

Australian Film/TV Bodies ALRC Discussion Paper Submission

Joint Submission August 2013

This submission is made by the following: Australian Screen Association (**ASA**), the Australian Home Entertainment Distributors Association (**AHEDA**), the Motion Picture Distributors Association of Australia (**MPDAA**), the National Association of Cinema Operators (**NACO**), the Australian Independent Distributors Association (**AIDA**), and the Independent Cinemas Association of Australia (**ICAA**), collectively referred to as the **Australian Film/TV Bodies**. These associations represent the following:

Australian Screen Association

The Australian Screen Association represents the film and television content and distribution industry in Australia. Our core mission is to advance the business and art of film making, increasing its enjoyment around the world. Our aim is to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs, to highlight to movie fans the importance and benefits of content protection.

We have operated in Australia since 2004 and were previously known as the Australian Federation Against Copyright Theft.

The Australian Screen Association works on protecting and promoting the creative works of its members. Our members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

Australian Home Entertainment Distributors Association

The AHEDA represents the \$1.3 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as: intellectual property theft and enforcement; classification; media access; technology challenges; copyright; and media convergence. AHEDA currently has 12 members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment, Hopscotch Entertainment, Fremantle Media Australia and Anchor Bay Home Entertainment.

Motion Picture Distributors Association of Australia

The MPDAA is a non-profit organisation formed in 1926 by a number of film distribution companies in order to promote the motion picture industry in Australia. The organisation represent the interests of motion picture distributors before government, media and relevant organisations, providing policy and strategy guidance on issues such as classification, accessible cinema, copyright piracy education and enforcement and industry code of conduct.

The MPDAA also acts as a central medium of screen-related information for members and affiliates, collecting and distributing film exhibition information relating to box office, admissions and admission prices, theatres, release details and censorship classifications. The MPDAA currently represents Fox Film Distributors, Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International, Walt Disney Studios Motion Pictures Australia and Warner Bros.

National Association of Cinema Operators

NACO is a national organisation established to act in the interests of all cinema operators. It hosts the Australian International Movie Convention on the Gold Coast, this year in its 66th year.

NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, Reading Cinemas Pty Ltd as well as the prominent independent exhibitors Dendy Cinemas, Grand Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners representing over 100 cinema screens.

Australian Independent Distributors Association

AIDA is a not-for-profit association representing independent film distributors in Australia, being film distributors who are not owned or controlled by a major Australian film exhibitor or a major U.S.film studio or a non-Australian person. Collectively, AIDA's members are responsible for releasing to the Australian public approximately 75% of Australian feature films which are produced with direct and/or indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).

Independent Cinemas Association of Australia

ICAA develops, supports and represents the interests of independent cinemas and their affiliates across Australia. ICAA's members range from single screens in rural areas through to metropolitan multiplex

circuits. ICAA's members are located in every state and territory in Australia representing nearly 500 screens across 110 cinema locations.

1 Executive summary

1.1 Introduction

1. The Australian Film/TV Bodies are disappointed that the ALRC has recommended the adoption of a fair use exception in Australia. There are many reasons why the ALRC should reconsider its position on the fair use exception before releasing its final report, including the following:
 - There is no consensus in support for a fair use exception - only a minority support it.
 - The case for a broad open ended fair use exception has not been established.
 - There is no evidence that it will assist with innovation or participation in the digital economy.
 - The evidence suggests that it will have negative economic impact on the market in Australia.
 - A broad open-ended standard is not more effective or more suitable than the current specific rules.
 - It would create uncertainty and lead to regulation by litigation.
 - It is not suitable for the Australian environment.
 - Australia would put itself in the company of a minority (4 out of 166) countries if it had fair use.
 - Adoption of broad open-ended fair use in the Australian context would put Australia in breach of its international obligations.
2. Australian Film/TV Bodies also address a range of other proposals in this submission, including proposals relating to non-consumptive use, private and domestic use, quotation and contracting out.
3. Before turning to the ALRC's recommendations, the Australian Film/TV Bodies have a number of concerns in relation to the approach taken by the ALRC to the Inquiry.

2 Preliminary concerns

2.1 Scope of Inquiry

4. The ALRC has taken an inconsistent approach to the scope of the Inquiry. Despite assurances that the ALRC "has been receptive to concerns and the need to take into account enforcement and other issues faced by stakeholders",¹ the Discussion Paper does not cover online infringement, enforcement and measures encouraging the growth of digital markets for authorised content because the ALRC concluded that "the focus of the ALRC Inquiry is on legal exceptions to copyright rather than on measures to combat copyright infringement".²

¹ Discussion Paper at [1.8].

² Discussion Paper at [1.5].

5. This is unfortunate. The TOR directed the ALRC to conduct a review of copyright in the digital economy, including “amongst other things” copyright exceptions. Nothing precluded the ALRC from considering the other side of the copyright balance and how to support the growth of new licensed digital distribution models. None of them were subject to any current national inquiry or review. It was a missed opportunity and one that undermines the ALRC’s recommendations.
6. It can be contrasted with the approach adopted in the UK and in the US. In the UK, an equivalent process started with the Hargreaves Review of Intellectual Property. Although that review and its proposals had many shortcomings, it at least gave more detailed consideration to enforcement issues, emphasising that “IPRs cannot succeed in their core economic function of incentivising innovation if rights are disregarded or are too expensive to enforce” and dedicating one of its ten recommendations to enforcement.³ The UK Government’s response to the Hargreaves Review emphasised the importance of achieving “a balance between the interests of rights holders, creators, consumers and users” and stated that “being able to enforce copyright is also a necessity for a healthy copyright system”, pointing to various UK Government initiatives in this regard.⁴ Similarly, the recently announced US copyright review is billed in the official House of Representatives Committee press release as “a wide review of our nation’s copyright laws *and related enforcement mechanisms*”.⁵
7. The decision to ignore copyright enforcement issues is more difficult to explain given that the ALRC considered other areas of copyright law that clearly fell outside the TOR, including:⁶
 - orphan works;
 - contracting out of exceptions to copyright infringement;⁷
 - technological protection measures (TPMs);⁸ and
 - safe harbours.⁹
8. Each of those topics was the subject of separate review processes and should not have been addressed. This Inquiry was not the appropriate forum to consider them, particularly in the superficial way in which the ALRC has approached them.
9. It is harder to understand why the ALRC expressed any views about the TPM regime given that it was the ALRC who was specifically directed not to consider TPMs.¹⁰ Despite this, the ALRC proceeded to recommend “consistent amendments to TPM provisions” to mirror the proposed restrictions on

³ Professor Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, May 2011 (**Hargreaves Review**) at e.g. p 5 and 9.

⁴ UK Government Response at e.g. p 3. and 31.

⁵ United States House of Representatives Committee on the Judiciary, Press release, *Chairman Goodlatte Announces Comprehensive Review of Copyright Law*, 24 April 2013, available at http://judiciary.house.gov/news/2013/04242013_2.html (emphasis added).

⁶ Chapters 12 and 17 of the Discussion Paper.

⁷ Discussion Paper at [1.14] and [17.118].

⁸ Chapters 12 and 17 of the Discussion Paper.

⁹ Discussion Paper at [8.34]-[8.40].

¹⁰ Discussion Paper at [9.76].

contracting out of copyright exceptions.¹¹ This amounts to a recommendation to repeal substantial parts of the TPM regime which are critical to Australia's creative economy and to innovative new distribution models.

10. Submissions by several academics appear to have encouraged the ALRC to exceed the scope of its remit in this way.¹² The ALRC ought not to have responded. By exceeding its remit, the ALRC appears to have included and excluded certain matters in line with its particular policy preferences and those of its members rather than the TOR. The ALRC should be very cautious in the next phase of the Inquiry to ensure that its final report is more closely aligned to issues within the TOR and that it transparently explains why any other issues should be addressed in the absence of giving all affected parties the opportunity to make submissions on the issues.

2.2 Independence

11. The ALRC promotes itself as being "independent of government" thereby enabling it to "undertake research, consultations and legal policy development, and to make recommendations to the Parliament, *without fear or favour*."¹³ In its submission to the Legal and Senate Legal and Constitutional Affairs References Committee Inquiry into its own activities in 2011,¹⁴ the ALRC highlighted the importance of its independence:

1.10 Law reform agencies such as the ALRC are not, of course, the only bodies responsible for developing policy, but a number of features of the ALRC distinguish it from other agencies and demonstrate why it is a vital contributor to the health and growth of Australian law. These features answer the question 'why law reform commissions?' and include the ALRC's:

- *Independence (from government, party politics, academic interests, special interest groups and other stakeholders),¹⁵*

(emphasis added)

12. The Australian Film/TV Bodies are very concerned that the independence of the ALRC could be perceived as being compromised in this Inquiry.
13. The composition of the ALRC Advisory Committee itself is not consistent with independence from "academic interests, special interest groups and other stakeholders" who are advocating positions now recommended in the Discussion Paper. The ALRC Advisory Committee included:
 - representatives of each of Google, Facebook, the Australian Digital Alliance, the Internet Industry Association and the Australian Communications Consumer Action Network;
 - four board members of the Australian Digital Alliance;

¹¹ Discussion Paper at [17.131].

¹² See e.g. submission by Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall (**Burrell et al**) at p 38; also the discussion at paragraph 20 below

¹³ <http://www.alrc.gov.au/about>.

¹⁴ The Terms of Reference included investigation of the ALRC, "its role, governance arrangements and statutory responsibilities."

¹⁵ The Australian Law Reform Commission's Final Submission to the Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Law Reform Commission.

- two representatives of bodies that prepared reports for the Australian Digital Alliance;¹⁶ and
 - three academics who are publicly advocates in favour of a US style fair use exception.¹⁷
14. **The ALRC Advisory Committee did not contain a single representative from the content/creative industry with a background and understanding of the commercial machinations of the content industry.**
 15. The closest that any representative of the ALRC Advisory Committee came to understanding the creator/copyright owner perspective of the copyright balance was a solitary member of the Australian Copyright Council.
 16. The composition of the ALRC Advisory Committee, which had no copyright owner representatives placed the ALRC in an almost impossible position to be able to avoid an appearance that it will be influenced, either consciously or unconsciously, by those interests who are represented on the ALRC Advisory Committee. With such a composition it was incumbent on the ALRC to take great care to avoid perceptions that it had been unduly influenced by the views, in particular, of the subset of companies that view copyright as an inconvenience to their business models and academics.¹⁸
 17. The ALRC is required under section 39 of its governing Act to deal with conflicts of interest involving members in a prescribed manner. A “member who has an *interest in a matter that is being considered*” is required to disclose that conflict at the meetings (s39(1)). Disclosures are to be minuted (s39(2)).¹⁹ The relevant “interest” is broadly defined to include any interest “direct or indirect” (s39(6)(a)) and “whether acquired before or after the member’s appointment” (s39(6)(b)). Unless the Commission or the Attorney-General determines otherwise, affected members “must not be present during any deliberation by the Commission” or “any decision by the Commission” on the matter (s39(3) and (4)). Any determination must be recorded in the minutes of the meeting (s39(5)).
 18. There is no indication from the Discussion Paper whether any of these processes were followed or whether consideration was given to whether they would be followed in the case of the members of the ALRC Advisory Committee referred to. Whether or not these processes directly apply to those members, they reflect the types of process that would have been appropriate to have to ensure that actual or perceived conflicts of interest were minimised given the representation on the ALRC Advisory Committee of commercial representatives of companies whose business models rely on re-distributing third party content, copyright user interests and academics with public positions supporting fair use amendments.
 19. The potential conflict of interest in the ALRC Advisory Committee would also have arisen when those members of the ALRC Advisory Committee themselves, or the organisations they represented, made

¹⁶ Policy Australia prepared a paper in favour of fair use for the Australian Digital Alliance /Australian Libraries Copyright Committee in November 2012. Lateral Economics prepared economic research commissioned by the Australian Digital Alliance.

¹⁷ Kathy Bowrey, Brian Fitzgerald (resigned from Committee in April 2013) and Kimberlee Weatherall.

¹⁸ This issue was raised in the November 2012 submission of the Australian Film/TV Bodies to the Inquiry (**Australian Film/TV Bodies Submission**) at [11].

¹⁹ The ALRC Annual Report for 2011-2012 records that during 2011–12, “there were no conflict of interest disclosures” (p50).

submissions. How could those members of the ALRC Advisory Committee claim to exercise objective and independent judgment, *without fear or favour*, when they were making submissions advocating positions of the interests they represent, determining which submissions to accept and which ones to reject and making recommendations that ultimately reflected the positions they were advocating?

20. Analysis of the footnotes in the Discussion Paper reveals a concerning trend in the document towards over-referencing of the submissions by the same set of individuals and organisations:
- almost 18% of footnoted references are to submissions written by, or otherwise directly connected with, members of the ALRC Advisory Committee who support the ALRC's central recommendation that a broad fair use regime be adopted;
 - the submission in favour of fair use by four academics (one on whom was an ALRC Advisory Committee member) is the equal third most cited submission in the Discussion Paper.²⁰ The extent to which the ALRC appears to have relied on this paper has even been acknowledged in a recent press release issued by Oxford University;²¹ and
 - despite the fact that these submissions are in the minority of all submissions made to the Inquiry, not only are the same submissions amongst the most frequently referenced, they are referenced as forming the principal support for many of the recommendations.
21. It is also concerning that the Discussion Paper pays little attention to the first guiding principle in the TOR, "the objective of copyright law in providing an incentive to create and disseminate original copyright materials." Although this principle is acknowledged by the ALRC,²² the discussion that follows appears to openly question whether copyright actually provides an incentive to create and focuses on incentives to "establish new ways of doing business and seek out new commercial opportunities" rather than incentives to create new copyright works.²³ The ALRC could be perceived as having taken on the role of questioning the appropriateness of its own guiding principle.
22. The apparent conflict of interest also appears to be reflected in the disproportionate emphasis in the Discussion Paper on one aspect of the broad third guiding principle in the TORs, the development of technology start-ups who will benefit from broader exceptions to copyright infringement.²⁴ This does not take into account the reality, acknowledged by the Hargreaves Review in the United Kingdom, that

²⁰ Submission by Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall (**Burrell et al**).

²¹ <http://www.law.ox.ac.uk/newsitem=626> "The Discussion Paper drew extensively from a submission co-authored by [Hudson, Burrell, Handler and Weatherall]...Their submission argued in favour of the introduction of a fair use provision modelled on that in the US."

²² Discussion Paper at [2.10].

²³ In particular paras [2.13] and [2.19]. We have already explained that the objective of copyright is to incentivise the creation of copyright works: see p 5-7 Australian Film/TV Bodies Submission.

²⁴ For example, the ALRC's arguments in favour of adopting a fair use exception at p 79-90. The only business sector referred to, in the discussion of why fair use is "suitable for the digital economy and will assist innovation", is the "market for technology investment and innovation" (at [4.97]). The exception is the ALRC's acknowledgment of how intermediaries benefit from disseminating transformative works without remunerating either the original or derivative copyright owner: see p 207, especially [10.69]. This leads the ALRC to reject a stand-alone transformative use exception, but the issue is not considered in other contexts e.g. when proposing non-consumptive use and private and domestic use exceptions.

the reliance of the technology sector on content gives it a symbiotic relationship with the creative sector, such that the growth of both sectors should be pursued in parallel.²⁵

23. The ALRC ought to determine what processes it can adopt, both internal and external, to demonstrate to all stakeholders in the Inquiry and to the general public that its independence has not been compromised when it releases its final report and final recommendations.

2.3 Potential impact of recommendations

24. On 1 July 2011 the ALRC Act was amended to require the ALRC to:

*“take into account the potential impact of its recommendations on ... persons and businesses who would be affected by the recommendations. This includes, for example, the **economic effects** of recommendations.”²⁶*

25. The Explanatory Memorandum explained that the amendment was to ensure that the ALRC ‘has regard to any broader implications its recommendations may have’. The importance of this requirement in this Inquiry cannot be overstated, especially in light of the fact that over 10% of Australia’s GDP, and about 8% of employment is in the copyright industries.²⁷
26. It means that the ALRC is required to consider the impact of recommendations on those who would be affected by it – Australia’s broader economy, copyright owners and users, not academics and commentators. The reference to the economic effects of recommendations puts front and centre the issue of the economic analysis of recommendations, such as consideration of any economic research in assessing its proposed recommendations.
27. The first question in the Issues Paper called for “*evidence* of how Australia’s law is affecting participation in the digital economy”. The importance of evidence-based analysis, especially in light of the Government’s broad commitment to evidence-based policy making, is clear.²⁸ The Discussion Paper recognises this as a “major concern of stakeholders”.²⁹ As far back as September 2000 the *Intellectual Property and Competition Review Committee* (the **Ergas Committee**) found that the “transaction costs of changing the Copyright Act [to an open-ended fair dealing exception] could outweigh the benefits.”³⁰
28. The ALRC appears to have undertaken limited, if any, critical analysis of the evidence. The basis for recommending fair use is the conclusion that “the ALRC considers that developments in recent years

²⁵ This point was emphasised in the UK Government’s response to the Hargreaves Review: see HM Government, *Modernising Copyright: a modern, robust and flexible framework* at p 10, available at . <http://www.ipc.gov.uk/response-2011-copyright-final.pdf> (**UK Government Response**).

²⁶ s24(2)(b) ALRC Act 1996.

²⁷ WIPO, *WIPO Studies on the Economic Contribution of the Copyright Industries* at 2 (2012), available at

http://www.wipo.int/export/sites/www/ip-development/en/creative_industry/pdf/economic_contribution_analysis_2012.pdf

²⁸ Australian Film/TV Bodies Submission at [11]. This was supported by other stakeholders including the ACCC, the Australian Copyright Council, Screenrights, News Limited, Combined Newspaper and Magazines Copyright Committee, AFL, Cricket Australia, Foxtel and The Newspaper Works.

²⁹ Discussion Paper at [3.14].

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

provide *further evidence* in support of Australia introducing fair use”.³¹ In arriving at this position, the Discussion Paper appears to rely on following three papers:

- R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), funded by Google;
- Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe Harbour Provisions* (2012), written by a board member of the Australian Digital Alliance and the ALRC Advisory Committee and funded by the Australian Digital Alliance; and
- PricewaterhouseCoopers (**PwC**), *The Start Up Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013), which was commissioned and funded by Google.

29. None of the papers are peer reviewed. The first two papers are not published on an academic website. None of them constitute independent research. Each was funded by a special interest represented on the ALRC Advisory Committee.³²
30. The first two papers are held up by the Discussion Paper as support for the proposition that “fair use will *not necessarily* cause economic harm to rights holders”.³³ The first paper, by Ghafele and Gilbert, does not refer or relate to Australia. It is a study of the Singaporean market. As Dr George Barker and Professor Ivan Png³⁴ have demonstrated, the underlying data used to reach the conclusions in the report was corrupted, rendering the analysis and conclusions unreliable.³⁵ Dr Barker and Professor Png have been given access by the Singapore Government to the underlying data relied upon by Ghafele and Gibert and have identified that the underlying data cannot support the claims made in their research. For instance, Ghafele and Gibert claim expanded fair dealing provisions in Singapore increased value add in computers, digital storage media, smart cards and other electronic devices used in copying. However, as Dr Barker points out, the data used by Ghafele and Gibert includes value add for both domestic sales and exports. Given that over 95% of Singapore's output in these categories are ‘export sales’, Dr Barker and Professor Png reason that Singapore’s open-ended fair dealing laws could not have affected domestic distribution of electronic private copying devices and that Ghafele and Gibert’s conclusions to the contrary are unsound.

³¹ Discussion Paper at [4.28].

³² In the case of the Australian Digital Alliance, which has 4 board members on the ALRC Advisory Committee, a Google representative is a board member of that organisation.

³³ Discussion Paper at [4.100], citing these studies which are R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), prepared for Google (**Ghafele and Gibert**); and Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe Harbour Provisions* (2012), prepared for the Australian Digital Alliance.

³⁴ See Dr George Barker, *Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions* (July 2013) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298618) (**Barker 2013**) and the submission by George R Barker and Professor Ivan Png, *Unreliable Evidence on Fair Use* (July 2013, to be published on the research-based economic analysis website Vox EU).

³⁵ *ibid*

31. The second paper is little more than advocacy for a philosophical conclusion, dressed up as research and written by a member of the ALRC Advisory Committee. As a more recent published and peer-reviewed paper has demonstrated, its research methodology is so weak that it reflects poorly on the Inquiry that it has been relied on at all by the ALRC Advisory Committee.³⁶
32. The reliance on the third paper³⁷ for the fair use proposal is basically dishonest. The third paper is a study “to identify potential ways to accelerate the growth of the Australian technology startup sector”. The report presents a positive picture of the Australian regulatory environment for start-ups, finding that “Australia already has one of the most favourable environments for entrepreneurship” (p 12). The report suggests some improvements in areas completely unrelated to copyright, such as tax incentives.³⁸ It is not addressed to how the current copyright law is affecting participation in the digital economy and does not support the conclusion in the Discussion Paper that with more flexible copyright law the sector has potential to contribute 4% of the nation’s GDP in 20 years’ time.³⁹ The paper does not even refer to copyright, Australian copyright law or the impact, if any, of the proposed open ended fair use exception on participation in the digital economy.⁴⁰
33. The Discussion Paper contains no critical review of these papers (being papers commissioned by special interests represented on the ALRC Advisory Committee itself, it would admittedly have been an awkward task for the Committee to undertake). It never tests the validity of the analysis, never carries out any assessment of its academic value or seriously tests the conclusions. However, the analysis and the findings of the papers have been heavily criticised.⁴¹ While the Discussion Paper refers to one published, peer-reviewed economic study that is critical of this research and concludes that fair use would harm content-producing industries, it pays no regard to it.⁴²
34. Prominence is also given in the Discussion Paper to submissions from a small subset of technology companies that claim they could not have been established under the Australian copyright framework.⁴³ Identical arguments were made to and rejected by Hargreaves and for good reason – these self-serving arguments are empirically wrong. It would be an understatement to say that, despite claims to the contrary, in reality these businesses have thrived under the existing copyright regimes in Australia and the UK. They have become some of the most successful, profitable and influential businesses in the world today. It cannot be suggested that their operations are materially impeded because of the absence of opened ended fair dealing defences in Australia and the UK or the other 164 Berne-Compliant countries that do not have them.

³⁶ Dr George R Barker, *Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore* (November 2012) Centre for Law and Economics <http://ssrn.com/abstract=2180769> (Barker 2012); Barker 2013.

³⁷ PricewaterhouseCoopers, *The Start Up Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013), available at <http://www.digitalpulse.pwc.com.au/wp-content/uploads/2013/04/PwC-Google-The-startup-economy-2013.pdf>.

³⁸ *Ibid*, p 29-31 and Discussion Paper at p 64, note 28.

³⁹ Discussion Paper at [4.30].

⁴⁰ The Discussion Paper only acknowledges in a footnote that this report does not refer to copyright law.

⁴¹ Barker 2012; Barker 2013.

⁴² Barker 2012, referred to in the Discussion Paper at [4.68].

⁴³ Discussion Paper at [4.46]-[4.47].

35. The contrast between the approach taken by the Committee towards research and economic evidence and the approach taken in the Hargreaves Review is striking. The first recommendation of the Hargreaves Review is titled “Evidence” and stated the need to “ensure that development of the IP System is driven as far as possible by *objective evidence*”.⁴⁴ In contrast to the Discussion Paper, the Hargreaves Review engaged with the challenges involved in identifying objective evidence and suggested ways of overcoming them.⁴⁵
36. The Hargreaves Review conducted interviews in Silicon Valley to test whether the existing regulatory framework in the UK was really holding back innovation in the digital economy. It was a worthwhile qualitative exercise because it found that “the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, and complex issues of economic geography, than it does to the shape of IP law” is far more reliable.⁴⁶ It found that “the economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated”.⁴⁷
37. In response to the Hargreaves Review, the UK Intellectual Property Office (**UK IPO**) has published guidance on standards of evidence for policy development. Its “Good Evidence for Policy” sets three criteria: evidence must be clear, verifiable and able to be peer-reviewed.⁴⁸ There is good reason for the adoption of such objective criteria. It ensures that proper academic and economic research can be distinguished from material that is little more than advocacy or fails to meet the requirements of accepted standards of research. The UK IPO criteria should be adopted by the ALRC when it considers the impact of its proposals on businesses, including the rights holders, as required under its governing legislation and by the first question in the TORs. The importance of obtaining objective evidence as a basis for copyright reform has also been recognised in the US, where the US National Research Council has recently issued a report explaining in detail how research can and should inform copyright policy.⁴⁹ It is also consistent with the *Australian Government Best Practice Regulation Handbook* (July 2013) which recommends regulation impact assessments be carried out.⁵⁰ The ALRC should take notice of these three reports when undertaking the final phase of the Inquiry.

2.4 Lack of Consensus

38. One of the two reasons the Government did not enact a fair use exception in 2006 was that “no significant interest supported fully adopting the US approach”, that is, a broad fair use exception.⁵¹

⁴⁴ Hargreaves Review, p 8.

⁴⁵ Discussion Paper at e.g. p 41, and the Hargreaves Review, p 18-19.

⁴⁶ Hargreaves Review, p 45.

⁴⁷ *Ibid*, p 45.

⁴⁸ UK Intellectual Property Office, *Good Evidence For Policy* (2011), available at <http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf>.

⁴⁹ Board on Science, Technology and Economic Policy, *Copyright in the Digital Era: Building Evidence for Policy* (2013), available at <http://www.ip-watch.org/weblog/wp-content/uploads/2013/05/NRC-Copyright-in-the-Digital-Era-FINAL-Apr-2013.pdf>

⁵⁰ *Australian Government Best Practice Regulation Handbook* (July 2013), para 1.14

⁵¹ Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), p 10. The second reason was concerns about compliance of a new Australian fair use exception (which would lack the extensive fair use jurisprudence in place in the US) with the three-step test: see also Discussion Paper at [4.27].

39. The Discussion Paper asserts that “the ALRC considers there is now more of an appetite for a broad, flexible exception to copyright”.⁵² It is not clear how it could make that assertion when **a minority of submissions supported a proposed fair use exception.**
40. Despite an extensive public consultation process, attracting 294 submissions from 280 respondents,⁵³
- 105 referred to fair use or fair dealing in their submission *at all*;
 - a majority, 47 (45% of the 105), opposed fair use (as occurred in the Hargreaves Review which noted that “[m]ost responses to the Review from established UK businesses were implacably hostile to the adoption of a US fair use defence in the UK”);⁵⁴
 - 32 (30%) of the respondents supported the introduction of a broad fair use defence;
 - only 15 submissions made any suggestions about the model Australia should adopt (often as simple as proposing the US model).⁵⁵
41. The Discussion Paper also appears to mis-characterise submissions as supportive of the proposal, when they were not. For example, the ALRC say that “eBay submitted that a fair use exception ‘would enhance the environment for e-commerce in Australia’.⁵⁶ eBay’s submissions were limited to an exception allowing copying for the purpose of offering goods for sale.⁵⁷

3 The “case for fair use” in Australia

42. It is not clear how the ALRC reached its conclusion in favour of fair use based on the submissions. Aside from the concerns expressed above about the process of reaching that conclusion, the case for the introduction of a fair use exception has not been made out.

3.1 Assisting innovation

43. There is no evidence before the ALRC that the fair use exception will assist innovation. The majority of submissions made in support of the proposition that fair use would assist innovation were from interests who would like to benefit from being able to avoid paying licence fees for otherwise accessing copyright works. There is an assumption in these submissions that businesses should be entitled to avoid paying for access to copyright works by taking the benefit of fair use defences.

⁵² Discussion Paper at [4.32]-[4.33].

⁵³ These submissions are available at <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc>.

⁵⁴ Hargreaves Review, p 44 noted that “[m]ost responses to the Review from established UK businesses were implacably hostile to the adoption of a US Fair use defence in the UK”.

⁵⁵ Submissions from Google, the Legal Institute of Victoria, the Law Council of Australia, the Intellectual Property Committee of the Business Law Section of the Law Council of Australia, the ADA/ALCC, Telstra, Copyright Advisory Group – Schools; Rebecca Giblin and Robert Burrell et al.

⁵⁶ Discussion Paper at [4.48].

⁵⁷ See eBay’s submission at p 12: “an exception of the nature proposed” clearly refers to the discussion at the end of the previous page, which is focused on e-commerce and does not consider a broad fair use exception in any other context.

44. Reliance on the CLRC recommendation in 1998,⁵⁸ before the existing of the digital environment, provides no assistance or guidance about how the adoption of an open-ended standard will operate or its effects in the current digital environment. That recommendation was rejected by the Ergas Committee because it could not be demonstrated that the benefits outweighed the transaction costs. No equivalent cost benefit analysis has been undertaken by the ALRC.
45. The PWC report relied on by many of the proponents of fair use identifies the real factors standing in the way of startups in the internet environment (taxation treatment, cultural approaches to startup funding etc) which do not include Australia's copyright laws. This is consistent with the findings of the Hargreaves Review, which rejected equivalent submissions by the proponents of fair use. The ALRC could confidently come to the same conclusion as the Hargreaves Review.
46. The conclusions of the ALRC that the proposals "are likely to enhance adjustment to the digital environment" and that it would "foster an entrepreneurial culture which contributes to productivity" are vague and not supported.⁵⁹ The weaknesses in the papers relied on by the ALRC have already been identified above.
47. In his peer-reviewed paper Dr Barker concludes that the introduction of a fair use exception to copyright "*will impose both direct costs and opportunity costs on the copyright industry*", which will be "*an increasing function of the extent and uncertainty surrounding the exceptions granted.*"⁶⁰ Higher costs are likely to have a negative impact by reducing investment in the copyright market and thus reducing future copyright output with the result that:
- "[T]he unintended consequences of broadening exemptions is that by limiting the growth of copyright it will in turn limit the growth of the internet intermediary services market which relies on demand for new copyright content like new music, films, games and books to fuel its growth."*⁶¹
48. The long term effects of a fair use exception, rather than increasing consumer access to copyright material, would likely lead to a reduction in the amount of copyright material available to consumers. A strong economic argument has been made that this in turn is likely to reduce overall consumer, and more generally, social welfare.⁶²
49. Dr Barker has argued that, rather than extending copyright exceptions in response to technological change, "*the development of the digital economy requires the opposite response – namely the strengthening of copyright and the limiting of exceptions*".⁶³ The economic argument for fair use, that it should operate to permit socially beneficial uses of copyright works that would otherwise be precluded due to high transaction costs, is actually of *less* application in the online environment. This is because

⁵⁸ Discussion Paper at [4.95].

⁵⁹ Discussion Paper at [4.94], [4.97].

⁶⁰ Barker 2013 at 17.

⁶¹ Ibid at 18.

⁶² [Brett Danaher, Michael D. Smith, Rahul Telang](http://www.nber.org/chapters/c12945.pdf), "Piracy and Copyright Enforcement Mechanisms" (2013), available at <http://www.nber.org/chapters/c12945.pdf>, Barker 2013 at 19.

⁶³ Barker 2013 at 3.

“the primary impacts of the growth and evolution of the digital economy is to (a) lower transactions costs by enabling low-cost communication and exchange between copyright holders and potential users; and (b) increase the value of copyright to users”.⁶⁴ This changed balance fundamentally weakens the underlying economic rationale for a fair use exception, undermining its ability to contribute to innovation and economic growth in the digital economy.⁶⁵ The result is that, *“with the internet the scope for agreed use has expanded and the scope for fair use should be more limited”*.⁶⁶

50. Some US commentators reason that the vagueness of fair use defence *“prevent[s] actors from precisely determining the optimal level of investment.”*⁶⁷ Commercial development is not assisted by structural impediments to careful risk / benefit analyses. As a recent US study in relation to investors attitudes towards copyright regulation demonstrated, 80% of investors felt uncomfortable investing in business models beset by regulatory ambiguity.⁶⁸ Australian studies have similarly reported reluctance amongst Australian libraries and cultural institutions relying on s.200AB to make productive uses of copyright material under that provision due to the uncertainty of that exemption.⁶⁹ Recent research has shown that the introduction of similar fair use style laws in Singapore has led to a slowing in revenue growth in copyright industries⁷⁰ from an average growth rate before the amendments of 14.16% to 6.68% for the period after the amendments were introduced.⁷¹
51. This issue was also thoroughly examined in the UK by the Hargreaves Review. In his report, Professor Hargreaves dismissed the proposition that the adoption of fair use would quickly stimulate innovation, noting that other factors such as attitudes towards business risk and investor culture were more significant.⁷² Professor Hargreaves found that the economic benefits of a copyright regime in the UK digital economy are more likely to be realised, in practice, through targeted copyright exceptions, not open standards.⁷³
52. Australia will never be Silicon Valley, nor will it have the same investment in technology experienced in the US. There are cultural and economic reasons for this that the current regulatory regime is neither responsible for nor likely to remedy, as the PWC’s report recognises. The PWC report does not support the argument that a change to a fair use exception will overcome these structural differences.
53. In the absence of an evidence-based analysis, the assumption permeating the Discussion Paper that there is a case for change to overcome existing obstacles to development and growth is dubious. The

⁶⁴ Ibid at 16.

⁶⁵ Ibid at 16.

⁶⁶ Ibid at 16.

⁶⁷ Gideon Parchomovsky & Kevin A. Goldman, Fair Use Harbors, 93 V(2007) Virginia Law Review 1483, 1498.

⁶⁸ La Merle, Matthew, Sarma, Raju, Ahmed, Tashfeen and Pencavel, Christopher, *The Impact of US Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study*, (Booz & Co, 25 Oct 2011), 16 available at <http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf> (This study was commissioned and funded by Google).

⁶⁹ E Hudson, ‘Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia’, Thesis, University of Melbourne, 2011.

⁷⁰ Ghafele and Gibert (note 33 above).

⁷¹ Ibid at 6.

⁷² Hargreaves Review at 53.

⁷³ Ibid at 52.

technology sector is thriving in Australia under the current Australian copyright framework.⁷⁴ There is a proliferation of new licensed content distribution platforms.⁷⁵ A number of highly successful digital content management and distribution systems have developed within this framework relying on copyright law to protect their walled ecosystems.⁷⁶ The list of innovative online platforms that have successfully launched in Australia, and which operate free of any active threats of litigation, is extensive and continuing to grow while the Inquiry is taking place.⁷⁷

3.2 Flexible standard

54. The pursuit of a “flexible standard” is not a goal or virtue in its own right. Fair dealings constitute rules and not standards because they are exceptions to the rights provided for in the Copyright Act, which are themselves strictly defined. As the authorities demonstrate, copyright owners have never benefitted from a flexible approach to the subsistence of their rights or the interpretation of their exclusive rights. Why should a right defined in such specific terms be qualified by an exception in such flexible and uncertain terms? There is no coherent answer to this in the Discussion Paper.
55. Some legal tests are more susceptible to a flexible standard than others. Resort to analogies with consumer protection or privacy legislation are flawed and provide further support for maintaining the current regime of rule based exceptions. The prohibition on “misleading or deceptive” conduct in s18 of the ACL is a prescription against conduct which otherwise may be freely undertaken. So too is the prohibition on unconscionable conduct or standards for collection of information without breaching privacy. They are restraints on the right to freely conduct one’s own business without interference.
56. The position of an exception to copyright is quite different. It is based on the presumption that but for a permissible act under the exception, no conduct can be engaged in which interferes with the rights of the copyright owner. That is the essence of the statutory monopoly, particularly one reflected in a right of property. Property rights are not amenable to flexible standards of defensive entitlement. The proposal for flexible exceptions misconceives the nature of copyright.
57. Inevitably, the adoption of a flexible fair use standard will cause uncertainty. That is the experience with the misleading or deceptive standard. It is one of the most litigated provisions in the statutes in Australia. It is no model of certainty or efficiency. Courts are not consistent in their interpretation of the standard or their application of the standards. Time and time again parties come before the Court in first instance and appellate decisions, and reversals are common. Regulation by litigation is an inefficient way to settle disputes.

⁷⁴ Australian Film/TV Bodies Submission at [59].

⁷⁵ See the Australian Film/TV Bodies Submission at [38]-[39] and Appendix A, “New and Emerging Digital Business Models”. This was supported by, for example, ARIA’s submission at p 51.

⁷⁶ Appendix A of the Australian Film/TV Bodies Submission, “New and Emerging Digital Business Models” which describes a number of these services.

⁷⁷ In addition to those listed in Appendix A of the Australian Film/TV Bodies Submission and recognised at p 181-2 of the Discussion Paper, these include Google, Facebook, YouTube, Twitter, Spotify, Pandora, Rdio, iTunesMatch, Instagram and Pinterest. See also the Australian Film/TV Bodies Submission at [60], which explains the absence of precedent in Australian copyright law in this area.

58. Australian Courts will struggle to determine how to give content to an open ended defence. Even proponents are counting on the fact that the content of what is considered a fair use will need to be determined by a Court and that it may not be dealt with consistently. The suggestion of industry guidelines reflects the practical need for some guidance if an opened exception is adopted.
59. In its 2006 amendments to the Copyright Act, the Australian Government recognised this risk of uncertainty when rejecting the fair use model in favour of enacting targeted exceptions. It noted that *“the present system of exceptions and statutory licences ...has been maintained for many years because it gives copyright owners and copyright users reasonable certainty as to the scope of acts that do not infringe copyright”*.⁷⁸ An open fair use model was considered less desirable, because the Government concluded that:

*“this approach may add to the complexity of the Act. There would be some uncertainty for copyright owners until case law developed. Until the scope was interpreted by the courts, there may be disruption to existing licensing arrangements. Similarly, a user considering relying on this exception would need to weigh the legal risk of possible litigation.”*⁷⁹

60. US caselaw will not assist. Rarely if ever do Australian Courts look to US caselaw. There are good reasons for this. Inevitably the enactment of laws in Australia is different in some form, has a different heritage and takes place in a different legal context from the US. The impact of the first amendment on US law, including copyright law, is significant and could play no legitimate part in any application of fair use standards in Australia. As the US Government has recently written:⁸⁰

“The Administration believes, and the U.S. Copyright Office agrees, that authors (including visual artists, songwriters, filmmakers, and writers) would benefit from more guidance on the fair use doctrine. Fair use is a core principle of American copyright law. The Supreme Court has repeatedly underscored fair use provisions in the Copyright Act as a key means of protecting free speech, and many courts across the land have upheld the application of fair use as an affirmative defense to infringement, in a wide variety of circumstances.”

(emphasis added)

61. The ALRC should reconsider its support for a flexible system. The rejection of a flexible fair use exception would be consistent with many countries with legal systems very similar to that of Australia:
- The Hargreaves Review examined the relative merits of open and closed standards in digital environments and concluded that the UK should stay with its fair dealing exceptions.
 - This followed the earlier *Gower Review of Intellectual Property: Proposed Changes to Copyright Exceptions* which also rejected moving to a fair use model for reasons including its uncertainty and the fact that, in the UK legal environment, it would not comply with the UK's international obligations.

⁷⁸ Explanatory Memorandum, *Copyright Amendment Act 2006* (Cth), p 6.

⁷⁹ *Ibid*, p 10.

⁸⁰ 2013 Joint Strategic Plan on IP Enforcement, 18 available at <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipecc-joint-strategic-plan.pdf>.

- New Zealand considered and rejected a fair use regime, concluding that no compelling reasons had been presented for an open model and describing its existing closed fair dealing system as “*technologically neutral and adaptable for the digital environment*”.⁸¹
- Canada rejected fair use in favour of fair dealing provisions for the purposes of parody, satire and education, in its recent review of copyright laws.⁸²

62. In the case of the UK, the reasons given by the Hargreaves Review for rejecting such a proposal Hargreaves Review went beyond the reasons referred to in the Discussion Paper:⁸³

“The review expressed regret that it could not recommend that the UK promote a fair use exception of the European (EU) - ‘the big once and for all fix’ - as it had been advised that there would be ‘significant difficulties’ in attempting to transpose US-style fair use into European law.”

63. The Hargreaves Review also concluded (in a passage omitted from the Discussion Paper) that:

*“... the benefits of a more adaptive copyright regime are more likely to be attained in practice by the [targeted exception] approach recommended above.”*⁸⁴

64. The fact that Hargreaves did not recommend a fair use exception because it was not the best solution in practice, not merely because of EU law constraints, is not acknowledged in the Discussion Paper which refers only to the EU law rationale.⁸⁵

3.3 Coherence and predictability

65. The conclusion in the Discussion Paper that the adoption of a US-style fair use exception would be coherent and predictable is based on a misunderstanding of the US experience of fair use⁸⁶ and an overreliance on the views of a minority of US academics.

66. There could not be any serious dispute that fair use is a highly controversial concept under US law. The criticism in the US of the open ended US fair use standard has been consistent and widespread:

- One court described it as “*the most troublesome in the whole law of copyright*”.⁸⁷
- Another US court characterised fair use as “*so flexible as virtually to defy definition*.”⁸⁸
- A leading scholar observed that the “*facial emptiness of the statutory language means that ... it is entirely useless analytically, except to the extent that it structures the collection of evidence*.”⁸⁹

⁸¹ Digital Technology and the Copyright Act 1994 Position Paper, at [160-61].

⁸² Copyright Modernization Act 2013.

⁸³ Discussion Paper at [4.14].

⁸⁴ Hargreaves Review at p 46.

⁸⁵ Discussion Paper at [4.14].

⁸⁶ Discussion Paper, at [4.119] – [4.130].

⁸⁷ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir 1939).

⁸⁸ *Time, Inc. v. Bernard Geis Assocs*, 293 F Supp 130, 144 (SDNY 1968).

⁸⁹ Michael J Madison, A Pattern-Oriented Approach to Fair Use, 45 Wm. & Mary L Rev 1525, 1564 (2004).

- Another leading scholar commented that the idea that the statutory test determines the outcome of fair use cases is “*largely a fairy tale*.”⁹⁰
 - Other scholars describe the statutory test as “*unpredictable and uncertain in many settings*”⁹¹.
 - Others have concluded that fair use “*is too indeterminate... to provide a reliable touchstone for future conduct*”.⁹²
 - Judge Leval, a leading US authority on intellectual property, has noted that US judges themselves “*do not share a consensus on the meaning of fair use*.”⁹³
67. All of the leading US fair use cases are characterised by divergent, often conflicting, conclusions on fair use.⁹⁴ If they can afford it, losing parties have an incentive to pursue appeals. As Professor Austin has observed “*lower courts’ fair use decisions [in the US] are usually reviewed de novo. As a result, appellate courts are seldom deferential to the conclusions reached by first-instance courts*.”⁹⁵ Even the most recent precedent is of limited value because of the fact-specific and context-dependent nature of the fair use inquiry.⁹⁶
68. An open-ended exception based solely on discretionary ‘fairness’ engenders inconsistent outcomes, divergent judicial approaches and incentives to pursue appeals if the parties can afford to do so. The business opportunity costs associated with litigation are, of course, significant. A system that encourages appeals – without achieving greater certainty – is of dubious utility.⁹⁷
69. It is a measure of the uncertainty of the fair use standard that resort to Professor Samuelson’s ‘policy clusters’⁹⁸ and Professor Beebe and Matthew Sag’s ‘regression analysis modelling’⁹⁹ is required to identify any discernible pattern to fair use jurisprudence. These patterns have not, however, been discernible to the vast majority of US legal commentators; and, as the comment by Judge Leval attests, judges themselves have difficulty in recognising any consistent patterns.¹⁰⁰ If such patterns

⁹⁰ David Nimmer, “Fairest of them All” and Other Fairy Tales of Fair Use, 66 Law and Comtemp. Probs 263, 282 (2003).

⁹¹ Thomas F. Cotter, Fair Use and Copyright Overenforcement, 93 Iowa L. Rev. 1271, 1284 (2008).

⁹² James Gibson, Once and Future Copyright, 81 Notre Dame L. Rev. 167, 192 (2005).

⁹³ Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L Rev 1105, 1106 (1990). See eg *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir 1939); *Time, Inc. v. Bernard Geis Assocs*, 293 F Supp 130, 144 (SDNY 1968);

⁹⁴ ***Sony v. Universal City Studios, Inc.*, 464 US 417 (1984)** District Court: 1 judge in favour of fair use; Court of Appeals: 3 judges against fair use; Supreme Court: 5 judges in favour of fair use and 4 judges against fair use; ***Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 US 539 (1985)**; the trial judge found against fair use; in the Court of Appeals 2 judges were in favour and 1 judge was against; in the US Supreme Court 6 judges against fair use and 3 judges in favour of fair use; ***Campbell v. Acuff-Rose Music, Inc.* 510 US 569 (1994)** the trial1 judge found in favour of fair use; in the Court of Appeals 2 judges against fair use and 1 judge in favour of fair use; in the Supreme Court 9 judges generally found in favour of fair use – but no final decision (case remanded for further evidence).

⁹⁵ Graeme Austin, *Fair Use Paper Prepared for the BPI*, March 2011, at 75.

⁹⁶ R Clarida, *Copyright Law Deskbook*, at [6.1.A.] As the Second Circuit noted in *American Geophysical Union v Texaco Inc* 802 F. Supp. 1 (SDNY, 1992) “[f]air use is a doctrine the application of which always depends on consideration of the precise facts at hand

⁹⁷ *Ibid.*

⁹⁸ P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 Fordham Law Review 2537, 2618.

⁹⁹ B Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions, 1978–2005’ (2008) 156 University of Pennsylvania Law Review 549 (**Beebe 2008**); M Sag, ‘Predicting Fair Use’ (2012) 73 Ohio State Law Journal 47.

¹⁰⁰ Graeme Austin, *Fair Use Paper Prepared for the BPI*, March 2011, at 73.

are not readily apparent to leading copyright scholars or to judges, then businesses and their legal advisors are unlikely to see them.

70. The Discussion Paper places reliance on an unpublished thesis to support the proposition that the fair use doctrine was not as uncertain as has been argued.¹⁰¹ The author of that paper has since expressed the view that “flexible or open-ended drafting is not inherently superior to other drafting choices” and that other factors may be important in explaining the approaches to the drafted language including “empirical analysis of the behaviours and attitudes of those regulated by the law”.¹⁰²
71. There is a growing recognition in Capitol Hill that the US doctrine might have become “*the great white whale of American Copyright Law*”.¹⁰³ In June 2013, the White House took the step of establishing a task force to develop and publish an index of major fair use decisions:¹⁰⁴

In order to make fair use more accessible to the authors of the 21st century, ease confusion about permissible uses, and thereby encourage the production of a greater variety of creative works, the U.S. Copyright Office, working in consultation with the Administration, will publish and maintain an index of major fair use decisions, including a summary of the holdings and some general questions and observations that may in turn guide those seeking to apply the decisions to their own situations. (emphasis added)

72. In practice, the fair use defence has led to a system where creators are required to hire a lawyer to defend their rights. As Lawrence Lessig has written:

[F]air use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad—in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law.¹⁰⁵

73. Fair use adds uncertainty to every case in which it is pleaded as a defence to infringement or advice rendered. As a leading US copyright lawyer recently observed in the *New York Law Journal*:

WOE TO THE COPYRIGHT lawyer asked to provide an opinion on fair use. The task of predicting whether a use falls on the fair or unfair side of the fair use dividing line can be perilous. In addressing such questions, the copyright attorney is often reduced to offering “on the one hand” and “on the other hand” circumlocutions followed by a somewhat definite “maybe.”¹⁰⁶

74. The suggestion in the Discussion Paper that “certainty can come from things such as guidelines developed by peak bodies, industry protocols and internal procedures and documents”¹⁰⁷ or that assistance can be found in industry co-regulation and self regulation in setting standards”¹⁰⁸ illustrates

¹⁰¹ Discussion Paper, at [4.127]-[4.128].

¹⁰² <http://www.law.unimelb.edu.au/cmcl/seminars/2012%20Seminars/Copyright%20Seminar/Emily%20Hudson%20PDF%20Slides.pdf>.

¹⁰³ Paul Goldstein, [Fair Use in Context](#), 31 *Colum. J.L. & Arts* 433, 433 (2008).

¹⁰⁴ 2013 Joint Strategic Plan on IP Enforcement, 18 available at <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipecc-joint-strategic-plan.pdf>.

¹⁰⁵ Lawrence Lessig, *Free Culture*, Chapter 12

¹⁰⁶ Joseph Petersen, “When Parodists Wish Upon the Fair Use Star”, *New York Law Journal*, Monday, August 16, 2010.

¹⁰⁷ Discussion Paper, at [4.129].

¹⁰⁸ Discussion Paper, at [4.129].

how uncertain and complex such a fair use doctrine would be in practice. The current fair dealing regime does not suffer from these structural difficulties.

75. The experience with fair use guidelines in the United States is that they often “*bear little relationship, if any, to the law of fair use*”, have, in many instances, been or become “*a source of misconstruction of judicial rulings*” and may have a distorting effect on the scope of legally permissible conduct¹⁰⁹
76. In his seminal article on the relationship between the law of fair use and fair use guidelines, Professor Crews made a number of observations which cast doubt on the ALRC’s contention¹¹⁰ that guidelines provide greater certainty to fair use:
- Guidelines are not legally binding. None of the US guidelines orientated from a source with authority to make law. No US court has accepted them as a standard of fair use applicable to any situation and Congress has never adopted any provision in any fair use guideline into legislation.
 - Guidelines do not, therefore, give any assurance that a user is actually operating within the law. In some instances, they, in fact, distort perceptions about what is and is not legally permissible under fair use law.
 - Guidelines are often more complicated than the law. Guidelines depend on a multiplicity of variables and include many requirements and prohibitions that are not found in the law. For example, the *Conference on Fair Use Guidelines (CONFU)* on production of multimedia works restrict the length of time that a professor may keep and use the finished work and require notices that the professor is exercising fair use. No such obligations exist in the law. CONFU also itemizes a long list of conditions related to quantity, purpose of use, and market effects.
 - In the US, the process of convening interested parties to “*take the lead*” in preparing and drafting guidelines “*has proven to be seriously flawed.*”¹¹¹ The result is often a negotiated statement supported only by the parties who choose to agree with the final document. Parties to guidelines gravitate towards commercially-acceptable outcomes, and not to results founded in the law.
 - Guidelines are more effective if they are rooted explicitly in fair use law; a fact which is not true of Australia.¹¹²
77. Whilst the Australian Film/TV bodies agree that guidelines or self-regulation can, in some contexts, be useful, the experience with fair use guidelines in the US suggests that, in many instances, they have proven to be of limited value in alleviating the uncertainty, business risk and transaction costs inherent in the fair use defence.

¹⁰⁹ K Crews, “The Law of Fair Use and Illusion of Fair-Use Guidelines”, 62 (2001) *Ohio State Law Journal* 602, (Crews 2001), at 602 and 698

¹¹⁰ Discussion Paper, at [4.129] – [4.130].

¹¹¹ Crews 2001, 697

¹¹² *Ibid*, 691-700

3.4 Suitability for the Australian environment

78. Whereas the open-ended language of the US provision was actually confined by decades of US jurisprudence, in Australia there would not be any judicial interpretations when the law is enacted and consequently no guidance as to the scope of the exception in Australia. US case law cannot be transplanted into Australian law given the different constitutional framework informing the US doctrine, just as it could not be transplanted into Canada.¹¹³
79. A consequence of a fair use model (or any other new legal standard, such as non-consumptive use) is that litigation is required to determine the scope and application of the defence. This is clear throughout the Discussion Paper, which expressly refers to court determinations¹¹⁴ and to the balancing of different facts under the 'fairness factors'.¹¹⁵ It is also acknowledged in one of the submissions relied on by the ALRC to support fair use, which notes that the adoption of a fair use defence will need to be accompanied by legal and practical initiatives to enable copyright users to "where necessary, clarify the scope of the exception".¹¹⁶ One example provided is that larger institutions will need to hire lawyers to manage copyright disputes.¹¹⁷ Resources will also need to be devoted to copyright compliance and disputes, including in government-funded organisations.¹¹⁸
80. A litigation based approach to legal reform is undesirable. Australia has never had a culture of litigation equivalent to the US. A sudden increase in litigation will likely cause significant disruption to both established and emerging businesses.¹¹⁹ Existing businesses, and entrepreneurs seeking to establish new undertakings, will both be unable to determine whether or not certain acts are likely to infringe copyright under Australian law. This is likely to result in a lack of confidence that will impede the development of the technology sector, as well as the development of the new digital business models being created and supported by rights holders.¹²⁰
81. This is not a path that Australia needs to take. Australian copyright legislation has long provided for a closed list of permitted purposes exceptions and miscellaneous exceptions which apply in prescribed circumstances (like the UK, Canada and New Zealand).¹²¹ It is a measure of the success of the existing framework that Australia has implemented specific provisions in every almost every major policy area resolved by fair use litigation in the United States:

¹¹³ See Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations* (15 September 2009) <<http://www.barrysookman.com/2009/11/22/why-canada-should-not-adopt-a-fair-use-regime/>> at 157-59.

¹¹⁴ Discussion Paper, at [4.162] and [4.182].

¹¹⁵ Discussion Paper, at [9.58]-[9.59].

¹¹⁶ Burrell et al, p 9.

¹¹⁷ Burrell et al, p 9.

¹¹⁸ As contemplated by Burrell et al at e.g. p 9, 75. The increased transaction costs associated with a fair use regime are supported by the peer-reviewed, published economic evidence.

¹¹⁹ This concern has previously been expressed: see the Australian Film/TV Bodies Submission at e.g. [153].

¹²⁰ See the Australian Film/TV Bodies Submission at [138].

¹²¹ UK: *Copyright Designs and Patents Act 1988* (UK) ss 29(1), (30); Canada: *Copyright Act*, RSC 1985, c C-42, s 29; New Zealand: *Copyright Act 1994* (NZ) ss 42, 43.

	Issue	US fair use case	Australian Equivalent
1.	parody or satire	<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994)	ss.41A, 103AA
2.	Publishing a photograph as part of a news story	<i>Núñez v. Caribbean Int'l News Corp.</i> , 235 F.3d 18 (1st Cir. 2000)	ss 42, 103B
3.	Making a time-shifted copy of television program on an analogue tape	<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	s 110AA
4.	Copying a document for litigation	<i>Sturgis v. Hurst</i> , 86 U.S.P.Q.2d (BNA) 1444 (E.D. Mich. 2007)	s 43(1), 104
5.	Reverse engineering a computer program to get access to interface information	<i>Sega Enters. Ltd. v. Accolade, Inc.</i> , 977 F.2d 1510 (9th Cir. 1992)	s 47D

82. In past consultation processes, the Australian government has amended copyright exceptions and limitations where there is demonstrated public policy need for access to copyright protected materials and the market has not met or is unable to meet that demand or it would defeat an important policy objective to require the user to obtain a licence prior to use of the copyrighted materials.
83. Leaving these policy decisions to individual litigants and the courts is a less effective and less principled way to approach copyright reform. A fair use system would not permit policy decisions to be made in advance with appropriate consultation, instead creating guidelines only after individual issues are tried. Given the length of time it would take to achieve a body of law that is specific enough to guide the decisions of users and right holders, it is questionable how useful it would be.
84. Issues relating to technological development are too varied, nuanced and complex to be resolved satisfactorily through the litigation process, delegating to courts critically important issues of economic regulation to be resolved through application of an unfettered discretionary standard. Due to the inherent problems with the fair use defence, specifically tailored defences and exceptions, accompanied by a careful assessment of the relevant costs, benefits, and interests of all affected parties, are better suited to responding to technological change than unpredictable fair use standards.

3.5 Compliance with international obligations

85. The Discussion Paper states that fair use “has been enacted in a number of countries, but most notably, the United States”.¹²² Nowhere does the ALRC acknowledge that only four countries *out of 166 Berne Convention countries* have a fair use regime and that, because many countries have considered and rejected introducing a fair use exception, the norm is fair dealing exceptions limited to specified purposes.¹²³
86. Were Australia to adopt the recommendation to replace its existing fair dealing framework with the proposed fair use framework, it would be moving from being aligned with the overwhelming majority of the international community to the minority. The question never posed by the ALRC is why would Australia adopt an open-ended standard when the majority of countries have not done so?

¹²² Discussion Paper at [4.11], see also [4.149].

¹²³ Australian Film/TV Bodies Submission at [15].

87. The UK, Canada and the New Zealand have all conducted enquiries in which a fair use defence was considered and each has rejected such proposals. Their rejections of equivalent proposals for open-ended exceptions ought to be given greater weight by the ALRC when it is considering the costs and benefits of the proposal to adopt an open-ended system.
88. In its 2006 amendments to the Copyright Act, the Australian Government, concluded that an open ended fair use defence “ *is not consistent with treaty obligations to include such general uses in a flexible exception.*”¹²⁴ The TORs direct the ALRC to take into account the “*consistency*” of proposed legislative solutions “*with Australia’s international obligations.*”¹²⁵ The ALRC Act requires it to “*aim at ensuring that the laws, proposals and recommendations it reviews, considers or makes: ... (b) are, as far as practicable, consistent with Australia’s international obligations that are relevant to the matter.*”
89. Before the ALRC would recommend the adoption of an open-ended fair use model, the ALRC would need to have been confident that Australia would be compliant with its obligations under international treaties. The reasoning disclosed in the Discussion Paper falls short of this.
90. Contrary to what is asserted in the Discussion Paper,¹²⁶ the interpretation of the three-step test is clear and unambiguous.¹²⁷ It has been the subject of two WTO Dispute Settlement Panels; first in a patent case¹²⁸ and then in a copyright case.¹²⁹ The panel reports confirm, amongst other things, that permissible exceptions or limitations in national law must, in the words of the adjudicating panel, be “*clearly defined and should be narrow in its scope and reach*”¹³⁰ and have “*an individual or limited*

¹²⁴ Explanatory Memorandum, *Copyright Amendment Act 2006* (Cth), p 10.

¹²⁵ Australian Law Reform Commission, Terms of Reference.

¹²⁶ Discussion Paper, at [4.139].

¹²⁷ See generally Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford: Oxford University Press, 2nd ed, 2006) 763 (**Ricketson & Ginsburg**); Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: commentary and legal analysis* (Butterworths Lexis Nexis, 2002) (**Reinbothe & von Lewinski**) Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Geneva: WIPO 2003), (**Ficsor Guide**) at CT-10.2 (“the use to be covered must be specific – precisely and narrowly determined”); Mihály J. Ficsor, “Short Paper on the Three-Step Test For the Application of Exceptions and Limitations in the Field of Copyright”, November 19, 2012 available at www.copyrightseesaw.net/.../0eb32b716fcaa40dd4cf398256e3fa8.doc.

¹²⁸ Panel Report on *Canada – Patent Protection of Pharmaceutical Products* (7 April 2000) WTO Doc. WT/DS114/R (**DS114**).

¹²⁹ Panel Report on *United States – Section 110(5) of the US Copyright Act*, WTO Doc. WT/DS160/R (15 June 2000) (**DS160**).

The findings of the Panels in relation to each condition and scholarship in the area are extensively discussed in our previous submissions. They warrant repeating again here.

In relation to the **first step**, the Panel found that ‘certain’ meant: “...*an exception or limitation in national law must be clearly defined. However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularized. This guarantees a sufficient degree of legal certainty.*” (DS160, at [6.108]) As to the meaning of “special” the WTO Panel noted that this means “having an individual or limited application or purpose,” “containing details; precise, specific.”(DS160, at [6.109])

The **second step** requires the exception not to conflict with the normal exploitation of the work, including “those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.” (DS160, at [6.180]) Accordingly, exceptions under national law must not permit exempted uses to enter into economic competition with copyright holder’s actual or potential markets for their works

The **final step** requires the exception not to unreasonably prejudice the legitimate interests of the author or rights-holder. In interpreting that phrase, the Panel observed that legitimate interests include economic and non-economic interests and that prejudice to the legitimate interest “reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright holder.” (DS160, at [6.229]).

¹³⁰ DS160, at [6.108]. This is consistent with the recommendations of the Stockholm Study Group which recommended that any exception to the right of reproduction be “*for clearly specified purposes.*”: David Gervais, “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations” (2008) 5 *University of Ottawa Law and Technology Journal* 1, p 26.

*application or purpose.*¹³¹ Open standards, in the absence of developed jurisprudence or restrictions, do not meet those requirements. In Australia, the open model proposed may operate in a manner which conflict with ‘normal exploitation’ of copyright works in existing or emerging markets or ‘unreasonably prejudice’ rights’ holders interests, in violation of the second and third steps.¹³²

91. Almost every international copyright scholar considers that the open-ended fair use model proposed does not, on its own, satisfy the first condition. In the absence of sufficiently interpretative jurisprudence, an open-ended exception, limited only by fairness, is insufficiently clear or defined to satisfy that test. An open-ended model is insufficiently narrow in scope, potentially covering any dealings in respect of any of the exclusive rights in relation to any work or subject matter by any persons or institutions and for any purpose, including in any and all technological context. As Dr Mihály Ficsor explains:

*The first criterion is that an exception or limitation may only be applied in “certain special cases”. There has always been agreement that this criterion means that the scope of application of an exception must be duly limited; it must not result in a general open-ended exemption from the obligation to protect the right concerned.*¹³³

92. Scholars, including Dr Senftleben,¹³⁴ who defend the compliance of the US fair use doctrine with the three-step test rely on 150 years of accumulated case law; it is not present in Australia. As one scholar explained:

Fair use – contrary to the three-step test – is not an internationally recognised legal concept. It only exists in a small number of countries and not necessarily in the same way. It may mean broadly differing criteria and forms of applications (whether partly codified in statutory law or basically left to case law).

When reference is made to fair use, usually the US system is in mind. ... However, section 107 is derived from, and is inseparably linked to, an extremely rich and complex case law, and it is only along this case law that it is meaningful. On the one hand, it is a statutory codification of the criteria of fair use developed by the US courts for many decades, and on the other hand, the well-established case law is indispensable to guarantee – along with the other provisions in the Copyright Act – that the US copyright law is in accordance with the international copyright provisions and, in particular, with each of the cumulative conditions of the three-step test.

93. It has been argued that even with the benefit of over 150 years of fair use precedent, the US provision does not comply with the three-step test. For instance, Professor Okediji’s careful analysis of the compatibility of TRIPS with the fair use doctrine led her to conclude that the international instrument cannot accommodate the US doctrine.¹³⁵ Herman Jehoram similarly observed that such is the

¹³¹ Ibid, at [6.109].

¹³² Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, (2003) World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO Doc. SCCR/9/7 at 22 (**Ricketson 2003**), 67 (step three); Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Faire Use: A Joint Submission to the Copyright Consultations* (15 September 2009) <<http://www.barrysookman.com/2009/11/22/why-canada-should-not-adopt-a-fair-use-regime/>> at 157-59 (steps two and three).

¹³³ Mihály J. Ficsor, “Short Paper on the Three-Step Test For the Application of Exceptions and Limitations in the Field of Copyright”, November 19, 2012 available at www.copyrightseesaw.net/.../0eb32b716fcaa400dd4cf398256e3fa8.doc, p 4-5.

¹³⁴ E.g. Martin Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*, 1 (2010) JIPITEC 67, [52].

¹³⁵ Ruth Okediji, “Towards an International Fair Use Doctrine” (2000) 82 *Columbia Journal of Transnational Law* 75, at 114 -23 outlining three reasons why the fair use doctrine violates Article 9(2) of the Berne Convention including (1) the indeterminacy of the fair use doctrine (2) the breath of the fair use doctrine and (3) the nullification and impairment of rights-holders’ expected rights.

uncertainty of the US model and its capacity to adversely affect the rights of authors that it is not capable of complying with three-step test requirements.¹³⁶ Professor Sam Ricketson, writing for the WIPO Standing Committee on Copyright and Related Rights, likewise concluded that the "open-ended, formulaic provisions contained in s. 107 of the U.S. Copyright Act were vulnerable to the three-step test."¹³⁷ As he observed that:

*the real problem, however, is with a provision that is framed in such a general and open-ended way. At the very least, it is suggested that the statutory formulation here raises issues with respect to unspecified purposes (the first step) and with respect to the legitimate interests of the author (third step).*¹³⁸

94. Whilst Professor Ricketson's misgivings related to the first and third steps, Sookman and others have argued that, despite statutory fairness factors requiring consideration of the effect on copyright markets, the open standard fall short of guaranteeing copyright holder's 'normal exploitation' of their works as required by the second condition.¹³⁹ A study of US case law found that the final 'fairness factor' only correlated with the eventual result in less than fifty percent of reported fair use cases.¹⁴⁰ Other studies found that a negative finding of the effect on copyright holder's market or value for their works only correlated with the eventual result in less than sixty-seven percent of fair use cases.¹⁴¹
95. The ALRC's preference for "*historical and normative arguments*" (promulgated by one particular respondent to the Inquiry)¹⁴² over the express language of the WTO Dispute Settlement Panels¹⁴³ and international copyright experts¹⁴⁴ is baffling. Professors Ginsburg¹⁴⁵ and Ricketson,¹⁴⁶ argue that a 'normative interpretation' of the first condition is not sustainable as it would be contrary to the object and purposes of the Berne Convention.
96. The preparatory materials accompanying the 1967 Stockholm Revision Conference on Article 9(2) do not recognise or support open-ended defences or the fair use doctrine.¹⁴⁷ The Agreed Statement accompanying article 10 of the WCT similarly provides no 'normative' basis for the introduction of open-end exceptions. Article 10 provides that it "...*neither reduces or extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.*"¹⁴⁸

¹³⁶ Herman C. Jehoram, "Restrictions on Copyright and their Abuse" (2005) 27 *European Intellectual Property Review*. 359, at 360.

¹³⁷ Ricketson 2003, p 67.

¹³⁸ Ibid.

¹³⁹ Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations* (15 September 2009) <<http://www.barrysookman.com/2009/11/22/why-canada-should-not-adopt-a-fair-use-regime/>> at 157-59.

¹⁴⁰ David Nimmer, "Fairest of them All and Other Fairy Tales of Fair Use" (2003) 66 *Law and Contemporary Problems* 263, p 280.

¹⁴¹ Beebe 2008 at 554.

¹⁴² Ibid.

¹⁴³ See footnote 129 above.

¹⁴⁴ See footnote 127 above.

¹⁴⁵ Ginsburg, p 424.

¹⁴⁶ Ricketson, p 87.

¹⁴⁷ For instance, in relation to the exceptions potentially covered by the Article 9(2), the Study Group to the 1967 Stockholm Revision Conference specifically referred to "*exceptions most frequently recognized in domestic laws*". In listing these exceptions, the Study Group did not refer to any open-end provisions or the fair use doctrine prevailing in the US: see Ricketson 2003, p 22.

¹⁴⁸ *Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)* (in force via Australia's WTO membership) Art. 10(2).

97. The Agreed Statement merely confirms the controlling nature of three-step test requirements in digital environments.¹⁴⁹ The suggestion¹⁵⁰ that it allows for new understandings of exceptions or limitations in digital environments irrespective of three-step test requirements is unsupportable:

*[I]t seems to be stretching Article 10(2) too far to suggest that it authorises the creation new limitations and exceptions that lie outside the Berne regime... It is therefore difficult to ascribe any operation to this part of the agreed statement. If a distinct regime for new limitations and exceptions is envisaged under the WCT, this would need to be the subject of an express provision of the treaty.*¹⁵¹

98. Reliance on the *absence of a WTO challenge* to the United States' fair use exception is the weakest argument in favour of an open-ended exception introduced in a different legal environment complying with the three-step test.¹⁵² The US was not a signatory to the Berne Convention in 1967, when all contracting parties did not have or consider having such an open-ended exception. The US only ratified the Berne Convention in 1981, by which time its fair use case law may have constituted a 'special case' under Berne.
99. Of the 4 countries which adopt a fair use model (namely, the US, the Philippines, Israel and South Korea),¹⁵³ the majority do so in more restrictive terms than the ALRC has recommended for Australia. The fair use model in the Philippines, for instance, de-limits fair use to a limited number of permitted purposes and "similar purposes."¹⁵⁴ The fair use model in South Korea, for example, specifically incorporates three-step test requirements.¹⁵⁵

4 Fair Use proposals

Proposal 4–1	The <i>Copyright Act 1968</i> (Cth) should provide a broad, flexible exception for fair use.
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Proposal 4–2	The new fair use exception should contain: <ul style="list-style-type: none">(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 uses ('the illustrative purposes').
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¹⁴⁹ Mihály J. Ficsor, "Short Paper on the Three-Step Test For the Application of Exceptions and Limitations in the Field of Copyright", November 19, 2012 available at www.copyrightseesaw.net/.../0eb32b716fcaa400dd4cf398256e3fa8.doc, p 4-5.

¹⁵⁰ Burrell et al.

¹⁵¹ Ricketson 2003 at 68-69.

¹⁵² It has been suggested that the United States is quoted as acknowledging "that the essence of the first condition [of the three-step test] is that the exceptions be well-defined and of limited application.": see Herman C. Jehoram, "Restrictions on Copyright and their Abuse" (2005) 27 *European Intellectual Property Review*, p 359.

¹⁵³ It is often incorrectly suggested that Singapore adopts an open-ended fair use model. In fact, Singapore uses a multi factor test within its open-ended fair dealing provisions.

¹⁵⁴ The Philippines, *Intellectual Property Code of the Philippines*, (officially known as Republic Act No. 8293), s 185.

¹⁵⁵ Republic of Korea, *Copyright Act 1957*, Article 35-3(1).

100. The Australian Film/TV Bodies oppose the introduction of a broad flexible “fair use” style exception as recommended in Proposals 4-1 and 4-2, for the reasons already given in paragraphs 42 to 99 above.

Proposal 4–3 The non-exhaustive list of fairness factors should be:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material used;
- (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

101. The Australian Film/TV Bodies oppose the introduction of the “fairness factors” to the proposed fair use defence, for the reasons already given in paragraphs 42 to 99 above.

102. In addition, the proposed “fairness factors” are complicated, provide no more guidance than the existing standard of “fairness”, and obscure the discretionary nature of the investigation since they are non-exhaustive. Based on the US experience, such factors would have limited utility in predicting the ultimate result of a fair use defence. In practice, the statutory factors in s 107 of the US Copyright Act provide “*very little guidance for predicting whether a particular use will be deemed fair.*”¹⁵⁶

103. In his 2003 critique of fair use¹⁵⁷ the US copyright scholar, Professor Nimmer, examined 60 cases in which a fair use defence was at issue. Of the twenty-four cases upholding fair use, and the thirty-six cases where the defence was refused, Professor Nimmer made the findings set out in the following table:¹⁵⁸

	Fairness Factor	Percentage
1.	The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes	55%
2.	the nature of the copyrighted work	52%
3.	the amount and substantiality of the portion used in relation to the copyrighted work as a whole	57%
4.	the effect of the use upon the potential market for or value of the copyrighted work	52%
5.	[cases where all four factors corresponded in the case]	50%

104. He found that “*had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears the upshot would be the same*”. He concluded that judges finding for and against fair use usually find three or four of the factors to justify their conclusions:

¹⁵⁶ Michael W. Carroll, Fixing Fair Use, 85 (2007) North Carolina Law Review N.C. L. Rev. 1087, 1106 .

¹⁵⁷ David Nimmer, “Fairest of them all” and other Fairy Tales of Fair Use” 2003 66 *Law and Contemporary Problems* at page 263.

¹⁵⁸ More recently, Professor Beebe similarly found that that of the reported fair use cases since 2005, the first factor correlated the outcome of the case in 72% of cases, the second factor in 61% of cases, the third factor in 67% of cases and the fourth factor in 67% of cases: B Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions, 1978–2005’ (2008) 156 *University of Pennsylvania Law Review* 549, 587.

*In the ultimate analysis, my review of cases convinces me that the high correspondence between the individual factors and court's ultimate disposition... reflects an important insight into how judges actually resolve fair use case: Court tend to first make a judgement that the ultimate disposition is fair*¹⁵⁹

105. The ALRC has suggested that the four factors proposed are “substantially the same”¹⁶⁰ as those governing the fairness of use of a sound recording or cinematograph film for research or study.¹⁶¹ However, the statutory model proposed does not include the “*the possibility of obtaining the work, adaptation audio-visual item or authorised recording of the performance within a reasonable time at an ordinary price*” as recommended by the CLRC and as incorporated in ss.40 and 103C of the Act. The absence of this factor from the model proposed is striking and unexplained.

4.2 “Illustrative purposes”

Proposal 4–4	<p>The non-exhaustive list of illustrative purposes should include the following:</p> <ul style="list-style-type: none"> (a) research or study; (b) criticism or review; (c) parody or satire; (d) reporting news; (e) non-consumptive; (f) private and domestic; (g) quotation; (h) education; and (i) public administration.
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106. The Australian Film/TV Bodies oppose the introduction of the “illustrative purposes” to the proposed fair use defence, for the reasons already given in paragraphs 42 to 99 above.

107. In addition, the “illustrative purposes” in the model by the ALRC are unlikely to assist Australian Courts in determining the scope of the acceptable uses. Under the existing fair dealing provisions it is necessary to show that the use was for one or more of the “permitted purposes”. Non-exhaustive illustrative purposes do not promote certainty and would encourage increasingly extreme arguments not confined to those purposes, or based on analogies with some or all of those purposes.

108. The experience of the open-ended provision in the US suggests that the listing of illustrative purposes has very little bearing on the outcome of the fair use test. As Professor Beebe’s study shows, a finding that a defendant’s use fell within one of the pre-ambular purposes list in s.107 of the Copyright Act corresponded with the outcome of the case in less than 60% of cases:

Purpose	Number	%	Found Fair Use
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¹⁵⁹ Ibid at 280.

¹⁶⁰ *Philippines Intellectual Property Code*, s 185.

¹⁶¹ Copyright Act, s.248(1A).

Research purpose	22	7.2	.409
Critical purpose	29	9.5	.621
News reporting	27	8.8	.778
Educational purpose	27	8.8	.482
Total	105	34.3%	0.572 (av)

109. The model proposed is inappropriately broad when compared with other countries with fair use defences. Of the 4 countries that have adopted a fair use model (namely, the US, the Philippines, Israel and South Korea), the majority do so in terms more restrictive than the model proposed.
110. The fair use exception in Korea applies only where the impugned use “*does not conflict with a normal exploitation of [the] copyright work and does not unreasonably prejudice the legitimate interests of the copyright holder*”.¹⁶² Likewise section 185 of the *Philippines Intellectual Property Code* limits “fair use” to the specified purposes of criticism, comment, news reporting, teaching and “similar purposes”.

Question 4–1 What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

111. The Australian Film/TV Bodies oppose the introduction into Australian law of a fair use defence and therefore no additional uses or purposes should be included in any exception.

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?

112. The Australian Film/TV Bodies oppose the introduction into Australian law of a fair use defence and therefore no other exceptions should be repealed.

5 Statutory Licences

Proposal 6–1 The statutory licensing schemes in pts VA, VB and VII div 2 of the *Copyright Act* should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

113. Parts VA, VB and VII Div 2 of the Copyright Act establish statutory licensing schemes in relation to the use of copyright works by educational institutions, the Crown and institutions assisting people with a print disability.
114. The Australian Film/TV Bodies make no comment on this issue in the context of this review.

Question 6–1 If the statutory licences are repealed, should the *Copyright Act* be amended to provide for certain free use exceptions for governments and educational institutions that only operate where the use cannot be licensed, and if so,

¹⁶² Republic of Korea, *Copyright Act 1957*, Art. 1-3.

how?

115. The ALRC has suggested that voluntary licensing is not always practical and that, where a voluntary licence is unreasonably withheld by the rights-holder, this may not always be in the public interest. It has requested submissions as to what further exceptions, if any, should be enacted if the statutory licence schemes in parts VA, VB and VII are repealed.
116. The Australian Film/TV Bodies are not aware of any instance where they would unreasonably refuse to enter into a voluntary licence with education bodies, the Crown or persons with a print disability necessitating enactment of further exceptions.

6 Fair Dealing

Proposal 7-1 The fair use exception should be applied when determining whether a use for the purpose of research or study; criticism or review; parody or satire; reporting news; or professional advice infringes copyright. 'Research or study', 'criticism or review', 'parody or satire', and 'reporting news' should be illustrative purposes in the fair use exception.

Proposal 7-2 The *Copyright Act* should be amended to repeal the following exceptions:

- (a) ss 40(1), 103C(1)—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.

117. The Australian Film/TV Bodies oppose the introduction into Australian law of a fair use defence and therefore no other exceptions should be repealed.

Proposal 7-3 If fair use is not enacted, the exceptions for the purpose of professional legal advice in ss 43(2), 104(b) and (c) of the *Copyright Act* should be repealed and the *Copyright Act* should provide for new fair dealing exceptions 'for the purpose of professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney' for both works and subject-matter other than works.

118. The Australian Film/TV Bodies oppose the introduction into Australian law of a fair use defence and therefore no other exceptions should be repealed.

Proposal 7-4 If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright is infringed.

119. The Australian Film/TV Bodies consider that the present regularity framework is preferable to the open-ended standard recommended by the ALRC and oppose the broadening of the current fair dealing provisions to include new “illustrative purposes” or “fairness factors” for the reasons provided at paragraphs 98 to 107 above and paragraphs 117ff below.

7 Non-Consumptive Use

Proposal 8–1 The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. ‘Non-consumptive use’ should be an illustrative purpose in the fair use exception.

120. The Australian Film/TV Bodies oppose the introduction into Australian law of a fair use defence and the listing of “non-consumptive use” as an illustrative purpose is also opposed.
121. The ALRC defines ‘*non-consumptive use*’ as:
- uses which do not trade on the underlying creative and expressive purpose of the material.*¹⁶³
122. The Discussion Paper focuses on two examples of “*non-consumptive use*” (i) caching and indexing by search engines and other internet intermediaries and (ii) text and data mining. If these examples are the intent of the exception, then it is unclear why ‘non-consumptive use’ has been so broadly framed.
123. Unlike the definition recommended in the Hargreaves report, the definition for ‘non-consumptive use’ recommended by the ALRC is not restricted to “*use of a work enabled by technology*”.¹⁶⁴ It appears to apply in much the same way as the transformative use doctrine the ALRC has rejected as a stand-alone exception or illustrative purpose.
124. The proposal is problematic for a number of reasons:
- (a) the introduction of a new enquiry into whether ‘*copyright material is being reproduced in a way that trades on its underlying creative and expressive purpose*’ is in effect a transformative use exception (masquerading in the Discussion Paper as an indexing, catching and temporary copying exception). US courts, applying the fair use doctrine, have at times, used the terms ‘non-consumptive use’¹⁶⁵ and ‘transformative use’¹⁶⁶ interchangeably.

¹⁶³ ALRC Discussion Paper, at [8.1].

¹⁶⁴ Hargreaves Review at [5.24].

¹⁶⁵ In *Kelly v. Arriba Soft Corp.*, 336 F. 3d 811 - Court of Appeals, 9th Circuit (2003) at 818 ‘non-consumptive use was defined as “A consumptive use is one in which defendant’s “use of the images merely supersede[s] the object of the originals . . . instead [of] add[ing] a further purpose or different character.” This definition was applied by the Californian District Court in *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (2006).

¹⁶⁶ In the Napster case (*A & M RECORDS, INC. v. Napster, Inc.*, 239 F. 3d 1004 - Court of Appeals, 9th Circuit 2001), the purpose and character test was explained on very similar terms to the definition of “consumptive use” applied in *Kelly v. Arriba Soft Corp.*, 336 F. 3d 811 - Court of Appeals, 9th Circuit (2003): *This factor focuses on whether the new work merely replaces the object of the original creation or instead adds a further purpose or different character. In other words, this factor asks “whether and to what extent the new work is ‘transformative.’”* (at 1015) .

- (b) the exception is unrelated to the temporary copying exceptions it is seeking to replace. For instance, it is unclear why there are no requirements that the copying be temporary, the user be a mere conduit or other common restrictions on internet exceptions of this kind.
- (c) the exception requires there be a double investigation into the substantiality of the defendants' appropriation and, as each standard is different, the two investigations (infringement and non-consumptive use) must arrive at diametrically opposed conclusions in order for the defence to apply. If, following the lead of US jurisprudence, Australian courts interpret the first fairness factor as requiring consideration of 'transformative use', then the model proposed by the ALRC would require the qualitative assessment be carried out three times.
- (d) the illustrative purpose is fundamentally uncertain. It provides no "bright line" as to when, how or to what extent infringing use will not trade on the underlying creative and expressive purpose.
- (e) the effect of the exception would be to extinguish or severely curtail the copyright owner's market for derivative works and author's moral rights in breach of the second and third steps.
- (f) fair use for non-consumptive use is unnecessary. There is no evidence that that any internet-related functions which are being impeded by Australia's existing copyright laws. The scope of the current exceptions in ss.43A and 111A of the Copyright Act and safe harbour provisions have given rise to, at most, only a theoretical or academic issue for ISPs providing search engine functionality where material is cached or indexed.

125. The Hargreaves Review recommendation for a non-consumptive use exception where "*the copying is really only carried out as part of the way technology works*"¹⁶⁷ was rejected by the UK government.¹⁶⁸ For similar reasons, Proposal 8–1 should be rejected.

Proposal 8–2	<p>If fair use is enacted, the following exceptions in the <i>Copyright Act</i> should be repealed:</p> <ul style="list-style-type: none"> (a) s 43A—temporary reproductions made in the course of communication; (b) s 111A—temporary copying made in the course of communication; (c) s 43B—temporary reproductions of works as part of a technical process of use; (d) s 111B—temporary copying of subject-matter as a part of a technical process of use; and (e) s 200AAA—proxy web caching by educational institutions.
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126. The Australian Film/TV Bodies oppose the introduction into Australian law of a fair use defence and therefore no other exceptions should be repealed.

¹⁶⁷ Hargreaves Review, p 47.

¹⁶⁸ See the UK Government Response, which does not refer to (let alone recommend) such an exception, as well as the House of Commons Business, Innovation and Skills Committee's report of session, *The Hargreaves Review of Intellectual Property: Where Next?*, First report 2012-13, at [51-65] (available at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/367/367.pdf>).

Proposal 8–3 If fair use is not enacted, the *Copyright Act* should be amended to provide a new fair dealing exception for ‘non-consumptive’ use. This should also require the fairness factors to be considered. The *Copyright Act* should define a ‘non-consumptive’ use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

127. The Australian Film/TV Bodies oppose the introduction into Australian law of new fair dealing provisions (including for non-consumptive use) and therefore also oppose these proposals.

8 Private and Domestic Use

Proposal 9–1 The fair use exception should be applied when determining whether a private and domestic use infringes copyright. ‘Private and domestic use’ should be an illustrative purpose in the fair use exception.

128. The Australian Film/TV Bodies oppose the incorporation of “private and domestic use” as an illustrative purpose with the fair use regime proposed by the ALRC.
129. The Australian audio-visual entertainment market is already providing services to enable consumers share content for private and domestic purposes and, as Kantar Worldpanel’s survey on “Triple Play” demonstrates, the majority of consumers do not take advantage of the digital copy that is made legally available to them.¹⁶⁹ In view of these emerging business models for delivery of films and television programs to consumers across multiple platforms and formats, there is no need for such an exception.
130. The model proposed is inappropriately broad and likely to result in significant harm to rights holders, particularly those in the audio visual sector. Under the present definition of ‘private and domestic use’, the exception potentially applies to any “*private and domestic uses on or off domestic premises*”¹⁷⁰ in respect of any of the exclusive rights in relation to any work or subject matter by any persons or cloud-based service, including in any and all technological contexts. The model proposed would likely fail each condition required under of the three-step test.

8.1 The Australian audio-visual entertainment market

131. The Australian film and television industry has a philosophy of ensuring that consumers can purchase content in whatever way the consumer wishes in order to maximise both consumer enjoyment and commercial return. Never before have Australian audiences enjoyed such a wide variety of choice in both access and in price, ranging from top-of-the range special edition collectors’ box-sets to a growing array of digital services and free catch-up television or ad-funded online video services.¹⁷¹

¹⁶⁹ Kantar Worldpanel, *Triple play*, 25 December 2011, summary available at http://www.bva.org.uk/files/u1/KantarWorldpanel___Tripleplay.pdf

¹⁷⁰ Copyright Act 1968 (Cth), s.10.

¹⁷¹ See eg Australian Film/TV Bodies Submission, Annexure A.

Case Study 1 – Triple Play

Triple Play is a form of home entertainment optical disc distribution which provides the buyer with a film or TV series in three different formats in a single keep case. The formats are Blu-ray Disc, DVD, and a digital copy. In some cases, an Ultraviolet copy will be included in place of a DVD.

132. All major film studios release motion pictures in Double or Triple Play format which enables consumers to enter a code contained on the packaging of the purchased DVD or Blu-ray disk, and download the movie to their PC, tablet, smartphone, set-top box or other UV-enabled device. In addition, a number of service providers, such as Apple TV and Foxtel.
133. In the audio-visual entertainment, there is a positive correlation between price and the nature of content purchased by the consumer.

Case Study 2 – Ultraviolet

UltraViolet is a digital rights authentication and cloud-based licensing system that allows users of digital home entertainment content to stream and download purchased content to multiple platforms and devices.

UltraViolet adopts a "buy once, play anywhere" approach that allows account holders to access purchased content on up to 12 shared devices and amongst up to six users.

Consumers are able to create a free-of-charge UltraViolet account where licenses for purchased content are stored and managed irrespective of the point of sale.

Once downloaded, purchased content can be copied between up to twelve devices, stored on physical media (e.g. DVDs, computers, game consoles, Blu-ray Disc players, Internet TVs, smartphones and tablets,) in cloud services or shared between up to 6 family members.

134. Ultraviolet licences offer potentially the broadest flexibility in that they allow purchasers to watch films and television programs on multiple devices, with up to five copies in some cases, and a possibility to share the license with up to five other family members.
135. Ultraviolet is not the only licensed cloud-based service in Australia¹⁷² but it has the greatest potential to meet consumer demand for interoperable digital video services because of it has the highest number of international device subscribers and content providers.

8.2 Potential harm to legitimate markets

136. In view of these emerging business models for delivery of films and television programs to consumers across multiple platforms and formats, an open-ended exception for private and domestic use risks undermining the viability of these emerging business models for legitimate uses of copyright works.

¹⁷² Disney is developing its own "KeyChest" format, while Apple has added movie storage to its iCloud service.

137. Recognising the divergent nature of particular copyright markets involved and the significant risks that would be posed to the rights of copyright owners if uncontrolled copying and format shifting were permitted, the Australian government concluded in 2005 that only limited rights of private copying and format shifting should be permitted. Those conclusions are as valid today as they were in 2005.
138. The basic premise that an open-ended exception for private copying would not provide remuneration to creators and might lead to less production of copyright works was supported by Australian copyright academics during the Fair Use Review in 2005. As Kimberlee Weatherall observed in May 2005:

*We could create a full, free exception to copyright for private copying, under which all personal copying of any kind of copyright material would no longer be a copyright infringement. This would ensure that Australian consumers were no longer 'serial infringers' – but it would not provide any remuneration to the creators of copyright works, and might lead to less production of copyright works. It may also be contrary to our international obligations.*¹⁷³

139. The impetus for change appears to be driven not by economic analysis of harm to content providers; but by normalising perceived social norms supposedly applying to all types of copyright works, all formats, technologies and copyright markets. For instance, the Discussion Paper makes unreferenced and unsupported statements that copyright laws “are almost universally ignored”,¹⁷⁴ that “many private uses of copyright material are commonly thought by members of the public to be fair” and overall that Australians do not understand or respect the current copyright laws.¹⁷⁵ The only evidence provided is a quote from retired High Court judge Michael Kirby:

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

140. It is clear from the context of this statement that Kirby’s comment was based on the content of a four-minute YouTube clip. This is not adequate evidence of a “social norm”, particularly in light of the findings of 2013 quantitative research on the attitudes and expectations of Australia’s ‘digital natives’, 12-17 year olds.¹⁷⁶ According to this Sycamore Research study (commissioned by the Intellectual Property Awareness Foundation), the vast majority (76%) of 12-17 year olds have never illegally downloaded movies or TV shows. Only 19% of 12-17 year olds thought that the internet does *not* require more regulation to prevent individuals from downloading or streaming pirated content. Particularly coming from the age bracket that can be expected to be most ingrained with the realities of the modern digital environment, this does not amount to a social norm of disrespect or non-compliance with copyright law.

¹⁷³ Kimberlee Weatherall, *Fair use, fair dealing: The Copyright Exceptions Review and the Future of Copyright Exceptions in Australia*, Intellectual Property Research Institute of Australia, Occasional Paper No. 3/05, May 2005, at p11.

¹⁷⁴ Discussion Paper at [3.43], see also [9.27].

¹⁷⁵ Discussion Paper at [9.20]ff.

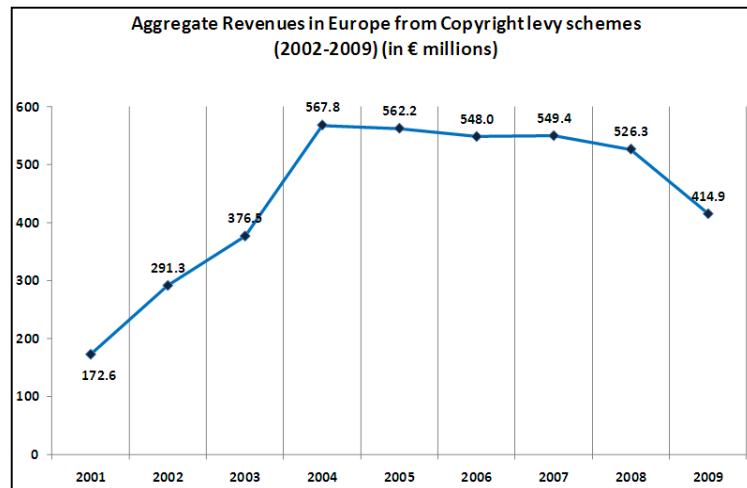
¹⁷⁶ This research will be published 3Q 2013.

141. In relation to digital copying of audio visual content specifically, home entertainment in Australia has always been made available subject to some form of technological protection measure, so there is no consumer expectation of being able to digitally copy. DVD and Blu-Ray Disk buyers are aware that discs may not be copied and are reminded of this by the symbol on packaging advising them that the disc is copyright protected.¹⁷⁷ At the same time, new business models are enabling new ways for consumers to format-shift and accessed content through direct licensing.
142. A persistent flaw in those advocating for broader private copying exceptions is to resort to examples of cases in, for example, the music industry (where digital copies are not regulated by technological protection measures), transpose that example to all other copyright sectors and make unsupported conclusions that perceived benefits can be achieved throughout the creative industries generally. The Discussion Paper, in our view, confuses 'consumer need' with 'consumer expectation'. There is a commercial value in the film and television industry in providing a digital copy alongside a physical product. The fact consumers are willing to pay more for a physical product that is accompanied by a digital copy clearly demonstrates that, rather than believing they have the right to make a digital copy, they understand that there is a 'price' and therefore value to that copy. If the ALRC decides that consumers have the 'right' to a fair digital copy for private and domestic use, that market would reduce to zero.
143. The private copying exception proposed by the ALRC has the capacity to adversely affect the viability of these new licensing models and the choices available to consumers who do not wish to have digital copy. The proposal, in our view, is likely to impose a loss to the video entertainment market which is currently servicing demand from consumers who do wish to have digital copy and would jeopardise potential for further growth:
- Some consumers are happy to pay more for a Blu-Ray Disc (BD), ultraviolet license or 3D format. Any private copying exception must not, therefore, prevent it being possible to give consumers choice. This could certainly damage the industry by making it more difficult to find new ways of getting a return on their investment in creativity. But more importantly it could mean that consumers are no longer able to only pay for what they want rather than a single hire price in case they may sometimes want to make a private copy.*
144. The Discussion Paper does not explain why, when it is accepted that harm accrues to rights holders from a private copying exception in most EU countries and in the US, no such harm would accrue to rights holders in Australia.
145. The UK government recently commented that although levy rates vary widely between different countries, and are not an accurate reflection of the actual harm caused by private and domestic exemptions, the below figures¹⁷⁸ indicate the magnitude of harm to copyright owners engendered from an overly-permissive private copy exception:¹⁷⁹

¹⁷⁷ The fact consumers are willing to pay more for a physical product that is accompanied by a digital copy suggest that, rather than believing they have the right to make a digital copy, consumers understand that there is a 'price' and therefore value to that copy.

¹⁷⁸ Data from European Commission; de Thuispopie Software Alliance.

¹⁷⁹ UK IPO, Impact Assessment, 18-19 (2011).



146. The harm is likely to more significantly affect the audiovisual sector, where the majority of films are only watched once, as opposed to sectors where copyright works are used repeatedly by the buyer.
147. The conclusion at paragraph [9.59] of the Discussion Paper that fair use is better suited to account for such harm to rights-holders by including the final ‘fairness factor’ (which requires consideration of ‘*the effect of the use upon the potential market for or value of the copyrighted work*’) is not supported by the study of US case law by Professor Nimmer that showed that the final ‘fairness factor’ only correlated with the eventual result in less than fifty percent of reported fair use cases.¹⁸⁰ Professor Beebe more recent study similarly found that the fourth fairness factor correlated with the eventual result in less than sixty-seven percent of reported fair use cases.¹⁸¹ A number of American copyright academics have argued that the fair use defence is a poor regulatory tool for regulating legitimate non-market destroying forms of private copying.¹⁸²
148. Extending s.110AA to cover digital-to-digital format shifting was considered and rejected by the Australian Law Reform Commission in 2008. As the Department observed in its Final Report:

In considering this issue, the Department notes the importance of the home entertainment market for film rights holders. At present, 99% of the video home market consists of DVDs. AVSDA statistics indicate that in 2007 the net revenue from DVD sales in Australia was \$1.3 billion. This compares with gross box office sales for feature films of \$895.4 million. It would be imprudent to embark on legislative change affecting a home entertainment market of this value without clear indications that intervention is appropriate and is likely to be effective.

149. It remains the case that in excess of 85% of the Australian video market are DVDs and that net revenue from DVD sales is in excess of \$1 billion annually.¹⁸³ At a time when our sector is still adjusting to the introduction of disruptive technologies and embracing new digital delivery channels to

¹⁸⁰ David Nimmer, “Fairest of them All and Other Fairy Tales of Fair Use” (2003) 66 *Law and Contemporary Problems*, p 263, 280.

¹⁸¹ Beebe, 2008 587.

¹⁸² See eg A Pavel, “Reforming the Reproduction Right: the Case for Personal Use Copies” 24 (2009) *Berkely Technology Law Journal* 1616

¹⁸³ Percentage calculations based on AHEDA data: Australian Home Entertainment Distributors Association, *Statistics: DVD, Blu Ray, HD, UMD & VHS Formats* (1999-2011) AHEDA <<http://www.aheda.com.au/statistics>>.

reach audiences via internet connected devices, the justification for market intervention to a market of this size is highly questionable.

150. Another concern is that extending section 110AA to allow digital format-shifting may encourage circumvention of technological protection measures. The public may not appreciate the distinction between permission to copy and a continuing prohibition against circumvention. Furthermore, once measures are circumvented for the purposes of format-shifting it would then be possible for unprotected copies to be limitlessly reproduced or made available online for distribution thereby undermining the opportunity of copyright owners to receive financial returns from exploitation.
151. The potential for licensing solutions to address many of the challenges the digital economy poses for copyright law is largely ignored in the Discussion Paper. The need for a private copying exception has already been largely supplanted by contract, as modern licensing models ensure that private copying that is not covered by the existing exceptions is licensed.¹⁸⁴ Overriding these arrangements would be unfair to the economic and other interests of copyright owners, as well as to the many parties that have already entered into relevant licenses, because it would destroy the market for these additional private copying rights as well as the competitive advantage they can provide to content owners.¹⁸⁵
152. These submissions appear to have been dismissed by the ALRC on the basis that “these matters are best considered when determining whether a particular use is fair”, i.e. under the fair use exception.¹⁸⁶ However it is hardly acceptable to leave the commercial interests of rights holders to the chance that the fair use exception will be applied in a certain way, particularly when even small revenue streams from digital licences are crucial in the modern fragmented distribution environment.¹⁸⁷
153. There is an increasing international recognition, not acknowledged in the Discussion Paper, of the capacity of licensing models to address many of the challenges for copyright in the digital economy by providing “an interface between exclusive rights and exemptions or limitations”.¹⁸⁸ Licences also provide a potential solution to the limited ability of domestic law exceptions to address access to content in the global digital environment, because contract is capable of smoothing over legislative exceptions to infringement that vary from territory to territory.¹⁸⁹ The Discussion Paper does not adequately acknowledge that an exception to infringement in Australian law may be of limited utility as there could still be liability in other jurisdictions which had not enacted such an exception. When the internet is involved, foreign law is likely to have a place in any infringement analysis.
154. This lack of attention to licensing as a non-legislative solution to the challenges of copyright in the digital economy contrasts with the Hargreaves Review and ongoing law reform processes in the UK,

¹⁸⁴ Australian Film/TV Bodies Submission at e.g. [86], [90] and [156].

¹⁸⁵ Australian Film/TV Bodies Submission at [15], [86], supported by submissions from the Australian Copyright Council, ARIA, APRA, Copyright Agency/Viscopy, the Software Alliance and the Arts Law Centre.

¹⁸⁶ See Discussion Paper at p 182-3, in particular [9.58-9].

¹⁸⁷ This is particularly true in light of the ALRC’s obligation to consider the economic effects of its proposals on interested parties: see the discussion at paragraph 25 above.

¹⁸⁸ Paper presented by prominent intellectual property law academic Daniel Gervais, *Licensing the Cloud*, at ALAI Congress in Kyoto in October 2012, at: [http://www.alai.jp/ALAI2012/program/paper/Licensing%20the%20Cloud%20\(Professor%20Daniel%20Gervais\).pdf](http://www.alai.jp/ALAI2012/program/paper/Licensing%20the%20Cloud%20(Professor%20Daniel%20Gervais).pdf)

¹⁸⁹ Ibid at e.g.3.1 – 3.2.

where copyright licensing has been a key platform. The Hargreaves Review recommended the establishment of a digital copyright exchange, and Richard Hooper was appointed to carry out a feasibility study of such an exchange.¹⁹⁰ Hooper's final report, *Copyright Works*, considered a wide range of ways copyright licensing could be made fit for purpose in the digital age, and a pilot of the UK's digital copyright exchange (known as the Copyright Hub) has just been launched.¹⁹¹ Licensing solutions are important alternatives, deserving greater attention in an Inquiry with a mandate to determine whether the existing regime is "adequate and appropriate" in the digital age. As Oxera put it in their independent study of copyright levies:

*The key advantage of licensing is that it is non-distortionary and economically efficient. There is no additional tax on products that alters consumer behaviour. In economic terms, consumers have variable willingness to pay for the ability to consume their content over various platforms, and a fully functioning licensing system would serve as a tool to price-discriminate efficiently across consumers at different parts of the demand curve. Depending on 'how the pie is shared', distributors and various rights holders should each receive market-based remuneration from the sales, part of which reflects the value of private copying.*¹⁹²

155. As previously outlined at paragraphs 27 to 37 of this submission, the Discussion Paper lacks the rigour expected of an evidence-based analysis of the economic impact of different copyright regimes. Citing, as it does, international studies that have nothing to do with copyright to suggest that there are relevant barriers to technological innovation in Australia is no substitute for a principled analysis.¹⁹³ The reference to countries with broader private copying exceptions without acknowledging that many have introduced levy systems to counteract the negative economic impact of legislative change on rights holders reflects a similarly flawed analysis.¹⁹⁴ Nor does the ALRC's unreferenced and unsubstantiated assertion that Australians do not understand or respect the current copyright laws, assist in assessment of the impact on affected businesses of the proposals.¹⁹⁵

8.3 Non-compliance with the three-step test

156. The private copying exception proposed by the ALRC is also likely to contravene the three-step test and put Australia in breach of its international obligations. Applying step one of the test, any private copying exception that was introduced in Australia would have to relate to a distinct, special case, and could not be too general. As already explained, open-ended exceptions are inconsistent with first step requirements without supporting jurisprudence, such as the extensive US case law discussed at paragraph 78 above. A private copying exception cannot be incorporated as part of the fair use model in the Australian legal environment and remain within Australia's international obligations.

¹⁹⁰ See Hargreaves Review at p 8 and <http://www.ipa.gov.au/hargreaves-copyright-dce>, which explains the background to the feasibility study and contains a link to Hooper's final report.

¹⁹¹ <http://www.copyrighthub.co.uk/>, launched on 8 July 2013.

¹⁹² Oxera, *Could 'fair compensation' be fairer to all? Finding an alternative to copyright levies*, 21 March 2012 available at <http://www.oxera.com/Publications/Agenda/2012/Could-%E2%80%98fair-compensation%E2%80%99-be-fairer-to-all--Findin.aspx>

¹⁹³ Discussion Paper at [3.7].

¹⁹⁴ The Australian Film/TV Bodies Submission at [74], supported by Arts Law Centre, Screenrights and the Australian Copyright Council.

¹⁹⁵ Discussion Paper at [9.20]ff.

157. The application of the ALRC’s alternative proposal for a new fair dealing exception for private and domestic purposes (which the Australian Film/TV Bodies oppose) would need to be heavily qualified in order to comply with the first step. The definition in s.10(1) of the Copyright Act should be repealed.

Examples of qualifications include:

- The copier must be an individual, not a body corporate
- The individual must have lawfully acquired, on a permanent basis, the copy from which further copies are made
- The further copy must be made for the individual’s private use, for non-commercial ends.
- the exception should not allow the copying by a third party or distribution of the copied content to a third party in any form, including cloud services.¹⁹⁶

158. Steps two and three require that any exception not conflict with normal exploitation of the relevant work (in this case, a cinematograph film) or unreasonably prejudice the interests of rights holders.

159. In light of the developments in the digital market for audio-visual content described above, the normal use of cinematograph films in the digital environment has for some time now included the licensing of copies to consumers for use on multiple devices. This makes their purchase more attractive.

Accordingly, on a proper application of the Three Step Test, additional exceptions to permit the additional free copying of cinematograph films are not justified in the Australian context and would be inconsistent with Australia’s international obligations.

Proposal 9–2 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

Proposal 9–3 The exceptions for format shifting and time shifting in ss 43C, 47J, 109A, 110AA and 111 of the *Copyright Act* should be repealed.

160. There is a case for repealing ss.111 and 110AA of the Copyright Act irrespective of whether the fair use or expanded fair dealing models are ultimately recommended. These exceptions arose in response to an era of analogue broadcasts where programming and time constraints meant that the opportunities to catch up on a missed broadcast program were limited and to permit the transposition of analogue VHS recordings to DVDs.

161. The growth of the digital market for feature films and television programs and the decline in sales of analogue recording equipment and mediums means that ss.111 and 110AA are no longer necessary.

Proposal 9–4 The fair use exception should be applied when determining whether a use of copyright material for the purpose of back-up and data recovery infringes

¹⁹⁶ Subject to a paid and licensed business model being in place, any uploading of content to a cloud service necessarily involves the transfer of a copy to a third party (the cloud service), and is therefore no longer under the control of the initial owner. That copy cannot therefore be maintained as a “private copy”.

copyright.

Proposal 9–5 The exception for backing-up computer programs in s 47J of the *Copyright Act* should be repealed.

162. The Australian Film/TV Bodies oppose the introduction into Australian law of a fair use defence and therefore no other exceptions should be repealed.

9 Quotation

Proposal 10–1 The *Copyright Act* should not provide for any new ‘transformative use’ exception. The fair use exception should be applied when determining whether a ‘transformative use’ infringes copyright.

Proposal 10–2 The fair use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair use exception.

Proposal 10–3 If fair use is not enacted, the Copyright Act should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.

163. The Australian Film/TV Bodies oppose the incorporation of ‘quotation’ as an illustrative purpose.
164. As a number of content industry submissions have pointed out the existing fair dealing provisions already exempt quotations of a substantial part of a copyrighted work in legitimate circumstances. To allow for quotation outside these purposes, for example to use an extract from a television broadcast in another television broadcast, is likely to significantly curtail rights-holders’ legitimate licensing markets. The majority of licensed content between televisions stations consists of short extracts of footage that is less than 60 seconds. If free usage of short “quotations” becomes permissible, then rights holders operating in the sector are likely lose their main source of revenue. Such an outcome is not consistent with the second and third steps of the Three-Part Test.
165. It is suggested in the Discussion Paper that Article 10(1) of the *Berne Convention* may provide a basis for introducing a quotation exception in the Copyright Act.¹⁹⁷ The open model proposed by the ALRC, without significant restrictions, is inconsistent with that Article. As Professor Ricketson, writing for the WIPO Standing Committee on Copyright and Related Rights, observed, Article 10 requires that a quotation exception (i) be restricted to ‘works’ made “*lawfully made available to the public*” (ii) be

¹⁹⁷ Discussion Paper, at [10.91].

“compatible with fair practice,” (iii) not exceed the purpose of the quotation and (iv) mention the source of the quotation and the name of the author.¹⁹⁸

166. Whilst there are many shortcomings¹⁹⁹ with the quotation exception presently under review by the UK Government, it at least attempts to engage with international copyright law requirements by restricting the exemption to quotations of works that:

- have already been lawfully made publically available;
- are accompanied by sufficient acknowledgement (where this is possible); and
- are consistent with fair practice.

167. The Australian Film/TV Bodies consider that the UK model is unsatisfactory. Absent delimitation of the purposes for which the quotations may be used and clear guidance on the circumstances amounting to “fair practice”²⁰⁰ and “not exceeding the purpose used by the quotation”, the model, in our view, runs the risk of exempting, on discretionary fairness basis, any act of using part, rather than the whole, of a work.

10 Libraries, Archives and Digitisation

Proposal 11–1 If fair use is enacted, s 200AB of the *Copyright Act* should be repealed.

Proposal 11–2 The fair use exception should be applied when determining whether uses of copyright material not covered by specific libraries and archives exceptions infringe copyright.

Proposal 11–3 If fair use is not enacted, the *Copyright Act* should be amended to provide for a new fair dealing exception for libraries and archives. This should also require the fairness factors to be considered.

Question 11–1 Should voluntary extended collective licensing be facilitated to deal with mass digitisation projects by libraries, museums and archives? How can the *Copyright Act* be amended to facilitate voluntary extended collective licensing?

Proposal 11–4 The *Copyright Act* should be amended to provide a new exception that permits libraries and archives to make copies of copyright material, whether published or unpublished, for the purpose of preservation. The exception should not limit the number or format of copies that may be made.

¹⁹⁸ Ricketson 2003, 11-13

¹⁹⁹ In particular, the exception has been criticised as lacking any meaning because it does not ascribe any particular purpose for exempted quotation and does not adequately define what is meant by “fair practice.”

²⁰⁰ It is generally considered that “fair practice” requires consideration of the second and third conditions of the three-part step. Ricketson 2003, at 13

Proposal 11–5 If the new preservation copying exception is enacted, the following sections of the *Copyright Act* should be repealed:

- (a) s 51A—reproducing and communicating works for preservation and other purposes;
- (b) s 51B—making preservation copies of significant works held in key cultural institutions’ collections;
- (c) s 110B—copying and communicating sound recordings and cinematograph films for preservation and other purposes;
- (d) s 110BA—making preservation copies of significant recordings and films in key cultural institutions’ collections; and
- (e) s 112AA—making preservation copies of significant published editions in key cultural institutions’ collections.

Proposal 11–6 Any new preservation copying exception should contain a requirement that it does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.

Proposal 11–7 Section 49 of the *Copyright Act* should be amended to provide that, where a library or archive supplies copyright material in an electronic format in response to user requests for the purposes of research or study, the library or archive must take measures to:

- (a) prevent the user from further communicating the work;
- (b) ensure that the work cannot be altered; and
- (c) limit the time during which the copy of the work can be accessed.

168. The Australian Film/TV Bodies oppose the introduction into Australian law of a fair use defence and therefore no other exceptions should be repealed. As Professor Ricketson observed in his report to WIPO, an exception for libraries, archives or preservation must have restrictions in order to comply with the three-step test.²⁰¹

11 Orphan Works

Proposal 12–1 The fair use exception should be applied when determining whether a use of an ‘orphan work’ infringes copyright.

Proposal 12–2 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 work was clearly attributed to the

²⁰¹ Ricketson 2003, at 76

author.

- Proposal 12–3** The *Copyright Act* should provide that, in determining whether a ‘reasonably diligent search’ was conducted, regard may be had, among other things, to:
- (a) how and by whom the search was conducted;
 - (b) the search technologies, databases and registers available at the time; and
 - (c) any guidelines or industry practices about conducting diligent searches available at the time.

169. The Australian Film/TV Bodies do not oppose this recommendation.

12 Educational Use

Proposal 13–1 The fair use exception should be applied when determining whether an educational use infringes copyright. ‘Education’ should be an illustrative purpose in the fair use exception.

Proposal 13–2 If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.

Proposal 13–3 The exceptions for education in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed.

170. The Australian Film/TV Bodies oppose the introduction into Australian law of a fair use defence and therefore no other exceptions should be repealed. We consider that there is no basis for extending the fair dealing provisions for research and study and criticism and review, to include new exception for fair dealing for “education”. Absent equitable compensation to copyright holders through statutory licensing, a blanket exception for education limited only by fairness factors may be inconsistent with Article 15 of the Rome Convention and Articles 9(2) and 10(2) of the Berne Convention.

13 Government Use

Proposal 14–1 The fair use exception should be applied when determining whether a government use infringes copyright. ‘Public administration’ should be an illustrative purpose in the fair use exception.

Proposal 14–2 If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered.

Proposal 14–3 The following exceptions in the *Copyright Act* should be repealed:

- (a) ss 43(1), 104—judicial proceedings; and
- (b) ss 48A, 104A—copying for members of Parliament.

171. The Australian Film/TV Bodies oppose the introduction into Australian law of a fair use defence and therefore no other exceptions should be repealed. We consider there is no basis for replacing the specific exceptions with a general fair dealing exception for public administration. The proposal would undercut almost all forms of exploitation of copyright materials with Government and other entities performing public administration functions.

14 Retransmission of Free-to-air Broadcasts

Proposal 15–1 Option 1: The exception to broadcast copyright provided by the *Broadcasting Services Act 1992* (Cth), and applying to the retransmission of free-to-air broadcasts; and the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of the *Copyright Act*, should be repealed. This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

Option 2: The exception to broadcast copyright provided by the *Broadcasting Services Act*, and applying to the retransmission of free-to-air broadcasts, should be repealed and replaced with a statutory licence.

Proposal 15–2 If Option 2 is enacted, or the existing retransmission scheme is retained, retransmission 'over the internet' should no longer be excluded from the statutory licensing scheme applying to the retransmission of free-to-air broadcasts. The internet exclusion contained in s 135ZZJA of the *Copyright Act* should be repealed and the retransmission scheme amended to apply to retransmission by any technique, subject to geographical limits on reception.

Question 15–1 If the internet exclusion contained in s 135ZZJA of the *Copyright Act* is repealed, what consequential amendments to pt VC, or other provisions of the *Copyright Act*, would be required to ensure the proper operation of the retransmission scheme?

Proposal 15–3 If it is retained, the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* should be clarified.

Question 15–2 How should the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* be clarified and, in particular, its application to internet protocol television?

172. The Australian Film/TV Bodies do not comment on this issue in the context of this review. This issue is more appropriately viewed within the context of the ongoing Convergence Review.

15 Contracting Out

<p>Proposal 17–1 The <i>Copyright Act</i> should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect. These limitations on contracting out should apply to the exceptions for libraries and archives; and the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.</p>

173. Copyright owners should continue to be able to negotiate by contract use of their copyright material. In guaranteeing freedom of contract,²⁰² the Copyright Act promotes distribution and efficient use of copyright material in online and multi-jurisdictional environments.²⁰³

174. Market forces, rather than government, are best placed to govern efficient and productive uses of copyright materials. As one submission observes, both rights-holders and users benefit from the variety of licences available presently available in the audio-visual sector :

“A consumer who wants the right to view an audio-visual work only once, or three times, need not pay the same tariff as the person who wants to view it an unlimited number of times. A researcher who wishes to acquire a single article need not pay for the entire journal. Consumers of music, software, or other works can “try before they buy” through a low-cost, limited-duration license. ... On the other side of the bargain, copyright owners are able to reach market niches that might be priced out of the market or missed altogether under the “all or nothing” outright sale paradigm. The result, once again, is greater access by a wider public than would otherwise be achievable, an outcome that is also threatened by legislative restrictions on freedom to contract.”²⁰⁴

175. In the digital environment, audio-visual services use licences to set the boundaries for the use of content by consumers. For example, a download service may allow a fixed number of copies of downloaded content, a streaming service may prohibit the copying of streams, and a service may supply a time limited copy to be reviewed within a fixed window. As already described, consumers typically pay higher prices for greater access, and accordingly may receive more limited access (e.g., viewing a film only once) at a much lower price or even for free. All of these delivery models provide varied consumer offerings and services which benefit both consumers and creators; they are also the business models of licensed third party suppliers.

176. Legislation introduced to ensure copyright exceptions cannot be overridden by contract is unlikely to achieve any of the alleged benefits discussed by the ALRC. Rather, such a move would reduce the clarity and certainty of certain contractual relationships, and prevent certain licensed business models being offered to consumers at all. The proposed provision would act against market uses where a firm might use a lower cost contract which defines more limited consumer uses. This would hold back the

²⁰² Save for s 47H of the *Copyright Act 1968* (Cth) relating to agreements that exclude or limit the reproduction of computer programs for technical study, back-up, security testing and error correction.

²⁰³ ACC, *CLRC Submission*, August 2001, at [12].

²⁰⁴ IIPA, *CLRC Submission*, August 2001, at 5-6.

development of the Australian digital content market, limit innovation and would not serve the interests of consumers.