



Australian Government

Australian Law Reform Commission

Copyright and the Digital Economy

SUMMARY REPORT

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

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

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Terms of Reference

Copyright and the Digital Economy

Having regard to:

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

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

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

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

Scope of Reference

In undertaking this reference, the Commission should:

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

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

Timeframe

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

Summary Report

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Overview

This Summary Report provides an accessible overview of the policy framework and recommendations of the final Report *Copyright and the Digital Economy* by the Australian Law Reform Commission (ALRC). The full Report sets out in detail the issues raised by the Terms of Reference, and the research and evidence base upon which the ALRC's recommendations were formulated.

The Summary Report begins with a brief account of the background to the Inquiry, the law reform brief and the development of the law reform response—including the principles underpinning the recommendations in the Report. This is followed by a description of the recommendations and their overall effect of providing a more flexible and adaptive copyright framework and one that simplifies the current regime.

Background

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

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

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

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

The Inquiry in context

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

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

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

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

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

Cultural policy and copyright reform: Many stakeholders in this Inquiry are at the forefront of cultural life in Australia. It is clear that copyright law directly affects a broad range of cultural activity, often impeding access to material for no good policy

reason. The ALRC recommends reform that is beneficial for Australians in terms of accessing and interacting with culture.

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

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

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

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

The Inquiry process

Since 1975 the ALRC has had a history of independent inquiry into law reform, and over that time has developed a well-established, rigorous process, the results of which have gained a considerable degree of public respect and recognition of high quality outcomes.¹ Within that established framework the process for each law reform project may differ according to the scope of inquiry, the range of key stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. While the exact procedure needs to be tailored to suit each topic, the ALRC usually works within a particular framework when it develops recommendations for reform.

Stakeholder consultation

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

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

The first stage of the Inquiry included the release of the Issues Paper² in August 2012, to identify the issues raised by the Terms of Reference and suggest principles which could guide proposals for reform, as well as to inform the community about the range of issues under consideration, and invite feedback in the form of submissions. The Issues Paper generated 295 submissions.

On 30 May 2013 a Discussion Paper was released³ and the ALRC again called for submissions to inform the final stage of deliberations leading up to the Report. In total, the ALRC received 870 public and 139 confidential submissions to the Inquiry.⁴

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

Consultations and submissions included those with and from:

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

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

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

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

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

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

Appointed experts

In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of its Advisory Committees and the appointment of part-time Commissioners.

The role of the Advisory Committee is to advise on coherence and structure of the ALRC process and recommendations; it does not formulate reform recommendations, and members are invited in their individual capacity. They are explicitly asked not to act in any representative capacity.

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

Outline of the Report

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

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

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

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

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

Chapter 6 considers an alternative to an open-ended fair use exception, namely, a new fair dealing exception that consolidates the existing fair dealing exceptions in the

Copyright Act and introduces new prescribed purposes. The ALRC recommends that, if fair use is not enacted, this new fair dealing exception be introduced.

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

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

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

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

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

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

copies or formats that may be made. As a consequence of the new exception, a number of existing exceptions should be repealed.

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

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

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

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

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

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

convergence, the Australian Government should consider whether aspects of the retransmission scheme for free-to-air broadcasts should be repealed.

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

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

Framing principles for reform

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

The framing principles are:

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

The recommendations

A flexible fair use exception

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

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

- Fair use is flexible and technology-neutral.

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

An important feature of fair use is that it explicitly recognises the need to protect rights holders' markets. The fourth fairness factor in the exception is 'the effect of the use upon the potential market for, or value of, the copyright material'. Considering this factor will help ensure that the legitimate interests of creators and other rights holders are not harmed by the fair use exception. If a licence can be obtained to use copyright material, then the unlicensed use of that material will often not be fair. This is vital to ensuring copyright law continues to fulfil its primary purpose of providing creators with sufficient incentive to create.

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

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

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

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

Fair use also facilitates the public interest in accessing material, encouraging new productive uses, and stimulating competition and innovation. Fair use can be applied to a greater range of new technologies and uses than Australia's existing exceptions. A

technology-neutral open standard such as fair use has the agility to respond to future and unanticipated technologies and business and consumer practices. With fair use, businesses and consumers will develop an understanding of what sort of uses are fair and therefore permissible, and will not need to wait for the legislature to determine the appropriate scope of copyright exceptions.

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

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

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

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

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

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

By appropriately limiting the ambit of copyright, exceptions can increase competition and stimulate innovation more generally, including in technologies and services that

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

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

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

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

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

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

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

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

The introduction of fair use to Australia is supported by the internet industry, telecommunications companies, the education sector, cultural institutions and many

others. However, it is largely opposed by rights holders. In light of this opposition, the ALRC recommends an alternative, second-best exception.

An alternative: a new fair dealing exception

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

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

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

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

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

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

Specific exceptions

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

Specific exceptions are recommended for unlicensed uses for which there is a clear public interest, and for some uses that are highly likely to be fair use anyway, making a case-by-case assessment of fairness unnecessary. Preservation copying by libraries and

archives is one example. The ALRC also recommends that specific exceptions for parliamentary libraries and judicial proceedings should be retained. New specific exceptions are recommended for use of copyright material in royal commissions and statutory inquiries, to allow public access to material when required by a statute, and to allow use of correspondence and other material sent to government.

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

Reform of statutory licences

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

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

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

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

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

Orphan works

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

Broadcasting

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

The ALRC suggests approaches to reform of broadcasting exceptions, including changes to the retransmission scheme and the statutory licensing scheme applying to broadcasting of music; and the extension of some other exceptions to the transmission of linear television or radio programs using the internet. These exceptions raise complex questions at the intersection of copyright and communications policy. The Australian Government needs to give further consideration to these issues in developing media and communications policy, in response to media convergence.

Contracting out

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

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

Overall effect of the recommendations

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

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

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

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

Recommendations

4. The Case for Fair Use

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

5. The Fair Use Exception

Recommendation 5–1 The fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair use ('the illustrative purposes').

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

- (a) the purpose and character of the use;
- (b) the nature of the copyright material;
- (c) the amount and substantiality of the part used; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

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

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) professional advice;
- (f) quotation;
- (g) non-commercial private use;
- (h) incidental or technical use;
- (i) library or archive use;

- (j) education; and
- (k) access for people with disability.

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

- (a) ss 40, 103C—fair dealing for research or study;
- (b) ss 41, 103A—fair dealing for criticism or review;
- (c) ss 41A, 103AA—fair dealing for parody or satire;
- (d) ss 42, 103B—fair dealing for reporting news;
- (e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and
- (f) ss 104(b) and (c)—professional advice exceptions.

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

6. The New Fair Dealing Exception

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

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) professional advice;
- (f) quotation;
- (g) non-commercial private use;
- (h) incidental or technical use;
- (i) library or archive use;
- (j) education; and
- (k) access for people with disability.

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

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

8. Statutory Licences

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

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

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

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

9. Quotation

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

10. Private Use and Social Use

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

11. Incidental or Technical Use and Data and Text Mining

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

12. Libraries and Archives

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

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

13. Orphan Works

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

- (a) a reasonably diligent search for the rights holder had been conducted and the rights holder had not been found; and
- (b) as far as reasonably possible, the user of the work has clearly attributed it to the author.

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

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

14. Education

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

15. Government Use

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

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

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

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

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

16. Access for People with Disability

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

18. Retransmission of Free-to-air Broadcasts

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

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

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

19. Broadcasting

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

- (a) s 45—broadcast of extracts of works;
- (b) ss 47, 70 and 107—reproduction for broadcasting;
- (c) s 109—broadcasting of sound recordings;
- (d) ss 65 and 67—incidental broadcast of artistic works; and
- (e) s 199—reception of broadcasts.

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

- (a) s 47A—sound broadcasting by holders of a print disability radio licence; and
- (b) pt VA—copying of broadcasts by educational institutions.

20. Contracting Out

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

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

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