptions before being given access to copyright material.[74]

Piracy is not fair use

10.94 Fair use does not legalise piracy. Unauthorised peer-to-peer file sharing of music and films with strangers, for example, would not be fair use nor a fair dealing for private use.

10.95 However, some object to exceptions for private copying on the grounds that they may facilitate piracy. It may be fine for the owner of a DVD to make a copy of the film for his or her own use but if this is permitted, it is argued, then the person may be more likely to share the copy with others, including through peer-to-peer networks. Foxtel, while open to the idea of a new single exception for private copying, expressed concern about digital-to-digital copying of films, and the possible facilitation of online piracy.[75]

10.96 The Motion Picture Association of America submitted that fair use, with an illustrative purpose for private use, would 'undoubtedly register in the public mind as a policy conclusion that infringements are excused if they take place at home or in a domestic environment' and 'businesses that cater to facilitating such infringements will be normalized in the public eye'.[76]

> [I]t is easy to imagine that someone knowingly downloading pirated content in her own home would assume that a newly-created 'private use' exception would apply to that activity, as incorrect as this may be. This eminently foreseeable communication problem would contribute to an already problematic culture of piracy.[77]

10.97 The ALRC considers that the introduction of fair use, with an illustrative purpose for private use, will not have this effect. Piracy will be no less criminal if fair use is enacted. If a person is prepared to infringe copyright laws by illegally sharing films with strangers over peer-to-peer networks, that person will presumably have little regard to laws that prohibit digital-to-digital copying of films for purely private use.

Social uses

10.98 Uploading a copyrighted song or video clip to YouTube or Facebook is not a private use. Whether or not such uses should sometimes be considered fair, these uses

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74 Exceptions in relation to TPMs are outside the Terms of Reference.
75 Foxtel, *Submission 245*. See also News Limited, *Submission 224*.
76 Motion Picture Association of America Inc, *Submission 573*.
77 Ibid. See also Association of American Publishers, *Submission 611*.

are clearly not private and so will not be captured by the fair use illustrative purpose for 'non-commercial private use' recommended in this Report.

10.99 Some social uses of copyright material would be fair use. However, sharing content outside the domestic sphere is less likely to be fair—particularly if the use is not transformative and harms a market that rights holders should be entitled to exploit. For this reason, the ALRC does not recommend that 'social uses' be included as an illustrative purpose for fair use.

10.100 Many online uses of copyright material are not transformative, and some are clearly not fair. Arguably the 'sharing' of copyright content that is most unfair and causes the greatest damage to rights holders is the use of peer-to-peer file sharing networks, digital lockers and other means to exchange entire films, television programs, music and ebooks.

10.101 Many submissions stressed that some so-called 'social' uses of copyright material must not be confused with true private uses. The Music Council of Australia said that a 'clear distinction must be drawn between burning a compilation CD at home to play on the kitchen stereo, on the one hand, and disseminating to 800 "friends" via social media such as Facebook'.[78] Cricket Australia submitted:

> The use of content on social media (such as Facebook and Twitter) or online sharing sites (such as YouTube) cannot properly be classified as 'private and domestic' where the content can be viewed by a large number of people (and in many cases all users of the internet) and monetised either by the uploader or site operator.[79]

10.102 Many users will not understand or recognise the difference between private and social uses, some stakeholders suggested. ARIA submitted that, in its experience, 'uses that an individual may consider to be of a 'private' or 'domestic' nature are now routinely uploaded to online services which make the content available globally and underpin very profitable commercial businesses'.[80]

10.103 However, many other social uses of copyright material—for example, creating certain user-generated content[81]—are arguably less harmful and now commonplace. These may even include uses that are unlicensed, not transformative, and feature on commercial platforms.

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78 Music Council of Australia, *Submission 269*.

79 Cricket Australia, *Submission 700*. See also Arts Law Centre of Australia, *Submission 706*: 'from the perspective of the artist or creator of the copyright work, it may be one thing to create a family video that incorporates a copyrighted song and share that video with family by email ... However, it is another to put such a video on a social networking site.' COMPPS, *Submission 634*: 'in the digital environment, many online services used by individuals are both public and commercial'.

80 ARIA, *Submission 731*. See also Arts Law Centre of Australia, *Submission 706*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*.

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

10.104 Existing exceptions, such as the fair dealing for parody or satire exception,[82] may apply to some user-generated content that uses copyright material. However, much user-generated content will not be covered by these existing exceptions—for example, using a copyright sound recording in a home video.

10.105 Jeff Lynn, chairman of the UK Coalition for a Digital Economy has written that this 'incidental' sort of copyright infringement is 'part and parcel of using the internet and participating in innovation':

> It is simply impossible to confirm the rights to every image, block of text or sound clip that one shares with friends on Facebook or incorporates into a home video to send to the grandparents.[83]

10.106 Further, Lynn writes that 'while this sort of copying may not always be innovative itself, its inextricable link with the highly innovative activities associated with internet use means that quashing it results in quashing a lot of collateral good':

> [A]ny hypothetical loss [to rights holders] from the failure of a handful of people to buy a licence to a given work shared casually among a small network is not only negligible but it is almost certainly outweighed by the discovery advantages.[84]

10.107 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.[85]

10.108 The ALRC agrees with the Copyright Council Expert Group's observation that user-generated content 'reflects a full spectrum of creative and non-creative re-uses' and should not automatically qualify for protection under any proposed exception aimed at fostering innovation and creativity.[86]

10.109 Social uses of copyright material are best considered on a case-by-case basis, applying the fair use exception. It is doubtful that attempting to prescribe types of social uses that should not infringe copyright would be beneficial. Attempts to distinguish between types of user-generated content without using general fairness principles seem unlikely to be successful.

An alternative—a new specific exception

10.110 If neither a fair use, nor a fair dealing for private use, exception is enacted in Australia, then the ALRC suggests that the existing private copying exceptions in the *Copyright Act* should be consolidated and simplified. Such an exception would not

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

83 J Lynn, 'Copyright for Growth' in I Hargreaves and P Hofheinz (eds), *Intellectual Property and Innovation: A Framework for 21st Century Growth and Jobs* (2012) 15, 15.

84 Ibid, 15.

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

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

refer to fairness factors, but would instead simply describe the circumstances in which a private or domestic copy might be made.[87]

10.111 The Law Institute of Victoria submitted that, if fair use is not enacted, 'then a separate, single exception should be introduced, along the lines of Canada's *Copyright Modernization Act 2012* (Can)'.[88] Rather than a separate format shifting exception for each type of work (one for films, one for music, etc), each with its own conditions, Canada's *Copyright Act* contains only one exception for reproductions for private purposes. This exception applies to 'a work or other subject-matter or any substantial part of a work or other subject-matter'.[89]

10.112 It has been argued that fair use may not allow for a sufficiently wide range of private uses—particularly for uses that are non-transformative, for example copying an entire film or television program from one format to another, for personal use.[90] Some have suggested broader exceptions that apply to all private uses, without an assessment of fairness. However, in the ALRC's view, without a fairness test, such exceptions may be too broad and may unfairly harm rights holders' interests.

Repeal of existing exceptions

10.113 The existing exceptions for time shifting and format shifting in the *Copyright Act* should be repealed. Most stakeholders that supported the introduction of fairness exceptions agreed that if such exceptions were enacted, the existing private copying exceptions could be repealed.

10.114 A few stakeholders suggested that the existing private copying exceptions should be repealed, but not replaced with fair use or other private copying exceptions. The Australian Film and TV Bodies submitted that the exceptions for time shifting broadcasts and format shifting VHS tapes should be repealed, because they were no longer necessary.[91] The Australian Copyright Council said that given the criticism of the existing exceptions for private use, the exceptions should be repealed.[92]

10.115 However, the ALRC recommends the existing exceptions for private use only be repealed if fair use or the new fair dealing exception is enacted.

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87 The ABC supported specific exceptions for private use, rather than fair use, but said it would consider supporting 'the consolidation of the various format-shifting exceptions into a single technology-neutral format-shifting exception' and it 'supports the extension of section 111 to cover ephemeral transmissions, such as simultaneous online streams of broadcasts ('simulcasts') and live webcasts by broadcasters': ABC, *Submission 775*.

88 Law Institute of Victoria, *Submission 198*.

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

90 See, eg, A Pavel, 'Reforming the Reproduction Right: The Case for Personal Use Copies' (2009) 24 *Berkeley Technology Law Journal* 1615, 1630.

91 Australian Film/TV Bodies, *Submission 739*: 'The growth of the digital market for feature films and television programs and the decline in sales of analogue recording equipment and mediums means that ss 111 and 110AA are no longer necessary.'

92 Australian Copyright Council, *Submission 654*.

Recommendation 10–1 The exceptions for format shifting and time shifting in ss 47J, 109A, 110AA and 111 of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether a private use infringes copyright.

11. Incidental or Technical Use and Data and Text Mining

Contents

Summary

11.1 Incidental or technical uses are essential to the operation of the internet, networks, and other technologies that facilitate lawful access to copyright material. The ALRC concludes that current exceptions in the *Copyright Act* are uncertain and do not provide adequate protection for such uses. Such uncertainty has adverse effects on innovation, incentives to build new services and products, and Australia's competitiveness as a place for technological investment. The current exceptions should be repealed.

11.2 The ALRC recommends that 'incidental or technical use' be an illustrative purpose of fair use. A flexible fair use exception will better accommodate technological change and foster lawful innovation and use of copyright material. If fair use is not enacted, a new fair dealing exception should be introduced, and this should include 'incidental or technical use' as a prescribed purpose.

11.3 Data and text mining refers to technologies that are used to analyse copyright material for patterns, trends and other useful information. The ALRC concludes that the fair use exception should be used to determine whether data and text mining constitute copyright infringement.

Incidental or technical use

11.4 Copyright owners have an exclusive right to reproduce and communicate their work to the public.[1] Without a licence or an exception, reproduction and communication to the public of copyright material constitute infringement.

11.5 This can be problematic in a digital environment where material 'cannot be handled without copying it'.[2] Reproduction and communication of copyright material has not only become ubiquitous, but necessary for the effective and efficient functioning of the internet, networks, and technological processes that facilitate lawful consumption of copyright material. For example, a reproduction and communication is required every time a person watches a DVD, reads a webpage,[3] or streams a video from the internet.[4] In contrast, no such reproduction or communication is required in a non-digital context when a person reads a book or a magazine.

11.6 One example of incidental or technical use discussed in this Inquiry related to caching and indexing by search engines. 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. 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.[5]

11.7 Caching improves the internet's performance by allowing search engines to quickly retrieve cached copies on its server, rather than having to repeatedly retrieve copies from other 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.[6]

11.8 Search engines, web hosts and other internet intermediaries rely on indexing and caching for their efficient operation.[7] Other parties also rely on caching and indexing to facilitate streaming services and to improve the speed of database searches.[8]

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1 See *Copyright Act 1968* (Cth) s 31. Further, the definition of 'material form' in s 10 suggests that electronic reproduction of copyright material will constitute copyright infringement.

2 iiNet Limited, *Submission 186*.

3 Internet browsers store 'cached' copies of a webpage to enable immediate retrieval when a person revisits the same page. Caching can also 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. Thus, 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.

4 Temporary cache and 'buffer' copies are usually made in the course of streaming content from the internet to ensure seamless experience for the user. For example, the ABC noted that caching and indexing are 'an essential part of the technical delivery process', without which it would be unable to provide reliable streamed television programming over the internet of a quality acceptable to customers: ABC, *Submission 210*.

5 Google Guide, *Cached Pages* <www.googleguide.com/cached_pages.html> at 30 July 2012.

6 Ibid. A website can specifically prevent a crawler from accessing parts of their website that would otherwise be publically viewable, by inserting a piece of code called 'robot.txt'.

7 See eg, iiNet Limited, *Submission 186*.

8 Screenrights, *Submission 215*; ADA and ALCC, *Submission 213*.

11.9 Stakeholders also emphasised the importance of the cloud computing sector to the future of Australia's digital economy.[9] Innovative cloud-based services rely heavily on technological processes that involve incidental or technical reproduction and communication of copyright material.[10]

11.10 Ericsson argued that the extra copying required in the digital environment results in businesses requiring more 'time and money to acquire necessary permissions', which are not required in relation to analog works.[11] The impact of such concerns was highlighted by the experience of Pandora, an internet streaming radio service that struggled to negotiate licences it needed to operate in Australia. Pandora argued that it needs to make permanent copies to deliver its services to the Australian public, and that it should not be required

> to separately negotiate licences to make copies of recordings where it secures a licence to communicate the recordings and the copies are made purely for the purposes of exercising that licence.[12]

11.11 The policy question for this Inquiry was whether unlicensed incidental or technical uses should infringe copyright and, if so, under what circumstances. Can the copyright system facilitate the efficient operation of digital technologies to promote innovation and ensure wide access to copyright material, while acknowledging and respecting authorship and creation?

11.12 There has been growing international consensus that certain unlicensed incidental or technical reproduction should not be viewed as infringing. For example, Maria Pallante, Director of the US Copyright Office, has observed that

> new technologies have made it increasingly apparent that not all reproductions are the same. Some copies are merely incidental to an intended primary use of a work, including where primary uses are licensed, and these incidental copies should not be treated as infringing.[13]

11.13 This sentiment was echoed by a number of stakeholders in this Inquiry, including the ACCC:

> In the digital environment there has been an increase in the use and copying of copyright material, in ways that appear to be quite incidental to the production of the primary good or service being produced. For example, copyright material copied by internet intermediaries for caching purposes. Similarly, some use and copying of copyright material may currently be 'unauthorised' in circumstances where this use has little, if any, detrimental impact on incentives for copyright creation.[14]

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9 See, eg, OzHub, *Submission 148*; CCH Australia Ltd, *Submission 105*; K Bowrey, *Submission 94*; eBay, *Submission 93*.

10 Telstra Corporation Limited, *Submission 222*; Australian Industry Group, *Submission 179*.

11 Ericsson, *Submission 151*.

12 Pandora Media Inc, *Submission 104*.

13 M Pallante, 'The Next Great Copyright Act' (2013) 36(3) *Columbia Journal of Law & the Arts* 315, 325. See also eBay, *Submission 93*.

14 ACCC, *Submission 165*. See also K Bowrey, *Submission 554*; eBay, *Submission 93*.

11.14 The Hargreaves Review also recommended that the UK Government push to build into the EU framework an exception allowing uses of a work enabled by technology which do not trade on the underlying and expressive purpose of the work:

> The idea is to encompass the uses of copyright works where copying is really only carried out as part of the way a technology works ... This is not about overriding the aim of copyright—these uses do not compete with the normal exploitation of the work itself—indeed, they may facilitate it.[15]

Current exceptions

11.15 The *Copyright Act* contains a number of exceptions that deal with temporary reproductions. These include:

- ss 43A and 111A—allowing for the temporary reproduction of a work and an adaptation of a work or an audiovisual item as part of the 'technical process of making or receiving a communication';[16]
- ss 43B and 111B—providing that copyright is not infringed by a temporary reproduction 'incidentally made as a necessary part of a technical process' of using a copy of the work or subject matter;[17]
- s 116AB—allowing 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 to facilitate efficient access to that material by that user or other users;[18]
- s 200AAA—allowing automated caching by computers operated by or on behalf of an educational institution;[19] and
- ss 47, 70 and 107, allowing copying to make broadcasts technically easier and to enable the making of repeat or subsequent broadcasts.[20]

11.16 Stakeholders suggested that these exceptions were not adequate to deal with caching and indexing and other technical or incidental uses in the digital environment. For example, ss 43A and 111A only permit a 'temporary' reproduction, but copyright

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15 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 47.

16 *Copyright Act 1968* (Cth) s 43A deals with a work, or adaptation of a work and s 111A deals with audiovisual items. Neither provision applies if the making of the communication is an infringement of copyright: ss 43A(2), 111A(2).

17 It has been suggested that ss 43B and 111B could apply to caching by search engines: K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance, 16.

18 '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 such as Telstra Bigpond are deemed carriage service providers. Reforms to the safe harbour provisions are outside this Inquiry's Terms of Reference.

19 Such caching can only be done 'in response to action by the users' and 'the reproductions and copies are made by the system merely to facilitate efficient later access to the works and other subject-matter by users of the system'.

20 These 'ephemeral' copying provisions are discussed in Ch 19.

material may need to be stored in a cache for long periods of time.[21] Similarly, it was submitted that the exceptions allow only a single reproduction, whereas the digital environment demands and that multiple reproductions are necessary.[22]

11.17 Stakeholders also submitted that exceptions do not adequately protect certain technical or incidental communications of copyright material, such as when a search engine communicates search results to a user.[23] The Copyright Advisory Group—Schools observed that there was merit in considering whether exceptions for 'temporary communications' are required in the same way as for 'temporary reproductions':

> For example, the upload of a work to a Learning Management System would involve a reproduction of that work, but the display of that work in class (via connection to a laptop and/or interactive whiteboard) or accessing the content by a student or staff from the cloud or a centralised content repository, may also result in one or more electronic transmissions comprised in the right of communication to the public when the content is transmitted from the Learning Management System (LMS) to a laptop, monitor or electronic whiteboard.[24]

11.18 Optus argued that s 43A only allows copies to be made after the user requests a download of the material and that this was not consistent with what happens on a practical level, where 'a copy is created in a cache in anticipation of download by other users'.[25] Similarly, it was suggested that it is unclear whether s 200AAA could facilitate 'active' forms of caching, whereby a school selects what material needs to be cached.[26]

11.19 Burrell and others suggested that the limitation in ss 43A(2) and 111A(2), that the copy not be an infringing copy, makes the exception unworkable for caching of any significance:

> Any entity that sets up their system to cache all (or all popular) communications is likely, at some point, to capture copies from both infringing and non-infringing communications without any knowledge on their part.[27]

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21 Google, *Submission 217*; Optus, *Submission 183*.

22 See, eg, ABC, *Submission 210*, suggesting that the 'communication of streamed program content may also be more effectively managed by service providers and intermediaries caching content at various points in the technical delivery chain, such as through the use of edge servers and mirror sites within content delivery systems, rather than streaming content from centralised servers and data warehouses'. See also Telstra Corporation Limited, *Submission 222*.

23 ACCC, *Submission 165*. See also Telstra Corporation Limited, *Submission 222*; Law Council of Australia, *Submission 263*; Google, *Submission 217*; iiNet Limited, *Submission 186*.

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

25 Optus, *Submission 183*. Similar concerns were expressed by the Law Council of Australia who argued that the terminology of ss 43A and 111A casts some doubt over the scope of the provision, for example, whether it covers proxy caching intended to facilitate access to users other than the ones involved in 'a communication': Law Council of Australia, *Submission 263*.

26 Law Council of Australia, *Submission 263*.

27 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*. See also K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform* (2011), Policy Paper prepared for the Australian Digital Alliance.

11.20 The concerns from stakeholders were summed up by the Law Council of Australia, which stated that the legal position in relation to caching in Australia is 'confusing, overlapping, incoherent and in some cases redundant' and that 'it is undesirable to have several overlapping, but distinct provisions aimed at the same basic phenomenon and offering only partial and uncertain protection'.[28]

Assisting innovation and lawful consumption

11.21 Stakeholders submitted that the uncertainty around caching and indexing inhibits, or has the potential to inhibit, innovation and investment in cloud computing and other products and services that rely on such incidental or technical uses.[29] While copyright holders suggested that nothing in the *Copyright Act* has impeded search engines from providing services to Australians, it remains the case that the 'servers that these services run on are all located overseas, and mostly in the US, because they simply can't operate in Australia'.[30]

11.22 Some stakeholders were concerned to ensure that Australia's regulatory framework puts it on the same footing as other jurisdictions.[31] For example, the Australian Industry Group emphasised the need for Australia's regulatory framework to be consistent and competitive with other jurisdictions:

> A copyright framework that prohibits critical or routine activities related to the digital economy that are permitted in other markets may discourage domestic innovation or lead to commercial or research activities staying or moving offshore.[32]

11.23 Burrell and others argued that, on principle, incidental or technical uses should be excluded from infringement. They suggested that rights holders should not be able to 'double dip' or otherwise expand the reproduction and communication rights to demand licence fees for each individual copy made to facilitate lawful uses of copyright material.[33] If reproductions that are necessary and ubiquitous risk infringement, this may have the effect of increasing transaction costs (as more licences are required) and stifling the creation of innovative services in the digital economy.[34] The ACCC said that

> Transaction costs can also arise as a result of uncertainty regarding whether certain incidental uses currently breach the *Copyright Act*, as resolving uncertainties can be expensive and in some instances, require litigation. These uncertainties could cause

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28 Law Council of Australia, *Submission 263*.

29 See, eg, Internet Industry Association, *Submission 744*; Google, *Submission 600*; AIMIA Digital Policy Group, *Submission 261*; R Giblin, *Submission 251*; Optus, *Submission 183*; Australian Industry Group, *Submission 179*.

30 R Xavier, *Submission 816*, noting that 'Australia's lack of fair use does not mean that works by Australians are not subject to fair use on the internet ... It just means that none of these services can be provided from Australia, and that the revenue from running them flows overseas'. See also Optus, *Submission 183*.

31 AIMIA Digital Policy Group, *Submission 261*; EFA, *Submission 258*; ADA and ALCC, *Submission 213*; Optus, *Submission 183*; Australian Industry Group, *Submission 179*; R Xavier, *Submission 146*.

32 Australian Industry Group, *Submission 179*.

33 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

34 Ericsson, *Submission 151*.

> third parties to avoid developing products that involve beneficial incidental copying, which can in turn limit product innovation and competition.[35]

Fair use

11.24 A number of stakeholders—including technology companies that rely heavily on caching and indexing—suggested that uncertainty could be removed by replacing the current exceptions with fair use.[36] Some compared the uncertain situation in Australia to the US, where caching and indexing is done in reliance on a 'well established fair use doctrine that permits this activity'.[37]

11.25 Stakeholders also suggested that fair use is more suitable than specific exceptions, because it can accommodate uses that 'don't exist yet, or haven't yet been foreseen'.[38] For example, Google submitted that closed exceptions

> are antithetical to how the internet works and the dynamic nature of the creativity enabled by the internet. Australia's system of closed-purpose, prescriptively described exceptions means that new and innovative uses of copyright materials that do not fall within the technical confines of an existing exception are not capable of being permitted by exceptions, no matter how creative the new use, or how strong the public interest in enabling that new use may be.[39]

11.26 Others suggested that it would be difficult to draft purpose-based exceptions for caching, indexing and other internet functions without 'some technology specificity'.[40] Telstra argued that redrafting 'based on today's technical knowledge and standards is likely to render the exception obsolete in the context of future innovations'.[41]

11.27 In Chapter 4, the ALRC makes the case that fair use is flexible, and can accommodate for technological change in ways that specific exceptions cannot. Australian copyright law should recognise that the reproduction and communication of copyright material is a necessary part of the effective functioning of technology in the digital environment. The fact that copyright material has been reproduced or communicated—for example by a search engine—should not, of itself, infringe copyright. The question should be answered by an analysis of whether such uses are fair.

11.28 New and unforeseen technical or incidental uses—beyond caching and indexing—will arise in the digital environment. The ALRC considers that fair use is sufficiently flexible to determine whether such uses should be permitted, based on an assessment of fairness. Importantly, fair use requires market considerations to be taken into account and this should protect the interests of copyright owners. A specific or blanket exception may not adequately provide for such protection.

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35 ACCC, *Submission 165*. See also Google, *Submission 217*.

36 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Yahoo!7, *Submission 276*; EFA, *Submission 258*; Telstra Corporation Limited, *Submission 222*; Google, *Submission 217*; ADA and ALCC, *Submission 213*; Law Institute of Victoria, *Submission 198*; iiNet Limited, *Submission 186*.

37 Yahoo!7, *Submission 276*; iiNet Limited, *Submission 186*.

38 Telstra Corporation Limited, *Submission 222*.

39 Google, *Submission 600*.

40 Telstra Corporation Limited, *Submission 222*; ADA and ALCC, *Submission 213*.

41 Telstra Corporation Limited, *Submission 222*.

11.29 In the ALRC's view, caching and indexing that are uncertain under the current exceptions would likely be fair, under the fair use exception recommended in this Report. However, whether a use is fair, must in each instance, be assessed after considering the following fairness factors.

The purpose and character of the use

11.30 Whether a use is 'transformative' will be a key question in applying the Australian fair use exception.[42] This requires an examination of the extent to which a new work merely 'supersedes' or 'supplants' the original work or whether the new work is 'for a different expressive purpose from that for which the original was created'.[43] A number of US court decisions have held caching and indexing to be transformative.

11.31 In *Field v Google*, a US court found that copies held in Google's cache were 'transformative' because they allowed users to:

- access content when the page was inaccessible;
- detect changes made to a page;
- understand why the page was responsive to their original query.[44]

11.32 Similarly, in *Perfect 10, Inc v Amazon.com, Inc*, thumbnails of artistic works that were communicated by Google's cache were considered to be 'highly transformative', because a search engine provides an entirely new use for the original work, turning the image from a use of artistic expression into an 'electronic reference tool'.[45]

11.33 The ALRC considers that caching and indexing are transformative and that this would weigh heavily in favour of fair use. Other incidental or technical uses may not be transformative, but may nevertheless be fair for other reasons.

11.34 Whether an incidental or technical use is commercial will also be relevant. A commercial purpose will tend to weigh against a finding of fair use,[46] but this will not always be the case.[47] For example, the US Copyright Office suggests that buffer copies made in the course of internet music streaming is fair use, despite being done for a commercial activity. Buffer copies are not a 'superseding use that supplants the original'. Rather, they are necessary and 'non-exploitative' and the purpose 'is to enable a use that has been authorised by the copyright owner and for which the copyright owner typically has been compensated'.[48] It considered that the commercial aspect in such cases 'can best be described as of minimal significance'.[49]

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42 See Ch 5.
43 N Weinstock Netanel, 'Making Sense of Fair Use' (2011) 15 *Lewis and Clark Law Review* 715, 768. See also *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579.
44 *Field v Google Inc* (2006) 412 FSupp 2d 1106 (District Court of Nevada), 1119.
45 *Perfect 10, Inc v Amazon.com, Inc*, 508 F 3d 1146 (9th Cir, 2007), 15468.
46 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 585.
47 *Blanch v Koons*, 467 F 3d 244 (2nd Cir, 2006).
48 US Copyright Office and the Library of Congress, *DMCA Section 104 Report* (2001), 133.
49 Ibid.

The nature of the copyright material used

11.35 The nature of the copyright material will be a relevant consideration. For example, reproduction of published material is more likely to be fair use than in the case of unpublished material.[50]

The amount and substantiality of the part used

11.36 This factor considers how much of work is taken, and how important was that taking in the context of the plaintiff's work. One question is whether the incidental or technical use takes only what is 'reasonably necessary' for a particular technical function.[51]

11.37 In some instances, they may require a small portion of the work to be reproduced, while in others, a whole of a work may need to be produced. For example, in *Kelly v Arriba Soft Corporation*, the court recognised that an internet search engine needs to engage in wholesale copying in order to provide any meaningful responses to search queries.[52] While holding that Arriba's use of thumbnail images to be fair use, it held the search engine's display of full size images was not fair use because this was not transformative and resulted in 'substantial adverse effects to the potential market for Kelly's original works'.[53]

Effect of the use upon the market

11.38 The effect of the use on the market will be a significant factor, and may often depend on how transformative a use is. A use that is transformative is less likely to substitute for the original work, and therefore less likely to cause harm to the market.

11.39 For the market harm factor to dictate against fair use, the harm to the market should be substantial, rather than minor or remote. Findings about whether incidental or technical uses have 'independent economic significance' may be relevant in determining whether such uses affect the market of the original work. For example, the US Copyright Office suggests that buffer copies made in the course of streaming have no 'economic value independent of the performance it enables' which can harm the market. Rather, such copying merely 'facilitates an already existing market for the authorised and lawful streaming of works'.[54]

An illustrative purpose

11.40 Incidental or technical uses appear to be a good example of fair use in the digital environment. In particular, the first and fourth factors, when applied to technical and incidental uses—such as caching and indexing or network functions—that facilitate lawful access to copyright material will tend to weigh heavily in favour of fair use.

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50 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 586.
51 Ibid, 588.
52 *Kelly v Arriba Soft Corporation*, 280 F 3d 934 (9th Cir, 2002).
53 Ibid, 948.
54 US Copyright Office and the Library of Congress, *DMCA Section 104 Report* (2001), 139.

11.41 The ALRC recommends that the fair use exception include an illustrative purpose for 'incidental or technical use'. This does not mean that all incidental or technical uses are fair, but it will signal that such uses are more likely to be fair than non-technical or non-incidental uses. However, when determining whether a particular technical or incidental use is fair, the fairness factors should all be considered.

11.42 In the Discussion Paper, the ALRC proposed that 'non-consumptive use'—being use of copyright material that does not trade on the underlying and expressive purpose of the copyright material—be an illustrative purpose in the fair use provision.[55] The ALRC considered that this purpose could cover technical or incidental uses as well as non-expressive uses, such as data and text mining (discussed below).

11.43 Stakeholders submitted that 'non-consumptive' as an illustrative purpose was vague and uncertain, and required further elaboration.[56] It was submitted that:

- it is difficult to ascertain what 'trade on' or 'underlying expressive purpose' means;[57]
- the term may rule out completely any use that is in some way 'consumptive' or commercial;[58]
- the term does not exist in any other international legislation;[59] and
- there is no 'bright line' as to when, how or to what extent, infringing use will not trade on the underlying or expressive purpose.[60]

11.44 Some stakeholders were not convinced that the phrase 'non-consumptive' could neatly cover both technical and incidental uses and those that are not merely facilitative but are non-expressive in nature. They suggested that the conflation of the two uses under the umbrella term 'non-consumptive use' may cause difficulties in the application of fair use.[61]

11.45 After further consideration, the ALRC has decided to recommend the narrower and precise 'incidental or technical use' as an illustrative purpose.

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55 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 8–1.

56 CSIRO, *Submission 774*; News Corp Australia, *Submission 746*; Australian Film/TV Bodies, *Submission 739*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; Springer Science and Business Media, *Submission 639*.

57 Intellectual Property Committee, Law Council of Australia, *Submission 765*; Queensland Law Society, *Submission 644*; Cyberspace Law and Policy Centre, *Submission 640*; R Xavier, *Submission 531*.

58 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*. They suggest that 'non-consumptive' use may rule out reproductions that are made as part of lawful consumption activities, such as reading a book or viewing copyright material in private. See also Music Council of Australia, *Submission 647*.

59 News Corp Australia, *Submission 746*.

60 Australian Film/TV Bodies, *Submission 739*.

61 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

Fair dealing for incidental or technical use

11.46 The ALRC also recommends that, if fair use is not enacted, a new fair dealing exception should be introduced.[62] This new fair dealing exception should include 'incidental or technical use' as a prescribed purpose.

11.47 The fair dealing exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the fair use exception. Applying the fair use or fair dealing exceptions to incidental or technical uses should produce the same result.

Specific exception for incidental or technical use

11.48 If neither fair use nor the new fair dealing exception is enacted, the ALRC suggests that the existing exceptions for temporary reproductions could be repealed in any event, and replaced with a new specific exception for incidental or technical use.

11.49 In the ALRC's view, this is a less flexible solution to fair use or new fair dealing. Nonetheless, a new specific exception may be warranted to alleviate uncertainty surrounding the current exceptions.

11.50 If a new specific exception is introduced, it should be technology neutral and should fill in the gaps that exist under the current exceptions. This includes recognition that incidental or technical uses require both reproduction and communication of copyright material. The references to 'temporary' should be removed. It should also be made clear that copyright is not infringed by using copyright material for caching and indexing by search engines, where that facilitates a lawful use.

11.51 This specific exception could also be confined to incidental or technical uses that facilitate lawful use of copyright material. This would prevent the use of the exception to aid infringing practices. Such reform would provide greater clarity and certainty to innovators that services or products relying on technical or reproduction to facilitate the lawful use of copyright material, will not infringe copyright.

11.52 In considering such a new specific exception, the Australian Government may wish to consider specific exceptions found in other jurisdictions. For example, in Canada, the *Copyright Act 1985* (Can) provides that it is not infringement to make a reproduction of a work that forms part of an essential process, for the purpose of facilitating a use that is not an infringement to copyright, and the reproduction exists only for the duration of the technical process.[63]

11.53 Canada also has an exception for 'network services'. A person who provides services related to the internet or another digital network do not, solely by providing

62 See Ch 6.
63 *Copyright Act 1985* (Can), s 30.71.

those means, infringe copyright in the telecommunication or reproduction of a work or other subject matter.[64]

11.54 The Copyright Review Committee (Ireland) has recommended an exception that would allow reproductions which are temporary, transient or incidental and that have no independent economic significance. The reproduction must be an essential and integral part of a technological process with the sole purpose of enabling either a transmission in a network between third parties by an intermediary or a lawful use.[65] This mirrors a European Union Information Society Directive, which provides that states should include a mandatory exception to the right of reproduction in respect of certain temporary acts of reproduction.[66] The Directive also leaves open to member states to provide for other non-mandatory exceptions to the right of communication.[67]

Safe harbour scheme

11.55 The exceptions discussed in this chapter do not remove the need for a safe harbour scheme. Australia's safe harbour scheme limits the remedies available against 'carriage service providers' for copyright infringement that takes place on their systems, which they do not control, initiate or direct. The scheme is now being reviewed, and is outside the ALRC's Terms of Reference.[68]

11.56 However, it should be noted that even if fair use or the new fair dealing exception for incidental or technical use were enacted, internet intermediaries and others may still need to rely on a safe harbour scheme in other circumstances.

Recommendation 11–1 The exceptions for temporary uses and proxy web caching in ss 43A, 111A, 43B, 111B and 200AAA of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether incidental or technical uses infringes copyright.

Data and text mining

11.57 Data and text mining has been defined as automated analytical techniques that work by 'copying existing electronic information, for instance articles in scientific

64 Ibid s 31.1. This is subject to a number of conditions including that the person: does not modify the material other than for technical reasons; ensures that directions in a manner consistent with industry practice are followed; and does not interfere with the use of technology that is lawful and consistent with industry practice in order to obtain data on the use of the work or other subject matter: s 31.3.

65 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 116.

66 *Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, (entered into force on 22 June 2001), art 5.

67 Ibid, art 5(4).

68 See Australian Government Attorney-General's Department, *Revising the Scope of the Copyright 'Safe Harbour Scheme'*, Consultation Paper (2011), 5. The safe harbour provisions are found in div 2AA of the *Copyright Act*.

journals and other works, and analysing the data they contain for patterns, trends and other useful information'.[69]

11.58 Data and text mining is becoming increasingly important in a number of research sectors, including medicine, business, marketing, academic publishing and genomics.[70] Employing technology to mine journal databases has been referred to as 'non-consumptive' research, because it does not involve human reading or viewing of the works.[71] 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.[72]

11.59 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 commercial and other sectors, and become a key basis of competition, underpinning new waves of productivity growth and innovation.[73] The Cyberspace Law and Policy Centre submitted that data mining

> has the potential to grant 'immense inferential power' to allow businesses, researchers and institutions to 'make proactive knowledge-driven decisions'. There are significant potential commercial benefits—data mining has the potential to improve business profits by allowing businesses to better understand and predict the interests of customers so as to focus their efforts and resources on more profitable areas.[74]

Non-expressive use

11.60 There has been growing recognition that data and text mining should not be infringement because it is a 'non-expressive' use. Non-expressive use leans on the fundamental principle that copyright law protects the expression of ideas and information and not the information or data itself. For example, consider a computer algorithm employed to search through a text to obtain metadata, which discovers two facts about Moby Dick:

> first, that the word 'whale' appears 1119 times; second, that the word 'dinosaur' appears 0 times. While a whale is certainly central to the expression contained in

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69 UK Government Intellectual Property Office, *Consultation on Copyright* (2011), 80.

70 R Van Nooren, 'Text Mining Spats Heats Up' (2013) 495 *Nature* 295 provides examples of text mining including: linking genes to research, mapping the brain and drug discovery.

71 C Haven, *Non-consumptive research? Text-mining? Welcome to the Hotspot of Humanities Research at Stanford* (2012) <http://news.stanford.edu/news/2010/december/jockers-digitize-texts-120110.html> at 22 April 2013; Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012).

72 See, eg, UK Government, *Consultation on Copyright: Summary of Responses* (2012), 17.

73 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).

74 Cyberspace Law and Policy Centre, *Submission 201*.

> Moby Dick, this data is not. Rather, metadata of this sort ... is factual and non-expressive, and incapable of infringing the rights of copyright holders.[75]

11.61 Academics use this example to argue that 'acts of copying that do not communicate the author's original expression to the public do not generally constitute copyright infringement'.[76] They suggest that to the extent that data and text mining do not substitute for the author's original expression, such non-expressive uses

> are properly considered equivalent to (or a subset of) highly transformative uses: their 'purpose and character' is such that they do not merely supersede the objects of the original creation.[77]

11.62 Similarly, Burrell and others submitted that uses that treat copyright material as mere data—rather than for its expressive value—do not compete with the original works and should not be treated as falling within the scope of the copyright owner's rights.[78]

11.63 Similar thinking was evidenced in the Hargreaves Review, which recommended an exception for uses of works enabled by technology which do not trade on the underlying and expressive purpose of the work. As a result of the recommendation, the UK Government will introduce an exception that allows a person who already has access to a work (whether under license or otherwise) to copy the work as part of a technological process of analysis and synthesis of the content of the work for non-commercial purposes.[79]

Current law

11.64 There is no exception in the *Copyright Act* that covers data and text mining. Where the data or text mining processes involve the copying, digitisation, or reformatting of copyright material without permission, it may give rise to copyright infringement.

11.65 One issue is whether data and text mining, if done for the purposes of 'research or study', would be covered by the fair dealing exception. The reach of the fair dealing exceptions may not extend to text mining if the whole dataset needs to be copied and converted into a suitable format. Such copying would be more than a 'reasonable portion' of the work concerned.[80] Nor is it clear whether copying for text mining would fall under the s43B exception relating to temporary reproduction of works as part of a technical process, but it seems unlikely.

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75 M Jockers, M Sag and J Schultz, *Brief of Digital Humanities and Law Scholars as Amici Curiae in Authors Guild v. Hathitrust* (2013), 18.

76 Ibid, 1609.

77 M Jockers, M Sag and J Schultz, *Brief of Digital Humanities and Law Scholars as Amici Curiae in Authors Guild v. Hathitrust* (2013).

78 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

79 Intellectual Property Office, *Data Analysis for Non-commercial Research* (2013).

80 *Copyright Act 1968* (Cth) s 40(5) setting out what is a 'reasonable portion' with respect to different works.

11.66 A number of stakeholders argued that data and text mining should be covered by fair use,[81] drawing on the principle of non-expressive use, or uses that do not trade on the underlying or expressive purpose of the work.[82] Others suggested that data and text mining are properly considered as 'transformative' uses.[83]

11.67 The Australian Industry Information Association argued that it is important for legislative reform to encourage research, development and competition in the data analytics field.[84] Universities Australia suggested that subjecting data and text mining to fair use would put Australian universities

> on a level playing field with their counterparts in the US (who rely on fair use to engage in non-consumptive uses such as data mining and text mining for socially useful purposes) as well as the UK (who will soon have the benefit of a stand-alone exception for non-commercial data mining and text mining).[85]

11.68 The Commonwealth Scientific and Industrial Research Organisation (CSIRO) agreed that if laws in Australia are more restrictive than elsewhere, the increased cost of research would make Australia a less attractive research destination.[86]

11.69 A number of stakeholders suggested that data and text mining should be limited to non-commercial research and study.[87] However, the CSIRO argued that the commercial/non-commercial distinction is not useful, since

> such a limitation would seem to mean that 'commercial research' must duplicate effort and would be at odds with a goal of making information (as opposed to illegal copies of journal articles, for example) efficiently available to researchers.[88]

11.70 Other stakeholders agreed.[89] Google submitted that there are clear public benefits to facilitating data and text mining 'regardless of whether this occurs within the confines of a university or other public research institution, or in the private sector'.[90]

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81 Internet Industry Association, *Submission 253*; Google, *Submission 217*; Society of University Lawyers, *Submission 158*; R Xavier, *Submission 146*.

82 ADA and ALCC, *Submission 213*; Australian Industry Group, *Submission 179*.

83 ADA and ALCC, *Submission 213*; R Xavier, *Submission 146*; M Rimmer, *Submission 138*.

84 AIIA, *Submission 211*. See also Internet Industry Association, *Submission 253*, who supported an exception around copying for the purposes of extracting information.

85 Universities Australia, *Submission 754*.

86 CSIRO, *Submission 242*.

87 AFL, *Submission 717*; Cricket Australia, *Submission 700*; CSIRO, *Submission 242*; Telstra Corporation Limited, *Submission 222*; M Rimmer, *Submission 138*.

88 CSIRO, *Submission 242*. The problematic distinction between commercial/non-commercial was also highlighted by Cyberspace Law and Policy Centre, *Submission 640* and John Wiley & Sons, *Submission 239*.

89 Universities Australia, *Submission 754*; Google, *Submission 600*; Cyberspace Law and Policy Centre, *Submission 201*.

90 Google, *Submission 600*.

11.71 On the other hand, publishers opposed an exception for data and text mining and suggested that 'the relative immaturity of the text/data mining market should not be considered as indicative of market failure demanding legislative intervention'.[91]

11.72 The Association of Learned and Professional Society Publishers (ALPSP) argued that 'publishers are not blocking access to articles for text and data mining—publishers are reporting that current requests are very low, and in the main, they are granted'.[92] Therefore, it was suggested that solutions lie in cooperation between users and publishers to create licensing solutions.[93] Exceptions, it was argued, would not create an environment conducive to collaboration:

> Data and text mining solutions are best found in market-based initiatives, like proactive voluntary licensing, that offer faster and more flexible ways to adapt to changing market needs and preferences ... Value proposals and business models for publishers in the field of data and text mining are only now emerging, and publishers are experimenting with various contractual and operational models.[94]

11.73 Publishers also argued that licensing helps offset publishers' costs to support content mining on a large scale, and that increases in costs 'could act as a significant disincentive to publishers to continue to invest in programmes to enrich and enhance published content, which in turn facilitates greater usage and encouragement'.[95]

Fair use

11.74 The ALRC considers that the unlicensed use of copyright material for non-expressive purposes, such as data and text mining, should be considered under the fair use exception recommended in this Report.

11.75 The ALRC agrees that non-expressive use can be considered a subset of transformative use. To the same extent that transformative use is not an illustrative purpose, the ALRC does not consider it necessary to include 'non-expressive use' or 'data and text mining' in the list of illustrative purposes.

11.76 Arguments in favour of considering data and text mining under a fair use exception, rather than introducing a new specific exception, largely parallel the more general arguments for introducing fair use. Data and text mining can 'cover a range of activities which do or may not raise the same issues'.[96] It is clear that data and text mining technologies are still evolving and they will become useful across a wide range

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91 John Wiley & Sons, *Submission 239*; Australian Publishers Association, *Submission 225*; ALPSP, *Submission 199*.

92 ALPSP, *Submission 199*.

93 Australian Publishers Association, *Submission 225*.

94 IASTMP, *Submission 200*.

95 John Wiley & Sons, *Submission 239*. The APA argued that cost implications arise because 'crawling can affect platform performance and response times, and may require the development and maintenance of parallel content delivery systems; costs are then incurred to ensure that adequate performance and access (whether for licensed or unlicensed users) is maintained': Australian Publishers Association, *Submission 225*.

96 Intellectual Property Committee, Law Council of Australia, *Submission 765*. See also John Wiley & Sons, *Submission 239* which submitted that 'there is currently little or no uniform understanding of what TDM actually is, nor how best it can be enabled or supported'.

of sectors in the economy, both commercial and non-commercial. The ALRC considers that fair use is sufficiently flexible to balance the competing interests between 'copyright owners on the one side and academic and commercial users of data mining techniques on the other'.[97]

11.77 Whether a use is fair must, in each instance, be assessed after considering the following fairness factors.

The purpose and character of the use

11.78 Data and text mining for illustrative purposes of fair use, such as 'research or study', 'education', 'library or archive use', are more likely to be fair. For example, the ALRC considers that the illustrative purpose of 'research and study' under fair use would allow data and text mining on the same grounds as the exception being implemented in the UK. This broadly aligns with the view of publishers, who had little problems with data mining for non-commercial purposes where a person has subscribed to the content that is being mined.[98]

11.79 A finding that data and text mining is transformative would weigh heavily in favour of fair use. For example, to the extent that data and text mining allows 'for the creation of new information, new aesthetics, new insight and understanding',[99] its use may be considered transformative.

11.80 Data and text mining for a commercial purpose would generally disfavour a finding fair use, but not always. The Cyberspace Law and Policy Centre submitted that data mining may be done in relation to commercial medical research, and it is not clear that the commerciality ought always to be decisive, when all the fairness factors are considered.[100]

The nature of the copyright material used

11.81 Copyright exists to protect the expression of ideas and facts, rather than the facts themselves. US courts have held that the scope of fair use is greater with respect to factual than non-factual works.[101] In addition, it has also been held that 'the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose'.[102]

The amount and substantiality of the part used

11.82 The amount and substantiality needed will depend on the purpose and character of the use. The ALRC envisages that many data and text mining exercises, to be useful, will involve reproduction of entire works. Fair use case law in the US makes it clear

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97 Cyberspace Law and Policy Centre, *Submission 201*.
98 International Association of Scientific Technical and Medical Publishers, *Submission 560*.
99 P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105, 1111.
100 Cyberspace Law and Policy Centre, *Submission 640*.
101 *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F Supp 1522 (SNDY, 1991), 1533.
102 *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F3d 605 (2nd Cir, 2006), 612.

that reproduction of a whole of a work can, depending on the circumstances, amount to fair use.[103]

Effect of the use upon the market

11.83 The effect on the market would be a relevant factor. Where the use is non-expressive or highly transformative, there will be good arguments that such uses are not a substitute for the original work, and therefore cannot directly harm the market for the original. For the market factor to work against fair use, the unlicensed use must harm 'traditional, reasonable, or likely to be developed' markets.[104]

11.84 The ALRC appreciates the arguments that licensing solutions are being developed for data and text mining. However, the mere availability of a licence should not mandate that unlicensed uses are never fair. However, where a licence is offered on reasonable terms, it will be more difficult to argue that the unlicensed use is fair. This will go against a finding of fair use, especially where the use is also commercial and non-transformative.

103 *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012).
104 *Princeton University Press v Michigan Document Services, Inc*, 99 F 3d 1381 (6th Cir, 1996), [26].

12. Libraries and Archives

Contents

Summary

12.1 This chapter considers uses of copyright material by libraries and archives in the digital environment. The *Copyright Act* contains specific exceptions for libraries and archives that relate to preservation copying and document supply. A flexible dealing exception is also contained in s 200AB.

12.2 The ALRC recommends that 'library and archive use' be an illustrative purpose of the fair use exception recommended in Chapter 4. The ALRC also recommends that, if fair use is not enacted, the *Copyright Act* be amended to introduce a new fair dealing exception, including 'library and archive use' as a prescribed purpose. The chapter discusses how such an exception might be framed.

12.3 As a consequence of fair use or the new fair dealing exceptions, the current flexible dealing exception in s 200AB for libraries and archives should be repealed.

12.4 The ALRC also recommends that the exceptions relating to preservation copying and document supply for research and study be retained, with some amendments. The retention of these exceptions is justified on public interest grounds and to reduce unnecessary transaction costs. These exceptions should not limit the operation of fair use, or the new fair dealing exceptions.

Cultural institutions in the digital environment

12.5 In this chapter, the ALRC uses the term 'cultural institutions' to refer to libraries[1] and archives[2] (including museums, galleries and public broadcasters) as defined in the *Copyright Act*. These cultural institutions have an important public interest role in maintaining collections and providing access to cultural and historical knowledge.[3]

12.6 The digital environment has changed the ways in which copyright materials are created, stored, preserved and published by cultural institutions.[4] In particular, the digitisation of collections has been recognised in government policy. The Australian Government's report, *Creative Australia: National Cultural Policy*, emphasised that:

> The way in which we engage with the collections of our National Collecting Institutions will change significantly. The digitisation of their collections and increasing online engagement, using the potential of the NBN, will exponentially increase the value and role of our national collections in telling Australian stories.[5]

12.7 During the Inquiry, cultural institutions sought reform to the *Copyright Act* that would give them greater freedom to engage in:

- routine digitisation of collection material;[6]
- digitisation and provision of access to unpublished material (for example, on a museum's website);[7]

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1 A library is defined in various exceptions in the *Copyright Act*. For example, for the purposes of s 49, a library is defined as 'a library all or part of whose collection is accessible to members of the public directly or through inter-library loan'. This is a broader concept than 'key cultural institutions' which are defined as bodies administering libraries and archives under a law of the Commonwealth or State, or bodies prescribed by the regulations. The prescribed bodies include the Australian Broadcasting Corporation, Special Broadcasting Service Corporation and the Australian National University Archives Program: *Copyright Regulations 1969* (Cth) sch 5.

2 *Copyright Act 1968* (Cth) s 10 defines 'archives' to mean archival material in the custody of: the Australian Archives; the Archives Office of NSW; the Public Record Office; the Archives Office of Tasmania; or a collection of documents or other material of historical or public interest in custody of a body that does not operate or maintain the collection for the purposes of deriving a profit. This may include museums: s 10(4).

3 Many cultural institutions have statutory obligations to develop, maintain and provide public access to their collections. See eg, *National Film and Sound Archive Act 2008* (Cth); *Archives Act 1983* (Cth); *Australian War Memorial Act 1980* (Cth); *National Library Act 1960* (Cth).

4 See A Christie, *Cultural Institutions, Digitisation and Copyright Reform* (2007), Intellectual Property Research Institute of Australia Working Paper No 9/07, 21–25, noting that digital technology has transformed libraries from traditionally holding non-digital works for physical access, to a 21st century-type institution that provides public access to digital representations of the cultural institutions online and around the clock.

5 Australian Government, *Creative Australia: National Cultural Policy* (2013), 100.

6 Grey Literature Strategies Research Project, *Submission 250*; National Library of Australia, *Submission 218*.

7 State Records South Australia, *Submission 255*; Grey Literature Strategies Research Project, *Submission 250*; CAMD, *Submission 236*; National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; National Archives of Australia, *Submission 155*.

- digitisation and communication of non-Crown copyright material that forms part of government records;[8]
- capturing and archiving Australian web content;[9]
- mass digitisation projects;[10] and
- use of orphan works.[11]

12.8 The fact that cultural institutions require greater flexibility to use copyright material in the digital environment is not a new consideration to copyright law reform in Australia. There was substantial debate during the Inquiry as to whether the current flexible dealing exception in s 200AB, discussed below, is adequate or whether it should be replaced by fair use.

Fair use

12.9 A move towards an open ended fair use exception, or the new fair dealing exception, would better achieve the objectives of ensuring that cultural institutions can continue to fulfil their public interest missions, while at the same time respecting authorship and creation. The following section explains why s 200AB should be repealed in favour of fair use.

Repeal of s 200AB

12.10 Section 200AB was inserted into the *Copyright Act* in 2006 to enable copyright material to be used for 'certain socially useful purposes', while remaining consistent with Australia's obligations under international copyright treaties.[12] The provision sought to give cultural institutions, educational institutions and users assisting those with a disability some of the 'benefits of fair use'.[13]

12.11 In respect of cultural institutions, s 200AB provides that use of copyright material is not infringement if it is:

- made by or on behalf of the body administering the library or archive;
- made for the purposes of maintaining or operating the library or archive; and
- not made partly for the purposes of the body obtaining a commercial advantage or profit.[14]

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8 CAARA, *Submission 271*; National Archives of Australia, *Submission 155*.
9 National Library of Australia, *Submission 218*.
10 Art Gallery of New South Wales (AGNSW), *Submission 111*.
11 See Ch 13.
12 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [6.53].
13 *Debates*, House of Representatives, 19 October 2006, 1 (Philip Ruddock MP, Commonwealth Attorney-General). Reforms relating to education and people with disability are considered elsewhere in this Report: Chs 14 and 16.
14 *Copyright Act 1968* (Cth) s 200AB(2)(a)–(c).

12.12 The exception is only available if no other exception or statutory licence is available to the user.[15]

12.13 Importantly, any use under s 200AB is subject to the three-step test language found in the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs Agreement). That is, use of the copyright material must:

- amount to a 'special case';
- not conflict with the normal exploitation of the work or subject matter; and
- not unreasonably prejudice the legitimate interests of the owner of copyright.[16]

12.14 The ALRC's examination of s 200AB has revealed that the section has not provided the intended benefits to cultural institutions. Many cultural institutions viewed the exception as a 'failure', and many have never relied on it.[17]. The evidence received from cultural institutions was consistent with field research by Dr Emily Hudson, which suggests that s 200AB 'operates on the margins, mostly as a de facto orphan works provision'.[18]

12.15 The failure of s 200AB can be traced to the inherently uncertain language of the three-step test.[19] In particular, stakeholders suggested that uncertainty surrounding the meaning of 'special case',[20] 'conflict with the normal exploitation', and 'unreasonably prejudice the legitimate interest' has not instilled confidence in the use of the provision.[21] Some suggested that the choice of language has turned the three-step test into a six[22] or an eight-step test.[23]

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15 Ibid s 200AB(6).

16 Ibid s 200AB(1)(a)–(d). Section 200AB(7) defines 'conflict with the normal exploitation', 'special case' and 'unreasonably prejudice the legitimate interest' with reference to Article 13 of the *TRIPS Agreement*.

17 ABC, *Submission 210*; State Library of New South Wales, *Submission 168*, State Records NSW, *Submission 160*; Powerhouse Museum, *Submission 137*. Only a couple of stakeholders indicated that they had expressly relied on s 200AB. The Art Gallery of NSW also stated that it had relied on s 200AB for the communication and publication of works in exhibitions where the author is unknown or un-contactable after a reasonably diligent search: Art Gallery of New South Wales (AGNSW), *Submission 111*. See also, Australian War Memorial, *Submission 188*.

18 E Hudson, 'Implementing Fair Use in Copyright Law' (2013) 25 *Intellectual Property Journal* 201, 225.

19 NFSA, *Submission 750*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; CAARA, *Submission 271*; National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

19 National Library of Australia, *Submission 218*.

20 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278* argued that cultural institutions had 'internalised the view that the special case requirement permitted only discrete uses of copyright works', and thus precluded mass digitisation.

21 See, eg, Copyright Advisory Group—Schools, *Submission 231*.

22 Ibid.

23 ADA and ALCC, *Submission 213*. Policy Australia, *Flexible Exceptions for the Education, Library and Cultural Sectors: Why Has s 200AB Failed to Deliver and Would These Sectors Fare Better Under Fair Use?* (2012), report prepared for Australian Digital Alliance/Australian Libraries Copyright Committee, 4 suggesting that copyright advisers needed to answer eight questions in determining whether s 200AB applies.

12.16 Moreover, section 200AB is intended to benefit user groups that are 'risk averse', lack legal resources, and that are rarely involved in litigation.[24] The reluctance of cultural institutions to use s 200AB has meant that no domestic case law has emerged. This has entrenched a narrow interpretation of the section in practice:

> If no one is willing to be the test case, it makes it difficult for industry practice to emerge, not just because of an absence of law, but because the muted practice themselves can end up justifying the interpretation of the exception as limited in scope, even if such an interpretation was never intended.[25]

12.17 At the international level, there has only been one decision interpreting art 13 of the TRIPs Agreement to guide users on the language of s 200AB. A Dispute Resolution Panel of the World Trade Organisation held that the US contravened its obligations under art 13 by exempting retail and restaurants from liability for public performance of musical works by means of communication of radio and television transmissions.[26] Academics have suggested that it is unclear how the narrow and restrictive reading of the provision by World Trade Organization Panel would apply to uses by libraries, archives or educational institutions.[27]

12.18 It may have been inevitable that an ambiguous framework unsupported by case law, when targeted at institutions that are generally risk averse and have little access to legal advice, would be doomed to failure.[28]

12.19 Cultural institutions uniformly supported repeal of s 200AB in favour of fair use.[29] There was little support for amending the provision.[30] For the reasons stated below, the ALRC rejects arguments that the problems associated with s 200AB would also arise under fair use.

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24 See ADA and ALCC, *Submission 213*; National Gallery of Victoria, *Submission 142*.

25 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

26 World Trade Organization, *Panel Report on United States–Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).

27 Professor Jane Ginsburg has commented that the WTO Panel interpretation of the 'normal exploitation' limb of the test may result in 'even traditionally privileged uses such as scholarship ... [being] deemed normal exploitations, assuming copyright owners could develop a low transactions cost method of charging for them': J Ginsburg, 'Towards Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions' (2001) *Revue Internationale du Droit d'Auteur* 1.

28 See Policy Australia, *Flexible Exceptions for the Education, Library and Cultural Sectors: Why Has s 200AB Failed to Deliver and Would These Sectors Fare Better Under Fair Use?* (2012), report prepared for Australian Digital Alliance/Australian Libraries Copyright Committee: ADA and ALCC, *Submission 213*.

29 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; CAARA, *Submission 271*; CAMD, *Submission 236*; National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; State Library of New South Wales, *Submission 168*; R Wright, *Submission 167*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*. The Australian Copyright Council did not support the introduction of fair use, but agreed that if fair use was introduced, s 200AB should be repealed: Australian Copyright Council, *Submission 654*.

30 Burrell and others considered broadening the exception to 'all users', but did not recommend this approach, given the problems with the current language of the provision: R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

12.20 The primary contention of those against the repeal of s 200AB in favour of fair use is that flexibility would come at the cost of uncertainty.[31] For example, the collecting society APRA/AMCOS argued that s 200AB

> is now said to be unusable—its flexibility causes so much uncertainty that its intended beneficiaries are paralysed. The result of a similarly flexible and technology neutral exception available to the public at large must either be a similar paralysis, or energetic acceptance resulting in litigation—neither an attractive outcome.[32]

12.21 The ALRC does not agree that flexibility has caused problems for the application of s 200AB. Rather, the evidence from cultural institutions accords with the view that s 200AB 'has failed not because it is a standard, but because it is an overly complex and ambiguous standard':

> The particular drafting of s 200AB has served to oust intuitive understandings and industry norms, and put in their place a series of concepts that neither institutional users nor their professional advisors feel confident to interpret.[33]

12.22 In the ALRC's view, fair use would not suffer from the same level of uncertainty. First, the fair use model requires consideration of the fairness factors, which are based on existing factors found in the current fair dealing provisions. Cultural institutions suggested that considerations of fairness are familiar and instinctive to them, and they would therefore be more willing to apply fair use.[34]

12.23 Secondly, users and courts can be guided by existing international case law, particularly from the US, when interpreting fair use.[35] US cultural institutions have confidence in relying on fair use, even in the absence of robust case law in the library and archives context:

> ... libraries look for guidance in fair use cases from other contexts, such as *Field v. Google, A.V ex rel. Vanderhye v iParadigms* and *Perfect 10, Inc v Amazon.com, Inc*, with the understanding that analogous fact patterns would likely favour libraries even more than commercial defendants given their socially beneficial missions.[36]

12.24 Rights holders also suggested that s 200AB could be amended or improved through agreed industry guidelines.[37] Copyright Agency/Viscopy argued that while there is a trade-off between 'certainty' and 'flexibility', s 200AB is less uncertain than some think and considered that additional confidence can be achieved through guidelines. However, the ALRC notes that existing guidelines have been developed by

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31 For example, the Australian Copyright Council, *Submission 654* suggested that 'cultural institutions would be at least unhappy with fair use as they are with s 200AB' for the same reasons.

32 APRA/AMCOS, *Submission 664*.

33 E Hudson, 'Implementing Fair Use in Copyright Law' (2013) 25 *Intellectual Property Journal* 201, 225.

34 ADA and ALCC, *Submission 213*; National Archives of Australia, *Submission 155*. Universities Australia expressed a similar view that university copyright officers have long been used to applying a fairness analysis: Universities Australia, *Submission 246*.

35 See Ch 5.

36 American Library Association and Association of Research Libraries, *Submission 703*.

37 APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; PPCA, *Submission 240*.

various groups to facilitate the use of s 200AB with limited success.[38] This appears to indicate that the fundamental ambiguity of the language used in s 200AB cannot be resolved by the use of guidelines.

12.25 In contrast, the ALRC foresees greater potential for effective guidelines around the concept of fairness because the starting point is less uncertain.[39] Indeed, the experience of American libraries and archives suggests that guidelines have been effective in guiding and providing more confidence to cultural institutions in their fair use practices.[40] Fair use guidelines and industry practice in other sectors have proved successful, and the ALRC sees no reason why this should not be the same for cultural institutions.

12.26 In Chapters 14 and 16, the ALRC notes similar problems relating to s 200AB as it applies to educational use and uses assisting people with disability. Those chapters also argue that fair use is preferable to s 200AB.

Illustrative purpose

12.27 The arguments for having an illustrative purpose for 'library and archive use' mirror those for introducing fair use more generally, as described in Chapter 4. Australian copyright law should continue to recognise the needs of cultural institutions to use copyright material, particularly where the uses have little or no effect on the potential market for, or value of, the copyright material. In the ALRC's view, the case for a flexible exception remains as strong now as it did in 2006, when s 200AB was introduced.

12.28 An illustrative purpose of 'library and archive use' would provide a legislative signal to cultural institutions that fair use is intended to emerge as a meaningful part of institutional practices. Given the risk averse nature of cultural institutions, an illustrative purpose is necessary to prevent some of the pitfalls of s 200AB and encourage cultural institutions to make socially beneficial uses of copyright material.

12.29 The fact that a use is made by a library or archive does not necessarily make the use fair. Uses by library and archives that facilitate other illustrative purposes such as research or study, or provide access to people with disability, would more likely to be fair use.[41] Similarly, uses that are transformative or 'non-expressive' might in the circumstances constitute fair use.[42] The assessment in each instance will need to be determined in accordance with the fairness factors.

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38 See L Simes, *A User's Guide to the Flexible Dealing Provisions for Libraries, Educational Institutions and Cultural Institutions* (2008), Australian Libraries Copyright Committee and the Australian Digital Alliance'; Australian Copyright Council, *Special Case and Flexible Dealing Exception: s 200AB* (2012).

39 See Ch 4.

40 American Library Association and Association of Research Libraries, *Submission 703*.

41 See Ch 16.

42 See Ch 11.

Where fair use might apply

12.30 Fair use is expected to cover uses that are not covered by specific exceptions relating to preservation and document supply, discussed below. This section briefly highlights how fair use might apply in relation to certain uses made by cultural institutions.

Mass digitisation

12.31 Fair use may allow cultural institutions to undertake mass digitisation projects in some instances. For example, in *Authors Guild v Hathi Trust*, the District Court for the Southern District of New York found that the defendant's mass digitisation of works in its collections to allow its members to conduct full text searches across the entire collection and to allow print-disabled patrons to access the collection to be fair use.[43] The use of copyright material was found to be transformative in that it provided access for print-disabled individuals, a purpose that was not served by the original work.[44] The provision of access for print-disabled individuals did not have a significant impact on a market.[45]

12.32 In the ALRC's view, mass digitisation projects are more likely to be fair use where they facilitate research and study, are transformative in nature, use material in the public domain, or are undertaken for non-commercial reasons.

Extended collective licensing

12.33 In the Discussion Paper, the ALRC asked whether voluntary extended collective licensing (VECL) should be pursued to help cultural institutions engage in mass digitisation projects.[46] Cultural institutions were opposed to VECL for a number of reasons. First, some suggested that materials that they might seek to digitise have little or no economic value (such as war diaries, government records, correspondence from individuals to government) that would warrant licensing.[47]

12.34 Secondly, a number of institutions were concerned to preserve their relationships with creators and their descendants, arguing that VECL would detract from rights holders' ability to give direct licences.[48]

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43 *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012), 23.

44 Ibid, 16.

45 Ibid, 21.

46 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Question 11–1.

47 For example, the National Library of Australia submitted that only a small proportion of its future mass digitisation projects would be suitable for VECL: National Library of Australia, *Submission 704*. See also NSW Government and Art Gallery of NSW, *Submission 740*; CAMD, *Submission 719*; National Archives of Australia, *Submission 595*.

48 NSW Government and Art Gallery of NSW, *Submission 740* suggested that VECL could take negotiating power away from artists and could jeopardise relationships between the institution and the artist or their estate. See also Australian War Memorial, *Submission 720*.

12.35 The Copyright Licensing Agency (CLA), noted that VECL was not 'necessarily a panacea to the issue of mass digitisation', and that

> the uses to which such digitised collections could be put, the fees to be payable for such usage, and the restrictions imposed to prevent any undermining of the creative industries are matters requiring a fuller discussion and an greater understanding of user needs and intentions.[49]

12.36 Burrell and others noted that, while collective licensing may be one way to facilitate mass digitisation, they queried whether VECL was suitable, arguing that

> [extended collective licensing] has the potential to implicitly reject the role for fair use which we believe would be conceding too much in terms of the capacity for a general exception to cover some aspects of large scale digitisation.[50]

12.37 Others noted that, if VECL were to be introduced, appropriate protection for rights holders would need to be considered, including the ability to opt out.[51]

12.38 The ALRC considers that VECL is not necessary to facilitate mass digitisation by cultural institutions. The combination of reforms recommended in this Report, including fair use, a limitation on remedies for the use of orphan works, and the expansion of the preservation copying provisions for cultural institutions, provide an adequate framework to cover mass digitisation projects.

12.39 If there are limited instances where cultural institutions consider VECL to be appropriate, the ALRC considers that other options may be pursued. For example, as noted by Australian copyright academics, 'there are already examples of blanket licenses being negotiated between Australian cultural institutions and copyright collectives for online uses of works'.[52] Rights holders suggested that blanket licensing, especially for musical works, was working well in allowing users to communicate material online.[53] Copyright Agency/Viscopy submitted that blanket licences commonly provide for 'indemnity for content that are not expressly excluded, rather than requiring licensees to check the mandate in each case'.[54] These options may be more efficient than VECL, as highlighted in Chapter 13.

12.40 This does not mean, however, that VECL is not suitable for other contexts. In the UK, ECL will become available to help streamline rights clearance where direct licensing is not possible. However, a collection society must apply and demonstrate that it represents a 'significant number of rights holders in relation to the woks covered by the scheme and has the support of those members of the application'. In effect, ECL will only be available where there is strong existing support for collective licensing.[55]

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49 The Copyright Licensing Agency, *Submission 766*.
50 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*. See also NFSA, *Submission 750*.
51 NFSA, *Submission 750*.
52 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.
53 APRA/AMCOS, *Submission 247*
54 Copyright Agency/Viscopy, *Submission 249*.
55 Intellectual Property Office, *Factsheet—Orphan Works Licensing Scheme and Extended Collective Licensing* (2013).

Unpublished works

12.41 A number of stakeholders called for a reduction in the term of copyright to allow the digitisation and communication of unpublished material.[56] Works that are never published risk remaining in copyright in perpetuity and their productive uses may be lost to users and copyright holders.[57] For example, the National Library of Australia (NLA) estimated that there are 2,041,720 unpublished items in its collection, use of which would support the 'general interest of Australians to access, use and interact with content in the advancement of education, research and culture'.[58]

12.42 The fact that a work is unpublished does not rule out the case for fair use. Guidance can be taken from the US fair use provision, which specifically recognises that 'the fact that a work is unpublished shall not of itself bar a finding of fair use if such a finding is made upon consideration of all the above factors'.[59] Similarly, under the ALRC's model, the fact that a work is unpublished does not determine the fair use question. Whether a use is fair will be determined by the fairness factors, including the nature of the use, the amount that is copied, and the impact on any potential market for the material.

Harvesting of Australian web content

12.43 The NLA called for a specific exception that would allow it to harvest and preserve Australian internet content. It advised that, despite having no exception to rely on, it has conducted annual harvests of Australian web material since 2005, gathering five billion files and 200 terabytes of data. In harvesting, the library 'posts information for website owners on the Pandora website and places a link to this notice in the web harvest robot's request to the targeted servers'. That is, the library does not contact the owners before harvesting the material. Notification of the harvesting is done at the time the website is harvested.[60]

12.44 The NLA noted that responses from website owners have been minimal.[61] Despite this, the NLA reported that because it has effectively copied the content without the copyright owner's permission, it has not permitted public access to the data.

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56 For example, the Australian War Memorial suggested that an ideal reform would be a 'provision whereby an individual unpublished literary work moves into the public domain following 50 years of donation into a public institution': Australian War Memorial, *Submission 188*. See also, National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*, National Archives of Australia, *Submission 155*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

57 *Copyright Act 1968* (Cth) s 33(2) provides that copyright subsists in a literary, dramatic, musical or artistic work until 70 years after the end of the calendar year in which the author died. If a literary, dramatic or musical work was not published before the author died, the copyright term of 70 years does not start to run until one calendar year after it is first published. Section 29(1) provides that literary, dramatic, musical or artistic works, cinematograph film or a sound recording shall be deemed to have been published, if and only if, reproductions/copies/records have been supplied to the public.

58 ADA and ALCC, *Submission 586*.

59 *Copyright Act 1976* (US) s 107.

60 National Library of Australia, *Submission 218*.

61 Ibid. Only 11 responses were received after the first annual harvest and the number of responses has declined since then.

12.45 Fair use may be used to facilitate such activities. To the extent that the NLA has not received many takedown requests, this might suggest that copyright holders consider such harvesting to be fair use. Having regard to the fairness factors, permitting access for non-commercial reasons such as research or study, or allowing 'data mining' of the pages may also be fair use.[62]

Fair dealing for library and archive use

12.46 The ALRC also recommends that, if fair use is not enacted, the *Copyright Act 1968* (Cth) should be amended to introduce a new fair dealing exception that would combine the existing fair dealing exceptions and introduce new prescribed purposes, including 'library and archive use'.[63] This new fair dealing exception should supplement, and not replace, specific exceptions relating to preservation copying and document supply.

12.47 The exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the fair use exception. Applying the fair use or amended fair dealing to library or archive uses should, therefore, produce the same result.

12.48 If the new fair dealing exception is implemented, consideration may need to be given to how 'library and archive use' should be further defined. One option is to define library or archive use in similar terms to s 200AB. That is, uses made 'by or on behalf of the body administering a library or archive' for the 'purpose of maintaining or operating the library or archives (including operating the library or archive to provide services of a kind usually provided by library or archives)'. The ADA and ALCC submitted that 'a fair dealing provision should ensure that it covers the needs of the users, scholars, researchers, and creators looking to make use of library and archive collections'.[64] Others suggested a more inclusive definition of 'library and archive' to take into account 'cultural heritage'[65] or the 'public interest purposes of cultural institutions'.[66]

12.49 The Australian Government may wish to consult stakeholders further on the appropriate definition of 'library or archive use' for the purposes of the new fair dealing exception, noting in particular the *National Cultural Policy*, which recognises the need to ensure both dissemination and access to cultural material, as well as adequate protection for copyright owners.

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62 See Ch 11.
63 See Ch 12.
64 ADA and ALCC, *Submission 586*.
65 For example, the National Archives of Australia submitted that 'cultural heritage' could be an illustrative purpose of fair use to cover institutions 'making accessible unique culturally and historically significant material': National Archives of Australia, *Submission 595*.
66 ADA and ALCC, *Submission 868*.

Recommendation 12–1 Section 200AB of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether uses by libraries and archives infringes copyright.

Preservation copying

12.50 While the ALRC recommends the introduction of a flexible fair use exception, it also recommends that some specific exceptions be retained and that certain new specific exceptions be introduced. These specific exceptions should not limit the application of fair use. The exceptions reflect the existence of strong public policy reasons for protection, and in some instances, recognition that the case for fair use is so strong that requiring an assessment of fairness factors would be redundant, and possibly serve to increase transaction costs.[67]

12.51 The ALRC considers that preservation activities undertaken by cultural institutions should be covered by such an exception. Preservation activities—as distinct from providing access to copyright material—would in most instances be fair use. Preservation of copyright material is in the interest of both users and copyright holders and does not affect the copyright holder's ability to exploit the market of his or her work. Further, preservation ensures the protection of Australian heritage and promotes the public interest in research and study and access to cultural and historical material.

Current law

12.52 There are numerous provisions in the *Copyright Act* that deal with preservation copying by cultural institutions. These are divided between copying of 'works'[68] and 'subject matter other than works'.[69]

12.53 Under s 51A, a library or archive can make and communicate a reproduction of the work if :

- the work is in manuscript form or is an original artistic work—for the purpose of preserving against loss or deterioration or for the purpose of research that is being carried out at the library or archive;[70] or
- the work is in published form but has been damaged, deteriorated, lost or stolen—for the purpose of replacing the work.[71]

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67 See, eg, NFSA, *Submission 750* suggested that leaving preservation copying to fair use risks the potential for such activities to be licensed in the future, eroding the protection provided by fair use. This may have unintended consequences of reducing preservation activities due to licensing costs.

68 *Copyright Act 1968* (Cth) s 10 defines a 'work' as a literary, dramatic, musical or artistic work. An artistic work is further defined to mean 'an artistic work in which copyright subsists'.

69 Ibid, ss 51A, 51B deal with copying 'works' while ss 110B, 110BA and 112AA deal with subject-matter other than works, which includes sound recordings and cinematograph films and published works.

70 Ibid s 51A(1)(a).

71 Ibid s 51A(1)(b), (c).

12.54 Preservation copying of works held in published form is only permitted subject to a commercial availability declaration. That is, preservation copying is only permitted if, after reasonable investigation, the library or archive is satisfied that a copy (not being a second-hand copy) cannot be obtained within a reasonable time at an ordinary commercial price.[72] Further, reproductions of original artistic works can only be communicated via copy-disabled computer terminals installed within the premises of the library or archive.[73]

12.55 Mirror provisions can be found in s 110B in relation to reproductions of sound recordings, and cinematographic films, including the commercial availability test, and the restriction of online communication to computer terminals installed within the premises of the library or archive.[74]

12.56 In 2007, three further exceptions were inserted into the *Copyright Act*: ss 51B, 110BA and 112AA. These provisions allow certain 'key cultural institutions' to make up to three reproductions of 'significant works', being 'works of historical or cultural significance to Australia' for preservation purposes.[75] They are in addition to the provisions that apply to library and archives generally.[76] The Supplementary Explanatory Memorandum noted that:

> The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation.[77]

Current exceptions are outdated

12.57 The exceptions are a good example of how prescriptive and rigid rules are inadequate for the digital environment. Stakeholders suggested that the limit of one copy for preservation purposes or three copies for a 'key cultural institution' no longer meets best practice preservation principles.[78] Aside from 'legacy' works—such as old manuscripts and films—libraries and archives must also preserve materials that are 'born digital' in the face of 'technological obsolescence'.[79] Best practice preservation

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72 Ibid s 51A(4)(a).

73 Ibid s 51A(3A).

74 Ibid s 110B. In relation to sound recordings, the provision refers to reproduction of a 'first record' of a sound recording or a 'first copy' of a cinematograph film.

75 Ibid s 51B (deals with manuscripts, original artistic works, published work); s 110BA (deals with: first record, or unpublished record, embodying sound recording; first copy or unpublished copy of a film; published film); s 112AA (deals with published editions of works).

76 Ibid ss 51B(1), 110BA(1), 112AA(1). The provisions define a 'key cultural institution' as one administering the library or archive with a statutory function of developing and maintaining the collection. Other institutions may be prescribed by the Regulations. Prescribed Institutions include: the Australian Broadcasting Corporation; Australian National University Archives Program; and the Special Broadcasting Corporation: *Copyright Regulations 1969* (Cth) sch 5.

77 Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [76].

78 National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; ABC, *Submission 210*; National Archives of Australia, *Submission 155*.

79 For example, the National Library of Australia stated that in 2011, it made preservation copies of 16,235 works. See also, National Archives of Australia, *Obsolescence—A Key Challenge In the Digital Age* <www.naa.gov.au/records-management/agency/preserve/e-preservation/obsolescence.aspx> at 24 March 2013.

principles in relation to digital material require numerous copies to be made in multiple formats.[80] For example, the ADA and ALCC suggested that effective preservation may require a 'variety of processes including reformatting, migration and emulation'.[81] Similarly the National Film and Sound Archive (NFSA) argued:

> Items selected for digital preservation may be subject to back up copying, format-shifting, remote storage, quality control and administration, which can also involve reproducing, communicating or performing copyright material. This full range of activities needs to be covered by the proposed exception.[82]

12.58 Stakeholders supported a more technologically-neutral exception that would not limit the number of copies and which would allow for format shifting.[83]

12.59 Australian copyright academics queried whether the distinction between 'original' and 'published' works remains tenable in the digital environment and argued that the preservation exceptions should apply to all works, whether published or unpublished. There appears little utility in having different preservation exceptions addressing 'works' and 'subject matters other than works' and different considerations for 'original' and 'published' works. As noted above, preservation of all copyright material is required in the interests of both users and copyright holders.

12.60 Recent copyright reviews in other jurisdictions have also recognised the need to give libraries and archives greater freedom to undertake preservation of copyright material. In the UK, the Government will implement recommendations from the Hargreaves review to allow libraries, archives and museums to copy any item for preservation purposes.[84]

12.61 Similarly, the Copyright Review Committee (Ireland) recommended that the *Copyright and Related Act 2000* (Ireland) be amended to allow heritage institutions to undertake format shifting for the purposes of preservation.[85] In Canada, libraries and archives are permitted to make copies of works, whether published or unpublished, in its permanent collection if the work is deteriorating, damaged or lost, or is at risk of being so.[86] Copying is also permitted if the library 'considers that the original is

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80 For example, International Standards Organisation contemplates a range of different archived copies, including: an archived master copy; an access copy; at least one backup copy which enables restoration in the event that a system is compromised; and at least one remote master copy. International Standards Organisation, *Reference Model for an Open Archival Information System (OAIS) Recommended Practice (IOS 14721:2012)*, (2012), 8. See also United Nations Educational, Scientific and Cultural Organisation, *Guidelines for the Preservation of Digital Heritage* (2003), 93.

81 ADA and ALCC, *Submission 868*.

82 NFSA, *Submission 750*.

83 ADA and ALCC, *Submission 213*. See also State Records South Australia, *Submission 255*; Grey Literature Strategies Research Project, *Submission 250*; Australian War Memorial, *Submission 188*; Arts Law Centre of Australia, *Submission 171*; National Archives of Australia, *Submission 155*; Powerhouse Museum, *Submission 137*.

84 See Intellectual Property Office, *Factsheet—Research, Libraries and Archives* (2013). The current provisions in the *Copyright, Designs and Patents Act 1988* (UK) only allow libraries and archives to make preservation copies of certain works, but not artistic works, sound recordings or films.

85 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 176.

86 *Copyright Act 1985* (Can) s 30.1(1)(a).

currently in a format that is obsolete or is becoming obsolete, or that the technology required to use the original is unavailable or is becoming unavailable'.[87]

12.62 The ALRC recommends that the *Copyright Act* be amended to consolidate and streamline existing preservation copying exceptions into a single exception that would permit libraries and archives to make use of copyright material necessary for the preservation of published and unpublished works in their collections. As a consequence, a number of existing exceptions should be repealed. These recommendations are consistent with the ALRC's framing principles for reform and ensure that libraries and archives are able to preserve copyright material in the interests of both users and copyright holders.

Commercial availability requirement

12.63 In the Discussion Paper, the ALRC proposed that any new preservation copying exception should include a requirement that does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.[88] Cultural institutions uniformly opposed this proposal.[89]

12.64 Many suggested that commercial copies are not the same as preservation copies. Commercially available digital works may not be in a format or quality that is suitable for preservation. For example, the NFSA submitted:

> Commercial copies are intended to be efficient to mass produce and distribute widely, not to ensure the highest quality or long-term survival of their content. It is rare that commercially available copies will be in a format and quality appropriate for preservation.[90]

12.65 The ADA and ALCC argued 'if the work is in an unstable format then purchasing another copy simply means acquiring another problem of the same kind'.[91] Others suggested that buying a copy of the work may not be appropriate where a work is a 'limited edition work'. For example, the Art Gallery of NSW suggested that

> in many cases preservation copying is needed to preserve a particular edition, or a particular copy with annotations or other features. The commercial availability of different editions, or copies without those features, does not assist.[92]

12.66 Cultural institutions suggested that a consequence of a commercial availability requirement may be that libraries and archives delay undertaking preservation activities until such time as a work is no longer commercially available, by which time the work

87 Ibid s 30.1(1)(c).
88 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 11–6.
89 ADA and ALCC, *Submission 868*; NFSA, *Submission 750*; National Library of Australia, *Submission 704*; CAARA, *Submission 662*; National Archives of Australia, *Submission 595*.
90 NFSA, *Submission 750*.
91 ADA and ALCC, *Submission 586*.
92 NSW Government and Art Gallery of NSW, *Submission 740*.

may have deteriorated.[93] The NLA suggested 'the ideal time for digital capture' of a paper based item is at the beginning of the item's existence.[94]

12.67 Some stakeholders suggested that if a commercial availability requirement is to be retained, it ought to consider whether the format and quality of the available material is suitable for preservation.[95] This would be consistent with similar provisions in other jurisdictions, where the commerciality requirement only applies if the commercial copy can 'fulfil the purpose' of preservation or is 'of a medium and quality appropriate' for preservation.[96]

12.68 However, others argued that commerciality should not be a relevant factor because preservation, of itself, involves no market harm.[97] The ABC considered that commercial availability 'incorporates the commercial sector, for which the preservation of cultural material is generally not an objective or driver of behaviour, into the process of preserving cultural heritage'.[98] Similarly, the Pirate Party echoed that preservation is 'not a normal or consumptive' use of a copyright work:

> It seems irrelevant to restrict preservation to prevent commercial disadvantage when there is no market value in preserved content. Preservation copies do not prejudice the ability of the copyright holder to derive profit from commercial sales: it is only when content becomes unavailable that preserved copies become relevant.[99]

12.69 Preservation may be beneficial to rights holders who do not foresee the need or do not have the resources to preserve material to an archival standard. The NFSA suggested that 'collection material is frequently used to develop new commercial release'[100] and that reduced preservation of material 'disadvantages rights holders, as it decreases the likelihood that their material will be available into the future'.[101]

Distinguishing between preservation and access

12.70 Rights holders did not express major concerns about copying works for preservation purposes, but were concerned with subsequent access to the works in

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93 ADA and ALCC, *Submission 586*.

94 National Library of Australia, *Submission 704*. Similarly, the NFSA argued that it may be important to make a high quality photographic copy of a drawing as soon as possible after acquisition to ensure there is copy in another medium against which decay, such as fading of pigments, can be measured.

95 NFSA, *Submission 750*; NSW Government and Art Gallery of NSW, *Submission 740*; National Archives of Australia, *Submission 595*.

96 The *Copyright, Designs and Patents Act 1988* (UK) s 42(2) restricts preservation copying to cases where it is not 'reasonably practicable to purchase a copy to fulfil that purpose'. In Canada, preservation copying is not permitted where an appropriate copy is commercially available in a medium and of a quality that is appropriate: *Copyright Act 1985* (Can) s 30.1(2).

97 Australian Society of Archivists Inc, *Submission 630* arguing that simply preserving the material does not affect the ability of the owner to commercially exploit the material. See also, Pirate Party Australia, *Submission 689*.

98 ABC, *Submission 775*.

99 Pirate Party Australia, *Submission 689*.

100 For example, the NFSA advised that 'rights holders often source copies of their copyright material from the NFSA as these tend to be the best preserved (or sometimes only) copies in existence from which new masters could be derived to enable commercial distribution': NFSA, *Submission 750*.

101 Ibid.

ways that affect the ability of the copyright holder to exploit the material.[102] For example, the Arts Law Centre of Australia supported an exception provided that the new 'preservation copying exception operates within commercial licensing arrangements that may be in place for the material for the reproduction and communication to the public of material held by libraries and archives'.[103]

12.71 While the ALRC's recommendations extend the preservation exceptions, the question of access is left to fair use, new fair dealing, or licensing solutions. In the case of fair use and new fair dealing, the fairness factors provide a framework in which to consider competing interests, including licensing solutions that are being offered.

Who benefits from the exception

12.72 A question that arises if the current exceptions are to be streamlined into one exception is who should benefit from the exception. The current exceptions distinguish between libraries and archives from 'key cultural institutions'. Burrell and others questioned the policy reasons for the three-copy limit applying to 'key cultural institutions' and not other libraries and archives, because it is difficult to argue that only key cultural institutions are the repositories of significant works.[104]

12.73 The ALRC agrees that the new preservation exception should apply not just to 'key cultural institutions'. One option is for the exception to be available to libraries, archives and museums that do not operate for profit and hold collections that are accessible to the public. This would be consistent with other jurisdictions that have libraries and archives exceptions. For example, the *Copyright Act* 1985 (Can) defines a 'library, archive or museum' to mean

- an institution, whether or not incorporated, that is not established or conducted for profit or that does not form part of, or is not administered or directly or indirectly controlled by, a body that is established for profit, in which is held or maintained a collection of documents and other materials that is open to the public or to researchers; or
- any other non-profit institution prescribed by regulation.[105]

12.74 This is already recognised to some extent in the *Copyright Act*. An archive is defined in s 10(4) to include 'a collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being maintained by the body for the purposes of conserving and preserving those documents or other material and the body does not maintain and operate the collection for the purposes of delivering a profit'.[106]

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102 Copyright Agency/Viscopy, *Submission 249*; ARIA, *Submission 241*; Australian Publishers Association, *Submission 225*; Pearson Australia/Penguin, *Submission 220*; Australian Copyright Council, *Submission 219*.

103 Arts Law Centre of Australia, *Submission 706*.

104 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

105 *Copyright Act 1985* (Can) s 2.

106 *Copyright Act 1968* (Cth) s 10(4). An explanatory note to the section states that museums and galleries are bodies that could have collections covered by the definition of 'archives'.

Recommendation 12–2 The exceptions for preservation copying in ss 51A, 51B, 110B, 110BA and 112AA of the *Copyright Act* should be repealed. The *Copyright Act* should provide for a new exception that permits libraries and archives to use copyright material for preservation purposes. The exception should not limit the number or format of copies that may be made.

Document supply for research or study

12.75 In the Discussion Paper, the ALRC proposed that certain access limits be placed on document supply by libraries and archives.[107] Following further consideration, the ALRC decided not to proceed with these proposals.

Current law

12.76 Under ss 49 and 50 of the *Copyright Act*, a person may make a request in writing to be supplied with a reproduction of an article, or part of an article contained in a periodical or published work held by the library or archive.[108] There are a number of limits to reproduction.[109] A key limit is that where a request is made for reproduction of the whole of the work, or part of a work that contains more than a 'reasonable portion'[110] of the work, reproduction cannot be made unless:

- the work forms part of the library or archives collection; and
- before a reproduction is made, an authorised officer, after reasonable investigation is satisfied that the work cannot be obtained within a reasonable time at an ordinary commercial price.[111]

12.77 Where a library acquires a work in an electronic form, the library may make the work available online within the library premises in a manner such that users cannot make an electronic copy of the work, or communicate the article or the work.[112]

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107 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 11–7.

108 *Copyright Act 1968* (Cth) s 49(2). Section 50(1)(b) allows an officer in charge of a library to request another library to supply an article or part of an article in contained in a periodical publication, or the whole or part of published work other than an article contained in a periodical publication, for the purposes of supplying the reproduction to a person who has made a request under s 49. This is known as interlibrary loan.

109 There are limits including that a request is not for reproduction of, or parts of two or more articles in the same periodical publication unless the articles are requested for the same research course or study: s 49(4).

110 'Reasonable portion' is defined in s 10(2) and (2A) of the Act, and is taken to be 10% of the number of pages in a published edition or where a work is divided into chapters, no more than a single chapter of the work.

111 *Copyright Act 1968* (Cth) s 49(5AB) provides that in determining whether a work could be obtained within a reasonable time, the authorised officer must take into account: the time by which the person requests requires it; the time within which a reproduction of the work at the ordinary price could be delivered to the person; and whether an electronic reproduction of the work could be obtained within a reasonable time at a reasonable price. The ADA and ALCC submitted that this requirement extends to materials that are available electronically: ADA and ALCC, *Submission 868*.

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

Emerging distribution markets

12.78 A number of publishers submitted that any expansion of the library and archives exceptions relating to document supply would undermine emerging distribution and licensing models.[113] For example, the Australian Publishers Association (APA) argued that part of the historical rationale that underpins the document supply exceptions—such as Australia's geographical isolation and inability to retrieve materials quickly—no longer applies in the digital environment. It argued that such 'legacy' provisions should be repealed.[114] The APA stressed there is now immediate access to authorised copies and that digital technology assists in both identifying and communicating with publishers and/or collection societies that are able to license the use of copyright material on behalf of publishers. It was argued that the exceptions 'have no place in copyright legislation that supports a digital economy'.[115]

12.79 A further concern was that files distributed by libraries and archives were susceptible to further distribution by users on file sharing sites. Allen & Unwin suggested that libraries 'frequently create files without any digital security and send them to patrons as email attachments' and that 'requiring library patrons to warrant the file is for personal use is no real protection with a digital file'.[116]

Limits on document supply

12.80 In the Discussion Paper, the ALRC proposed that some limits could be placed on document supply by libraries and archives, including measures to: prevent users from further communicating the work; ensure that the work cannot be altered; and limits on the time in which the work could be accessed.[117]

12.81 Cultural institutions opposed such limits on the basis that they:

- place unreasonable burdens on cultural institutions compared to others who provide content to third parties;[118]
- would restrict fair use of copyright material amounting to de facto contracting out of fair use;[119]

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113 Australia Council for the Arts, *Submission 260*; Australian Publishers Association, *Submission 225*; Pearson Australia/Penguin, *Submission 220*; Australian Copyright Council, *Submission 219*.

114 Australian Publishers Association, *Submission 225*. The Australian Copyright Council, *Submission 219* also highlighted that the libraries and archives provisions 'reflect the importance of such institutions in a geographically disparate nation' and queried 'whether the policy basis for all these provisions remain valid in the digital economy'.

115 Australian Publishers Association, *Submission 225*.

116 Allen & Unwin, *Submission 174*.

117 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 11–7.

118 R Xavier, *Submission 816*; NFSA, *Submission 750*; Australian Parliamentary Library, *Submission 694*; CAARA, *Submission 662*;

119 NFSA, *Submission 750*.

- amount to a tax on technology that would deter digital use;[120] and
- are inconsistent with the mandate of cultural institutions to provide access in the public interest of research and study.[121]

12.82 Many cultural institutions stressed that they would not be in a position to implement the ALRC's proposals due to lack of funding[122]and the need to make a massive overhaul of infrastructure.[123] For example, ADA and ALCC went into some detail in their submission about the different systems that are used provide document delivery and emphasised that moving from open systems to proprietary systems would be expensive.[124]

12.83 Cultural institutions suggested that it should be sufficient for libraries and archives to notify the user of his or rights under the *Copyright Act*.[125] The ADA and ALCC noted concerns in relation to piracy, but suggested that there 'has not been any expectation on the part of libraries that these copies would be made available for wider public access, or to reduce purchasing of digital content licenses'.[126] It argued that:

> While we understand the legitimate worries of copyright holders about piracy, considering that document supply requests are either of non-commercially available material (so are not damaging markets) or of a small portion, it seems unlikely that they would be used for piracy ... Indeed, there was no evidence we noted in the submissions to this inquiry that linked document supply to systematic piracy.[127]

12.84 The NLA drew attention to a survey it conducted showed that file sharing as a result of document supply is low.[128] For the financial year 2012–2013, the NLA refused 13% of document supply requests for copyright reasons:

> With the increasing capacity of internet searches and efficient distribution portals, it is becoming increasingly easy to ascertain whether a work is available at an ordinary commercial price and within a reasonable time. If it is, and the user has requested more than a 'reasonable portion' they will be directed to the commercially available source. In these cases, libraries are often acting as pointers to direct business to publishers and authors.[129]

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120 ADA and ALCC, *Submission 868* argued that users requesting a copy of a print item face more restrictions in requesting the item in digital format than were the library to photocopy the item and post a paper copy to their address.

121 Ibid.

122 Ibid; NFSA, *Submission 750*; CAARA, *Submission 662*; Australian Society of Archivists Inc, *Submission 630*.

123 ALIA and ALLA, *Submission 624*; National & State Libraries Australasia, *Submission 588*; ADA and ALCC, *Submission 586*.

124 ADA and ALCC, *Submission 868*. The National Archives of Australia also suggested that a move to 'bespoke or proprietary formats' reduces the ability of the archives to provide meaningful access to its collection.

125 Association of Parliamentary Libraries of Australasia, *Submission 650*; Museum Victoria, *Submission 522*.

126 ADA and ALCC, *Submission 213*.

127 ADA and ALCC, *Submission 868*.

128 National Library of Australia, *Submission 218*.

129 ADA and ALCC, *Submission 868*.

12.85 After further consideration, the ALRC agrees that the limits proposed are unreasonable and would have a negative impact on research and study, particularly for people who do not have physical access to a library. From the view of copyright holders, the 'reasonable portion' and market availability requirements compare favourably with other jurisdictions.

Supply for purposes beyond research and study

12.86 Cultural institutions also called for a more liberal interpretation of research and study, to take into account situations where a user might request a document for any fair use or fair dealing purpose. For example, the supply of sheet music for someone learning to play a piece may not be research or study, and therefore, not supplied.[130]

12.87 On the other hand, copyright holders called for the document supply provisions to be limited to 'non-commercial research' and 'private study'—consistent with the way similar provisions are framed in other jurisdictions.[131]

12.88 The ALRC does not consider that the document supply exception should be expanded beyond research or study, nor further confined to private research or non-commercial research. As Professor Sam Ricketson and Chris Creswell observed:

> the purpose of the person requesting the reproduction under s 49 is linked only to the individual research and study fair dealing defence in s 40: it does not extend to any of the other purposes that are covered by the fair dealing defences in ss 41 to 43.[132]

12.89 The link between the document supply exception and the research and study fair dealing should be retained in the interest of certainty. If either fair use, or the new fair dealing exception for library and archive use is implemented, that may provide some scope for document supply beyond research and study, subject to the fairness factors.

Simplification

12.90 While the exception should be retained, it would benefit from substantial redrafting and simplification. Cultural institutions voiced concerns over the complexity of the document supply provisions, including their limited breadth and inefficiency in operation. The ADA and ALCC suggested that:

- the 1,600 word provision is complex and difficult to administer for library staff; and
- the need to destroy all electronic copies sent to the user as soon as practicable has resulted in inefficiencies and increased cost for end-users.[133]

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130 National Library of Australia, *Submission 218*.

131 Australian Publishers Association, *Submission 225*. See eg, Intellectual Property Office, *Factsheet—Research, Libraries and Archives* (2013). Amendments to the UK legislation following the Hargreaves Review will allow libraries and archives to supply a single copy, but only for non-commercial research and private study. Similarly, a single copy of a work can be supplied in Canada for private research or study: *Copyright Act 1985* (Can) s 31.2(4).

132 S Ricketson and C Creswell, *Law of Intellectual Property, Copyright, Designs and Confidential Information* Thomson Reuters Australia, [11.270].

133 The ADA and ALCC provided some statistics in their submission: ADA and ALCC, *Submission 213*.

12.91 The ALRC agrees that s 49 is unnecessarily complex and would benefit from simplification. In implementing the ALRC's recommendations, the Australian Government may wish to also consider amendments to simplify the document supply provision in s 49, along with the associated exceptions in s 50 (interlibrary loan). The ALRC notes that guidance can be sought from other jurisdictions with similar exceptions, which display much clearer drafting.

Technological protection measures and contracting out

12.92 Some cultural institutions raised issues relating to temporary protection measures (TPMs). The ADA and ALCC were concerned about the

> increasing tendency of digital content licenses to contract libraries out of existing copyright exceptions, and ways in which TPMs impede preservation and long-term access to copyright works in the public interest.[134]

12.93 The ADA and ALCC called for 'mirrored exceptions permitting circumvention of TPMs where an exception for digitisation or fair use or proposed legislative alternative exists'.[135]

12.94 The Australian Government Attorney-General's Department is conducting an inquiry into whether exceptions for TPMs under the *Copyright Act* are appropriate and whether new exceptions should be added. That review is considering whether further exceptions for 'reproduction and communication of copyright material by libraries, archives and cultural institutions for certain purposes' are needed.[136] The Terms of Reference direct the ALRC not to duplicate work in relation to this review.

12.95 However, as discussed in Chapter 20—and consistent with the ALRC's views in this chapter—the inherent public interest in libraries and archives exceptions requires that there be no contracting out of these exceptions. For the reasons stated in that chapter, the ALRC recommends that contracting out of fair use should be possible, but if fair dealing is implemented, there should be limits on contracting out of fair dealing and specific exceptions for libraries or archives.

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134 Ibid.
135 Ibid.
136 Australian Government Attorney-General's Department, *Review of Technological Protection Measure Exceptions made under the Copyright Act 1968* (2012).

13. Orphan Works

Contents

Summary

13.1 Orphan works are copyright material with no owner that can be identified or located by someone wishing to obtain rights to use the work.[1] This chapter considers reforms that would facilitate the use of orphan works to enable their beneficial uses to be captured in the digital economy, without creating harm to the copyright holder.

13.2 The fair use exception recommended in Chapter 4 may apply to uses of orphan works.

13.3 The ALRC recommends that the *Copyright Act* be amended to provide that remedies available for copyright infringement be limited where the user has conducted a reasonably diligent search for the copyright holder and, where possible, has attributed the work to the author.

13.4 What constitutes a reasonably diligent search may change as new technologies, databases, registers and services emerge. The *Copyright Act* should not be prescriptive

1 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.

about what constitutes a reasonably diligent search. Rather, it should provide that a number of factors may be considered in determining whether a reasonably diligent search has been conducted.

13.5 The chapter also discusses options for the establishment of an orphan works or copyright register, but notes that it could be the subject of further consideration by the Australian Government in consultation with stakeholders.

The orphan works problem

13.6 Orphan works are a significant problem around the world.[2] The inability to use orphan works means that their productive and beneficial uses are lost to both users and copyright holders. The Australian Attorney-General's Department review of orphan works (the AGD Orphan Works Review) noted that enabling uses of orphan works could contribute to 'research, education, culture and to the creation of further transformative works' as well as 'commercial purposes, thus increasing the already considerable contribution of copyright industries to the Australian economy'.[3]

13.7 Enabling the use of orphan works in the digital environment would potentially facilitate other socially beneficial uses, enabled by technology, mentioned elsewhere in this Report, including data and text mining, digitisation and other uses.

13.8 This Inquiry has found that orphan works present particular problems for cultural institutions, many of which are inhibited from digitising and providing access to orphan works in their collections to aid research, education and access to cultural heritage.[4] For example, the CAMD noted that orphan works 'in some collections are virtually invisible to the public as well as academic historians and researchers, which fosters significant gaps in knowledge and impedes scholarly research'.[5]

13.9 The extent of the orphan works problem has not been quantified in Australia. However, anecdotal evidence received from stakeholders suggests that the problem is real. For example, the NLA estimated that it has some 2,041,720 unpublished items in its collection, a significant number of which are orphan works.[6] The result of a survey of members of the ADA and ALCC indicated that library collections comprise up to

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2 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 38 notes that orphan works represent 'the starkest failure of copyright to adapt' and that the UK system is locking up 'millions of works in this category'. Similar findings have been made elsewhere in Europe: Comité Des Sages, *The New Renaissance: Reflection Group on Bringing Europe's Cultural Heritage Online* (2011), 20–21 recommended that 'a European legal instrument for orphan works needs to be adopted as soon as possible'.

3 Australian Government Attorney-General's Department, *Works of Untraceable Copyright Ownership—Orphan Works: Balancing the Rights of Owners with Access to Works* (2012), 3. The report suggests that orphan works affect large parts of the economy, including: information technology companies, Indigenous creators, news and print media, composers, photographers and web-based creators.

4 National Archives of Australia, *Submission 595*; National & State Libraries Australasia, *Submission 204*; National Gallery of Victoria, *Submission 142*.

5 CAMD, *Submission 236*.

6 National Library of Australia, *Submission 218*.

70% unpublished orphan works.[7] A number of museums also indicated that their collections include a substantial number of orphan works.[8]

13.10 Public broadcasters—the ABC and the SBS—drew attention to the problems of using orphan works in derivative works. The ABC noted that it 'frequently confronts situations in which copyright clearances are required for orphan works, particularly in relation to literary works'.[9] Free TV Australia also observed that broadcasters had problems using archival material, such as audiovisual footage or photographs, where the owner could not be found.[10]

13.11 The ALRC heard that photographs are susceptible to being 'orphaned' in the digital environment, due to rights information being removed.[11] Measures to reduce instances of orphan works in the digital environment are considered below, in relation to the possibility of an orphan works or copyright register.

Current law

13.12 There is no specific exception in the *Copyright Act* for the use of orphan works. Unless covered by an exception or licence, use of an orphan work may constitute copyright infringement.

13.13 However, orphan works may be used when covered by existing fair dealing exceptions or a statutory licence. For example, the statutory licences under pts VA and VB of the *Copyright Act* allow the copying and communication of materials for education, whether or not they are orphaned, subject to the payment of reasonable remuneration to a declared collecting society.[12] Cultural institutions that are covered by a government statutory licence under s 183 may copy orphan works for government purposes.[13]

13.14 Some users have also used orphan works by taking a 'risk management' approach, for example, by undertaking a diligent search before using an orphan work.[14]

13.15 Libraries, archives and educational institutions may also use orphan works for socially useful purposes under s 200AB. However, as noted in Chapter 12, s 200AB

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7 See ADA and ALCC, *Submission 213*.

8 National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

9 ABC, *Submission 210*.

10 Free TV Australia, *Submission 270*.

11 Copyright Agency/Viscopy, *Submission 249*; Australian Copyright Council, *Submission 219*; ALPSP, *Submission 199*.

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

13 Copyright Agency/Viscopy, *Submission 249*.

14 For example, the National Gallery of Victoria advised that 'where it has not been possible to clear copyright, we have published the orphan work and invited the copyright holders to contact the NGV. We would much rather publish these works than risk them being unknown to the public': National Gallery of Victoria, *Submission 142*.

has been used on rare occasions to deal with orphan works primarily because of the uncertainty in the language of the section.[15]

Reform options

13.16 This section canvasses the different models that can be implemented to facilitate the use of orphan works. The central aim of each model is to facilitate the use of orphan works, while ensuring that owners are adequately compensated when they are identified.

Limitations on remedies after reasonably diligent search

13.17 In 2006, the US Copyright Office's *Orphan Works Report* recommended that remedies be limited in cases of infringement involving orphan works. Limitation on remedies would apply where the user had conducted a 'reasonably diligent search' for the copyright owner, and had provided attribution where possible.[16]

13.18 The Copyright Office did not seek to define what ought to be a 'reasonably diligent search'. Rather, it acknowledged that the search standard was 'very general' and favoured 'the development of guidelines' by users and stakeholders.[17] It was argued that a truly 'ad hoc' system—where users simply conduct a reasonable search and then commence use, without formality—is most efficient.[18] However, it highlighted a number of factors that could guide users on a case-by-case basis.[19]

13.19 The Copyright Office recommended that remedies be limited in certain circumstances. Where use of the work is commercial, the liability for infringement is limited to 'reasonable compensation', rather than statutory damages.[20] In most cases, reasonable compensation would be the amount a user would have paid to the copyright owner had they engaged in negotiations before the infringing use commenced.[21] No relief would be available for non-commercial uses of orphan works, provided that the user ceased using the work expeditiously upon receiving an infringement notice. Future uses of the work would be the subject of negotiations between the parties.

13.20 The Copyright Office also proposed limiting the scope of injunctive relief in two ways. First, where a user has made a derivative use of an orphan work that also includes 'substantial expression' of the user—such as incorporating it into another

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15 See, eg, CAMD, *Submission 236*; Art Gallery of New South Wales (AGNSW), *Submission 111*. In Ch 12, the ALRC recommends repeal of s 200AB.

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

17 Ibid, 108−10.

18 Ibid, 113.

19 Ibid, 99–108. Such factors may include: the amount of identifying information on the copy of the work; whether the work has been made available to the public; the age of work; whether information can be found on publicly available records; whether the author is still alive; and whether the use of the orphan work is commercial or non-commercial.

20 In cases of infringement, US courts may award statutory damages ranging from $750 to $30,000 in respect of any one work: *Copyright Act 1976* (US) § 504(c)(1).

21 United States Copyright Office, *Report on Orphan Works* (2006), 116. It was suggested that the onus is on the owner to demonstrate that the work had a fair 'market value'. The term 'reasonable' imports the notion that some uses may attract a zero or low royalty payment.

work—a court would not restrain its use.[22] Rather, the user is to pay 'reasonable compensation' for use of the orphan work, and is required to adequately attribute the work.[23] If a work is used without transforming the content, a full injunction is still available, but a court would take into account and accommodate the interest of the user that might be harmed by an injunction.[24]

13.21 The Copyright Office emphasised that an orphan works solution should not act as a replacement or substitute for fair use:

> The user of an orphan work should consider whether her use might fall within fair use, or curtailing her use in a way to have it more clearly fall within the exemption, in addition to or in lieu of reliance on any orphan works provision.[25]

13.22 Part of the reasoning for a legislative solution was that many stakeholders to that inquiry expressed a view that the 'uncertain nature of fair use and the idea/expression dichotomy' contributes to a user's hesitation in using orphan works, even in cases that seem to 'fall squarely within classic fair use situations'.[26]

13.23 Despite a number of Bills before Congress to implement the Copyright Office's proposals, these were not passed.[27] The drafters of the Bills grappled with particular issues, including: recognising and accounting for the concerns of photographers; the contours of a 'reasonably diligent search'; and the role of searchable electronic databases.[28]

13.24 In late 2012, the Copyright Office launched a further inquiry into orphan works, seeking to identify the 'current state of play for orphan works' and 'what has changed in the legal and business environments in the last few years that might be relevant to a resolution of the problem and what additional legislative, regulatory, or voluntary solutions deserve deliberation'.[29] Submissions to date have emphasised that a 'reasonably diligent search' is necessary before any use of an orphan work. Many stakeholders called for the establishment of a copyright register to help identify owners of orphan works.

Limited exceptions for uses of orphan works

13.25 In October 2012, the European Union adopted its Directive on Certain Permitted Uses of Orphan Works. Member states are required to implement the Directive in national legislation by 29 October 2014. The Directive allows publicly accessible cultural institutions to reproduce and communicate orphan works in furtherance of their

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22 The term 'substantial expression' is intended to exclude situations where the work is simply put into a collection of other works, like an electronic database: Ibid, 120.

23 Ibid, 119–121.

24 United States Copyright Office, *Report on Orphan Works* (2006), 120.

25 Ibid, 56.

26 Ibid, 57.

27 These included: *Orphan Works Act of 2006* HR 5439, 109th Cong; *Orphan Works Act of 2008* HR 5589, 110th Cong; and *Shawn-Bentley Orphan Works Act of 2008* S 2193.

28 For example, the *Orphan Works Act of 2006* HR 5439, 109th Cong would have required users to document their search, and proposed that that the Copyright Office set out authoritative information on search tools. See, B Yeh, *CRS Report for Congress: 'Orphan Works in Copyright Law'* (2008).

29 Federal Register 6455 Vol 77, No 204 (Monday October 22).

public interest mission.[30] The Directive only applies in respect of certain types of work held by institutions: text; audiovisual and cinematographic works; and phonograms first published or broadcast within an EU member state.[31] Photographs are only covered to the extent that they are incorporated into other works.[32]

13.26 Orphan works can only be used after the institution conducts a 'diligent search' in good faith.[33] The Directive leaves discretion for member states to determine the sources that are appropriate to include in diligent search criteria for each category of work.[34] It also leaves open the possibility of allowing external organisations to conduct a diligent search for a fee.[35]

13.27 Importantly, the Directive establishes a central EU orphan works register and requires reciprocal recognition of orphan work status across member states.[36] Results of a diligent search are recorded and provided to a competent national authority and made available on a publicly accessible online database to be established and managed by the European Commission's Office for Harmonization in the Internal Market.[37]

13.28 The Directive provides that rights holders should, at any time, be able to put an end to the orphan work status insofar as their rights are concerned.[38] Fair compensation is then due to the rights holder, but the member states retain the discretion to determine the circumstances under which compensation may be organised.[39]

Centrally granted licences

13.29 A number of jurisdictions have opted to facilitate the use of orphan works through a centralised body with the ability to license uses of orphan works.[40]

13.30 Since 1998, users in Canada may apply to 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.[41] Licences are only available for orphan works that are published or fixed.[42]

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30 *Directive 2012/28 of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works*, art 1(1). These public institutions include libraries, educational establishments and museums, archives, film and audio heritage institutions, and public service broadcasting institutions. Public interest missions include the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collections: art 6(2).

31 Ibid art 1(2) and (3).

32 Ibid art 1(4).

33 Ibid art 3(1).

34 Ibid art 3(2).

35 Ibid art 3(1) and recital 13.

36 Ibid art 4.

37 Ibid art 3(6).

38 Ibid art 5.

39 Ibid art 6(5).

40 *Copyright Act 1985* (Can) s 77; *Copyright Act 1970* (Japan) art 67; *Copyright Act 1967* (South Korea) art 50.

41 *Copyright Act 1985* (Can), s 77.

42 Ibid. The *Copyright Act 1985* (Can) requires that orphan works and sound recordings be 'published' and performances and communication signals to be 'fixed'.

13.31 The Board works closely with the Canadian Copyright Licensing Agency (CCLA) in setting the royalty fee and the terms and conditions of the licence.[43] Royalties collected are held in a fund for five years after the expiration of the licence for collection by the copyright owner.[44] If the royalty is not collected, the Board will allow the CCLA to dispose of the fee to its members as it sees fit.[45] Since it was enacted in 1998, the Board has opened 411 files relating to a total of 12,640 orphan works.[46] Similar systems are in place in Japan, South Korea, and India.[47]

13.32 Centralised licensing is also being pursued in the United Kingdom, where a centralised body will be established to license individual uses, whether commercial or non-commercial, of orphan works subject to a diligent search.[48]

13.33 The independent body will maintain a registry of orphan works, set and levy fees, ensure that diligent searches are undertaken and approve individual cases.[49] It will not validate individual diligent searches. Rather, it would regularly test the quality of searching and the methods through a sampling approach.[50] The estimated cost of setting up such a scheme in the UK is said to be between £2.5m and £10.5m.[51]

13.34 The UK Intellectual Property Office argued that the scheme:

> should enable the use of orphan works; reduce legal uncertainty for users of orphan works; ensure that rights holders can see what content is being used; and give returning rights holders easy access to any fees that have been paid.[52]

Extended collective licensing

13.35 Several Nordic countries use extended collective licensing (ECL) schemes that allow users to pay licence fees to a collecting society comprising a 'substantial number' of rights holders of a certain type of works.[53] A feature of ECL schemes is that the collecting societies are authorised by statute to grant licences on behalf of the copyright owner, even where the owner is not a member of the collective.[54] Some rules

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43 *Copyright Act 1985* (Can) s 77(2).

44 Ibid s 77(3).

45 Ibid.

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

47 See *Copyright Act 1970* (Japan) s 67; *Copyright Act 1967* (South Korea) s 47; *Copyright Act 1957* (India) s 31(A).

48 UK Government, *Government Policy Statement: Consultation on Modernising Copyright* (2012), 8. See *Enterprise and Regulatory Reform Act 2013* (UK) pt 6. A new s 116A will be inserted into the *Copyright, Designs and Patents Act 1988* (UK) that allows the Secretary to approve an independent body to license orphan works.

49 Intellectual Property Office, *Orphan Works Impact Statement: BIS 1063* (2012).

50 Ibid, 5.

51 Ibid, 6. Equivalent to $3.9m–$16.3m (at 21 May 2013).

52 Ibid, 3.

53 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.

54 For example, *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.

allow copyright owners to opt out of the system and instead deal directly with licensees.[55]

13.36 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.

13.37 Reforms in the UK will also provide for voluntary ECL to deal with mass digitisation. This will allow an appointed authorised licensing body, for certain classes of materials, to grant copyright licences to bodies who do not own the copyright material they wish to use. The regulations will provide an opt out provision for the copyright owner.[56]

Reform approach

13.38 In formulating its recommendations in this area, the ALRC has had regard to the framing principles for reform for this Inquiry. In particular, the ALRC considers that reform in this area should have the primary aim of making orphan works more widely available in the digital economy, while at the same time acknowledging and respecting authorship and creation.[57] Maria Pallante, Director of the US Copyright Office has argued:

> We seem to have general agreement that in the case of a true orphan work, where there is no copyright owner and therefore no beneficiary of the copyright term, it does not further the objectives of the copyright system to deny use of the work, sometimes for decades. In other words, it is not good policy to protect a copyright when there is no evidence of a copyright owner.[58]

13.39 At the same time, any orphan works solution also needs to ensure that identified copyright holders are adequately compensated. Any solution should also be efficient to minimise any transactions costs and reduce unnecessary burdens on users and in particular, public cultural institutions for whom orphan works are a particular problem.

13.40 Lastly, any solution should be cost-effective and compliant with Australia's international obligations.

Centralised or extended collective licensing

13.41 The ALRC does not recommend that centralised licensing or ECL be pursued in Australia as a solution for orphan works, for the reasons outlined below.

Up-front payment is problematic

13.42 A key feature of the centralised licensing and ECL models referred to above is to require up-front payment before an orphan work be used. The ALRC considers that

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

56 See Ch 12.

57 See Ch 2.

58 M Pallante, 'Orphan Works and Mass Digitisation: Obstacles and Opportunities' (Paper presented at Orphan Works & Mass Digitization: Obstacles & Opportunities Symposium, Berekley, April 12–13).

it would be inefficient to require up-front payment when there is no guarantee or little likelihood that a copyright holder will appear to claim the money.[59] For example, the CSIRO argued in relation to ECL:

> The suggestion that a licence fee would be paid to a collecting society seems strange where the issue is the identity of the recipient. Disbursement of money after a period to members of the collecting society seems unfair to the user of material who may claim to be entitled to a refund or to be obliged simply to agree to pay a reasonable royalty should the correct rights holder be identified.[60]

13.43 Even where the money is held in an escrow account and redistributed to other copyright holders in an ECL scheme, the recipients may have no connection with the orphan work. This is not consistent with copyright's purpose of providing an incentive to create by remunerating the author of a work.[61]

13.44 Secondly, up-front payment may lead to inefficient underpricing or overpricing of licences compared with a reasonable payment that is calculated after the rights holder appears. For example, photographers were opposed to the UK's centralised licensing scheme because the 'de facto standard rate' set by the scheme would make it more difficult for individuals to negotiate higher rates where the quality and nature of their work justifies it.[62] On the other hand, law and economics scholars have also suggested that setting a fee for orphan works based on market licensing rates for non-orphan works, would most likely lead to overpricing:

> Basing royalty on the price that is being paid to non-orphans, or that would have been paid in a hypothetical negotiation between the entrant and the copyright holder, would almost certainly result in a royalty that is too high, as measured by what we want socially. We should expect royalty rates for orphan use to be modest.[63]

13.45 Similarly, the ACCC expressed concerns about collective licensing because collecting societies represent licensors who might otherwise be in competition with one another. This may give rise to 'market power and the likelihood that a collecting society would have both the ability and incentive to exercise that market power (leading to higher licence fees) in its dealings with both its members and potential licensees'.[64]

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59 CAMD, *Submission 236*; State Records NSW, *Submission 160*; National Archives of Australia, *Submission 155*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*; Art Gallery of New South Wales (AGNSW), *Submission 111*; H Rundle, *Submission 90*.

60 CSIRO, *Submission 242*.

61 See Ch 2.

62 Ibid. See also Stop43 and others, *Briefing for Members of House of Lords Second Reading Debate Enterprise & Regulatory Reform Bill* (2012). This briefing paper was signed by 70 organisations representing photographers.

63 R Picker, 'Private Digital Libraries and Orphan Works' (2012) 27 *Berkeley Technology Law Journal* 1259, 1283.

64 ACCC, *Submission 165*.

Market distortion

13.46 Some stakeholders submitted that, without up-front payment, the market for other non-orphan works would be harmed.[65] That is, without up-front payment, users would choose orphan works over other copyright works where the user has to pay.[66] Copyright Agency/Viscopy preferred a model under which a licence to use an orphan work could be granted by a collecting society, but only if an 'equally suitable' licensed work was not available.[67]

13.47 Such market distortion arguments are unconvincing. It would be very difficult to determine in practice whether one work is 'equally suitable' for another. Most stakeholders took a different view and considered that such a scheme would be inefficient, and would unnecessarily restrict competition.[68] Rather, greater access to orphan works

> should be seen as 'increasing competition' and ... the same logic would support measures to limit the public domain or inhibit the voluntary use of free licenses like creative commons or open source software licenses, which would be highly undesirable.[69]

13.48 Some orphan works were never intended to be commercially exploited, such as those donated to the cultural institutions. Professor Jennifer Urban argues that, if a reasonably diligent search has been conducted and the copyright owner cannot be found, there is a high probability that the work has been 'economically abandoned'.[70] In a case where the work can truly be said to be an orphan, there is little difference between it and one in which the copyright holder would allow free use, such as through a creative commons licence. Demand for unconnected works should not be a factor in formulating an orphan works scheme.

13.49 The use of orphan works would not detrimentally affect the incentive to create new works. As Professor Randal Picker argues, it seems unlikely that a prospective author would reason that

> I won't write this book now because when my successor copyright holders discover that a book once lost to them is at that point being used by others my successors won't have a remedy against those users.[71]

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65 Copyright Agency, *Submission 727*; Arts Law Centre of Australia, *Submission 706*; MEAA, *Submission 652*.

66 See, eg, ALPSP, *Submission 199*, arguing that an exception 'would naturally make orphan works more attractive than other copyright works that the same user may have to pay for the use of, photographs being a prime example. This puts other creators at a disadvantage and creates an unfair marketplace.'

67 Copyright Agency/Viscopy, *Submission 249*.

68 See, eg, A Katz, *Submission 606* who suggested that the tendency to treat the requirement to seek permission before use as dogma 'impedes simple and effective solutions and leads to the adoption of grand solutions, such as extended collective licensing, that are ineffective at best and harmful at worst'.

69 R Xavier, *Submission 146*.

70 J Urban, 'How Fair Use Can Help Solve the Orphan Works Problem' (2012) 27 *Berkeley Technology Law Journal* 1, 18.

71 R Picker, 'Private Digital Libraries and Orphan Works' (2012) 27 *Berkeley Technology Law Journal* 1259, 1282. Picker argues that a prospective author who expects his work to succeed would track the title

13.50 As noted above, the inability to use orphan works means that their beneficial uses are lost to both users and copyright holders. Rather than harming markets, use of an orphan work may, in some instances, reunite copyright owners with their works and thereby revive the market and provide new streams of income.[72] For example, the Small Press Network submitted that republishing orphan works would 'stimulate innovation and new publishing opportunities'.[73]

Inefficient and more expensive?

13.51 Licences granted through a central body or ECL scheme are often granted for limited duration and, therefore, may not provide sufficient security for cultural institutions that may be seeking long-term security for their collections or are seeking to engage in mass digitisation projects.[74] A study commissioned by the UK Intellectual Property Office to support the implementation of the Hargreaves Review undertook a 'rights clearance simulation' across six different jurisdictions with centralised or ECL schemes and concluded that there was 'no systematic recognition of the need for permanent licences'.[75] The report also noted that licensing tariffs may prevent mass digitisation projects, since 'per item fees initially appearing very low and thus sustainable turn out to render mass digitisation unviable for public and non-profit institutions when scaled up under reasonable assumptions'.[76]

13.52 Stakeholders also suggested that centralised or collective licensing models may suffer from bureaucracy and be more expensive and time-consuming to administer.[77] The University of Sydney submitted that under an ECL scheme:

> the administrative burden of negotiating and implementing an ECL will in most circumstances outweigh modest royalties that may be paid for most non-commercial uses that public collections, the academic community and the general public are likely to make of digitised works.[78]

13.53 Similarly, others suggested that the cost of setting up and maintaining a centralised body would outweigh any benefits in terms of minimal payments to rights holders. For example, the UK Intellectual Property Office estimates that substantial

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for future uses. Orphan works are classes of works that are insufficiently successful to warrant tracking and we would 'expect those rights to go for very little'.

72 CAMD, *Submission 719* suggested that there would be a far 'greater chance to find copyright holders if these items were included on the websites of cultural institutions which regularly log tens of millions of visits per year. See also Pirate Party Australia, *Submission 689*.

73 Small Press Network, *Submission 221*.

74 R Hansen et al, 'Solving the Orphan Works Problem for the United States' 37(1) *Columbia Journal of Law & the Arts* 1, 41.

75 M Favale et al, *Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation* (2013), prepared for the Intellectual Property Office, 86. The rights clearance exercise asked representatives from rights clearance authorities in Canada, Denmark, France, Hungary, India and Japan to provide a licence fee for six scenarios that are likely to occur in reality, ranging from small online resources to mass digitisation projects.

76 Ibid, 4.

77 Copyright Advisory Group—Schools, *Submission 231*; ADA and ALCC, *Submission 213*; ABC, *Submission 210*.

78 University of Sydney, *Submission 815*.

costs will be required in setting up its centralised system.[79] Commentators have also criticised the Canadian system as being an expensive and lengthy process, for which only a small number of licences have been granted over a long period of time.[80] Some stakeholders noted that they had strong networks with copyright owners and that it would be more efficient to maintain such relationships and settle any fees when an owner appears.[81]

13.54 Academics have also argued that ECL schemes are inefficient because they do not reduce the transaction cost of conducting a diligent search, but merely transfer the obligation to a collecting society which has to conduct the search at a later time when it is seeking to distribute funds.[82] Concerns have also been raised about how ECL schemes might operate in practice. For example, the AGD Orphan Works Review cautioned that conferring the rights of orphan works owners on collection societies and other representative bodies may 'prioritise corporate advantages ahead of author and user interests'.[83]

Fair use

13.55 Some uses of orphan works can be expected to constitute fair use. Where use of an orphan work is for an illustrative purpose such as 'quotation', 'research and study', 'reporting the news', 'criticism and review' and 'libraries and archives', it is more likely to be fair.

13.56 The ALRC expects that fair use would be particularly helpful to cultural institutions that are digitising or making available access to orphan works for non-commercial purposes, such as research or study. Cultural institutions suggested that they would be more confident relying on a fair use exception, rather than the exception under s 200AB when using orphan works.[84] For example, the NLA considered that fair use 'will provide workable solutions to many issues of providing access to orphan works'.[85]

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79 Intellectual Property Office, *Final Impact Statement: Orphan Works* (2012), 2 suggesting that it would cost £2.5m to establish a register or database of licensed orphan works and £10m to establish a new body with that could determine whether orphan works could be used under licence; and £0.5–1.8 pa to operate the new authorising body.

80 See D Khong, 'Orphan Works, Abandonware and the Missing Market for Copyrighted Goods' 15 *International Journal of Law and Information Technology* 54, 75; J de Beer and M Bouchard, *Canada's 'Orphan Works' Regime: Unlocatable Copyright Owners and the Copyright Board* (2009) noting that between 1988 and 2009 only 441 applications were filed in relation to 12,640 orphan works, and only 230 licences were granted.

81 ADA and ALCC, *Submission 586*; National Gallery of Victoria, *Submission 142*.

82 R Hansen et al, 'Solving the Orphan Works Problem for the United States' 37(1) *Columbia Journal of Law & the Arts* 1 (2013), 47–48.

83 Australian Government Attorney-General's Department, *Works of Untraceable Copyright Ownership—Orphan Works: Balancing the Rights of Owners with Access to Works* (2012).

84 NFSA, *Submission 750*; NSW Government and Art Gallery of NSW, *Submission 740*; National Library of Australia, *Submission 704*; ADA and ALCC, *Submission 586*. See also Ch 12.

85 National Library of Australia, *Submission 704*.

13.57 Submissions to the current US Copyright Office's Inquiry show that cultural institutions are comfortable relying on fair use to facilitate uses of orphan works. For example, the Library Copyright Alliance stated:

> We are convinced that libraries no longer need legislative reform in order to make appropriate uses of orphan works. However, we understand that other communities may not feel comfortable relying on fair use and may find merit in an approach based on limiting remedies if the user performed a reasonably diligent search for the copyright owner prior to use.[86]

13.58 The confidence displayed by US cultural institutions may have resulted from a number of best practice guidelines. For example, the American Library Association and Association of Research Libraries submitted to the ALRC Inquiry that US libraries 'have gained increasing comfort' in relying on fair use because of the development of Codes of Best Practice and other education provided through library associations.[87] Similar guidelines could be developed in Australia in relation to orphan works and in particular, around the diligent search criteria.[88]

13.59 However, a use of an orphan work will not always be fair. Whether or not a use is fair must be assessed in accordance with the fairness factors.

13.60 ***The purpose and character of the use***. Uses of orphan works for one of the illustrative purposes of fair use, such as 'quotation' or 'library or archive use' are more likely to be fair. The extent to which use of an orphan work is 'transformative' will also be highly relevant.[89] Commercial uses of orphan works are less likely to be fair; however, this is by no means determinative. US case law illustrates that the commercial use must be weighed against other factors, including whether the use is transformative or harms the market of the rights holder.[90]

13.61 ***The nature of the copyright material used***. US case law suggests that it is easier to argue fair use in relation to works that have been published, rather than those that remain unpublished.[91] US courts have also considered that whether the work was 'out of print' or unavailable on the market is an important factor.[92] Use of a work that is out of print or unavailable for purchase through normal channels is unlikely to harm any

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86 Library Copyright Alliance, *Comments of the Library Copyright Alliance in Response to the Copyright Office's Notice of Inquiry Concerning Orphan Works and Mass Digitisation* (2013), 7.

87 American Library Association and Association of Research Libraries, *Submission 703*.

88 Stakeholders have expressed a willingness to do this. See, eg, NFSA, *Submission 750*.

89 See, eg, *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012).

90 *Sony Corp of America v Universal City Studios, Inc* (1984) 464 US 417; *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569.

91 B Beebe, 'An Empirical Study of US Copyright Fair Use Opinions, 1978–2005' (2008) 156 *University of Pennsylvania Law Review* 549, 614–615. In *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 564 O'Connor J considered that 'under ordinary circumstances, the author's right to control the first appearance of his undisseminated expression will outweigh a claim of fair use'. This line of reasoning was followed until s 107 was inserted into the Act in 1991, providing that 'the fact that a work is unpublished shall not, of itself, bar a finding of fair use if such a finding is made upon consideration of all the above factors'.

92 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 553 ('If the work is "out of print" and unavailable for purchase through normal channels, the user may have more justification for reproducing it.').

market.[93] The extent to which an orphan work is factual or creative will also be important. Use of works which are highly factual, or those that were created without the intention of commercial exploitation—such as government or archival records or old war diaries—are more likely to be fair.[94]

13.62 ***The amount and substantiality of the part used.*** The influence of the amount and substantiality factor will sometimes depend on the purpose and character of the use. Fair use case law in the US makes it clear that reproduction of a whole of a work can, depending on the circumstances, amount to fair use.[95]

13.63 ***Effect of the use upon the market.*** The effect, if any, on the relevant market or markets for the orphan work will be a relevant factor. When considering this factor, the relevant markets are 'traditional, reasonable or likely to be developed' markets. If a use fills a 'market niche' that the rights holder 'simply had no interest in occupying',[96] then the fourth factor may not disfavour fair use. Professor Jennifer Urban has argued that orphan works represent a complete market failure, as there is no owner with whom to transact. Where one party to the transaction is missing, no market can arise for which there would be a negative effect.[97]

Limitation on remedies

13.64 While guidelines may provide some certainty, users relying on fair use may still run the risk of the use being judged not to be fair. There may also be instances where a user may determine that use of an orphan works is unlikely to be fair. The risk of damages or injunctive relief may therefore discourage users from making socially productive uses of orphan works.

13.65 To overcome this, the *Copyright Act* should be amended to provide for a limitation on remedies following a diligent search. This proposal received strong stakeholder support, with many suggesting that the approach adopted by the US Copyright Office be followed.[98]

13.66 The ALRC also considers that limiting remedies will provide some measure of certainty to users beyond fair use. The importance of adequately compensating rights holders could be recognised, for example, if remedies were limited to 'reasonable

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93 W Patry, *Patry on Fair Use* (2012), 445.

94 'The law generally recognises a greater need to disseminate factual works than works of fiction or fantasy': *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 563.

95 *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012).

96 *Princeton University Press v Michigan Document Services, Inc*, 99 F 3d 1381 (6th Cir, 1996) (citations omitted).

97 J Urban, 'How Fair Use Can Help Solve the Orphan Works Problem' (2012) 27 *Berkeley Technology Law Journal* 1, 25.

98 University of Sydney, *Submission 815*; ABC, *Submission 775*; CSIRO, *Submission 774*; Universities Australia, *Submission 754*; Internet Industry Association, *Submission 744*; Arts Law Centre of Australia, *Submission 706*; Pirate Party Australia, *Submission 689*; Association of American Publishers, *Submission 611*; Google, *Submission 600*; National & State Libraries Australasia, *Submission 588*; ADA and ALCC, *Submission 586*; Motion Picture Association of America Inc, *Submission 573*; SBS, *Submission 556*; Free TV Australia, *Submission 270*. The Australian Film/TV Bodies, *Submission 739* did not oppose the ALRC's proposals.

compensation'. The ALRC appreciates that, unlike the US, the Australian system does not have statutory damages. However, the *Copyright Act* does permit the award of additional damages that may deter users from using an orphan work.[99]

13.67 The introduction of a limitation on remedies would not be new in Australian copyright law. Section 115(3) already provides that, in an action for infringement a plaintiff is not entitled to any damages, if it is established that 'at the time of infringement, the defendant was not aware, and had no reasonable grounds for suspecting, the act constituting the infringement was an infringement of copyright'.[100]

A reasonably diligent search

13.68 The first step in the ALRC's model requires a user to conduct a reasonably diligent search for the copyright holder. This recognises that the optimal outcome is to bring owners and users together to facilitate licensing of works. As noted below, diligent search criteria may also encourage the development and use of technological tools such as registries and databases. These may have flow-on benefits of reducing the amount of orphan works and helping facilitate efficient licensing in the digital environment.

13.69 The person or entity conducting the diligent search would be expected to keep records of the search.[101] Robert Xavier submitted that it is 'reasonable to require records to be kept of attempts made to discover the holder of copyright before a work is treated as orphaned'.[102] Professor Jock Given suggested libraries could 'include information about the copyright status of works in their catalogue records, including information about any diligent search already conducted'.[103]

13.70 Given that orphan works cover the spectrum of copyright material, each with different challenges in terms of locating a copyright owner, it would not be appropriate for legislation to set a standard for a reasonably diligent search for all or many of these circumstances. The ALRC expects that guidelines, protocols and search technologies will continue to evolve and change. What constitutes a 'reasonably diligent search' in 2013 may not be so in 2023.

13.71 Instead, the *Copyright Act* should provide for a number of factors that can guide users and courts to determine whether a reasonably diligent search was conducted on a case-by-case basis. These factors would be flexible, but precise enough to ensure that users consider the circumstances of the case and make use of the most appropriate technologies and tools available to search for the copyright holder. The balance of factors may mean that a reasonably diligent search will, as circumstances dictate, range from a limited search to an extraordinary one.

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99 *Copyright Act 1968* (Cth) s 115(4).
100 Ibid s 115(3).
101 IASTMP, *Submission 200*; NSW Young Lawyers, *Submission 195*; J Given, *Submission 185*; R Xavier, *Submission 146*.
102 R Xavier, *Submission 146*.
103 J Given, *Submission 185*.

The nature of the copyright material

13.72 The nature of the copyright material—including the age, type of work and amount of identifying information are all relevant factors in what may constitute a diligent search. Stakeholders suggested that searches would almost certainly be fruitless in relation to certain types of material for which there is no identifying information.[104] The age of a work may come into consideration as the identifying information may no longer be relevant. For example, the National Film and Sound Archive suggested in relation to Australian audiovisual material, that since the turn of the century Australian media production has been 'characterised by short-lived companies, mergers, and takeover', making it difficult to track down rights owners.[105] Similarly, the CAARA suggested that the age of the material and the lack of clear transmission of ownership are particularly relevant to archival records.[106] These factors may suggest that a limited search is appropriate in some circumstances.

13.73 On the other hand, a recent work would more likely contain identifying information, on the basis of which a user would be expected to conduct a more thorough search. Professor Jock Given submitted that the 'effort required should be greater where the work is recent, or created for professional purposes or proposed to be used in ways that are hard to revoke'.[107]

13.74 The US Copyright Office's *Report on Orphan Works* suggested that, whether the use is commercial or non-commercial and how prominently the work figures in the activity of the user, should be a consideration. For example:

> If a work is to play a prominent role in the user's activity, then more effort to find the owner should be required. Similarly, more effort should be required where the use is commercial as opposed to non-commercial. Also, the more broadly the work is disseminated, the more effort to locate the owner should be required, even where the user is a non-commercial entity.[108]

How and by whom the search was conducted

13.75 There seems no reason why collecting societies or others should not be able to perform diligent searches on behalf of a user. However, the *Copyright Act* should not provide that only some organisations may perform such searches, or that users are required to have their searches validated.[109] Such monopolies are less likely to be efficient and innovative.

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104 For example, the National Archives of Australia suggested that a diligent search should not be required for a letter to government that is 50 years old and with no address for the author where it is reasonable to conclude that such a person would not be able to be located: National Archives of Australia, *Submission 595*. See also, NSW Government and Art Gallery of NSW, *Submission 740*.

105 NFSA, *Submission 750*.

106 CAARA, *Submission 662*.

107 J Given, *Submission 185*.

108 United States Copyright Office, *Report on Orphan Works* (2006), 107.

109 CSIRO, *Submission 242*.

Guidelines, protocols databases and registers

13.76 Guidelines could direct users to publicly available registers and databases that they might be expected to consult in conducting a reasonably diligent search.[110] Freely available registers and databases exist worldwide and they are becoming more prevalent and robust.[111] SBS suggested that 'reference to industry standards may alleviate concerns that may be specific to particular creative industries'.[112]

13.77 Guidelines have already been developed in some sectors. For example, a position statement on orphan works by a consortium of international publishers outlines what they consider to be a diligent search for copyright owners in relation to scholarly material.[113] The position paper suggests that if a user conducts a reasonably diligent search as outlined, the user will be entitled to a 'safe harbour protection'.[114] In Australia, National and State Libraries Australasia have produced a position statement on 'reasonable search on orphan works'.[115] Stakeholders expressed a willingness to cooperate and create such guidelines.[116]

13.78 On a wider scale, the European Union's Orphan Works Directive allows member states to determine the criteria for a diligent search, but suggests that it shall include at least 'relevant sources listed in the Annex'.[117] The Annex provides a list sources or different types of works that a user would be expected to consult in performing a diligent search.[118]

Attribution

13.79 Stakeholders suggested that when using orphan works, a user should, as far as possible attribute the work to the author.[119] The primary reason for this requirement is to increase the likelihood that copyright owners will be alerted to the fact that their work is being used. A user who has conducted a reasonably diligent search would likely have developed material that could be used in the attribution.[120] For example, the

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110 See, eg, NFSA, *Submission 750*; CAMD, *Submission 719*; K Bowrey, *Submission 554*; Museum Victoria, *Submission 522*; SBS, *Submission 237*; J Given, *Submission 185*.

111 Examples pointed out by stakeholders include the Global Repertoire Database; ARROW (the Accessible Registries of Rights Information and Orphan Works); PLUS Registry and the Linked Content Coalition.

112 SBS, *Submission 237*.

113 International Association of Scientific Technical and Medical Publishers and others, *Safe Harbour Provisions for the Use of Orphan Works for Scientific, Technical and Medical Literature* (2013).

114 Ibid. The document states that where the publisher identifies the use of a work as an 'orphan work', the publisher agrees to waive, if a diligent search has been conducted, any claim or entitlement to all fees or damages, including statutory, punitive, exemplary or other special or general damages (other than a reasonable royalty).

115 National and State Libraries Australasia, *Position Statement on Reasonable Search for Orphan Works* (2011).

116 See, eg, NFSA, *Submission 750*; Pearson Australia/Penguin, *Submission 220*.

117 *Directive 2012/28 of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works*, art 3(2) and Annex.

118 The Annex provides guidance in relation to published books, newspapers, magazines, journals and periodicals; visual works; and audiovisual works and phonograms.

119 ARIA, *Submission 241*; ADA and ALCC, *Submission 213*; Australian Society of Archivists Inc, *Submission 156*.

120 United States Copyright Office, *Report on Orphan Works* (2006), 111.

International Association of Scientific Technical and Medical Publishers argued that 'where a copyright notice is present in the orphan work, credit should be given in a manner that reflects the notice'.[121]

13.80 Attribution in the case of Indigenous material requires careful consideration. Stakeholders emphasised that users should also have regard to any protocols relating to Indigenous material.[122] For example, consultations might be needed with relevant Indigenous groups before using an Indigenous orphan work, and consideration be given to whether attribution is possible or acceptable in the circumstances.[123] As Professor Kathy Bowrey suggests:

> Due to the circumstances of the making of the work copyright ownership in Indigenous knowledge is often vested in a third party. Copyright practices of attribution can, in such cases, involve what is from a cultural perspective, an act of wrongful attribution that causes serious cultural offence.[124]

Options for limiting remedies

13.81 In the Discussion Paper, the ALRC invited stakeholder discussion on a number of possible avenues for limiting remedies including:

- limiting remedies—for example, to 'reasonable compensation';
- amending the *Copyright Act* to provide that, in an action for infringement, where it is established that a user has conducted a reasonably diligent search and the owner could not be found prior to the infringing use, the plaintiff is not entitled to any damages, but may be entitled to an 'account of profits' or injunctive relief;
- providing that damages for the use of orphan works be capped;[125] or
- providing that a court, in exercising its discretion to award damages, consider that a reasonably diligent search has been conducted, and reduce the amount of damages accordingly.

13.82 A majority of stakeholders favoured structuring limits on remedies in a manner similar to that recommended by the US Copyright Office's *Report on Orphan Works*. There was broad support for limiting remedies to a 'reasonable licence fee', 'reasonable compensation' or similar formulation.[126] This was said to facilitate an

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121 IASTMP, *Submission 200*.

122 Australia Council for the Arts, *Submission 860*; Arts Law Centre of Australia, *Submission 706*.

123 Australia Council for the Arts, *Protocols for Producing Indigenous Australian Visual Arts* (2nd ed, 2007), 19.

124 K Bowrey, *Submission 554*.

125 Australian Government Attorney-General's Department, *Works of Untraceable Copyright Ownership—Orphan Works: Balancing the Rights of Owners with Access to Works* (2012) suggests that 'different uses could attract different licence fees or damages caps. For example, payment or damages limitations for non-commercial use could be set much lower (or waived altogether) than commercial use.

126 Stakeholders referred to a number of different formulations, including: ABC, *Submission 775*; CSIRO, *Submission 774* (reasonable fee for future use); Intellectual Property Committee, Law Council of Australia, *Submission 765* (reasonable royalty for the use in question); ARIA, *Submission 731*; Copyright Advisory Group—Schools, *Submission 707* (fair remuneration); International Association of Scientific

efficient 'market-oriented' solution to the orphan works problem.[127] Stakeholders therefore suggested that 'reasonable compensation' for non-commercial uses of an orphan work may attract zero or no royalty fees.[128]

13.83 On the other hand, 'reasonable compensation' for commercial uses might equate to the price that would have been negotiated between the parties, or a reasonable market price.[129] The University of Sydney suggested that copyright owners should be restricted from claiming damages, but could claim an account of profits which would be discounted for fair use.[130]

13.84 The Australian Copyright Council considered that a limitation on remedies was not necessary because a competent lawyer could plead such matters 'in mitigation under existing law'.[131] However, the Law Council of Australia suggested that amendment is necessary because 'it is unclear to what extent the courts are willing to adopt a reasonable royalty basis for assessing the amount of damages except in cases where the copyright owner has a practice of licensing'.[132]

13.85 Some suggested that where an orphan work is used for non-commercial purposes and the user expeditiously ceases infringement after receiving a notice, there should be no compensation at all.[133] Others suggested that remedies should only be limited to future profits, and that previous uses should be allowed without authorisation, so as not to stifle mass digitisation projects.[134]

13.86 Stakeholders also suggested that some limitations on injunctive relief will be necessary.[135] For example, SBS submitted that account of profits should not be available where the use of the work is included in another work.[136] The Queensland Law Society argued that injunctions should not be available where that would unreasonably restrict use of a work that has commenced, particularly derivative works.[137]

13.87 The ALRC recognises that it is important to get the balance right in terms of limiting the remedies available for infringement, and considers the model suggested by

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Technical and Medical Publishers, *Submission 560* (licence fee for the entire term of use as would have been negotiated between the parties); National & State Libraries Australasia, *Submission 588*; ADA and ALCC, *Submission 586*.

127 Motion Picture Association of America Inc, *Submission 573*.

128 For example, the University of Sydney argued that attribution and take down if requested by the copyright holder is sufficient: University of Sydney, *Submission 815*.

129 See, eg, IASTMP, *Submission 200*; John Wiley & Sons, *Submission 239*.

130 University of Sydney, *Submission 815*.

131 Australian Copyright Council, *Submission 654*.

132 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

133 CAMD, *Submission 719* suggested that its members 'have indicated a willingness to be involved in the development of an industry wide policy for take-down where copyright concerns are raised'. See also Arts Law Centre of Australia, *Submission 706*.

134 Google, *Submission 217*; R Xavier, *Submission 146*.

135 Queensland Law Society, *Submission 644*; Association of American Publishers Inc, *Submission 611*; Google, *Submission 600*.

136 SBS argued that an account of profits would almost never form part of a licensing negotiation with the rights holder in an underlying work or program and is therefore 'an inappropriate and punitive remedy in relation to use of an orphan work in good faith in a new creative work': SBS, *Submission 237*.

137 Queensland Law Society, *Submission 644*.

the US Copyright Office to be a good starting point. The Australian Government may wish to consult further with stakeholders on the appropriate form of limitation on remedies.

A copyright or orphan works register

13.88 Stakeholders suggested that the orphan works problem has been exacerbated by extensions to the term of copyright and by prohibitions on imposing formalities on registration of works in international agreements.[138] The role of registration as an effective method for dealing with copyright issues, including orphan works, has gained some traction in copyright reform.[139]

13.89 Some stakeholders suggested that an orphan works or copyright register would be important to future copyright reform.[140] The Australian Copyright Council suggested that reforms should address the issue of 'works being orphaned in the first place'.[141] Others emphasised the problems faced by photographers whose works may be orphaned due to metadata being stripped from them.[142] Associate Professor Ariel Katz submitted that orphan works reform should also focus on the 'supply side', because copyright owners 'who do not internalise the full social cost of forgone uses, face suboptimal incentives to maintain themselves locatable'.[143]

13.90 Stakeholders highlighted the benefits of registers in reducing instances of orphan works. The Motion Picture Association of America highlighted the success of the US Copyright Office's comprehensive register of copyright works and noted:

> Indeed, MPAA believes that few commercially released motion pictures could qualify as orphan works, because use of the Copyright Office's registration and recordation systems has long been routine in the motion picture industry; all major motion pictures are registered with the US Copyright Office, regardless of their country of authorship.[144]

13.91 Similarly, the collecting society APRA/AMCOS noted that orphan works are not a significant issue for owners of musical works, due to its comprehensive database that can be accessed for a small fee.[145]

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138 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972) art 5. See also Pirate Party Australia, *Submission 223*; ADA and ALCC, *Submission 213*; NSW Young Lawyers, *Submission 195*.

139 W Patry, *How to Fix Copyright Law* (2011), 203–209. See also, Comité Des Sages, *The New Renaissance: Reflection Group on Bringing Europe's Cultural Heritage Online* (2011), 5 recommending that 'some form of registration should be considered as a precondition for a full exercise of rights. A discussion on adapting the Berne Convention on this point in order to make it fit for the digital age should be taken up in the context of WIPO and promoted by the European Commission'.

140 ABC, *Submission 775*; Motion Picture Association of America Inc, *Submission 573*; BSA, *Submission 248*; PPCA, *Submission 240*; N Suzor, *Submission 172*; Australian Copyright Council, *Submission 219*; Google, *Submission 217*; Walker Books Australia, *Submission 144*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

141 Australian Copyright Council, *Submission 654*.

142 Australian Institute of Professional Photography (AIPP), *Submission 152*.

143 A Katz, *Submission 606*.

144 Motion Picture Association of America Inc, *Submission 573*.

145 APRA/AMCOS, *Submission 247*.

13.92 The Business Software Alliance urged copyright industries to 'develop and integrate databases of copyright information to suit the particular types of works and business models'.[146]

13.93 The Music Council of Australia suggested that a number of online systems, platforms and processes could be developed with the assistance of the Australian Government, and that such a system could benefit both users and creators and 'could enable the licensing of orphan works'.[147]

13.94 Australian copyright academics Professor Michael Fraser and David Court have also suggested that the Australian Government set up a national copyright register. This would allow rights holders to voluntarily register their work and could act as a hub for accessing online content.[148] They suggest that the Australian Government issue a Green Paper and should thereafter run a pilot project that would focus on Australian films.[149] Further, it was suggested that incentives should be provided to rights holders to register their works, including 'enjoying a rebuttable presumption of ownership of the copyright in that content in legal proceedings, and when seeking injunctions'.[150]

13.95 The Hargreaves Review made similar recommendations for the establishment of a Digital Copyright Exchange (DCE) that would allow users to quickly identify and license works while also giving copyright holders options to license their works.[151] A subsequent feasibility study conducted by Richard Hooper recommended the creation of an industry-led and industry-funded 'copyright hub', which would serve not only as a registry of rights, but also a marketplace for licensing copyright material.[152] The report suggested that use of the hub would be an element of a reasonably diligent search.[153] A pilot phase of the hub was launched on 8 July 2013 with connections to 35 websites providing information on copyright or opportunities for licensing.[154]

13.96 Similarly, the Copyright Review Committee (Ireland) recommended that the proposed Copyright Council could 'press ahead with a Digital Copyright Exchange immediately, or wait to reap the benefit of emerging experience in the UK and elsewhere, particularly at EU level'.[155]

13.97 Similarly, many submissions to the US Copyright Office's current inquiry into orphan works also supported the creation of a voluntary copyright register.[156] A

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146 BSA, *Submission 248*.
147 Music Council of Australia, *Submission 269*.
148 D Court and M Fraser, *Call for 21st Century Copyright Register* (2013).
149 Ibid, 13.
150 Ibid, 14.
151 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 31.
152 R Hooper and R Lynch, *Copyright Works: Streamlining copyright licensing for the digital age* (2012).
153 Ibid, 24.
154 Copyright Hub Launch Group, *The Copyright Hub: Streamlining Copyright for the Digital Age* (2013), 8.
155 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 171.
156 US Copyright Office, *Comments on Orphan Works* (2013) <www.copyright.gov/orphan/comments/noi_10222012/> at 3 March 2013. See submissions from American Association of Law Libraries and others; Microsoft Corporation; Science Fiction and Fantasy Writers of America; and Copyright Alliance.

register was said to be a crucial step in reducing the incidence of 'abandoned' as well as 'kidnapped' orphan works.[157]

13.98 While the ALRC has not considered the establishment of a copyright or orphan works register in sufficient detail in this Inquiry to support a recommendation, it agrees with stakeholders that such registers would assist in preventing works from being orphaned in the digital environment. The Australian Government may therefore wish to consider international developments such as the DCE and consult stakeholders further with a view to establishing such a register.

13.99 As technology improves, the creation of such registers will become increasingly viable. They would complement the ALRC's recommendations in this area as use of such a register would be a persuasive factor in determining whether a reasonably diligent search was conducted.[158]

13.100 In the ALRC's view, any register should be voluntary, as any expanded requirement of formalities would likely violate the *Berne Convention*, which mandates that the exercise of copyright rights 'shall not be subject to any formality'.[159]

Recommendation 13–1 The *Copyright Act* should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

(a) a reasonably diligent search for the rights holder had been conducted and the rights holder had not been found; and

(b) as far as reasonably possible, the user of the work has clearly attributed it to the author.

Recommendation 13–2 The *Copyright Act* should provide that, in determining whether a reasonably diligent search was conducted, regard may be had to, among other things:

(a) the nature of the copyright material;

(b) how and by whom the search was conducted;

(c) the search technologies, databases and registers available at the time; and

(d) any guidelines, protocols or industry practices about conducting diligent searches available at the time.

157 Ibid.

158 ABC, *Submission 775*; AIATSIS, *Submission 762*; NFSA, *Submission 750*.

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

14. Education

Contents

Summary

14.1 Copyright law must continue to ensure writers, publishers, film makers, and other rights holders have an incentive to create the educational resources that students and educational institutions rely on.

14.2 However, the existing exceptions for educational use of copyright material are due for reform. New exceptions are needed to ensure educational institutions can take full advantage of the wealth of material and new technologies and services now available in a digital age.

14.3 Education should not be hampered or stifled by overly prescriptive and confined exceptions. Licences should not be required for fair uses of copyright material that do not harm rights holders and do not reduce the incentive to produce educational material.

14.4 The ALRC has concluded that fair use is a suitable exception to apply when determining whether an educational use infringes copyright. Further, the fact that a particular use is for education should favour a finding of fair use. 'Education' should be included as an illustrative purpose in the fair use exception.

14.5 If fair use is not enacted, then 'education' should be included in the list of prescribed purposes in the new fair dealing exception recommended in Chapter 6.

Applying this exception would also require consideration of what is fair, having regard to the same fairness factors in the fair use exception.

14.6 The fair use and new fair dealing exceptions are not unqualified or blanket exceptions for education. Educational uses are not even presumptively fair; other factors must be considered, including any potential harm to the rights holder's market. A non-transformative use that merely repackages and substitutes for a copyright work will not be fair use, under the exceptions recommended in this Report.

14.7 This chapter is about unremunerated exceptions for education. Remunerated exceptions for education—the statutory licences—are discussed in Chapter 8.

Education and exceptions

14.8 Education has been called 'one of the clearest examples of a strong public interest in limiting copyright protection'.[1]

14.9 The preamble to the *World Intellectual Property Organization Copyright Treaty* (WCT) refers to 'the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the *Berne Convention*'.[2]

14.10 The fair use of copyright material for teaching has long been recognised as a legitimate type of exception in international law. Article 10(2) of the *Berne Convention* provides:

> It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.[3]

14.11 The references to 'purpose' and 'fair practice', Professors Sam Ricketson and Jane Ginsburg state,

> make the provision more open-ended, implying no necessary quantitative limitations. The words 'by way of illustration' impose some limitation, but would not exclude the use of the whole of a work in appropriate circumstances.[4]

14.12 However, Ricketson and Ginsburg express some doubt about whether anthologies or course packs consisting of chapters taken from various books would fall within the scope of art 10(2) of the *Berne Convention*. It would be 'a distortion of language', they state, to describe such uses as 'by way of illustration ... for teaching'.[5] They also note that such usages are 'well-developed forms of exploitation in many

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

2 *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002), preamble.

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

4 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 791.

5 Ibid, 794.

countries, subject to voluntary licensing arrangements or even compulsory licensing schemes'.[6]

Current exceptions

14.13 The *Copyright Act* contains a number of unremunerated exceptions for educational institutions. There are exceptions for:

- s 28—performing material, including playing music and films, in class;
- s 44—including short extracts from material in a collection;
- ss 135ZG, 135ZMB—copying insubstantial portions;
- s 200—use of works and broadcasts for educational purposes (copying works by hand in class, for example, on a blackboard; examination copying; copying a sound broadcast); and
- s 200AAA—proxy web caching by educational institutions.[7]

14.14 There is also a broad exception in s 200AB of the *Copyright Act* for, among others, bodies administering an educational institution. The exception covers a use that is for the purpose of giving educational instruction and not for a profit.[8] 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.[9]

14.15 The *Copyright Act* also provides exceptions for fair dealing for the purpose of research or study, in ss 40 and 103C.[10] However, these exceptions have been held not to extend to uses by educational institutions, but only to private research and study by individuals.[11]

Criticisms

14.16 Copyright Advisory Group—Schools (CAG Schools) submitted that the current education exceptions are inflexible and feature a number of practical problems. For example, writing a quote from a book on an interactive whiteboard is not technically covered by an exception.[12] CAG Schools also submitted that 'showing an artwork on screen in class is treated differently than showing a poem on the same screen'[13] and

6 Ibid, 794.
7 See Ch 11.
8 *Copyright Act 1968* (Cth) s 200AB.
9 Ibid s 200AB.
10 Ibid ss 40, 103C, 248(1)(aa). See also Ch 7.
11 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99; *Haines v Copyright Agency Ltd* (1982) 64 FLR 185.
12 Copyright Advisory Group—Schools, *Submission 707*. Copyright Agency submitted that it had never sought payment for this use, even if the use could be measured: Copyright Agency, *Submission 727*.
13 Copyright Advisory Group—Schools, *Submission 231*.

that 'Australian schools pay to hand out small extracts of books to students in classrooms'.[14] CAG Schools said that there are:

> different rules regarding how much of a work can be made available to students, depending upon whether this is done by making the content available on the school intranet, learning management system etc or by handing out copies to each student. ...
>
> In an age of learning management systems, centralised content delivery systems and networked interactive whiteboards in classrooms, provisions such as s 135ZMD(3) make compliance with the statutory licence using modern education tools increasingly difficult. ...
>
> A school that decides that the most efficient way of delivering content to its students is via the school intranet or learning management system is effectively penalised for that choice. This is completely contrary to Government policy of encouraging schools to fully embrace digital technology to improve efficiency and educational outcomes.[15]

14.17 The exception for short extracts in s 44 of the *Copyright Act*, others submitted, is 'tightly circumscribed', 'employs vague terminology', appears to be an 'historical anachronism', and is 'another provision that makes a mockery of claims that the existing approach delivers certainty for users'.[16]

14.18 Australian copyright law is also limiting the way in which Australian universities can deliver course content via massive open online courses, or MOOCs, Universities Australia submitted. This is putting Australian universities at a competitive disadvantage to universities in fair use jurisdictions like the United States. The existing exceptions are 'insufficiently flexible to allow this kind of use'.[17] However, Universities Australia stressed that:

> fair use is not a 'free for all' for US universities operating MOOCs, and nor would it be if this exception were enacted in Australia. Some US copyright experts have suggested that the open nature of MOOCs will mean that fair use will operate in a more limited way than it does with password protected university e-reserves.[18]

14.19 Copyright content made available through an open online course may indeed have a greater potential to harm a rights holder's market than the same content distributed to a confined group of students. Universities should obtain a licence to use much of this material for online courses.

14.20 Universities Australia said the existing pt VB statutory licence does not apply to 'content that is publicly accessible, regardless of whether it has been made available for educational purposes'.[19] Copyright Agency however submitted that 'dissemination of content via MOOCs is covered by the statutory licence, and much more comprehensively than arrangements in any other country'.[20]

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14 Copyright Advisory Group—Schools, *Submission 707*.
15 Ibid.
16 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.
17 Universities Australia, *Submission 754*.
18 Ibid.
19 Ibid.
20 Copyright Agency, *Submission 866*.

Fair use and education

14.21 The ALRC recommends the introduction of fair use.[21] That some educational uses may be fair is clear from the US fair use provision. The US fair use exception twice refers explicitly to education. The preamble includes, as an illustrative purpose, 'teaching (including multiple copies for classroom use), scholarship, or research'. Furthermore, the first of the four fairness factors in the US provision is the 'purpose and character of the use, including whether such use is of commercial nature or is for *nonprofit educational purposes*'.[22] Some US copyright academics submitted:

> We have seen that in the United States, the importance of education as a purpose deserving of recognition in fair use analysis is well established, and that this fact has enabled a wide range of time-honored educational practices to flourish, and facilitated others to emerge. That said, it is important to emphasize that educational fair use has not eclipsed or displaced the sale and licensing of educational materials in the United States. Textbook publishing, in both hard-copy and digital formats, continues to thrive.
>
> And schools at all levels continue to license other content for class use and teaching support, as well as to purchase monographs and periodicals for digital libraries. This is true, in part, because even decisions like the recent *Cambridge University Press v Becker* allow a relatively narrow scope for unlicensed illustrative quotation in teaching materials; in other words, educational fair use in the United States provides some room for innovation in teaching but none for wholesale appropriation of copyrighted content.[23]

14.22 The United Kingdom Government is introducing a 'fair dealing provision for the purpose of instruction, enabling teachers to make reasonable use of copyright materials without infringing copyright, as long as such use is minimal, non-commercial, and fair to copyright owners'.[24] This is more confined than fair use—non-commerciality, for example, is a condition, rather than a consideration. However, in the ALRC's view, the proposed UK provision is likely to permit similar unlicensed uses that would be permitted under fair use. Importantly, neither exception is overly prescriptive, and both require a consideration of fairness.

14.23 The ALRC recommends that 'education' be one of the illustrative purposes listed in the fair use provision. Including an illustrative purpose for education in Australia's fair use exception will signal that an educational use is more likely to be fair than a non-educational use. In other words, an educational purpose will weigh in favour of fair use.

14.24 However, the fairness factors must be considered. The fact that a particular use is educational does not necessarily mean the use is fair. In fact, it does not even create a presumption that the use is fair. In particular, the unlicensed use of material specifically

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21 See Ch 4.
22 *Copyright Act 1976* (US) s 107 (emphasis added).
23 G Hinze, P Jaszi and M Sag, *Submission 483*.
24 Intellectual Property Office (UK), *Technical Review of Draft Legislation on Copyright Exceptions—Education* (2013).

produced for educational purposes would usually harm the market for that material. Such unlicensed uses, even though for education, will often not be fair use.

14.25 Stakeholders who supported fair use generally said educational use should be considered under the exception, and education should be an illustrative purpose.[25]

14.26 However, many stakeholders opposed the introduction of fair use, including the proposal to consider educational uses under a fair use exception. The most common argument against fair use was that the exception would harm rights holders' markets, and particularly markets for books and other material specifically made for education.

Market harm

14.27 Many vital educational resources might not be created without the protection of copyright laws. The incentive to write or publish a textbook, for example, might be undermined if the authors and publishers were not paid for the use of their books by students and educators. The public interest in education could be undermined by 'weak' copyright laws that undermine the incentive to create. Fair use accounts for this by requiring consideration of harm to rights holders' markets.

14.28 Many publishers of Australian educational material expressed concern about potential harm to their markets, should new exceptions be introduced or the statutory licences for education be repealed.[26] Oxford University Press, for example, wrote of authors and publishers 'who have invested their expertise, research, time, effort and money in producing educational materials specifically designed to support learners of all ages and bespoke Australian curricula'.[27]

14.29 Expanding exceptions for educational institutions will discourage investment in and the development of educational content, including investment in 'new resources and platforms' which are important for the digital economy.[28] John Wiley and Sons submitted that 'quality education materials, especially those tailored for a specific Australian curriculum, take significant time, resources and skill to develop and the efforts and rights of the creators and copyright holders should be recognised'.[29] This publisher also stated:

> the primary market of many texts and resources are for their express use in schools and educational institutions, so to allow any extended right of free use (particularly in the digital arena) would significantly reduce the ability of, and incentives for, publishers to produce the kinds of innovative and educational materials which are relied on by teachers, lecturers and educators.[30]

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25 See, eg, CSIRO, *Submission 774*; Universities Australia, *Submission 754*; Copyright Advisory Group—TAFE, *Submission 708*; Copyright Advisory Group—Schools, *Submission 707*; Education Services Australia, *Submission 661*; National Archives of Australia, *Submission 595*.

26 For example, Penguin Australia, *Submission 669*; Allen & Unwin, *Submission 582*; International Association of Scientific Technical and Medical Publishers, *Submission 560*; RIC Publications Pty Ltd, *Submission 456*; OfficeLink Learning, *Submission 379*.

27 Oxford University Press Australia, *Submission 333*.

28 Australian Publishers Association, *Submission 225*.

29 John Wiley & Sons, *Submission 239*.

30 Ibid.

14.30 Another publisher of educational material for Australian schools submitted that it relies heavily on funds it receives through the statutory licence:

> Remove that compensation and you remove that capacity to create. Remove new creative product and publishers would have to dilute the quality of resource available to educators. A diluted resource pool means a diluted quality of education.[31]

14.31 The International Association of Scientific, Technical and Medical Publishers stated that 'the public interest of education is best served by encouraging the creation of new publications and information services targeted at this sector'. Offering journal subscriptions and other information services to non-commercial communities was said to be 'the very essence of "normal exploitation" which must be left free of exceptions that prejudice the legitimate interests of rights holders unreasonably'.[32]

14.32 It was submitted that course pack licensing schemes are 'ensuring a healthy, vibrant and viable market for creators' and producing material specifically for educational institutions. This income stream was said to be 'particularly important for individual and small creators'.[33]

> There is likely to be little argument that for illustration purposes, teachers may make copies of works for use on teaching tools, such as interactive whiteboards. ... However, permitting teachers to make copies of copyright works (small or substantial portions thereof) and distribute them to students appears to strongly conflict with normal exploitation of works.[34]

14.33 Stakeholders stressed that new exceptions would be particularly damaging in an environment in which creators and rights holders are already struggling to fight piracy and maintain successful business models in a new digital age, with new digital formats and distribution channels.[35]

14.34 For example, music publishing was said to have been 'severely affected by the distribution of unauthorised copies on the internet', and any 'further undercutting of the financial viability of these specialist publishers by the broadening of statutory licences or unremunerated exceptions may see the unintended consequence of closing this market down entirely'.[36]

14.35 Another publisher warned that allowing more unpaid uses for education 'would result in drying up of income streams for writers'.[37] A reasonably secure source of income was considered particularly important for creators in an industry 'where sales and therefore royalties tend to decline after a year or so'.[38] Secondary licence fees can 'give much-needed stability to a creator'.[39]

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31 RIC Publications Pty Ltd, *Submission 456*.
32 International Association of Scientific Technical and Medical Publishers, *Submission 560*.
33 ALPSP, *Submission 562*.
34 Ibid.
35 For example, Allen & Unwin, *Submission 582*.
36 AMPAL, *Submission 189*.
37 Spinifex Press, *Submission 125*.
38 Walker Books Australia, *Submission 144*.
39 Ibid.

14.36 The Australian Publishers Association (APA) submitted that:

> except in relation to the existing free *de minimus* uses such as copying material onto whiteboards and so on (section 200) or uses that fall within section 200AB, there are *no* compelling grounds on which educational sectors should be entitled to use copyright material without payment.[40]

14.37 The APA also considered that it is only fair that publishers share in the value that educational institutions have in accessing copyright material, rather than have to subsidise educational institutions. Different uses have different value, but the APA submitted that this can be considered when determining the equitable remuneration the education sector should pay—it should not simply be made free.[41]

14.38 In the ALRC's view, the importance of education does not mean creators should subsidise education in Australia. Although this Inquiry is about exceptions to copyright, the ALRC appreciates the need for copyright laws to help ensure authors, publishers, film makers and other creators have an incentive to create.[42]

14.39 However, the fairness exceptions recommended in this Report explicitly require that harm to rights holders' interests be considered when determining whether a particular use—including a use for education—is fair. The stronger the arguments are that unpaid uses will harm creators and publishers, the stronger the case will be that a particular educational use is not fair.

Availability of a licence

14.40 As discussed in Chapter 5, if a licence can be obtained for a particular use of copyright material, then the unlicensed use of that material will often not be fair. The availability of a licence is an important consideration in determining whether a use is fair, and will weigh against a finding of fair use.

14.41 However, the availability of a licence does not settle the question of fairness. Market harm needs to be weighed along with the other fairness factors. Some damage to a rights holder's market may be justified, for a use that is transformative or has an important social value, particularly if the damage is minor or remote.

14.42 Market harm does not mean *any* loss of licence fees. This may be particularly important to recognise where there is a broad statutory licence in place. Those who now rely on the statutory licences for education have strongly objected to having to account and pay for uses that are not traditionally licensed, such as so-called technical copies and certain material freely available on the internet. When considering market harm under a fair use or fair dealing exception, the relevant market should be 'traditional, reasonable, or likely to be developed markets'.[43] Statutory licences will not always be a good guide to this market, because they provide broad protection from infringement, and therefore licence both inside and outside traditional markets. Rather

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40 Australian Publishers Association, *Submission 225*.
41 Ibid.
42 See Ch 2, framing principles 1 and 2.
43 See Ch 5.

than consider statutory licences under the fourth fair use factor, courts might instead consider whether the particular use is being licensed voluntarily, either directly or collectively, in Australia and overseas.

14.43 The fair use exception may act as an incentive for rights holders and collecting societies to offer reasonable and convenient licences for the use of their material. Where such licences are not offered, it will be easier to establish that an unpaid use did not harm a rights holder's market.

Transformative use

14.44 An educational use is more likely to be fair, and less likely to harm a market that a rights holder alone should be entitled to exploit, when the use is transformative.[44]

14.45 Many of the uses about which publishers of educational materials are concerned, appear to be non-transformative uses, such as photocopies or digital reproductions of educational resources that would be used as a substitute for buying or licensing the original material. Such uses are unlikely to be fair, under the fair use or new fair dealing exceptions recommended in this Report.

14.46 However, the use for educational purposes of copyright material that was *not* in fact created for educational purposes is more likely to be transformative, and is much less likely to interfere with the market for the original material.

14.47 For example, the market for a film made for educational purposes may be harmed if the film is shown without a licence to students in schools and universities. People may have invested in the making of the film, expecting some return from sales to schools and universities. Copying this film for educational purposes may therefore not be transformative or fair.

14.48 However, the nightly news is not made for educational purposes. Television networks do not invest in news programs hoping for a return from licensing fees from schools who might record and show the program in class the next day. They might not return fees collected from schools by collecting societies for this use, but the news program would have been made whether or not schools paid to copy the program. The educational use of this news program is therefore more likely to be transformative and fair.

'Freely available' material

14.49 Some have submitted that schools and universities should be able to use, without payment, some material that is otherwise 'free'—uses such as copying freely available web pages and content broadcast on free-to-air television. In the ALRCs view, whether such uses infringe copyright should be determined by applying a fairness exception. The difficulty of distinguishing between freely available material that should be paid for, and freely available material that need not, highlights the benefits of flexible principles-based copyright exceptions.

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44 See Ch 5.

14.50 The Australian education sector has favoured 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.[45]

14.51 This option was put to the ALRC in support of calls to repeal the statutory licences for educational uses. Statutory licences may provide a mechanism for such uses to be monitored and monetised. In the ALRC's view, it may be more straightforward to consider whether these uses should be permitted under an unremunerated exception.

14.52 CAG Schools submitted that paying for content that is freely available online undermined the Government's digital economy goals, including 'the success of the Government's investments in digital education'. It 'potentially adds millions of dollars to education budgets each year' and, furthermore, 'Australia is the only place in the world where schools are legislatively required to pay for printing a page from a website'.[46]

14.53 Examples of uses that CAG Schools said were treated as remunerable under the statutory licence in the 2011 survey of electronic copying in schools included:

- reproducing thumbnail images of books on a school intranet as a way of showing teachers and students what books are in the school library;
- saving and displaying a Google map on an interactive whiteboard in the classroom;
- telling a student to print, copy or save a page from Facebook;
- printing a page of a Government Department's contact information from the White Pages;
- printing a freely available webpage such as the home page from the McDonald's website; and
- printing a freely available webpage such as an information page from the University of Newcastle's website.[47]

14.54 Universities Australia submitted that freely available internet material, including blogs and wikis, is copied in homes and businesses throughout Australia, and in universities in other countries, and 'no one is seeking to be paid for it'.[48]

> We are particularly concerned that at the very time that a wide range of high quality audio-visual resources are being made freely available—such as content on YouTube EDU and the Open University on iTunesU—Screenrights is proposing to seek extension of the Part VA licence that may result in content of this kind becoming remunerable in Australia.[49]

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45 D Browne, 'Educational Use and the Internet—Does Australian Copyright Law Work in the Web Environment?' (2009) 6(2) *SCRIPT-ed* 450, 461.
46 Copyright Advisory Group—Schools, *Submission 231*.
47 Copyright Advisory Group—Schools, *Submission 707*.
48 Universities Australia, *Submission 754*.
49 Universities Australia, *Submission 246*. See also Society of University Lawyers, *Submission 158*.

14.55 Universities Australia submitted that no one but the education sector is paying to time shift free-to-air broadcasts, and the payments extracted from the education sector 'cannot in any way be said to be necessary to provide an incentive for the continued creation of the content'.[50]

14.56 Universities Australia submitted that often the fees collected do not even benefit the publishers, authors and other creators of that material. Instead, 'the millions of dollars collected each year from educational institutions for copying of freely available internet content and orphan works is likely to be paid to Copyright Agency members who have no connection to the works that were copied'.[51] These members were said to be benefiting at the expense of publicly funded educational institutions, and the 'loss of this windfall income could not in way be said to cause them unreasonable prejudice'.[52]

14.57 Universities Australia wrote of a 'global move towards making high quality educational content freely available' and submitted that 'open access publishing has dramatically changed the scholarly communications landscape'.[53]

14.58 Many of the claims of the education sector were strongly opposed by publishers and collecting societies. For example, Copyright Agency said that uses such as reading a poem out loud to distance education students and reciting a poem to a virtual class using Skype or a Google hangout are allowed by ss 28 or 200AB.

14.59 Copyright Agency submitted that other uses are excluded from 'volume estimates' if the terms of use allow free use by schools, and where the terms of use do not allow such free use, the collecting society can nevertheless be instructed not to allocate payment.[54] For some other uses of copyright material, Copyright Agency submitted that they are permitted under the statutory licence, but are 'not recorded in surveys and Copyright Agency seeks no payment'.[55]

14.60 The collecting society Screenrights submitted that the call by the education sector wrongly assumes that 'free' material on the internet is not valued by the copyright owner.

> Copyright owners like Screenrights' professional filmmaker members make material available online for very clear commercial reasons. They may choose to make it available for a fee, such as with commercial video on demand services or they may choose to license a website to stream the content for a period of time without charging the consumer directly (such as ABC iView). In the latter case, the consumer still pays for the content, either by watching associated advertising, or through brand attachment to the website and there are clear cross promotional benefits to other platforms where the content is available for a fee, such as via DVD or Blu-ray discs.[56]

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50 Universities Australia, *Submission 246*.
51 Universities Australia, *Submission 754*.
52 Ibid.
53 Ibid.
54 Copyright Agency, *Submission 866*.
55 Ibid.
56 Screenrights, *Submission 215*.

14.61 Material 'freely' available on the internet, Screenrights submitted, is very much like material broadcast 'freely' on television, and copyright owners should be compensated for the use of either type of material. Screenrights said that there may be 'debate about the value of the content and the price of the compensation, but the principle is the same'.[57]

14.62 In the ALRC's view, it is important to distinguish between different types of material which may be accessed without paying a fee. Some of this content may be provided without any expectation that rights holders will collect fees from educational institutions and governments for the use of the material. At other times, rights holders may only wish to provide their content under limited circumstances.

14.63 Of course, a film shown with advertisements on free-to-air television is not really 'free'. Advertising is also not the only way of selling content without explicitly charging for its use: giving a customer access to a free book, for example, so that the customer enters a content 'ecosystem' in which he or she is more likely to buy other books, or films, television shows and other material, is not necessarily the same as giving the book away for free.

14.64 The fair use and new fair dealing exceptions recommended in this Report may capture some uses of this content by educational institutions. As discussed below, these exceptions require consideration of the likely harm a particular unpaid use might have on a market. The exceptions are flexible and require certain principles to be considered, and are therefore better equipped to distinguish between types of 'freely available' material than more prescriptive exceptions.

Small portions

14.65 Some publishers called for the removal of the 'small portions' exceptions in ss 135ZG and 135ZMB of the *Copyright Act*, so that educational institutions pay for the use of this material.

14.66 Walker Books Australia said that the 'small portions' exceptions are 'perhaps not really fair in relation to works such as picture books, or poems, where a small portion might represent a significant part of a work'.[58] Cengage Learning Australia submitted that

> two pages is often the exact extent (often one page is) of a relevant classroom exercise or lesson plan that we create and seek to sell in a 'bundle' of classroom and homework exercises, tests and lesson plans. A two-page portion from our work can represent 100% of value of that portion downloaded.[59]

14.67 Extending the licence to cover these uses 'would provide a fairer system for all interested parties', RIC Publications said, and 'allow greater clarity for the Copyright Agency in its administration process, again for the benefit of all parties'.[60]

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57 Ibid.
58 Walker Books Australia, *Submission 144*.
59 Cengage Learning Australia Pty Ltd, *Submission 68*.
60 RIC Publications Pty Ltd, *Submission 147*.

14.68 Universities Australia, however, submitted that current copyright laws are 'stifling academic engagement'. For example, it was argued that universities risk infringing copyright simply by making available on an online repository a student thesis featuring short excerpts or images from other copyright material.

> To avoid this risk, they generally require their students to obtain permission for use of third party content (which can be highly costly, and in many cases impossible) or, alternatively, to remove this content from their thesis.[61]

14.69 Many of these factors are relevant in any consideration of the fair use exception. For example, the third fairness factor is 'the amount and substantiality of the part used'. This factor in the US fair use provision was considered in 2012 by a US District Court in *Cambridge University Press v Becker (Georgia State University).* The Court stated that the word 'substantiality' as used in the US fair use provision means 'value'.[62] It also stated:

> In determining what percentage of a book may be copied, the Court looks first to the relationship between the length of the excerpt and the length of the book as a whole. Then, the relationship between the value of the excerpt in relation to the value of the book is examined. The Court also considers the value of a chapter in itself (rather than just a few paragraphs).[63]

14.70 The Court also considered the other fairness factors. In relation to the fourth factor, which concerns market harm and is discussed further below, the Court stated:

> Unpaid use of a decidedly small excerpt (as defined under factor three) in itself will not cause harm to the potential market for the copyrighted book. That is because a decidedly small excerpt does not substitute for the book. However, where permissions are readily available from CCC [Copyright Clearance Center] or the publisher for a copy of a small excerpt of a copyrighted book, at a reasonable price, and in a convenient format (in this case, permissions for digital excerpts), and permissions are not paid, factor four weighs heavily in Plaintiffs' favor. Factor four weighs in Defendants' favor when such permissions are not readily available.[64]

14.71 Finally, the Court considered whether the use would 'disserve the purposes of the copyright laws', and concluded that 'the unpaid use of small excerpts will not discourage academic authors from creating new works, will have no appreciable effect on Plaintiffs' ability to publish scholarly works, and will promote the spread of knowledge'.[65]

14.72 Similar analyses may be made when the fair use or new fair dealing exceptions recommended in this Report are applied to the use of small portions of copyright material for education. However, much may turn on the nature of the copyright

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61 Universities Australia, *Submission 246*.

62 *Cambridge University Press v Becker (Georgia State University)* (District Court for North District of Georgia, 11 May 2012), 67. It has been reported that this case will be appealed.

63 *Cambridge University Press v Becker (Georgia State University)*, Civ Action No 1:o8-CV-1425-ODE (District Court for North District of Georgia, 11 May 2012), 87.

64 Ibid, 89.

65 Ibid, 89.

material that is used. The works discussed in this US case may be distinguished from other educational material, such as resources created specifically for classroom use.

Commercial use and third parties

14.73 Under fair use, a use is less likely to be fair if it is commercial. The fact that the material will ultimately be used for educational purposes does not necessarily mean the use will be fair, particularly if the use was made by a commercial entity.

14.74 Two US cases illustrate this point. In *Basic Books v Kinko's Graphics Corp,*[66] the copying of copyright material to form course packs was found by a US District Court not to be fair use. The use was found to have undermined the market for the full texts from which excerpts had been taken. The Court placed particular weight on the profit-making motive of the defendant, a commercial photocopying business.[67]

14.75 There was a similar outcome in *Princeton University Press v Michigan Document Services Inc*.[68] Michigan Document Services was a commercial copy shop that, without a licence, reproduced substantial segments of copyrighted works and bound and sold them as course packs to students. Professors Ginsburg and Gorman explain that the majority of the Court held, among other things, that there was not a blanket exemption in s 107 for 'multiple copies for classroom use'; that the 'verbatim duplication of whole chapters and other large portions of the plaintiff-publishers' books weighed heavily against fair use'; and that 'the photocopying adversely affected not only the publishers' book sales but also the photocopying royalties that they would otherwise be paid by a by-then thriving licensing and collecting agency'.[69]

14.76 These cases concerned commercial copying. Copying and other uses by a nonprofit educational institution are more likely to be fair, though the fairness factors would need to be considered. In 2012, a US District Court, in a case involving making copies of excerpts of copyrighted works for teaching and scholarship, distinguished commercial copying held not to be fair from the 'purely nonprofit, educational purposes' of a university.[70]

14.77 Not all commercial uses will be unfair under fair use. Many companies rely on the fair dealing exceptions for news reporting and other exceptions, and should be able to rely on fair use in appropriate circumstances. Some commercial uses that are ultimately for education may also prove to be fair use. Third party digital applications, for example, may in some cases be fair use, despite being commercial. Such services may be found to be fair in part because the use merely facilitates another use that would be fair, or perhaps because the use is 'purely technical'.[71]

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66 *Basic Books v. Kinko's Graphics Corp* 758 F Supp 1522 (SNDY, 1991).
67 J Ginsburg and R Gorman, *Copyright Law* (2012), 194.
68 *Princeton University Press v Michigan Document Services, Inc*, 99 F 3d 1381 (6th Cir, 1996).
69 J Ginsburg and R Gorman, *Copyright Law* (2012), 194.
70 *Cambridge University Press v Becker (Georgia State University)* (District Court for North District of Georgia, 11 May 2012), 49.
71 See Chs 7 and 11.

Technical copying

14.78 The education sector expressed particular concern about having to license so-called 'technical copies' that are made when using digital technologies in the classroom.[72] CAG Schools, for example, submitted that

> The simple act of using more modern teaching methods potentially adds up to 4 remunerable activities under the statutory licence in addition to the potential costs incurred by more traditional 'print and distribute' teaching methods.[73]

14.79 The statutory licences may provide a mechanism for these technical uses to be accounted and paid for by governments and educational institutions. The ALRC suspects most other organisations happily ignore the fact that caching a website on a local server, for example, may infringe copyright.

14.80 Submissions from the education sector highlighted the inefficiencies and inequity of having to account for technical copies. But the fact that unlicensed technical copying by an educational institution will be for the ultimate purpose of education may only slightly favour a finding of fair use. The stronger arguments for permitting this type of use are set out in Chapter 11, and may be relied on by many organisations, not just educational institutions. The ALRC considers that merely technical or incidental uses will often be fair use, and should not need to be licensed.

Fair dealing and education

14.81 If Australia does not adopt a fair use exception, then the *Copyright Act* should be amended to include a new fair dealing exception with a prescribed purpose for education.[74]

14.82 Like fair use, the exception would be flexible and able to adapt to new technologies and teaching practices. Like fair use, it would only cover uses which are fair, having regard to the fairness factors. This is a second best option, but it is more likely to enable educational institutions to make use of new digital technologies and opportunities than the existing or amended specific exceptions.

14.83 Some have argued that the existing exceptions for fair dealing for research or study[75] should be interpreted to extend to copying by educational institutions. As discussed in Chapter 8, these exceptions have been interpreted not to extend to uses by educational institutions, but only to private research and study by individuals.[76] The Supreme Court of Canada has taken a broader interpretation to Canada's fair dealing

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72 Some of these uses are discussed in Ch 8.
73 Copyright Advisory Group—Schools, *Submission 231*.
74 See Ch 6.
75 *Copyright Act 1968* (Cth) ss 40, 103C, 248(1)(aa).
76 See *Haines v Copyright Agency Ltd* (1982) 64 FLR 185, 191; *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, 105−6.

for research provision, finding that the 'teacher/copier ... shares a symbiotic purpose with the student/user who is engaging in research or private study'.[77]

14.84 This problem does not arise with fair use, in which the listed purposes are illustrative, and do not confine the exception. It is preferable to consider whether any given use is fair, rather than automatically prohibit the use. In any event, Canada has since introduced an exception for fair dealing for the purpose of education,[78] and the ALRC recommends the introduction of a fair dealing for education exception.

Guidelines

14.85 One objection to fairness exceptions for education is that teachers may not have the time or expertise to determine whether particular uses are fair. The Australian Education Union submitted:

> Teachers simply cannot be expected to navigate such a 'flexible' and complex legal area. The flexibility and complexity may simply serve to increase doubt and angst for teachers about the use of copyright material.[79]

14.86 The publisher Allen & Unwin submitted that teachers may mistakenly believe that using copyright material for education should be free because education has a public value and is often not-for-profit. They also doubted whether teachers would be 'in a position to reliably assess the market impact of their copying as fair use requires'.[80]

14.87 In the ALRC's view, guidelines should play an important part in providing this necessary help and certainty for teachers.[81] The education sector has said that teachers and other educators are already given copyright guidelines, and that new guidelines for fair use would be produced if fair use were enacted. The ALRC considers that teachers will find it easier to apply fair use than Australia's current complex range of specific exceptions.

Repeal of existing exceptions

14.88 If either fair use or a fair dealing for education exception is enacted, then the existing specific exceptions in the *Copyright Act* for educational institutions should be repealed—ss 28, 44, 200, 200AAA and 200AB.[82]

14.89 The ALRC would expect that many uses within the scope of these exceptions are likely to be fair under the fair use exception, although this would depend on the application of the fairness factors in the particular circumstances. Some may not be

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77 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada), [23].

78 'Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright': *Copyright Modernization Act, C-11 2012* (Canada), s 29.

79 Australian Education Union, *Submission 722*.

80 Allen & Unwin, *Submission 582*.

81 Fair use guidelines are discussed more generally in Ch 5.

82 The repeal of s 200AB is also recommended in Ch 12. Section 200AB also covers certain uses for people with disability.

fair, perhaps where rights holders now offer licences they were once thought unlikely to offer.

14.90 In any event, the ALRC considers that to increase innovation and efficiency in a digital age, copyright exceptions should be flexible and refer to principles. Confined and specific exceptions should therefore generally only be necessary to remove doubt with respect to uses that have a particularly important public interest.

Recommendation 14–1 The exceptions for educational use in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether an educational use infringes copyright.

15. Government Use

Contents

Summary

15.1 The *Copyright Act* contains exceptions for parliamentary libraries using copyright material to assist parliamentarians, and copying for judicial proceedings. Other government use of copyright material is carried out under direct licences, or under the statutory licence for government copying.

15.2 This chapter identifies certain government uses that should not be remunerable. It considers whether these uses should be dealt with by way of the statutory licence, or whether fair use or a specific exception should apply. The ALRC concludes that high volume institutional uses that are nearly all fair (according to the four fairness factors) are most efficiently dealt with by way of specific exceptions. Such exceptions, if technology-neutral and clear, can reduce transaction costs by avoiding the necessity of

counting them in surveys, considering the fairness factors or developing protocols and guidelines.

15.3 The ALRC recommends that the current exceptions for parliamentary libraries and judicial proceedings should be retained, and that further exceptions should be enacted. These exceptions should apply to use for public inquiries and tribunal proceedings, uses where a statute requires public access, and use of material sent to governments in the course of public business. Governments should also be able to rely on all of the other exceptions in the *Copyright Act*. These exceptions should be available to Commonwealth, state and local governments.

Current arrangements

15.4 The parliamentary, judicial and executive arms of government all use copyright material. A significant amount is used under direct licence. There are specific exceptions available for parliamentary libraries[1] and for copying for judicial proceedings.[2] Other copying is done under the statutory licence in pt VII div 2 of the *Copyright Act*.[3]

15.5 Under the statutory licence, government use of copyright material does not infringe copyright if the acts are done 'for the services of the Commonwealth or State'.[4] When a government uses copyright material, it must inform the owner of the copyright and agree on terms for the use.[5] However, if a collecting society has been declared in relation to a government copy, the government must pay the collecting society equitable remuneration for the copy.[6]

15.6 Two collecting societies have been declared, Copyright Agency for text, artworks and music (other than material included in sound recordings or films) and Screenrights for the copying of audiovisual material, including sound recordings, film, television and radio broadcasts. The *Copyright Act* requires equitable remuneration to be worked out by using a sampling system to estimate the number of copies made.[7] The method of working out equitable remuneration may provide for different treatment of different kinds of government copies.[8] However, no survey has been conducted since 2003 as governments and collecting societies have been unable to agree on a method for a survey. Since then, governments have paid Copyright Agency and Screenrights on a per employee basis.

1 *Copyright Act 1968* (Cth) ss 48A, 104A.
2 Ibid ss 43(1), 104.
3 See Ch 8.
4 *Copyright Act 1968* (Cth) s 183(1).
5 Ibid s 183(5).
6 Ibid s 183A(2).
7 Ibid s 183A(3).
8 Ibid s 183A(4).

15.7 It is unclear whether the fair dealing exceptions in pt III div 3 of the *Copyright Act* are available to governments in Australia. It is also unclear whether a government can rely on an implied licence to use copyright material.[9]

Changing patterns of government use

15.8 Government use of copyright material has changed significantly in response to the emergence of digital technologies. Governments are much less likely to subscribe to hardcopy newspapers, books, journals and looseleaf services, and government officers are less likely to photocopy these items. Instead, governments subscribe to online libraries and media portals.[10]

15.9 Governments now receive large amounts of copyright material via email and online, scan and digitally store documents sent to them and email documents internally. Legislation and policy related to open government principles (discussed below) means they are now more likely to publish material on external websites.

15.10 The effect of these changes is that government use of commercially available material is more likely to be under direct licence. An increased amount of material is being used under the statutory licence, but most of it is not commercially available. Some of the problems with the statutory licence have been discussed in Ch 8. This chapter considers whether some of the uses now made under the statutory licence would be better dealt with by exceptions.

Options for reform: statutory licensing, fair use or specific exceptions

15.11 There are certain government uses of copyright material that should not be remunerable, because of their public interest nature, and because they largely concern material that is not commercially available. For example, governments and collecting societies agree that internal use of surveys for land title registration, copying and communicating material in response to freedom of information requests, and copying and digitising correspondence to government, should not be remunerable.[11]

15.12 The question for this Inquiry is whether these types of uses should continue to be made in reliance on the statutory licence, or be considered under a fair use exception or a specific exception. The ALRC has concluded that specific exceptions would best achieve the purposes of copyright law.

15.13 Five Australian government agencies called for exceptions for certain government uses.[12] Copyright Agency/Viscopy proposed that these uses should continue to be made in reliance on the statutory licence, with equitable remuneration

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9 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 6–7, 32–42.

10 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

11 Copyright Agency, *Submission 727*; NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

12 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; Department of Defence, *Submission 267*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

negotiated between the parties, in the interests of 'consistency, simplicity and equity'.[13] Uses that should be free can be 'zero rated', and disagreements can be settled by the Copyright Tribunal.

15.14 The experience since 2003 is that disagreements about which uses are remunerable have led to difficult and protracted negotiations over the amounts payable under the statutory licence.[14] The parties (government agencies and collecting societies) have not reached agreement over whether fair dealing and other exceptions are available to governments, or over how surveys should be conducted and what should be counted.[15] The Copyright Tribunal has not been asked to resolve these issues.

15.15 The ALRC concludes that the statutory licence is not an efficient way of managing uses that do not require remuneration. It would be more efficient for the statute to clearly specify which uses can be freely undertaken. An exception would reduce uncertainty and would avoid the expense of including these uses in surveys and the associated processing costs.

15.16 In the Discussion Paper for this Inquiry, the ALRC proposed that government uses could be made in reliance on a fair use exception.[16] The fair use exception asks of any particular use, 'is this fair?'. In deciding whether a use is fair, four fairness factors must be considered: the purpose and character of the use, the nature of the copyright material, the amount and substantiality of the part used, and the effect of the use upon the potential market for, or value of, the copyright material.[17]

15.17 ALRC considers that fair use could be an efficient way of dealing with government uses. In the US, no specific exceptions or statutory licences are available to government, and even military and security agencies must work within a framework of direct licensing and fair use.[18] In 1999, the Acting Assistant Attorney General noted that 'reported cases involving application of the fair use doctrine to governmental conduct are rare'.[19] Other fair use jurisdictions simply provide for fair use for use:

- 'in juridical or administrative procedures according to law' (Israel);[20]
- 'by or under the direction or control of the Government ... where such use is in the public interest and is compatible with fair use' (the Philippines);[21] or

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13 Copyright Agency/Viscopy, *Submission 249*.
14 See Ch 8.
15 See Ch 8.
16 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013) Ch 14.
17 See Ch 5.
18 G Bowman, 'Application of the Copyright Doctrine of Fair Use to the Reproduction of Copyrighted Material for Intelligence Purposes' (2000) *The Army Lawyer* 20.
19 R Moss, *Memorandum: Whether and Under What Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing 'Fair Use' under Section 107 of the Copyright Act of 1976* (1999), prepared for Department of Justice.
20 *Copyright Act 2007* (Israel) s 20.
21 *Intellectual Property Code of the Philippines*, Republic Act No 8293 (the Philippines) s 184.1(h).

- 'for the purpose of judicial proceedings and of internal legislative or administrative organs' (South Korea).[22]

15.18 Moving from a regime based on a statutory licence, to a less familiar regime based on a standard of fairness, would pose challenges. As discussed in Ch 5, fair use works best when institutions prepare guidelines and protocols to guide officers in their use of copyright material. The Australian public sector possesses the flexibility to manage such a transition.[23] Future Australian governments may consider that fair use is the appropriate exception for government uses that do not require remuneration.

15.19 However, the ALRC considers that, at the present time, the more efficient way of dealing with the particular government uses discussed in this chapter is by way of specific exceptions. Specific exceptions, if technology-neutral and clear, can reduce transaction costs by avoiding the necessity of considering the fairness factors or developing protocols and guidelines. They are particularly suitable for high volume institutional uses where transaction costs could be high if users had to refer to fairness factors or guidelines for each use. They are suitable for categories of uses where all or nearly all uses are fair (such as where the material used has no real market). The government uses outlined below seem to fit into these categories.

15.20 William Patry suggests that furthering culture requires dynamic laws, but where there are 'situations with identifiable fact patterns ... concrete exemptions, whether contained on a list or otherwise, are desirable. Where we can identify recurring problems, we should provide specific guidance'.[24] The exceptions recommended in this chapter are intended to provide specific guidance for situations that have been identified by stakeholders as recurring problems.

15.21 Nearly all the uses covered by the recommended exceptions are likely to be assessed as fair, if judged according to the four fairness factors. The purpose and nature of the use would be given great weight: the uses are intended to serve the public interest in the free flow of information between the three branches of government and the citizen.[25] With regard to the fourth factor, it is not anticipated that the exceptions will have a significant impact on the market for material that is commercially available. There may be an occasional use that affects the copyright owner's market. However, if the use is essential to the functioning of the executive, the judiciary or the parliament, or to the principle of open government, it is likely that the use would be considered fair.

Parliamentary libraries

15.22 There are specific exceptions in the *Copyright Act* that provide that use of copyright material for the purpose of assisting a member of Parliament in the

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22 *Copyright Act 1967* (South Korea) art 23.

23 CSIRO, *Submission 774*; IP Australia, *Submission 681*; ACCC, *Submission 658*; State Records WA, *Submission 585*.

24 William Patry, 'Limitations and Exceptions in the Digital Era' (2011) 7 *Indian Journal of Law and Technology* 1, 13.

25 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 6.

performance of the person's duties does not infringe copyright.[26] There is also an exception for interlibrary loans for the purpose of assisting members of Parliament.[27] These exceptions are not qualified by any fairness requirements.

15.23 The Australian Parliamentary Library reports that these provisions were enacted in 1984 in response to 'a realisation that the copyright obligations on parliamentary libraries were having an increasingly problematic impact on the ability of those libraries to fulfil their function of providing parliamentarians with unimpeded access to quality information'.[28] Those obligations included 'onerous record keeping requirements, the heavy restrictions on copying, the inability to provide audio visual services and build current affairs data bases, and issues of timeliness and confidentiality'.[29]

15.24 Parliamentary libraries indicated that these exceptions are necessary for their work.[30] The exceptions provide the certainty that the libraries need to fulfil their functions in a time-pressured environment.[31] The absence of record keeping requirements allows the libraries to preserve the required confidentiality.[32] The Australian Parliamentary Library also submitted that the Library 'does not abuse the broad and generous exceptions' and noted that the Library has a substantial collection development budget and subscribes to various media services.[33] No rights holders raised any concerns about the parliamentary library exceptions. The ALRC concludes that these exceptions should be retained.

15.25 However, the exceptions in their current form are not adequate for the digital environment. To carry out their duties, parliamentary librarians need to archive material from online sources and provide immediate access to information in digital form. Parliamentary libraries have called for ss 48A and 104 to be extended to include the capture of material in digital form, for s 48A to extend to dealing with copies of works.[34] The ALRC recommends that the parliamentary libraries exceptions should be technology-neutral and should apply to all of the rights encompassed by copyright.

15.26 Similarly, the exception in s 50(1)(aa), which allows a library to supply copies of works to parliamentary libraries, should be retained and updated to include digital works.

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26 *Copyright Act 1968* (Cth) ss 48A, 104A.
27 Ibid s 50(1)(aa).
28 Australian Parliamentary Library, *Submission 694*.
29 Ibid.
30 Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; Association of Parliamentary Libraries of Australasia, *Submission 650*; NSW Parliamentary Library, *Submission 626*.
31 Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; Association of Parliamentary Libraries of Australasia, *Submission 650*; NSW Parliamentary Library, *Submission 626*.
32 Queensland Parliamentary Library, *Submission 718*; Australian Parliamentary Library, *Submission 694*.
33 Australian Parliamentary Library, *Submission 694*.
34 Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; Association of Parliamentary Libraries of Australasia, *Submission 650*; Australian Parliamentary Library, *Submission 107*.

15.27 Parliamentary libraries have also reported concerns about contracts with publishers that appear to limit the scope of the exceptions for parliamentary libraries.[35] In Ch 20, the ALRC recommends that the *Copyright Act* should provide that a contractual term that excludes or limits the libraries exceptions is not enforceable.

Recommendation 15–1 The parliamentary libraries exceptions in ss 48A, 50(1)(aa) and 104 of the *Copyright Act* should be extended to apply to all types of copyright material and all exclusive rights.

Judicial proceedings

15.28 There are specific exceptions in the *Copyright Act* for reproduction for the purpose of judicial proceedings or a report of judicial proceedings.[36] Like the exceptions for assisting members of Parliament, the exceptions for judicial proceedings apply to print and audiovisual material but not digital material or copies of print material. They are not qualified by any fairness requirements.

15.29 These exceptions are necessary for the proper and speedy administration of justice.[37] As the NSW Government noted,

> It is frequently the case that copyright material such as correspondence and a company's internal documents constitute important evidence in litigation, often to support points that may be detrimental to the author or copyright owner. In other cases, it may be necessary to use works owned by third parties or in which ownership is uncertain. Multiple copies are needed of all material brought before a court or tribunal.[38]

15.30 The rationale for these exceptions is the public interest in the smooth functioning of the legal system. They have been uncontroversial. They should be retained and updated to be technology-neutral.

15.31 The NSW Law Society suggested that, 'given government's increasing use of tribunals to resolve disputes, the defence should apply equally to administrative proceedings as well as judicial proceedings'.[39] Tribunals are not part of the judicial arm of government, but are part of the executive. They are characterised by informality, and the laws of evidence do not usually apply.[40]

15.32 The considerations are very similar for use for judicial proceedings, use for tribunal proceedings, and use for statutory inquiries (discussed below). The uses facilitate important public processes, use mostly material that is not commercially

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35 Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; Association of Parliamentary Libraries of Australasia, *Submission 650*; Australian Parliamentary Library, *Submission 107*.

36 *Copyright Act 1968* (Cth) ss 43(1), 104.

37 Intellectual Property Committee, Law Council of Australia, *Submission 765*; NSW Government and Art Gallery of NSW, *Submission 740*.

38 NSW Government and Art Gallery of NSW, *Submission 740*

39 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

40 Garry Downes, 'Tribunals in Australia: Their Roles and Responsibilities' (2004) 84 *Reform* 7.

available, and do not affect the market for the original work. The *Copyright Act* should include an exception for use of copyright material for the purpose of tribunal proceedings.

Recommendation 15–2 The *Copyright Act* should provide for a new exception for the purpose of the proceedings of a tribunal, or for reporting those proceedings.

Parliamentary proceedings

15.33 Copyright material is sometimes provided in evidence, in a report, or otherwise presented ('tabled') before a parliament or a parliamentary committee. The *Copyright Act* does not currently include an exception for use of material for parliamentary proceedings or reporting on parliamentary proceedings. Article 9 of the *Bill of Rights 1689* has been adopted in all Australian jurisdictions and provides that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.[41] This privilege protects the publication of papers for the use of members of Parliament from claims of copyright infringement. However, it does not protect wider publication, even if authorised by the Parliament.[42] Wider publication is usually necessary to ensure that the proceedings of Parliament can be scrutinised by citizens.

15.34 Accordingly, each Australian parliament (except Tasmania and South Australia) has enacted legislation protecting a person who publishes parliamentary papers from civil or criminal action.[43] For example, the *Parliamentary Privileges Act 1987* (Cth) provides that, for the purpose of art 9, 'proceedings in Parliament' include acts done for the purposes of:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

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41 *Parliamentary Privileges Act 1987* (Cth) s 16(1); *Imperial Acts Application Act 1969* (NSW) s 6, sch 2; *Parliament of Queensland Act 2001* (Qld) s 8; *Imperial Acts Application Act 1984* (Qld) s 5, sch 1; *Constitution Act 1934* (SA) s 38; *Imperial Acts Application Act 1980* (Vic) ss 2, 8; *Parliamentary Privileges Act 1891* (WA) s 1; *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24; *Legislative Assembly (Powers and Privileges) Act 1992* (NT) s 6(1); *R v Turnbull* (1958) Tas SR 80 , 84.

42 E Campbell and M Groves, 'Parliamentary Papers and their Protection' (2004) 9 *Media & Arts Law Review* 113, 114, discussing *Stockdale v Hansard* (1840) 11 Ad & E 253; 113 ER 1112.

43 *Parliamentary Privileges Act 1987* (Cth) s 16(2); *Parliamentary Papers (Supplementary Provisions) Act 1975* (NSW) s 6; *Parliament of Queensland Act 2001* (Qld) s 8; *Constitution Act 1975* (Vic) s 73; *Parliamentary Privileges Act 1891* (WA) s 1; *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24; *Legislative Assembly (Powers and Privileges) Act 1992* (NT) s 11. In Tasmania, there is protection from defamation for a person who publishes a fair report of public parliamentary proceedings: *Defamation Act 2005* (Tas) s 29, but no protection for copyright infringement. South Australian provisions were contained in the *Wrongs Act 1936* (SA) s 12 but this Act has been repealed and equivalent provisions do not appear in the replacement Act, the *Civil Liability Act 1936* (SA).

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.[44]

15.35 There was some support among stakeholders for a specific exception for parliamentary records.[45] There is a specific exception in the United Kingdom[46] and New Zealand.[47] However, there is insufficient evidence before the ALRC to justify such a recommendation. The current legal protections appear to be sufficient to permit parliaments to publish tabled material and records of proceedings. The Tasmanian Parliament has the power to legislate to protect publishers of parliamentary papers from claims of copyright infringement if it so wishes.[48]

15.36 The Australian Commonwealth, state and territory parliaments have sufficient powers to protect themselves from claims of copyright infringement, and a specific exception in the *Copyright Act* is not necessary.

Public inquiries

15.37 The *Copyright Act* does not contain an exception for the use of copyright material for inquiries or royal commissions. These uses are currently made under the statutory licence.

15.38 Public inquiries are established by the executive to inquire into a matter of public importance.[49] The Commonwealth and all Australian states and territories have enacted legislation that provides for the appointment of royal commissions[50] or other public inquiries with powers and protections.[51] Governments may also establish inquiries, task forces, committees and reviews without statutory foundation.

15.39 The *Royal Commissions Act 1902* (Cth) provides that an authorised person may make copies of any documents produced before a royal commission that contain matter

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44 *Parliamentary Privileges Act 1987* (Cth) s 16(2).

45 Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*.

46 *Copyright, Designs and Patents Act 1988* (UK) s 45.

47 *Copyright Act 1994* (NZ) s 59.

48 While Commonwealth legislation normally overrides state legislation, Campbell & Monotti point out that 'the federal Parliament cannot ... use its legislative powers in ways that impair the capacity of State governments to perform their constitutional functions': E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 469.

49 Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report 111 (2010), 57.

50 *Royal Commissions Act 1923* (NSW); *Royal Commissions Act 1968* (WA); *Royal Commissions Act 1917* (SA); *Royal Commissions Act 1991* (ACT).

51 *Constitution Act 1975* (Vic) ss 88B, 88C; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 14–21C; *Commissions of Inquiry Act 1950* (Qld); *Commissions of Inquiry Act 1995* (Tas); *Inquiries Act 1945* (NT). Also see: *Special Commissions of Inquiry Act 1983* (NSW); *Public Sector Management Act 1994* (WA) ss 3, 24H–24K; *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA); *Inquiries Act 1991 (ACT)*; *Commission of Inquiry (Deaths in Custody) Act 1987* (NT).

that is relevant to a matter into which the commission is inquiring.[52] A document includes 'any book, register or other record of information, however compiled, recorded or stored'.[53] It also provides that a custodian of royal commission records may use the records for the purpose of performing his or her functions or powers.[54] The Act is silent as to the copyright implications. The Act provides certain immunities to commissioners, witness and legal practitioners assisting a royal commission,[55] but it is not clear that these immunities extend to actions for copyright infringement.

15.40 Use of copyright material for investigation, presenting exhibits, briefs and reports is intrinsic to the conduct of an inquiry. These uses serve the public interest in ensuring that matters of public importance are thoroughly investigated and the proceedings made public where possible. Most copyright material used for these purposes, such as letters, file notes, and other internal documents of companies, government agencies and private institutions, are not produced for creative or commercial purposes, and do not have any market value.

15.41 There are exceptions for these uses in the United Kingdom and New Zealand. In the UK, copyright is not infringed by anything done for the purposes of the proceedings of a royal commission or statutory inquiry, or reporting those proceedings.[56] In New Zealand, the exception extends to anything done for the purposes of the proceedings of royal commissions, commissions of inquiry, ministerial inquiries or statutory inquiries, or reports of those proceedings.[57]

15.42 The ALRC considers that the *Copyright Act* should include an exception for use of copyright material for the proceedings of royal commissions and inquiries established under a statute. If the four fairness factors were considered, these uses would generally be fair: they are non-commercial; are in the public interest; and the material used is generally not offered for sale.

15.43 It is not necessary to extend the exception to every inquiry established by government. The inquiries that are of significant public importance will be established under statute. Uses for other inquiries may be undertaken under the fair use exception or under the statutory licence.

Recommendation 15–3 The *Copyright Act* should provide for a new exception for the purpose of the proceedings of a royal commission or a statutory inquiry, or for reporting those proceedings.

52 *Royal Commissions Act 1902* (Cth) s 6F(1)(c).
53 Ibid s 1B Definitions.
54 Ibid s 9(6).
55 Ibid s 7.
56 *Copyright, Designs and Patents Act 1988* (UK) s 46.
57 *Copyright Act 1994* (NZ) s 60.

Statutes requiring public access

15.44 Many statutes require government agencies to give public access to information and documents. Most of the statutes require access to material that has been created by government agencies themselves, but some concern material that has been submitted to governments, and may be subject to copyright. For the purpose of this Inquiry, the most important of these statutes are freedom of information (FOI) laws, planning and environmental protection laws and laws associated with land title registration. This section of this Report will consider these three areas in some detail. Intellectual property statutes, including the *Patents Act 1990* (Cth),[58] the *Trade Marks Act 1995* (Cth)[59] and the *Designs Act 2003* (Cth)[60] also require documents to be made available.

15.45 The ALRC considers that, where a statute requires governments to give public access to copyright material, those uses should not be remunerated. First, because these uses are fair—they are transformative and do not affect the potential market for, or value of, the copyright material. Secondly, if the cost of copyright payments is passed on to the citizen seeking access, this would constitute a burden on public access in a context where public access is highly valued.

15.46 This exception is not intended to apply to libraries and archives. The specific needs of libraries and archives are addressed in Ch 12.

Freedom of information and open government

15.47 FOI laws are intended to promote democracy by contributing to increasing public participation in government processes, promoting better decision making, and increasing scrutiny, discussion, comment and review of the government's activities.[61]

15.48 The 'second generation' of FOI laws implement the open government agenda. The Australian Government has declared that 'it is committed to open government based on a culture of engagement, built on better access to and use of government held information, and sustained by the innovative use of technology'.[62] Open government treats government information as 'a national resource that should be available for community access and use'.[63] Reforms associated with open government include the *Freedom of Information Amendment (Reform) Act 2010* which established the Office of the Australian Information Commissioner and the Information Publication Scheme. This scheme requires agencies to publish certain information, including information released under FOI requests, on their websites.[64] At state and territory level, there are

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58 The *Patents Act 1990* (Cth) provides that reproducing, communicating and translating documents open to public inspection under the Patents Act does not infringe copyright: s 226.

59 *Trade Marks Act 1995* (Cth) s 217A.

60 *Designs Act 2003* (Cth) s 60.

61 *Freedom of Information Act 1982* (Vic) s 3.

62 Australian Government. Department of Finance, *Declaration of Open Government* (2010) http://agict.gov.au/blog/2010/07/16/declaration-open-government at 15 November 2013.

63 Australian Government. Office of the Australian Information Commissioner, *Principles On Open Public Sector Information* (2011).

64 *Freedom of Information Act 1982* (Vic) pt 2.

statutes requiring that information in the possession of a public authority must be provided to a person unless the information is exempt.[65]

15.49 Access to government information in the digital environment means online access, which poses some significant challenges when the information comprises, in part, copyright material that is not owned by the government.

15.50 Copyright law has a different impact on use under FOI laws for each level of government. The *Freedom of Information Act 1982* (Cth) (FOI Act) provides immunity from proceedings for copyright infringement to Australian Government agencies and officers who give access to a document as required by the FOI Act.[66] In 2010, this immunity was extended to cover the publication on a website of information released to an FOI applicant.[67]

15.51 The immunity in the FOI Act only applies to the acts of federal government agencies subject to the FOI Act. For state and territories, providing immunity from copyright infringement for government officials may not be possible. It is arguable that such a state or territory statutory provision would be inconsistent with the *Copyright Act*, and would, to the extent of the inconsistency, be invalid.[68]

15.52 If a state or territory government uses copyright material in compliance with FOI laws, this use is covered by the statutory licence.[69] The situation regarding remuneration for these uses at state and territory level is unclear. Copyright Agency/Viscopy has indicated that remuneration for disclosure under FOI laws is a matter for negotiation[70] and that it does not seek payment for material provided in response to an FOI request.[71] Both the Victorian and NSW governments raised concerns about the risk of being required to pay remuneration for material used as required by FOI laws.[72] As noted earlier, current arrangements between governments and the Copyright Agency require payment per employee, and do not specify which uses are remunerable.

15.53 Local governments are subject to state and territory FOI laws, and they are not covered by the statutory licence in the *Copyright Act*. The effect is that they risk copyright infringement when using copyright material in a way that is required by an FOI law.[73] It has been necessary to make special provision in FOI laws so that, if access to a document in the form requested would breach copyright, then access in that

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65 *Government Information (Public Access) Act 2009* (NSW); *Right to Information Act 2009* (Qld); *Right to Information Act 2009* (Tas).

66 *Freedom of Information Act 1982* (Vic) s 90.

67 *Freedom of Information (Amendment) Reform Act 2010* (Cth) sch 4 pt 1 item 50; *Freedom of Information Act 1982* (Vic) s 90.

68 *Constitution* s 109, see also E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 471–472; Victorian Government, *Submission 282*.

69 J Bannister, 'Open Government: From Crown Copyright to the Creative Commons and Culture Change' (2011) 34 *UNSW Law Journal* 1080, 1097–1098.

70 Copyright Agency/Viscopy, *Submission 249*.

71 Copyright Agency, *Submission 727*.

72 NSW Government, *Submission 294*; Victorian Government, *Submission 282*.

73 Information and Privacy Commission NSW, *Submission 209*.

form may be refused and access given in another form.[74] The only form of access that does not breach copyright is making the document available for inspection,[75] which is an inadequate approach in the digital age.

15.54 Limits on laws requiring governments to make information available proactively have also been enacted—for example, the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) was amended to provide that an agency is not required to make 'open access information' available if this would infringe copyright.[76] This approach gives blanket and inflexible protection for copyright material, and does not further the aim of open government. The NSW Information and Privacy Commission (NSW) stated that the risk of infringing copyright 'undercuts the transparency and effectiveness of the GIPA Act by limiting councils' ability to provide public access to documents that inform the basis of their decisions'.[77]

Planning and environmental protection laws

15.55 Planning and environmental protection laws often require a person to provide documents to a government agency, and require the agency to provide public access to the documents. For example, the proponent of a development is usually required to submit a development application, which may include surveys, architects' plans and environmental impact statements.[78] The proponent pays the various professionals commercial rates for their work. The purpose of the laws is to facilitate public participation in planning processes,[79] with the expectation that this will improve decision making.

15.56 Providing public access to a development application, including the copyright material contained within it, raises similar issues to disclosure under FOI laws. Commonwealth statutes requiring public access to documents can create immunity for Australian Government agencies. However, state and territory governments cannot take advantage of immunity and may be liable for payment under the statutory licence. Local governments have no immunity and no statutory licence, and risk copyright infringement when providing public access to documents.[80]

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74 See, eg, *Freedom of Information Act 1982* (Vic) s 23(3)(c); *Government Information (Public Access) Act 2009* (NSW) s 72; *Freedom of Information Act 1989* (ACT) s 19. These provisions are expressed generally, but are only relevant to local governments because Commonwealth or state government uses 'for the services of the Commonwealth or State' do not infringe copyright: *Copyright Act 1968* (Cth) s 183(1). Similar provisions are contained in provisions allowing public access to state and territory records, eg: *State Records Act 1998* (NSW) s 60; *Public Records Act 2002* (Qld) s 20; *Territory Records Act 2002* (ACT) s 29.

75 For example, *Freedom of Information Act 1991* (SA) s 22(1)(a).

76 *Government Information (Public Access) Amendment Act 2012* (NSW) sch 1(1); *Government Information (Public Access) Act 2009* (NSW) s 72.

77 Information and Privacy Commission NSW, *Submission 209*.

78 For a useful example, see NSW Government, *Submission 294*.

79 For example, *Environmental Planning and Assessment Act 1979* (Cth) s 5.

80 A voluntary licence is available to local councils, but this licence does not cover placing third party material online: Copyright Agency, *Local Government* <www.copyright.com.au/licences/not-for-profit-sector/local-government> at 9 May 2013. Town planner Tony Proust described the extraordinary difficulties he had in obtaining a copy of a 20 year old building plan because of local government's copyright obligations: T Proust, *Submission 264*.

Land title registration

15.57 The use of survey plans as required by the Torrens System of title registration has been the subject of lengthy litigation between Copyright Agency and the NSW Government. NSW laws provide that transactions relating to land cannot be registered unless a current plan has been registered.[81] Upon registration, the Registrar-General must make copies of plans available to the public.[82] The Land and Property Information division of the NSW Government (LPI) makes the plans available through its online shop and also through information brokers, upon payment of fees.[83]

15.58 In 2003, Copyright Agency Ltd applied to the Copyright Tribunal for orders requiring the NSW Government to pay equitable remuneration for copying and communicating survey plans to the public.[84] The proceedings were transferred to the Federal Court which found that surveyors who submit plans for registration retain their ownership of copyright, but there is an implied licence for the State to do everything that the State is obliged to do with the plans.[85] On appeal, the High Court held that it is not necessary to imply a licence, because the statutory licence makes provision for the State to use the survey plans.[86] The matter has been returned to the Copyright Tribunal to calculate equitable remuneration, and the Tribunal recently noted that, 'the parties remained, as they have on almost all matters for over a decade, in strident, if polite, disagreement'.[87]

15.59 The High Court decision is directly relevant to the use of surveys in all Australian jurisdictions, and may also be relevant to the use of other copyright material deposited with government and used under statutory obligations, such as environmental impact statements and building plans.

15.60 The ALRC asked if there should be an exception in the *Copyright Act* to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law.[88] The Spatial Industries Business Association (SIBA), a peak industry organisation for surveyors, vigorously objected to such an exception,[89] as did 99 surveyors who responded by supporting the current copyright regime. These submissions emphasised the high level of skills, training and education possessed by surveyors, and the high level of technical expertise and professional judgement that is required to prepare a survey plan. Many of these

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81 See, eg, *Real Property Act 1900* (NSW); *Strata Schemes (Freehold Development) Act 1973* (NSW); *Strata Schemes (Leasehold Development) Act 1986* (NSW); *Community Land Development Act 1989* (NSW).

82 *Conveyancing Act 1919* (NSW) ss 198, 199.

83 Land & Property Information, *Public Registers* (2013) <www.lpi.nsw.gov.au/land_titles/public_registers > at 15 October 2013. Similar arrangements are in place in Queensland. Other states and territories provide survey plans to the public for a fee (but do not use external providers).

84 Copyright Agency Ltd did not seek payment for internal uses including copies made for registration, and these uses are zero rated under the statutory licence: Copyright Agency, *Submission 727*.

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

86 *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279.

87 *Copyright Agency Ltd v New South Wales (No 2)* [2013] ACopyT 2 [3].

88 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 34.

89 SIBA, *Submission 612*

submissions noted that 'similar considerations apply to the creation of other documents, such as environmental plans; design plans and as constructed plans, that are registered or deposited with governments under statutory obligations'. The surveyors also noted that the survey plans were being provided to the public for a fee, and that it is 'fair and equitable' for the creator of the content to receive a payment for this use.[90]

15.61 On the other hand, government stakeholders argued that an exception, similar to the exceptions in the United Kingdom and New Zealand, would be appropriate.[91] They considered that where statutes require copyright material to be made available to the public, these uses should not be remunerable.[92]

Uses under a statute requiring public access are fair

15.62 As noted earlier, the ALRC considers that high volume institutional uses that are all, or nearly all, fair, are best dealt with by way of a specific exception.[93]

15.63 The first fairness factor is the purpose and character of the use. Uses under statutes requiring public access are normally for the purpose of informing the public about government activities, to encourage public participation and scrutiny. These uses have high public interest value and embody 'the general interest of Australians to access, use and interact with content'.[94] They are not usually commercial. They are also transformative, in that the purpose of the use—informing the public—is not the same as the purpose of the creator. The purpose of the creator is usually to obtain a governmental action or approval, rather than to encourage public participation.

15.64 The second fairness factor is the nature of the copyright material. The material released to the public includes surveys, architects plans, environmental impact statements, letters, reports and requests. This material is nearly always factual. Disseminating factual material creates important public benefits and is more likely to be fair than using creative material.[95]

15.65 The third fairness factor is the amount and substantiality of the material used. Statutes usually require use of the entire work, which means the use is less likely to be fair, but this is not conclusive.

15.66 The fourth factor requires consideration of the effect of the use upon the potential market for, or value of, the copyright material. Copyright material used under statute usually has no real market, as it has been created for the purpose of an interaction with government, rather than for a commercial purpose.

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90 See, eg, Gray Surveyors, *Submission 31*; Ferguson Perry Surveying, *Submission 30*; Craig & Rhodes Pty Ltd, *Submission 29*.

91 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

92 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

93 See Ch 5 for discussion of the four fairness factors.

94 Terms of Reference, *Copyright and the Digital Economy*.

95 See Ch 5; *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 563.

15.67 The ALRC concludes that uses under statutes requiring public access are nearly always fair, and serve important public purposes, such as allowing citizens to scrutinise and contribute to government decision making. It is therefore suitable to have an exception in the *Copyright Act*.

Recommendation 15–4 The *Copyright Act* should provide for a new exception for uses where statutes require local, state or Commonwealth governments to provide public access to copyright material.

Fairness, surveys and land title registration

15.68 Particular attention to the use of surveys for land title registration is needed, because of the long standing controversy. The comments above regarding the second, third and fourth factors are relevant to the use of surveys. However, the purpose and character of the use deserves further scrutiny. SIBA and some surveyors described the purpose of the government use of surveys as commercial:

> We do not want to stop governments using surveyors' plans, and we are not seeking payment for every use of such plans by governments, but we think it is fair that surveyors receive a royalty when the government sells the plans on a commercial basis.[96]

15.69 The Copyright Tribunal found that the provision of surveys by the LPI is 'a commercial activity', because the fees were based on direct cost recovery plus 12%.[97] Government agencies are required to recover the cost of services when it is efficient to do so (and does not conflict with government policy objectives).[98] The added 12% is intended to place the LPI in a position of competitive neutrality with private providers of surveys, as is required by the *Competition Principles Agreement* between the Australian Commonwealth, state and territory governments.[99]

15.70 The characterisation of the use of surveys as having a commercial aspect is significant, as commercial uses are less likely to be fair. This commercial aspect coexists with the non-commercial purpose of making information available to the public, and with the ultimate objective of facilitating certainty of title to land.

15.71 When considering the fairness of government use of surveys, it is relevant that the surveyor has already been remunerated by the client for the in-house cost of each plan.[100] Further remuneration by way of royalties is unpredictable. The amount paid depends on the number of activities relating to a parcel of land and those adjacent to it,

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96 For example Association of Consulting Surveyors NSW Inc, *Submission 699*; KLM Spatial, *Submission 587*; O'Reilly Nunn Favier Surveyors, *Submission 468*. See also SIBA, *Submission 612*.

97 The margin or profit made by the State could not be accurately calculated, but it was not likely to be 12%: *Copyright Agency Ltd v New South Wales* [2013] ACopyT 1 [91]-[103].

98 Department of Finance and Administration, *Australian Government Cost Recovery Guidelines July 2005* (2005), 2;

99 *Copyright Agency Ltd v New South Wales* [2013] ACopyT 1 [101]. See also NSW Treasury, *Guidelines for Pricing of User Charges* <www.treasury.nsw.gov.au> at 14 October 2013.

100 *Copyright Agency Ltd v New South Wales* [2013] ACopyT 1 [53].

and is unrelated to the skill and expertise of the surveyor, or the quality of the survey. Demand is largely driven by the condition of the property market.[101] Royalties are not an incentive for the creation of surveys.

15.72 The ALRC acknowledges the submission of Copyright Agency on behalf of its member surveyors, that 'the objectives of the copyright system are reward for the benefits to the community from creative work, and an environment that encourages creative endeavour'.[102] The ALRC view of the objectives of the copyright system is encapsulated by the Inquiry's framing principles, discussed in Chapter 2. While creators should be acknowledged and respected (Principle 1), and incentives for the creation of works should be maintained (Principle 2), rewards should not necessarily flow when those rewards do not maintain incentives for the creation of works.

15.73 The Copyright Tribunal has noted that the payment of royalties for uses associated with land title registration will not result in benefits to surveyors.

> [Copyright Agency] submitted that the State fully recovered its costs ... On the other hand, the State submitted, on the basis of economic evidence, that any remuneration provided to the surveyors for the copyright would be competed away between them. In principle, the Tribunal accepts both of these submissions although neither throws much light on the appropriate remuneration to be set. The submissions do underscore, however, the futility of this litigation. Whatever the Tribunal awards will have little impact on the parties. Economically, it will result in an improvement in the position of the consumers of the services of surveyors … at the expense of the consumers of registered survey plans …
>
> The Australian Taxation Office will also incidentally benefit through the additional income tax payable by surveyors, as will [Copyright Agency] on the commission it charges for the collection of the remuneration. So viewed, this litigation appears to offer little benefit to those whose interests are said to be at stake.[103]

15.74 Having weighed the matters outlined above, the ALRC considers that the copying and communicating of surveys to the public, for the purposes of the land titles registration system, is fair. This activity has a mixed commercial and public interest nature. It disseminates factual material. There is no real market for the surveys—there is an artificial market created by the statute that requires the LPI to provide access to the surveys, but a surveyor could not resell a survey created for a particular client. The LPI use does not affect the potential market for, or value of, the copyright material. These uses should, therefore, be made in reliance on an exception for uses where statutes require public access. Surveyors would continue to own copyright in their surveys, and could continue to assert their exclusive rights to control uses other than those required by statute.

Material that is commercially available

15.75 The recommendation that the *Copyright Act* should contain an exception for uses where a statute requires public access is based, in part, on the evidence that most

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101 Ibid [55].
102 Copyright Agency, *Submission 727*.
103 *Copyright Agency Ltd v New South Wales* [2013] ACopyT 1 [62]-[63].

of the copyright material used under statute is not commercially available and has no real market. Stakeholders to this Inquiry have proposed that an exception for uses required by statute should not be available where the material is commercially available.[104] The ALRC considers that such a limitation should not be contained in the *Copyright Act*, but may be appropriately included in a statute requiring a government to provide public access.

15.76 In the UK, material that is open to public inspection pursuant to a statutory requirement may be copied for the purpose of facilitating inspection of the material.[105] There is a draft amendment being circulated at the time of writing that would both extend this exception to making material available online, but limit the exception to material that is not commercially available.[106] In New Zealand, an exception for material open to public inspection pursuant to a statutory requirement does not include any limitation regarding commercial availability.

15.77 It may sometimes be appropriate to make commercially available material open to public inspection, with appropriate safeguards. In the US, photocopies of patent applications, including copyrighted work, are made available to the public for a fee, and this is considered fair use. However, the US Patent Office has chosen not to make this material available online because of fears of further exploitation.[107] CSIRO advises that the European Patents Office makes material available for viewing only.[108] IP Australia has proposed that the proper functioning of patent laws requires the release of non-patent literature (extracts, and sometimes the whole, of journal articles, books and other copyright material) to the public.[109]

15.78 On the other hand, some public registers function well without the need to include commercially available material. It might not be necessary, for example, to release commercially available material under an FOI law. The Office of the Australian Information Commissioner (OAIC) raised concerns that some publication of material under the FOI Act could have an undesirable impact on the copyright owner's revenue or market. The OAIC indicated that it is considering whether to make a determination that information should not be published under the Information Publication Scheme 'in circumstances where publication on a website would be unreasonable, such as if the document is an artistic work or publication would clearly impact on the copyright owner's revenue or market'.[110]

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104 ALPSP, *Submission 562*; International Association of Scientific Technical and Medical Publishers, *Submission 560*.

105 *Copyright, Designs and Patents Act 1988* (UK) s 47.

106 Intellectual Property Office, *Public Administration* <www.ipo.gov.uk > at 14 October 2013. The Copyright Review Committee (Ireland) has recommended a similar exception: Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013) 70.

107 Bernard J Knight Jr, *Memorandum: USPTO Position on Fair Use of Copies of NPL Made in Patent Examination* (2012).

108 CSIRO, *Submission 774*.

109 IP Australia, *Submission 681*.

110 Office of the Australian Information Commissioner, *Submission 145*.

15.79 The ALRC considers that this question is best dealt with by Parliament when it legislates to require governments to provide public access to material. Parliament may consider that it is in the public interest to place commercially available material on public registers for some purposes, such as patent law, but not others, such as FOI law. Different restrictions on copying, communication and use may be necessary. This should be dealt with on a case by case basis in the statute creating the obligation to release the material.

Correspondence and other material sent to government

15.80 Correspondence and other material sent to governments may be scanned into an electronic file for efficient storage and to provide access to government officers at distant locations. While authors of letters retain copyright, both governments and the relevant collecting society agreed that government use of correspondence should not require remuneration.[111]

15.81 The *Copyright, Designs and Patents Act 1988* (UK) includes an exception for use of material sent to government 'with the licence of the copyright owner ... for the purpose for which the work was communicated ... or any related purpose which could reasonably have been anticipated by the copyright owner'.[112] There is an equivalent provision in s 62 of the *Copyright Act 1994* (NZ). This approach recognises that when citizens send material to governments, permission can be implied for use of the material as necessary to fulfil the objective for which the material was sent. The Australian *Copyright Act* should contain a similar provision.

15.82 The UK and NZ exceptions allow the Crown to copy the work and issue copies of the work to the public, as long as the work has not been previously published.[113] This is intended to avoid damaging the market for published work that is sent to government. However, in the digital age, copying of material sent to government is essential for internal purposes such as scanning and emailing. The Australian exception should allow previously published material to be copied for internal purposes, but should not allow it to be made publicly available.

Recommendation 15–5 The *Copyright Act* should provide for a new exception for use of correspondence and other material sent to government. This exception should not extend to uses that make previously published material publicly available.

111 Copyright Agency, *Submission 727*; CAARA, *Submission 662*; Victorian Government, *Submission 282*; State Records South Australia, *Submission 255*; Queensland Department of Natural Resources and Mines, *Submission 233*; Tasmanian Government, *Submission 196*

112 *Copyright, Designs and Patents Act 1988* (UK) s 48.

113 Ibid s 48(2), (3); *Copyright Act 1994* (NZ) s 62(2), (3).

Local government

15.83 Local government is not covered by the statutory licence in pt VII div 2 of the *Copyright Act*. Councils may use copyright material under direct licence, and may also be able to rely on implied licenses,[114] and on other exceptions in the *Copyright Act*. Some councils hold voluntary licences from collecting societies for music.[115]

15.84 As noted earlier, copyright concerns have inhibited local councils from making material available as required by FOI laws and planning and environmental laws. The Information and Privacy Commission NSW has advised councils not to publish any copyright material on websites without the consent of owners and to provide 'view only' access to plans in development applications.[116] Some councils do make information available, taking a risk management approach. Others do not allow copying, even when it is clearly in the public interest (such as to allow inspection of development applications other than on council premises) .[117] A voluntary licence for copying works is available to local councils, but only about 15 of more than 500 councils have taken up this option.[118] The voluntary licence does not allow material to be placed online.

15.85 The ALRC asked if the statutory licence should be extended to local government.[119] Representatives of rights holders were divided, with some considering such a move would 'enable more comprehensive use of material by local governments on fair terms',[120] while others considered that there was no justification for such an extension.[121] SAI Global, a publisher of Australian Standards, was particularly concerned about the prospect of councils being able to communicate the whole of a work and the potential for under-reporting and infringement.[122]

15.86 The NSW Government submitted that councils need specific exceptions for certain public interest uses.[123]

15.87 In the ALRC's view, specific exceptions are necessary for local government. Councils play an important role in planning, development and environmental management. Public consultation and scrutiny of local government operations are essential, but are hindered by current copyright arrangements. The new exceptions recommended in this chapter (use for public inquiries, uses where a statute requires

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114 The High Court in *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279 said there was no implied licence from surveyors to the NSW government, but was influenced by the existence of a statutory licence. The situation may be different for local governments, which cannot use the statutory licence.

115 APRA/AMCOS, *Submission 247*; PPCA, *Submission 240*.

116 Information and Privacy Commission NSW, *Submission 209*.

117 T Proust, *Submission 264*; K Bowrey, *Submission 94*.

118 Copyright Agency, *Submission 727*.

119 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012) 57.

120 Copyright Agency/Viscopy, *Submission 249*. See also SPAA, *Submission 281*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; ABC, *Submission 210*.

121 APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; PPCA, *Submission 240*.

122 SAI Global, *Submission 193*.

123 NSW Government and Art Gallery of NSW, *Submission 740*.

public access, and use of material sent to the Crown in the course of public business) are defined by the purpose of the use, and would be available to councils.

Non-government users

15.88 The statutory licence for uses 'for the services of the Commonwealth or State' covers uses made by non-government users, as long as the user is authorised in writing.[124] The exceptions recommended in this chapter should also be available to non-government users.

15.89 Outsourcing of certain government functions is commonly undertaken in pursuit of innovation and efficiency. For example, both the NSW and Queensland governments provide public access to surveys, as required by statute, via approved providers in the private sector.

15.90 It is also likely that government use of digital technologies, including the cloud, will result in use of copyright material by non-government users. The current exceptions for parliamentary libraries are only available to an authorised officer of a library,[125] while the exceptions for judicial proceedings are not so limited.[126] As already noted, the new exceptions recommended in this chapter are defined by the purpose of the use, rather than the identity of the user. A non-government actor should be able to use material under both the current and the recommended new exceptions.

15.91 Normally, such a person would be acting on the authority of the government agency. In the United Kingdom and New Zealand, the exceptions for use of material open to public inspection are limited to users who are authorised by the 'appropriate person'.[127] The ALRC does not consider such a limitation is necessary. A user who is not authorised by the government agency with the obligation to provide public access could not be said to be using material 'for the purpose of complying with a statute that requires a government agency to provide access to material'.

Government and other exceptions

15.92 The Franki Committee said that governments 'should be entitled to copy a work in the circumstances where a private individual would be entitled to copy it without obligation to the copyright owners'.[128] The ALRC agrees that governments should not be required to pay for uses that are free to others. The statute should be clear that governments can rely on fair use, or if fair use is not enacted, the new fair dealing exception, and other specific exceptions in the *Copyright Act*.

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124 *Copyright Act 1968* (Cth) s 183(1).
125 Ibid ss 48A, 104A.
126 Ibid ss 43(1), 104.
127 *Copyright, Designs and Patents Act 1988* (UK) s 47; *Copyright Act 1994* (NZ) s 61.
128 Copyright Law Committee, *Report on Reprographic Reproduction* (1976), 7.10, cited in J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 7.

Fair use

15.93 It has been argued above that specific exceptions are useful in the case of high volume institutional uses that are fair or mostly fair. The exceptions recommended in this chapter are intended to facilitate open government and the functioning of the parliament, the judicial system, and the executive. However, there will be other uses that serve these same interests that are also fair. These should be considered under the fair use exception. The recommendations for specific exceptions are not intended to limit the scope of the fair use exception.[129]

15.94 One activity that is likely to fall under the fair use exception is the digitisation of government archives. The NSW Government reports that State Records NSW is considering mass digitisation of the following material:

- letters complaining about the classification of publications;
- progress reports on land improvement sent by First World War veterans in applications for continuing financial aid under the Soldier Settlement Scheme;
- testimonials;
- requests sent to the Colonial Secretary for items, such as canoes;
- requests to the Colonial Secretary for permission for convicts to marry;
- reports on schools, containing examples of students' work.[130]

15.95 To the extent that the uses listed above are not captured by the specific exceptions recommended in this chapter, these uses could be considered under the fair use exception.[131]

15.96 Dr Judith Bannister provided another example of a use associated with open government that is not covered by the recommended specific exceptions:

> In a modern democracy open access to information and government accountability does not end with the release of documents by a government agency to an individual applicant. Recent reforms to freedom of information at the Commonwealth level (and in some States) encourage proactive disclosure to the world at large on agency websites.
>
> Open government goes beyond government use and extends to re-use by the wider public. Whether it is whistleblowers releasing documents, media reporting, community groups engaged in public campaigns, or individuals engaged in online discussions, a wide range of non-government users play an important role in ensuring government accountability and these activities should also be covered by an appropriately worded exception.[132]

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129 See *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012) 12–13 where the US District Court held that the existence of specific exceptions for libraries in s 108 of the *Copyright Act 1976* (US) did not preclude reliance on fair use in s 107.

130 NSW Government and Art Gallery of NSW, *Submission 740*.

131 See Ch 12 regarding mass digitisation.

132 J Bannister, *Submission 715*.

15.97 Such uses would not be covered by the recommended exception for uses under a statute requiring public access. These uses should be considered under the fair use exception.

15.98 If the fair dealing exception recommended in Chapter 6 is enacted, rather than fair use, then some of these government uses could not be held to be fair. The fair dealing exception does not include government use or public administration in the confined list of purposes. Therefore, if a government use is not for one of the other listed purposes (such as quotation), then it could not be held to be fair, under the fair dealing exception. This highlights the flexibility of the open-ended fair use exception over a confined fair dealing exception.

Fair dealing

15.99 If fair use is not enacted, governments should have access to fair dealing exceptions in the *Copyright Act*. The fair dealing exceptions have the purpose of encouraging socially useful activities such as research, study, criticism, review and reporting news. These activities remain socially useful when conducted by governments and should not be burdened by a requirement to pay remuneration.

15.100 There is currently disagreement and uncertainty about whether governments can rely on fair dealing exceptions. John Gilchrist has explained that two views are possible.[133] One construction of the statutory licence scheme in pt VII div 2 is that governments cannot rely upon fair dealing exceptions and must instead adhere to the requirements of the licence.[134] Governments have advised that the declared collecting societies have taken this view.[135] Gilchrist points out that the Australian Government's 2003 agreement with Copyright Agency Ltd (as it was then known) exempted material copied for judicial proceedings and giving professional advice, but expressly excluded reliance on the other exemptions, such as research or study.[136] Copyright Agency has indicated that it does not consider that the fair dealing exception would not apply to a use made for 'government purposes'.[137]

15.101 The Victorian Government said that this approach 'puts the State at a disadvantage compared to most non-government copyright users, such as corporations and individuals, who are entitled to rely on the exceptions to infringement by not remunerating copyright owners for specified copyright acts'.[138]

15.102 An alternative construction is that governments, like individuals and corporations, can rely on the fair dealing exceptions. In this case, the statutory licence is only relevant when government use goes beyond that permitted by the fair dealing

133 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1.
134 Ibid, 7–9.
135 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.
136 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 15.
137 Copyright Agency, *Submission 727*.
138 Victorian Government, *Submission 282*.

exceptions.[139] Gilchrist suggested that this is 'the better view' of the relationship between the fair dealing and the government statutory licensing provisions.[140] This approach has wide support.[141]

15.103 The Full Federal Court has indicated that fair dealing is to be determined by reference to the facts of each case, and that determination must take into account the effect of a statutory licence.[142] This does not exclude governments from relying on fair dealing exceptions, but the exceptions may have a narrower scope for governments than they do for private citizens and institutions that do not have the benefit of a statutory licence.[143]

15.104 To avoid any doubt, it should be made clear, either via an amendment or an explanatory note, that the fair dealing exceptions are available to governments.

Other exceptions

15.105 There is similar uncertainty as to whether governments can access existing specific exceptions in the *Copyright Act*. The South Australian Government submission identified a number of relevant exceptions.[144]

15.106 As with fair dealing exceptions, governments should be in the same position as private and institutional users regarding access to specific exceptions. To avoid any doubt, an amendment or explanatory note should clarify that the specific exceptions are available to governments.

Just terms

15.107 Two stakeholders suggested that the ALRC should consider whether the creation of new exceptions would require 'just terms' under s 51(xxxi) of the *Constitution*.[145] This section considers whether the recommended new exceptions for government use would be affected by the just terms guarantee.

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139 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 7. See also E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 464.

140 *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279, [11] cited in J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 8.

141 E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 464; Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*; SAI Global, *Submission 193*.

142 *Haines v Copyright Agency Ltd* (1982) 64 FLR 185, 191.

143 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 18.

144 State Records South Australia, *Submission 255*: *Copyright Act 1968* (Cth) ss 14 (insubstantial parts), 43 (judicial proceedings or professional advice), 44 (inclusion of works in collections for use by places of education), 44B (labels for containers of chemical products), 47C (back up copy of computer programs), 47D (reproducing computer programs to make interoperable products), 49 (libraries and archives). See also DSITIA (Qld), *Submission 277* which contains a more extensive list.

145 Arts Law Centre of Australia, *Submission 706*; Australian Copyright Council, *Submission 219*.

15.108 The Commonwealth Parliament has the power to make laws with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.[146] It can also make laws for the acquisition of property under heads of power other than s 51(xxxi), and these laws are not necessarily subject to the guarantee of 'just terms'.[147] It is not clear whether a law creating an exception to copyright would be subject to that guarantee. The High Court has indicated that rights under copyright law, because of their susceptibility to modification, are not necessarily protected by s 51(xxxi).[148] The High Court has also held that intellectual property laws inevitably

> impact upon existing proprietary rights. To the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer, the grant of legislative power contained in s 51(xviii) manifests a contrary intention which precludes the operation of s 51(xxxi).[149]

15.109 On the other hand, the High Court has held that there is no 'absolute proposition' that changes to rights within copyright do not attract the guarantee,[150] and has confirmed that 'copyright constitutes property to which s 51(xxxi) can apply'.[151]

15.110 Even if the guarantee applies, the creation of a new exception may not amount to an acquisition of property. The High Court has held that creating an exception for private copying reduced the exclusive rights of copyright owners, but did not amount to an acquisition of property, and therefore did not attract the just terms guarantee.[152] In another context, it was held that the use of a person's property by the Commonwealth did not amount to an acquisition.[153] The recommended exceptions for government use do not result in a transfer of ownership of copyright, and the copyright owner's rights remain otherwise unaffected.

15.111 Finally, the new exceptions recommended in this chapter are largely for uses of material with no real market value. If remuneration is currently being received, this is because of the operation of the statutory licence, which can be construed as requiring remuneration even where the material has no real market. Where an exception allows use of copyright material with no market value, it would be difficult to argue that s 51(xxxi) requires payment to the owner.

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146 *Constitution* s 51(xxxiii).

147 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133, [153]–[154].

148 *Wurridjal v Commonwealth* (2009) 237 CLR 3009, [363]–[364].

149 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, [38].

150 *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* (2012) 286 ALR 61, [96].

151 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1933) 176 CLR 480, 527; *JT International SA v Commonwealth* [2012] HCA 43, [35], [105]. For a detailed discussion of these authorities, see J Clarke, 'Can Droit de Suite be Characterised as a Right Pertaining to Copyright? Discussion of the Necessity of s 11 of the *Resale Royalty Right for Visual Artists Act 2009* (Cth)' (2012) 17 *Media and Arts Law Review* 23, 36–40.

152 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1933) 176 CLR 480.

153 *Australasian United Steam Navigation Co Ltd v Shipping Control Board* (1945) 71 CLR 508, 525–526.

15.112 Should the Government wish to avoid any risk that the exceptions are invalid because of s 51(xxxi), it would be possible to insert a section analogous to s 116AAA, providing that if the exceptions for government use result in the acquisition of property other than on just terms, compensation is payable.

16. Access for People with Disability

Contents

Summary

16.1 The digital era creates the potential for vastly improved access to copyright material for people with disability. However current legislative arrangements mean that this potential is not fully realised. The *Copyright Act* provides for a statutory licence for institutions assisting people with disability. The licence allows these institutions to make accessible versions of copyright works, but its scope of the licence is limited, the administrative requirements are onerous, and it has not facilitated the establishment of an online repository for people with print disability. The exceptions available for individuals—fair dealing, format shifting and the s 200AB 'special case' exception—are also limited in their scope. The widespread use of technological protection measures (TPMs) is creating significant barriers to access for people with disability.

16.2 The ALRC recommends that access for people with disability should be an illustrative purpose listed in the fair use exception. Many uses for this purpose will be fair, as they are transformative and do not have an impact on the copyright owner's existing market. Including this purpose as an illustrative purpose will increase certainty and confidence for users, and encourage people to undertake these socially desirable uses. Fair use would not usually permit a use that competed with a commercially available product, and would ensure that commercial publishers retain an incentive to produce accessible material.

Introduction

16.3 Until recently, the predominant way for people with print disability to access text was via Braille and sound recordings. However, access remains poor, with only 5% of all books produced in Australia being published in accessible formats such as large print, audio or Braille, a situation that the Disability Discrimination Commissioner, Graeme Innes, describes as a 'book famine'.[1] The digital era creates the potential for vastly improved access to copyright material for people with disability, using digital technology including:

- online databases of digital versions of books, such as Bookshare or the HathiTrust Digital Library;
- portable mp3 players to listen to an audio description of a movie;
- portable scanners to format shift a purchased copy of a work;
- computers, tablets or smartphones with built-in screen reading software;
- electronic texts read via a digital Braille display, copied to a portable Braille note taking device or sent to an embosser to produce hardcopy Braille; and
- screen access technology that provides tables of contents and allows the user to adjust the font size or colour.

16.4 While the older technology—that is, Braille and sound recordings—was resource intensive and relied upon institutions to create accessible formats, some of the newer technology empowers individuals to convert material to a suitable format for their own use.

16.5 However, the full benefits of digitisation are not yet available for people with disability, partly because of the current legislative arrangements, and partly because of the widespread use of TPMs on digital material, particularly ebooks. TPMs are intended to discourage the making of infringing copies, but they also inhibit the use of screen readers and the creation of Braille versions.[2]

Current legislative arrangements

16.6 Part VA of the *Copyright Act* provides for a statutory licence for copying and communicating broadcasts that is available to an institution assisting persons with an intellectual disability.[3] Part VB contains a statutory licence for reproducing and communicating works, available for institutions assisting persons with print disability

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1 Australian Human Rights Commission, *Australia Can Help End World Book Famine* <www.humanrights.gov.au> at 24 October 2013.

2 See generally J Fruchterman, *Technological Protection Measures and the Blind* (2013) <http://www.benetech.blogspot.com.au/2013/06/technological-protection-measures-and.html> at 7 November 2013; N Suzor et al, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13(1) *Media & Arts Law Review* 1.

3 *Copyright Act 1968* (Cth) pt VA. A broadcast, for the purpose of pt VA, extends to the content of a free-to-air broadcast made available online by a broadcaster: s 135C(1). See also Ch 19.

(literary or dramatic works only) or intellectual disability (literary, dramatic, artistic and musical works). The Part VB licence allows reproduction of the work in one of five versions: sound recording, Braille, large print, photographic or electronic.

16.7 The licence does not extend to making a reproduction of a work in a particular format if there is already a commercially available version in that format.[4] The statutory licences require equitable remuneration to be paid, but Copyright Agency has indicated that it does not collect payment for these uses.[5]

16.8 There is no comprehensive exception for individual users. Copyright Agency notes that individuals can create accessible materials by relying on exceptions for format shifting, fair dealing for research and study, and 'special cases' (s 200AB).[6]

16.9 AMCOS has provided a licence for music to the National Information Library Service. It does not cover all repertoire and is only available for copying for students.[7]

International obligations

16.10 Until recently, international copyright law has permitted, but not required, countries to include exceptions for access for persons with disability.[8] The *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled* (the Marrakesh Treaty) was adopted on 27 June 2013. The Marrakesh Treaty requires parties to provide exceptions to copyright to facilitate the availability of works in accessible formats.[9] The exceptions should allow certain uses of copyright material by institutions ('authorised entities') and by individuals (for personal use).[10] Australia is not yet a signatory to the Marrakesh Treaty.

16.11 Australia is a party to the UN *Convention on the Rights of Persons with Disabilities*, which requires parties to 'ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials'.[11]

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4 Ibid s 135ZQ.

5 Copyright Agency, *Submission 727*.

6 Copyright Agency, *Submission 866*, see also Australian Copyright Council, *Print Disability Copyright Guidelines* (2007).

7 RBS.RVIB.VAF Ltd, Blind Citizens Australia, Royal Institute for Deaf and Blind Children, *Submission to the Copyright Law Branch, Attorney-General's Department on Fair Use and Other Copyright Exceptions* (2005).

8 J Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired* (2007), 9.

9 *Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled*, (adopted by the Diplomatic Conference, Marrakesh, 27 June 2013), art 4(1).

10 Ibid art 4(2).

11 *Convention on the Rights of Persons with Disabilities*, 13 December 2006, ATS 12 (entered into force on 3 May 2008).

Problems with existing arrangements

The statutory licence for institutions

16.12 Stakeholders pointed out that the pt VB statutory licence does not extend to artistic works (such as drawings, diagrams, maps and plans) or to musical works.[12] It extends to educational institutions and institutions assisting persons with print disability, but not other institutions such as libraries outside educational institutions.

16.13 Some difficulties with the statutory licence have been identified by the Australian Copyright Council.

- Publishers are not legally obliged to supply digital files for people with print disability, and can provide them on restrictive terms and conditions.
- Organisations must check for commercial availability before making each copy,[13] which is 'pointlessly onerous' when the work is frequently requested and is never likely to be available in the relevant format. This requirement means that it is 'effectively impossible to make accessible material available online'.
- The Act does not allow reproduction into a format that is commercially available, even where the commercially available version has TPMs that inhibit the use of screen readers, or does not have the navigation information that is useful for a person with a print disability.[14]

16.14 There are penalties for the removal of TPMs, and for manufacturing, importing or distributing a circumvention device.[15] Institutions assisting persons with print disability are allowed to remove a TPM,[16] but it is not clear how the institution would obtain a circumvention device.[17]

16.15 Some publishers are making audio books available using synthetic voice rather than human narration. Many people find synthetic speech unpleasant to listen to and prefer to listen to a version with human narration. However, if there is a synthetic voice version commercially available, it may not be possible to rely on the statutory licence to make a human narration version.[18]

16.16 In 2005, the Queensland Narrating Service, an institution assisting people with a print disability, reported that its efforts to provide narrations of books in a timely

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12 ADA and ALCC, *Submission 586*; Copyright Advisory Group—Schools, *Submission 707*.

13 *Copyright Act 1968* (Cth) s 135ZQ.

14 Australian Copyright Council, *Print Disability Copyright Guidelines* (2007). The statutory licence does not permit an 'electronic version' to be made if there is an electronic version available within a reasonable time at an ordinary commercial price: *Copyright Act 1968* (Cth) s 135ZP(6A). See also Vision Australia, *Submission 181*.

15 *Copyright Act 1968* (Cth) pt V div 2A.

16 *Copyright Regulations 1969* (Cth) sch 10A.

17 The ALRC has been asked not to duplicate work being done by the review of exceptions relating to technological protection measures. See also Australian Government Attorney-General's Department *Review of Technological Protection Measure Exceptions* www.ag.gov.au at 24 October 2013.

18 Blind Citizens Australia, *Submission 157*; Vision Australia, *Submission 181*.

manner were hindered by long waits for publishers' permissions, refusal of permission for digital copies and the administration costs associated with the statutory licence.[19]

16.17 Also in 2005, a joint submission from three Australian organisations representing people with print disability reported that efforts to digitise 500 analogue items that were 'the core collection of library materials for the print disabled' were jeopardised by 'outmoded and restrictive legislation'.[20]

16.18 In 2008, Nicholas Suzor pointed out that while the United States had an online repository of books for the blind, and Canada was developing one, Australia had no such repository. He noted that Australian copyright law appears to provide for the development of a repository, but none had been developed for reasons that may include 'the complexity of the legislative scheme'.[21] He also reported that the statutory licence 'is rarely used to provide electronic text versions (which) suggests some difficulties in interpretation or implementation of the licence in the digital environment'.[22]

Exceptions for individuals and libraries

16.19 The exceptions in the *Copyright Act* that are available to individuals are highly qualified—fair dealing is only available for research and study, and not, for example, for reading for leisure. The format shifting and s 200AB 'special case' exceptions have significant limitations, discussed in Ch 10 and 12.[23] The ALRC recommends that all of these exceptions should be repealed and replaced with fair use.[24]

16.20 The usefulness of these exceptions for people with disability is diminished by the existence of TPMs on many copyright works. Individuals are not permitted to remove TPMs on copyright material they have purchased, even if that TPM is preventing the operation of a screen reader.[25]

16.21 The *Copyright Act* allows libraries to scan books for the benefit of persons with print disability, but ss 49(7A) and 50(7C) require those scans to be destroyed after a single use, resulting in significant expense for the library and delay for the student.[26]

Market-based solutions

16.22 Some of these problems may be resolved without changes to the law. The Australian Publishers Association (APA) reported that audio, large print, Braille and

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19 Queensland Narrating Service, *Submission to the Copyright Law Branch, Attorney-General's Department on Fair Use and Other Copyright Exceptions* (2005).

20 RBS.RVIB.VAF Ltd, Blind Citizens Australia, Royal Institute for Deaf and Blind Children, *Submission to the Copyright Law Branch, Attorney-General's Department on Fair Use and Other Copyright Exceptions* (2005).

21 N Suzor et al, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13(1) *Media & Arts Law Review* 1, 4.

22 Ibid 6.

23 See also Ibid 8 on the limitations of s 200AB.

24 See Ch 5, 10, 12.

25 *Copyright Act 1968* (Cth) s 116AN, see also N Suzor et al, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13(1) *Media & Arts Law Review* 1, 9–11.

26 ADA and ALCC, *Submission 213*.

DAISY[27] versions of books are becoming more available through commercial channels.[28] The APA also pointed to changes in technology that allow customers to choose their own font size when accessing an ebook, and to a World Intellectual Property Organization project that facilitates the cross border exchange of books in accessible formats between national libraries and charitable institutions serving people with print disabilities.[29]

16.23 Similarly, the Australian Copyright Council has attempted to address these problems by encouraging publishers to offer the Individuals Print Disability Licence and by drafting a sample agreement for print disability organisations and publishers.[30] In 2005, five publishers had granted the licence to individuals with print disability.

Other approaches

16.24 Canada and the United Kingdom allow a wide range of bodies, as well as individuals, to use the exceptions for access for people with disability.[31] New Zealand's approach is similar to Australia, in that it allows prescribed bodies to make modified copies of published literary or dramatic works, if the work is not commercially available.[32]

16.25 The United States has a print disability scheme under s 31 of the US *Copyright Act 1976* (the Chafee Amendment). It allows authorised entities to copy published, non-dramatic literary works in formats for use by persons with disability.[33] This scheme has facilitated the establishment of Bookshare, an online library for individuals with print disability. Bookshare is available in Australia but not all the books in the collection are available to Australians.[34] Blind Citizens Australia noted that

> The creation of secure online text repositories for the exclusive use of people who are blind has allowed these countries [US and Canada] to provide a highly beneficial service with little impact on copyright owners.[35]

16.26 In *The Authors Guild v Hathitrust*, the court held that the existence of the Chafee Amendment did not preclude reliance on fair use for access for people with disability.[36] The HathiTrust Mass Digitisation Project made digital books available to students on a secure system for students with certified disabilities. Justice Baer said

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27 'DAISY' stands for Digital Accessible Information System and is a technical standard designed for use by people with print disability.

28 Australian Publishers Association, *Submission 225*.

29 Australian Publishers Association, *Submission 629*. Referring to the WIPO project, known as TIGAR (Trusted Intermediary Global Accessible Resources), Disability Discrimination Commissioner Graeme Innes has urged the Australian government not to fund TIGAR, on the basis that it has only produced 300 books in three years: Australian Human Rights Commission, *Australia can help end world book famine* <www.humanrights.gov.au> at 24 October 2013.

30 Australian Copyright Council, *Print Disability Copyright Guidelines* (2007).

31 *Copyright Act 1985* (Can) s 32; *Copyright, Designs and Patents Act 1988* (UK) ss 31A–321F.

32 *Copyright Act 1994* (NZ) s 69.

33 *Copyright Act 1976* (US) 17 U.S.C. 121.

34 Bookshare has 102,000 titles available in most countries, and 71,000 books for readers in Australia: Bookshare, *Books Without Barriers* <www.bookshare.org> at 22 October 2013.

35 Blind Citizens Australia, *Submission 157*.

36 *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012), 23.

that digitisation has enabled 'the unprecedented ability of print-disabled individuals to have an equal opportunity to compete with their sighted peers'.[37] He found that the use of copyright material was transformative in that it provided access for print-disabled individuals, a purpose that was not served by the original work.[38] He also noted that the provision of access for print-disabled individuals does not have a significant impact on a market.[39]

16.27 The American Library Association reports that fair use has provided the flexibility to allow libraries to 'maintain their missions when a purpose-specific exception may not cover unforeseen or unaccounted-for changes in technology or access'.[40]

An illustrative purpose of access for people with disability

16.28 The ALRC has been asked not to duplicate work being undertaken on increased access to copyright works for people with print disability. However, having determined that Australia would be best served by a fair use exception accompanied by a list of illustrative purposes, it is difficult to ignore the question as to whether facilitating access for people with disability should be an illustrative purpose. Some stakeholders, including schools, libraries, and organisations representing people with disability agreed that there should be such an illustrative purpose.[41]

> It is our view that a fair usage provision which recognises the need for individuals with a print disability to format shift from an inaccessible to accessible copy would dramatically enhance access for a significant proportion of the population and also advantage copyright owners through increased sales of their works.[42]

16.29 Representatives of content creators considered that the statutory licence was adequate.[43] For example, Australian Copyright Council noted that 'the print disability statutory licence in Part VB provides greater certainty and access than either fair use or a voluntary licence'.[44]

16.30 The ALRC agrees that the statutory licence has the potential to provide access and certainty, although there is some evidence that it is not meeting this potential. The

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37 Ibid, 21.
38 Ibid, 16.
39 Ibid, 21.
40 American Library Association and Association of Research Libraries, *Submission 703*.
41 Copyright Advisory Group—Schools, *Submission 707*; American Library Association and Association of Research Libraries, *Submission 703*; Google, *Submission 600*; ADA and ALCC, *Submission 586*; M Rimmer, *Submission 581*; R Xavier, *Submission 146*. See also the joint submission from three of Australia's blindness organisations to the 2005 *Fair Use Review*, that supported fair use: RBS.RVIB.VAF Ltd, Blind Citizens Australia, Royal Institute for Deaf and Blind Children, *Submission to the Copyright Law Branch, Attorney-General's Department on Fair Use and Other Copyright Exceptions* (2005).
42 Blind Citizens Australia, *Submission 157*.
43 Copyright Agency, *Submission 727*; Flemish Book Publishers Association, *Submission 683*; International Publishers Association, *Submission 670*; Australian Copyright Council, *Submission 654*; Australian Publishers Association, *Submission 225*. The International Association of Scientific, Technical and Medical Publishers proposed an exception for 'libraries for non-commercial research or educational institutions' to make digital copies for people with print disability: IASTMP, *Submission 200*.
44 Australian Copyright Council, *Submission 654*.

ALRC has not conducted a detailed consideration of the statutory licence, because of its Terms of Reference. However, some tentative conclusions have been reached. First, the statutory licence should be retained and streamlined. Secondly, the obligation to undertake an investigation into commercial availability before making each accessible copy should be reconsidered. In particular, the statutory licence should be reformed so that an Australian online repository for people with print disability can be established. Finally, the statutory licence should permit reproduction in an electronic version as long as there is no commercially available electronic version with the particular access features required.

16.31 There are many ways that copyright material could be used to improve access for people with disability that are not covered by the statutory licence. The fair use exception would be valuable for people with disability doing their own format shifting, and for individuals and institutions not covered by the statutory licence who are assisting people with disability. People with disability are entitled to access copyright material at the same time and the same price as everyone else.[45] When commercial providers are not able to provide this access, individuals and institutions should be able to use material, as necessary, to make it accessible. The fair use exception, in combination with the statutory licence, would ensure that such uses could occur.

16.32 Many uses that facilitate access for people with disability will be considered to be fair use even if there is no specific illustrative purpose, for the reasons identified by the Court in *HathiTrust*—such uses are transformative and do not affect the market for the original work. On the other hand, including this specific illustrative purpose would give a strong signal to the courts and the public, particularly people with disability, that such uses may be fair. It would increase certainty and confidence for users, and encourage people to undertake these socially desirable and valuable uses.

16.33 It is hoped that the market will become more responsive to consumers with disability. The best result for these consumers is 'built-in accessibility', where commercial providers make material available to people with disability at the same time and the same price as for others.[46] Fair use would not usually permit a use that competed with a commercially available product. The fair use approach, with its emphasis on avoiding market harm, would ensure that commercial publishers retain an incentive to produce accessible material.[47]

16.34 Fair use, with an illustrative purpose of facilitating accessibility for people with disability would also be an effective way of ensuring compliance with the Marrakesh Treaty, should Australia become a signatory.

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45 J Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired* (2007), 129. See also the objects of the *Disability Discrimination Act 1992* (Cth): 'to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of ... the provision of goods, facilities, services and land ...' (s 3).

46 Ibid 129.

47 Copyright Advisory Group—Schools, *Submission 707*.

Fair dealing for the purpose of access for people with disability

16.35 The ALRC recommends that, if fair use is not enacted, the *Copyright Act* should be amended to introduce a new fair dealing exception. This would combine existing fair dealing exceptions and introduce new prescribed purposes which may be held to be fair dealing. The fair dealing exception would also require the fairness factors to be considered in determining whether a particular use was fair.

16.36 If there is a new fair dealing exception, access for people with disability should be a prescribed purpose. This would have the same advantages as fair use—it would allow people with disability, other people assisting them, and institutions not covered by the statutory licence, to copy and format shift, as long as these activities were for the purpose of access. The fairness factors would apply, and uses that compete with a commercially available product would be unlikely to be fair.

Recommendation 16–1 The fair use or new fair dealing exception should be applied when determining whether a use for access for people with disability infringes copyright.

17. Computer Programs and Back-ups

Contents

Summary

17.1 This chapter discusses exceptions to copyright for computer programs and the need for an exception for backing-up all types of copyright material.

17.2 The use of legally-acquired copyright material—including films, music, ebooks and computer programs—for the purpose of back-up and data recovery should be considered under the fair use exception. For the exception to apply, making back-up copies must be fair, having regard to, among other factors, harm to rights holders' markets. The ALRC considers that such uses are likely to be found to be fair.

17.3 If fair use is enacted, there may also be a case for repealing or amending the existing exceptions for computer programs. However, further consultation should be conducted before repealing these exceptions.

Back-ups and fair use

17.4 Part III div 4A of the *Copyright Act* includes exceptions to copyright for computer programs. One of these exceptions, in s 47C, is for backing-up computer programs. There is no comparable exception for backing-up other copyright material.

17.5 Despite this, there can be little doubt that many Australians and Australian businesses routinely make back-up copies of their digital files. Many would be surprised to hear that making copies of this material for these purposes may infringe copyright.

17.6 The ALRC considers that the use of copyright material for the purpose of back-up and data recovery should be considered under the fair use exception recommended in Chapter 4.

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

17.8 Electronic Frontiers Australia, for example, stated that back-up and data recovery 'should not infringe copyright in any circumstances, particularly where it involves an individual backing-up their own legally acquired data'.[1] Likewise, eBay stated that the existing exception in s 47C is 'complex and unacceptably narrow' and that it is 'vital in a digital economy that the owners of digital copyright material have the right to protect digital purchases by making backup copies'.[2] The Internet Industry Association also submitted that exceptions for back-up should not distinguish between different types of digital content:

> Backing up should not require a further permission of the copyright owner and should not be restricted as to the technology used or the place where the stored copy is made or held.[3]

17.9 Many submitted that a fair use exception, rather than new specific exceptions for back-up and data recovery, should be applied to determine whether an unlicensed use of copyright material for back-up purposes infringes copyright.[4] For example, Dr Rebecca Giblin submitted that

> a narrow purpose-based exception would be poorly adapted to the changing technological environment and potentially hinder the development and uptake of new back-up and recovery technologies. A flexible exception in the style of fair use would be a far preferable method of achieving the same aims.[5]

17.10 Ericsson also said it 'strongly supports the application of the fair use exception when determining whether a use of copyright material, for the purpose of backup and data recovery, infringes copyright'.[6]

17.11 The Arts Law Centre, on the other hand, favoured a 'specific exception allowing individual consumers to make back-up copyrighted material such as images, ebooks, audio and audio-visual material that have been legally-acquired'.

> The sole purpose for the back-up would be in case the source copy is lost, damaged or otherwise rendered unusable as provided, for example, as provided for in the Canadian Copyright Act.[7]

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

> substantial evidence of online business models and content delivery services that permit a consumer to re-download or re-stream content if another copy is legitimately required. iTunes is a popular example. The introduction of a right of back-up for any

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1 EFA, *Submission 714*.
2 eBay, *Submission 751*.
3 Internet Industry Association, *Submission 253*.
4 Whether making back-up copies is fair use does not appear to have been properly tested in US courts.
5 R Giblin, *Submission 251*. See also EFA, *Submission 258*.
6 Ericsson Australia, *Submission 597*.
7 Arts Law Centre of Australia, *Submission 706*.

> content downloaded from iTunes would undercut existing licensing models and therein licensees' ability to offer specific licence conditions for authorised content (including at different price points).[8]

17.13 APRA/AMCOS also expressed concern that a new exception might interfere with established markets.[9] Similarly, ARIA submitted that the ability to make back-up copies of copyright material is being

> addressed through the commercial models already operating in the market, with download stores allowing consumers to make additional copies of recordings under the terms of the licensed service. Therefore an additional exception for this purpose is unnecessary and unjustified.[10]

17.14 The Interactive Games and Entertainment Association submitted that business models are addressing users' desire to back-up content. Users can often re-download a game 'multiple times if for any reason they accidentally, or intentionally, remove the game from their device'.[11]

17.15 Some stakeholders expressed concern that new exceptions to copyright might allow users to copy copyright material which they are only entitled to access for a limited time or for so long as they pay an ongoing subscription fee. A subscription to a magazine, for example, may come with access to digital copies of the magazine's entire back catalogue. Subscribers should not then be free to copy and keep that entire back catalogue. APRA/AMCOS submitted that if exceptions extended to the back-up of 'tethered' downloads, it would have a 'chilling effect on innovation' and 'may lead to the exit from the Australian market of Spotify, Rdio and others'.[12]

17.16 Similarly, Foxtel submitted that it makes content available to its subscribers to stream or download for a limited time, and this period of time is usually determined by the content owner. If copyright exceptions allowed subscribers to copy this content, 'this would conflict with Foxtel's and/or the rights holder's ability to exploit that content at a later time'.[13] Foxtel submitted that an exception for making back-up copies would risk 'undermining the ability for content owners and distributors to monetise their content and extract fair value from distribution windows'.[14]

17.17 Copying such 'tethered' downloads would not be fair use. Further, such distinctions between fair and unfair copying for private purposes or the purpose of keeping back-up copies, highlights the benefit of having a flexible, principled exception like fair use.

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8 Australian Film/TV Bodies, *Submission 205*. See also Screen Producers Association of Australia, *Submission 281*.
9 APRA/AMCOS, *Submission 247*.
10 ARIA, *Submission 241*.
11 iGEA, *Submission 192*.
12 APRA/AMCOS, *Submission 247*.
13 Foxtel, *Submission 245*.
14 Ibid.

17.18 Third parties increasingly offer data back-up and retrieval services, often allowing users to store their digital belongings on remote servers in the cloud. Some of these services will automatically scan a customer's computer, and upload files to a remote server. Many stakeholders stated that third parties should be able to offer such cloud-based back-up services. For example, the ADA and ALCC submitted that exceptions 'must account for consumers and organisations "making" copies of information for back-up purposes, and service providers who facilitate back-up automatically, on their behalf'.[15]

17.19 Telstra submitted that exceptions should allow cloud service operators to back-up and store legally-acquired material on behalf of their customers, but should not be able to 'commercially exploit material under the protection of a private use exception'.[16]

17.20 The use of copyright material by some back-up and data recovery services may well be fair use. Although commercial, some such services may be transformative and may not harm the markets of rights holders.

17.21 A program or cloud-based service that backs-up and stores the entire contents of a hard drive—all programs and files, including music and films—may be distinguished from services that, for example, store and allow remote access to a customer's music and films. The latter service is now offered by many rights holders; an unlicensed service that unfairly competes with and harms this market may well be unfair. The former service, however, may be a transformative and fair use.

17.22 Using copyright material for back-up and data recovery purposes should often be fair use. Rather than propose new or extended exceptions for this activity, as were enacted in Canada in 2013,[17] the ALRC proposes that the fair use exception should be used to determine whether such uses infringe copyright.

17.23 Some stakeholders submitted that the fair use exception could expressly refer to reproduction for the purpose of back-up and data recovery.[18] However, the ALRC does not consider that this is a sufficiently broad category of use to justify including it as an illustrative purpose of fair use—and in any event, not every good example of fair use can be listed in the provision.

17.24 If fair use is enacted, the existing specific exception in s 47C of the *Copyright Act* for making back-up copies of computer programs should be repealed. If fair use is not enacted, then a new specific exception for back-up and data recovery should be introduced, and should apply to the use (not merely reproduction) of all copyright material (not merely computer programs).

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15 ADA and ALCC, *Submission 213*.

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

17 Section 29.24 of the *Copyright Act 1985* (Can) applies broadly to 'a work or other subject-matter'. The person who owns or has a licence to use the source copy may reproduce it 'solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable'. The copy is limited to personal use, the original must not be an infringing copy, the person must not circumvent a TPM to make the copy, and the person must not give away any of the reproductions.

18 See, eg, Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria, *Submission 198*.

Exceptions for computer programs

17.25 In addition to the exception for backing-up, there are other exceptions for computer programs in pt III div 4A of the *Copyright Act*, namely:

- reproduction for normal use or study of computer programs (s 47B);
- reproducing computer programs to make interoperable products (s 47D);
- reproducing computer programs to correct errors (s 47E); and
- reproducing computer programs for security testing (s 47F).

17.26 Contracts that exclude the operation of these exceptions are largely unenforceable.[19]

17.27 These exceptions were introduced, and one was amended, by the *Copyright Amendment (Computer Programs) Act 1999*, following a 1995 Copyright Law Review Committee report on computer software.[20] The Explanatory Memorandum explained the objectives of the new provisions:

> The objectives of allowing decompilation are: a) for interoperability—to put Australian software developers on a competitive footing with their counterparts in Europe and the USA and increase the range of locally produced interoperable computer products available to the wider community; b) for error correction, including combating the potential disruption to business and the community by the Y2K bug in many computer programs; and c) for security testing—to combat the potential disruption to business and the community by computer hackers and viruses.[21]

17.28 A few stakeholders commented on the importance of exceptions for computer programs. The ADA and ALCC stated:

> The activities covered by the computer software exceptions are critical to ensuring that computer programs and IT networks work safely and securely. These exceptions are particularly important in an environment where homes and business are becoming increasingly connected to the internet and are reliant on computer software for performing everyday tasks. Ensuring that computer software can be reverse engineered to enable the creation of interoperable products is also an important competition goal.[22]

17.29 The computer program exceptions attracted limited comment in the initial stages of this Inquiry, however some stakeholders pointed out a number of problems with them.[23] Robert Xavier submitted that the definition of computer program is too narrow, as it is too often confined to 'literary works', which would not cover images, audio and films that are often part of computer programs, such as computer games.[24]

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19 *Copyright Act 1968* (Cth) s 47H.
20 Copyright Law Review Committee, *Computer Software Protection* (1995).
21 Explanatory Memorandum, Copyright Amendment (Computer Programs) Bill 1999 (Cth).
22 ADA and ALCC, *Submission 586*.
23 R Xavier, *Submission 531*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.
24 R Xavier, *Submission 531*.

17.30 The exception for making interoperable products in s 47D seems to be the most problematic, and was said to be ineffective for a number of reasons. It does not allow programs to be 'reproduced in the interoperable program, which severely limits its use'.[25] It 'does not appear to extend to copying necessary to make software work with hardware'.[26] And to create an interoperable program, it is often not practically possible to reproduce programs only 'to the extent reasonably necessary to obtain the information', as is required by the exception.[27] The Federal Court in *CA Inc v ISI Pty Ltd* called it a 'very limited exception'.[28]

17.31 The Internet Industry Association submitted that the exceptions for reverse engineering and interoperability in ss 47B and 47D are too narrow and 'seriously out of date':[29]

> The very limited nature of the rights to copy for the purpose of reverse engineering (s 47B and s 47D) is also an impediment to those wishing to study code in order to create new and/or interoperable systems. Note in particular that the relevant provisions do not permit reproduction for the purpose of testing interoperability.[30]

17.32 The Business Software Alliance, on the other hand, submitted that the existing exceptions should be retained: they provide certainty and clarity for users and rights holders, and they represent an appropriate balance.[31] The fact that Europe and the US have specific exceptions relating to software uses may also support this view.[32]

17.33 In light of some of the problems highlighted above—problems not discussed by those supporting the existing provisions—the existing computer programs exceptions may be in need of revision. Xavier suggested that one option would be to 'scrap the whole division and start again'.[33]

17.34 Another option would be to repeal the existing exceptions, and apply fair use or the new fair dealing exception, to determine whether these unlicensed uses of computer programs infringe copyright. The Internet Industry Association said it would be a 'futile exercise' to update the existing exceptions, and instead, favoured a principles-based approach.[34] Others submitted that the fair use exception may 'provide some leeway to Australian courts to consider the competition-enhancing benefits of reverse engineering and other acts covered by the computer program exceptions such as security testing and error correction'.[35]

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25 Ibid; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.
26 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.
27 Ibid.
28 (2012) 201 FCR 23.
29 Internet Industry Association, *Submission 744*.
30 Internet Industry Association, *Submission 253*.
31 Business Software Alliance *Submission* 598.
32 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*. See also BSA, *Submission 598*.
33 R Xavier, *Submission 531*.
34 Internet Industry Association, *Submission 744*.
35 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

17.35 Some stakeholders submitted that an additional illustrative purpose could be added to the fair use provision, such as for 'interoperability, error correction and security testing'.[36]

17.36 In the ALRC's view, if fair use is enacted, further consideration should be given, and consultation with industry conducted, before repealing these exceptions. If the existing exceptions are retained, then the Act should be clear that they do not limit the application of fair use.

17.37 If fair use is enacted, it may also be necessary to introduce limitations on contracting out of fair use to the extent that it applies to particular uses of computer programs.[37]

36 R Xavier, *Submission 531*. See also Google, *Submission 600*; ADA and ALCC, *Submission 586*.
37 See Ch 20.

18. Retransmission of Free-to-air Broadcasts

Contents

Summary

18.1 Subscription television companies and other media content providers retransmit free-to-air television and radio broadcasts to their own customers. Retransmission, in this context, means providing the content contained in broadcasts by other means, such as cable or satellite transmission, in a simultaneous and unaltered manner.

18.2 The *Copyright Act* and the *Broadcasting Services Act 1992* (Cth) effectively operate to provide, in relation to the retransmission of free-to-air broadcasts:

- an unremunerated exception in relation to broadcast copyright;
- a remunerated exception in relation to underlying works or other subject matter ('underlying rights'), which does not apply to retransmission that 'takes place over the internet'; and
- an unremunerated exception in relation to copyright in underlying rights, applying only to retransmission by non-profit self-help providers.

18.3 This chapter examines these exceptions and whether they are adequate and appropriate in the digital environment. This raises complex questions at the intersection of copyright and communications policy. Options for reform are largely dependent on assumptions about matters not within the scope of the ALRC's Inquiry.

18.4 The ALRC nevertheless recommends that, in developing media and communications policy, and in the light of media convergence, the Australian Government consider whether the retransmission scheme for free-to-air broadcasts should be repealed (other than in relation to self-help providers).

18.5 Removing the retransmission scheme would promote copyright law that is technologically neutral, rather than favouring some retransmission platforms over others. Reform would be based on a view that retransmission no longer needs to be facilitated in a converging media environment, and the extent to which retransmission occurs can be left to be determined by market mechanisms.

18.6 Importantly, removing the retransmission scheme would avoid the need to consider the extension of the scheme to the internet. The fact that extending the scheme to internet retransmission would be problematic suggests that it is not fit for the future. Policy makers should, therefore, be considering how it might be phased out.

18.7 If the existing retransmission scheme is retained, the ALRC recommends that the scope and application of s 135ZZJA of the *Copyright Act*, which provides that the remunerated exception does not apply in relation to retransmissions 'over the internet' (the internet exclusion), should be clarified.

The current retransmission scheme

18.8 A retransmission is defined in the *Copyright Act* as a retransmission of a 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.[1] Retransmission without the permission of the original broadcaster does not infringe copyright in broadcasts, by virtue of provisions contained in the *Broadcasting Services Act*.

18.9 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.[2] The retransmission must, however, be within the licence area of the broadcaster or, if outside the licence area, with the permission of the Australian Communications and Media Authority (ACMA).[3]

18.10 In this way, the *Broadcasting Services Act* provides immunity against any action for infringement of copyright that might otherwise be able to be brought by the original broadcaster for retransmission of a free-to-air broadcast.

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

2 *Broadcasting Services Act 1992* (Cth) s 212.

3 Ibid s 212(1)(b)—in the case of programs transmitted by a commercial broadcasting licensee or a community broadcasting licensee.

18.11 The immunity does not extend to copyright subsisting in a work, sound recording or cinematograph film included in a free-to-air broadcast (the underlying rights) unless the retransmission is provided by a 'self-help provider'.[4]

18.12 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.[5] Briefly, self-help providers include non-profit bodies, local government bodies or mining companies, which provide retransmission to improve reception in communities; or other persons providing retransmission by in-building cabling of apartment buildings and hotels. Self-help providers do not have to remunerate either the free-to-air broadcaster or the underlying rights holders.

18.13 The ALRC does not recommend any change to the operation of the unremunerated exceptions applying to retransmission by self-help providers. These exceptions appear to retain relevance, and there has been no indication that they require review.[6] References to the 'retransmission scheme' in this chapter should be read as excluding the provisions applying to retransmission by self-help providers.

18.14 For retransmitters, other than self-help providers, pt VC of the *Copyright Act* provides a statutory licensing scheme for the underlying works. The 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 equitable remuneration is paid.[7] 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. Retransmission of a free-to-air broadcast that 'takes place over the internet' is excluded from this remunerated exception by virtue of s 135ZZJA of the *Copyright Act*.

18.15 Essentially, the current retransmission scheme allows the retransmission of free-to-air broadcasts, without the permission or remuneration of the broadcaster, and for equitable remuneration to be paid to the underlying rights holders.[8]

18.16 In relation to this remuneration, the Copyright Tribunal has concluded that the benefits to subscription television consumers of the retransmissions, and therefore the value of those retransmissions to subscription television companies, are best described under the heading of 'convenience'—the advantage to consumers of only having to use one remote control to access subscription and free-to-air channels.[9]

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4 Ibid s 212(2A).
5 Ibid s 212A.
6 In 2011–12, the ACMA issued 417 broadcasting retransmission licences to regional councils and other self-help providers, mainly for television broadcasts: Australian Communications and Media Authority, *Annual Report 2011–12* (2012).
7 *Copyright Act 1968* (Cth) s 135ZZK.
8 Ibid pt VC.
9 *Audio-Visual Copyright Society Limited v Foxtel Management Pty Limited* [2012] ACopyT 1 (1 June 2012), [188].

History of the retransmission scheme

18.17 The *Broadcasting Services Act*, as originally enacted, contained special provisions for retransmission of programs. These provided an immunity against actions, suits or proceedings in respect of such retransmission, for persons other than broadcasting licensees.[10]

18.18 In 1995, in *Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd*,[11] the Federal Court confirmed that a cable television service consisting of multiple channels could take advantage of the immunity under s 212 of the *Broadcasting Services Act* when retransmitting free-to-air broadcasts.

18.19 In 1999, amendments to the *Broadcasting Services Act* changed the operation of the immunity so that it no longer applied to underlying rights, except where retransmission was provided by a 'self-help provider'.[12] This meant that anybody retransmitting programs, other than a self-help provider, would infringe these rights unless retransmission was with the permission and remuneration of the underlying copyright holders.

18.20 The amending bill in its original form would also have required retransmitters to seek the permission of the owners of copyright in broadcasts before retransmitting.[13] In 1998, the Australian Government announced that 'new rules' would be introduced to 'correct an anomaly … which allowed pay TV operators to retransmit free-to-air television or radio signals without seeking the consent of the originating broadcaster'.[14] However, in the face of opposition to this requirement from the non-Government parties in the Parliament, the Government introduced an amendment that had the effect of overriding the requirement pending the resolution of outstanding issues 'through further consultation with industry'.[15]

18.21 The *Berne Convention* specifically allows signatories to implement a statutory licence applying to rebroadcast and retransmission of copyright works.[16] The *Copyright Amendment (Digital Agenda) Act 2000* (Cth) introduced the pt VC statutory

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10 *Broadcasting Services Act 1992* (Cth) s 212(2) as enacted.

11 *Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd* (1995) 60 FCR 483; *Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd* (1996) 66 FCR 75.

12 *Broadcasting Services Act 1992* (Cth) s 212(2A) introduced by the *Broadcasting Services Amendment Act (No.1) 1999* (Cth).

13 Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth).

14 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.350], quoting a joint media release of then Minister for Communications, the Information Economy and the Arts (the Hon Senator Richard Alston) and then Attorney-General (the Hon Daryl Williams AM QC MP), dated 10 March 1998.

15 Ibid, [9.530], citing Australian Government Attorney-General's Department, *AGD e-News on Copyright No 11* (1999). See, also, the history of the retransmission exception set out in Free TV Australia, *Submission 270*: the retransmission exception 'has long been recognised by industry and government as an unintended anomaly of broadcasting and copyright law'.

16 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 11(bis)(2). Also *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002) art 8.

licensing scheme applying to underlying works.[17] The stated reason for implementing the licensing scheme was that 'it would be impractical for retransmitters to negotiate with individual copyright owners in underlying copyright material to enable the retransmission of free-to-air broadcasts'.[18]

18.22 These provisions were inserted at the same time as the introduction of a new technology-neutral right of communication to the public.[19] This replaced and extended an existing rebroadcasting right, which only applied to 'wireless' broadcasts and not, for example, to cable or online communication.[20]

Scope of broadcast copyright

18.23 The grant of a separate copyright in broadcasts did not occur until the passage of the *Copyright Act* in 1968, and followed Australia's accession to the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (*Rome Convention*).[21] The *Rome Convention* established a regime for protecting rights neighbouring on copyright, including minimum rights for broadcasting organisations.

18.24 These rights can be protected by copyright law, as in Australia, or by other measures. Under the Convention, broadcasting organisations enjoy, among other things, the right to authorise or prohibit the 'rebroadcasting of their broadcasts'.[22] Broadcasting is defined under the *Rome Convention* as 'transmission by wireless means'[23] and rebroadcasting as the 'simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation'.[24] The *Rome Convention* does not require that broadcasters have an exclusive right to retransmission of their signal by cable.

18.25 In Australia, however, the *Copyright Act* provides that copyright in relation to a broadcast includes the right to 're-broadcast it or communicate it to the public otherwise than by broadcasting it'.[25] This applies to both wireless and wired transmissions and, therefore, provides broadcasters with broader rights than required internationally. In this regard, the Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 (Cth) explained that the amendment to broadcast copyright was

> intended to extend the current re-broadcasting right which only applies to wireless telegraphy to include the cable transmission of broadcasts and the making available online of broadcasts. The new right will therefore allow broadcasters to control the

17 *Copyright Amendment (Digital Agenda) Act 2000* (Cth); *Copyright Act 1968* (Cth) pt VC.
18 Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), [6].
19 *Copyright Act 1968* (Cth) s 87.
20 Ibid s 87(c), as enacted.
21 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964).
22 Ibid art 13(a).
23 Ibid art 3(f).
24 Ibid art 3(g).
25 *Copyright Act 1968* (Cth) s 87(c).

retransmission of their broadcasts irrespective of the means of delivery of the service.[26]

Copyright and communications policy

18.26 The Terms of Reference specifically directed the ALRC to take into account the recommendations of the Australian Government's Convergence Review.[27] In particular, the Convergence Review suggested that the retransmission provisions be reviewed as part of the ALRC's Inquiry.[28]

18.27 The ALRC faces challenges in making firm recommendations for the reform of the retransmission scheme—and the broadcast exceptions discussed in Chapter 19. The technologies by which people access audiovisual and, in particular, television-like services, are changing rapidly both in Australia and overseas. At the same time, the future shape of communications and media policy in Australia is in a state of flux, following the Convergence Review and in the absence of an Australian Government position on reform.

18.28 If the recommendations of the Convergence Review were accepted, broadcast regulation in Australia would look very different, with wide-reaching implications for the *Copyright Act*. The Convergence Review recommended the abolition of the system of licensing commercial broadcasters, with regulation instead to be applied to 'content service enterprises'—enterprises delivering professional content to a large number of Australian users and deriving a high level of revenue from the delivery of these services to Australians.[29] The Convergence Review also envisaged limits being placed on control of content by copyright owners to address competition concerns, recommending that a new communications regulator should have the power to investigate content-related competition issues and promote fair and effective competition in content markets.[30]

18.29 Implementing the Convergence Committee's recommendations would require significant rewriting, and perhaps rethinking, of Australian copyright law. Links with the *Broadcasting Services Act* would need to be removed from the *Copyright Act* and decisions made about extending copyright protection and exceptions beyond licensed broadcasters—for example, to all 'content service enterprises' otherwise subject to communications and media regulation.

18.30 In this context, the ALRC carefully considered whether its Inquiry was an appropriate forum to make recommendations concerning retransmission.[31] While some stakeholders considered that there was no reason the ALRC should not consider reform

26 Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), [116].
27 Australian Government Convergence Review, *Convergence Review Final Report* (2012).
28 Ibid, 33.
29 Ibid, 2.
30 Ibid, ch 3.
31 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [228], Question 38.

of the retransmission scheme,[32] others felt that the central importance of communications policy issues meant that the 'incidental' copyright issues should be left to other policy-making processes.[33]

18.31 The AIG argued, for example, that the ALRC Inquiry was not the appropriate forum 'to determine issues related to the treatment of retransmission of broadcasting signals under the Act because any reform to current arrangements would have impacts beyond copyright policy and should not be made in isolation from these broader effects'.[34]

18.32 AIG observed that in July 2013, the Senate Environment and Communications References Committee, in its report on radio simulcasts, recommended that the Minister for Broadband, Communications and the Digital Economy and the Attorney-General 'fully and urgently address in a comprehensive and long-term manner all of the related broadcasting and copyright issues identified in numerous reviews, and by many stakeholders, following receipt of the ALRC [copyright] review'.[35]

18.33 COMPPS stated that, before making any changes to the retransmission scheme, the 'communications, convergence, competition and other similar legal and policy considerations and impacts would need to be considered' and these areas were outside the ALRC's Terms of Reference—making it impossible for the Inquiry to 'properly review and make recommendations' on retransmission.[36]

18.34 Free TV stated that retransmission should be the subject of a further review, which should 'take as its starting point the acknowledgement that broadcasters should be accorded retransmission consent'.[37]

18.35 The retransmission scheme raises significant communications and competition policy questions. These should not necessarily be determined by decisions made about copyright law, but in the context of a more comprehensive review of issues at the intersection of copyright and broadcasting—including in relation to the concept of a broadcast as protected subject matter, as an exclusive right and in exceptions.

18.36 In the absence of clear directions on communications and media policy reform, the ALRC is not in a position to make detailed recommendations regarding reform of the retransmission regime. However, given the significant engagement of stakeholders with the issues surrounding retransmission, the ALRC considers that it is appropriate to

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32 For example, Music Council of Australia, *Submission 269*; ARIA, *Submission 241*; Australian Copyright Council, *Submission 219*; ABC, *Submission 210*; NSW Young Lawyers, *Submission 195*.

33 For example, Free TV Australia, *Submission 865*; IMW Media Services, *Submission 757*; ASTRA, *Submission 747*; Australian Film/TV Bodies, *Submission 739*; Australian Industry Group, *Submission 728*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*; NRL, *Submission 257*; Foxtel, *Submission 245*; SBS, *Submission 237*; News Limited, *Submission 224*.

34 Australian Industry Group, *Submission 728*.

35 Ibid; Parliament of Australia, Senate Environment and Communications References Committee, *Inquiry into the Effectiveness of Current Regulatory Arrangements in Dealing with Radio Simulcasts* (2013), Rec 2.

36 COMPPS, *Submission 634*.

37 Free TV Australia, *Submission 865*.

express some views on this matter, while recognising that communications and competition policy factors may ultimately dictate other conclusions.[38]

Background and assumptions

18.37 The Discussion Paper described how options for reform of the retransmission scheme are dependent on assumptions about matters not within the scope of the ALRC's Inquiry, including:

- the scope of the exclusive rights covered by broadcast copyright, or other protection of broadcast signals;
- the extent to which retransmission of free-to-air television and radio broadcasts still needs to be facilitated in a converging media environment; and
- the extent to which it remains important to maintain geographical limits on the communication of free-to-air broadcasts.

18.38 Reform raises threshold questions about what exclusive rights should be covered by broadcast copyright. In Australia, broadcasters are provided with broader protection than required internationally. The *Rome Convention* provides only limited protection and does not require that copyright cover broadcasts. The *Rome Convention* permits exceptions to broadcast protection, including: private use; the use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research.[39] Signatories may also provide for the same kinds of limitations with regard to the protection of broadcasting organisations as domestic law provides 'in connection with the protection of copyright in literary and artistic works'.[40]

18.39 From this perspective, options for reform can be seen as relatively unconstrained, in copyright policy terms, because the *Rome Convention* does not require broadcast copyright, and allows a series of exceptions not found in the *Berne Convention*.[41] Arguably, the nature of broadcast rights can justify anomalous exceptions—that is, exceptions that do not apply to other subject matter.

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38 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [228], Question 38.

39 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964) art 15. International protection of broadcasting organisations has been discussed at length at the World Intellectual Property Organization, by the Standing Committee on Copyright and Related Rights (SCCR). The issue of providing legal protection for broadcasting organisations against unauthorised use of broadcasts, including by retransmission on the internet, has been retained on the Agenda of the SCCR for its regular sessions: World Intellectual Property Organization, *Program Activities, Broadcasting Organizations* <www.wipo.int/copyright/en/activities/broadcast.html> at 24 April 2013.

40 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964) art 15(2).

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

18.40 The scope of broadcast copyright has long been tied up with debates regarding communications policy, including 'the facilitation of the subscription television industry, ensuring access to broadcasts in remote areas, and the introduction of digital and high-definition technologies'.[42] Associate Professor Kimberlee Weatherall has observed that the 'desire to promote these goals of broadcast policy has led to broadcasters being denied certain rights they might, as copyright owners, expect to have'.[43]

18.41 Copyright law has longstanding links with communications regulation, which has tended to emphasise the 'special' place of broadcasting in the media landscape. The *Copyright Act* contains, for example, many unremunerated and remunerated exceptions that take the circumstances of the broadcasting industry into account, including the statutory licensing scheme for radio broadcast of sound recordings and other broadcast exceptions discussed in Chapter 19.

18.42 Historically, regulators have pursued a range of public policy goals in relation to broadcasting, such as ensuring universal public access, minimum content standards (including classification and local content rules), diversity of ownership, competition and technological innovation.[44]

18.43 The retransmission scheme, in facilitating access to free-to-air broadcasts across media platforms, was intended to serve at least some of these public policy goals. The extent to which retransmission remains important may, however, be questioned in light of the convergence of media content and communications technologies. For example, if television audiences fragment across a multiplicity of broadcast, cable and online programming, or there is a move away from licensing media content providers, the case for a retransmission scheme that qualifies ordinary copyright principles may be weaker.

18.44 The retransmission scheme can be seen as favouring certain commercial interests in the communications and media markets. At present, subscription television providers do not need to license broadcast copyright when retransmitting free-to-air broadcasts, which advantages them over internet content providers by removing the need to negotiate rights with broadcasters. Similarly, cable and satellite subscription television providers have an advantage in being able to access the pt VC statutory licensing scheme for the underlying rights.

18.45 Whether the existing retransmission scheme produces good outcomes in terms of communications and competition policy is a matter beyond the scope of the ALRC's Inquiry. Further, many aspects of communications and media regulation are under

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42 K Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in A Kenyon (ed) *TV Futures: Digital Television Policy in Australia* (2007) 242, 254.

43 Ibid, 254. More generally, it has been suggested that the 'main challenges for twenty-first century copyright are not challenges of authorship policy, but rather new and harder problems for copyright's communications policy: copyright's poorly understood role in regulating competition among rival disseminators': T Wu, 'Copyright's Communications Policy' (2004) 103 *Michigan Law Review* 278, 279.

44 K Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in A Kenyon (ed) *TV Futures: Digital Television Policy in Australia* (2007) 242, 244.

review, including as a response to the Convergence Review[45] and against the backdrop of the development of the NBN.

The future of the retransmission scheme

18.46 There are some indications suggesting that the retransmission scheme is no longer necessary. The scheme was originally intended to provide for the distribution of free-to-air broadcasts to areas which did not receive adequate reception. The regime facilitated self-help arrangements to enable individuals and communities to access free-to-air broadcasting services where the location or other reception difficulties meant that signal quality was not adequate or the signal was not available.[46]

18.47 With the introduction of subscription television into Australia in 1995, operators began retransmitting the national and commercial television services as 'free additions' to their channels, without the permission or remuneration of either broadcasters or underlying rights holders.[47] While underlying rights holders are now remunerated under pt VC statutory licensing, the agreement or remuneration of the broadcaster is still not required, despite the extension of broadcast copyright in 2000.

18.48 In addition to retransmission by self-help providers, since 2010, rebroadcast by 'satellite BSA licensees'[48] has been authorised, subject to a separate statutory licensing scheme under the *Copyright Act*.[49] Under this scheme, the Australian Government-funded Viewer Access Satellite Television (VAST) service provides free-to-air digital television channels to viewers with inadequate terrestrial reception.[50]

18.49 One possible reason for retaining the retransmission scheme, once it became apparent that subscription television operators could utilise it, may have been to assist in the early development of that industry, and to ensure competition in content provision across media platforms. If so, this rationale may no longer be relevant, given the market penetration of established subscription television services.

18.50 The retransmission scheme may simply provide subscription television platforms with additional content for their offerings at a lower cost than might be the case if a commercial agreement were required. Subscription television providers benefit commercially because they are able to provide free-to-air channels as part of

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45 The Convergence Review Committee was established to examine the operation of communications and media 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: see Australian Government Convergence Review, *Convergence Review Final Report* (2012).

46 Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth).

47 Ibid.

48 A 'satellite BSA licensee' means the licensee of a commercial television broadcasting licence allocated under *Broadcasting Services Act 1992* (Cth) s 38C: *Copyright Act 1968* (Cth) s 10.

49 *Copyright Act 1968* (Cth) pt VD.

50 Successive Australian Governments have 'invested many hundreds of millions of dollars since 2001 to ensure universal access to digital FTA television by terrestrial means, or by satellite where terrestrial reception is not feasible': ASTRA, *Submission 227*.

their subscription packages without having to negotiate a commercial fee, or conditions, with broadcasters.[51]

The unremunerated exception to broadcast copyright

18.51 Free-to-air broadcasters submitted that retransmission should be allowed to continue only with broadcasters' permission because the rationale for the unremunerated exception for broadcast copyright no longer exists.[52] That is, the retransmission scheme was introduced specifically to allow retransmission by self-help providers, and was never intended to allow new services to retransmit free-to-air broadcasts without authorisation.[53]

18.52 Stakeholders also questioned the justification for recognising underlying rights but, effectively, not copyright in the broadcast itself.[54] Commercial Radio Australia, for example, submitted that both the broadcast and the underlying works or other subject matter are creative products and there is no 'reasonable basis for the current distinction between the protection of the underlying content and the broadcast'.[55]

18.53 Free TV observed that broadcast copyright acknowledges the 'creative and economic value of broadcasts' and the 'endeavours of a broadcaster in promoting, arranging and scheduling programming in a competitive commercial environment'.[56] The retransmission scheme is seen to allow free-to-air television broadcasts to be exploited by competitors of the relevant broadcasters. Free TV stated that the business of subscription television providers

> has been built around carriage of the commercial free-to-air television services, which account for over 50% of total prime time viewing in Pay TV homes. While a small fee is payable through Screenrights for the separate underlying rights, free to air broadcasters have not received any compensation for the commercial exploitation of their broadcast signal.[57]

18.54 However, support for repeal of the unremunerated exception appears to be predicated on the continuation of the pt VC statutory licence and, to some extent, on the introduction of 'must carry' obligations on retransmitters.

The remunerated exception

18.55 If the unremunerated exception for broadcast copyright were repealed, so that the permission of the broadcaster would be required for retransmission, this has implications for the operation of the remunerated exception—the statutory licensing scheme in pt VC of the *Copyright Act*. If the unremunerated exception were repealed, the pt VC scheme would only come into effect if a market-based agreement were to be

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51 Free TV Australia, *Submission 270*.
52 Ibid; Commercial Radio Australia, *Submission 132*; TVB (Australia) Pty Ltd, *Submission 124*.
53 Free TV Australia, *Submission 270*.
54 Ibid; Australian Writers' Guild & Australian Writers' Guild Authorship Collecting Society, *Submission 265*; Commercial Radio Australia, *Submission 132*.
55 Commercial Radio Australia, *Submission 132*.
56 Free TV Australia, *Submission 270*
57 Free TV Australia, *Submission 865*.

reached between a free-to-air broadcaster and a retransmitter. That is, if there were no agreement, there could be no retransmission and the need to remunerate underlying rights holders would not arise.

18.56 If the unremunerated exception were repealed, while underlying rights holders would not directly determine whether retransmission was allowed, in practice, they may be able to prevent it, despite the existence of the pt VC licence. An underlying rights holder may condition licensing of their content for free-to-air broadcast on the basis that retransmission will not occur, or that retransmission only occur on, for example, subscription television but not other technologies, such as mobile networks.

18.57 Significant content owners, such as major professional sports bodies, could impose such conditions in negotiations around the sale of exclusive broadcasting rights. Therefore, although retaining the pt VC statutory licence would mean that the retransmitter would not have to negotiate with all the underlying rights holders over retransmission, the broadcaster may have to negotiate in order for retransmission to occur.

18.58 Further, free-to-air broadcasters might decide to permit retransmission of only some of their channels and, for example, exclude sports channels from retransmission. The situation could also become more complex over time—a broadcaster might agree to retransmission at one point in time, and be placed in a difficult position later when subsequent underlying rights holders refuse to licence retransmission.

18.59 Rather than facilitating retransmission, retaining pt VC may simply make negotiating retransmission more complicated. These problems may mean that, if the unremunerated exception were repealed, the remunerated exception for underlying rights should also be repealed, and retransmission left to be determined entirely by market mechanisms.

18.60 The MPAA supported the repeal of the pt VC statutory licence, stating that issues surrounding retransmission should be left to marketplace negotiations about the terms and conditions of retransmission. The MPAA stated that statutory licences 'inevitably harm copyright owners by limiting their control over their works and denying them the market level of compensation for their exploitation' and should be 'avoided or strictly limited to situations in which there is a demonstrable market failure'. Rather, the public interest in promoting access to content would be best served by

> enabling copyright owners, broadcasters and retransmitters to develop the appropriate transactional framework for such dissemination in a free market environment. Such private licensing is already working effectively in many markets for scores of new distribution channels for audiovisual content, including over the Internet. MPAA knows of no reason why it would not deliver the same benefits in Australia.[58]

58 Motion Picture Association of America Inc, *Submission 573*. However, the retransmission of free-to-air broadcasts by cable and satellite television providers in the US is also governed by statutory licences: see *Copyright Act 1976* (US) ss 111, 119, 122.

18.61 Some underlying rights holders, while not favouring any change to the existing retransmission scheme, nevertheless preferred repeal of the retransmission scheme rather than its extension to other forms of communication.[59] COMPPS, for example, stated that it had 'no objection in principle to a retransmission regime which is determined by market mechanisms'.[60] The AFL noted that this position is 'consistent with the principle that owners of copyright should determine where and how copyright material is disseminated'.[61]

18.62 Other stakeholders highlighted the importance of retransmission in ensuring the distribution of free-to-air television content.[62] Ericsson Australia observed that statutory licensing of retransmission 'provides an alternative means for a distributor to acquire rights for retransmission of linear content without the need for a direct licensing agreement with the broadcaster, thereby growing the addressable market which is viewed as a positive outcome'.[63]

18.63 The Internet Industry Association stated that, while repealing the retransmission scheme would be 'platform neutral and consistent with the right of broadcasters to control the retransmission of broadcasts', it could be 'highly disruptive in terms of existing services to the public and existing service providers'.[64] In this context, around four million homes in Australia rely on retransmission to receive some or all of their free-to-air television and radio content, and retransmission to smart phones is the second most popular way for Australians to receive free-to-air television.[65]

18.64 Broadcasters opposed the options for change proposed in the Discussion Paper. Free TV Australia observed that, while leaving retransmission to market mechanisms 'takes into account the right of free-to-air broadcasters to control their broadcast signal', if accompanied by the repeal of the remunerated exception for underlying rights, this would 'make a consent scheme unworkable due to the large number of underlying copyright owners to be consulted in relation to any retransmission'.[66]

18.65 Some stakeholders considered that repeal of the retransmission scheme would likely mean commercial retransmission of free-to-air broadcasts in Australia would cease.[67] Any retransmitter would have to 'engage in two sets of separate commercial

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59 AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*.
60 COMPPS, *Submission 634*.
61 AFL, *Submission 717*.
62 For example, Internet Industry Association, *Submission 744*; Fetch TV, *Submission 721*; Ericsson, *Submission 597*.
63 Ericsson, *Submission 597*.
64 Internet Industry Association, *Submission 744*.
65 IMW Media Services, *Submission 757*. The most popular way remains by direct reception of terrestrially radiated free-to-air broadcasts.
66 Free TV Australia, *Submission 865*.
67 Foxtel, *Submission 748*; ASTRA, *Submission 747*;News Corp Australia, *Submission 746*; Screenrights, *Submission 646*; Telstra Corporation Limited, *Submission 602*. Others expressly supported the views of Screenrights on retransmission issues: Arts Law Centre of Australia, *Submission 706*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*.

negotiations—for the underlying content and for the broadcast copyright'.[68] It was considered impracticable to obtain licences from the many underlying rights holders. [69]

18.66 ASTRA stated that, without the statutory licence in pt VC, even if a free-to-air broadcaster sought to have its entire service retransmitted on a subscription television platform it may not be able to, or may be forced to 'black out' certain programs from view on the retransmitted service.[70] Foxtel submitted that repealing the retransmission scheme would be 'practically unworkable and will have the effect of eliminating retransmission in Australia' and have a 'detrimental impact for Foxtel's customers without any corresponding benefits'.[71]

18.67 Fetch TV considered that, as a relatively small player, it was highly unlikely to be able to negotiate the range of licences required to retransmit a free-to-air broadcast. Further, 'given the increasingly concentrated nature of the Australian media landscape, the protection of self interests may make the acquisition of necessary licences impossible'.[72]

18.68 Many stakeholders opposed changes to the current retransmission scheme,[73] including those who favoured extending the scheme to retransmission over the internet.[74] Stakeholders considered that the current scheme facilitates choice for consumers; improves access to free-to-air broadcasts; has no negative impact on advertising revenue for commercial free-to-air television services; and ensures underlying rights holders are remunerated.

18.69 A central argument for retaining the current arrangements is that they benefit consumers through competition in the market, by ensuring that free-to-air broadcasts are available across platforms, so consumers may access these services terrestrially, or via cable or satellite.[75] ASTRA and Foxtel submitted that the existing retransmission regime works well for the benefit of consumers, has ensured access to free-to-air broadcast through commercial negotiation and that there is no justification for legislative reform.[76]

18.70 Foxtel emphasised that retransmission is 'an extremely limited right and the Copyright Tribunal of Australia has accepted that Foxtel retransmits the FTA services for the convenience of [its] subscribers'.[77]

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68 Telstra Corporation Limited, *Submission 602*.
69 ASTRA, *Submission 747*; Fetch TV, *Submission 721*; Telstra Corporation Limited, *Submission 602*.
70 ASTRA, *Submission 747*.
71 Foxtel, *Submission 748*.
72 Fetch TV, *Submission 721*.
73 IMW Media Services, *Submission 757*; Foxtel, *Submission 748*; ASTRA, *Submission 747*; News Corp Australia, *Submission 746*; Australian Film/TV Bodies, *Submission 739*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; PPCA, *Submission 666*; COMPPS, *Submission 634*; Australian Directors Guild, *Submission 594*.
74 Free TV Australia, *Submission 865*; ABC, *Submission 775*; Internet Industry Association, *Submission 744*; Communications Alliance, *Submission 653*; Telstra Corporation Limited, *Submission 602*; Ericsson, *Submission 597*; SBS, *Submission 556*.
75 ASTRA, *Submission 227*; Screenrights, *Submission 215*.
76 Foxtel, *Submission 245*; ASTRA, *Submission 227*.
77 Foxtel, *Submission 748*.

18.71 Generally, it was suggested that the scheme works well and there is no significant demand for reform.[78] Screenrights stated that, from a commercial perspective, 'access to the free to air broadcast channels is very important for a new entrant into the television market in Australia'.[79] In its view, retransmission has fostered competition in the broadcast market and has 'encouraged new and diverse services, that probably were not considered at the time the scheme was created'.[80]

Repeal of the retransmission scheme

18.72 The Discussion Paper presented alternate sets of proposals. The first option was to repeal both the unremunerated exception applying to broadcast copyright and the pt VC remunerated exception in relation to underlying rights.[81] This would effectively leave the extent to which commercial retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

18.73 In theory, allowing retransmission to be determined by consent would provide for the value to broadcasters and subscription television services of free-to-air broadcasts to be established through normal commercial negotiations between the two parties. This would give free-to-air broadcasters control over the commercial use of their signal, while allowing subscription television services the choice of which broadcasts they wish to retransmit, subject to the permission of the broadcaster.

18.74 At the same time, it would provide for the remuneration of free-to-air broadcasters where subscription television services were willing to pay for retransmission, while allowing them to decline to carry free-to-air broadcasts where the price is considered to be too high. In some cases, 'it is possible that carriage of the signals themselves could become the established market price for retransmission'—that is, no remuneration would need to be paid in either direction.[82]

18.75 The ALRC recognises that, without the continuation of the pt VC remunerated exception, some retransmission will no longer be practicable, even with broadcaster consent, because broadcasters will not have a licence from underlying copyright holders to authorise retransmission. The effect of repealing pt VC may even be that retransmission will cease, at least for a time. From a consumer perspective, this would mean that some people who currently rely on cable or satellite subscription television to receive free-to-air television and radio content would have to use other technology (that is, for example, install a digital television signal amplifier).

18.76 This position may be addressed by underlying copyright holders, broadcasters and retransmitters developing new transactional frameworks. The MPAA observed that

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78 For example, Ibid; ASTRA, *Submission 747*; COMPPS, *Submission 634*; Telstra Corporation Limited, *Submission 602*.

79 Screenrights, *Submission 215*.

80 Screenrights stated that these services include 'satellite and cable residential subscription television, mobile television, fibre to the premises services, hospital communication systems and IPTV' and that, in 2010–11, more than 2.25 million households received retransmission: Ibid.

81 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 15–1, Option 1.

82 See Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth), 13.

voluntary licensing is working effectively in many markets for the distribution of audiovisual content, including over the internet. Eliminating the retransmission exceptions, after an appropriate transition period, would give rights holders the opportunity to act on incentives to develop new licensing arrangements.[83]

18.77 The ALRC has concluded that repeal of the retransmission scheme is the option most consistent with the framing principles for this Inquiry. Specifically, removing the retransmission scheme would promote rules that are technologically neutral, rather than favouring some retransmission platforms over others.[84]

18.78 Removing the retransmission scheme would be based on the assumption that retransmission is no longer necessary to promote access to content,[85] given the many means by which consumers may now obtain free-to-air television and radio. These include retransmission by self-help providers and the VAST service, which provides free-to-air digital television channels to viewers with inadequate terrestrial reception. In addition, there are new forms of internet and mobile transmission of linear programmed (that is, 'streamed') content and on-demand television.

18.79 Reform would be based on a view that the retransmission of free-to-air television and radio broadcasts no longer needs to be facilitated in a converging media environment, and the extent to which retransmission occurs can be left to be determined by market mechanisms. In contrast with the pt VA and pt VB statutory licensing schemes,[86] there may be no continuing rationale for intervention to address market failure.

18.80 Importantly, removing the retransmission scheme would avoid the need to consider the extension of the scheme to retransmission over the internet or the scope of the internet exclusion. As discussed in detail below, the fact that the extension of the retransmission scheme to internet transmission is problematic provides another reason to suggest that the scheme is not fit for the future and policy makers should be considering how it might be phased out.

18.81 In contrast, continuing the scheme would be based on the assumption of a continuing need to facilitate the retransmission of free-to-air television and radio broadcasts—either to ensure access to free-to-air broadcasting or to facilitate market entry by television platforms—and that it would be impracticable for retransmitters to negotiate the retransmission of free-to-air broadcasts.[87] The extent to which the convenience of retransmission on subscription cable and satellite television outweighs copyright and competition policy concerns is a matter that communications and media policy makers are better placed to advise upon than the ALRC.

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83 Motion Picture Association of America Inc, *Submission 573*.

84 See Ch 2, framing principle 4.

85 See Ch 2, framing principle 3.

86 See Ch 8.

87 The retention of pt VC would also retain the only statutory source of remuneration for directors because, under s 98 of the *Copyright Act*, directors are entitled to licence fees for retransmission. The Australian Directors Guild expressed concern about the limited scope of directors' copyright in films: Australian Directors Guild, *Submission 226*.

Recommendation 18–1 In developing media and communications policy, and in responding to media convergence, the Australian Government should consider whether the retransmission scheme for free-to-air broadcasts provided by pt VC of the *Copyright Act* and s 212(2) of the *Broadcasting Services Act 1992* (Cth) should be repealed.

Note: This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

A remunerated exception for broadcast copyright

18.82 The second option proposed in the Discussion Paper was to continue the existing retransmission scheme while providing some recognition for broadcast copyright by introducing a remunerated exception, similar to that which applies to the underlying rights.[88]

18.83 One model for such a scheme is pt VD of the *Copyright Act*.[89] Unlike the pt VC licence, the pt VD licence extends to the copyright in the broadcast itself. For the satellite BSA licensee to be able to rely on the statutory licence to use that copyright there must be an agreement, Copyright Tribunal order or an undertaking covering payment to the broadcast copyright owner.[90] A similar scheme could apply to broadcast copyright in relation to retransmission.

18.84 There was little support for any new statutory licence from stakeholders[91]—and this support was predicated simply on preferring a new statutory licence over repeal of the retransmission scheme entirely.[92]

18.85 The ACCC considered that a remunerated exception for broadcast copyright might mitigate the potential for free-to-air broadcasters to exercise their market power over retransmission, but stated that it would be important to consider 'the value and costs of retransmission to various parties' before any final view was reached.[93]

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88 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 15–1, Option 2.

89 Part VD was introduced in 2010 as part of the changeover from analogue to digital television broadcasts: *Broadcasting Legislation Amendment (Digital Television) Act 2010* (Cth). A new service was implemented to transmit television by satellite to remote reception areas. As the new satellite service would mainly rebroadcast, pt VD provided a statutory licence to allow this without infringing copyright.

90 *Copyright Act 1968* (Cth) s 135ZZZI. See Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.225].

91 Internet Industry Association, *Submission 744*; Optus, *Submission 725*; ACCC, *Submission 658*.

92 For example, ABC, *Submission 775*; Fetch TV, *Submission 721*.

93 ACCC, *Submission 658*.

18.86 Fetch TV stated that it would not oppose the replacement of the pt VC scheme with a statutory licence which set 'reasonable licence fees for both broadcasters and underlying rights holders, taking into account that each are remunerated through other means'.[94]

18.87 Screenrights stated that it could not 'foresee any difficulties in including broadcast signal copyright within the Part VC scheme in the same manner as other copyright subject matter', but did not express a view on the desirability or otherwise of an additional statutory licence.[95]

18.88 Stakeholders opposing the idea of a new statutory licence for broadcast copyright included those representing both free-to-air and subscription broadcasters.[96] ASTRA observed that free-to-air broadcast signals are universally and freely available in Australia. Therefore, where broadcasts are retransmitted on a subscription television platform, which just provides another way of 'navigating' to channels that are otherwise already able to be received, 'there is no case for imposing new cost and administrative burdens' by introducing an additional licensing scheme.[97]

18.89 ASTRA submitted that no evidence has been provided to show any loss of advertising revenue or potential audience reach as a result of retransmission of commercial television services on subscription platforms. Rather, commercial broadcasters were seen as effectively seeking an additional revenue stream from subscription television consumers 'for television services that are required to be both freely available and usually funded by advertising, and where those customers can already receive those services without payment'.[98]

18.90 Foxtel considered that introducing a statutory licensing scheme for broadcast copyright would be 'purely about establishing an additional revenue stream for services that are required to be freely and universally available' when broadcasters already receive remuneration as underlying rights holders.[99] In any case, the administrative costs of such a licensing scheme would 'outweigh what we expect to be very modest distributions for broadcast copyright based on Screenrights' current practices'.[100] News Corp Australia agreed with Foxtel's views and also observed that free-to-air broadcasters have been the beneficiaries of significant government investments in programs to ensure universal access to the Australian population.[101]

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94 Fetch TV, *Submission 721*.

95 Screenrights, *Submission 646*. Also Arts Law Centre of Australia, *Submission 706*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*.

96 Free TV Australia, *Submission 865*; Foxtel, *Submission 748*; ASTRA, *Submission 747*; News Corp Australia, *Submission 746*; Telstra Corporation Limited, *Submission 602*; Motion Picture Association of America Inc, *Submission 573*; SBS, *Submission 556*.

97 ASTRA, *Submission 747*.

98 ASTRA, *Submission 227*.

99 On Foxtel's estimate, free-to-air broadcasters 'are underlying rights holders in approximately one third of Screenrights distributions and, additionally, the commercial FTA broadcasters are remunerated for Foxtel's retransmission through advertising revenue': Foxtel, *Submission 748*.

100 Ibid.

101 News Corp Australia, *Submission 746*. See also ASTRA, *Submission 227*.

18.91 The idea of a statutory licence for broadcast copyright was not supported by free-to-air broadcasters either. SBS favoured 'direct remuneration of SBS's broadcast signal'.[102] Free TV stated that a licence fails to take into account the right of free-to-air broadcasters to control their broadcast signal and that it 'opposes any right to retransmit broadcast television without the consent of the broadcaster'.[103] In Free TV's view, the retransmission regime

> allows exploitation of the free-to-air broadcasters' copyright in a manner that can be highly damaging to their strategic interests. The benefit received by Pay TV from the retransmission right cannot be compensated by a statutory scheme that simply places a dollar value on the broadcast copyright. This is because in addition to being a question of copyright ownership, the issues … are also about the integrity of the services provided by packaging the various copyright works and subject matter that make up a broadcast stream, including the skill and expertise in developing that packaged content.[104]

18.92 The ALRC has concluded, above, that the Australian Government should consider the repeal of the retransmission scheme for free-to-air broadcasts. If the scheme is retained, however, the ALRC does not consider that any new remunerated (or, at least, remunerable) exception should be introduced.

18.93 Broadcasters already receive remuneration in other ways. Commercial broadcasters are ultimately remunerated for retransmission through higher ratings, which have a role in determining advertising revenue; and are often underlying rights holders and receive remuneration under pt VC.[105] In any case, from the perspective of broadcasters, it appears that control of broadcasts rather than remuneration for retransmission is the major concern.[106] That is, broadcasters would like to have the ability to refuse permission for retransmission in certain situations—and to require retransmission in others.

Internet retransmission

18.94 An exclusion from the retransmission scheme is provided by s 135ZZJA of the *Copyright Act*. This provision states that the pt VC statutory licensing scheme 'does not apply in relation to a retransmission of a free-to-air broadcast if the retransmission takes place over the internet' (the internet exclusion).

18.95 In practice, free-to-air broadcasts are generally not communicated on the internet, except in simulcasts by broadcasters themselves, because of the barriers involved in licensing the broadcast and underlying rights.

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102 SBS, *Submission 237*.
103 Free TV Australia, *Submission 865*.
104 Ibid.
105 Foxtel, *Submission 245*. ASTRA stated that free-to-air broadcasters currently receive a 'substantial proportion of the remuneration payments made under Part VC': ASTRA, *Submission 227*.
106 See, eg, Free TV Australia, *Submission 865*; SBS, *Submission 237*; Commercial Radio Australia, *Submission 132*.

18.96 The discussion below proceeds on the basis that the existing retransmission scheme remains in place. If the retransmission scheme were repealed, the extent to which internet retransmission occurs would remain determined by market mechanisms. That is, if a broadcaster wished to enter agreements to permit internet retransmission, the broadcaster would have to acquire the relevant rights from all the underlying right holders. If the underlying rights holders only have rights that are defined territorially, then the broadcaster would not be able to confer rights to wider communication. Any retransmission would be confined to territories in relation to which the retransmitter can obtain rights.

History of the internet exclusion

18.97 One government objective of the reforms leading to the retransmission scheme was 'technological neutrality insofar as retransmission was not confined to any particular means'.[107]

18.98 In the face of concerns about the potential harm caused to copyright owners by internet retransmission,[108] the Government retained the technology-neutral language in pt VC, but introduced the 'over the internet' exclusion in s 135ZZJA.[109]

18.99 The concerns about internet retransmission included fallout from controversy involving a Canadian company, iCraveTV, which had commenced internet retransmission of US television signals, resulting in successful litigation by US film studios and broadcasters to prevent it.[110] This highlighted the possible consequences of extra-territorial internet retransmission.

18.100 Concerns about internet retransmission were also reflected in art 17.4.10(b) of the *Australia–US Free Trade Agreement* (AUSFTA). This provides that 'neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal'.[111]

18.101 The need for future renegotiation of this provision was anticipated. By mutual side letters, the Australian and US representatives agreed that if, at any time, 'it is the considered opinion of either party that there has been a significant change in the reliability, robustness, implementability and practical availability of technology to effectively limit the reception of Internet retransmissions to users located in a specific

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107 D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8.

108 See, eg, Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Copyright Amendment (Digital Agenda) Bill 1999* (1999).

109 See the legislative history summarised in D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8.

110 See Ibid, 26.8.

111 No such restriction applies to radio, and the US has established a statutory licence for internet retransmission of radio broadcasts: *Copyright Act 1976* (US) 17 USC ss 112, 114. The ability to do so was preserved by *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005) art 17.6.3(c). See also K Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in A Kenyon (ed) *TV Futures: Digital Television Policy in Australia* (2007) 242.

geographical market area', the parties would negotiate in good faith to amend the agreement in this regard.[112]

Retransmission and the internet

18.102 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.[113]

18.103 Given media convergence and other developments such as the NBN, the ALRC examined whether the pt VC scheme should apply in relation to retransmission over the internet and, if so, subject to what conditions. Many stakeholders favoured reform in this direction.[114] Media convergence was seen to have rendered the internet exclusion 'increasingly absurd from a consumer's perspective, as television services over the internet are often indistinguishable from those not over the internet'.[115]

18.104 The ACCC noted that, as technology continues to develop and consumers become increasingly able to view many 'different forms of broadcast on different platforms', it is likely that the pt VC scheme will become even more restrictive. Therefore, the ACCC submitted, amendments to the retransmission scheme need to be considered.[116]

18.105 In the Discussion Paper, the ALRC proposed that the internet exclusion should be repealed and the retransmission scheme amended to apply to retransmission by any technology, subject to geographical limits on reception.[117]

18.106 A number of stakeholders supported the idea that the retransmission scheme should be extended to retransmission over the internet, at least in principle.[118] This view was based on a recognition that copyright law should, ideally, be technologically neutral.[119]

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112 *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005), side letter dated 18 May 2004, [2].

113 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [226]. See, D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8, 26.9.

114 See, eg, SPAA, *Submission 281*; Music Council of Australia, *Submission 269*; Internet Industry Association, *Submission 253*; SBS, *Submission 237*; Telstra Corporation Limited, *Submission 222*; Australian Copyright Council, *Submission 219*; ABC, *Submission 210*; NSW Young Lawyers, *Submission 195*; Optus, *Submission 183*; Commercial Radio Australia, *Submission 132*. Some stakeholders stated that they were not opposed in principle to such reform, but considered it a matter of broadcast rather than copyright policy: Australian Directors Guild, *Submission 594*; Foxtel, *Submission 245*; News Limited, *Submission 224*.

115 Screenrights, *Submission 215*.

116 ACCC, *Submission 165*.

117 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 15–2.

118 Free TV Australia, *Submission 865*; Optus, *Submission 725*; ABC, *Submission 775*; Internet Industry Association, *Submission 744*; ACCC, *Submission 658*; Communications Alliance, *Submission 653*; Telstra Corporation Limited, *Submission 602*; Ericsson, *Submission 597*; SBS, *Submission 556*.

119 For example, Communications Alliance, *Submission 653*; Telstra Corporation Limited, *Submission 602*; Ericsson, *Submission 597*; SBS, *Submission 556*.

18.107 Telstra, for example, stated that, 'in the era of media convergence, retransmission platforms should be treated in a technology-neutral way'—but that any extension of the scheme ought to be implemented in a way which addresses the legitimate concerns of rights holders.[120] Some stakeholders highlighted that extending the scheme to retransmission over the internet would ignore important communications law and policy differences between broadcast and internet transmission.[121] Fetch TV, for example, stated:

> Delivery via the open, public internet is significantly different to delivery by other forms of transmission and involves significant risks for copyright owners as well as significant challenges for broadcasting policy.[122]

18.108 An extension of the retransmission scheme was seen as being of possible benefit to content providers and the public. The Internet Industry Association stated that internet retransmission would 'benefit the broadcasters and create technological neutrality between those media organisations able to deliver programmed services over cable and those who wish to do so over the internet'.[123]

18.109 Free TV stated that, in association with the introduction of a must carry regime, content providers 'delivering linear programmed content by cable, satellite, internet, IPTV or mobile platforms' should be covered by the retransmission scheme, subject to some 'reasonable threshold test'.

18.110 Importantly, Free TV submitted that the operation of the pt VC statutory licence should only be available to retransmitters that observe the licence area obligations set out in the *Broadcasting Services Act*:

> Free TV acknowledges that internet retransmissions would require sufficient technological restriction, including geoblocking, in order to observe licence area restrictions. However, the concept of area based licensing is fundamental to the operation of the [*Broadcasting Services Act*] and to Free TV's members, and its removal would create serious disruption to the industry.[124]

18.111 Many other stakeholders submitted that internet retransmission should be required to be subject to some form of 'geoblocking',[125] including to restrict transmission to the relevant broadcasting licence area.[126] The ABC considered geographically-based limits on transmission as necessary because retransmission should do 'no more' than retransmit:

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120 Telstra Corporation Limited, *Submission 602*.

121 Fetch TV, *Submission 721*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*.

122 Fetch TV, *Submission 721*.

123 Internet Industry Association, *Submission 744*.

124 Free TV Australia, *Submission 865*.

125 Geoblocking refers to the practice of preventing internet users from viewing websites and downloading applications and media based on location, and is accomplished by excluding targeted internet addresses: Definition of 'geo-blocked' PC Mag, *E-encyclopedia* <www.pcmag.com/encyclopedia> at 25 February 2013.

126 ABC, *Submission 775*; Internet Industry Association, *Submission 744*; ARIA, *Submission 241*; SBS, *Submission 237*; Telstra Corporation Limited, *Submission 222*; Screenrights, *Submission 215*.

> That is, the internet retransmitter should not value-add to the retransmission nor affect the editorial integrity of the content being retransmitted nor impose any editorial content or advertising around the retransmission.[127]

18.112 The extension of pt VC to internet retransmission was opposed by many other stakeholders,[128] primarily because of adverse effects on the commercial interests and existing licensing practices of underlying rights holders.[129]

18.113 Screenrights expressed concern that, while including internet retransmissions in pt VC 'may fix some anomalies in the scheme for consumers', it would potentially cause new problems for rights holders:

> In particular the sporting bodies are concerned that valuable rights for internet retransmission of events could be undermined by retransmission of these broadcasts over the internet in reliance on an amended Part VC. Such a retransmission would severely undermine the market for a voluntary licence of internet rights for this content. This would be an impediment to the development of digital services for online content.[130]

18.114 These concerns were echoed by sporting bodies themselves.[131] COMPPS stated that extending the retransmission scheme to the internet would 'allow unlicensed third parties to unreasonably benefit from the valuable copyright content of COMPPS members'. Such a reform would, it was said, allow third parties to 'free ride' on copyright content and unfairly prejudice the ability of rights holders, such as Cricket Australia, to sell international media rights.[132]

18.115 The NRL expressed specific concerns about the negative commercial impact of internet retransmission on rugby league rights, especially given that games are shown at different times in different states to maximise potential television audiences.[133] The impact of 'anti-siphoning' legislation',[134] which requires sporting bodies to make much of their content available on free-to-air television, was also emphasised. The NRL stated that, under an extended retransmission scheme, the NRL would be required to make its content available 'across all platforms, irrespective of its wishes or the commercial consequences'.[135]

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127 ABC, *Submission 775*.

128 NRL, *Submission 732*; ARIA, *Submission 731*; Fetch TV, *Submission 721*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; PPCA, *Submission 666*; Screenrights, *Submission 646*; COMPPS, *Submission 634*; Motion Picture Association of America Inc, *Submission 573*.

129 For example, NRL, *Submission 732*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; PPCA, *Submission 666*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; Screenrights, *Submission 646*; COMPPS, *Submission 634*.

130 Screenrights, *Submission 646*.

131 NRL, *Submission 732*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*.

132 Cricket Australia, *Submission 700*.

133 NRL, *Submission 732*. See also AFL, *Submission 232*.

134 *Broadcasting Services Act 1992* (Cth) s 115; sch 2, cl 10(1)(e); Broadcasting Services (Events) Notice (No. 1) 2010.

135 NRL, *Submission 732*.

18.116 More broadly, the MPAA opposed any extension of the retransmission scheme on the basis that voluntary licensing was the 'optimal and preferred model' for managing internet retransmissions and for encouraging new channels for content dissemination. Extending statutory licensing 'would be a step backward, and an unjustified curtailment of market principles in an area where there is simply no evidence of market failure'.[136]

18.117 Screenrights observed that broadcasting services commonly simulcast their free-to-air channels over the internet and that this is 'currently managed effectively through voluntary licence arrangements, with broadcasters acquiring additional rights from underlying rights holders to enable web transmission of their broadcasts'.[137]

Removing the internet exclusion

18.118 The ALRC has concluded, above, that the Australian Government should consider repeal of the retransmission scheme for free-to-air broadcasts. An important reason for this recommendation is that the retransmission scheme currently favours some players in the subscription television market over others, depending on the technological platform used (that is, cable and satellite over internet).

18.119 At present, cable and satellite subscription television providers have an advantage over internet content providers in being able to access the pt VC statutory licensing scheme for underlying rights. Ideally, retransmission platforms should be treated in a more technology-neutral way.

18.120 Technological change, including that brought about by the NBN, may make forms of internet retransmission of broadcasts more feasible. If communications policy makers decide that it is important to facilitate the availability of online television, then it would be logical to consider extending the pt VC statutory licence to internet retransmission.

18.121 However, extending the retransmission scheme to the internet raises problems, particularly if geographically limiting retransmission of broadcasts remains an aim of communications policy. The ACMA observed that to extend retransmission to the internet

> sets up a potential point of conflict between a geographically-defined licensing scheme under the [*Broadcasting Services Act*], and the global delivery models for content transmitted over the internet that are not bounded by such geographic limitations.[138]

18.122 At the same time, the future of geographically-based broadcasting licences is unclear. The Convergence Review concluded that, given the increasing availability of internet broadband, content services can be delivered over the internet across Australia and the world and, therefore, it is 'no longer efficient or appropriate for the regulator to

136 Motion Picture Association of America Inc, *Submission 573*.
137 Screenrights, *Submission 215*.
138 ACMA, *Submission 613*.

plan for the categories of broadcasting service for different areas and issue licences to provide those services'.[139]

18.123 In the ALRC's view, the internet exclusion is primarily a matter of communications and media policy, rather than copyright. The Convergence Review noted that emerging platforms, including internet protocol television (IPTV), are not covered comprehensively by existing content regulation and the availability of internet content on smart televisions means that viewers can move easily between 'regulated broadcast content' and 'unregulated internet content'.[140]

18.124 In this context, there are unresolved questions about how IPTV and other television-like online content should be regulated under the *Broadcasting Services Act* or successor legislation for the purposes of, among other things, imposing content standards and obligations with regard to Australian content. The Convergence Review recommended that new content services legislation should replace the *Broadcasting Services Act*; and communications legislation should be reformed to provide a technology-neutral framework for the regulation of communications infrastructure, platforms, devices and services.[141]

18.125 Extending the pt VC scheme to retransmission over the internet would also require Australia to negotiate amendments to the AUSFTA.[142] Arguments may be made that excluding the internet from the retransmission scheme is no longer the best means of controlling the reach of retransmission, and that the conditions precedent for renegotiation on this point have been met.[143]

18.126 While arguments may be advanced that, in a converging media environment, the internet exclusion should be removed and replaced so that retransmission platforms are treated in a more technology-neutral way, such a reform faces a number of barriers. It could also cause significant disruption to existing business models—especially as there is a tension between territorially-based copyright licensing and internet dissemination.

18.127 In view of the need for further Government consideration of the issues beyond copyright that such a reform may raise, and possibly to renegotiate provisions of the AUSFTA, the ALRC does not make any firm recommendation about extending the retransmission scheme.

18.128 However, the complexities discussed above reinforce the ALRC's view that the retransmission scheme is not fit for the future and policy makers should be considering how it might be phased out, rather than extended to other forms of communication.

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139 Australian Government Convergence Review, *Convergence Review Final Report* (2012), viii.
140 Ibid, 40.
141 Ibid, 106–107.
142 *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005).
143 Screenrights, *Submission 215*.

Clarifying the internet exclusion

18.129 As discussed above, retransmission of a free-to-air broadcast that 'takes place over the internet' is excluded from the remunerated exception by virtue of s 135ZZJA of the *Copyright Act*. There is some uncertainty over the meaning of this phrase and, in particular, its application to IPTV.[144]

18.130 It appears that whether retransmission by an IPTV service 'takes place over the internet' may depend on functional characteristics of the service[145] that should have no relevance in deciding whether or not retransmission should be facilitated. For example:

> Foxtel is not provided over the internet to a Foxtel set top box but it is provided over the internet to the Foxtel X-box service. But to a consumer, they are more or less the same. Similarly, IPTV services such as Fetch TV and Telstra T-Box are also impossible to distinguish but one happens to be over the internet, while the other is not.[146]

Interpretation of 'over the internet'

18.131 Some IPTV retransmission may fall within the operation of the pt VC scheme because, 'while the retransmission occurs over infrastructure shared by an Internet connection, as a direct feed from [internet service provider] to customer at no point is connection to the Internet by either ISP or customer necessitated'.[147]

18.132 Other IPTV retransmission may not fall within the scheme—for example, where the retransmission is so-called 'over the top' television (OTT TV).[148] OTT TV in this context means a television-like service where content is delivered over an unmanaged network such as broadband internet, for example, through Telstra T-Box—rather than over a closed managed (or private) network. As a result, some current subscription IPTV services are able to offer access to free-to-air broadcasts only because they include built-in digital TV tuners in their set top boxes.

18.133 In the Discussion Paper, the ALRC proposed that, if it were retained, the scope and application of the internet exclusion should be clarified, and asked how it should be clarified in its application to IPTV in particular.[149]

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144 For the purposes of this discussion, the term IPTV includes TV-like services where content is delivered by internet protocol, whether over the content provider's own network or 'over the top' of existing infrastructure; and only includes streamed and not on demand content.

145 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.

146 Screenrights, *Submission 215*.

147 D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.9.

148 Adapting language used by Broadcast Australia: Broadcast Australia, *Submission 133*.

149 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 15–3; Question 15–2.

18.134 A number of stakeholders agreed that clarification of the internet exclusion is desirable.[150] FetchTV, for example, stated that the lack of a definition of 'the internet' introduces 'uncertainty into the retransmission exception both in the copyright and broadcasting contexts'.[151]

18.135 Different policy formulations were suggested. COMPPS and other sporting bodies supported an amendment to confirm that IPTV is included in the scope of the internet exclusion.[152] The AFL, for example, stated that:

> any internet related delivery, including IPTV howsoever defined, should be captured by the internet exclusion contained in section 135ZZJA of the *Copyright Act*. The AFL welcomes clarification of that section to confirm that the retransmission provisions do not apply to transmission over IPTV.[153]

18.136 In contrast, Free TV considered that the retransmission scheme should cover any form of delivery of 'linear programmed content', including by 'cable, satellite, internet, IPTV or mobile platforms'.[154] Ericsson Australia observed that the 'internet' as it is known today will continue to evolve with high-speed networks such as the NBN likely to attract new forms of content delivery such as 'broadband broadcasters':

> These entities may well decide to deliver content and services not over the public internet or 'over the top', but rather over dedicated distribution networks, in much the same way today that cable networks deliver both subscription TV as well as internet access … [T]he two services are independent and not reliant on 'internet' access for delivery.[155]

18.137 The ACMA stated that differences 'between modes of internet transmission, such as IPTV and internet video, would be difficult to translate into legislation as they are essentially differences in service models', and that legislative boundaries applied around the different service models 'would be unlikely to remain relevant over the long-term as technologies and service models evolve'. The ACMA also noted that the *Broadcasting Services Act* does not currently differentiate between different types of internet transmission and

> proposals that would introduce such a distinction are likely to introduce further complexities into the regulatory treatment of broadcast material. This risks a further fragmentation and overall loss of coherence for content regulation, In the ACMA's view a coherent regulatory framework for content is a preferable solution to further incremental and piecemeal changes to legislative definitions.[156]

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150 Free TV Australia, *Submission 865*; ABC, *Submission 775*; Optus, *Submission 725*; Fetch TV, *Submission 721*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*; Ericsson, *Submission 597*.

151 Fetch TV, *Submission 721*.

152 COMPPS, *Submission 634*.

153 AFL, *Submission 717*; Cricket Australia, *Submission 700*.

154 Free TV Australia, *Submission 865*.

155 'To illustrate, a clear distinction can be made between the network communications protocol TCP/IP, which happens to be used for the internet, as well as for private networks which clearly are separated from the internet': Ericsson, *Submission 597*.

156 ACMA, *Submission 613*. Communications Alliance cautioned against 'attempting to define concepts such as the internet or internet TV protocol in legislation': Communications Alliance, *Submission 653*.

18.138 Screenrights also advised that clarification of the internet exclusion should be approached with caution, because 'it may have the effect of making the provision harder to understand and administer'. In Screenrights' experience:

> the lack of a definition [of 'the internet'] has not prevented companies from using Part VC in the widest possible manner. While non-experts may struggle to differentiate between over the internet versus not over the internet, for practitioners this does not seem to be a difficulty.[157]

Amending the internet exclusion

18.139 If the internet exclusion were to remain, its scope should be clarified. At present, the internet exclusion may give some providers of IPTV services a competitive advantage over others, in being able to rely on the pt VC scheme to carry free-to-air broadcasts, despite services being identical to the end consumer.[158]

18.140 While there are differing interpretations, it seems widely accepted that some forms of IPTV are not considered to take place 'over the internet', for the purposes of the internet exclusion. On the other hand, it seems that OTT TV is considered to be excluded. While the ALRC understands that OTT TV retransmission of high rating free-to-air broadcasts is unlikely to be offered because it would be likely to overload most internet delivery networks, it is possible that small audience free-to-air channels might be retransmitted in such a way.

18.141 In policy terms, the current interpretation may lead to arbitrary distinctions between retransmission platforms that are not based on the underlying purpose of the internet exclusion.

18.142 The development of the NBN makes it important to clarify the position. The intention is that the NBN will enable content providers to retransmit using internet protocol multicasting, in reliance on the pt VC licence.[159] The NBN Co's Multicast feature is being marketed as 'particularly suitable' for IPTV service delivery.[160] There may be difficulties, and cost implications, in enforcing restrictions on the retransmission of free-to-air broadcasts using the NBN.

18.143 The rationale for excluding retransmission 'over the internet' from the retransmission scheme appears to have been to avoid retransmitted content intended for Australian audiences being disseminated globally without the authorisation of the copyright holders.

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157 Screenrights, *Submission 646*. In contrast, the ABC observed that the term IPTV has 'no commonly accepted definition in the industry' and the current legal position of some operators under the retransmission scheme 'is not clear as it might be argued that they are not able to access pt VC legally because they are retransmitting via the internet': ABC, *Submission 210*.

158 Screenrights, *Submission 288*.

159 Screenrights, *Submission 215*.

160 NBN Co, *Multicast—Broadcasting the Future* <www.nbnco.com.au/getting-connected/service-providers/multicast.html> at 2 March 2013. NBN multicasts 'will be accessible from the same physical port on the NBN Co network termination equipment as the accompanying broadband internet connection': Broadcast Australia, *Submission 133*.

18.144 Arguably, if the internet exclusion were to remain, it should be redrafted to reflect its purpose of ensuring that internet retransmission does not lead to retransmission that is geographically unlimited. That is, it should be redrafted to reflect the fact that internet protocol technology can be 'employed in closed, secure distribution systems that offer complete protection against copying and redistribution of programming over the Internet, and that respect the principle of territorial exclusivity'.[161]

18.145 The ALRC has not developed recommendations on how this should be done. As discussed above, the internet exclusion is primarily a matter of communications policy, rather than copyright law. The discussion in this Report is provided as a contribution to that policy development.

18.146 Ideally, the meaning of the phrases 'over the internet' in the *Copyright Act* internet exclusion[162] and 'using the internet' for the purposes of defining a 'broadcasting service' under the *Broadcasting Services Act*[163] should be considered and clarified, if necessary, at the same time.[164] In any case, the ALRC has concluded that the preferable course of action may be to repeal the retransmission scheme entirely rather than to 'tinker' with the internet exclusion the face of rapid technological change in content delivery.

Recommendation 18–2 If the retransmission scheme is retained, the scope and application of the internet exclusion in s 135ZZJA of the *Copyright Act* should be clarified.

Must carry obligations

18.147 Calls to strengthen broadcasters' rights in relation to retransmission have included suggestions 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 broadcasts be carried on cable or another platform, or requiring that the free-to-air broadcaster is remunerated where the other platform chooses to retransmit the signal.[165]

18.148 Many jurisdictions have must carry regimes. These were designed primarily to ensure that locally-licensed television stations must be carried on cable providers' systems, mainly to protect local broadcasters from distant competitors and, in Europe,

161 Motion Picture Association of America Inc, *Submission 197*.
162 *Copyright Act 1968* (Cth) s 135ZZJA.
163 As discussed in Ch 16, a ministerial determination, made in 2000 under the *Broadcasting Services Act*, excludes a 'service that makes available television and radio programs using the internet' from the definition of a broadcasting service: *Broadcasting Services Act 1992* (Cth) s 6; *Commonwealth of Australia Gazette—Determination under Paragraph (c) of the Definition of 'Broadcasting Service'*, (No 1 of 2000), Commonwealth of Australia Gazette No GN 38, 27 September 2000.
164 See IMW Media Services, *Submission 757*.
165 Australian Government Convergence Review, *Convergence Review Final Report* (2012), 33.

to protect local language channels. For example, in the absence of must carry obligations cable providers might only carry major capital city channels.

18.149 In Australia, the purpose of a must carry regime would be to provide a framework for commercial negotiations between free-to-air broadcasters and subscription television companies about payments for broadcasts retransmitted by the latter. A must carry regime would also ensure that, in future, free-to-air broadcasters are not forced to pay for carriage on subscription platforms (particularly if IPTV becomes a primary platform with the advent of the NBN) and prevent 'cherry-picking' of channels where subscription television only retransmits some of a free-to-air broadcaster's channels.

18.150 A number of stakeholders addressed the issue of must carry regimes in submissions to this Inquiry. Free TV was in favour of such a regime, under which retransmission of free-to-air television broadcasts would be permitted 'with the consent of, and in accordance with commercial terms agreed with, the broadcaster' or in accordance with a 'must carry' obligation. These issues should, Free TV suggested, be one subject of a further review of 'copyright and broader media policy'.[166]

18.151 The introduction of a must carry regime was opposed by other stakeholders.[167] Screenrights submitted that a must carry regime is not necessary in Australia and that such a regime would be both 'unworkable and anti-competitive' and contrary to the interest of underlying copyright owners.[168]

18.152 Screenrights considered that the context of retransmission in Australia is significantly different from that in overseas jurisdictions that have must carry regimes. First, the Australian retransmission rules effectively limit retransmission of commercial channels to local signals only—removing concerns about retransmission of distant signals.[169] Secondly, for a must carry regime to be applied in Australia, it would have to include existing satellite-based television service providers, such as Foxtel. Screenrights submitted that it would not be 'commercially viable to retransmit local signals via satellite due to the large number of small licence areas'.[170]

18.153 Foxtel also contrasted the US position with that in Australia, suggesting that it would be inappropriate to implement must carry in Australia. It stated that, while the key objective in the US was to ensure that consumers could continue to receive signals in circumstances where cable television penetration was high and consumers did not have access to television signals via aerials, in Australia, almost 99% of the population

166 Free TV Australia, *Submission 865*.

167 For example, Foxtel, *Submission 748*; ASTRA, *Submission 747*; News Corp Australia, *Submission 746*; SPAA, *Submission 281*; Australian Directors Guild, *Submission 226*; News Limited, *Submission 224*;Screenrights, *Submission 215*.

168 Screenrights, *Submission 215*.

169 That is, retransmission generally must be within the licence area of the transmitter: *Broadcasting Services Act 1992* (Cth) s 212(1)(b).

170 Screenrights, *Submission 215*.

has access to free-to-air television and cable and satellite penetration is significantly lower.[171]

18.154 The ALRC has concluded that the Australian Government should consider repeal of the retransmission scheme for free-to-air broadcasts. However, the ALRC makes no recommendation on whether reform should also involve the imposition of must carry obligations on subscription television service providers.

18.155 Essentially, must carry provisions would operate to impose obligations to communicate copyright materials (broadcasts), at the behest of the copyright holder. This issue does not directly concern the operation of copyright exceptions, which are the subject of the Terms of Reference. Further, the policy rationales for must carry regimes are based primarily on communications policy and are not issues that can, or should, be driven by reform of copyright laws.

171 Foxtel, *Submission 245*.

19. Broadcasting

Contents

Summary

19.1 In addition to the retransmission scheme discussed in Chapter 18, a number of other exceptions in the *Copyright Act* refer to the concept of a 'broadcast' and 'broadcasting'. These exceptions are referred to in this chapter as the 'broadcast exceptions'.

19.2 The broadcast exceptions include those operating to provide exceptions for persons engaged in making broadcasts (such as free-to-air broadcasters); and others operating to provide exceptions for persons receiving, communicating or making copies of broadcasts (such as educational institutions).

19.3 In a changing media environment, distinctions currently made in copyright law between broadcast and other platforms for communication to the public require justification. Innovation in the digital economy is more likely to be promoted by copyright provisions that are technologically neutral.

19.4 The ALRC has closely considered whether the *Copyright Act* should be amended to ensure that broadcast exceptions also apply to the transmission of television or radio programs using the internet. However, given the many different exceptions and important differences between broadcast and other forms of communication, recommending any blanket reform is not an option.

19.5 In some cases, moreover, technological neutrality may best be achieved by removing exceptions that apply only to broadcast. That is, some broadcast exceptions may be able to be repealed on the basis that the relevant uses are likely to be covered by the recommended new fair use or fair dealing exceptions, or are amenable to voluntary licensing.

19.6 The extension of some statutory licensing schemes to the transmission of linear programmed television or radio content using the internet should also be considered, to ensure the licences continue to serve their purpose in an era of media convergence.

19.7 The ALRC recommends that, in developing media and communications policy, and in responding to media convergence, the Australian Government give further consideration to these issues.

The definition of 'broadcast'

19.8 The *Copyright Act* defines the term 'broadcast' to mean 'a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act*'.[1]

19.9 The *Broadcasting Services Act 1992* (Cth) defines a 'broadcasting service' to mean 'a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means'. A broadcasting service does not include:

> (a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or
>
> (b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or
>
> (c) a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.[2]

19.10 A ministerial determination, made in 2000 under the *Broadcasting Services Act*, excludes a 'service that makes available television and radio programs using the internet' from the definition of a broadcasting service.[3]

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

2 *Broadcasting Services Act 1992* (Cth) s 6.

3 *Commonwealth of Australia Gazette—Determination under Paragraph (c) of the Definition of 'Broadcasting Service'*, (No 1 of 2000), Commonwealth of Australia Gazette No GN 38, 27 September 2000.

19.11 The primary reasons for the ministerial determination were to ensure that developing internet audio and video streaming services were not regulated as broadcasting services under the *Broadcasting Services Act*; and to clarify the regulatory position of 'datacasting' over broadcasting services bands.[4]

19.12 However, it also has a significant effect on the scope of the broadcast exceptions under the *Copyright Act*, as discussed below. Among other things, it means that while free-to-air and subscription cable and satellite television transmissions are covered, transmissions of television programs 'using the internet' are not.[5]

Broadcast exceptions and the *Rome Convention*

19.13 As discussed in Chapter 15, the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (*Rome Convention*) established a regime for protecting rights neighbouring on copyright, including minimum rights for broadcasting organisations.[6] These rights can be protected by copyright law, as in Australia, or by other measures. Broadcasting and rebroadcasting are defined under the *Rome Convention* as 'the transmission by wireless means for public reception of sounds or of images and sounds'.[7]

19.14 The *Rome Convention* permits exceptions, including: private use; the use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research.[8]

19.15 In addition, signatories may provide for the same kinds of limitations with regard to the protection of broadcasting organisations as domestic law provides 'in connection with the protection of copyright in literary and artistic works'.[9]

Use of 'broadcast' in copyright exceptions

19.16 A number of exceptions in the *Copyright Act* use the terms 'broadcast', 'broadcasting' or 'broadcaster'. These exceptions include those concerning time shifting and retransmission of free-to-air broadcasts, which are discussed separately elsewhere in this Report.[10] Other exceptions that refer to the concept of a broadcast

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4 See *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013] FCAFC 11, [52]–[46].

5 While some forms of internet protocol television (IPTV) and internet radio are treated as broadcasting services under the *Broadcasting Services Act*, others are not—for example, where television-like content is delivered over an unmanaged network, such as broadband internet ('over the top'). This is discussed in more detail in Ch 18.

6 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964).

7 Ibid, art 3(f).

8 Ibid, art 15.

9 Ibid, art 15(2).

10 See Chs 9, 15.

include those providing for unremunerated exceptions[11] and for remunerated use, subject to statutory licensing.[12]

19.17 Distinctions currently made in copyright law between broadcast and other platforms may be increasingly difficult to justify in a changing media environment. In particular, television and radio content is increasingly made available on the internet.[13]

19.18 A 2012 Australian Communications and Media Authority (ACMA) report highlighted growth in the availability of commercially-developed video content over the internet.[14] This includes: catch-up television offered by free-to-air broadcasters on an 'over the top' basis,[15] enabling viewers to access recently aired shows via the internet; high-end internet protocol television (IPTV) services providing users with access to video content on a subscription or fee-per-view basis provided by internet service providers; and 'over the top' content services offered direct from the content provider to the consumer.[16]

19.19 The ways in which consumers can access video content, including IPTV services, are expanding and the rollout of the National Broadband Network is likely to provide significant additional stimulus to the supply and take up of online content.[17]

19.20 More generally, the ACMA has identified that the historical distinctions between radio communications, telecommunications, broadcasting and the internet are breaking down:

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11 Unremunerated broadcast exceptions are provided by: *Copyright Act 1968* (Cth) ss 45, 47(1), 70(1), 107(1), 65, 67, 199, 200(2). In addition: s 28(6) provides an unremunerated exception for the communication of television and sound broadcasts, in class, in the course of educational instruction. Because the performance and communication of works or other subject-matter contained in the broadcast is covered by s 28(1), (4) and there is no copyright in an internet transmission itself, internet transmission is effectively covered. Similarly, s 135ZT provides an unremunerated exception and, because the copying and communication of 'eligible items' contained in the broadcast is covered by s 135ZT, internet transmission is effectively covered. Sections 47AA and 110C provide unremunerated exceptions for the reproduction of broadcasts for the purpose of simulcasting them in digital form. These provisions relate specifically to the switchover from analog to digital broadcasting in Australia. Section 105 provides a free-use exception for the broadcasting of certain sound recordings that originate overseas. The purpose of the exception is to prevent performing and broadcasting rights being extended to some foreign-origin sound recordings that were first published in Australia. These broadcast exceptions are not discussed further in this chapter.

12 Remunerated broadcast exceptions are provided by: Ibid ss 47(3), 70(3), 107(3), 47A, 109; pt VA.

13 ACMA advised that an online research survey, conducted in 2011, showed that almost four in 10 respondents watched television or video content both offline and online (38%); less than a third watched this material solely offline (31%); and some were solely online viewers (12%): ACMA, *Submission 214*.

14 Australian Communications and Media Authority, *Online Video Content Services in Australia: Latest Developments in the Supply and Use of Professionally Produced Online Video Services*, Communications report 2011–12 series: Report 1 (2012). The ACMA noted that 'the supply of IPTV services has continued to expand over the 2011–12 period, encouraged by increased competition between ISPs and higher available bandwidth': 2.

15 'Over the top' refers to communications over existing infrastructure that does not require business or technology affiliations with the host internet service provider or network operator: see Ch 18.

16 Australian Communications and Media Authority, *Online Video Content Services in Australia: Latest Developments in the Supply and Use of Professionally Produced Online Video Services*, Communications report 2011–12 series: Report 1 (2012), 1–2.

17 Ibid, 2.

> digitisation of content, as well as standards and technologies for the carriage and display of digital content, are blurring the traditional distinctions between broadcasting and other media across all elements of the supply chain, for content generation, aggregation, distribution and audiences.[18]

The link with communications regulation

19.21 Extending the scope of the broadcast exceptions to take account of new technologies is not a new phenomenon. Prior to the *Copyright Amendment (Digital Agenda) Act 2000* (Cth), 'broadcast' was defined as to 'transmit by wireless telegraphy to the public'. The digital agenda legislation substituted an extended technology-neutral definition, mainly to cover cable transmissions.

19.22 This extension occurred in the context of the enactment of a new right of communication to the public, replacing and extending the existing broadcasting and cable diffusion rights.[19] A definition of 'broadcast' was retained, however, because the Government 'decided to retain most of the existing statutory licences and exceptions in the Act in relation to broadcasting and not extend these licences to apply in relation to communication'.[20]

19.23 The distinction between broadcasts and other electronic communication to the public in the *Copyright Act* comes about indirectly, by virtue of the ministerial determination made under the *Broadcasting Services Act*. The determination has implications for the coverage of licence fee requirements, local content requirements, programming standards and advertising restrictions. Arguably, the implications for copyright law were very much a secondary consideration.

19.24 The Government decision not to extend the scope of exceptions was consistent with earlier conclusions of the CLRC. In 1999, the CLRC considered how the Government's proposed digital agenda reforms should address whether exceptions should extend beyond communications to the public delivered by a broadcasting service.[21]

19.25 The CLRC recommended specifically that the ephemeral copying provisions[22] should not be further extended (beyond cable transmission). In reaching this conclusion, the CLRC noted that these exceptions operate for the benefit of those broadcasters 'who have paid for the right to broadcast the copyright materials used in their broadcast programs'.[23] As the makers of other transmissions to the public were 'not technically broadcasters', the CLRC stated that 'there is presently no obligation

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18 Australian Communications and Media Authority, *Digital Australians—Expectations about Media Content in a Converging Media Environment* (2011), 7.

19 *Copyright Act 1968* (Cth) s 31(1)(a)(iv), (b)(iii) inserted by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

20 Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), Notes on clauses, [7].

21 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999), [7.103]–[7.105].

22 *Copyright Act 1968* (Cth) ss 47, 70, 107.

23 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999), [7.105].

for them to obtain a licence for the transmission of the copyright materials they use'. Accordingly, the CLRC considered that extending the ephemeral copying provisions to the makers of such transmissions was not justified.[24]

19.26 Since the digital agenda reforms in 2000, however, internet transmission is clearly an exclusive right covered by copyright. A continuing link between the scope of some copyright exceptions and the regulatory definition of a broadcasting service under the *Broadcasting Services Act* may be unnecessary. While a broadcasting service may have additional obligations to comply with copyright law—for example, under broadcasting licence conditions—other content providers still need to obtain permission to communicate the copyright material of others over the internet.[25]

19.27 The reasons for excluding internet transmission from the definition of broadcasting services included that the business models for internet content providers might be significantly different from those of traditional broadcasters, and that broadcast licensing would lead to a competitive disadvantage for Australian content providers and impede the growth of alternatives to traditional broadcasting.[26]

19.28 While the exclusion of internet content services from *Broadcasting Services Act* regulation may promote competition and innovation in broadcasting, it may have an unintended and opposite effect in the copyright context—by privileging traditional broadcast over internet transmission.

19.29 Some stakeholders questioned the need for the continuing link between the scope of copyright exceptions and the *Broadcasting Services Act*.[27] The Internet Industry Association, for example, submitted that 'the regulation of broadcast services should be separate and unrelated to whether or not copyright subsists in a transmission'.[28]

19.30 The PPCA suggested that the ALRC should consider the 'decoupling of Australian broadcasting and copyright laws' by recommending a stand-alone definition of broadcasting in the *Copyright Act*.[29] Screenrights also considered that copyright policy should not be left subject to communications policy. Instead 'the definition of broadcasting service should be imported into the *Copyright Act* in essentially its

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24 Ibid, [7.105]. Similarly, in relation to s 199, the CLRC contrasted broadcasters licensed under the *Broadcasting Services Act* and other content providers, stating that the latter are 'presently not required to obtain a licence from copyright owners' and therefore the scope of s 199 should 'continue to be confined to licensed broadcasts': Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999), [7.72].

25 While internet-only media are not regulated as broadcasting services, they are subject to content regulation under *Broadcasting Services Act 1992* (Cth) schs 5, 7.

26 See D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.6–26.7; Department of Communications, Information Technology and the Arts, *Report to Parliament: Review of Audio and Video Streaming over the Internet* (2000).

27 eBay, *Submission 751*; Internet Industry Association, *Submission 744*; PPCA, *Submission 666*.

28 Internet Industry Association, *Submission 744*.

29 PPCA, *Submission 666*.

current form (including the effect of the Ministerial declaration) so as to minimize disruption of existing rights and exceptions'.[30]

Transmission using the internet

19.31 In the Discussion Paper, the ALRC proposed that a range of broadcast exceptions should also apply to the transmission of television or radio programs using the internet. The ALRC also asked how such amendments should be framed. [31]

19.32 A number of stakeholders agreed, in principle, that the scope of some broadcast exceptions should extend to transmission on the internet, as well as to broadcasts as currently defined.[32]

19.33 The Internet Industry Association observed that the current situation is anomalous because the streaming of 'live or pre-programmed' material over the internet is effectively the same as broadcasting.[33] Ericsson Australia noted that

> consumers are often not aware (nor do they care) if content they watch is broadcast, multicast to a selected group, or unicast to an individual. Further, with the recent introduction of Hybrid Broadcast Broadband TV (HBBTV) into Europe and planned introduction into the Australian market, any distinctions between delivery platforms will be increasingly obscure to the end consumer.[34]

19.34 Ericsson suggested that exceptions should extend to any delivery platform and 'be framed without technology specificity, in order to future-proof and support on-going technological innovation'.

19.35 The ABC submitted that exceptions should be reframed to extend to transmissions using the internet, including on demand programs, but only where content is made available by a broadcaster.[35] CRA stated that it was seeking a new ministerial determination to ensure that internet simulcasts (by broadcasting services) are treated as broadcasts. This position, CRA said, would 'properly reflect the current use of technology by media consumers and the trend towards platform neutrality'.[36]

19.36 In contrast, the PPCA stated that voluntary licensing arrangements make it unnecessary to extend the existing broadcast exceptions to the delivery of television and radio programs using the internet. The PPCA has licensed 'a range of new internet services as well as offering internet rights to traditional broadcasters'.[37] Similarly, the ACC referred to voluntary licensing frameworks already in place and supporting the

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30 Screenrights, *Submission 646*.
31 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 16–1; Question 16–1.
32 Commercial Radio Australia, *Submission 864*; ABC, *Submission 775*; Internet Industry Association, *Submission 744*; Ericsson, *Submission 597*.
33 Internet Industry Association, *Submission 744*.
34 Ericsson, *Submission 597*.
35 ABC, *Submission 775*.
36 Commercial Radio Australia, *Submission 864*.
37 PPCA, *Submission 666*.

'large number of internet radio and television services already operating in the Australian market'.[38]

19.37 Other stakeholders also opposed any extension of the broadcast exceptions.[39] Nightlife, a provider of music to commercial venues, expressed concern that extending the broadcast exceptions would 'further reduce the ability of creators to leverage an income, while commercial companies turnover billions of dollars on the use of their works'.[40]

19.38 COMPPS expressed concern that including internet transmissions would extend the broadcast exceptions from 'applying only to a limited and identifiable category of persons to potentially anyone in the world', with significant communications law and policy consequences. If the exceptions were extended, however, COMPPS and other sporting bodies considered they should apply only to 'internet transmission by licensed broadcasters of a linear feed of the programming broadcast by that broadcaster'.[41]

19.39 The following section examines particular categories of broadcast exceptions and considers the possible extension of these exceptions to internet transmissions or other forms of communication to the public.

Exceptions for broadcasters

19.40 Sections 45, 47, 70, 107, 47A, 65, 67 and 109 of the *Copyright Act* operate to provide exceptions for persons engaged in making broadcasts. In effect, the definitions of 'broadcast' and 'broadcasting' in these sections serve to limit the availability of these exceptions to broadcasting services as defined by the *Broadcasting Services Act*. They provide broadcasting services with advantages as compared with other content providers who provide content over the internet or by other means (such as over telecommunications networks). The provisions may also operate as a barrier to broadcasters using the alternative platforms for communicating their own content.

Broadcast of extracts of works

> **Example:** A radio interview with an author from the Melbourne Writers Festival is interspersed with a reading of an extract from the writer's book.

19.41 Section 45 of the *Copyright Act* provides an unremunerated exception for the reading or recitation of a literary or dramatic work in public or for a broadcast, of a reasonable length, with sufficient acknowledgement. The original justification for the s 45 exception was that:

> Recitations of reasonable extracts of works in public halls have for many years been regarded as a legitimate exception to copyright protection and it seems to us that the

38 Australian Copyright Council, *Submission 654*.
39 Nightlife, *Submission 657*; COMPPS, *Submission 634*.
40 Nightlife, *Submission 657*.
41 COMPPS, *Submission 634*. Also AFL, *Submission 717*; Cricket Australia, *Submission 700*.

> broadcasting of such recitations is the modern successor to that form of entertainment.[42]

19.42 It is equally possible to see other forms of communication to the public, including on the internet, as the 'modern successor' to recitations in public halls.

19.43 Many uses covered by s 45 would also be covered by the new fair use exception or by the consolidated fair dealing exception under one of the prescribed purposes of quotation, criticism or review, and reporting news—although this would depend on the application of the fairness factors in the particular circumstances. For this reason, the Australian Government should consider repealing s 45, if fair use is introduced.[43]

Reproduction for broadcasting

> **Example:** A television station makes a recording of a variety show it has produced, because a pre-recorded version of the program is to be broadcast.

19.44 Sections 47, 70 and 107 of the *Copyright Act* provide what is referred to in the literature, and in this Report, as the 'ephemeral' copying provisions.[44]

19.45 Section 47(1) provides an unremunerated exception that applies where, in order for a work to be broadcast, a copy of the work needs to be made in the form of a record or film to facilitate the broadcasting. Sections 70(1) and 107(1) provide similar exceptions, in relation to films of artistic works and sound recordings, respectively.

19.46 The exceptions cover copying 'to make the actual broadcast technically easier, or to enable the making of repeat or subsequent broadcasts'[45] and can be seen as promoting efficiency in broadcast programming.[46]

19.47 These exceptions are expressly permitted by the *Rome Convention*, which states that domestic laws and regulations may provide for exceptions as regards 'ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts'.[47]

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42 Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959), [111] (Spicer Committee).

43 Some stakeholders suggested that s 45 could be repealed if fair use is implemented. They stated that the 'existing exception allows for the use of an extract of "reasonable length" (another nice example of the unpredictability that attaches to the current provisions) and there is no obvious disadvantage in replacing this highly uncertain standard with a structured test of fairness': R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

44 See, eg, Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.225]; Australian Copyright Council, *Community Broadcasters and Copyright, Information Sheet G077v06* (2012).

45 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.225].

46 Australian Copyright Council, *Exceptions to Copyright, Information Sheet G121v01* (2012), 7.

47 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964), art 15(1)(c).

> **Example:** A television station makes a recording of a televised play made by an outside producer, in order to broadcast the play at a later time.

19.48 Sections 47(3), 70(3) and 107(3) of the *Copyright Act* provide similar exceptions, subject to a statutory licensing scheme, for the temporary copying of works, films of artistic works and sound recordings by a broadcaster, other than the maker of the work, film or recording, for the purpose of broadcasting.

19.49 The licences do not apply unless all the records embodying the recording or all copies are, within 12 months of the day on which the work, film or sound recording is first used for broadcasting, destroyed or transferred to the National Archives of Australia.[48]

19.50 There may be no policy reason why the ephemeral copying provisions should not apply, for example, to temporary copying to facilitate the streaming of content over the internet, especially by a broadcasting service that also provides content over the internet.

19.51 In the Discussion Paper, the ALRC proposed that ss 47, 70 and 107 be amended to apply to the transmission of television or radio programs using the internet.[49]

19.52 A number of stakeholders representing copyright owners specifically opposed the extension of the ephemeral copying provisions.[50] APRA/AMCOS stated that the ephemeral copying provisions were originally introduced to deal with 'specific issues faced by a nascent broadcasting industry'.

> As it is, AMCOS has licensing arrangements with all free-to-air broadcasters that extend the provisions of the ephemeral licence, due to its narrow application that renders it largely inutile in the current broadcast environment.[51]

19.53 APRA/AMCOS submitted that more appropriate response in the digital environment would be to repeal these provisions altogether. Similarly, the PPCA submitted that uses covered by s 107, in relation to sound recordings, are already granted in voluntary licence agreements, for example, between the PPCA or record companies and copyright users providing television or radio-like services over the internet. In particular, the PPCA

> non-exclusively offers broadcasters and other service providers the rights for incidental copying and other uses of sound recordings which are necessary to provide their services in an online environment, including podcasting, catch-up viewing or listening. Accordingly, voluntary licensing is adequate to deal with new technology and services because PPCA's offering augments and in some cases expands upon the statutory exceptions under s 107 of the Act, including the extension of incidental or

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48 *Copyright Act 1968* (Cth) ss 47(5), 70(5), 107(5).

49 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 16–1.

50 ARIA, *Submission 731*; PPCA, *Submission 666*; APRA/AMCOS, *Submission 664*.

51 APRA/AMCOS, *Submission 664*.

> ephemeral copying rights for sound recordings in respect of services which are delivered or made available using the internet.[52]

19.54 The ABC observed that, due to technological change, the ephemeral copying provisions provide only part of the rights necessary for the ABC to deliver content. The ABC stated that when content is broadcast relying on statutory licences under ss 47, 70 and 107, it is 'administratively burdensome, complex and costly' then to have to seek further licences when the content moves online—for example, for catch-up television. This, the ABC said, 'renders the statutory licence ineffective in the digital economy'.[53]

19.55 The ABC suggested that these provisions 'need to be rephrased in a technology-neutral way in order to support broadcasters as technologies converge'. Other problems with the statutory licences were said to include the use of the word 'solely' in the phrase 'solely for the purpose of broadcasting' in s 107(1). This limitation does not recognise that 'broadcast material has a longer shelf-life than the broadcast alone—including, online archiving, and then to other distribution'. Further, s 107 may restrict broadcasters to making one copy of a sound recording, rather than allow for copying 'as necessary' for the purpose.[54]

19.56 Pandora, an internet music provider, observed that in order to be able to stream recordings to users over the internet, server copies of all recordings need to be made, but Pandora does not currently qualify for protection under the ss 47 and 70 exceptions because it is not a broadcaster. Pandora submitted that such copying 'does not constitute any form of additional commercial use, but is instead the only way in which the recordings can be accessed and streamed in accordance with the commercially negotiated communication licence'.[55]

19.57 In the ALRC's view, many uses of copyright material covered by the ephemeral copying provisions would be covered by the recommended new fair use exception—in particular, uses within the illustrative purpose of 'incidental or technical use'.[56] For example, where a broadcaster needs to transcode between digital formats to broadcast a television program, this should be expected to be considered a fair use.

19.58 In any case, voluntary licensing solutions seem to be available to cover many uses of copyright material that facilitate broadcasting or the activities of broadcasting organisations.[57] While there may be arguments that some ephemeral uses need to be covered by a specific exception in order to provide certainty to broadcasters,[58] there is

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52 PPCA, *Submission 666*.

53 Australian Broadcasting Corporation, *Submission 210*.

54 This position was said to be 'unworkable in the digital age as multiple copies are necessary due to the pre-production and broadcasting processes being used by the ABC': Ibid.

55 Pandora Media Inc, *Submission 329*.

56 See Ch 11.

57 Although Pandora submitted that, while it had 'successfully secured the necessary reproduction licences through voluntary licence arrangements … no licensee should be in a position where such necessary licences are at the commercial discretion of the collecting society': Pandora Media Inc, *Submission 329*.

58 The United States retains some exceptions similar to the Australian provisions, despite also having a fair use exception: see *Copyright Act 1976* (US) s 112, 'Limitations on exclusive rights: Ephemeral recordings'. See also United States House of Representatives, Committee on the Judiciary, *Copyright Law Revision (House Report No. 94-1476)* (1976), [101]–[102].

little to suggest that the absence of ephemeral copying provisions has been a barrier to the development of internet transmission of content, which operates under voluntary licensing.

19.59 For these reasons, the Australian Government should consider repealing the ephemeral copying provisions in ss 47, 70 and 107 of the *Copyright Act*.

Sound broadcasting by holders of a print disability radio licence

> **Example:** A book is read aloud on a print disability radio station.

19.60 Section 47A of the *Copyright Act* provides exceptions, subject to a statutory licensing scheme, for sound broadcasting by holders of a print disability radio licence.

19.61 These exceptions cover the making of sound broadcasts of a published literary or dramatic work, or of an adaptation of such a work, where this is done by the holder of a print disability radio licence, in force under the *Broadcasting Services Act* or the *Radiocommunications Act 1992* (Cth).[59]

19.62 Print disability radio licences are granted for the purpose of authorising the making of sound broadcasts to persons who, by reason of old age, disability or literacy problems, are unable to handle books or newspapers or to read or comprehend written material.[60] In practice, this requirement is met by the granting of community radio licences with these conditions, and Radio for the Print Handicapped (RPH) broadcasts from stations in most capital cities.[61]

19.63 Vision Australia submitted that the scope of the s 47H remuneration exception means that RPH services are 'currently not able to operate as a reading service in this medium without engaging in time-consuming negotiations with individual publishers to obtain copyright permission'.

> The result is that people who are blind, have low vision, or another print disability are unable to benefit from advances in content distribution such as internet streaming, at a time when internet radio is becoming commonplace for the rest of the community.[62]

19.64 In the ALRC's view, the extension of the s 47A statutory licence to cover the provision of sound recordings of written material using the internet or other means should be considered. The licence may need to be restricted to linear, programmed (that is, 'streamed' but not 'on demand') content to avoid applying to any internet sound recordings.

19.65 Such a reform would necessitate parallel review of the current system for granting print disability radio licences under the *Broadcasting Services Act* and *Radiocommunications Act 1992* (Cth).

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59 *Copyright Act 1968* (Cth) s 47A(11).
60 Ibid.
61 Australian Copyright Council, *Disabilities: Copyright Provisions Information Sheet G060v08* (2012).
62 Vision Australia, *Submission 181*.

Incidental broadcast of artistic works

Example: A television documentary about an art gallery shows paintings and sculptures in the background of a person being interviewed.

19.66 Section 65 of the *Copyright Act* provides an unremunerated exception that covers, among other things, the inclusion of a work in a television broadcast, where the work is 'situated, otherwise than temporarily, in a public place, or in premises open to the public'.

19.67 Section 67 provides an unremunerated exception for the inclusion of an artistic work in a film or television broadcast where its inclusion is only incidental to the principal matters represented in the film or broadcast.

19.68 The policy behind these exceptions appears to be that it is reasonable to allow the inclusion of these works in a broadcast, as it would be impractical to control these forms of copying.

19.69 This rationale seems to apply equally to the inclusion of public works, or the incidental broadcast of works, in internet transmissions or other forms of communication to the public.

19.70 The ALRC would expect that many uses covered by ss 65 and 67 would be covered by the new fair use exception[63]—although this would depend on the application of the fairness factors in the particular circumstances. An industry practice of licensing incidentally captured music for documentary films, for example, may weigh against fair use. The Australian Government should consider repealing ss 65 and 67, if a fair use exception is introduced.[64]

Broadcasting of sound recordings

Example: A radio station broadcasts recordings of popular music.

19.71 Section 109 of the *Copyright Act* provides an exception, subject to a statutory licensing scheme, for the broadcasting of published sound recordings, to facilitate access by free-to-air broadcasters to published sound recording repertoire.

19.72 Section 109 provides that copyright in a published sound recording is not infringed by the making of a broadcast (other than a broadcast transmitted for a fee), if

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63 For example, in the US, fair use was found where a television film crew covering an Italian festival in Manhattan recorded a band playing a portion of a song, which was replayed during a news broadcast. In concluding that this activity was a fair use, the court considered that only a portion of the song was used, it was incidental to the news event, and it did not result in any actual damage to the composer or to the market for the work: *Italian Book Corp v American Broadcasting Co*, 458 F Supp 65 (SDNY, 1978).

64 The National Association of Visual Artists favoured the repeal of ss 65 and 67, but not the introduction of a fair use exception: NAVA, *Submission 655*.

remuneration is paid by the maker of the broadcast to the copyright owners in accordance with the scheme.[65] The PPCA is the organisation that administers the statutory licensing of the broadcast rights in sound recordings. The owner of the copyright in a published sound recording or a broadcaster may apply to the Copyright Tribunal for an order determining the amount payable by the broadcaster to the copyright owner in respect of the broadcasting of the recording.[66]

19.73 While broadcasters have access to sound recordings under the s 109 licence, other licences may still be needed with respect to the public performance and communication of the music and lyrics. APRA is the organisation that administers the voluntary licensing of music and lyrics for broadcast.

19.74 Broadcast radio stations are able to use the s 109 statutory licensing scheme to obtain rights to broadcast music and other sound recordings, but internet radio services cannot—at least where they are not also broadcasting services for the purposes of the *Broadcasting Services Act*. Rather, internet radio services must negotiate rights to transmit sound recordings outside the scheme.

19.75 A further complexity arises in relation to internet simulcasts, where radio stations, which are broadcasting services, commonly stream content simultaneously on the internet that is identical to their terrestrial broadcasts. In *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* (*PPCA v CRA*), the Full Court of the Federal Court held that, in simulcasting, a radio station was acting outside the terms of its licence, as internet streaming is not a 'broadcast'.[67]

19.76 While the case concerned the interpretation of a licensing agreement to broadcast sound recordings, it was agreed between the parties that the term 'broadcast' in the agreement was to be understood as having the meaning specified in the *Copyright Act*. The Court held that 'the delivery of the radio program by transmission from a terrestrial transmitter is a different broadcasting service from the delivery of the same radio program using the internet'.[68]

19.77 Broadcast radio stations, like internet radio services, now have to negotiate separate agreements with the relevant collecting society (the PPCA) to stream the same content for which they have already obtained a statutory licence to broadcast.

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65 The statutory licensing scheme does not apply to a broadcast transmitted for a fee payable to the broadcaster: *Copyright Act 1968* (Cth) s 109(1). Ricketson and Creswell state that it 'was evidently felt that subscription broadcasters did not need the same help in accessing and making use of sound recordings as free-to-air broadcasters': Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.245].

66 For these purposes, a 'broadcaster' is defined as meaning the ABC, the SBS, the holder of a licence or a person making a broadcast under the authority of a class licence under the *Broadcasting Services Act*: *Copyright Act 1968* (Cth) s 152(1).

67 *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013] FCAFC 11. In August 2013, an application for special leave to appeal this decision to the High Court was refused: *Commercial Radio Australia Ltd v Phonographic Performance Company of Australia* [2013] HCATrans 187 (16 August 2013).

68 Ibid, [69].

19.78 The implications of this have to be considered in the context of the s 152 remuneration caps, which make access to statutory licensing under s 109 more desirable for radio stations. The remuneration caps are discussed further below.

19.79 After the decision in *PPCA v CRA*, the Senate Environment and Communications References Committee was asked to examine the effectiveness of current regulatory arrangements in dealing with simulcasts, including the impact of current regulation on broadcasters and copyright holders (the Simulcast Inquiry). In June 2013, the Simulcast Inquiry recommended further Government consideration of this and related issues, following the release of the ALRC's Report.

Extending the s 109 licence

19.80 In the Discussion Paper, the ALRC proposed that the compulsory licensing scheme in s 109 of the *Copyright Act* be amended to apply to the transmission of television or radio programs using the internet.[69] The ALRC also asked whether, in the alternative, s 109 should be repealed, leaving licences to be negotiated voluntarily.[70]

19.81 There was little support for the idea of extending the operation of the s 109 licence to internet transmission, except in relation to internet simulcast.

19.82 Pandora, however, submitted that the absence of a statutory licensing scheme covering all forms of 'online radio' may create an 'unnecessary and unjustified barrier to market entry for those creating and launching new innovative online services'. Pandora suggested that either the existing statutory licensing scheme for broadcasters should be extended to include online licences, or a new scheme created for such services.[71]

19.83 The Australian position was compared with that in the United States, where internet radio services operate pursuant to statutory licences under the *Copyright Act 1976* (US). The US statutory licensing scheme covers the performance of sound recordings publicly by means of a 'digital audio transmission', including by subscription services.[72] Pandora submitted that the differences in these legal frameworks with respect to internet radio, works to

> impede the introduction into Australia of new and innovative business models, imposes unnecessary costs and inefficiencies upon those wanting to access or make use of copyright material and places Australia at a competitive disadvantage internationally.[73]

19.84 Pandora supported the proposal to extend s 109, subject to qualifications, including that: a similar statutory licence in relation to musical works be made

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69 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 16–1.

70 Ibid, Question 16–3.

71 Pandora Media Inc, *Submission 104*.

72 *Copyright Act 1976* (US) s 114(d)(1), (2). US law does not, however, recognise a terrestrial broadcast performance right for sound recordings, so has no equivalent to *Copyright Act 1968* (Cth) s 109. That is, in the US, broadcast radio is the only medium that transmits music but does not compensate artists or labels for the performance.

73 Pandora Media Inc, *Submission 104*.

available; 'radio program' be defined broadly;[74] and the existing exclusion in relation to subscription broadcasts should not apply.[75]

19.85 Pandora suggested that a 'workable method' to extend s 109 would be to define its scope by reference to a definition of a 'relevant communication', which would include the existing concept of a broadcast and 'communication of a radio program or TV program otherwise than by way of broadcast'.[76]

19.86 Other stakeholders considered that s 109 should simply be extended[77] to ensure that it covers internet simulcasts.[78] CRA stated that this reform is required to 'correct the inconsistency that copyright owners would be able to charge twice for the simultaneous use of exactly the same copyright material merely because the device on which it is received is different'.[79]

19.87 This position was opposed by others,[80] including the PPCA, which submitted that internet simulcasting must be treated as a communication to the public other than a broadcast 'in keeping with existing copyright principles and commercial practice'.[81] The ACC stated that, in accordance with international practice, broadcasting and internet simulcasts should be treated separately, because

> to do otherwise would mean overturning settled law, shifting the structure of the *Copyright Act* for the narrow purpose of meeting the commercial objectives of the radio industry and distorting the market for the licensing of sound recordings on the Internet.[82]

19.88 These, and other, stakeholders also opposed any other extension of the s 109 licence, or favoured repeal of the statutory licence entirely.[83] In this context, stakeholders highlighted relevant differences between broadcasting and internet transmission, and the role of voluntary licensing.

19.89 The ACC contested the idea that the same exceptions should apply to internet transmissions as to broadcast, and referred to its submission to the Simulcast Inquiry, in which it stated:

> Broadcasting is distinct from communication via the Internet in three important ways:

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74 Pandora noted that 'radio program' would have to be defined broadly to ensure that its service would be covered—for example, a radio program should be able to be indeterminate in length and personalised; and should not require 'pre-programming' and or a mix of music and other content: Pandora Media Inc, *Submission 329*.

75 Ibid. That is, the reference to 'broadcast transmitted for a fee' in *Copyright Act 1968* (Cth) s 109(1).

76 Pandora Media Inc, *Submission 329*.

77 Through the mechanism of a new ministerial determination under the *Broadcasting Services Act 1992* (Cth) concerning the definition of 'broadcasting service'.

78 Commercial Radio Australia, *Submission 864*; ABC, *Submission 775*.

79 Commercial Radio Australia, *Submission 864*.

80 Association of Artist Managers, *Submission 764*; ARIA, *Submission 731*; PPCA, *Submission 666*; Australian Copyright Council, *Submission 654*.

81 PPCA, *Submission 666*.

82 Australian Copyright Council, *Submission 654*.

83 Music Victoria, *Submission 771*; Association of Artist Managers, *Submission 764*; ARIA, *Submission 731*; PPCA, *Submission 666*; APRA/AMCOS, *Submission 664*; Nightlife, *Submission 657*; Australian Copyright Council, *Submission 654*.

> 1. Broadcasting is tied to the broadcast signal and is therefore limited to a reasonably confined geographic area.
> 2. Broadcasting relates to a particular kind of technology, which also limits the potential audience (ie, those with a radio).
> 3. Not all sound recordings are covered by the broadcast right (under Australia's international treaty obligations, not all sound recordings are protected).
>
> These limitations do not apply to communications via the Internet. It follows, in our submission, that communications via the Internet are qualitatively and quantitatively different from broadcasting and require separate remuneration.[84]

19.90 The PPCA also emphasised that treating communications over the internet (including internet simulcasts) as broadcasts would have negative effects on the protection of certain classes of sound recordings—notably US sound recordings—and bring Australia in possible breach of provisions of the AUSFTA.[85]

19.91 Further, stakeholders submitted that voluntary licensing arrangements make it unnecessary to extend s 109 to internet radio.[86] The Australian Independent Record Labels Association, for example, observed that

> the wide range of legitimate music services currently available in the Australian market makes it abundantly clear that voluntary licensing practices between rights holders and music services are facilitating the creation and growth of new business models without the need for statutory licences and further copyright exceptions.[87]

19.92 There was support for repeal of the s 109 licence and its replacement with forms of voluntary licensing.[88] Nightlife stated, for example, that repeal would be the 'best pathway for creators to manage their own rights and to allow technology to enable discount blanket licensing and address many needs currently unserviceable under statutory blanket licensing'.[89]

19.93 Support for the repeal of s 109 was influenced by the existence of the remuneration caps, which limit remuneration for the broadcasting of published sound recordings (discussed below). For example, the ACC stated that,

> For as long as the statutory licence under section 109 is subject to the inequitable one percent and ABC caps imposed on the equitable remuneration of performers and copyright holders in sound recordings, this statutory licence does not support nor

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84 Australian Copyright Council, *Submission 654* referring to Australian Copyright Council, *Submission to Senate Environment and Communications References Committee Inquiry into the Effectiveness of Current Regulatory Arrangements in Dealing with Radio Simulcasts*, 29 April 2013.

85 *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005), art 17.6(3), which requires Australia to afford the full exclusive right of communication to the public in respect of US sound recordings transmitted over the internet.

86 Australian Independent Record Labels Association, *Submission 752*; PPCA, *Submission 666*; APRA/AMCOS, *Submission 664*.

87 Australian Independent Record Labels Association, *Submission 752*.

88 Music Victoria, *Submission 771*; ARIA, *Submission 731*; PPCA, *Submission 666*; Nightlife, *Submission 657*; Australian Copyright Council, *Submission 654*.

89 Nightlife, *Submission 657*.

> properly incentivise the creation of sound recordings and accordingly should be repealed.[90]

19.94 However, some stakeholders expressly supported repeal of s 109, even if the remuneration caps were abolished.[91] The PPCA observed that

> there is no compulsory licensing scheme for the broadcasting of musical works in Australia and the voluntary licensing arrangements entered into between broadcasters and APRA appear to operate effectively outside of section 109. Nor does a compulsory licence exist in New Zealand in respect of the broadcast of sound recordings. Similarly, PPCA is able to effectively license internet services in Australia such as those referred to above without a compulsory licence regime in place. It would be inconsistent as a matter of public policy to treat the sound recordings and musical works differently because services are required to license both rights when operating a music service.[92]

19.95 In contrast, the ABC submitted that s 109 should not be repealed, because it is 'in the public interest for broadcasters to be able to have access to the full available repertoire of sound recordings so that they can be made available to the public'. Further, it suggested that the introduction of a voluntary licence scheme could result in 'censorship' and in 'increased administration costs for broadcasters and delays in obtaining permission'.[93]

19.96 In Pandora's view, direct licensing is not a practical alternative, because of the breadth of licensing required, the costs involved in negotiating separate licensing agreements, limitations on the rights granted to the PPCA by record companies and unsatisfactory dispute resolution procedures.[94]

19.97 Pandora opposed voluntary licensing, including in relation to musical works, on the basis that rights owners may refuse to licence content, creating significant problems for Pandora's business model.[95] Pandora submitted that the ALRC should 'guard against that possibility by recommending a provision in relation to musical works that mirrors s 109'.

The remuneration caps

19.98 Related issues are raised by the remuneration caps under s 152 of the *Copyright Act*, which provides caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings.

19.99 Section 152(8) provides that, in making orders for equitable remuneration, the Copyright Tribunal may not award more than one per cent of the gross earnings of a

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90 Australian Copyright Council, *Submission 654*.
91 ARIA, *Submission 731*; PPCA, *Submission 666*.
92 PPCA, *Submission 666*.
93 ABC, *Submission 775*.
94 Pandora Media Inc, *Submission 104*.
95 Pandora referred to recent experience in the US where over the past 12–18 months, various rights owners have withdrawn 'digital' rights from the US equivalent of APRA: Pandora Media Inc, *Submission 329*.

commercial or community radio broadcaster (the 'one per cent cap').[96] The one per cent cap has been controversial and subject to court challenge.[97]

19.100 The ABC is subject to a different cap under s 152(11), which provides that remuneration is limited to the sum of 0.5 cents per head of the Australian population (the 'ABC cap').

19.101 In 2000, the Ergas Committee recommended that the one per cent cap be abolished 'to achieve competitive neutrality and remove unnecessary impediments to the functioning of markets on a commercial basis'.[98] This recommendation was supported by arguments that the one per cent cap lacks policy justification and distorts the sound recordings market.[99] A previous review reached similar conclusions.[100]

19.102 The Ergas Committee accepted that the one per cent cap was originally implemented in 1969 to ease the burden imposed on the radio broadcasting industry by payments for the broadcasting of sound recordings. The Ergas Committee noted that, since then, the economic circumstances of the commercial radio industry had evolved. It concluded that no public policy purpose is served by the cap, which may 'distort competition (for example, between commercial radio and diffusion over "Internet radios" of sound recordings), resource use, and income distribution'.[101] However, the retention of the ABC cap was recommended, on the basis that the ABC is not a commercial competitor in the relevant markets, and there is a clear public interest in its operation as a national broadcaster.[102]

19.103 In 2001, the Government rejected the Ergas Committee's recommendation to repeal the one per cent cap.[103] Then, in 2006, the then Attorney-General, the Hon Philip Ruddock MP, indicated that repeal of the one per cent cap had been approved, as part of 2006 amending legislation, but this did not eventuate.[104]

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96 *Copyright Act 1968* (Cth) s 152(8).

97 See, eg, Australian Government Attorney-General's Department, *Review of the One per cent Cap on Licence Fees Paid to Copyright Owners for Playing Sound Recordings on the Radio*, Discussion Paper (2005); *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* (2012) 286 ALR 61.

98 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 14, 114–116.

99 Ibid, 14, 114–116.

100 S Simpson, *Review of Australian Copyright Collecting Societies—A Report to a Working Group of the Australian Cultural Development Office and the Attorney-General's Department* (1995), 119. See also Australian Government Attorney-General's Department, *Review of the One per cent Cap on Licence Fees Paid to Copyright Owners for Playing Sound Recordings on the Radio*, Discussion Paper (2005).

101 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 115.

102 Ibid, 116.

103 Ricketson and Creswell state that it can be assumed that the one per cent cap issue: 'became a bargaining chip in the extensive review and negotiations that the government was undertaking at the time with regard to a whole range of policy issues concerning the regulation of the broadcasting industry, including cross-media ownership, digital broadcasting and the like': Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.258].

104 Ricketson and Creswell state: 'One is left with the impression that effective lobbying by the radio broadcasters may have weakened the government's resolve to go through with its announced decision': Ibid, [12.258].

19.104 The PPCA submitted to the ALRC Inquiry that both caps should be repealed, because the caps:

- distort the market in various ways—including by subsidising the radio industry;
- are out of date—given that the financial and other circumstances of the radio industry are very different from the late 1960s;
- reduce economic efficiency and lack equity—including by creating non market-based incentives for broadcasters in relation to increasing music use at the expense of non-music formats;
- are not necessary—given that the Copyright Tribunal independently assesses fees for statutory licence schemes;
- are inflexible and arbitrary—as the levels at which the caps are set are not linked to an economic assessment of the value of the licence;
- are anomalous—because the *Copyright Act* contains no other statutory caps, other jurisdictions do not cap licence fees, and the cap is inconsistent with Australian competition policy;
- may not comply with Australia's international treaty obligations—in particular, the requirement under the *Rome Convention* for equitable remuneration to be paid.[105]

19.105 The PPCA argued that removing the caps would bring benefits to the sound recording industry and Australian recording artists, through increased income and, in turn, provide a greater economic incentive for creativity and investment and enhance cultural opportunities.[106]

19.106 The PPCA was supported in its position by a number of other stakeholders.[107] The ACC, for example, submitted that both caps should be repealed as they are 'inequitable, completely arbitrary and do not involve any analysis of economic efficiency' and 'constitute an unfair subsidisation of the radio industry by performers and sound recording copyright owners'.[108]

19.107 Pandora also submitted that the caps provide the 'commercial radio sector with a significant competitive advantage over online radio services' and should be repealed. However, if the caps are not repealed, Pandora suggested that 'market parity

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105 PPCA, *Submission 240*. Referring to *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964), art 12.

106 PPCA, *Submission 240*.

107 Music Victoria, *Submission 771*; Association of Artist Managers, *Submission 764*; Australian Independent Record Labels Association, *Submission 752*; ARIA, *Submission 731*; Arts Law Centre of Australia, *Submission 706*; PPCA, *Submission 666*; Nightlife, *Submission 657*; Australian Copyright Council, *Submission 654*; Pandora Media Inc, *Submission 329*.

108 Australian Copyright Council, *Submission 654*.

demands that online businesses providing the same or similar services should also receive the benefit of those caps'.[109]

19.108 The ABC submitted that the ABC cap should remain, on the basis that the cap 'represents a financial indicia set by Government', the constitutional basis of which has recently been upheld unanimously by the High Court of Australia.[110]

The future of s 109

19.109 Reform to broaden the communication technologies covered by the broadcast exceptions may be justified in order to encourage innovation and competition, and respond to technological change. The availability of the s 109 licensing scheme for radio broadcasters provides them with a competitive advantage over internet radio services.

19.110 In the context of media convergence, the continuing distinction between broadcasts and other electronic communications to the public in relation to copyright exceptions seems difficult to justify. There may be no reason, in copyright policy terms, why radio broadcasters should have access to a licensing scheme under s 109, while internet radio services do not. Australia appears to have a comprehensive and flexible system for the voluntary licensing of music, which can easily be adapted to the needs of broadcasters.

19.111 As discussed above, broadcasters usually require licences from two sources to broadcast a sound recording: one relating to copyright in the sound recording (available under s 109), and another relating to copyright in the musical work recorded. Voluntary licensing appears to operate effectively in respect of the latter.[111]

19.112 For these reasons, the Australian Government should consider repealing the s 109 licensing scheme for the broadcasting of sound recordings, leaving licences to be negotiated voluntarily. If this approach were taken, issues concerning the application of the licensing scheme to internet transmission of television or radio programs, and concerns about remuneration caps, would no longer be relevant.

19.113 However, if the s 109 licence is retained, there appears to be a strong case for repeal of the one per cent cap. Further, the ABC cap may not be the most appropriate way to support the funding of the national broadcaster. The problematic nature of the caps was recognised by the Simulcast Inquiry, which stated that it 'can understand why previous reviews have recommended the abolition of such a cap'.[112]

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109 Pandora Media Inc, *Submission 329*.

110 ABC, *Submission 775* referring to *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* (2012) 286 ALR 61. The Arts Law Centre also supported retention of the ABC cap: Arts Law Centre of Australia, *Submission 706*.

111 That is, broadcasting and public performance rights of composers, lyricists and music publishers are administered by APRA, outside s 109.

112 Parliament of Australia, Senate Environment and Communications References Committee, *Inquiry into the Effectiveness of Current Regulatory Arrangements in Dealing with Radio Simulcasts* (2013), 27.

Exceptions for persons using broadcasts

19.114 Sections 199, 200 and pt VA of the *Copyright Act* operate to provide exceptions for the benefit of persons receiving, communicating or making a record of a broadcast. The references to 'broadcast' in these sections serve to limit the application of these sections to broadcasts made by content providers that are broadcasting services for the purposes of the *Broadcasting Services Act*.

Reception of broadcasts

> **Example:** A supermarket plays radio broadcasts for the entertainment of its customers.

19.115 Section 199 provides unremunerated exceptions in relation to the reception of broadcasts of works, sound recordings and films. Essentially, the effect of these provisions is that enterprises such as pubs, supermarkets and other shops are permitted to play radio or television broadcasts without infringing copyright.

19.116 Under s 199(1), where an extract from a literary or dramatic work is broadcast, a person who, by receiving the broadcast causes the work to be performed in public, does not infringe copyright in the work.

19.117 Section 199(2) provides that where a person, by receiving a television or sound broadcast, causes a sound recording to be heard in public, there is no infringement of copyright in the sound recording. However, while the supermarket (in the example above) need not license the right to play the sound recording, it must still obtain a licence to use the underlying musical works.

19.118 Section 199(3) provides that where a person, by receiving an authorised television broadcast, causes a film to be seen in public, the person is to be treated as if the holder of a licence granted by the owner of the copyright to show the film.

19.119 The framing of the term 'broadcast' in s 199 is narrower than in the case of some of the other exceptions, being restricted to broadcasts made by the ABC, SBS, holders of broadcasting licences, or persons authorised by class licences, under the *Broadcasting Services Act*.[113]

19.120 The policy behind the exception appears to be that it is reasonable to allow the reception of broadcasts in public, as it would be impractical to control this form of communication. This rationale seems to apply equally to similar content that is transmitted using the internet. Therefore, in the Discussion Paper, the ALRC proposed that s 199 be amended to apply to the transmission of television or radio programs using the internet.[114]

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113 *Copyright Act 1968* (Cth) s 199(7).

114 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 16–1.

19.121 Some stakeholders specifically opposed the extension of the s 199 exceptions on the basis that it would advantage internet radio services.

19.122 Nightlife, for example, stated that extending s 199 would create 'an unfair advantage to radio streaming providers like Pandora' and extending it to 'on demand' services would 'decimate the music industry'.[115] Similarly, the PPCA stated that the extension of s 199 would cause 'inequitable treatment of performers and copyright owners in sound recordings'. For example, if an internet radio service was subject to this unremunerated exception,

> a nightclub, café or restaurant could tailor its service to play a particular style or genre of music in a commercial setting for the entertainment of its customers without the need to obtain a licence or pay for the public performance of sound recordings which in that setting would clearly add considerable value to the business and to the customers' experience.[116]

19.123 Stakeholders considered that s 199 should instead be repealed on the basis that it constitutes an unjustified restriction on the rights of rights holders and is unnecessary due to the availability of voluntary licensing.[117]

19.124 The PPCA submitted that s 199 unfairly prejudices the legitimate interests of the owners of copyright in sound recordings; creates an anomaly between how sound recordings and musical works are treated; and is not required under intellectual property treaties.[118] To retain s 199 would be to ignore the fact that

> there is a commercial licensing regime in place for musical works relating to the public performance of musical works embodied in broadcasts (as administered by APRA) which is denied to sound recordings by the operation of existing section 199(2).[119]

19.125 Enterprises that play radio or television broadcasts for their customers already have to obtain a licence to use the underlying musical works, and there is no indication that voluntary licensing does not operate adequately in this regard.

19.126 The Australian Government should consider repealing the unremunerated s 199 exception, which would require enterprises to obtain licences from the owners of copyright in sound recordings.

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115 Nightlife, *Submission 657*.
116 PPCA, *Submission 666*.
117 Association of Artist Managers, *Submission 764*; ARIA, *Submission 731*; PPCA, *Submission 666*.
118 Specifically, the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964); and *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, ATS 27 (entered into force on 20 May 2002).
119 PPCA, *Submission 666*.

Use of broadcasts for educational purposes

> **Example:** A high school records a radio broadcast for schools to replay the broadcast in the classroom at a later time.

19.127 Section 200(2) of the *Copyright Act* provides an unremunerated exception in relation to making a recording of a sound broadcast, for educational purposes, being a broadcast intended to be used for educational purposes.

19.128 This exception is expressly permitted by the *Rome Convention*, which states that domestic laws and regulations may provide for exceptions as regards 'use solely for the purposes of teaching or scientific research'.[120]

19.129 The rationale for allowing unremunerated use of educational radio broadcasts, but not in relation to internet radio services, is not clear.

19.130 The ALRC would expect that the use of a recording of a radio broadcast for educational purposes would be covered by the new fair use exception—although this would depend on the application of the fairness factors in the particular circumstances. In Chapter 14, the ALRC proposes that, if fair use is enacted, s 200 should be repealed.

Copying of broadcasts by educational institutions

> **Example:** A university records a television broadcast of a film for use in film studies classes.

19.131 Part VA of the *Copyright Act* provides a statutory licensing scheme applying to the copying and communication of broadcasts by educational institutions and institutions assisting persons with an intellectual disability, as long as this is for one of the authorised statutory purposes.[121]

19.132 The *Copyright Amendment Act 2006* (Cth) extended the pt VA licensing scheme, pursuant to s 135C(1), to apply to 'a communication of the content of a free-to-air broadcast, by the broadcaster making the content available online at or after the time of the broadcast'.

19.133 The Explanatory Memorandum said that this provision responded to 'the increasing trend of broadcasters making the content of their broadcast material available online, either simultaneously or at a later time (eg, through services commonly referred to as webcasting or podcasting)'.[122]

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120 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964), art 15(1)(d).

121 Screenrights is the declared collecting society administering the pt VA statutory licensing scheme.

122 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [8.5].

> This extension caters for the possibility that the owners of copyright in the content of a broadcast, in agreeing to its being made available online as a podcast, may not have agreed to license more than downloading for the private listening/viewing by the downloader; that is they may not have expressly or impliedly licensed the downloader to communicate the content to the public or play/show it in public.[123]

19.134 Given that the underlying copyright owners have authorised downloading for consumption by the downloader, who could be a student watching or listening to the podcast in connection with his or her studies, s 135C 'sensibly allows educational institutions to facilitate that activity'.[124]

19.135 Part VA is often referred to as the 'statutory broadcast licence' and permits educational institutions to copy radio and television programs, including programs from free-to-air broadcasters and satellite and subscription radio and television. Educational institutions can also copy and communicate podcasts and webcasts that originated as free-to-air broadcasts and which are available on the broadcaster's website.[125]

19.136 A number of stakeholders expressly identified the existing definition of broadcast as being problematic in the context of the pt VA scheme.[126] The Society of University Lawyers submitted that pt VA is not adequate or appropriate in the digital environment because it excludes 'internet transmissions or internet-only content uploaded by television or radio broadcasters', despite the fact that such content, and the use of tablets rather than television, are becoming more common.[127]

19.137 CAG Schools stated that, while pt VA applies to broadcasts and to some free-to-air broadcasts made available online, under the current *Copyright Act* definition of broadcast 'many types of content such as communications delivered via internet protocol television (IPTV), the majority of online content such as "made for internet" content, YouTube videos etc are currently excluded from the Part VA licence'.[128]

19.138 Screenrights stated that the exclusion of transmissions over the internet from the definition of broadcast creates 'an unnecessarily complicated distinction for educators'.[129] Screenrights explained:

> Depending on the transmission mechanism, the program may or may not be part of a broadcast, and therefore amenable to copying under Part VA. This is illustrated for example by IPTV services offered by FetchTV: if you receive FetchTV through iiNet or Internode it is a broadcast, whereas if you receive FetchTV through Optus it is not a broadcast, and a copy would not be protected by the statutory licence.[130]

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123 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.210].
124 Ibid, [12.210].
125 Copyright Advisory Group—Schools, *Submission 231*.
126 Ibid; Screenrights, *Submission 215*; Arts Law Centre of Australia, *Submission 171*; R Wright, *Submission 167*; Society of University Lawyers, *Submission 158*.
127 Society of University Lawyers, *Submission 158*.
128 Copyright Advisory Group—Schools, *Submission 231*.
129 Screenrights, *Submission 215*.
130 Screenrights, *Submission 646*.

19.139 Screenrights observed that voluntary licensing is unable to fill this gap, because it is not possible to offer a comprehensive voluntary licence for educational institutions to copy broadcasts. It recommended that the definition of broadcast in pt VA be amended to 'deem linear television and radio services to be broadcasts' for the purposes of pt VA.[131]

19.140 In contrast, Universities Australia opposed any expansion of pt VA for two reasons:

> Firstly, expanding the Part VA licence to include freely available internet content may result in Australian universities paying for content that no one ever expected to be paid for and that can currently be used in reliance on s 200AB. Secondly, even if the intention were to confine an expanded Part VA to 'the online equivalent of television or radio programs', we are concerned that the practical effect would be for Part VA to potentially apply to a much broader range of content than the ALRC appears to anticipate, as the line between 'TV like' and 'other' kinds of video content increasingly blurs.[132]

19.141 In the ALRC's view, the extension of the pt VA statutory licence to cover some other forms of communication to the public, including using the internet, should be considered. There may be good reasons to extend the licence, for example, to television or radio-like content that is provided using the internet by a provider that is not a broadcasting service. Again, the licence may need to be restricted to linear, programmed content to avoid applying to all internet content.

Further review of broadcast exceptions

19.142 As discussed in Chapter 18, copyright law has longstanding links with communications regulation, which has tended to emphasise the special place of broadcasting in the media landscape. To some extent, the scope of some exceptions may reflect the special characteristics of broadcasts, particularly free-to-air broadcasts, in terms of their ubiquity and market or cultural penetration.

19.143 Where broadcasters are given special treatment in copyright policy terms, this is sometimes seen as commensurate with obligations under the *Broadcasting Services Act* that do not apply to other content providers.[133] In considering the future of exceptions for broadcasters, the issues include whether a justification remains for an exception; or media content providers other than licensed broadcasters should have a 'level copyright playing field'.

19.144 The scope of exceptions for persons using broadcasts means they are sometimes required to draw distinctions between broadcasts and other audiovisual content, including internet content—or infringe copyright laws by inadvertently treating broadcast and other content in the same manner. Justifications for the

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131 Ibid.

132 Universities Australia, *Submission 754*. Also ADA and ALCC, *Submission 586*.

133 For example, through obligations under the *Broadcasting Services Act* and commercial radio codes of practice, commercial radio broadcasters must adhere to minimum Australian music quotas; provide a minimum daily amount of local content; and provide a minimum daily amount of local news: see CRA 864.

continuing existence of exceptions for persons using broadcasts are most likely to centre on assumptions that broadcast retains a 'special' place in the media landscape.

19.145 In the Discussion Paper, the ALRC suggested that some broadcast exceptions should be amended to apply to the transmission of television or radio programs using the internet and asked how this might be done—for example, whether some exceptions should: be extended only to the 'internet equivalent of television and radio programs'; continue to exclude 'on demand' programs; or extend only to content made available by free-to-air broadcasters using the internet.[134]

19.146 One risk of such approaches is that links with technologies or regulatory concepts specific to 'technologies and regulatory concepts of today' may become quickly outdated and regulatory distinctions that 'depend on concepts based on television and broadcasting are extremely problematic in an age of convergence'.[135]

19.147 The ACMA stated, for example, that: defining the 'internet equivalent' of radio and television programs is likely to become 'increasingly problematic' as business models continue to evolve; changing business models and consumer behaviour will challenge the distinction between live programs and on demand services; and restricting exceptions to free-to-air broadcasters could effectively exclude market entrants from the same 'opportunities and protections'.[136]

19.148 Further, unexpected consequences may arise from reform. For example, in the context of educational statutory licensing, extending the pt VA licence to additional categories of internet transmission would have the effect of removing many educational uses of online content from an unremunerated to a remunerated exception.[137]

19.149 The broadcast exceptions nevertheless require comprehensive reform in the light of media convergence and changes in the way that media content is consumed by the Australian public. The need for review has been thrown into sharp relief by the decision in *PPCA v CRA*,[138] which confirmed that a broadcast, for the purposes of the *Copyright Act*, does not include an internet simulcast of a broadcast.

19.150 Stakeholders agreed on the need for further review.[139] The ADA and the ALCC supported review of the 'full range of issues across copyright and communications policy'.[140] The ACMA stated that reform should be part of 'an overall

134 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 16–1; Question 16–1.
135 ADA and ALCC, *Submission 586*.
136 ACMA, *Submission 613*.
137 ADA and ALCC, *Submission 586*. That is, some uses covered by s 200AB may then be covered by pt VA.
138 *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013] FCAFC 11.
139 For example, COMPPS, *Submission 634*; ACMA, *Submission 613*; Google, *Submission 600*; ADA and ALCC, *Submission 586*.
140 ADA and ALCC, *Submission 586*.

coherent approach to content regulation, to minimise the potential for proposals to have unintended consequences or introduce potential market distortions'.[141]

19.151 In this context, stakeholders referred to the deliberations of the Simulcast Inquiry, which in its report emphasised that reform at the intersection of copyright and broadcasting should not be dealt with in a piecemeal way.[142]

19.152 The Simulcast Inquiry recommended that, following receipt of this ALRC Report, the Minister for Broadband, Communications and the Digital Economy and the Attorney-General 'fully and urgently address in a comprehensive and long-term manner all of the related broadcasting and copyright issues identified in numerous reviews, and by many stakeholders'.[143]

19.153 In this context, the ALRC suggests that some of the broadcast exceptions should be repealed on the basis that relevant uses are likely to be covered by the fair use or new fair dealing exception, or are amenable to voluntary licensing. In these cases, removing exceptions may:

- better acknowledge creators' rights and maintain incentives by removing unnecessary exceptions and facilitating voluntary licensing;[144] and
- advance technological neutrality and innovation by removing exceptions that apply only to broadcast but not other forms of communication to the public.[145]

19.154 Despite the complexities, the extension of some statutory licensing schemes to the transmission of linear television or radio programs using the internet should be considered, in order to ensure these licences continue to serve their purpose in an era of media convergence.

Recommendation 19–1 In developing media and communications policy, and in responding to media convergence, the Australian Government should consider whether the following exceptions in the *Copyright Act* should be repealed:

(a) s 45—broadcast of extracts of works;

(b) ss 47, 70 and 107—reproduction for broadcasting;

(c) s 109—broadcasting of sound recordings;

(d) ss 65 and 67—incidental broadcast of artistic works; and

(e) s 199—reception of broadcasts.

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141 ACMA, *Submission 613*.
142 Parliament of Australia, Senate Environment and Communications References Committee, *Inquiry into the Effectiveness of Current Regulatory Arrangements in Dealing with Radio Simulcasts* (2013), 27.
143 Ibid, Rec 2.
144 See Ch 2, framing principles 1, 2
145 See Ch 2, framing principle 4.

Recommendation 19–2 The Australian Government should also consider whether the following exceptions should be amended to extend to the transmission of linear television or radio programs using the internet or other forms of communication to the public:

(a) s 47A—sound broadcasting by holders of a print disability radio licence; and

(b) pt VA—copying of broadcasts by educational institutions.

20. Contracting Out

Contents

Summary

20.1 'Contracting out' refers to an agreement between owners and users of copyright material that some or all of the statutory exceptions to copyright are not to apply—so that, for example, the user will remunerate the copyright owner for uses that would otherwise be covered by an unremunerated exception; or the user agrees not to use copyright material in ways that would constitute fair use or fair dealing.

20.2 Contracting out raises fundamental questions about the objectives of copyright law, the nature of copyright owners' exclusive rights and exceptions, and the respective roles of the *Copyright Act*, contract, and competition and consumer law and policy.

20.3 This chapter considers whether the *Copyright Act* should limit the extent to which parties may effectively contract out of existing, and recommended new, exceptions to copyright.[1]

20.4 The ALRC recommends that the *Copyright Act* should be amended to provide that contractual terms restricting or preventing the doing of any act which would otherwise be permitted by the libraries and archives exceptions are unenforceable.

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1 There are existing limitations on contracting out of certain exceptions relating to computer programs: *Copyright Act 1968* (Cth) s 47H.

20.5 The *Copyright Act* should not provide any statutory limitations on contracting out of the new fair use exception. However, if the fair use exception is not enacted, limitations on contracting out should apply to the new fair dealing exception.

20.6 The primary reason for these recommendations is to ensure that certain public interests protected by some copyright exceptions are not prejudiced by private arrangements, promoting fair access to content.[2] However, broader limitations on contracting out—for example, extending to all exceptions, or to all fair uses—would not be practical or beneficial. Generally, removing freedom to contract risks reducing the flexibility of the copyright regime, and the scope to develop new business models for distributing copyright materials.

What is contracting out?

20.7 Agreements that include 'contracting out' may be in writing, or entered online in the form of a 'clickwrap licence' or other electronic contract. To enter a 'clickwrap licence', for example, the terms of the licence are presented to the user electronically, and the user agrees to the terms of the licence by clicking on a button or ticking a box labelled 'I agree', or by some other electronic action.[3]

20.8 Contractual terms in licensing and other agreements may require copyright users to contract out of exceptions—purporting to prevent users from relying on statutory exceptions and, for example, engaging in fair dealing with copyright materials.

20.9 Copyright owners may also limit permissible uses of copyright materials by imposing technological protection measures (TPMs) which prevent, inhibit or restrict certain acts comprised in the copyright. The use and circumvention of TPMs raises similar policy issues to those raised by contracting out, and TPMs can be used to enforce the terms of licences and other agreements.[4]

20.10 Legislative limitations on contracting out of statutory provisions are not uncommon, at least in consumer protection law. For example, under the Australian Consumer Law (ACL), a term of a contract is void to the extent that the term purports to exclude, restrict or modify legislative consumer guarantees, such as guarantees as to the fitness for purpose of goods or services.[5]

Contracting out in practice

20.11 The ALRC did not conduct its own research into the nature or prevalence of contracting out in Australia. However, there is reason to assume that terms contracting out of copyright exceptions are common.

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2 See Ch 2, framing principle 3.

3 D Clapperton and S Corones, 'Unfair Terms in Clickwrap and Other Electronic Contracts' (2007) 35 *Australian Business Law Review* 152, 154.

4 The ALRC is directed not to duplicate work on TPMs being undertaken at international level and by the Attorney-General's Department. See Australian Government Attorney-General's Department, *Review of Technological Protection Measure Exceptions made under the Copyright Act 1968* (2012).

5 *Competition and Consumer Act 2010* (Cth) sch 1 s 64.

20.12 In 2002, the CLRC reported information about the extent to which contracting out was being used.[6] It observed that agreements with online publishing companies may contain clauses that prevent libraries and archives from reproducing and communicating extracts of works, which would otherwise be permitted by the library and archives exceptions. Agreements may also exclude or limit the fair dealing exceptions, and the statutory licensing schemes for educational and other institutions and the services of the Crown.[7] The CLRC confirmed that many of the online licences it had surveyed involved contracting out of copyright exceptions.[8]

20.13 Academic commentators have suggested that the 'majority of electronic contracts involving material protected by copyright purport to restrict the uses of that material in ways that conflict with applicable exceptions to copyright, such as fair dealing'.[9]

20.14 Recent research funded by the Australian Research Council is said to indicate that the practice of excluding or limiting exceptions by contract is 'just as (if not more) prevalent now as it was 10 years ago'.[10] The study, by Robin Wright, found that common contract terms may hinder the ability of libraries to deliver interlibrary loans, reproduce and communicate materials for educational purposes, and prevent researchers or students relying on the fair dealing exceptions.[11]

20.15 In a submission, Wright confirmed that an examination of excerpts from publisher agreements demonstrates that licence agreements include terms that 'purport to exclude or limit a library's ability to use the existing Australian copyright exceptions with licensed digital material'.[12]

20.16 In this Inquiry, many stakeholders submitted that contracting out has continued—and perhaps become more common—since the CLRC reported.[13] The shift to online distribution of copyright materials was identified as a key driver of this trend.[14]

20.17 The National Library of Australia stated that only 21% of its licence agreements for subscription databases permit supply of copies to Australian users through the Australian interlibrary loan network, and 57% prohibit access by users outside the

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6 Copyright Law Review Committee, *Copyright and Contract* (2002), ch 4. Information was gathered through submissions in response to the CLRC inquiry, and from a survey of online licence agreements.

7 Ibid, ch 4.

8 Uses that were prohibited by the licences included 'reproducing, making derivative works from, or commercially exploiting the material and communicating, distributing or publishing the material'. Exceptions that were explicitly excluded included the computer programs exceptions and (in one case) exceptions allowing copying for satire or parody under the fair dealing doctrine. Further, many of the agreements examined prohibited the use of even insubstantial portions of material: Ibid, 129.

9 D Clapperton and S Corones, 'Unfair Terms in Clickwrap and Other Electronic Contracts' (2007) 35 *Australian Business Law Review* 152, 175.

10 ADA and ALCC, *Submission 213*.

11 R Wright, 'Libraries and Licensing: the eFuture will Need Legal as well as Technical Skills' (Paper presented at VALA 2012, Melbourne, 9 February 2012).

12 R Wright, *Submission 167*.

13 See, eg, ADA and ALCC, *Submission 213*; Australian Parliamentary Library, *Submission 107*.

14 Copyright Advisory Group—Schools, *Submission 231*; Society of University Lawyers, *Submission 158*; R Xavier, *Submission 146*.

NLA's premises. Further, none of the agreements permit the NLA to supply copies in response to requests from individuals and, therefore, prohibit it from supplying copies that would otherwise be permitted by fair dealing exceptions.[15]

20.18 Other stakeholders provided examples of contractual terms encountered by Australian libraries that potentially affect the availability of document supply and interlibrary loans.[16] For example, contracting out has become an issue for parliamentary libraries, as online information service contracts limit or negate copyright exceptions:

> This trend compromises the intended function of the exceptions, which is to provide members of Parliament with unimpeded access to quality information. There is a need for the exceptions to be broadened to provide immunity from infringement when using these services and/or copying from electronic and online services.[17]

20.19 Universities Australia stated that the most common forms of contractual limitations on commercially-published journal content were prohibitions on:

- use of content in course packs (otherwise permitted by pt VB of the *Copyright Act*);
- use of material for interlibrary loans (otherwise permitted by ss 49 and 50);
- electronic transmission of content between authorised users (otherwise permitted by ss 40 and 41);
- use of content for the purpose of data mining or text mining; and
- use other than 'personal use' of online broadcast material (otherwise permitted by pt VA).[18]

20.20 Stakeholders expressed concerns about the effect of contractual restrictions on fair dealing with copyright materials. The ABC stated that it is 'often placed in a worse position for having entered into a contract with a rights holder, where that contract restricts fair dealing, compared with its competitors for those rights, who have no such contract and who can fair deal with that content across platforms'.[19]

20.21 Internationally, a review of contracts conducted for the UK Strategic Advisory Board for Intellectual Property Policy in 2010 looked at empirical evidence from the UK and several other countries. Bargaining outcomes, the review found, are tilted towards rights owners, because consumers 'typically are not in a position to contest the terms of licences offered'.[20]

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15 National Library of Australia, *Submission 218*.

16 For example, Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; ADA and ALCC, *Submission 213*.

17 WA Parliament, *Submission 696*.

18 Universities Australia, *Submission 246*.

19 ABC, *Submission 210*.

20 M Kretschmer, E Derclaye, F Favale and R Watt, *A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy* (2010), 4.

20.22 The review found that the market for electronic services is growing rapidly. The review also found that users' access to copyright content is increasingly governed by contract; and that there was 'robust evidence that licence agreements for software, digital consumer services and educational content routinely conflict with statutory copyright exceptions (for example regarding back-up copies and archiving)'.[21]

Current law

Contracting out and the *Copyright Act*

20.23 The *Copyright Act* generally contains no provisions that prevent agreements excluding or limiting the operation of exceptions, except in relation to the reproduction of computer programs. Therefore, for example:

- copyright owners of filmed recordings of sporting 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.

20.24 In relation to computer programs, s 47H of the *Copyright Act* expressly provides that 'an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting' the operation of certain exceptions permitting the reproduction of computer programs for technical study, back-up, security testing and error correction 'has no effect'.[22]

20.25 These limitations on contracting out were inserted by the *Copyright Amendment (Computer Programs) Act 1999* (Cth), which resulted from the Government's consideration of a CLRC report on computer software protection. In that report, the CLRC stated that provisions regarding interoperability, back-up copying and de-compilation of locked programs would have little practical effect if parties could rely on contractual provisions to prevent these acts. It recommended that the *Copyright Act* be amended to ensure that these exceptions could not be avoided by contractual means.[23]

20.26 The existence of an express provision against contracting out in s 47H arguably helps to confirm that exceptions elsewhere in the *Copyright Act* can be overridden by contract.[24] After considering the legislative history, the CLRC concluded that the effect

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21 Ibid, 4. Similarly, consumer protection legislation is often ignored or hard to enforce—for example, because 'many online licence agreements are not easily understood, and contain excessive exclusions of liability'.

22 *Copyright Act 1968* (Cth) s 47H relating to agreements that exclude or limit exceptions provided under ss 47B(3), 47C–47F.

23 Copyright Law Review Committee, *Computer Software Protection* (1995), [10.106].

24 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

of s 47H on agreements which exclude or limit other exceptions is 'ultimately unclear'.[25]

20.27 Several reasons why Parliament enacted an express provision only in relation to computer programs can be identified. These include that:

- s 47H applies expressly to specific exceptions implemented by the same amending legislation, so it is not possible to imply an intention on the part of Parliament that all pre-existing exceptions be subject to contract, no matter when they became part of the Act; and
- the relevant provisions of the *Copyright Amendment (Computer Programs) Act 1999* (Cth) were based on a model provided by a European Directive[26] on the protection of computer programs.[27]

Enforceability of contracts

20.28 Leaving aside provisions of the *Copyright Act* itself, the enforceability of contractual terms excluding or limiting exceptions may also be affected by:[28]

- consumer protection legislation—for example, provisions of the ACL, which proscribe misleading or deceptive conduct and unconscionable conduct in trade or commerce, and unfair contract terms in consumer contracts;[29]
- competition legislation—notably provisions of the *Competition and Consumer Act 2010* (Cth), which prohibit misuse of market power;[30]
- the ordinary principles of contract law concerning the formation of contracts—for example, where there is insufficient notice of, and assent to, the terms of online licences;[31]
- the equitable doctrine of unconscionable conduct—for example, where one party is known by the other to be at a special disadvantage and unfair or unconscientious advantage is taken;[32] and
- the law relating to contracts that are contrary to public policy—where a contract term defeats or circumvents a statutory public purpose or policy.

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25 Copyright Law Review Committee, *Copyright and Contract* (2002), 179.

26 Council of the European Communities, *Council Directive on the Legal Protection of Computer Programs* (1991).

27 See Copyright Law Review Committee, *Copyright and Contract* (2002), 174–179; J Carter, E Peden, K Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 45.

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

29 *Competition and Consumer Act 2010* (Cth) sch 2, ch 2, pts 2–2, 2–3.

30 Ibid s 46.

31 An Attorney-General's Department review of Australian contract law 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.

32 The CLRC concluded that this doctrine was unlikely to apply to most contracts the subject of its review: Copyright Law Review Committee, *Copyright and Contract* (2002), 151.

20.29 As discussed below, there are differing views on whether, and in what circumstances, contractual terms excluding or limiting exceptions to copyright may be unenforceable. Depending on the circumstances, and where agreements are governed by Australian law, contractual terms that exclude or limit the operation of exceptions may be unenforceable due to legislative provisions outside the *Copyright Act* or the operation of general law (common law and equity).

Competition and consumer law

20.30 The ACL provides that a court may determine that a term of a standard form consumer contract is unfair and therefore void, including in response to proceedings taken by the ACCC.[33]

20.31 Under the ACL, a 'consumer contract' includes a contract for the supply of goods and services to an individual who acquires them wholly or predominantly for personal, domestic or household use or consumption.[34] The ACL outlines a number of factors that the court must take into account in determining whether a contract is a 'standard form contract'. Such contracts will typically be those that have been prepared by one party to the contract and are not subject to negotiation between the parties—that is, offered on a 'take it, or leave it' basis, as is typically the case with consumer contracts involving copyright.

20.32 The ACL provides that a contractual term is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations under the contract;
- is not reasonably necessary to protect the legitimate interest of a party to the contract; and
- would cause detriment to a party to the contract if it were to be applied or relied upon.[35]

20.33 The ACL provides examples of the kinds of terms of a consumer contract that may be unfair, including for example, 'a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract'.[36]

20.34 The ACCC observed that it is not clear whether the ACL (or other parts of the *Competition and Consumer Act*) would operate to protect consumers or businesses where there is an imbalance of power between the parties to a copyright licence.[37]

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33 *Competition and Consumer Act 2010* (Cth) sch 2. The ACCC has been active in reviewing standard form consumer contracts in a number of industries, including in the airline, telecommunications, fitness and vehicle rental industries but has not, to date, focused on copyright licensing agreements. See Australian Competition and Consumer Commission, *Unfair Contract Terms: Industry Review Outcomes* (2013).

34 *Competition and Consumer Act 2010* (Cth) sch 2, s 23(3).

35 Ibid sch 2, s 24(1).

36 Ibid sch 2, s 25(1)(a). Robert Xavier suggested that the ACL's examples of unfair contract terms could be augmented with a reference to 'terms that exclude copyright exceptions': R Xavier, *Submission 531*.

37 ACCC, *Submission 658*.

Choice submitted that the ACL does not provide adequate protection in these circumstances—that is, the 'mere presence of the potential for action against unfair contract terms is not acting as a sufficient deterrent' against contracting out.[38]

Contract and public policy

20.35 It has been argued that some contractual provisions purporting to exclude or limit a licensee's rights under the *Copyright Act* are ineffective to do so, as such terms are void or unenforceable on public policy grounds. This view is based on the general principle of contract law that, except where permitted by legislation, 'a contract which purports to oust the jurisdiction of the courts is contrary to public policy and therefore void or unenforceable, but probably not an illegal contract'.[39]

20.36 In relation to the *Copyright Act*, it may be sufficient that a court has jurisdiction to make orders in respect of rights conferred by the Act and that the rights conferred are of a public rather than private nature. The rights conferred by the *Copyright Act* may be characterised as public rights, because 'at least some of the relevant provisions confer positive rights, in effect as statutory licences, which may be enforced by action against an owner'; and exceptions may be relied on as a defence in proceedings for infringement.[40]

20.37 The case law on contracting out of legislative rights establishes that, 'if the operation of a contractual provision defeats or circumvents the statutory purpose or policy, then the provision is inconsistent in the relevant sense and falls within the injunction against contracting out'.[41]

20.38 Applying these legal principles to contracting out under the *Copyright Act*, Professor J W Carter, Professor Elisabeth Peden and Kristin Stammer have argued that:

- contractual terms that purport to exclude or limit the fair dealing exceptions are unenforceable because to 'permit an owner to sue for breach of contract in relation to conduct amounting to a fair dealing would circumvent the scheme of the Act under which fair dealing is permitted';[42] and
- contractual terms that purport to exclude or limit the exceptions that provide for the copying of copyright materials in libraries or archives are unenforceable, because these exceptions are based on, and give effect to, important policy concerns and the 'real beneficiaries' of the exceptions are the users of libraries and archives.[43]

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38 Choice, *Submission 745*.

39 J Carter, E Peden, K Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 41.

40 Ibid, 41–42.

41 Ibid, 42, citing *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516, 522.

42 That is, a contractual provision cannot convert fair dealing into an infringement of copyright and the Act 'also impliedly prohibits a contractual claim in relation to conduct amounting to a fair dealing': J Carter, E Peden, K Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 46.

43 Ibid, 47.

US copyright misuse doctrine

20.39 Some comparison with United States law is useful, given that the US has a fair use exception similar to that recommended for Australia in this Report.

20.40 US law has developed a copyright-specific defence against copyright infringement based on a doctrine of copyright misuse. Under this doctrine, US courts may refuse to enforce agreements that attempt to extend protection of copyright material beyond the limits set by copyright law, including limits on the duration of copyright protection. Once a defence of copyright misuse has been proven, the rights holder is prevented from enforcing its copyright until the misuse has been removed.

20.41 In *Lasercomb America v Reynolds*,[44] a licensee had agreed not to develop a competitive computer-aided design program for 99 years—beyond the period of protection by copyright laws. The Court found that the copyright owner was trying effectively to extend the term and scope of its copyright beyond the permitted limits of copyright law, preventing people from legitimately developing competitive software.

20.42 The underlying policy rationale for the copyright misuse doctrine is the copyright and patent clause of the *US Constitution*, which states an intention 'to promote the Progress of Science and useful Arts'. The application of the doctrine depends on 'whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright'.[45] Courts have suggested that anti-competitive licensing agreements and agreements that exclude fair use may conflict with the public purposes of copyright.[46]

20.43 However, there seem to be no clear instances of the application of the copyright misuse doctrine to the multitude of online contracts that exclude otherwise fair use of copyright materials. Rather, courts have generally followed a 'freedom of contract' line.[47] In a submission to this Inquiry, the Kernochan Center for Law, Media and the Arts, at the Columbia University School of Law advised that the doctrine of copyright misuse is capable of invalidating contract provisions only in the 'most egregious' or 'obviously overreaching' of cases.[48]

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44 *Lasercomb America v Reynolds*, 911 F 2d 970 (4th Cir, 1990).

45 Ibid, 978.

46 *Video Pipeline Inc v Buena Vista Home Entertainment Inc*, 342 F 3d 191 (3rd Cir, 2003), 204–205.

47 V Moffat, 'Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking' (2007) 14(1) *University of California Davis Law Review* 45, 50.

48 Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*. See also M Kretschmer, E Derclaye, F Favale and R Watt, *A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy* (2010), 104–105.

Should contracting out be enforceable?

20.44 Many stakeholders disagreed with proposals to place statutory limitations on contracting out.[49] This view is held primarily because unhindered freedom of contract is seen as important in facilitating the efficient and competitive distribution of copyright materials; and statutory limitations on contracting out may cause uncertainty concerning the enforceability of contracts.

20.45 BSA/The Software Alliance, for example, stated that freedom of contract is vitally important to business in the digital economy because copyright owners are increasingly reliant on licensing agreements (in providing access to content rather than selling copies). Freedom to agree on the terms of licensing agreements

> is fundamental to the development of new products and services, which may depend upon new and innovative business models. The ability to agree on specific licence terms, such as the duration of a licence, geographical restrictions, technological platforms, reproduction of material, is essential to those business models.[50]

20.46 The Australian Recording Industry Association stated that, in order to foster the active participation of Australian businesses in the digital economy, it is important to provide them with 'flexibility to contract and certainty regarding for example, the provision of content from creators and effective protection measures'.[51] Similarly, Australian Film/TV Bodies submitted that, in 'guaranteeing freedom of contract, the *Copyright Act* promotes distribution and efficient use of copyright material in online and multi-jurisdictional environments'.[52]

20.47 Sporting bodies also expressed concerns about limitations on freedom of contract. The AFL emphasised that licensing arrangements with media companies are undertaken on 'an arm's length basis with large corporations', which should be 'free to contract on whatever terms they see fit in relation to copyright exceptions'.[53] The NRL stated that limitations on contracting out 'even if limited to private and domestic use' would be problematic as it would prevent, for example, a sporting body 'licensing digital downloads on a once only or limited use basis'.[54]

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49 Foxtel, *Submission 748*; ASTRA, *Submission 747*; News Corp Australia, *Submission 746*; iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*; NRL, *Submission 732*; ARIA, *Submission 731*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; Music Council of Australia, *Submission 647*; Screenrights, *Submission 646*; Springer Science and Business Media, *Submission 639*; COMPPS, *Submission 634*; Australian Publishers Association, *Submission 629*; Association of American Publishers, *Submission 611*; BSA, *Submission 598*; Motion Picture Association of America Inc, *Submission 573*; AIPP, *Submission 564*; ALPSP, *Submission 562*.

50 BSA, *Submission 598*.

51 ARIA, *Submission 731*. For example, consumers typically pay higher prices for greater access so that different delivery models 'provide varied consumer offerings and services which benefit both consumers and creators' and are also 'the business models of third party suppliers': ARIA, *Submission 241*.

52 For example, 'a download service may allow a fixed number of copies of downloaded content, a streaming service may prohibit the copying of streams, and a service may supply a time limited copy to be reviewed within a fixed window': Australian Film/TV Bodies, *Submission 739*.

53 AFL, *Submission 717*.

54 NRL, *Submission 732*. See also COMPPS, *Submission 634*.

20.48 Certainty was a significant concern for stakeholders.[55] John Wiley & Sons observed that 'agreeing the scope of a use under licence can provide a pragmatic business solution satisfactory to both parties and thus increase legal certainty and mitigate risk, both essential elements of a robust policy for innovation'.[56]

20.49 Springer Science and Business Media stated that contracts and licensing 'allow specifically defined and tailored agreements and therefore enable legal certainty that exceptions often do not give'. In contrast, if copyright exceptions 'overrule commercial terms, this is likely to lead to disagreements between rights holders and users about the scope and reach of exceptions'.[57]

20.50 More generally, contract was seen as having an important role in protecting the legitimate interests of copyright holders.[58] For example, an artist who releases music for children may not wish to see his or her sound recordings used in contexts that are 'adult or perverse', even though the use may be considered as a 'fair dealing'.[59] The Coalition of Major Professional and Participation Sports, for example, observed that its members and their licensees may contract out of exceptions to protect the reputation or integrity of their sports—for example, to restrict the use of violent sports 'highlights'.[60]

20.51 The international competitiveness of Australia was considered to be at risk, if contracting out is limited.[61] That is, limitations on contracting out in Australian law may make Australia 'less attractive as a hub for business'.[62] The Interactive Games and Entertainment Association stated that Australian creators need to be able to 'develop new and innovative business models without the risk of such business models being undermined by local copyright exceptions'.[63]

20.52 The fact that the US does not have statutory limitations on contracting out was also considered to be significant, given the ALRC's proposals to introduce a fair use exception.[64]

20.53 Finally, it was suggested that enacting limitations on contracting out might conflict with Australia's obligations to comply with the three-step test under the *Berne Convention*,[65] as 'rights owners would not be able to resolve by contract any exceptions which may conflict with the normal exploitation of their work'.[66]

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55 See, eg, Australian Film/TV Bodies, *Submission 739*; International Association of Scientific Technical and Medical Publishers, *Submission 560*.

56 John Wiley & Sons, *Submission 239*.

57 Springer Science and Business Media, *Submission 639*.

58 CSIRO, *Submission 242*; ARIA, *Submission 241*.

59 ARIA, *Submission 241*.

60 COMPPS, *Submission 634*.

61 Springer Science and Business Media, *Submission 639*; ARIA, *Submission 241*; IASTMP, *Submission 200*; iGEA, *Submission 192*; Thomson Reuters, *Submission 187*.

62 IASTMP, *Submission 200*.

63 iGEA, *Submission 192*.

64 Australian Publishers Association, *Submission 629*.

65 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 9(2).

66 ALPSP, *Submission 562*.

Limitations on contracting out

20.54 In the Discussion Paper, the ALRC proposed that limitations on contracting out should apply to the exceptions for libraries and archives, and the fair use or fair dealing exceptions, only to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.[67]

20.55 Essentially, if a fair use exception were introduced, the proposed limitations on contracting out would have applied to some, but not all, fair uses. That is, the proposal would have created a 'hierarchy' of fair use, for the purposes of limiting contracting out.

20.56 The rationale for taking this approach was that while the libraries and archives exceptions and fair dealing exceptions promote important public interests, any broader limitation on contracting out—for example, extending to all fair uses—would not be practical or beneficial.

20.57 While this approach was welcomed by some stakeholders,[68] others who favoured limitations on contracting out, criticised the proposed hierarchy of limitations in relation to fair use,[69] or otherwise considered that the limitations did not extend far enough.[70]

20.58 The ADA and ALCC strongly supported limitations on contracting out, but raised detailed concerns about distinguishing between categories of fair use for this purpose. These included concerns that the ALRC proposal would:

- be unworkable in practice because of the difficulties involved in differentiating between illustrative purposes, because many uses have multiple purposes (for example, study and education)[71] and other uncertainties concerning what uses would be covered;

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67 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 17–1.

68 Free TV Australia, *Submission 865*; ABC, *Submission 775*; CAMD, *Submission 719*; Arts Law Centre of Australia, *Submission 706*; Cyberspace Law and Policy Centre, *Submission 640*; SBS, *Submission 556*.

69 R Xavier, *Submission 816*; Copyright Advisory Group—Schools, *Submission 707*; Australian Parliamentary Library, *Submission 694*; Communications Alliance, *Submission 652*; Google, *Submission 600*; ADA and ALCC, *Submission 586*.

70 Copyright Advisory Group—Schools, *Submission 861*; University of Sydney, *Submission 815*; AIATSIS, *Submission 762*; eBay, *Submission 751*; NFSA, *Submission 750*; Choice, *Submission 745*; Internet Industry Association, *Submission 744*; Queensland Parliamentary Library, *Submission 718*; EFA, *Submission 714*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; ACCAN, *Submission 673*; R Giblin, *Submission 660*; ACCC, *Submission 658*; Communications Alliance, *Submission 652*; Association of Parliamentary Libraries of Australasia, *Submission 650*; Google, *Submission 600*; National Archives of Australia, *Submission 595*.

71 A student 'primary user' and a 'third party' educational institution facilitating the use may have different purposes. Therefore, it may be difficult in practice to avoid addressing questions about 'who made the copy', rather than focusing on questions of fairness: Copyright Advisory Group—Schools, *Submission 707*.

- undermine the operation and rationale of the fair use exception, by introducing an emphasis on purpose rather than fairness—that is, limits on contracting out would depend on whether a use falls within a particular illustrative purpose, and not on whether use is fair;
- be contrary to public policy, because protecting illustrative purposes that align with the current fair dealing provisions, at the expense of the other illustrative purposes, jeopardises public interests such as education and public administration; and
- undermine any attempt to 'future-proof' the *Copyright Act*, because new uses and markets may not be able to develop if constrained by contract.[72]

20.59 A particular concern expressed by stakeholders was that any division of illustrative purposes risks creating a presumption that some illustrative purposes are more likely to be fair use than others, (which would be contrary to the ALRC's intention).[73]

20.60 Google expressed concern that purposes considered 'non-core' to the public interest may come to be seen as more presumptively fair than those that are not.[74] The Communications Alliance objected to what it characterised as a situation where 'old media' uses—such as criticism or review and reporting news—would, in effect, be 'quarantined while new uses which are just as critical from a public interest perspective will be considered as second tier'.[75]

20.61 CAG Schools had particular concerns about contracting out and educational uses. It submitted that, as a matter of public policy, treating education as a 'non-core' fair use would be 'at odds with the universal acknowledgement of the role of the education sector in advancing the public interest'. Further, it considered 'any attempt to divorce the public interest in education from the public interest in libraries, and in research and study' to be highly artificial.[76]

20.62 More generally, CAG Schools submitted that the contracting out proposal would 'undermine the flexibility and balancing of interests' sought by the ALRC. It considered that the proposal would enable rights holders, not Parliament, to set the scope of fair use for 'non-core' illustrative purposes.[77]

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72 ADA and ALCC, *Submission 586*.

73 R Xavier, *Submission 816*; Copyright Advisory Group—Schools, *Submission 707*; Australian Parliamentary Library, *Submission 694*; Communications Alliance, *Submission 652*; Google, *Submission 600*; ADA and ALCC, *Submission 586*.

74 Google, *Submission 600*.

75 Communications Alliance, *Submission 652*.

76 Copyright Advisory Group—Schools, *Submission 707*.

77 Ibid.

20.63 Many stakeholders submitted that limitations on contracting out should extend to all fair uses,[78] or all copyright exceptions.[79]

20.64 The ADA and ALCC, for example, proposed that 'the specific library and archive exceptions and fair use in its entirety [should be] protected from contracting out'. Limitations on contracting out were justified on the basis that the ALRC's reform proposals 'describe a cohesive and balanced copyright system, offering protection and incentives to users and creators of content' and, therefore, it is 'important that that balance is preserved and not skewed by contractual arrangements'.[80]

20.65 There may also be a competition policy rationale for broader limitations on contracting out. The ACCC advised:

> A fair use exception should properly reflect a cost-benefit framework for copyright protection and seek to address inefficient transaction costs and the potential for the extent and use of the rights conferred by copyright to restrict competition and create market power. In such circumstances, the ACCC considers that it necessarily follows that contracting out is more likely to be economically detrimental than beneficial.[81]

20.66 CAG Schools submitted that limitations on contracting out should extend to all copyright exceptions. The effect of a such a statutory limitation should be to ensure that 'contracts cannot be used to automatically rule out reliance on fair dealing'. However, contractual terms that purport to restrict or prevent certain uses should remain relevant to an analysis of fairness.[82] Dr Rebecca Giblin also considered that a determination of fair use should depend 'upon consideration of all relevant factors, including any public interest considerations and the precise terms of the licence'.[83]

20.67 Commonwealth and state parliamentary libraries submitted that there should be no contracting out of exceptions applying to their operations.[84]

20.68 Given the importance of the public interests served by copyright exceptions and the ease with which exceptions can be overridden by contract, Dr Giblin stated that broader limitations on contracting out should be considered. She suggested that it should be made explicit that, in addition to the categories of exception covered by the ALRC's proposal, contracting out will not be enforceable where it is 'against the public interest'.[85]

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78 R Xavier, *Submission 816*; eBay, *Submission 751*; Choice, *Submission 745*; Internet Industry Association, *Submission 744*; EFA, *Submission 714*; ACCAN, *Submission 673*; R Giblin, *Submission 660*; ACCC, *Submission 658*; ADA and ALCC, *Submission 586*.

79 Copyright Advisory Group—Schools, *Submission 707*.

80 ADA and ALCC, *Submission 586*.

81 ACCC, *Submission 658*.

82 Copyright Advisory Group—Schools, *Submission 707*.

83 R Giblin, *Submission 660*.

84 Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; Association of Parliamentary Libraries of Australasia, *Submission 650*. The National Archives of Australia proposed that contracting out of the use of material for 'public administration' and 'cultural heritage' should also be restricted: National Archives of Australia, *Submission 595*.

85 R Giblin, *Submission 660*.

20.69 The Law Council expressed concerns about a 'blanket limitation' on contracting out and submitted that the question should be 'whether a term of an agreement that purports to exclude or limit the operation of the relevant copyright exception is fair and reasonable in all of the circumstances'.[86]

Approach to reform

20.70 Contracting out raises fundamental questions about the objectives of copyright law; the nature of copyright owners' exclusive rights and the exceptions to those rights; and the respective roles of the *Copyright Act*, contract and competition law and policy in governing licensing practices.

20.71 The issue has been characterised as involving a collision between two important legal principles: statutory rights reflecting public policy on the one hand; and freedom of contract on the other[87]—or public versus private ordering of rights.

20.72 Copyright owners generally oppose limitations on contracting out because this challenges freedom of contract, with possible unintended consequences. Contractual terms are said to provide clarity and certainty for copyright users about how they may deal with copyright materials.

20.73 The economic value of freedom of contract is an important factor. Arguably, most contractual restrictions imposed on licensees 'are designed either to protect the integrity of the work or the owner's financial interests'. Both these interests are legitimate concerns.[88]

20.74 From this perspective, copyright users should be able to effectively agree that they will pay for uses covered by unremunerated exceptions in the *Copyright Act*, for example, under the libraries and archives exceptions. Any restrictions on permissible uses should, in theory, be reflected in the price paid to the copyright owner.

20.75 At the same time, copyright users may gain benefits under the contract that they might otherwise not have, for example, access to the whole of the work for the making of copies or for the purposes of communication or adaptation. A contractual term is not 'necessarily unfair' if it prohibits something allowed under a copyright exception when the context in which the term is used is fully considered, including the benefit to the user of the contract as a whole.[89]

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86 The Law Council stated that '[i]n this way, both freedom of contract and the public interests protected by copyright are protected'. For example, where an author provides his or her novel to a book reviewer, for the purpose of writing a review and a term of their agreement is that the review must not be published until three months later, when the novel is publicly released. 'This is a fair and reasonable contractual term that limits the fair dealing exception for criticism and review': Intellectual Property Committee, Law Council of Australia, *Submission 765*.

87 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

88 J Carter, E Peden, K Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 34.

89 Copyright Council, *Response to report of Copyright Law Review Committee on Copyright and Contracts* (2003).

20.76 However, contracting out has the potential to render exceptions under the *Copyright Act* inoperative. Contractual terms excluding or limiting copyright exceptions are commonly used. While contracts may create clarity and provide copyright users with permission to use materials in ways that would otherwise be an infringement, some contractual terms can also erode 'socially and economically important uses of copyright works'.[90] Further, copyright users are often unable to negotiate the terms on which copyright materials are licensed, particularly where contracts are entered into online.

20.77 Where copyright owners are in a strong bargaining position, they may overreach and circumvent the provisions of the Act, so that 'private ordering' leads to a different balancing of parties' rights than is contemplated in the many complex and carefully structured statutory provisions of the *Copyright Act*.[91]

20.78 There are differing views on the extent to which the general law and legislation outside the *Copyright Act* are adequate to constrain contracting out, at least where agreements are governed by Australian law.

20.79 In particular, as discussed above, it has been argued that many contractual terms that restrict user rights under the *Copyright Act* are invalid through the application of 'the public policy rule relating to the ouster of the jurisdiction of the courts'.[92] Therefore, expressly prohibiting contracting out may not be necessary, because 'the common law already provides for invalidity in cases where the public interest requires it'.[93] Other commentators, however, observe that there is nothing in the *Copyright Act* to suggest that copyright exceptions cannot be pre-empted contractually.[94]

20.80 The ALRC has concluded that contracting out puts at risk the public benefit that copyright exceptions are intended to provide and, therefore, some express limitations should be considered. This conclusion is consistent with 2002 recommendations of the CLRC,[95] and with proposed reforms in the UK and Ireland.

20.81 In its 2012 response to the Hargreaves Review,[96] the UK Government announced that it would legislate to ensure that new copyright exceptions 'cannot be undermined or waived by contract'.[97] In June 2013, the UK Intellectual Property

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90 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 19.

91 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

92 J Carter, E Peden, K Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 54. Carter, Peden and Stammer consider that, as the rights conferred by the *Copyright Act* include positive rights—for example, statutory licences that may be enforced by action against an owner, and rights that may be relied upon by way of defence in proceedings for infringement, this is sufficient to bring the public policy rule into operation: Ibid, 41–42.

93 J Carter, E Peden, K Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 54.

94 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

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

96 The Hargreaves Review recommended, in 2011, that the UK Government should change the law to make it clear that no exception to copyright can be overridden by contract: I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 51.

97 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 19.

Office released draft legislation to modernise copyright exceptions, including new exceptions for private copying, parody, quotation and public administration, which include limitations on contracting out.[98]

20.82 In Ireland, the Copyright Review Committee recommended in 2013, just before completion of this Report, that any contract term which unfairly purports to restrict an exception permitted by Irish copyright law should be void.[99] Whether a term is unfair would, under the Committee's recommendation, depend on all the circumstances of the case and, in particular, where a contract 'has not been individually negotiated, a term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the party who had not drafted the term in question'.[100]

Scope of new limitations

20.83 Reform in this area should address public policy problems caused by contracting out, without unnecessarily restricting innovation and flexibility in licensing practices.

20.84 New limitations on contracting out might apply to all exceptions, or only some exceptions—for example, those that serve certain important public interests, or which are fundamental to the copyright balance. In this context, the CLRC recommended that 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'.[101]

20.85 The CLRC's recommendations were based on a view that contracting out may upset the copyright 'balance'.[102] The CLRC considered that the fair dealing exceptions are 'an integral component of the copyright interest'.[103]

20.86 The idea of balance is an underlying theme of those seeking to defend the operation of copyright exceptions from contractual arrangements. The concern is that 'privately enforced arrangements have the potential to upset important public policies

98 Intellectual Property Office (UK), *New Exception for Quotation* (2013); Intellectual Property Office (UK), *Technical Review of Draft Legislation on Copyright Exceptions—New Exception for Private Copying* (2013); Intellectual Property Office (UK), *Technical Review of Draft Legislation on Copyright Exceptions—New Exception for Parody* (2013); Intellectual Property Office (UK), *Technical Review of Draft legislation on Copyright Exceptions—Amendment to Exceptions for Public Administration* (2013).

99 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 13.

100 Ibid, 138.

101 Copyright Law Review Committee, *Copyright and Contract* (2002), 266, 274, referring to *Copyright Act 1968* (Cth) ss 40, 41, 42, 43, 43A, 48A, 49, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, 111A. 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 in the course of a communication: referring to *Copyright Act 1968* (Cth) ss 43A, 111A.

102 Copyright Law Review Committee, *Copyright and Contract* (2002), 262.

103 Ibid, 266.

embodied in copyright law, which are premised on establishing a balance of interests'.[104]

20.87 However, recourse to the idea of a copyright 'balance' that must be maintained in the face of freedom of contract may be criticised.[105] The ALRC is not convinced that limitations on contracting out can be justified by recourse to arguments based on a need to maintain a copyright balance. The idea of balance is constantly contested, as legislators and policy makers seek to determine how rights should be reformulated or modified[106]—a process illustrated by this Inquiry.

20.88 Other arguments for and against limitations on contracting out derive from different conceptual understandings of copyright exceptions—on whether exceptions are considered to define the scope of the copyright owner's exclusive rights (that is, are integral to those rights), or are simply defences to claims of infringement of those exclusive rights.

20.89 If the former view is taken, it may be easier to justify limiting contracting out—on the basis that the copyright owner is seeking to extend its exclusive rights beyond their statutory limits. Again, however, the ALRC is not convinced that such an analysis is the most useful prism through which to view the issue, especially because it raises conceptual arguments on which stakeholders have long disagreed.

20.90 A better criterion for identifying exceptions that should be subject to statutory protection from contracting out is the extent to which exceptions serve defined public purposes that warrant protection. Limitations on contracting out of exceptions that serve public purposes may promote fair access to content, consistently with the framing principles for this Inquiry.[107]

20.91 A 2010 paper for the UK Strategic Advisory Board for Intellectual Property Policy examined how the rationales for different copyright exceptions may dictate whether or not contractual overriding should be permitted. The paper notes distinctions between exceptions that safeguard 'fundamental freedoms' or 'reflect public policy norms' (such as criticism or review; and news reporting); and those that affect 'less fundamental principles'.[108] While there is a case for protecting the former category of

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104 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 8.

105 See, eg, Australian Publishers Association, *Submission 225*. Lindsay notes that simply to invoke the concept of balance says 'nothing about why the objective of copyright law should be to balance owner and user interests, what an appropriate balance should be, and whether the balance established by the current complex combination of exclusive rights and exceptions is anywhere near appropriate': D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 8.

106 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.10].

107 Ch 2, framing principle 3.

108 M Kretschmer, E Derclaye, F Favale and R Watt, *A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy* (2010), 73.

exceptions, exceptions that simply address market failure (such as statutory licences), do not justify such protection.[109]

Contracting out and fair use

20.92 The nature of an open-ended fair use exception means that limitations on contracting out may have unintended consequences for business models for the distribution of copyright materials. One reason policy makers have been reluctant to be prescriptive about limitations on contracting out is the difficulty of predicting future developments in emerging markets and technologies.[110] Unnecessary limitations on freedom to contract may reduce the flexibility and adaptiveness to new technologies of the copyright regime.[111]

20.93 It is significant that, in the US, there are no statutory restrictions on contracting out of fair use. Arguably, freedom to contract becomes more important in a fair use environment:

> As the copyright statute becomes less specific and certain in outlining the parameters and boundaries of free-use exceptions, the value of contractual provisions that can translate general statutory 'principles' into specific licensing 'rules' to which the parties to the contract agree to be bound increases proportionally.[112]

20.94 The fair use exception covers an open-ended category of uses, only some of which serve important public interests. However, as discussed above, distinguishing between different categories of fair use for the purpose of limitations on contracting out is problematic and may have flow-on effects for the interpretation of fair use.

20.95 For these reasons, the ALRC does not consider that the *Copyright Act* should provide statutory limitations on contracting out of the fair use exception. In some circumstances, as discussed above, other laws may operate to render contractual terms unenforceable where they are against public policy or unfair.

20.96 The ALRC expects that the contractual background to any dispute over copyright infringement would nevertheless be able to be taken into account in determining whether fair use exists—in particular, as part of the assessment of the 'purpose and character of the use' under the first fairness factor. That is, whether a particular use was in breach of contract may be relevant to a fairness determination. It may also be possible to take into account the effect that a finding of fair use would have on a copyright owner's ability to use contracts to control the market for its works, under the fourth ('potential market') factor.[113]

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109 Ibid, 73–74.

110 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 110.

111 Ch 2, framing principle 4.

112 Motion Picture Association of America Inc, *Submission 573*.

113 So that, 'contractual provisions that are genuinely reasonable and necessary to protect rights-holders' markets should not be unduly affected': R Xavier, *Submission 816*. See also R Giblin, *Submission 660*.

Contracting out and fair dealing

20.97 In the Australian context, the existing fair dealing exceptions[114] protect important public interests in education, the free flow of information and freedom of expression, which the CLRC recommended should be protected. Consistently, the ALRC recommends that, if fair use is not enacted, limitations on contracting out should apply to these fair dealing exceptions. These exceptions are long-established and their scope is well understood, so limitations on contracting out should not cause disruption to existing business models.

20.98 The new fair dealing exception incorporates the existing fair dealing provisions and, in addition, provides for fair dealing covering quotation, non-commercial private use, incidental or technical use, educational use, library or archive use, and access for people with disability.[115]

20.99 In the ALRC's view, these should also be covered by limitations on contracting out. In part, this is a pragmatic recommendation, avoiding the need to distinguish between different categories of fair dealing for the purposes of contracting out. In part, it reflects a balancing of interests. That is, if users of copyright materials continue to be restricted to a closed category of fair uses, these rights should be protected from contracting out. In the less confined, more market-oriented environment of an open-ended fair use exception, limitations on contracting out are harder to justify and more likely to have unintended effects.

Other exceptions

20.100 Whether or not fair use is implemented, statutory limitations on contracting out should apply to the library and archives exceptions.[116] These are clearly for public rather than private purposes. The beneficiaries of the rights are users of the libraries. For example, under s 48A of the *Copyright Act*, the copyright in a work is not infringed by anything done by a parliamentary library for the sole purpose of assisting a person who is a member of parliament in the performance of the member's duties. The designated beneficiary is the member of parliament, on whose behalf the act is done.[117]

20.101 The fact that users of libraries and archives benefit from these exceptions, but are not parties to the licensing arrangements entered into by libraries and archives, makes it easier to argue that these exceptions should not be able to be removed by contract. An express limitation on contracting out from these exceptions may help remedy problems being experienced by libraries, in particular. Such an approach would be consistent with the principle of promoting fair access to, and wide dissemination of, content.[118]

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114 *Copyright Act 1968* (Cth) ss 41, 103A; 41A, 103AA; 42, 103B; s 43(2).

115 See Ch 6.

116 *Copyright Act 1968* (Cth) ss 48A, 49, 50, 51, 104A and the new exception for preservation copying recommended in Ch 12.

117 J Carter, E Peden, K Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 46–47.

118 See Ch 2, framing principle 3.

20.102 Arguably, the judicial proceedings exceptions[119] and government use exceptions[120] should also be subject to express limitations on contracting out. The rationale for these exceptions is to protect the public interest in the efficient functioning of the justice system and public administration more generally. The new exceptions cover use of copyright material for public inquiries; where a statute requires public access; and where copyright material is sent to governments in the course of public business.[121]

20.103 However, a contractual term that sought to prevent copyright material being used in judicial proceedings or a public inquiry would be among those most likely to be found contrary to public policy and, therefore, void or unenforceable under the common law doctrine discussed above. In any case, the copyright material used under the recommended new exceptions will not often have been acquired under a contract.

Framing the limitations

20.104 The wording of the ALRC's Discussion Paper proposal on contracting out was based on the language used in s 47H, the only existing limitation on contracting out contained in the *Copyright Act*.[122] This section states that:

> an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of [the computer program exceptions], has no effect.

20.105 The Law Council submitted that any new limitation on contracting out should not follow this model because s 47H purports to invalidate agreements that exclude or limit exceptions, whether or not a particular act infringes copyright. A contracting out provision should focus on the acts contemplated by the exception.[123]

20.106 While the exact wording of an Australian provision is best left to specialist parliamentary drafters, the proposed UK provisions appear to avoid this particular problem in providing that:

> To the extent that the term of any contract purports to restrict or prevent the doing of any act which would otherwise be permitted by [an exception], that term is unenforceable.

20.107 The ALRC recognises that the recommendation, if implemented, will not affect contracts governed by foreign law. Licensing agreements may specify that the law of another country will apply in determining the rights of the parties, or that a foreign court has exclusive jurisdiction over disputes. Parties to a contract can choose

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119 *Copyright Act 1968* (Cth) ss 43(1), 104.

120 See Ch 15.

121 These new exceptions would be available to Commonwealth, state and local governments. See Ch 15.

122 Another model is provided by the Australian Consumer Law: *Competition and Consumer Act 2010* (Cth) sch 1 s 276.

123 The Law Council submitted that limitations on contracting out should provide that 'a term of a contract is void if (a) the term prevents a person from doing an act falling within one of the nominated exceptions; and (b) the term is unfair or unreasonable. The provision could set out factors to be taken into account in determining whether the term is unfair or unreasonable': Intellectual Property Committee, Law Council of Australia, *Submission 765*.

the proper law by an express provision in their agreement. Where the parties have not chosen the proper law, the contract is, in general, governed by the system of law with which the transaction has its closest and most real connection.[124]

20.108 While Australian statutory limitations on contracting out would not affect contracts governed by foreign law, it is also possible to enact accompanying provisions that override the parties' ability to choose foreign law,[125] or will apply despite the parties' express choice of law.[126] The Australian Government may wish to consider whether to recommend such a provision, limiting parties' ability contractually to choose a foreign system of law, where the contract would otherwise governed by Australian law.[127]

20.109 Finally, in recommending limitations on contracting out that are only applicable to some exceptions, the ALRC is not indicating that contractual terms excluding other exceptions should necessarily be enforceable. Rather, this is a matter that should be left to be resolved under the general law or other legislation, including the *Competition and Consumer Act*.

20.110 If the ALRC's recommendation is implemented, explanatory materials should record that Parliament does not intend the existence of an express provision against contracting out of some exceptions to imply that exceptions elsewhere in the *Copyright Act* can necessarily be overridden by contract, but that this would need to be determined on a case by case basis.[128]

Recommendation 20–1 The *Copyright Act* should provide that any term of an agreement that restricts or prevents the doing of an act, which would otherwise be permitted by specific libraries and archives exceptions, is unenforceable.

Recommendation 20–2 The *Copyright Act* should not provide statutory limitations on contracting out of the fair use exception. However, if fair use is not enacted, limitations on contracting out should apply to the new fair dealing exception.

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124 Thomson Reuters, *The Laws of Australia*, [5.11.1180].

125 See, eg, *Bills of Exchange Act 1909* (Cth) s 77.

126 See, eg, *Insurance Contracts Act 1984* (Cth) s 8.

127 For example, *Insurance Contracts Act 1984* (Cth) s 8 provides that, 'where the proper law of a contract or proposed contract would, but for an express provision to the contrary included or to be included in the contract or in some other contract, be the law of a State or of a Territory in which this Act applies or to which this Act extends, then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory'. CSIRO submitted that the exercise of copyright exceptions in Australia should be protected 'notwithstanding governing law of the relevant contract': CSIRO, *Submission 774*.

128 The ADA and ALCC expressed concern that, in protecting some exceptions and being silent as to others, 'general principles of statutory interpretation' may operate to create a 'strong presumption' that the unprotected exceptions were not intended by Parliament to be protected: ADA and ALCC, *Submission 586*.

Technological protection measures

20.111 Concerns about contracts supplanting copyright law are 'commonly coupled with concerns that technological forms of protection, such as encryption, will give copyright owners effective control over access to, and uses of, copyright material in digital form'.[129]

20.112 The use and circumvention of TPMs raise similar policy issues to those raised by contracting out. It has been argued, for example, that if parties are not able to contract out of the fair dealing exceptions, neither should copyright owners be able to make fair dealing irrelevant by means of technological access controls.[130]

20.113 Just as the CLRC recommended that the operation of some copyright exceptions should be preserved by statutory restrictions on contracting out, a number of previous reviews have reached similar conclusions in relation to TPMs.

20.114 In 2004, the Digital Agenda Review concluded that the *Copyright Act* should be amended to provide that 'any attempt to contractually prohibit the use of a circumvention device or service for the purposes of fair dealing is unenforceable'.[131] In 2006, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that an exception for 'fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice' be included in new TPM provisions of the *Copyright Act*.[132]

20.115 The TPM provisions subsequently enacted by the *Copyright Amendment Act 2006* (Cth) did not contain any such exception, in part because of obligations under the Australia-US Free Trade Agreement.[133]

20.116 If limitations on contracting out are implemented, consistent amendments to TPM provisions may be justified. That is, there may be little point in restricting contracting out of exceptions if TPMs can be used unilaterally by copyright owners to achieve the same effect.

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129 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 5.

130 M De Zwart, 'Technological Enclosure of Copyright: The End of Fair Dealing?' (2007) 18 *Australian Intellectual Property Journal* 7, 38.

131 Phillips Fox, *Digital Agenda Review: Report and Recommendations* (2004), [1.6].

132 Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of Technological Protection Measures Exceptions* (2006), rec 27, [4.169].

133 *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005), art 17.4.7(e)(viii). See M De Zwart, 'Technological Enclosure of Copyright: The End of Fair Dealing?' (2007) 18 *Australian Intellectual Property Journal* 7, 21.

Consultations

Name	Location
Charles Alexander (Minter Ellison)	Sydney July 2012
Art Gallery of NSW	Sydney April 2013
Arts Law Centre	Sydney August 2013
APRA/AMCOS	Sydney October 2012
APRA/AMCOS; Australian Music Publishers Association; Australian Recording Industry Association; Phonographic Performance Company of Australia	Sydney August 2013
Australian Broadcasting Corporation	Sydney February 2013
Australian Competition and Consumer Commission	Melbourne November 2012 & July 2013
Australian Copyright Council	Sydney June 2012
Australia Council for the Arts	Sydney August 2013

Name	**Location**
Australian Digital Alliance	Canberra August 2013
Australian Digital Alliance; Australian Libraries Copyright Committee; Australian Library and Information Association	Canberra June 2012
Australian Digital Alliance; Policy Australia	Sydney February 2013
Australian Federation Against Copyright Theft; Australian Home Entertainment Distributors Association	Sydney October 2012
Australian Football League	Melbourne August 2012 & July 2013
Australian Government Attorney-General's Department, Business Law Branch	Canberra June 2012 & September 2013
Australian Institute of Aboriginal and Torres Strait Islander Studies	Canberra August 2013
Australian Institute of Professional Photography	Sydney August 2013
Australian National Library Information Association	Sydney August 2013
Australian Parliamentary Library	Sydney September 2013
Australian Publishers Association	Sydney October 2012

Name	**Location**
Australian Recording Industry Association; Phonographic Performance Company of Australia Limited	Sydney October 2012
Australian Subscription Television and Radio Association	Sydney July 2013
Australian War Memorial	Canberra September 2013
Australian Writers Guild	Sydney August 2013
Association of Consulting Surveyors NSW	Sydney February 2013
Professor Kathy Bowrey (University of New South Wales)	Sydney June 2012
Broadcast Australia	Sydney July 2013
Alex Byrne (State Library of New South Wales)	Sydney July 2012
Canadian Media Production Association	Sydney November 2013
Choice	Sydney February 2013
Clickview	Sydney August 2013
Coalition of Major Professional and Participation Sports	Sydney August 2013

Name	**Location**
Collecting societies roundtable: APRA/AMCOS; Copyright Agency; Phonographic Performance Company of Australia; Screenrights; Viscopy	Sydney July 2012
Commercial Radio Australia	Sydney August 2013
Content owners roundtable: Australian Publishers Association; APRA/AMCOS; Australian Recording Industry Association; Copyright Agency; Foxtel; Hoyts; Interactive Games and Entertainment Association; Microsoft; News Corp Ltd; Paramount Home Entertainment Australia; 20th Century Fox Television Distribution	Sydney April 2012
Copyright Advisory Group (Schools & TAFE)	Sydney March & July 2013
Copyright Agency	Sydney February & August 2013
Creators roundtable: Kingston Anderson; Robyn Ayres; Jenny Darling; Jacqueline Elaine; Angelo Loukakis; Paul Mason; Tamara Winikoff	Sydney May 2013
Cultural sector roundtable: Australian Broadcasting Corporation; Australian Institute of Aboriginal and Torres Strait Islander Studies; Australian Libraries Copyright Committee/Australian Digital Alliance; Australian Library and Information Association; Art Gallery of NSW; Council of Australasian Museum Directors; International Federation of Library Associations and Institutions; Museum Victoria; National Archives of Australia; National Film and Sound Archive; National Gallery of Victoria; National Library of Australia; National Maritime Museum; National Museum of Australia; National and State Libraries Australasia Copyright Group; Special Broadcasting Service; State Library of NSW, State Library of Queensland; State Library of South Australia; State Library of Victoria; State Records NSW; Powerhouse Museum; University of Technology	Sydney April 2013

Name	**Location**
Cyberspace Law and Policy Centre	Sydney February 2013
Department of Broadband, Communications and the Digital Economy	Canberra November 2012 & September 2013
Department of Science, Information Technology, Innovation and the Arts (Qld)	Sydney September 2013
Professor Henry Ergas, Network Economics Consulting Group	Sydney May, 2012 Canberra August & September 2013
Patrick Fair (Baker & McKenzie and Internet Industry Association)	Sydney June 2012
Professor Brian Fitzgerald (Australian Catholic University)	Melbourne June 1012
Foxtel	Sydney March & July 2013
Free TV Australia	Sydney October 2012 & August 2013

Name	**Location**
GLAM sector roundtable: ACT Heritage Library; Australian Government Libraries Information Network; Australian Law Librarians Association; Australian Libraries Copyright Committee; Australian Library and Information Association; Australian National University Law Library; Australian Society of Archivists; Council of Australian University Librarians; Flinders University; National Archives of Australia; National Library of Australia, National Museum of Australia; State Library of South Australia; State Library of Western Australia; Swinburne University of Technology	Canberra August 2013
Gabrielle Gardiner	Sydney February 2013
Google Australia and New Zealand	Sydney August 2013 & July 2012
Dr Nicholas Gruen (Lateral Economics)	Melbourne June 2012
John Habjan (Embassy of United States of America)	Sydney October 2012
Richard Hooper (Copyright Hub Launch Group); Simon Lake, (Screenrights)	Sydney October 2012
Dan Ilic (writer, performer, filmmaker)	Sydney October 2012
Interactive Games and Entertainment Association	Sydney October 2012

Name	**Location**
The Hon Justice Susan Kenny (Federal Court of Australia, ALRC Part-time Commissioner until July 2012)	Melbourne June 2012 & July 2013
Professor Andrew Kenyon, Professor Megan Richardson (Melbourne University); Dr Emily Hudson (Oxford University); Robin Wright (Swinburne University of Technology)	Melbourne August 2012
The Hon Kevin Lindgren QC	Sydney June 2012
Associate Professor David Lindsay (Monash University)	Melbourne June 2012
Melbourne University—Academic roundtable: Dr Emily Hudson, Professor Andrew Kenyon, Professor Megan Richardson (Melbourne University Law School); Associate Professor David Lindsay, Paul Sugden (Monash University); Marc Trabsky (La Trobe University; Dilan Thampapilai (Deakin University); Mark Williams (RMIT); Amanda Scardamaglia, Robyn Wright (Swinburne University of Technology)	Melbourne July 2013
Microsoft Australia	December 2012
Music Industry Roundtable: David Albert (Albert Group); APRA/AMCOS; Australian Music Publishers Association; Australian Recording Industry Association; Jenny Morris (singer/songwriter); Phonographic Performance Company of Australia; John Watson (John Watson Management)	Sydney April 2013
National Archives of Australia	Canberra November 2012
National Copyright Unit (Schools)	Sydney October 2012

Name	**Location**
National Film and Sound Archives	Canberra November 2012
National Rugby League	Melbourne September 2013
Matthew Nevin (Senior Adviser on the Commonwealth Cyber White Paper)	Canberra June 2012
News Limited	Sydney December 2012
NSW local government roundtable: Helen Dakin and Lynne Shearman (Department of the Attorney General and Justice); Peter Holt (NSW Department of Planning and Infrastructure); Frank Loveridge (Local Government NSW)	Sydney September 2013
NSW Department of Attorney General and Justice	Sydney September 2012 & August 2013
Policy Australia	Sydney June 2012
Professor Sam Ricketson (University of Melbourne)	Melbourne June 2012
Associate Professor Matthew Rimmer (Australian National University), Alan Hui and Alison McLenna	Canberra June 2012
Professor Matthew Sag (Loyola University of Chicago)	Canberra February 2013

Name	**Location**
Professor Maree Sainsbury, Associate Professor Bruce Arnold (University of Canberra)	Canberra June 2012
Screen Producers Association of Australia	Sydney August 2013
Screenrights	Sydney March & September 2013
Special Broadcasting Service	Sydney August 2013
Telstra	Melbourne November 2012 & July 2013
Ultraviolet Working Group	Sydney January 2013
Universities Australia	Sydney October 2012 March & July 2013
Victorian Government, Department of Treasury and Finance	Melbourne July 2013
Walt Disney Company	Sydney May 2013 Melbourne July 2013

Abbreviations

AANA	Australian Association of National Advertisers
AAP	Australian Associated Press
ABC	Australian Broadcasting Corporation
ACARA	Australian Curriculum, Assessment and Reporting Authority
ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
ACIG	Australian Content Industry Group
ACL	Australian Consumer Law
ACMA	Australian Communications and Media Authority
ACTF	Australian Children's Television Foundation
ADA	Australian Digital Alliance
AFL	Australian Football League
AGD Fair Use Review	Attorney-General's Department's Fair Use Review
AGD Orphan Works Review	Attorney-General's Department's Internal Orphan Works Review
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AIG	Australian Industry Group
AIIA	Australian Information Industry Association

AIMIA Digital Policy Group	Australian Interactive Media Industry Association Digital Policy Group
AIPP	Australian Institute of Professional Photography
AIR	Australian Independent Record Labels Association
ALAA	Australian Literary Agents' Association
ALCC	Australian Libraries Copyright Committee
ALIA	Australian Library and Information Association
ALLA	Australian Law Librarians Association
ALPSP	Association of Learned and Professional Society Publishers
AMCOS	Australasian Mechanical Copyright Owners Society
AMPAL	Australasian Music Publishers Association
APA	Australian Publishers Association
APRA	Australasian Performing Right Association
ARC	Australian Research Council
ARIA	Australian Recording Industry Association
ASA	Australian Society of Archivists
ASTRA	Australian Subscription Television and Radio Association
AUSFTA	*Australia–United States Free Trade Agreement*
Berne Convention	*Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*
Broadcasting Services Act	*Broadcasting Services Act 1992* (Cth)
BSA	BSA/The Software Alliance
CAARA	Council of Australasian Archives and Records Authorities

CAG Schools	Copyright Advisory Group—Schools
CAG TAFE	Copyright Advisory Group—TAFEs
CAL v NSW	*Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279
Campbell	*Campbell v Acuff-Rose* (1994) 510 US 569
CAMD	Council of Australian Museum Directors
CCI	ARC Centre of Excellence for Creative Industries
CCLA	Canadian Copyright Licensing Authority
CLA	Copyright Licensing Agency
CLRC	Copyright Law Review Committee
CNMCC	Combined Newspapers and Magazines Copyright Committee
COMPPS	Coalition of Major Professional and Participation Sports
CONFU	Conference on Fair Use
Copyright Act	*Copyright Act 1968* (Cth)
CRA	Commercial Radio Australia
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DCE	Digital Copyright Exchange
DSITIA (Qld)	Department of Science Information Technology Innovation and the Arts (Qld)
ECL	Extended collective licensing
EFA	Electronic Frontiers Australia Inc
Ergas Committee	Intellectual Property and Competition Review Committee
EU	European Union

FOI	Freedom of information
FOI Act	*Freedom of Information Act 1982* (Cth)
FOI law	Freedom of information legislation
Franki Committee	Copyright Law Committee, *Report on Reprographic Reproduction* (1976)
Free TV	Free TV Australia
GIPA	*Government Information (Public Access) Act 2009* (NSW)
GLAM sector	Galleries, libraries, archives and museums
HADOPI	The French creation and internet law (*Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet*)
IASTMP	International Association of Scientific Technical & Medical Publishers
IFFRO	International Federation of Reproduction Rights Organisations
iGEA	Interactive Games and Entertainment Association
IIA	Internet Industry Association
IP	Intellectual property
IPTV	Internet protocol television
ISAA	Independent Scholars Association of Australia Inc
ISP	Internet service provider
JSCOT	Joint Standing Committee on Treaties
Law Council	Intellectual Property Committee, Law Council of Australia
LIV	Law Institute of Victoria
LPI	Land and Property Information division of the NSW Government

Marrakesh Treaty	*Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled*
MCA	Music Council of Australia
MEAA	Media, Entertainment and Arts Alliance
MOOCs	Massive open online courses
MPAA	Motion Picture Association of America Inc
Munich Declaration	*Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law*
NAVA	National Association for the Visual Arts
NBN	National Broadband Network
NFSA	National Film and Sound Archive of Australia
NLA	National Library of Australia
NRL	National Rugby League Limited
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Co-operation and Development
OTT TV	'Over the top' television
PPCA	Phonographic Performance Company of Australia
PwC	PricewaterhouseCoopers
Rome Convention	*International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*
SBS	Special Broadcasting Service
SIBA	Spatial Industries Business Association
SPAA	Screen Producers Association of Australia

Spicer Committee	Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959)
TAFE	Technical and further education
TPMs	Technological protection measures
TRIPs	*Agreement on Trade-Related Aspects of Intellectual Property Rights*
VECL	Voluntary extended collective licensing
VET	Vocational education and training
WCT	*World Intellectual Property Organization Copyright Treaty*
WIPO	World Intellectual Property Organization
WPPT	*World Intellectual Property Organization Performances and Phonograms Treaty*
WTO	World Trade Organization