

# Copyright and the Digital Economy

*Submission by the Australian Digital Alliance and*

*Australian Libraries Copyright Committee*

*In response to*

*The Australian Law Reform Commission's Discussion Paper*

July 2013

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## Executive Summary

The ADA and ALCC strongly support the ALRC's proposals to introduce a broad, flexible fair use exception and to repeal the statutory licences. We believe these proposals will deliver an adaptable, technologically neutral copyright system suitable for the digital age which will support Australia's 21st century economic development.

The internet has profoundly changed the way we create, access and disseminate culture, ushering in new industries and altering our perceptions of creators. A systematic examination of the way copyright exceptions are working in this rapidly changing environment is essential to ensure that Australia can capitalize on the opportunities provided by new innovations.

In this context, we welcome the timeliness and relevance of the ALRC's inquiry and commend them on this discussion paper. In almost 400 pages of careful reasoning, they have clearly set out and examined the concerns of all major stakeholder groups, identifying both the practical effects and theoretical underpinnings of the current system. The conclusion that closely defined exceptions, limited in purpose and technology specific, are hindering Australian innovation is supported by the evidence, with stakeholders identifying issues as diverse as: the precariousness legality of internet caching;<sup>1</sup> the potential restrictions on Australian consumers being able to effectively use cloud storage;<sup>2</sup> and the inability of national institutions to properly preserve and present Australia's history.<sup>3</sup>

The major proposals; the introduction of fair use and the repeal of the statutory licences, are positive reforms that will encourage innovation and growth. By making the central question in copyright law one of fairness, innovative uses will no longer be ruled out simply because they don't fit into a pre-written definition. Instead uses will be weighed against a series of easily understood and familiar<sup>4</sup> factors, and assessed as to whether they are fair.

These reforms are an important step to 'future-proof' the law, removing the need for parliament to legislate in response to each technological development. It will put Australia on an equal footing with other major economies such as the USA and Singapore, who already operate under fair use and without statutory licences. In an increasingly globalised world, copyright intensive industries such as

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<sup>1</sup> See, for example, *eBay Issues Paper Submission 93*, p. 8; *Yahoo 7 Issues Paper Submission 276*, pp.3-4; *AIMIA Digital Policy Group Issues Paper Submission 261*, p.17; *Google Issues Paper Submission 217*, p. 25.

<sup>2</sup> See, for example, *AIMIA Digital Policy Group Issues Paper Submission 261*.

<sup>3</sup> See for Example *National Library of Australia Issues Paper Submission 218*; *Council of Australasian Archives and Records Authorities (CAARA) Issues Paper Submission 271*.

<sup>4</sup> Cf. *Copyright Act 1968* s51; USA - *s107 Copyright Act 1976*; Israel - *s19 Copyright Act 2007*; The Philippines - *s185 Intellectual Property Code*.

education, a \$60 billion contributor to Australia's economy,<sup>5</sup> need to be able to compete on a level playing field.

## Scope of our Submission

This submission in response to the ALRC's discussion paper *Copyright and the Digital Economy* builds on the principles and recommendations developed in our submission to the Issues Paper.<sup>6</sup> In addressing the specific proposals put forth by the ALRC, our submission covers the following chapters of the Discussion Paper:

4. Fair Use
6. Statutory licences
7. Fair Dealing
8. Non-consumptive Use
9. Private and Domestic Use
11. Libraries, Archives and Digitisation
12. Orphan Works
16. Broadcasting
17. Contracting Out

While strongly supporting the headline recommendations outlined in the discussion paper, we would like to draw the ALRC's attention to some details of concern for our members, which are addressed in detail in our submission.

- **Copyright and contract.** We are concerned that the proposal to explicitly protect only some fair uses from contractual override risks undermining fair use and exacerbating uncertainty.
- **Libraries and Archives.** The restrictions proposed for preservation copying and document supply may hamper institutions from fulfilling their public service duties.
- **Fair Use.** We are concerned about the potential that the interplay of various sections of the act would lead to a narrow reading of fair use.

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<sup>5</sup> Lateral Economics, *Exceptional Industries: The economic contribution to Australia of industries relying on limitations and exceptions to copyright* (August 2012) p. 8, [http://digital.org.au/content/LateralEconomics Reports](http://digital.org.au/content/LateralEconomics%20Reports).

<sup>6</sup> Australian Digital Alliance and Australian Libraries Copyright Committee *Issues Paper Submission 213*.

- **Fair Dealing.** If the ‘fallback’ position of enhanced fair dealing is implemented we are concerned that it may be unworkably restrictive, especially in regards to third parties.
- **Consumers.** We wish to ensure that consumers will be adequately protected.

Our concerns, suggestions and requests for clarification are outlined in detail in the body of the submission below.

We would also like to endorse the submissions of the National Library of Australia, Universities Australia and CAG – Schools.

We welcome the ongoing opportunity to contribute to the discussion about Australia’s copyright future, and look forward to the ALRC’s final recommendations.

## About the Australian Digital Alliance

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.

## About the Australian Libraries Copyright Committee

The Australian Libraries Copyright Committee is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Australian Library and Information Association
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia
- Australian Government Libraries Information Network

## The Case for Fair Use in Australia

Fair use is a defence to copyright infringement. It essentially asks of any particular use, ‘is this fair?’ This is determined on a case by case basis. The statute does not define what is fair.<sup>7</sup>

We strongly endorse the ALRC’s fair use proposal.

As outlined in our submission to the issues paper,<sup>8</sup> Australia’s current copyright regime, with its collection of narrow, specific exceptions, is hindering innovation. Currently uses, however fair, however innovative, however beneficial, cannot be excepted from copyright restrictions if they do not fall within the defined parameters of a purpose-based exception. By contrast, fair use allows uses to be assessed as to whether they are fair, encouraging people to use, innovate, and experiment in ways that still protect creators’ interests.

### Fair use is not arbitrarily restrictive

Framing the fair use exception to incorporate a ‘non-exhaustive’ list of illustrative purposes will help to provide guidance to users, creators and courts without creating undesirable inflexibility.

For example, should assistance for people with a disability not be included as an illustrative purpose (please see discussion at pages 12-13 below) we anticipate that uses that place people with a disability on an equal footing with other users could still be found to be ‘fair’.<sup>9</sup> Uses likely to be permitted under fair use, that were noted by the ALRC as likely to fall outside the current fair dealing provisions, include:

accessible formats of texts—including ‘verbalisation of elements such as page numbers or spelling of proper names’ and navigational tools<sup>10</sup>— for blind or vision impaired persons<sup>11</sup>

The move to a non-exhaustive list of illustrative purposes would be a welcome advance from the current situation, where courts are forced to focus on the defined purpose of the use. For example in the ‘Panel case’<sup>12</sup> a TV channel was sued for using short excerpts on a satirical comedy show. In

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<sup>7</sup> Australian Law Reform Commission (ALRC) *Copyright and the Digital Economy - Discussion Paper* at 4.5.

<sup>8</sup> Australian Digital Alliance and Australian Libraries Copyright Committee (ADA and ALCC) *Issues Paper Submission 213*.

<sup>9</sup> See for example *Authors Guild, Inc v Hathitrust* 902 F Supp 2d 445 (SDNY 2012), holding (at 461) that uses aimed at facilitating access for the print-disabled are transformative, and (at 464) did not significantly impact any market. In that case District Judge Harold Baer concluded that “I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants’ MDP and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the [Americans with a Disability Act].” (at 464).

<sup>10</sup> Vision Australia, *Issues Paper Submission 181*.

<sup>11</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 4.5 referencing Blind Citizens Australia, *Issues Paper Submission 157*.

<sup>12</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No. 2)* (2005) FCAFC 53

their judgment, the full Federal Court found that several of the uses could not be characterized as reporting the news, criticism or review, and were therefore not covered by an exception. Shortly afterwards the law was changed to include a new fair dealing provision for parody and satire. This incremental law reform, in response to cases where the uses could be considered 'fair' could itself be considered 'unfair'. We submit the ALRC's approach makes much more sense - enabling a court to take into account the user's purpose as well as the nature of the copyright work, but to do so in the context of a more general assessment of whether a use is fair.

One crucial area in which fair use is preferable to fair dealing and other purpose based exceptions, is third party uses. By asking 'is the use fair' and how it relates to the policy goals of copyright, rather than asking only 'what is the purpose of the person using the material' it encourages courts to focus more squarely on the whether the use at issue is something which should be permitted, rather than whether it fits within an arbitrary pigeonhole.<sup>13</sup> This will avoid the current unfortunate situation where a student may be permitted to copy material under an exception, but a school cannot engage in exactly the same copying on their behalf without attracting a licence fee. It's vital to make this change now: as technology becomes more complex, third parties are becoming increasingly involved in transactions that involve issues of copyright. One obvious, and rapidly growing, example would be cloud storage operators who may be making copies on behalf of their users.<sup>14</sup>

### Fair Use is adaptable, not uncertain

In a rapidly changing world, there is a need for legislation that can adapt to new ways of creating and using content.

The current narrow, technology specific exceptions in the Act are too prescriptive to adapt to new technologies, and as a result need constant review and change in order to 'catch-up' with the changed world. As prominent American academics, Gwen Hinze, Peter Jaszi and Matthew Sag, write in a response to the Kernochan Report<sup>15</sup> addressing the ALRC's fair use proposal:

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<sup>13</sup> Although we note that in our view, there has been too much focus on the narrow approach of the court to third party uses in *De Garis* and insufficient attention paid to other cases where fair dealing has been applied despite the availability of an argument that there were 'third party uses', such as *The Panel*. The ADA/ALCC would also argue that it is open to Australian courts – especially in light of the fact that *De Garis* is a first instance decision – to adopt some of the reasoning used by Canadian Courts in cases like *CCH* or the recent *Access Copyright* decision that apply fair dealing where the copyright use is undertaken by a third party (such as a library or school) on behalf of an end user whose use falls within one of the prescribed purposes.

<sup>14</sup> Cf R Giblin' Stranded in the Technological Dark Ages: Implications from the Full Federal Court's decision in *NRL v. Optus*' European Intellectual Property Review (2012) 632-641.

<sup>15</sup> J Besek and others, *Copyright Exceptions in the United States for Educational Uses of Copyrighted Works* (2013), prepared for Screenrights.

Rule-based limitations and exceptions are quite vulnerable to technological rigidity and their application can hinge on arcane debates over taxonomy – these features can make rules perennially uncertain.<sup>16</sup>

The ALRC notes six major reviews of relevance to this inquiry in the last fifteen years,<sup>17</sup> seven if you include the current inquiry. Legislative change takes time and resources, and creates uncertainty for consumers and business.

The move to a principles based approach to fair use would move the Act to ‘copyright exceptions that are more like standards than rules’ which ‘will generally be more flexible and better able to adapt to new technologies, services, licensing environments and consumer practices.’<sup>18</sup>

This adaptability is often seen as a trade-off, with flexibility increased at the expense of certainty. We do not think this is the case. For a start, experience in other countries has shown that a fair use exception is not as unpredictable as claimed.<sup>19</sup> As Gwen Hinze, Peter Jaszi and Matthew Sag note:

The test for predictability should be whether like cases are decided alike, and whether the law is sufficiently clear to enable those well-versed in the law to provide coherent advice on the risks and benefits of future conduct. In our experience the fair use doctrine meets this test of predictability.<sup>20</sup>

In reviewing the academic literature they note that:

A number of comprehensive studies of fair use case law in the United States have concluded that the fair use doctrine has a set of core principles and is coherent across particular types of uses or “policy clusters”... no empirical study is perfect, but the empirical studies of fair use have clear advantages over less systematic anecdotal observation of the same events.<sup>21</sup>

The ALRC’s proposal to draft a fair use provision with reference to the four fairness principles already familiar from the existing fair dealing provision for research and study (and other

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<sup>16</sup>G Hinze, P Jaszi & M Sag *The Fair Use Doctrine in the United States — A Response to the Kernochan Report*, (July 2013) p. 3. Available at SSRN: <http://ssrn.com/abstract=2298833>.

<sup>17</sup> ALRC *Copyright and the Digital Economy – Issues Paper* at 21.

<sup>18</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 4.102.

<sup>19</sup> P Samuelson, ‘Unbundling Fair Use’ (2009) 77:5 *Fordham Law Review* 2537, 2618; and M Sag, ‘Predicting Fair Use’, (2012) 73:1 *Ohio State Law Journal* 76.

<sup>20</sup> G Hinze, P Jaszi & M Sag op. cit., p. 3.

<sup>21</sup> Ibid., p. 4.

international provisions)<sup>22</sup> strikes an appropriate balance between familiarity, certainty and flexibility.

Meanwhile there is plenty of evidence that the rigid ‘rules-based’ language of the current exceptions can be uncertain, especially when applied to new technologies not envisioned at the time of drafting. The ‘Optus TV Now case’<sup>23</sup> illustrates that point, which on appeal decided that the technology used by Optus in its TV Now system was not analogous to the DVD or VCRs that the court considered the government had in mind when they drafted the provision. In the wake of the judgment, most remote DVR services ceased business, one remarking:

When we launched the Beem PVR service, we, as well as our (very expensive) legal advisers were confident it was within the law as it stood. However, the Australian Federal Court has decided otherwise.<sup>24</sup>

This uncertainty is hindering innovation and putting Australian companies at a comparative disadvantage. As we stated in our submission to the issues paper:

While Australia's Copyright Act does not expressly prohibit activities such as indexing, searching and caching, the uncertainty created by the lack of exceptions clearly applicable to these activities makes undertaking these activities in Australia highly uncertain relative to comparable jurisdictions and exposes organisations deploying these technologies to uncertain legal risks. This has a negative effect on innovation, particularly innovation based in Australia.<sup>25</sup>

The move to a standards based provision also provides clarity. As Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall noted in their submission to the Issues Paper:

In our view, a well-drafted standard can provide an acceptable level of guidance, and all the more so as judicial precedent accumulates. In fact, when compared with a poorly-drafted detailed rule, a standard may provide greater certainty for users... In our view, well-understood legal concepts like “fairness” or “reasonableness” may in fact make the application of exceptions more predictable than they have been in the past.<sup>26</sup>

The non-exhaustive list of fairness factors for the proposed fair use exceptions is easy to read and comprehend. This compares favourably with sections such as 200AB – which combines standards

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<sup>22</sup> See for example: in the USA s107 *Copyright Act 1976*; in Israel s19 *Copyright Act 2007*; and in the Philippines s185 *Intellectual Property Code*.

<sup>23</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

<sup>24</sup> Quoted in R Giblin, op. cit., p. 640.

<sup>25</sup> ADA and ALCC *Issues Paper Submission 213*, p. 12.

<sup>26</sup> R Burrell, M Handler, E Hudson and K Weatherall *Issues Paper Submission 278*, p. 59.

with rules, producing 630 words of dense, interlinked exceptions, difficult to interpret and apply. Our research suggests it has hardly been used by those institutions it was designed to benefit as those who need to use it do not feel confident in their interpretation.<sup>27</sup> In the six years since its introduction there has not been one legal challenge, which means that we have just as much precedent for s200AB as we have for the currently theoretical fair use provision. Indeed, we possibly have more precedent for fair use, given the rich corpus of international precedents that would be highly persuasive in informing fair use litigation in Australia.<sup>28</sup>

Finally, we note that best practice guidelines would also assist certainty, and would likely do so in an efficient, non-litigious way. 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. These have worked successfully in other countries, and we would anticipate they would do the same in Australia.<sup>29</sup>

### Fair use supports a cohesive and fair copyright system

Under a provision where ‘all [fairness] factors would need to be considered and balanced and a decision made in view of all of them’<sup>30</sup> the interaction of fair use and licencing becomes reasonable. As the ALRC states:

the *Copyright Act* should not provide that free-use exceptions do not apply to copyright material that can be licensed. Instead, the availability of a licence should be an important consideration in determining whether a particular use is fair.<sup>31</sup>

In conjunction with the repeal of statutory licences this will be of great use to schools and governments, who have been paying under licence for uses that were free exceptions for others. Under fair use teachers would be able to display a short quote on an interactive whiteboard or send home a government fact sheet about head lice, without infringing copyright or paying for the use under a compulsory licence. At the same time, fair use ensures that creators will be protected from unfair uses of their content, and that future market development and licensing arrangement will be able to be supported. For example we would anticipate a fair use to be a teacher streaming an episode of a TV show from a catch up TV service in class, whereas a teacher copying an entire TV

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<sup>27</sup> 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?’ (October 2012); attached to ADA and ALCC Issues Paper Submission 213.

<sup>28</sup> See for example J Band & D Goldman *Global Fair Use and Fair Dealing Decisions Available Online* (2013) <http://infojustice.org/archives/30057>.

<sup>29</sup> G Hinze, P Jaszi & M Sag op. cit., pp.6-11.

<sup>30</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 4.150.

<sup>31</sup> Ibid. at 13.57.

series and uploading the series to ClickView for use throughout the school year would have to pay a licence fee.

Being able to rely on fair use will also be a comfort to libraries and archives. In focusing on fairness, fair use will operate to supplement the specific exceptions remaining in the Act, such as the library and archive exceptions for preservation copying and document supply. By ensuring these specific exceptions do not limit fair use exception, it will enhance certainty as to what uses would be permissible. To date, many of these organisations have been largely reluctant to use s200AB due to uncertainty as to its relationship with the other exceptions.<sup>32</sup>

With the benefits of adaptability and clarity, supported by codes of best practice, we believe that the proposed fair use provision would provide a good balance between flexibility and certainty, and be an efficient and effective support for Australian industry and innovation.

## Response to Question 4–1

### ‘What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?’

We strongly support the ALRC’s position that:

the fact that a use is not included as an illustrative purpose will not be a bar to that use constituting a fair use. In theory, a use for any purpose may be considered under the fair use exception.<sup>33</sup>

However, given the role of the illustrative purposes, there may be some interpretive value in including illustrative purposes to address uses to assist people with a disability and the computer exceptions. We would also prefer the wording private ‘or’ domestic over private ‘and’ domestic, to bring it into line with the other illustrative purposes.

### Assisting people with a disability

There are two major reforms in this area. Within this process, the ALRC has proposed the repeal of s200AB and the part VB statutory licence. Working together these two mechanisms currently provide the framework within the Copyright Act for assisting people with a disability. On an international front Australia has signed the recently concluded WIPO *Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities* (‘VIP Treaty’).<sup>34</sup> This

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<sup>32</sup> See ‘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?’ by Policy Australia October 2012 attached as attachment A to ADA and ALCC *Issues Paper Submission 213*.

<sup>33</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 4.161.

<sup>34</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled* (Marrakesh June 2013).

treaty obliges Australia to ensure our domestic law provides exceptions to copyright in order to allow:

- ‘authorised entities’ to make and supply to ‘beneficiary persons’ copies of works in an ‘accessible format’; and
- ‘beneficiary persons’ (or someone acting on their behalf) to make an ‘accessible format’ copy of a work for the personal use of the ‘beneficiary person’.

Our current system falls short of these obligations. Both Section 200AB and Part VB only apply to organisations making copies on behalf of people with disabilities, not to people making copies for themselves. In addition the part VB licences do not extend to artistic works, something that is included in the treaty definition of works.<sup>35</sup>

As noted above at p. 7, we think that the fair use provision as currently proposed would likely apply to uses to assist people with disabilities that do not unreasonably harm copyright owners’ markets. For example, making a Braille copy of a book where an acceptable version is not commercially available would probably be considered fair use. However, given the strong public interest in the area, the addition of another illustrative purpose would be eminently suitable, and we would submit that it is preferable not to limit it to the visually impaired and print disabled protected by the VIP treaty, but ensure it covers all those with disabilities. Because the uses would still be assessed against the fairness factors, the markets of rights-holders making, or wishing to develop, materials to assist the disabled would still be protected against unfair exploitation.

It may be wise for the Explanatory Memorandum to state that fair use is intended to uphold our obligations under the VIP Treaty to guide the courts’ deliberations.

We also note that in order to fulfil our international obligations it would be essential that fair use, for the purposes of assisting the visually impaired and print disabled, is not subject to contractual override. We strongly feel the best way to protect this is to protect fair use in its entirety from contracting out, as is discussed at pp. 55-62 below.

Should the fall-back proposal of fair dealing be adopted, we would argue that a fair dealing provision to assist people with disabilities, and people assisting people with disabilities, should be implemented as discussed below at p. 24.

### Computer software exceptions

The ALRC notes that at this stage it has not examined the exceptions in Part III Division 4A of the Copyright Act (the computer software exceptions). These exceptions can be used by both individuals and organisations to copy computer software for public interest reasons such as making a

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<sup>35</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled (Marrakesh June 2013) Article 2.

back up copy, security testing, reverse engineering for making interoperable products and error correction. Section 47H prevents the contractual override of these exceptions.

We wish to draw the ALRC's attention to three issues in this area: the substance and effect of the current provisions; proposal for reform; and concerns in regard to contracting out.

- **The Current Computer Software Exceptions**

### **Back up copying**

The ALRC notes that using copyright materials (including computer software) for back-up and data recovery purposes might be covered by the fair use exception.<sup>36</sup> However, this statement is made in the context of Chapter 9 *Private and Domestic Use*. It is not clear from the discussion paper whether back up copying (whether of software or of any other copyright material) done in organisations would also be considered to be a fair use.

Section 47C (the exception permitting a back up copy of computer software) is not included in the ALRC's list of the exceptions to be repealed on the introduction of a fair use exception.<sup>37</sup>

### **Reverse engineering, security testing etc**

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.

Some of these exceptions can be performed in a private and domestic context. However many are performed in a commercial context, either by companies performing testing 'in house', or by businesses that make a living by offering security testing and related services. As such, it is unclear whether they would be covered by the ALRC's proposed list of illustrative purposes. Many of the activities conducted under the computer software exceptions could be seen as non-consumptive,<sup>38</sup> such as running a program as part of its normal use or for the purposes of error correction. However it is possible that other purposes may not be considered to be non-consumptive, for example studying a program's operation.

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<sup>36</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 9.95.

<sup>37</sup> *Ibid.* Proposal 7-2.

<sup>38</sup> Although it is far from clear how well the Discussion Paper's definition of 'non-consumptive use' – ie as 'use which does not trade on the underlying creative and expressive purpose of the material' – fits with the use of computer programs which, while creative and expressive on one level are also intended to be functional: see Matthew Sag, 'Orphan Works as Grist for the Data Mill' (2012) 27 *Berkeley Technology Law Journal* 1503, 1532.

- **Proposals for reform**

We believe that these exceptions perform an important public interest purpose and these activities should continue to be permitted under Australian copyright laws.

Our general view is that a fair use style provision that enables uses to be assessed against fairness criteria is a better approach for the digital economy than a series of ‘closed’, purpose-based exceptions. As such, we would support a decision to include the computer software provisions as examples of activities that could be considered to be a fair use. However if this approach is adopted, then we suggest that further clarification would be required, for example by the inclusion of an additional illustrative purpose, or by the addition of a legislative note that these activities are considered to be non-consumptive for the purposes of a fair use analysis.

While the addition of an illustrative purpose within fair use would be preferable, we would not object to these exceptions remaining as standalone provisions in the Act. If that was the case however, we would submit that it would be preferable to consolidate the current exceptions into one more open-textured provision that avoids some of the restrictions found in the present provisions and which have resulted in them being considered ‘very limited’.<sup>39</sup> We would also suggest that the provisions could apply not just to software but also to other digital materials which may also need to be security tested or made ‘interoperable’..

- **Copyright and contract**

As discussed at pp. 55-62, we have significant concerns about the practical effects of the ALRC’s recommendation to protect only some illustrative purposes within fair use from contractual override, and leaving to the general law the question of whether contracting out of the other illustrative purposes is permitted.

As the ALRC has not considered the computer software exceptions in the Discussion Paper, it appears that as the proposals are currently framed, s47H, which protects the computer software exceptions from contractual override, would remain in the Act. As discussed below at p. 57, we are concerned that in leaving s47H in the act we are increasing the presumption that contractual override is permitted for other uses not specifically protected.

Alternatively, if these provisions were repealed and instead covered by a fair use provision, this could actually result in removing a level of legal protection for these uses, as private and domestic uses and non-consumptive uses are not currently proposed to be protected from contractual override.

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<sup>39</sup> *CA Inc v ISI Pty Ltd* [2012] FCA 35 at [351]. For a discussion of some of these limitations and this case in particular, see R Burrell, M Handler, E Hudson and K Weatherall *Issues Paper Submission 278*, p. 59.

## Private and Domestic

We strongly support the inclusion of this as an illustrative purpose. We would, however, like to suggest redrafting 'private "and" domestic' to 'private "or" domestic'. This would bring it into line with the other illustrative purposes, and is discussed in more detail at pp. 28-30 below.

## Response to Question 4–2

**'If fair use is enacted, the ALRC proposes that a range of specific exceptions be repealed. What other exceptions should be repealed if fair use is enacted?'**

Please note the discussions above at p.15 regarding the possible repeal of the computer software exceptions. We would submit that more clarity is required as to the impact on s50 of the Copyright Act, which is discussed in more detail at pp. 40-42 below.

## Statutory Licences

### Educational statutory licences

We strongly support the ALRC's proposals in relation to the repeal of the educational statutory licences.<sup>40</sup> The ALRC's proposals are critically important and will ensure that Australia's existing educational copyright exceptions that were designed in the age of the photocopier are updated for the digital age.

Australia's current system of technologically specific educational exceptions and statutory licences means that many technical and non-harmful uses of copyright materials in education are either not permitted or must be remunerated. As a result educational institutions, and indirectly the tax-payers, students and parents that fund them, are paying for uses which do not in any way impact on copyright owner's markets, such as a teacher asking a student to print a page from a website for a homework exercise.

We note that the education sector has clearly expressed its position that Australian schools and universities should continue to pay reasonable licence fees for educational uses that would extend beyond the limits of any fair use exception.<sup>41</sup> We were therefore surprised to see recent claims from the Australian Society of Authors and the Copyright Agency that the changes proposed by the ALRC would take away fair remuneration from the creators of educational resources<sup>42</sup> or that the rights and income of authors and publishers are being seriously challenged by the ALRC's proposals.<sup>43</sup>

We expect that Australian schools and universities will continue to pay for many educational uses of copyright materials under voluntary licensing arrangements. The ALRC's proposals will simply inject fairness back into the Copyright Act and change the situation where the educational sector is required to pay remuneration for virtually every use that occurs in an educational institution, no matter how technical or temporary the use may be, and irrespective of the actual impact of the use on the copyright owner.

We strongly support the ALRC's proposed approach which would ensure that public interest educational and non-consumptive uses that do not unreasonably harm copyright owner markets

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<sup>40</sup> We wish also to register strong support from the government libraries (represented by their peak body AGLIN) for the repeal of the government statutory licences.

<sup>41</sup> See *Universities Australia Issues Paper Submission 246* and *CAG Schools Issues Paper Submission 290*.

<sup>42</sup> Australian Society of Authors, *Letter to Australian schools teachers*, paragraph 1. The ADA/ALCC would be happy to provide a copy of this recently circulated letter, and the response from CAG, to the ALRC should they not already have a copy.

<sup>43</sup> Letter from Sandy Grant, Chair, Copyright Agency/Viscopy, paragraph 1. ADA/ALCC would be happy to provide a copy of this recently circulated letter to the ALRC should they not already have a copy.

should be permitted, and voluntary licensing arrangements should be established for other educational uses of copyright content.

## The rationale for reform

We firmly believe that Australia's current copyright system for education is not suitable for the digital age. It is overly technical, discriminates against the use of digital technologies, and requires remuneration for educational uses which do not in any way interfere with copyright owner markets, and which would not attract remuneration in comparable jurisdictions. The following issues and examples that illustrate these problems are drawn directly from the experiences of educational institutions.<sup>44</sup>

*The technical nature of the existing exceptions means that some educational uses are covered by an exception, other similar uses are covered by a statutory licence.*

Examples:

- writing text on a blackboard is covered by a free exception, writing the same content on an interactive whiteboard is covered by the Part VB statutory licence
- including an extract of a work in an exam paper is covered by an exception. Emailing the same exam paper to distance students is covered by a statutory licence.

*Different rules apply for different copyright subject matter.*

Example:

- displaying an artwork on a screen in class is covered by an exception, displaying a poem on a screen in class is remunerable under Part VB.

*The law imposes technical and complex distinctions that are linked to the technologies being used, rather than the nature and purpose of the use.*

Example:

- two teachers in a school can each photocopy a different page of a textbook to distribute to their classes at the same time. However they can't each display those same pages on screen in class using a learning management system as the simultaneous communication of

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<sup>44</sup> These examples are drawn from Universities Australia *Issues Paper Submission 246* and CAG Schools *Issues Paper Submission 290* and the *Copywrong* website [www.faircopyright.com](http://www.faircopyright.com)

content from the same book is not permitted.

*Minor and technical uses that do not affect copyright owners are considered to be remunerable under the statutory licences.*

Example:

- the act of saving an image to a hard drive, and the act of saving the image into a PowerPoint presentation are both remunerable activities under the statutory licence, but the display of the presentation in class is covered by an exception.

*Uses that are permissible for students in their personal capacity are considered remunerable when a teacher asks the student to make the same use.*

Example:

- if a student prints a page from a website to do an assignment this would be a fair dealing for research or study. If a teacher asks the student to print the same page, it is covered by the statutory licence.

*Uses that are free in general society are remunerable in a classroom.*

Example:

- If a teacher time shifts the ABC news to watch later at home this is covered by a free exception. If the teacher time shifts the ABC news to watch later with her students in class, this is remunerable under the Part VA statutory licence.

*The broad coverage of the statutory licences means that educational institutions pay for uses even where the copyright owner cannot be found (in the case of orphan works) or where it is clear that the copyright owner never intended to seek remuneration from educational uses of their works.*

Example:

- Schools pay licence fees for freely available web content, such as free tourism maps and public health fact sheets.

The current system also focuses on requiring remuneration for virtually every copy and communication made by an educational institution, irrespective of whether the content was actually

made available to students. For example, the act of uploading a resource to a learning management system is remunerable, even if it is never made available to a student. We agree with the ALRC that:

The Copyright Act should not prescribe a method of settling equitable remuneration that results in an over-emphasis on the volume of material made available to - as opposed to actually used by - students ... One would hardly 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).<sup>45</sup>

The ALRC's proposals, if enacted, would also ensure that Australia's education providers could compete effectively on the global stage. As Universities Australia wrote in its submission to the Issues Paper:

The statutory licences are also economically inefficient. They have led to the creation of a false market that has imposed unreasonable costs on Australian universities. They have led to highly inefficient practices that are out of step with emerging international norms, and have put Australian universities at a competitive disadvantage in a global education market. They have effectively removed any scope for fair dealing within Australian universities, which has led to Australian universities paying for uses that amount to fair use or fair dealing in comparable jurisdictions such as the US, Canada, Israel, South Korea, Singapore and the Philippines.<sup>46</sup>

Australian education exports contribute over \$15 billion annually to the Australian economy.<sup>47</sup> They also enhance Australia's international reputation and contribute significantly to the social and cultural fabric of the nation.<sup>48</sup> Repeal of the statutory licences will encourage growth and development of this sector.

For the reasons set out above, we fully endorse the ALRC's proposed approach of repealing the existing set of technology prescriptive educational exceptions and statutory licences and replacing them with a flexible fair use provision supported by voluntary licensing arrangements.

We also endorse the ALRC's approach to how collective voluntary licences should be negotiated:

If fair use is enacted, then licences should be negotiated in the context of which uses are fair. If the parties agree, or a court determines, that a particular use is fair, then educational

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<sup>45</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 6.67

<sup>46</sup> Universities Australia *Issues Paper Submission 246*

<sup>47</sup> Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, International Research and Analysis Unit- Australian Education International *Export income to Australia from International Education Activity in 2011-2012* (November 2012)  
<https://aei.gov.au/research/Research-Snapshots/Documents/Export%20Income%202011-12.pdf>

<sup>48</sup> Universities Australia *Issues Paper Submission 246*

institutions and governments should not be required to buy a licence for this particular use. Licences negotiated on a more reasonable footing may also be more attractive to other licensees.<sup>49</sup>

## Voluntary collective licensing

We note with surprise claims from Copyright Agency and Screenrights that the ALRC's proposals in relation to voluntary licensing are unworkable,<sup>50</sup> despite the evidence of their success in other comparable jurisdictions.

Voluntary collective licensing arrangements for copyright are the norm around the world. Indeed, Australia's system of statutory licensing could be seen as something of an outlier. We note that educational institutions have successfully operated under collective voluntary licensing arrangements for many years in countries such as Argentina, Barbados, Canada, Hong Kong, India, Ireland, Jamaica, Japan, Mexico, New Zealand, the Philippines, Trinidad & Tobago, Turkey, the United Kingdom and the United States of America.<sup>51</sup>

We submit that a voluntary licensing system would enable the parties to assess which uses should be considered to be fair, and then to agree on licence terms for educational uses which would exceed these fair uses. Voluntary licences could be negotiated without the constraints of the existing rules of the Part VA and VB statutory licences, and could be tailored to better facilitate the educational uses of schools and universities and which rights holders would wish to licence. This is what has happened in the case of music licences in Australian educational institutions for many years. We also note that the Copyright Agency currently offers a voluntary licence for commercial users of works.

We acknowledge that due to the unique nature of broadcasts, some statutory support may be required to ensure that Screenrights would be in a position to secure the range of underlying rights necessary to offer a comprehensive voluntary licence. We would not oppose the introduction of a statutory provision designed to ensure that voluntary licensing could operate effectively in relation to the underlying rights contained in broadcasts.<sup>52</sup> However, it would be critical that any statutory support was designed simply to ensure the collecting society had the legal capacity to offer the licence, and should not interfere with the ALRC's policy intention that licences should be offered in

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<sup>49</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 6.101.

<sup>50</sup> See Copyright Agency *Issues Paper Submissions 249 and 287*, Screenrights *Issues Paper Submissions 215, 288 and 289*.

<sup>51</sup> Copyright Licensing Agency (UK) fact sheet *Different Licensing Systems*, available at [www.cla.uk.au/rightholders/international/differentlicensingsystems](http://www.cla.uk.au/rightholders/international/differentlicensingsystems).

<sup>52</sup> The ADA/ALCC note that similar provisions are used in the UK and New Zealand.

the context of what is fair. Educational institutions should not be required to obtain a licence for uses that would not infringe copyright because they are covered by an exception.<sup>53</sup>

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<sup>53</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 6.101

## Fair Dealing

We strongly agree with the ALRC's position that:

The purpose-based, or close-ended, nature of the fair dealing exceptions is problematic in the digital environment. Rather than take a piecemeal approach and propose the addition of further specific exceptions in the hope of addressing gaps, the ALRC proposes the repeal of the existing fair dealing provisions and application of the new fair use exception<sup>54</sup>

Many of the benefits of fair use, its adaptability, flexibility, balance, and fairness, are absent in fair dealing. By focusing on 'purpose' instead of 'fairness', many socially and economically desirable outcomes may fall outside the protected exceptions, while less desirable activities may remain protected even where unfair.

### Fairness factors

However, should the decision be made to implement specific fair dealing exceptions, rather than fair use, we support the inclusion of the four fairness factors in all fair dealing provisions.

We believe that allowing the question of fairness to be asked within the fixed purposes of fair dealing will ameliorate somewhat the arbitrary nature of a more rules based system. In looking to the fairness factors we would expect, for uses that fall within the specific purposes, the implementation of the fair dealing provisions will be substantially the same as for fair use. For example, in judging whether a use infringes copyright the 'availability of a licence should be a relevant, but not determinative, consideration'.<sup>55</sup>

### Inefficient and restrictive

The restriction to defined purposes is less efficient than allowing a fairness evaluation. It is likely that new purposes will be required at some point in the future, as a group of prominent academics noted in their submission to the ALRC issues paper:

Policymakers simply cannot be expected to identify and define ex ante all of the precise circumstances in which an exception should be available.<sup>56</sup>

The time lag and resources required to effect these changes put Australia at a competitive disadvantage. As Dr Giblin, noted in her submission to the Issues Paper, an effective copyright exception permitting time-shifting was not enacted in Australia until 22 years after time-shifting had

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<sup>54</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 7.2.

<sup>55</sup> *Ibid.* at 13.59.

<sup>56</sup> Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall *Issues Paper Submission* 278 p.35.

been found to be fair use in the US (and long after time-shifting had become an ordinary consumer activity).<sup>57</sup>

### Third Parties

We note with concern the ALRC's discussion regarding third parties and fair dealing:

If a given use is for some other ancillary purpose, the fair dealing exceptions will not apply, and the question of whether the use is fair will not even be asked<sup>58</sup>... These alternative exceptions would at least expand the number of prescribed purposes or categories of use that may be considered under a fairness exception. However, many of the uses of copyright material discussed in this chapter are unlikely to be fair dealing for these or any of the other prescribed purposes in the fair dealing provisions.<sup>59</sup>

We would ask the ALRC to note that while *De Garis* focuses very specifically on the purpose of the user in that case, a quite different approach was taken in *The Panel* case and in *Telstra Corporation Pty Ltd v Premier Media Group Pty Ltd*.<sup>60</sup> We would recommend that the ALRC examine ways to turn the court's attention to the purpose of the use, rather than the purpose of the person doing the copying, as is the primary question under the current fair dealing provisions.<sup>61</sup> We would support the inclusion of statements in an Explanatory Memorandum to this effect.

We note that this is particularly important in the digital age, and to do otherwise risks restricting Australians' ability to effectively use modern innovations. For example, cloud computing simply does not work unless people/organizations make copies on behalf of others. Similarly important is assistance provided by third parties to those with disabilities, many of whom are unable to make copies themselves.

### New fair dealing provisions – assistance for those with disabilities

In the event that the fallback position of fair dealing being retained is given effect, we support the introduction of new fair dealing provisions for education, non-consumptive use, quotation, private or domestic use,<sup>62</sup> public administration and public interest uses by libraries and archives. We believe that, by expanding the recognised public interest purposes, the law can reduce current restrictions on third party uses.

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<sup>57</sup> R Giblin *Issues Paper Submission* 251.

<sup>58</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 5.43.

<sup>59</sup> *Ibid.* at 5.45.

<sup>60</sup> (2007) 72 IPR 89.

<sup>61</sup> *Telstra Corporation Pty Ltd v Premier Media Group Pty Ltd* (2007) 72 IPR 89

<sup>62</sup> Please see pp. 28-31 for a discussion on the terminology of 'private or domestic' use.

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We would also propose an additional fair dealing exception in order to assist people with disabilities. Please see discussion above at pp. 12-13 in regards to the exceptions needed to assist those with a disability and to comply with Australia's international obligations.

Specific issues regarding the fair dealing proposals for education, private and domestic use and libraries and archives are discussed in more detail below.

## Non-consumptive Use

The ADA and ALCC welcome the recognition of non-consumptive<sup>63</sup> use as an illustrative purpose in the fair use exception, defined as ‘uses which do not trade on the underlying creative and expressive purpose of the material’.<sup>64</sup> As the Hargreaves report noted, in the UK context:

that these new uses happen to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect.<sup>65</sup>

It is entirely appropriate that, in circumstances where uses do not compete with copyright owners’ core rights, the rights to control expressive uses of the fruits of their labour and creativity, the law ought not give copyright owners the right to prevent technical uses and technological innovations that have significant public benefits.

Technical processes identified by the ALRC, such as caching and indexing by search engines,<sup>66</sup> would likely be examples of non-consumptive fair use. A principles-based approach to non-consumptive use will remove many of the concerns raised by the fact that many technically necessary and efficient processes may fall outside the existing purpose-based exceptions, such as the full range of caching, such as browser caching, buffering and proxy caching, as well as any future types of caching, by any person or organization.<sup>67</sup>

Similarly, we draw the ALRC’s attention to other uses that do not trade on the underlying creative and expressive purposes of the material that would presumably fall under the non-consumptive illustrative purpose. These include the copies made for use in:

- plagiarism tools used by schools and universities;

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<sup>63</sup> While welcoming the definition of non-consumptive use, we note that we are not wedded to the terminology of non-consumptive use of different options for terminology in K Bowrey *Issues Paper Submission 64*; Pamela Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham L Rev* 2537.

<sup>64</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 8.1.

<sup>65</sup> I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 47.

<sup>66</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 8.1.

<sup>67</sup> See, for example, eBay *Issues Paper Submission 93*, p. 8; Yahoo 7 *Issues Paper Submission 276*, pp.3-4; AIMIA Digital Policy Group *Issues Paper Submission 261*, p.17; Google *Issues Paper Submission 217*, p.25.

- music recognition applications such as Shazam,<sup>68</sup>
- data analysis tools such as nGram.<sup>69</sup>

As the ALRC notes:

Uses that fall within the broader category of non-consumptive uses are more likely to be fair than uses that do not fall into this, or any other, category of illustrative purpose. However, this does not mean that all non-consumptive uses will be fair. A wider inquiry into the fairness factors is necessary and crucial.<sup>70</sup>

Using the rubric of fairness to assess non-consumptive use, the impact of such activities, including their impact on copyright owners and their public benefits can be assessed.

Although outside of the scope of this review, we note again that for optimal operation, the fair use exception should be supported by an expanded safe-harbour regime. Safe-harbour reform is critical to ensure that online providers can operate with legal certainty in Australia.

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<sup>68</sup> See [www.shazam.com](http://www.shazam.com).

<sup>69</sup> Which charts the occurrence of letter combinations on a yearly basis sourced from books digitised in the google books program, <http://books.google.com/ngrams>.

<sup>70</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 8.66.

## Private and Domestic use

Consumers require special consideration. Extensive users of copyrighted content in their daily lives, they are vulnerable to commercial pressures, and often lack specialised expertise, bargaining power and the resources to protect their interests. The move from a range of highly technical exceptions to broad, flexible fair use is welcomed, as the ADA and ALCC stated in our submission:

Most Australian consumers aren't aware of the detailed regulation governing the extent to which they can legally format shift, time shift and space shift their music, film and TV collections. It's not clear to consumers why format shifting from CDs to iPods is perfectly acceptable, but format shifting from DVDs to iPads is not. It's content they have purchased lawfully, and a use which bears no impact on the commercial market for the copyright holder (the consumer is not going to purchase the same content twice).

### Private OR Domestic

While welcoming the move to a fairness analysis, the ADA and ALCC would like to suggest the rewording of this illustrative purpose as 'private OR domestic' rather than the proposed 'private AND domestic'. We have concerns that the 'and' may be seen as a word of limitation, requiring the use to be private and domestic, rather than indicative of a general spectrum of uses. We note that the current definition in s10 of the Act, 'private and domestic use means private and domestic use on or off domestic premises' and it does not seem the ALRC's intention to narrow this. As the ALRC state when they outline the proposal:

'Private and domestic use' should also be an illustrative purpose in the proposed fair use exception, to signal that *many private uses* may be fair.<sup>71</sup> (emphasis added)

In the move from a specific exception with a prescribed definition to an illustrative purpose in a standards based exception, it is important that the wording also moves to illustrative from prescriptive.

The change of 'and' to 'or' would bring this illustrative purpose in line with other dual purposes such as 'research or study', 'parody or satire' and 'criticism or review' and will ensure that the question of fairness will be able to be asked of common uses, rather than requiring a narrow focus on the pigeonholes in which the use falls.

In a world where private uses are increasingly being facilitated by outside entities, such as cloud storage or internet streaming, allowing courts to ask the question of fairness, and allowing consumers to make a similar assessment, will help copyright remain relevant and reasonable.

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<sup>71</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 9.3.

## Understandable and relevant

In our view, the recognition that some consumer uses of material are fair use will be critical to copyright law maintaining its credibility with the broader public. As the Australian government recognized in 2006, a copyright law that labels as infringement long-tolerated ordinary consumer activities (indeed, activities that have been encouraged)<sup>72</sup> risks being seen as positively asinine. A problem with the current private and domestic exceptions is that they draw arbitrary lines not consistent with ordinary consumer behaviour: making the law ridiculous. And as the Honourable Justice Susan Crennan, of the High Court of Australia noted in 2010:

laws must be fair and capable of obedience. Intellectual property laws, like other rules or laws, must command a social consensus if they are to be enforceable.<sup>73</sup>

## Relevant issues – TPMs and Contract

The benefits of the proposed fair use exception are put at risk if fair uses are subject to TPMs and able to be contracted out of. We understand that TPMs are outside the scope of the ALRC's Inquiry, however wish to again note the importance they have to the practical effect of copyright exceptions. As the House of Representatives Standing Committee on Infrastructure and Communications noted in their recent report into IT pricing:

evidence indicates that TPMs can restrict competition in copyright markets by preventing consumers from accessing and using legally acquired content in legitimate ways.<sup>74</sup>

Contracting out is considered in detail by the ALRC in the discussion paper, and they have proposed protecting of fair use contracting out, but only to the extent that this extends to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation. This is discussed in more detail below (see the section on 'contracting out') but we wish to note at this point that the exclusion of private and domestic uses from the contracting out provisions risks undermining the consumer protections. Consumers are often in a vulnerable position, unable to vary the terms of licences that are offered to them. As the ALRC concludes in Chapter 9:

exceptions for private and domestic use will be of less value to consumers, if they cannot circumvent TPMs and they must contract out of the exceptions before being given access to copyright material.<sup>75</sup>

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<sup>72</sup> Such as computer back-up

<sup>73</sup> The Honourable Justice Susan Crennan, lecture Institute of Advanced Legal Studies on 15 February 2010, subsequently published in Issue 82 (Summer 2010) *Amicus Curiae*.

<sup>74</sup> House of Representatives Standing Committee on Infrastructure and communications Inquiry into IT Pricing *At What Cost? IT pricing and the Australia Tax* (July 2013) at 4.55.

<sup>75</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 9.76.

For this reason, and others discussed below, we strongly suggest that the protection against contractual override be extended to the fair use provision in its entirety (or to all fair dealing provisions), including private or domestic uses.

## Fair Dealing

As discussed directly above, we believe that a fair use exception would be a much better mechanism for dealing with consumers and copyright than a fair dealing exception. One area that is particularly pertinent for consumers is that of third party facilitation. As the ALRC notes in regard to fair dealing:

the permitted uses are confined to the prescribed purposes. If a given use is for some other ancillary purpose, the fair dealing exceptions will not apply, and the question of whether the use is fair will not even be asked.<sup>76</sup>

Many private uses are facilitated by third parties as consumers lack the technical skills and resources to do it themselves. Companies offering cloud storage facilities or security tests for home networks may have a commercial interest in their services, but they are also essential to enable consumers' legitimate use of copyright material.

## Repeal of existing exceptions – proposals 9-3 and 9-5

We are seeking clarification on whether proposals 9-3 and 9-5 are intended to apply only if fair use is enacted. For the reasons outlined above in relation to third parties, if fair dealing for private or domestic use is enacted we believe it would be important to note that consumers' abilities to undertake uses such as time shifting, format shifting and computer back-up should be protected and that third parties should be able to facilitate these uses.

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<sup>76</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 5.43.

## Libraries, Archives and Digitisation

### Fair Use

The ADA and ALCC strongly support the repeal of 200AB and replacement with a broad and flexible fair use exception. The specific library and archive exceptions supplemented by fair use will provide libraries and archives with the certainty and flexibility they need in order to fulfill their vital public-service duties.

Recent research, commissioned by the ADA and ALCC, by Policy Australia looking at the implementation of s200AB in the education, library and cultural sectors concluded that:

Six years after its introduction, Australian libraries, archives, schools, universities and cultural institutions still struggle to use s 200AB. While this can to some extent be explained by the risk averse nature of these organisations, this does not tell the full story.

The incorporation of the three step test in s 200AB has led to great confusion and uncertainty. Our analysis, based on information obtained in consultations with stakeholders, suggests that this is a greater factor in the lack of adoption of s 200AB than cultural factors alone.

Stakeholders expressed a natural affinity and comfort with the type of fairness analysis required by provisions such as fair use and fair dealing. It was generally considered by participants that a fair use provision would be significantly easier and more certain to apply in practice than s 200AB.<sup>77</sup>

We agree with the ALRC's observation that that there is 'potential for guidelines, around the concept of fairness, to be effective'<sup>78</sup> and would anticipate that codes of best practice<sup>79</sup> may help provide certainty to some core uses that would be held to be fair.

Domestically, peak bodies such as National and State Libraries Australasia ('NSLA') are already working towards producing some guidelines for the current system<sup>80</sup> and member organizations of

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<sup>77</sup> *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?* by Policy Australia (October 2012)p.16 attached as attachment A to ADA and ALCC *Issues Paper Submission 213*.

<sup>78</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 11.30.

<sup>79</sup>For a recent discussion on the benefits of codes of best practice in the USA see Hinze G, Jaszi P and Sag M *Fair Use Doctrine in the United States – A response to the Kerochan Report*.

<sup>80</sup> See for example *Copyright Project* <http://www.nsla.org.au/projects/copyright>

the ALCC have indicated to us that they would be very happy to collaboratively produce guidelines to aid organisations to assess uses and processes under fair use.

We note with approval the ALRC's position that 'the fact that a work is unpublished does not rule out the case for fair use'.<sup>81</sup> As noted in our submission to the Issues Paper, libraries and archives hold vast collections of unpublished works, many of which are orphaned, which remain in copyright in perpetuity. The National Library of Australia alone estimates it has at least 2,041,720 unpublished items in its collection,<sup>82</sup> many of great historical and cultural value to Australia. Communicating and using this content supports the 'general interest of Australians to access, use and interact with content in the advancement of education, research and culture'.<sup>83</sup>

Finally we note that fair use should not be constrained by the specific library and archive exceptions. We envisage that these specific exceptions would instead act as 'safe harbour' provisions, so that uses that exceed what is expressly allowed under those provision may still be fair, and can be assessed under the fair use provision.<sup>84</sup>

## Fair Dealing

Fair use is a much preferable option for the library and archive sector. However should fair use not be adopted, we would support the repeal of s200AB and replacement with a fair dealing exception for libraries and archives that incorporates the four fairness factors.<sup>85</sup> Additionally we note that education, also within the scope of the current s200AB, should be covered by its own fair dealing provision.<sup>86</sup>

Just as the specific library and archives exceptions for document supply and preservation copying would be retained in a fair use scenario, they should also be retained in the case of a fair dealing provision, in order protect the 'interest of cultural policy and the wider public interest in education and research'.<sup>87</sup> We note that fair dealing should act as supplementary to those exceptions, so that uses that fall outside of the specific exceptions may still fall within the fair dealing provision.

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<sup>81</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 11.36.

<sup>82</sup> National Library of Australia *issues Paper Submission 218* p. 50.

<sup>83</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 2.24.

<sup>84</sup> This is the approach adopted in the US: see *Authors Guild, Inc v Hathitrust* 902 F Supp 2d 445, 457 (SDNY 2012). This could be made clear in the legislation by a provision, like that found in the US (17 USC 106) that the exclusive rights of the copyright owner are 'subject to sections 107 through 122' (that is, subject to the provisions setting out defences/exceptions). Such a limitation could be inserted into our *Copyright Act 1968* (Cth) ss. 31, 85-88.

<sup>85</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 11.34

<sup>86</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at Proposal 13-2

<sup>87</sup> *Ibid.* at 11.3

Careful drafting would be needed for any fair dealing provision to ensure that it was wide enough to capture the public interest purposes of cultural institutions (not just organisations whose primary purpose is that of a library or archive).

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. The provision of access to collections is only part of a cultural institution's mandate; use of the collection by others should also be encouraged.

On that point, we have some concerns about the ALRC's discussion of third party use in regards to fair dealing. The ALRC notes in its discussion:

the permitted uses are confined to the prescribed purposes. If a given use is for some other ancillary purpose, the fair dealing exceptions will not apply, and the question of whether the use is fair will not even be asked.<sup>88</sup>

As the ALRC notes in Chapter 17 of the Discussion Paper, the beneficiaries from the library (and by extension, other cultural bodies) uses of content are the public. Thus it is important that the role of libraries and archives in enabling legitimate uses of copyright material by the public should be reflected in any fair dealing provision.

We strongly support the inclusion of the four fairness factors in any expanded fair dealing provision. We would expect that this would provide scope to consider the transformative nature of any use. As noted in our submission, a wide definition of transformative use 'where the purpose of the use is sufficiently removed from the purpose of the original work'<sup>89</sup> has been used in the US to allow libraries to digitise their print holdings for the purposes of preservation, search and access for print disabled persons.<sup>90</sup>

## Voluntary Extended Collective Licensing

There are varied views within the cultural sector as to whether voluntary extended collective licencing ('VECL') would be appropriate within a cultural institutional setting. Art Galleries have noted that digitisation of art works for online access is very much guided by relationships with artists and that using a VECL could damage those relationships (and similarly, that it is important to protect the rights of creators to opt out of VECL). As such they would be unlikely ever to rely on a VECL.

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<sup>88</sup> Ibid. at 5.43.

<sup>89</sup> ADA and ALCC *Issues Paper Submission 213* p.37.

<sup>90</sup> *Authors Guild, Inc v Hathitrust* 902 F Supp 2d 445 (SDNY 2012).

Within the library and archive sector we note that many digitisation projects, those done under fair use, using orphan works or copying for preservation purposes would not use VECL (see below for further discussion on this point). However libraries have noted some potential uses where collections are to be digitised and communicated, especially where the administrative burden of tracking rights holders would be prohibitively onerous. Following are two examples put forward by members of the sorts of circumstances in which VECL may be useful.

*Curating an exhibition on the advertising photos of Max Dupain.*

“One of Australia’s most regarded photographers, Max Dupain was a commercial photographer operating independently from his own studio, with much of his work was commissioned. Many of the commissioning organizations are now defunct, or do not know whether they can claim copyright because of contractual intricacies (business records aren’t usually retained for anything like the period of the copyright term – 7 years is more like it)! And the employees responsible for the commissioning transaction are also long gone.”

The difficulties in tracking down the copyright holders in these circumstances may mean that VECL would work out more administratively efficient than doing everything in house.

*A project like the 50th anniversary of the 1967 referendum.*

“National and State Libraries Australia is doing a major national commemorative project about the referendum and its impact, including an online exhibition which would involve digitization of referendum collection materials in the various libraries. We want to launch a project website and already we are finding it time consuming to track down the copyright owner of the poster which was used in the original campaign, although this is very famous image which we would wish to reuse.”

In this case the difficulties of organising materials across different institutions and a large collection of ephemera may suit VECL, however it would depend on the exact factors of the exhibition, including the amount of work to be digitised.

We can see more scope for VECL outside of the library and archive sector, where it may provide an effective solution for mass digitisation projects. It seems likely that other not-for-profit or commercial entities would find the administrative certainty of VECL supported innovative projects, and we suggest that in extending the VECL proposal from simply libraries and archives it is more likely to be useful. We can’t see any reason why an organisation that wishes to digitise shouldn’t be able to pay a licence to do so.

Any proposal for VECL would need to be set up with a framework of clear guidelines that emphasized accountability and transparency and an impartial adjudicator to ensure all parties, collecting agencies and public institutions, were behaving in the interests of content creators and the general public.

## No restriction on Fair Use

VECL should only be required for copying that would exceed fair use. As the ALRC noted when examining statutory licences, users ‘should not need to pay for uses of copyright material that would otherwise not infringe copyright because they are covered by an exception’.<sup>91</sup> Cultural institutions, who are already effectively paying to collect, preserve, curate and provide free public access to cultural material, will be relying on fair use in order to achieve their mandated purposes. As such, it is essential that VECL is not seen as a way of curtailing or confining fair use, but rather as a supplement to fair use.

We cannot run the risk of the existence of VECL restricting fair use. We note the difficulties faced by the education sector who found s200AB of little use due to the blanket application of the Part VB licences and we note that it would be counter to the public interest if libraries and archives ability to use fair use was similarly curtailed. Statements to this effect may need to be recorded in the Explanatory Memorandum to assist court with the interpretation of the new regime.

## No presumption on licencing orphan works

VECL should not lead to a presumption that the use of orphan works should be licenced. As we noted in our submission to the discussion paper:

Given that many orphan works are not commercially available, or in the case of unpublished material generally, not produced with any commercial intent in mind, attempts to broadly commercialise orphan works through a licensing scheme remains a problematic concept. The British Library has gone so far as to say that creating markets where they did not exist, for bonafide reasons *is distorting of culture*.<sup>92</sup>

Recent research of the licencing of orphan works concludes that no scheme is currently working well, with low take-up and high costs for mass digitisation projects two common issues.<sup>93</sup> We commend the ALRC on its proposals for orphan works (discussed in detail below pp. 50-51) and would strongly oppose anything that sought to restrict their efficacy.

## Preservation Copying

We welcome the move to combine the numerous specific preservation copying exceptions into one clear exception. The ability to copy for preservation purposes, without limit on format or copies,

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<sup>91</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 6.97.

<sup>92</sup> ADA and ALCC *Issues Paper Submission 213* p. 53, quoting British Library, *Response to UK Government Consultation on Copyright* <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.aspx?MediaDetailsID=1423>.

<sup>93</sup> Report commissioned by UK Intellectual Property Office – M Favale, F Homberg, M Kretschmer, D Mendis & D Secchi, *Copyright and the Regulation of Orphan Works: a comparative review of seven jurisdictions and a rights clearance simulation* at <http://www.ipso.gov.uk/ipresearch-orphan-201307.pdf>.

will mean that libraries and archives have the best chance of effectively and efficiently safeguarding their collections, preserving Australia's national heritage for future generations.

We do wish to draw the ALRC's attention to the term 'copies' to ensure that it is not interpreted in a restrictive way. In order to effectively preserve works, including born digital works, we may need to do a variety of processes including reformatting, migration and emulation, and we draw the ALRC's attention to the National Library of Australia's submission to the discussion paper on this point, as well as our submission to the Issues Paper.<sup>94</sup>

We would support strong statements in the Explanatory Memorandum or a legislative note that indicates that the words 'make copies' are intended to cover all the steps necessary for effective preservation, those mentioned above and any that may be developed in the future. Alternatively there may be merit in rewording the proposal and we would be happy work with the ALRC to find the optimal words.

Finally, we note that fair use should enable much of the preservation copying done by libraries and archives, and that the preservation copying exception should act in a complementary fashion. It would be a perverse result if it was used to argue for a 'ceiling' or restriction to preservation copying under fair use.

### Commercial availability

We note that a similar requirement for the work being preserved not to be commercially available is currently incorporated in some preservation copying provisions in the *Copyright Act*. For example, before making a preservation copy of an item in its collection in reliance on section 51A, a library or archive must after reasonable investigation make a declaration:

- (a) stating that he or she is satisfied that a copy (not being a second-hand copy) of the work, or of the edition in which the work is held in the collection, cannot be obtained within a reasonable time at an ordinary commercial price; and
- (b) if he or she is satisfied that a copy (not being a second-hand copy) of another edition of the work can be obtained within a reasonable time at an ordinary commercial price--stating why the reproduction should be made from the copy of the work held in the collection.<sup>95</sup>

In light of the existing framework, we were surprised to receive feedback from some members that many libraries and archives considered the commercial availability test to be unworkable in practice. As one member commented, 'it fundamentally misunderstands the nature of preservation'.

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<sup>94</sup> ADA and ALCC *Issues Paper Submission 213*.

<sup>95</sup> Section 51A(4) *Copyright Act 1968 (Cth)*.

The commercial availability requirement implies that prior to making any preservation copies at that point of acquisition, the library or archive must confirm that no other copies could be otherwise acquired in a reasonable time frame at an ordinary commercial price. On this reading, the library or archive who desires to make preservation copies of an item at the point of acquisition is prohibited from doing so, because commercial copies of the acquisition item are still available. Instead, it is presumed they would buy further commercial copies of the item.

The ADA and ALCC sought feedback from members as to why the existing commercial availability requirement seems to be rarely activated when undertaking preservation copying. We have provided brief overviews of some responses below.<sup>96</sup>

### Acquisition practice and ‘access’ copies

For some libraries and archives, it is standard practice to purchase both a ‘preservation’ copy and an ‘access’ copy at the point of acquisition of an item (and, sometimes, a ‘preservation’ copy as well as multiple ‘access’ copies). That ‘preservation’ copy is then copied into appropriate preservation formats at the point of acquisition, to guard against future deterioration. The preservation copy can then be stored in an appropriate conditions and the access copy(ies) made available for use.

Having purchased a copy solely to be a ‘preservation’ copy, it seems ridiculous that an institution could not follow best-practice preservation guidelines.

### Preservation of the work

Purchasing another copy of the work is not *preservation* – it is the acquisition of a new work (or, the replacement of a work). If the work is in an unstable format then purchasing another copy simply means acquiring another problem of the same kind.

For example, recordable compact discs (CD-R) used by local musicians to self-publish their work have an unpredictable life expectancy that relies on the interaction of the individual burner, the blank disc and the playback equipment.<sup>97</sup> If the first copy of a CD-R is unreliable or has an unexpectedly short life-span, it is likely that subsequent copies purchased will have the same inherent faults.

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<sup>97</sup>See, for example, UNESCO Guidelines - <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/risks-associated-with-the-use-of-recordable-cds-and-dvds-as-reliable-storage-media-in-archival-collections-strategies-and-alternatives/>

In regard to born digital material, collecting institutions need to make decisions during accessioning on whether to store resources as received or to reformat.<sup>98</sup> Preservation reformatting may involve replication, emulation, migration or a hybrid approach of more than one process.

Purchasing a further copy of the work rather than preserving the work itself can lead to the content of the original work being lost to future generations. A film acquired by an archive, for example, in 35mm format, may still be commercially available in DVD format at the point the archive would like to make preservation copies, but the DVD formatted work may be significantly different. Image and sound quality may have been updated, credits revised, special features added, scenes removed from the film. The DVD version is an entirely new *work*, potentially reflecting social or political changes taking place at the time. Even if restricted to the same edition of the same work, it is problematic. Unexpected events can intervene, for example a library would not have foreseen that many movies shot against the backdrop of New York would be pulled and suddenly reissued without images of the Twin Towers in the wake of the September 11 attacks. Even without such dramatic interventions, it is administratively impossible for libraries and archives to keep track of when various runs or productions cease being available.

### Preservation at the point of acquisition

The consequence of this restriction being imposed may well be that libraries and archives hold onto one copy of the work until no more are commercially available, forcefully moving preservation from the point of acquisition to a later date when the original will have deteriorated.

Again, this goes against best-practice preservation principles. For example, under the Australian Newspaper Plan,<sup>99</sup> the National and State libraries microfilm newspapers published in their jurisdiction as soon as possible after acquisition due to the unstable acidic nature of newsprint. Another preservation technique that can be used is to take a copy of a work at point of acquisition to use the copy as a reference to track stability and deterioration as time goes on. Again, to restrict institutions, many of whom have a government mandate to protect and preserve Australia's cultural heritage, from using best-practice preservation techniques is inefficient and counter to the public interest.

### What is 'ordinary commercial price?'

For some museums and art galleries, the commercial availability requirement can be financially impossible to comply with. The 'ordinary commercial price' of a well known artist's works may be in the tens of thousands of dollars.

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<sup>98</sup> See, for example, standard text Beagrie, N & Jones, M 2009, 'Organisational activities – storage and preservation' in *Preservation management of digital materials: a handbook*, Digital Preservation Coalition, viewed 23 April 2013, <http://www.dpconline.org/advice/preservationhandbook/organisational-activities/storage-and-preservation>.

<sup>99</sup> See for example <http://www.nla.gov.au/australian-newspaper-plan>.

For example Tracey Moffatt, one of Australia's most prominent artists, primarily uses photography and video. Her photos may come in editions of 30, with each print worth \$15,000-\$20,000. With tight budgets there is no way that an institution should be expected to purchase an additional copy. Indeed, many artists would prefer the money to be spent buying another, different print for exhibition, showcasing their range to the public, rather than knowing a copy was sitting in a vault somewhere.

## Document Supply

We welcome the ALRC's recognition of the importance of document supply, and their preservation of the key library and archive exceptions in 'in order to promote the public interest in research and study and the preservation of cultural heritage'.<sup>100</sup>

We believe that with the flexibility of fair use, especially the ability of libraries and archives to facilitate third party uses, much of the access to content that is provided by libraries currently would be considered fair. Currently libraries receive a number of requests for document supply which they don't feel they can fulfill as they don't fit squarely within research and study. As one member described to the ALCC:

A user asked for a copy of the sheet music "When a boy from Alabama meets a girl from Gundagai". The words and music are by Jack O'Hagan 1898-1987 and the sheet music was published in 1942 in Melbourne by Allan's. It is four pages long. The user listed their use as 'research or study' and noted that 'it is an old Australian war song I just remember and I would like to play and sing it on my piano for my own private only enjoyment'. An online search of a few minutes found no evidence that this publication was available new."<sup>101</sup>

We support the approach of the ALRC in continuing a specific provision for document supply, that will work with (not limit) fair use. We generally agree with the ALRC's analysis at paragraph 11.121:

The debate in relation to document supply is, in many ways, one about what ought to be a legitimate role of libraries in a digital environment. In the ALRC's view, the emergence of markets providing licenced on demand access to journal articles and copyright works should not, of itself, override the wider public interest in research and education. However, there ought to be reasonable limits on document supply services to recognise the role of emerging distribution markets.

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<sup>100</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 11.67.

<sup>101</sup> ADA and ALCC *Issues Paper Submission 213* p. 41.

However we respectfully submit that in attempting to legislate for ‘reasonable limits’ the ALRC has unintentionally proposed an unworkable exception that would give little practical benefit to libraries, and may restrict their ability to act in the public interest, discussed in depth below.

### Clarification on the implementation of the proposals

- **Is s49 being replaced in its entirety?**

We seek clarity as to how the ALRC intends to amend s49. We are unsure whether the words proposed at 11-7 would replace the entirety of s49, for example, the requirements that:

before supplying more than a reasonable portion of a work, a librarian must first be satisfied that a copy of the work cannot be obtained within a reasonable time at an ordinary commercial price, s49(5)(b);

where works are acquired by a library in electronic form, the library may make it available online on the library premises in such a way that users cannot make electronic copies of the work, or communicate it ‘dumb terminal’ provision, s49(5A);

libraries must destroy any electronic copies created in the course of supply, as soon as practicable after the work is communicated, s49(7A) (d).

We would like to remind the ALRC of the issues we raised in our submission to the issues paper regarding s49 in its current form, and suggest it may inform further detail in the drafting of this proposal.<sup>102</sup>

- **What other provisions are being replaced/amended?**

Proposal 11-5 of the Discussion Paper recommends the repeal of the following sections of the Copyright Act, if a new preservation copying provision is enacted:

s51A – reproducing and communicating works for preservation and other purposes;

s51B – making preservation copies of significant works in key cultural institutions’ collections;

s110B – copying and communicating sound recordings and cinematograph films for preservation and other purposes

s110BA – making preservation copies of significant recordings and films in key cultural institutions’ collections; and

s112AA - making preservation copies of significant published editions in key cultural institutions’ collections.

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<sup>102</sup> ADA and ALCC *Issues Paper Submission 213* pp. 39-42.

However, the Discussion Paper is silent as to whether corresponding document supply and interlibrary loan provisions are to be repealed or amended, if proposal 11-7 is adopted.

We would support the introduction of a technology neutral document supply provision, which removes the distinction between ‘works’ and ‘subject matter other than works’. We support the ALRC’s use of the words ‘copyright material’ in both its proposed preservation copying and document supply provisions, but note there are other areas of the Copyright Act that will need to be amended for continuity and consistency. For example, we query whether section 110A, which prescribes the copying and communicating of unpublished sound recordings and cinematograph films for research and study, is to be repealed, covered under the new definition of ‘copyright material’? As we understand it, the ALRC intends the proposed s49 amendment to cover the supply of both traditional ‘works’ as well as audiovisual content.<sup>103</sup>

We also query whether s50, prescribing the reproduction and communication of works by libraries and archives for other libraries and archives, to be retained as a stand-alone provision? Inter-library loan is still common practice in Australia and it is envisaged this will not change in the foreseeable future. If s50 is to be retained as a separate provision, does the ALRC envisage amending it to also refer to ‘copyright material’ rather than ‘works’, and to include restrictions similar to those under proposal 11-7?

### Concerns regarding the proposed document supply provision

We recommend, in principle, the adoption of document supply and inter-library loan provisions which are subject matter neutral (‘copyright material’) and which provide for the supply of both published and unpublished works.

However, the ADA and ALCC see several concerns with the proposed amendments to section 49, if intended to cover all copyright material and apply to unpublished and published works.

- **Cost of compliance**

Under proposal 11-7, the ALRC recommends that s49 be amended to provide that, where a library or archive supplies copyright material in an electronic format in response to use requests for the purposes of research and study, the library or archive must take measures to:

- Prevent the user from further communicating the work;
- Ensure the work cannot be altered; and
- Limit the time during which the copy of the work can be accessed.

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<sup>103</sup> Where libraries and archives are supplying copyright material in certain digital formats (like a CD), compliance with proposal 11-7 would be almost non achievable. Technological issues are discussed further below.

The ALRC provides examples of measures a library could take to satisfy proposal 11-7:

libraries could provide access to documents through a secure website to ensure that only the person who requested the document could access it. Technologies could be implemented to limit the type of use (for example, read only) and to ensure the work could not be altered. Limits could also be placed on the time available for the copy to be accessed, and perhaps, where the work can be accessed from (for example, only within Australia).<sup>104</sup>

We are concerned that these suggestions are based on overseas examples, for example the UK, which operate in a very different system to Australian Libraries. The Australian library environment is not as structured as the British system and the role of the National Library is different.

### **Current system**

In order to explain the difficulties that would be faced by libraries in Australia should proposed restrictions on document supply be enacted, we have attempted to briefly outline the current systems operating to facilitate document supply in Australia at the moment.

Currently the main Libraries Australia inter-library loan ('ILL') and document delivery ('DD') system is the Libraries Australia Document Delivery ('LADD'),<sup>105</sup> a consortium of over 700 libraries participating in resource sharing, which includes all of the Universities, State and National Libraries and a good number of special and public libraries. Many of these libraries use other systems/processes to manage requests to/from non-members of this network. Special libraries often also participate in other networks and reciprocal arrangements. This environment is complex and the National Library of Australia, whilst probably the largest lender, does not occupy the role the British Library has in the UK, being a relatively small part of the ILL/DD environment. It should be noted that electronic delivery of articles is by far the main delivery method, usually as a PDF attachment sent via email.

Some library groups have developed their own interlibrary lending systems such as the health libraries which developed the Gratisnet system to exchange requests between each other. There are about 300 libraries participating in these networks. Some use one network exclusively, whilst others participate in multiple networks.

In order to meet their patron's information needs, libraries sometimes request material from overseas libraries and vice versa. There are many reasons why material may not be available in country, such as limited publication runs, locally significant content and unique collections built over time by cultural institutions. In today's global research environment, where cross disciplinary studies and international collaboration is common, it is essential that resources are available to

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<sup>104</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at11.125.

<sup>105</sup> See, for more detail - <http://www.nla.gov.au/librariesaustralia/services/docdel/>.

Australian Library patrons via Interlibrary loan and document delivery. The infrastructure to support this environment is also complex; LADD uses the VDX software from the Online Computer Library Center ('OCLC'). This software is also used by about 70 libraries to manage their ILL/DD activities and delivery of documents to other libraries. About 25 libraries use the Relais<sup>106</sup> international software to manage their ILL/DD activities and delivery of documents to other libraries via a webservice, and the Aleph system has an interlibrary loan module that supports the management of these requests. The company Prosentient<sup>107</sup> offers these small libraries the network system to support their reciprocal ILL/DD requests.

### International comparisons

The model cited by the ALRC and publishers in their responses to the Discussion Paper (and is perhaps what the ALRC had in mind in making proposal 11-7) is the British Library Document Supply Service ('BLDSS'). On their website, the British Library notes:

The new British Library Document Supply Service (BLDSS) has taken **over 2 years to develop, cost nearly £6 million and has completely replaced legacy systems.** In addition to introducing new services supporting remote document supply, it retains the links with all Library services and systems that currently interact with document supply operations.<sup>108</sup>

To protect against further electronic communication of the work by the end user and alteration of the work (both requirements of proposal 11-7) the British Library offers two TPM options: Adobe Digital Editions and File Open. Both of these require an end-user plug in – that is, the user will not be able to open the encrypted file unless they have downloaded and installed the corresponding software. The British Library noted on inquiry from the ADA and ALCC that plug in secure delivery has been problematic for end users, with firewalls frequently preventing the effective passage of encrypted documents. They are investigating offering 'plug-in less' DRM as an option, which is estimated by British Library IT support to require approximately 4-6 weeks development. We would be happy to put the ALRC in contact with the British Library for a more detailed overview of DRM models in place to protect against further electronic communication and alteration of documents supplied.

While s56A of the New Zealand *Copyright Act 1994* mandates that libraries supply copies in electronic formats that cannot be 'altered or modified', communications with NZ libraries indicate that in their view, supply in PDF format is sufficient.

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<sup>106</sup>See for more detail - <http://www.relais-intl.com/solutions/>. The National Library of Australia (NLA) provides document delivery via Relais, which is suitable for libraries accessible to all users (like state and public libraries).

<sup>107</sup>See for more detail - [http://joomla.prosentient.com.au/index.php?option=com\\_content&view=article&id=116&Itemid=579](http://joomla.prosentient.com.au/index.php?option=com_content&view=article&id=116&Itemid=579).

<sup>108</sup> See for more detail - <http://www.bl.uk/bldds>.

The British Library is estimated to be by far the largest supplier of document delivery in the United Kingdom, through a combination of UK copyright exceptions and licence agreements with publishers. BLDSS provides document delivery to UK residents for non-commercial research and study in reliance on UK copyright exceptions,<sup>109</sup> with no licence fee payable to right holders.<sup>110</sup> Through licence agreements with UK publishers and collecting societies, the British Library is able to supply across UK borders and outside the scope of copyright exceptions. The scope of document supply provided through BLDSS, which the British Library estimates is:

probably the largest in the world devoted to the provision of remote document delivery. It covers every aspect of scientific, technical, medical and human knowledge, in many languages'.<sup>111</sup>

This, to a great extent explains the significant investment in secure infrastructure by the British Library (in partnership with the Higher Education Funding Council). Australian libraries would be unable to rely on the same public investment in secure infrastructure for document delivery.

### **Cost of implementation**

Not all Australian systems have delivery mechanisms and email is frequently the delivery mode. None of the systems, Prosentient, Aleph, Relais or VDX currently offer the level of secure access proposed by the ALRC in amendments to section 49 of the *Copyright Act*. The costs for libraries in Australia to develop their own infrastructure to comply with proposal 11-7 would be prohibitive, and we believe out of reach for the vast majority, if not all, Australian libraries.

The National Library of Australia (NLA) noted in their Issues Paper submission to the ALRC that the total documents supplied to individuals using their Copies Direct service in 2012 was 13,000.<sup>112</sup> The National Library has confirmed to the ADA and ALCC that they do not currently have the infrastructure to support secure document delivery of the kind proposed by the ALRC under 11-7.

Upgrading the NLA's infrastructure alone to reflect the kind of secure access provided by the British Library, taking into account the total documents supplied electronically in 2012 (13,000) and the cost of implementation of BLDSS (nearly £6 million) places a value on document delivery of the kind

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<sup>109</sup> Ss 38 and 39, *Copyright, Designs and Patents Act 1988* (UK).

<sup>110</sup> See for more detail - <http://www.bl.uk/reshelp/atyourdesk/docsupply/help/blcss/replycodes/BLDSS%20Handbook/BLDSSHandbookForBusinessAccountManagement.pdf> p 4.

<sup>111</sup> See for more detail - <http://www.bl.uk/reshelp/atyourdesk/docsupply/collection/index.html>.

<sup>112</sup> National Library of Australia, *Issues paper Submission 218*.

envisaged by proposal 11-7 over the first year at \$692 per document supplied electronically by the National Library.<sup>113</sup>

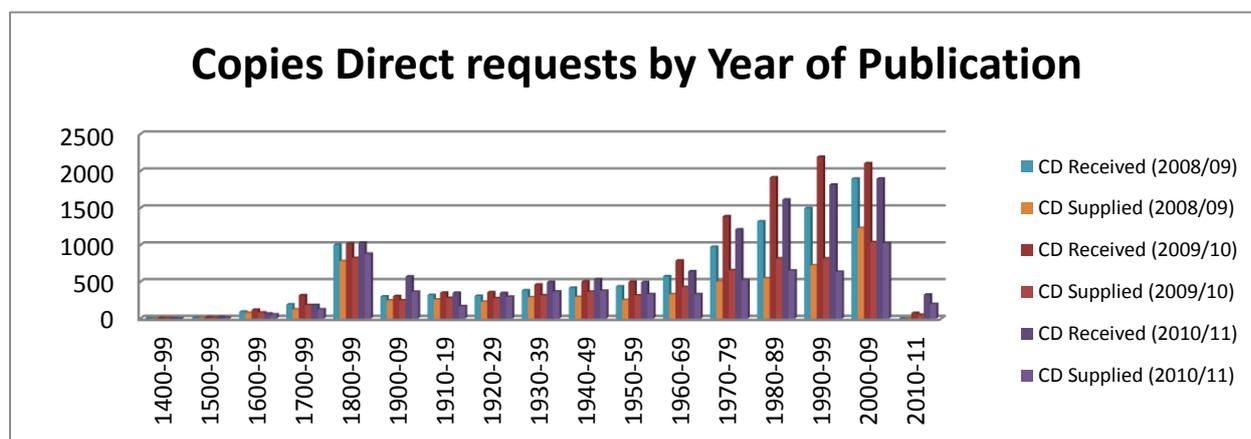
Even if the number of documents supplied by the NLA alone was to continue at present rate, (which presumes, among other variables, that no digital document distribution markets of the kind described by publishers in their submissions to the ALRC do emerge)<sup>114</sup> by 2022 each document delivered would have cost an additional \$106.47. This figure is on top of the costs of long term storage and preservation, as well as cataloguing, retrieval and scanning of the item on user request by the National Library.

It seems unreasonable that the protection of every document supplied for research and study by the National Library against further communication is to be valued at over \$100 per document. Particularly as noted by the NLA in their Issues Paper submission, evidence of further distribution of documents supplied under s49 and 50 is low.<sup>115</sup>

Currently the NLA does not have the resources to implement this system. Other libraries, with fewer resources, also have no ability to implement such a system. Unless the governments, State and Federal, are willing to provide the funding required for this substantial structural investment, this sort of system will remain out of reach for Australian libraries.

### Evidence-based decision making

The National Library has provided us with the following graph, displaying the variety of ages of documents supplied under s49.



Documents supplied through Copies Direct by the NLA vary in age (and copyright status) from the 1400s to the present day. It is worth noting that there is still a 'long tail' of content supplied by the

<sup>113</sup> £5.5 million ('nearly £6 million') in AUD at 9 July 2013 is \$8 996823 (using conversion rate 1.64 AUD to 1 British Pound, accurate at 30 July 2013).

<sup>114</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 11.09-11.10.

<sup>115</sup> National Library of Australia, *Issues Paper Submission 218*.

NLA that is out of copyright. Further, while the NLA is able to fulfil Copies Direct requests for research and study within the ‘deemed fair’ quantities prescribed under s49 *without* confirming that there is no commercial copy available, in all other circumstances the NLA is only able to supply for the purposes of research and study *because* the work is not available for purchase otherwise.

We understand that there may be concern that document supply is impinging on legitimate markets. However we have seen no evidence to back up this concern. To the contrary, we have some evidence that the amounts supplied under document supply do not have a large impact, as shown in the following example:

“The National Library is the biggest supplier in Australia of copies made under the interlibrary loan and document supply provisions. A major international journal publisher sought detailed information about the National Library’s document supply transactions from its journals to libraries and direct to end users, claiming they exceed what is permitted under applicable copyright exceptions and offering a “publisher backed solution”. After being sent spreadsheets for one year’s transactions (1034 requests supplied to end users and 5346 to libraries) the publisher concluded “as you indicated the quantities of deliveries ... was not so material as to warrant a licensing solution”

The ADA and ALCC reiterate our view put forward in our Issues Paper submission:

The ADA and ALCC don’t support the unauthorised distribution of copyright works. However, we are concerned that threats of unauthorised distribution or “piracy” sometimes dictate or influence the introduction of further exceptions to achieve necessary public interest purpose...

There are valid concerns regarding the impact of unauthorised distribution and reproduction of copyright works on commercial business models. However, we are concerned that a perceived threat of ‘piracy’ has been expanded to prevent or seriously confine access to content by disadvantaged groups in the community, to counter access to education and to counter against flexible exceptions.<sup>116</sup>

Restrictions on document supply by libraries and archives of the kind envisaged under Proposal 11-7 (which will require significant public investment in updated infrastructure) can only be justified if the investment outweighs the costs, both financial and the potential to restrict fair access to content. Currently there is no evidence that accurately quantifies the impact of existing document supply (taking into account the diversity of works requested from libraries, their age and availability for purchase).

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<sup>116</sup> ADA and ALCC Issues Paper Submission 213

It should not be forgotten that document supply exists for the public benefit. As one researcher, recently supplied by the NLA with a copy of a Zurich sales catalogue entry of a c1560 automaton of a monk which was purchased by the Smithsonian Museum in Washington, remarked

I was thrilled to hear back so quickly from Reference Librarian, who pulled the item I was seeking and identified for me which page numbers I was after, from my description in a communication with your "Ask a Librarian" service... Thank you with amazed gratitude. Yours is the only copy of this item I could locate worldwide. It was my last hope for a resource absolutely essential to my research.

- **Technological limitations – supplying out of copyright material**

Library and archive sector members have explained to the ADA and ALCC the extent to which existing document delivery technology would need to be updated to satisfy the requirements of proposal 11-7. We have noted our cost concerns above.

Proposal 11-7 envisages a centralised document delivery mechanism (akin to Copies Direct) but on a secure server that is time limited, with technological protection measures attached to prevent further communication of the document by the user. A centralised delivery mechanism would be essential to ensure compliance with proposal 11-7, and to maximise efficiency and minimise costs for libraries (provided they could afford the infrastructure). However, a centralised mechanism incorporating proposal 11-7 measures may not be able to distinguish between in copyright and out of copyright material.

The British Library has confirmed that BLDSS cannot distinguish between in copyright and out of copyright material. Any out of copyright material requested by an end user is supplied with TPMS attached, and with the same additional restrictions on access (a secure server, time limited access) as copies supplied under UK fair dealing provisions and licence agreements with publishers and collecting societies.

Similarly, the NLA has indicated that if their infrastructure were updated to reflect the type of requirements proposed by the ALRC in Proposal 11-7, they most probably could not justify the resources to develop two different delivery mechanisms (with different access restrictions) for in copyright and out of copyright material.

While we presume that the ALRC intends that only in copyright material is to be captured by proposal 11-7, it would be alarming if, in practice, out of copyright material requested were supplied with TPMs. Some libraries with higher volumes of document delivery have indicated this would be the case.

- **Imposing a technology “tax”**

11-7 applies to any copyright material supplied in electronic format, not only born-digital material. As currently drafted, Proposal 11-7 imposes access restrictions for users requesting *any* documents

from a library or archive for the purposes of research study, whether scanned from print or supplied from born digital material. With regards the supply of print material in electronic form, which is not available for purchase digitally (and may never be), this seems to be “digital innovation” going backwards. Users requesting a copy of a print item (noting the library or archive may be the only source of the item) face more restrictions requesting the item in a digital format than were the library to photocopy the item and post a paper copy to their address. The scope of proposal 11-7 deters digital use. This may be preferable for Australian publishers, but is antithetical to the goals of this Inquiry – to ensure copyright exceptions are adequate and appropriate for the digital environment. It also becomes more problematic as time passes and more content is natively digital.

The ADA and ALCC think that, where libraries have acquired digital material for their collections, it’s reasonable that right holders would want to ensure that any supply of that content under s49 contains the same level of security right-holders would expect when supplying to the rest of the market. Although we note that this should be at a reasonable standard, and not bound by excessively restrictive outliers.

However we oppose the use of TPMs where they impede legitimate access to education and information, and make long term preservation difficult –as proposed by amendments to section 49.

- **Entrenches disadvantage**

Proposal 11-7 entrenches the divide between access to education and information between those able to walk into a library, and those without that access. A person can walk into the library and exercise their fair dealing/fair use right, read a book, email document to themselves and generally access the library collection. However people living remotely, or with mobility problems will have much more restricted access.

Users with limited access to, or knowledge of, technology may also have issues accessing the information in electronic form, especially if they have to correctly download and install plug-ins onto a personal machine in order to read the content.

- **Fundamentally misunderstand the nature of study and research**

The limits on the delivery of documents, in particular the limits on time, fundamentally misunderstand the nature of study and research. We re-emphasise that under s49 documents can only be delivered for the purposes of study and research. Research is often a long process, where researchers will return to materials several times as they gather more information. Limiting the time materials are available has the potential to curtail the quality of material produced, and in turn impede Australia’s knowledge capital.

- **Relationship between proposal 11-7 and fair use**

We would like to reiterate that we would not support the document supply constraining or limiting libraries and archives’ ability to use copyright material under a fair use provision. The document

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supply provision should not be seen as a placing a 'ceiling' on document supply by restricting uses that would otherwise be judged fair. Instead s49, as amended, should be a supplementary exception.

## Orphan Works

We welcome the ALRC's proposals for orphan works, and strongly endorse them.

Our members see the positives in having orphan works dealt with under the fair use exception. They anticipate that many uses of orphan works would be captured under this provision. Under a fairness analysis factors that are of particular relevance to orphan works, the nature of the material, its age, the possibility of tracking a rights holder, the commercial value of the work, can all be taken into account when assessing whether a use is fair.

Some uses would seem to be obviously fair use, such as a library digitising and communicating copies of convict letters from the 1800s, which were never published and whose authorship is impossible to track.

This should also be of great use in collections of ephemera. As one member noted:

'We are in the process of acquiring an aviation collection. It's a comprehensive visual archive of most aircraft (international and national) – beautifully described and organised... The donor will give us copyright with the material, but he's swapped many negatives and prints with other aviation buffs over the years who he "thinks wouldn't mind if we digitised their material".'

The nature of the collection, amateur, hobby photography, by unknown/untraceable/unattributed photographers would be well suited to being digitised under a fair use exception.

## Diligent Search and Limitation of Remedies

For uses that would not fall under the fair use exception, the ADA and ALCC support the limitation of remedies for infringement of copyright if a reasonably diligent search has been carried out prior to use and, as far as possible, the work was attributed to the author.

A recent report commissioned by the UK Intellectual Property Office concluded that:

The evidence provided in this study underlines that the incentive problem is not mere speculation but reflected in actual user behaviour and shows that in particular in the US a limited liability system seems to enhance the availability of orphan works.<sup>117</sup>

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<sup>117</sup> Report commissioned by UK Intellectual Property Office – M Favale, F Homberg, M Kretschmer, D Mendis & D Secchi, *Copyright and the Regulation of Orphan Works: a comparative review of seven jurisdictions and a rights clearance simulation* at <http://www.ipo.gov.uk/ipresearch-orphan-201307.pdf> p. 83.

Archives and libraries hold a large number of orphaned public interest documents, and there is a clear public policy advantage to communicate these works to the public. The success of the limited liability in the US is heartening, and we would anticipate a similar outcome in Australia.

As stated in our submission, we support a reasonably diligent search with a 'proportionate standard of search [which] encompasses the diverse nature of works, their age and any commercial value, in Australian cultural collections.'<sup>118</sup> We submit that, to best give effect to the ALRC's framing principles for reform, and in the interests of administrative efficiency, adaptability and flexibility 'reasonably diligent search' would be better not to be too tightly defined within the legislation. The factors outlined in the proposal form a solid base for ordinary interpretation by a court. It is expected that further certainty would be provided through the development of codes of best practice.

In regards to the invitation to offer suggestions as to what limited remedies should entail, members of the ADA and ALCC are in broad agreement that when a rights holder comes forward remedies should be limited to the amount of the applicable licence fee for the work, or if unknown, a reasonable licence fee.

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<sup>118</sup> <sup>118</sup> ADA and ALCC *Issues Paper Submission 213* p. 56.

## Broadcasting

Chapter 16 of the Discussion Paper addresses the complex issue of the interaction of the Broadcasting Services Act 1992 ('BSA') and the Copyright Act. Many of the complexities in this area stem from the Ministerial Determination made under the BSA in 2000 to exclude internet services from the definition of 'broadcasting service' in the BSA.<sup>119</sup>

As the Discussion Paper sets out, stakeholders have suggested that this has created distinctions between broadcasting and internet services that are increasingly problematic in the context of copyright licensing.<sup>120</sup> However, we submit that the primary reason for this Determination, ensuring that internet streaming services were not regulated as broadcasting services under broadcasting regulation,<sup>121</sup> involves separate policy considerations to those involved in setting copyright policy.

The ALRC's consideration of these issues is occurring in the context of other recent policy reviews of these issues. For example, the Convergence Review recommended the abolition of broadcasting licences, calling into question the continuing need for the definition of 'broadcasting services' in the BSA.<sup>122</sup> This would have profound implications for the Copyright Act.

### Technology neutrality is an important goal

The ADA and ALCC caution against any approach that attempts to use technical descriptions of current technologies, or concepts that are based in concepts that are linked to specific business models. For example, Question 16-1 asks a series of questions related to the possible extension of broadcasting exceptions and licences to internet services. These questions are framed in relation to concepts such as:

- the internet equivalent of television and radio programs
- on-demand programs; and
- content made available by free-to-air broadcasters using the internet.

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<sup>119</sup> Commonwealth of Australia Gazette - *Determination under Paragraph (c) of the Definition of 'Broadcasting Service'*, (No 1 of 2000), No GN 38, 27 September 2000.

<sup>120</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 16.20

<sup>121</sup> *Ibid.* at 16.10

<sup>122</sup> Australian Government Convergence Review, *Convergence Review Final Report* (2012), p viii

We submit that each of these questions are linked to technologies and/or regulatory concepts that are quite specific to the technologies and regulatory concepts of today, but may become outdated quite quickly. For example, in a world of ubiquitous high speed broadband, consumers consume broadcast content via a portable device with the content delivered via a broadband network. Consumers can watch ‘programs’ that are delivered over the airwaves, made available ‘on demand’ via the web or using a mobile app, by purchasing the program from an online store such as the iTunes store or Google Play. They may also select to view content via a platform such as YouTube or Facebook. Regulatory distinctions that depend on concepts based on television and broadcasting are extremely problematic in an age of convergence.

### **Moving from ‘technology specific’ to ‘technology neutral’ regulation can have unanticipated effects**

The Convergence Review recommended that Parliament should avoid enacting legislation that either favours or disadvantages any particular communications technology, business model or delivery method for content services.<sup>123</sup> We believe that the ALRC’s fair use recommendation achieves this important aim, enabling all potential uses of copyright materials to be assessed against technology neutral fairness principles. It also seems to be the goal behind the ALRC’s approach to Proposal 16-1 and Question 16-1.

However, while technology neutrality is an important aim, in this circumstance focusing on achieving strict technology neutrality in relation to the operation of the existing ‘broadcasting’ exceptions could have unintended consequences in the context of the Copyright Act. These consequences come from the imposition of ‘technology neutral’ regulation onto sectors that are currently regulated in a ‘non-neutral’ manner.

For example, in the context of educational statutory licensing, if the Part VA licence is retained, extending it to all forms of online ‘broadcasts’ or other online content would have the effect of removing many educational uses of online content from a free exception (in s.200AB) to a remunerable statutory licence (in Part VA). We do note that the ALRC has proposed repealing the statutory licences, a position we strongly support for reasons outlined at pp. 17-22 above

Further we note that the Senate Environment and Communications References Committee has recently called for a full and urgent review of the related broadcasting and copyright issues arising from the ALRC’s review, the Convergence Review and other related policy issues caused by convergent technology.<sup>124</sup>

We would agree that these issues are extremely complex, and should be considered in a holistic manner. We would support these issues being fully considered by a review where the terms of

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123 Convergence Review op. cit. Recommendation 1a)

124 Senate Environment and Communications Committee *Effectiveness of current regulatory arrangements in dealing with radio simulcasts*, July 2013, Recommendation 2

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reference enabled consideration of the full range of issues across copyright and communications policy.

## Contracting Out

We welcome the ALRC's recognition of the necessity of protecting copyright exceptions from contracting out. The proposals set out in the discussion paper describe a cohesive and balanced copyright system, offering protection and incentives to users and creators of content. It is important that that balance is preserved and not skewed by contractual arrangements

As the Copyright Law Review Committee (CLRC) stated in its 2002 report, when looking at the balance of rights in the Copyright Act 'any attempt to exclude or modify the exceptions by contract brings about a fundamental imbalance of these rights. It follows that it should not be possible to alter that balance by means of contract'.<sup>125</sup> The CLRC went on to propose privileging some key exceptions from contracting out. More recently, in a UK context, the Hargreaves review concluded that the 'Government should change the law to make it clear that no exception to copyright can be overridden by contract'.<sup>126</sup>

As such, we welcome the ALRC's recognition of the importance of protecting exceptions from contractual override, and agree with the expressed purpose that 'the primary reason for this proposal is to ensure that the public interests protected by copyright exceptions, including the proposed fair use exception, are not prejudiced by private arrangements'.<sup>127</sup> We are heartened by the careful attention paid to the issues faced by the library and archive sector, and strongly support the recommendation to ensure that the library and archives exceptions are protected from contracting out.

However we have concerns about the specifics of proposal 17-1, stemming from the splitting of the fair use exception into some illustrative purposes that will be protected from contractual override, and all other purposes. We believe this aspect of the proposal would not be practical or beneficial, and instead **propose that the specific library and archive exceptions and fair use in its entirety are protected from contracting out.**

We note that the ALRC is 'concerned about the possibility of unintended effects and remains interested in further comment in this regard'.<sup>128</sup>

In that context, our concerns with the splitting of fair use may be grouped under four main topics:

- a) that the proposal would be unworkable in practice;

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<sup>125</sup> Copyright Law Review Committee, *Copyright and Contract* (2002) at 7.15.

<sup>126</sup> I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) at 5.40.

<sup>127</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 17.4.

<sup>128</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 17.19.

- b) that it would undermine the operation and rationale of fair use (and the whole regime outlined in the discussion paper);
- c) that it would be contrary to public policy; and
- d) that it would undermine the ALRC's attempt to 'future-proof' the Act.

## Unworkable in practice

- **Impossible to clearly differentiate between illustrative purposes**

The ADA and ALCC are concerned that, because many uses have multiple purposes (for example, study and educational) the distinction suggested by the ALRC could be unworkable in practice.

It is unclear how a court would deal with a use that has multiple motivations, some protected from contracting out and some not. Would a court declare the 'primary' purpose to be most relevant? Would the use be protected from contracting out to the limits of the protected purpose and no further? If the use could be characterized as two protected purposes and one not protected, would it be protected on balance?

- **Third party use**

The distinctions become particularly troubling in the area of third party use. In the discussion paper the ALRC makes the point that 'a use might sometimes be considered fair when a third party appears merely to be facilitating an otherwise fair use'.<sup>129</sup> In this context the overlap between the 'protected purposes' (research or study, criticism or review, parody or satire, reporting news, or quotation) and the remaining 'unprotected purposes' is especially problematic.

The difficulties are illustrated the following example.

A history teacher is running a course on modern Australian politics. She hands out short excerpts from speeches from prominent Australian politicians and commentators for the class to compare and discuss.

In this situation, should the use be characterized as a third party facilitation of the student's research or study (protected from contracting out) or as education (not protected)? What if the students were reviewing the material? Would the teacher's third party facilitation of two protected purposes (research or study, criticism or review) then outweigh the non-protected education purpose? If we move the example into the home, would a parent helping their child with their homework fall under a research or study purpose (protected) or private and domestic (not protected)? The ADA and ALCC welcome ALRC's proposal that third party use should be covered under the fair use exception, and

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<sup>129</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 5.3.

the proposition that the main question should be directed to whether the use is fair, rather than the narrower question of the purpose of the person doing the copying.<sup>130</sup> The proposed distinction on contracting out threatens to undermine this long-needed improvement.

- **Uncertainty in contract**

As one of the two key reasons given for providing protection from contracting out for some exceptions, the ALRC states that ‘there is doubt about the extent to which contractual terms excluding or limiting exceptions are enforceable and more certainty is desirable, in relation to some exceptions’.<sup>131</sup>

The ALRC notes, at paragraph 17.58, strong stakeholder concern regarding possible legal uncertainty in contracts.<sup>132</sup> The difficulties created by the need to characterize the purpose of the use caused by the ALRC’s ‘splitting’ of the illustrative purposes, and deciphering which contractual terms would be unenforceable in relation to which uses would increase the uncertainty over which terms would apply. By comparison, a simple exception for any fair use would be much clearer.

Adding to this confusion is the uncertainty over whether contractual terms could override exceptions not specifically legislatively protected against contracting out. ‘In proposing limitations applicable to only some exceptions the ALRC is not indicating that contractual terms excluding other terms should necessarily be enforceable’<sup>133</sup> and to that end the ALRC proposes Explanatory Memorandum to record this intention.

General principles of statutory interpretation however would suggest that the protection of specific exceptions and silence as to others creates a strong presumption that the unprotected exceptions were not intended by parliament to be protected. When the CLRC examined the effect of s47H, an exception introduced with a clear protection from contracting out, it found that Parliament’s intention may still be unclear due to the nature of the provision and its introduction (a specific exception, added after the existing exceptions and not within a wider reform of the Copyright Act).<sup>134</sup> This would not be the case should the ALRC recommendations implemented, as it would be clear that Parliament had turned its mind to the issue and had the opportunity to legislate, and chose not to. A provision stating that certain exceptions cannot be contracted out of, introduced in the context of prior uncertainty of whether it was possible to do so, would lead to a strong presumption that you could contract out of the non-protected exceptions. Although we note that

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<sup>130</sup> *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99.

<sup>131</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 17.90.

<sup>132</sup> ALRC quotes for example, APRA/AMCOS, *Issues Paper Submission 247*; Foxtel, *Issues Paper Submission 245*; ARIA, *Issues Paper Submission 241*; John Wiley & Sons, *Issues Paper Submission 239*; AAP, *Issues Paper Submission 206*; IASTMP, *Issues Paper Submission 200*.

<sup>133</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 17.121.

<sup>134</sup> Copyright Law Review Committee, *Copyright and Contract* (2002).

the ALRC suggests noting their contrary intention in Explanatory Memorandum, this would leave the Explanatory Memorandum at odds with generally accepted principles of statutory interpretation, leaving creators and users in an uncertain position. We strongly suggest that it would be preferable to include the entire fair use provision (as well as the library and archive sections) in proposal 17-1, returning the enquiry to a more certain question of 'is the use fair?'

### **Undermines Fair Use and the proposed Copyright Regime**

- **Emphasis on purpose rather than fairness**

The ADA/ALCC strongly support the ALRC when it says 'it would seem preferable at least to consider whether any particular use is fair, rather than automatically excluding uses not for prescribed purposes'.<sup>135</sup> One fundamental concern is that in cases where contracts purport to limit the fair use copyright exception, the primary question will not be what is fair, but rather what was the purpose of the use? And in cases where a contract seeks to override fair use, if the purpose does not fall within the excepted illustrative purposes, then for practical purposes the question as to fairness will remain unasked and unanswered.

This is a position that the ALRC seems to have deliberately tried to avoid by proposing a broad, flexible fair use provision rather than narrow purpose-based exceptions, and it would be sub-optimal for this purpose to be subverted by the structure of a contracting out provision.

- **Interpretive issues as to fair use**

The splitting of fair use into two parts may cause additional issues in statutory interpretation. In specifying some illustrative purposes that are so important that they must be protected from contractual override it risks creating a hierarchy of purposes. This would arguably lead to a presumption that some illustrative uses are more essential than others, a result that does not seem to be intended in the ALRC discussion of fair use in Chapter 4. The risk is that even in cases that are unrelated to contracting out, this emphasis on relative importance of certain provisions will shift the focus from balancing whether the use is fair, using the four proposed fairness factors, and instead giving disproportionate weight to the nature of the purpose, with some illustrative purposes arguably 'more illustrative' or conversely, creating more of a presumption of fairness for some purposes (contrary to the ALRC's intentions).

The splitting of fair use may also undermine the role that the illustrative purposes were intended to play. As the ALRC states as paragraph 4.157, the illustrative purposes may be thought of as 'examples of the broad types of uses that may be fair'. In concentrating attention on certain of the purposes at the expense of others, the contracting out provision risks informing an approach where

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<sup>135</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 5.44.

the illustrative purposes are seen as definitive, rather than simply concrete, accessible examples of broad types of use.

## Protecting the Public Interest

- **Risks to the protection of core public interests**

When explaining the reasoning behind protecting some exceptions from contracting out, the ALRC notes ‘that important public interests promoted by the fair dealing and libraries and archives exceptions may be compromised if these exceptions are rendered inoperative by contract’.<sup>136</sup>

When the CLRC examined in depth the exceptions that should be protected from contracting out, it concluded that they should be the ones that ‘embody the public interest in education, the free flow of information and freedom of expression’.<sup>137</sup> When the CLRC suggested privileging substantially the same exceptions as the ALRC, it was working within a framework containing narrower exceptions and statutory licences for government and educational use. If, as the ALRC proposes, broader exceptions are implemented (and the statutory licences repealed), we believe that more needs to be done to give effect to this guiding principle.

The move to protect the illustrative purposes that align with the current fair dealing provisions, at the expense of the other illustrative purposes, jeopardises some clear public interests. For example, when discussing government use, the ALRC notes ‘there are certain uses that are essential for the proper conduct of the administrative, judicial and parliamentary work of government’.<sup>138</sup> Similarly it notes the uneasy relationship currently with legislated uses of copyright material, such as Freedom of Information (‘FOI’) requests. An FOI request, as well as being central to the working of an accountable parliamentary democracy, would seem to clearly fit within the ‘free flow of information’ principle outlined by the CLRC, and as the ALRC notes, would be expected to fairly fall within fair use. This is the sort of public purpose use that should be protected, not made even more uncertain.

- **Institutional beneficiaries**

When explaining the importance of protecting the specific libraries and archives exceptions, the ALRC explained library and archives exceptions are clearly for ‘public rather than private purposes’ and:

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<sup>136</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 17.90.

<sup>137</sup> Copyright Law Review Committee, *Copyright and Contract* (2002) at 7.25.

<sup>138</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 14.2.

the fact that users of libraries and archives benefit from these exceptions, but are not parties to the licencing arrangements entered into by libraries and archives, makes it easier to argue that these exceptions should not be able to be removed by contract.<sup>139</sup>

We agree, and note that similar reasoning could be extended to schools or universities, whose students are not direct parties to the licensing arrangements, or to governments, the judiciary and statutory bodies who enter into licencing arrangements that benefit the population of Australia as a whole.

Similarly, technology companies that may rely on non-consumptive fair use to provide services such as search engines, are crucial to the continued operation of the internet, which is critical to modern society and Australia's digital economy.

Under the current proposal, large media corporations such as News Corp Australia will be able to protect their commercial interests in reporting the news, while schools and government will be unable to protect their non-commercial interests in education or effective public administration, even though their users are dependent on their provision of services. We are not suggesting that it should be possible to contract out of the exception for news reporting, which is after all a core public purpose. However we strongly suggest that other core public uses, such as providing information to members of parliament, allowing the judicial system to run efficiently and educating the next generation of Australians, should be similarly protected, and not disproportionately burdened with onerous administrative burdens and costs.

### Protection for the vulnerable

The exclusion of private and domestic use from the illustrative purposes in proposal 17-1 arguably reduces protection for the most vulnerable group of users. As the ALRC notes in the discussion paper, quoting a report prepared for UK Strategic Advisory Board for Intellectual Property<sup>140</sup> 'fragmented end-users (such as consumers) are typically not in a position to contest the terms of the licence offered'.

Examples are not hard to find. The ubiquitous use of 'clickwrap' and other online licence agreements is prevalent, with the IP sections a small part of larger terms and conditions. Research in the US solely relating to privacy policies concluded that:

We estimate that reading privacy policies carries costs in time of approximately 201 hours a year, worth about \$3,534 annually per American Internet user. Nationally, if Americans were

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<sup>139</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 17.116.

<sup>140</sup> *Ibid.* at 17.15.

to read online privacy policies word-for-word, we estimate the value of time lost as about \$781 billion annually.<sup>141</sup>

We would expect the pro rata figures to be similar for Australian users and licencing agreements.

These licences, offered on a 'take-it or leave-it' basis, leave no room for the average consumer to negotiate better terms, including negotiating fair use of copyright material.

As the recent House of Representatives Committee report *At what cost? IT pricing and the Australia Tax* notes:

Conditional licences to access copyright content contrast sharply with the traditional rights of consumers over purchased copyright content and have broad flow-on effects in relation to the cost of copyright material.<sup>142</sup>

The vulnerability of consumers and their unequal positions when compared with corporate entities has been legislatively recognized in the Australian Consumer Law (ACL) where consumers are protected by voiding any term of a contract to the extent that it excludes, restricts or modifies legislated consumer guarantees.<sup>143</sup> The existence of this, and other protections, may be one reason that the ALRC did not feel the need specifically protect consumers, relying on other laws to address unfair terms and uneven power balances.

However, while consumer protection legislation may address some of the issues that make consumers particularly vulnerable, it does not protect their fair uses of copyright material. More worryingly, it is possible that the presumption that protections under the ACL may actually be reduced on the basis that government considered contracting out prima facie reasonable for those purposes not specifically protected.

The practicalities of enforcement pose problems, as the CLRC found:

in practice, there are very considerable disincentives to users ever seeking to defend their rights while there are very powerful incentives for copyright owners to seek to enforce what might otherwise be objectionable terms.<sup>144</sup>

Finally reliance on other laws is fraught from a legislative perspective, if the ACL for example should change or be repealed, the legislators may not turn their minds to the unintended effects on the

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<sup>141</sup> A McDonald and L Cranor 'The Cost of Reading Privacy Policies': *A Journal of Law and Policy for the Information Society* (2008) <http://lorrie.cranor.org/pubs/readingPolicyCost-authorDraft.pdf>.

<sup>142</sup> House of Representatives Standing Committee on Infrastructure and communications Inquiry into IT Pricing *At What Cost? IT pricing and the Australia Tax* (July 2013) at 4.59, p. 101.

<sup>143</sup> *Competition and Consumer Act* (2010) sch 1, s64.

<sup>144</sup> Copyright Law Review Committee, *Copyright and Contract* (2002).

copyright balance. And the Copyright Act may have a substantial lag before it was next amended. The most appropriate place to protect a consumer's fair use of copyright is within the Copyright Act.

## Future Proofing

Guiding the ALRC proposals is framing principle 4, 'providing rules that are flexible and adaptive to new technologies'. When asking for feedback on unintended consequences flowing from proposal 17-1, the ALRC notes that:

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.<sup>145</sup>

One danger in allowing contract to override copyright is that new uses and markets may not be able to develop as they will be stifled by contract (and TPMs). As new markets and uses emerge it is important that there is a forum where they can be assessed. The use of thumbnail photos in order to sell items on eBay, or the ability to create mash-up artworks in digital media were new and innovative uses that would likely be considered 'fair' under the proposed fair use provision. However if innovative uses like these are smothered by restrictive contractual terms, then they will never be assessed in the public forum of a court. As the ALRC notes:

copyright law that is conducive to new and innovative services and technologies should at least allow for the question of fairness to be raised.<sup>146</sup>

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<sup>145</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 17.119

<sup>146</sup> ALRC *Copyright and the Digital Economy - Discussion Paper* at 13.67