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Broadcasting  
Corporation

Intellectual Property Arrangements  
Productivity Commission  
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Dear Commissioner,

### **Intellectual Property Arrangements**

The ABC does not intend to make a full submission responding to the Issues Paper on Intellectual Property Arrangements. However, in relation to your inquiries about copyright, the Corporation draws the Commission's attention to its submission of November 2012 to the Australian Law Reform Commission (ALRC) on Copyright and the Digital Economy, a copy of which is attached. This submission articulates some of the ABC's thinking about copyright; some of which was ultimately at odds with the Final Report of the ALRC.

Yours sincerely,

  
Michael Millett  
Director, Corporate Affairs

ATTACHMENT

**Australian Broadcasting Corporation**

submission to the

**Australian Law Reform Commission**

**Issues Paper on Copyright and the Digital  
Economy**

November 2012

**Note:** the ABC provides this submission in multiple file formats to maximise accessibility. Where differences between versions of the document exist, the PDF version is definitive.



# **ABC submission in response to the ALRC issues paper on copyright and the digital economy**

November 2012

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## **Introduction**

The ABC has played a significant role in Australian cultural life for more than 80 years. As a national public broadcaster, it has a responsibility to support Australian democracy and public life through its provision of news and information services, and to contribute to the cultural life and memory of the nation by the presentation of Australian stories.

In 2011–12, the ABC’s operational expenditure was just under \$1 billion.

The Corporation operates 60 Local Radio stations serving communities in metropolitan and regional Australia and four national radio networks: Radio National, the music stations ABC Classic FM and triple j and ABC News Radio. In addition, it broadcasts four digital-only music radio services in the mainland capital cities, as well an additional “pop up” digital channel to provide event-specific coverage.

It likewise delivers five television services across four digital channels: ABC1, ABC2, the dedicated children’s services ABC4Kids and ABC3, and the news channel ABC News 24.

The ABC is an active participant in the digital economy. It has responded to Australian audiences’ embrace of digital platforms that comprise the foundations of the digital economy by offering free, high-quality online and mobile services.

The ABC’s online services are available at [abc.net.au](http://abc.net.au) and include content delivered via streaming, podcasting, vodcasting and video-on-demand, as well as mobile platforms.<sup>1</sup> The ABC’s website comprises over 5 million pages of content. In 2011–12, the site had an average monthly reach of 3.7 million internet users. The Corporation also delivers many of its radio programs as live streams and podcasts, and its television programming is available on an on-demand basis through its “catch-up television” service, iview. It offers a range of dedicated mobile services, including more than 20 apps for iOS and Android smartphones and tablets.

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<sup>1</sup> For further information, see <http://www.abc.net.au/services/>.

Consistent with its Charter obligations in s 6 of the *Australian Broadcasting Corporation Act 1983* (“ABC Act”), the ABC is widely-recognised as a digital innovator. It was one of the first Australian media organisations to develop an online presence, launching its website in 1995. The Corporation was the first Australian media organisation to begin offering podcasts of its radio programming in 2006 and the first to introduce an online “catch-up television” service with *iview* in 2008. It experiments with new forms of interactive content, such as the 3D historical work *Gallipoli: the first day* and the augmented reality game *Bluebird AR*. It has also been active in using and exploring social media, including through the user-generated collaborative content site, *Pool*, in conjunction with a number of universities. Along with *Pool*, the ABC has experimented with open-access licensing its own archive material.<sup>2</sup> Through *ABC Open*, it fosters community storytelling and digital literacy throughout regional Australia.

This innovation benefits the media industry as a whole, as the ABC’s public service remit and funding allow it to take creative and technical risks that commercial media organisations might not. In so doing, it not only provides creative leadership for the industry as a whole, but also contributes to the overall health of Australia’s independent creative community by providing a potential outlet for novel and controversial productions.

The ABC International division operates two services: Australia Network and Radio Australia. Australia Network is Australia’s international television service, beaming 24/7 to more than 46 countries across Asia, the Pacific and Indian subcontinent. Radio Australia offers an Australian perspective with a focus on Asia and the Pacific. Through the provision of content on radio, web, mobile and through social media, these services encourage conversation and the sharing of ideas between Australians and the diverse people and cultures of the Asia Pacific.

The Corporation’s commercial arm, ABC Commercial, which extends the availability of ABC content to audiences beyond its free broadcast and/or online publication window, also operates in the online environment. In addition to physical sales through its network of ABC Shops and ABC Centres, ABC Commercial delivers traditional audiovisual content to customers via digital distribution channels, as well as offering uniquely online services, such as the educational site *Reading Eggs*. Profits generated from ABC Commercial’s activities are reinvested in ABC program-making.

In the digital economy, as in the traditional broadcasting environment, the ABC is both an owner and a user of copyright. It believes that, in the adaptation of copyright to the online environment, care should be taken to balance the interests and needs of the wide range of participants in the digital economy, including producers and creators, members of the audience, educational users and the Corporation itself.

The ABC supports changes to copyright regulation which would allow it more fully and efficiently to meet its Charter obligations. The changes proposed in this submission would enable the Corporation to enhance audiences’ experience of ABC output in new and more innovative ways, thereby helping to deliver the benefits of the digital economy to all Australians.

Rapid changes in technology and consumer behaviour are creating a growing rift between platform-specific provisions of the *Copyright Act 1968* (Cth) and the ways in which Australians are increasingly using copyright materials. In the face of such changes, the most appropriate

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<sup>2</sup> See <http://www.abc.net.au/archives/default.htm>.

response is to adopt a technologically-neutral approach in many areas of regulation. Such an approach must, however, always be balanced with the need to reward creativity, risk and investment on the part of content creators.

Australia needs a modern and flexible copyright system which facilitates full use of content by users, appropriate reward for creators and sufficient incentive to further encourage innovation. The net result should be a thriving creative industries and an Australian population that can derive full benefit and enrichment from digital services.

## Responses to questions

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

- (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;
- (b) affects the introduction of new or innovative business models;
- (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or
- (d) places Australia at a competitive disadvantage internationally.

The ABC can only provide evidence in relation to (b)—how copyright law is affecting the introduction of new or innovative business models—and (c)—how copyright law imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material.

In relation to (b)—how does copyright law affect the introduction of new or innovative business models—it is difficult to compile evidence, other than through the testimony of the ABC's content makers and innovators.

Monique Potts, Head of Strategic Development in the ABC's Innovation Division, said:

To be honest it's a bit of a nightmare! Because we are working in fast moving digital environments, where people expect a high level of interactivity, the complexity of existing copyright laws makes it really difficult to innovate with content.

It's difficult enough for us to understand the complexity ourselves as digital producers and almost impossible for our audiences.

Some of our recent projects including the Open Archives pilot project and the new education website ABC Splash require us to clear rights for archival and contemporary content that have been produced using a broadcast rights methodology. This may have worked when a show was only broadcast once or twice, but it doesn't work for a digital publishing environment. Audiences want to be able to reuse and remix content for their own creative works and it's very difficult with existing copyright law to facilitate this type of interactivity.

Robert Hutchinson, General Manager of Digital Content Development in ABC Commercial, said:

In the early days of a new innovative business model, your revenue doesn't cover your costs, at least to begin with. The fact that you don't have great content cleared can contribute to its failure.

In relation to (c)—whether copyright law imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material—the ABC comments on this firstly, from the perspective of unlocking content for digital use.

### **Unlocking the ABC archive**

From an evidential point of view, the ABC refers the Commission to the two case studies relating to broadcasters unlocking archives for public access cited by McCausland.<sup>3</sup> These are the BBC experience and the NHK experience. The BBC also referred to this trial in its submission to the Hargreaves Review.<sup>4</sup>

To negotiate 1,000 hours of archive programming (from an archive with over 1 million hours) available online for streaming it took the BBC around 6,500 person hours to check 1,000 hours of programming for rights implications and the archive trial team subsequently had to obtain permission for use from about 300 individual or collective rights holders. The BBC said:

The trial data suggests [sic] that administrative costs of clearing the entire archive would be prohibitively expensive. We estimated that it would take 800 staff around three years to clear the entire BBC archive at a total cost of £72 million (equivalent to about 2% of the BBC's annual licence fee income).

The BBC also spoke about the difficulty in clearing *Doctor Who* for digital use; a similar experience shared by the ABC.<sup>5</sup>

In 2008, NHK selected 1000 hours from its television archive. NHK estimated it would take a team of 20 people working full-time for eight months to clear this material.<sup>6</sup>

While the ABC has not formally assessed the likely costs and effort required to clear the underlying rights in significant portions of its archive for digital use, these figures are broadly consistent with the Corporation's experience. The costs of such clearances include both administrative costs and the actual licensing costs, which vary considerably across genres and need to be determined on a case-by-case basis. As a result, the ABC's digitisation of its archive has been almost entirely confined to: (a) digitisation for preservation purposes, which does

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<sup>3</sup> McCausland, Sally "Getting Public Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old (but in Copyright) Cultural Material for Digital Use", *Media Arts Law Review*, Vol 14, No.2 June 2009, 142.

<sup>4</sup> *Digital Opportunity: A review of Intellectual Property and Growth: An independent report by Ian Hargreaves*, May 2011. See: <http://www.ipo.gov.uk/ipreview-c4e-sub-bbc.pdf> at p 7.

<sup>5</sup> *Ibid*, at p 6.

<sup>6</sup> McCausland, *Op Cit* n3, p 159.

not necessarily require the clearance of underlying rights; (b) digitisation of content, such as news footage, that is ABC-owned and thus requires minimal clearance; and (c) digitisation for use in ABC Commercial products that are able to recoup the rights clearance costs through sales revenue.

In terms of testimony, Monique Potts said:

Within Innovation we have been exploring new publishing models where we can add value to existing broadcast content for niche audiences such as the education platform ABC Splash, where we are adding educational and curriculum information to a library of short form media content. The process of clearing rights for this content to be used online is a very manual and time consuming process and means the amount of content we can publish is much more limited. Any way of simplifying the number or range of rights holders and payments required to clear rights for this content would help to be able to reuse broadcast content efficiently across a range of digital platforms. The process of clearing archival material to make available online is very time consuming and difficult and means only a very small proportion of the available ABC archive can be made available for Australian audiences.

Robert Hutchinson said:

We were able to release *Wild Side*, *Janus* and *Phoenix* on DVD, but clearances got in the way of the digital release. It got way too hard, and one of the writers had disappeared.

## **Music Licensing**

In common with most media outlets, the ABC's business requirements are increasingly focusing on the need to share content across its output platforms (Radio, Television and Online). Effective content sharing requires that the ABC's various licensing arrangements allow for this to occur without there being a need to either re-license or reversion content. For the ABC, the most efficient method of licensing to facilitate content sharing across platforms is via its blanket type licensing arrangements with the bodies which represent copyright holders. Music presents a very significant issue in this multi-platform environment. Whilst the ABC has largely been successful in securing the necessary rights to enable internal content sharing from the relevant representative body for musical works, the limitations in the online rights it can secure for sound recordings are inhibiting the seamless sharing of content.

The ABC is constrained from providing specific examples due to confidentiality obligations in its blanket licences. However, the "mismatch" in rights available for musical works and commercial sound recordings means the ABC is not able to get the best value for money out of its music blanket licences, and in some circumstances is prevented from using broadcast content in the digital environment without the additional expense of replacing the music or removing it altogether.

## Guiding principles for reform

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

The Commission has outlined certain guiding principles that are important in influencing copyright law reform. In addition to those guiding principles that the Commission has identified, the ABC submits that the following principles should also be taken into account:

- Acknowledging the fundamental principle of freedom of expression, and the role it plays in Australian society; and consequently the importance of information dissemination. Acknowledging that fair use and free use can foster freedom of expression, information dissemination, innovation and creativity. Reform should be consistent with these principles.
- Promoting incentives to create, innovate and participate in the digital economy. Reform in relation to copyright exceptions should encourage cultural production rather than inhibit it.
- Identifying uses of copyright material which do not materially infringe upon or reduce the capacity of rights holders to exploit their material so that such uses are not restricted. Reform should consider the *intent* of copyright protection when assessing the value of an exception.
- Assessing the public benefit of a legal regime which creates private rights. As well as addressing microeconomic issues when considering copyright law reform, reform should also take a “big picture” view of the use of copyright material.
- Recognising that the digital economy is not measured purely by financial indicators, but also that cultural benefits play a significant part of the digital economy.
- Acknowledging that there are various types or levels of copyright owners and users in Australia. Reform should recognise that some copyright owners are incorporated, motivated, financially driven, organised and resourced to control their copyright assets adequately and be easily identified and located. Other copyright owners are not. Similarly, copyright users come in all shapes and sizes.
- Acknowledging that different copyright material has different commercial market value—some material, albeit original copyright material, has no intrinsic or market value, while other copyright material has high intrinsic or market value. Reform should acknowledge the different value of copyright material and should reflect this nuance; it should not be assumed that all copyright material shares the same economic value or viability.
- Examining whether shifting and sharing the burden of copyright compliance might result in more efficiencies within the digital economy marketplace. Another similar principle would be an examination of transaction costs—not just in terms of assessing licence fees, but assessing them in terms of time, human resources, effort and successful outcomes.



Consistent with one of the ABC's core values, innovation, the ABC submits Australia should be innovative and world-leading in its approach to copyright law reform; it should take risks and experiment with new models in order to achieve the best outcome for copyright owners and users over the longer term.

## Caching, indexing and other internet functions

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

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

The ABC is addressing these two questions together.

For the radio and television industries, caching and buffering of program content streamed over the internet is an essential part of the technical delivery process to ensure appropriate standards of viewer experience can be maintained. If caching was not possible, then the ABC would be unable to provide reliable streamed television programming over the internet of an acceptable quality to its audiences.

Furthermore, the cost of communication of streamed program content may also be more effectively managed by service providers and intermediaries caching content at various points in the technical delivery chain, such as through the use of edge servers and mirror sites within content delivery systems, rather than streaming content from centralised servers and data warehouses.

S 111A of the *Copyright Act* provides that copyright in an audiovisual item which is defined broadly to include a sound recording, cinematograph film, sound broadcast or television broadcast, is not infringed by making a temporary copy of the item as part of the technical process of making or receiving a communication, provided that the making of the communication is not itself an infringement of copyright. This may be taken to include temporary caching and progressive downloading of content lawfully streamed via the internet.

However, questions remain about the uncertainty of the term "temporary". For how long can content be temporarily stored? It may be that in some circumstances, content could remain cached for extensive periods of time, even indefinitely, if data storage capacity is large enough.

The ABC acknowledges that caching and other related functions may create increased risks of unauthorised access to, reproduction and distribution of copyright material in digital form. However, the ABC considers that provisions for the enforcement of rights and remedies already exist in the *Copyright Act* to address such activity. The technology market will also most likely continue to drive the development of more sophisticated means to protect digital content made available online, such as encryption, DRM, progressive downloading and client verification/authentication systems. The interest and demand in supporting and facilitating reliable, efficient, and cost-effective means of delivering high quality content via the internet

and the availability of such technological protection methods thereby counterbalances the potentially increased risks of unauthorised access to digital content.

Subject to the comments above, whilst s 111A of the Act appears to be adequate in terms of its scope for the purposes of caching streamed content, the ABC would also support a more flexible exception in the *Copyright Act* allowing for reproduction of copyright material to support or enhance related technical functions in the digital environment, assuming that appropriate and cost-effective technological protection measures could be taken to prevent unauthorised access to, and use of, such material.

## Cloud computing

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

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

The ABC is addressing these two questions together.

In the broadcasting context, the ABC does not consider that the *Copyright Act* significantly impedes the development or delivery of cloud computing services. The utilisation of cloud computing services as a content management and delivery method is effectively a means to an end. It is one of a number of ways for consumers to store, manage, share and access content.

In the ABC's view, the *Copyright Act* appropriately maintains and protects the interests of rights holders. If cloud computing services are used to facilitate access to properly licensed content, then the *Copyright Act* should accommodate such services. However, if cloud computing services are utilised to facilitate the exploitation of copyright material without proper licence or authorisation, then it is appropriate that the effect of the Act may be to impede the use of such services in these ways. This issue is discussed in more detail at Question 9.

Content creators and rights holders should be entitled to control the exploitation of their content—consumer sentiment will inevitably determine what restrictions around access and dissemination of content consumers will be prepared to accept for the price they pay. Consumer expectations as to the accessibility of content have expanded over time, largely due to technological developments making access to and reproduction of digital content easier and more widespread.

However, the demands of consumer expectations should not necessarily mean that content should be universally accessible without consideration for the interests of rights holders and their ability to exploit such content through licensing regimes and other commercial means. Without an appropriate balance being maintained, it can be expected that investment in the production of high quality content will inevitably decrease. The utilisation of cloud-based computer services to manage and distribute digital content and their recognition in the development of regulatory policy must accommodate this balance.

## Copying for private use

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

The ABC submits copying of legally acquired copyright material, including broadcast material, for private and domestic use should be more freely permitted but only in some limited respects.

Of the current permitted uses of copying legally-acquired copyright material in the *Copyright Act*, the most relevant to the ABC are:

- s 109A – Copying sound recordings for private and domestic use
- s 110AA – Copying cinematograph films in different format for private use
- s 111 – Recording of broadcasts for replaying at more convenient time.

These two format-shifting sections (ss 109A and 110AA) and one time-shifting section (s 111) are relevant to the ABC as a producer, broadcaster and distributor of sound recordings and cinematograph films.

The ABC submits, in principle, that format-shifting and time-shifting exceptions for private and domestic use of copyright material should be retained in Australian copyright law.

The ABC has previously supported a specific exception to copyright infringement for format-shifting for private domestic use.<sup>7</sup> At that time, the ABC considered that such format-shifting was in the interests of its audience because it provided legitimate access to ABC content and because it was in the public interest. The ABC submitted such an exception would ensure copyright policy attained a balance between the interests of copyright owners and copyright users. The ABC supported the right of the audience to make back-up copies of copyright material provided that the exception was limited to private and domestic use only.

Since that time, the ABC has witnessed its audiences' increasing desire to format-shift when accessing ABC content. Particularly, the ABC has observed its audiences want to be able to "platform-shift" or in other words "device-shift".

For example, an ABC viewer or listener might want to shift from a television to a PVR, or from a radio to a computer, or from a computer to a tablet, or from a television to a mobile device, to view or listen to the content more conveniently. To give effect to the policy behind the exceptions, the ABC believes they should be device/platform neutral.

The ABC acknowledges that other stakeholders such as content producers and collecting societies, and those parties who compete for rights in content, are concerned to ensure that there are sufficient limits placed on such free use to ensure the viability of their commercial business models. The Corporation is also concerned about unduly extending the exception, as changes that have an economic impact on the business models for content production are likely to have a "flow on" impact on the ABC. It is concerned that the real cost of a broad

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<sup>7</sup> "The Department of the Attorney General: Fair Use and Other Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age", Submission of the Australian Broadcasting Corporation, July 2005.

private-use copying exception will fall back on the ABC, because as the costs of production increase and revenue is potentially diminished by wider private and domestic use, the ABC will have to contribute more by way of equity investments and licence fees to secure quality content for broadcast. For this reason, any extension to the free private and domestic use exceptions needs to be approached carefully. Given these concerns, the ABC makes the following observations.

Firstly, the phrase “for private and domestic use” is key for the ABC when considering this question. This qualification should be strictly maintained, noting that the definition in s 10 of “private and domestic use” allows for location-shifting.<sup>8</sup>

Secondly, as stated above, these exceptions should be platform- and device-neutral; in other words, format-neutral. There should be sufficient flexibility in the language used in the legislation to allow platform-shifting or device-shifting to occur. Language such as this from s 109A:

- (c) the earlier copy was not made by downloading over the internet a digital recording of a radio broadcast or similar program; and

is a barrier to device-shifting where a download is offered by the ABC. The term “videotape” in s 110AA is also device-specific.

To attempt to constrain the platform on which a private and domestic user of content is able to view or listen to content, given current available technology, is probably futile despite the fact there is currently a market for device-based rights. The better basis would be to define the purpose or use, and the type of access given to the public. In relation to format-shifting and time-shifting, the policy is to provide a certain level of convenience for owners of copies of content and audiences, while maintaining sufficient recognition of rights and economic return to rights holders.

### **Type of Access**

It is useful to analyse what type of access to the content is provided for private and domestic use by looking at:

- whether the content is “owned”<sup>9</sup> or disseminated by a broadcaster;<sup>10</sup>
- whether the content is provided on an ephemeral basis (for example, via a broadcast or a point-to-point stream);
- whether the content is provided on a more accessible basis (for example, by way of point-to-point download), and
- restrictions around access that are consistent with the policy of format-shifting and time-shifting by concentrating on how the consumer can *use* the content within the private domestic setting.

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<sup>8</sup> S 10 defines “private and domestic use” as “private and domestic use on or off domestic premises.”

<sup>9</sup> In respect of ss 109A and 110AA there may be some legal ambiguity around the word “own”.

<sup>10</sup> Under s 111 the legal acquisition of the content arises by fact of the content being broadcast.

Special status should continue to be given to free-to-air broadcasters and their content, and the exceptions should also extend in limited ways to broadcasters' online content.

### **Period of Access**

Where content is provided on an ephemeral basis, any time-shifting exception should be limited to a reasonable period of time to allow consumers to catch up on content more conveniently.

### **Number of Copies**

When content is used under a format- or time-shifting exception, the number of copies could be restricted to permit a reasonable number of copies in the same way that the market has restricted the number of copies when downloads are sold to consumers.

### **ABC Context**

It may also be useful to consider time-shifting and format-shifting exceptions within the current framework at the ABC, as follows.

### **Time-Shifting**

#### **Off-Air**

Under s 111, consumers can currently tape the ABC's ephemeral broadcasts off-air for private and domestic use, and store that copy for viewing at a more convenient time. In principle this practice should continue to be supported by an exception in the *Copyright Act*.

#### **Streaming Services – Simultaneous with Broadcast**

However, until the decision in *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited* ("*PPCA v CRA*"),<sup>11</sup> consumers did not have a clear exception under which they may copy content that is simultaneously streamed online by the ABC on an ephemeral basis for private and domestic use for viewing at a more convenient time. From a copyright perspective, as this is an extension of the ABC's broadcast, the s 111 exception should be extended to cover copying of simultaneous online streams of broadcast material.

#### **Streaming Services – Original Webcasts**

The ABC submits the exceptions should be extended to allow time-shifting and format-shifting of original webcasts when the ABC streams a live webcast of content that is not broadcast.

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<sup>11</sup> [2012] FCA 93 (15 February 2012).

### **Streaming Services – Catch-Up Services**

Section 111 should not be extended to allow copying of content streamed from catch-up services. Take for example ABC TV's iview service. This service allows users to view content at a more convenient time, usually for a period of 14 days (although for some content that period may be extended). The purpose of iview is to provide convenient access to ABC TV content within the boundaries of what is reasonable and technically feasible given the cost of, and competition for rights, and costs of infrastructure. However, unlike taping off-air, users are not permitted to store copies permanently from iview for viewing at a further more convenient time. It would significantly change the market for the rights to this content if consumers were permitted by law to copy this type of content for further time-shifting purposes or for the purpose of having a permanent copy of the content to own.

For free-to-air content, the ABC submits that there is no need to extend the time-shifting exception to allow further time-shifting of content freely available on a streamed catch-up service.

### **Download to Own**

Private and domestic users can already copy some ABC content which is available for free on a download to own basis. For example, ABC Radio podcasts can be downloaded for private and domestic use. The provision of this content as a download by its very nature already allows time-shifting—being able to listen to the content at a more convenient time. No further exception would be required in this regard.

### **Download to Rent**

However, if the ABC did include digital rights management (DRM) on downloads to own which restricted the availability of the download for a period of time, then that DRM would provide a reasonable period of time in which to time-shift, and only format-shifting should be available for that period of time.

### **Device-Shifting**

The ABC provides a range of applications that permit audiences to device-shift, for example, iview is accessible via computer, and now via tablet and mobile devices and through some smart TVs.

In principle, the Corporation submits that private and domestic users should be able to rely on an exception to device-shift in relation to off-air copying, copying of original webcasts and content simultaneously streamed online with broadcast, for catch-up services which are made available by broadcasters, and for download-to-rent and download-to-own services, provided that at all times, the private and domestic user complies with the restrictions around the use of the content.

The ABC believes that device-shifting should be permitted for catch-up streamed services such as iview, but only within and for the relevant timeframe allowed by the catch-up service. In the Corporation's view, it would not significantly change the market for these rights if

consumers were permitted by law to copy this content for device-shifting purposes. Consumers should therefore be permitted to format-shift content which is provided on an unrestricted download-to-own basis as an exception in Australian copyright law.

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

Yes, the ABC submits that a single, technology-neutral, format-shifting exception with common restrictions that reflects the underlying policy of the exception would be preferable. This is because:

- it is likely to be far more adaptable and flexible to deal with new technologies.
- a single format-shifting exception would allow it to be more aligned with its underlying policy. It will also be easier to consider and locate. This may go some way to reducing the complexity of the Act, which is a current criticism.

However, if there are to be parameters placed on time-shifting for a more convenient time, then these should not be able to be overridden by a format-shifting exception.

**Question 9.** The time shifting exception in s111 of the *Copyright Act 1968* (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

- (a) should it matter who makes the recording, if the recording is only for private or domestic use; and
- (b) should the exception apply to content made available using the internet or internet protocol television?

Yes, this exception should be amended as we have outlined in Question 7.

Under s 111, consumers can currently record ABC ephemeral broadcasts off-air for private and domestic use, and use those copies for viewing at a more convenient time. The ABC submits that the basis for this time-shifting exception in principle should be retained in Australian copyright law.

### **Simulcast Streams**

If the decision of the judge in first instance in *PPCA v CRA* is upheld on appeal, then the term “broadcast” as used in s 111 would be read in any case to apply to internet simulcasts of broadcasts. It should be legislatively determined what comprises a broadcast in the digital economy. The ABC believes it should include simultaneous streams of broadcast content.

## Live Webcasts

The exception should be extended to allow the time-shifting of live webcasts (one off streamed services).

## Catch-up Services

However, the exception should not be extended when content is provided by broadcasters in more than an ephemeral way; particularly, when content is available legitimately via free catch-up streaming services, such as *iview*, and free, timed downloads. This is because these services are by their nature time-shifting services. It would significantly change the market for the rights to this content if consumers were permitted by law to copy this content for *further* time-shifting purposes in addition to what was already being provided. Another reason is because it is important for the ABC to maintain an ongoing relationship with its audience members. The ABC wants to encourage Australians to return to the ABC for content and information.

## Who makes the recording?

While the ABC does not wish to undermine its audience's ability to watch and listen to ABC broadcast programming at a more convenient time, and while the ABC does not wish to undermine the potential of technology such as cloud services in Australia, the ABC is also concerned to recognise the interests of rights holders and the market for rights. Section 111 should not operate to undermine a rights holder who has exclusive rights to provide particular content. It is a delicate balance to get right.

Section 111 presumes that members of the public have legal access to the broadcast content in order to tape it off-air – they either access it freely, or they have paid their subscription for the pay television broadcast. With the advent of cloud services and the potential for other new technologies to emerge, the issue should be approached in terms of legal *access* and the market for rights.

The ABC believes that in the future, the notion of device based rights such as “mobile rights” and “online rights” will likely diminish due to technological developments and audience consumption patterns. Instead, the market for rights underpinning broadcast content is likely to segment into the following:

- Live broadcast/live streaming rights
- Catch-up rights – on demand streaming/timed download/download to rent
- Catch-up rights – download to own

It is important to look at the *nature of the activity* being undertaken by the cloud service and ask: is the cloud service being offered to consumers under the veil of protection of s 111 as a substitute for obtaining rights in the content by an entity who is a competitor for those rights, or is it merely offering a recording facility? If the recording facility being offered via the cloud is a substitute for obtaining a licence of the rights, then at the very least, compensation should be paid to the rights holder (perhaps by way of a statutory licence).



Where the cloud service is being offered in competition with the true rights holder, then it is important to consider what legal access to the content is already available to the public. If the content is already accessible on demand by way of a catch-up service by a legitimate rights holder, then the competing cloud service should not be able to offer that content.

A competing, time-shifting cloud service should need to wait at least until a reasonable period of time has elapsed from content having been streamed by the legitimate rights holder via an online service before providing any time-shifting service.

The ABC's comments in relation to retransmission of online webcasts and online simulcasts of broadcasts at Questions 36 and 37 are also relevant.

## **IPTV**

The ABC believes the time-shifting exception should apply to ephemeral content made available using the internet, for example, ephemeral content made available by IPTV services. If the ABC were to communicate a scheduled stream of content in an ephemeral manner on a point to point basis, regardless of whether it is simulcast with a point to multipoint service, the exception should apply to such internet protocol television if no catch-up service is provided.

For example, the ABC News 24 service is streamed via the internet. That service might be termed "internet protocol television", as it is certainly content made available using the internet; and the ABC would suggest that s 111 apply to that stream.

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

An exception for the purpose of back-up or data recovery would assist the ABC in maintaining its extensive archive.

## **Online use for social, private or domestic purposes**

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

The ABC hosts user-generated content and acts to facilitate the collaborative and creative use of copyright and original content by audience members and users, consistent with its public service remit to inform, entertain, educate and promote the arts. Examples include:

- ABC Pool,<sup>12</sup> a social media site using a Creative Commons framework where anyone, any age, anywhere can contribute, share and engage with creative work and collaborate with the people who make it. The site hosts a number of projects that

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<sup>12</sup> <http://pool.abc.net.au/>

include remixes<sup>13</sup> and mash-ups.<sup>14</sup>

- ABC Open,<sup>15</sup> an initiative that provides skills and tools to encourage people of any age in regional communities to create, collaborate and share their stories and experiences. Individual and collaborative projects are hosted on the site and shared through external sites such as Vimeo<sup>16</sup> and Flickr.<sup>17</sup> Users are encouraged to use material from their own collections or public collections—see projects such as “Now and then”<sup>18</sup> and “One small window”.<sup>19</sup>
- User contributions are also occasionally invited and hosted in association with ABC programs that inform and entertain. For example, in recent years, *Q&A* solicited user-created satirical political video mash-ups,<sup>20</sup> *Gruen Transfer* invited audience members to create mash-ups and *Hungry Beast* hosted viewer videos.<sup>21</sup>
- The ABC’s triple j Unearthed<sup>22</sup> invites unsigned musical artists to submit their music, which might include sampling of other artists’ copyright musical tracks. Unearthed not only provides a place for artists to upload and share their music; it also promotes musicians in the highly competitive world of contemporary music, providing ways for them to be discovered by the music industry with the prospect of reputational acclaim and commercial opportunities offered by third parties (e.g., paid gigs and record labels contracts).

Such uses support a variety of public interests, including providing an avenue for cultural and self-expression, encouraging democratic participation (especially among young people who engage in this activity), and providing a catalyst for digital literacy in anticipation of expanded online capabilities becoming available with the roll-out of the National Broadband Network.

Providing opportunities to engage in such activities is expressly acknowledged in and supported by the ABC’s Editorial Policies (see s 9, “Public access and participation”) and in related guidance notes (notably on “Moderating user generated content”).<sup>23</sup> In defining “user generated content” (UGC), the ABC, like the ALRC, bases its understanding of the term on the OECD’s definition of user-created content. The Glossary to the ABC’s Editorial Policies defines UGC as:

Content in the form of text, video, still image or audio that:

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<sup>13</sup> See, e.g., <http://pool.abc.net.au/projects/abc-archive-remixes> and <http://pool.abc.net.au/tag/remix>

<sup>14</sup> <http://pool.abc.net.au/tag/mashup>

<sup>15</sup> <https://open.abc.net.au/>

<sup>16</sup> <http://vimeo.com/abcopen>

<sup>17</sup> <http://www.flickr.com/groups/abcopen>

<sup>18</sup> <https://open.abc.net.au/projects/now-and-then-14tm2sh#/discover>

<sup>19</sup> <http://vimeo.com/groups/onesmallwindow/videos>

<sup>20</sup> <http://www.abc.net.au/tv/qanda/mashups.htm>

<sup>21</sup> <http://www.abc.net.au/tv/hungrybeast/getontv/gallery/index.html>

<sup>22</sup> <http://www.triplejuneearthed.com/>

<sup>23</sup> The ABC’s Editorial Policies, glossary and guidance notes are available at:

<http://about.abc.net.au/how-the-abc-is-run/what-guides-us/our-editorial-policies/>.

- (a) is submitted by a user for publication on an ABC online or other interactive service;
- (b) generally involves some creative effort on the part of the user, in creating original content or adapting existing content; and
- (c) is usually self-produced and submitted without expectation of payment from the ABC.

ABC archival material is made available for reuse through the ABC's website (e.g. ABC Open Archives<sup>24</sup>) and in collaboration with other organisations and sites such as Flickr<sup>25</sup> and Wikimedia.<sup>26</sup> The ABC also refers users to other sources of reusable content – see, e.g. the list at Pool.<sup>27</sup>

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

The ABC has found that copyright restrictions can impede the creative reuse of content in ways that seem disproportionate to the potential harm to the legitimate interests of copyright owners. Use of commercial music in mash-ups, sampling and other UGC is an area of particular concern. Significant resources can go into vetting such content. Content using music as background (e.g. in a user video about dancing) or in combination with open/licensed content may have to be pulled down or not published. By way of example, students learning how to remix content will occasionally use music that is protected by copyright. Unauthorised use is often unintentional, particularly with music that is commercially released. The way in which the user subsequently licenses their remix (for example, licensed under a Creative Commons “By” licence) demonstrates a lack of knowledge as to how they can use music.

The ABC takes a number of steps to inform users about the appropriate use of copyright material. However, this message is increasingly out of synch with the general trend on the internet where copyright material is widely used and shared by individuals. The ABC generally encourages users to use CC licensing to enable their content to be widely shared and reused in transformative ways.

The ABC is also exploring ways to promote interactivity with school students through educational content. Restricting a student's use of music in, say, a homework assignment that involves a video mash-up, seems overly restrictive where such use does not interfere with the copyright owner's market or moral rights.

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

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<sup>24</sup> <http://www.abc.net.au/archives/openarchives.htm>; <http://pool.abc.net.au/users/abc-open-archives/profile/works>

<sup>25</sup> <http://www.flickr.com/photos/abcarchives/>

<sup>26</sup> [https://commons.wikimedia.org/wiki/Category:Files\\_from\\_the\\_Australian\\_Broadcasting\\_Corporation](https://commons.wikimedia.org/wiki/Category:Files_from_the_Australian_Broadcasting_Corporation)

<sup>27</sup> <http://pool.abc.net.au/content/finding-reusable-media>

of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

The ABC supports in principle the creation of an exception that allows online and transformative use of copyright materials where that use does not conflict with the normal exploitation of the material and does not unreasonably prejudice the legitimate interests of the copyright owner. Limiting such an exception to non-commercial use is problematic, as the ALRC points out, in a digital world where some users (or more likely, the host of the content) may benefit financially by posting their content on advertising-supported sites. In principle, the ABC supports an attitude of content sharing for non-commercial, non-prejudicial use.

It is also noted that some flexibility and clarity might be called for when defining or explaining the scope of terms like “social”, “private”, “domestic” and “legitimate interests of the owner of the copyright”. For example, the ABC has a strong interest in protecting its reputation as an impartial and independent news provider. The ABC would not support an exception that would authorise use of its copyright material in ways that might, for instance, suggest that the ABC endorsed a political party or campaign. Consideration would also need to be given to how to deal with content where a number of parties have underlying rights.

## Transformative use

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

See the response to Question 11, above.

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

See the response to Question 12, above.

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

The ALRC defines “transformative use” as referring to works that transform pre-existing works to create something new and that is not merely a substitute for pre-existing works. Consideration should be given to extending this definition to include new works that combine pre-existing works in a way that indicates a level of curatorship or editorial judgement.

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

See the response to Question 13, above.

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

The ABC does not at this stage see any reason to amend the moral rights provisions in the *Copyright Act*. However, it should be made clear that exceptions to copyright infringement are also exceptions to moral rights infringements.

## Libraries, archives and digitisation

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

The ABC holds a sizeable collection of historically and culturally significant material, particularly sound recordings and audiovisual content. These include radio and television collections, as well as sound and reference library collections, daily news and current affairs material, photos and stills, stock shots on a range of topics including personalities; and a vast document archive including records on rights in old programs, broadcast schedules and old scripts, which are of great public interest and national value. The ABC’s radio and television collections record the day-to-day unfolding of Australian history and Australian perspectives on world affairs. Australian identity and cultural diversity are documented through the news, current affairs, general entertainment, information and educational programming held in these collections.

In recognition of the value of this collection, the Corporation is a prescribed key cultural institution under Schedule 5 of the *Copyright Regulations 1969*. Accordingly, under ss 51B, 110BA and 112AA of the *Copyright Act*, the ABC is entitled to make three copies of works, sound recordings, cinematograph films and published works for the purposes of preserving against loss or deterioration.

As a result of this preservation capability, the Corporation does not face any theoretical impediments to undertaking mass digitisation of its archive. The ABC is in the process of digitising its archive as its resources permit.

The Corporation regards the limit of three copies as inadequate, particularly for the purposes of generating digital copies for inclusion in the archive.

A more significant issue in relation to archives is the ability of host organisations to provide wider access to them. As the fundamental purpose of archives is to ensure the

continued availability of the cultural and historical works that they contain, it is important that legitimate users of archives be able to search and browse their contents. Moreover, in an age of networked communications, it is not only possible to make digital archives available for searching and browsing remotely, but users are likely to increasingly request or expect to be able to do so.

In the case of the ABC, the users of its archive are primarily program-makers. Browsing or viewing the material in the ABC's collection is a necessary part of the Corporation's business activities; it is part of normal program-making processes in which ABC staff locate, select and, as required, clear or license relevant content for inclusion in programs. As a national organisation with staff in more than 60 locations around the country, there are considerable advantages in being able to provide distributed access to the contents of its archive.

While, as a key cultural institution, the ABC has a blanket right to make preservation copies of programs and works, this does not remove or reduce the underlying rights and licences that may attach to any particular item in its archive. Those rights must be directly addressed in any future use of the content of the archive, including the creation of copies to facilitate browsing of the archive.

Without sufficiently flexible preservation exceptions for archives like the ABC's, potentially significant material may be jeopardised for the following reasons:

- (a) it is not practical and cost effective for the ABC to obtain copyright clearances across all copyright material contained in the ABC's substantial collections which must be digitised for preservation purposes; and
- (b) copyright issues could drive preservation decisions, resulting in a failure to preserve significant material which should be maintained. The ABC may not preserve important cultural material if faced with significant legal risk of copyright infringement.

Extending the copyright preservation provisions would assist the Corporation in the preservation of the following examples of important content which requires on-going preservation but where copyright embedded in the programs is variously held by multiple parties:

- Cricket programming—The Don Bradman documentary, cricket broadcasts from the '70s and '80s.
- *Rugby in the '70s*.
- *Four Corners* programs—*Four Corners* has been broadcast since 1961 and is now one of the few long form (over 45 minute) investigative "one topic" news and current affairs programmes left in the world and arguably has an increasing global significance.
- The documentary series *Liberals* and *Labor in Power*.
- Drama programs such as *Rush* and *The Leaving of Liverpool*.
- Programs such as *Quantum*, *Catalyst* and *Compass* which are all reused constantly, and need to be copied for this purpose, but contain substantial underlying rights.
- Music programs such as *Six O'Clock Rock* and *Countdown*.
- *Playschool*.
- *Bananas in Pyjamas*.
- *Blue Hills*.

- *Bellbird*—the few remaining episodes.
- 1956 Olympics.
- *Landline*.
- Ballets with Robert Helpmann
- ABC recordings of orchestral and opera performances—ABC TV broadcast 128 operas between 1956 and 1995. Forty-two were presented as live transmissions, with radio simulcasts included in the 1980s. Unfortunately, the first broadcast of “The Telephone” on 20 December 1956 did not survive.
- State based news programming—following the recent Black Saturday Victorian bush fires the Royal Commission requested all ABC field camera tapes when investigating what had unfolded during the day.
- Crime tape collection—this collection is often accessed by Government authorities undertaking investigations.
- Regionally produced radio content.

Increasingly, the ABC is the only library or archive that maintains a collection of material of this kind in Australia. As the online and digital age amplifies with the rapid unfolding of new technology, the ABC’s library and archive is an increasingly valuable historical record. This is particularly the case when other commercial broadcasters who previously had comparable and extensive archive and library collections, increasingly operate on thirty day collect and dump news cycles. Material not included in the news packaged to air on television is consequently deleted after a thirty day period. In most of the commercial broadcast sector resources are no longer provided for the collection and cataloguing of items and rich and unique historical and culturally significant material is lost.

The ABC’s preservation activities complement the ABC’s obligations under the *Archives Act 1983* (Cth) as well as supporting its own production operations. Not every significant item is required for permanent preservation within the policies of the National Archives. The ABC’s collection holds state and local material and material significant to small and diverse groups which is culturally significant but may not fit within the National Archives policies. To the extent copies are held by the National Archives, they may not be available to the ABC within broadcasting time-frames, and without further cost.

Examples of significant programming which has been able to be re-broadcast as a result of ABC preservation processes include *Seven Little Australians*, a wide range of unique historical sporting programs shown on ABC2’s *Latenight Legends* which won its largest viewing audiences at the time, *Chequerboard Revisited*, the ABC’s 50 years of programming including its news retrospectives—*Reporting the World*, *Reporting the Nation*, and the *Stateline 50 Years Specials*. The ABC’s 75-year website and the ABC’s contribution to Australian Screen Online also provided public access to clips of preserved ABC material. If material is not preserved, the ABC is limited in its ability to reuse material and provide public access to it. Therefore the quality of services delivered by the ABC, which caters to a diversity of stakeholders, is reduced.

Furthermore, a benefit to copyright owners may also be lost. This is because sometimes owners of material no longer hold their own copy, but due to the ABC’s investment in preservation of material, these owners can access it through the ABC.

The Corporation currently creates low-resolution “viewing” copies of digitised works that are used by program-makers searching for relevant audio or video segments. As the transfer of even low-resolution files is costly, the ABC’s strong preference would be to be able to store local, mirrored, low-resolution viewing copies of all digital items in each of its capital-city MAS repositories. Further, as not all staff are based in capital-city offices – nor, indeed, is it feasible for capital-city staff to all use designated “archives” machines – the ABC believes that its staff should be able to browse the archive from local desktop machines. Importantly, such a system would not infringe the rights of the non-ABC rights-holders in its archived content, as none of the audio and video material it contains could be used for program-making without directly addressing those rights.

The Corporation is concerned, however, that the current provisions of the *Copyright Act* would prohibit such a distributed system. Not only would it require the creation of additional copies in repositories, but providing browsing access via program-makers’ computer terminals would potentially entail the communication of copies of works and the creation of additional copies in the random-access memory (RAM) of their computers that are not permitted by the Act.<sup>28</sup>

The ABC proposes the addition of a browsing exception to the *Copyright Act* under which the maintainer of an archive would be permitted to make copies of programs and works held in its collection and communicate those copies to networked computers for the purposes of facilitating browsing of that collection.

In proposing this exception, the Corporation acknowledges that, if the exception were to be extended to public libraries and archives, arguments might be made to restrict the browsable content to a representative excerpt in order to protect the legitimate interests of rights holders (this is the approach adopted, for example, with music in Apple’s iTunes Store). In the case of an archive such as the ABC’s, such a restriction would be unnecessary and counterproductive, as it would prevent potential users of the collection from selecting and then licensing and/or clearing content for further uses permitted under the Act.

Another aspect of the ABC’s activities involves opening up the archive and releasing its content to allow public access to that content via open access licences. (Please see the response to Question 11, above, for examples and Question 50 under the heading “Unlocking archive of low value copyright material”). The ABC is currently working within the confines of the Act and the rights restrictions placed on archival content to find content which is suitable for release under open access licences. However, the complex nature of rights in archival content is a significant impediment to releasing old content; and while the ABC is required to work within the confines of the Act, it proposes there be a scheme that might free up access to the ABC’s significant archive for innovative public use. (Please also see the ABC’s response to Question 1).

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<sup>28</sup> The ABC notes that the definition of “material form” in s 10 of the *Copyright Act* is sufficiently broad to include the instantiation of digital files in the RAM of a networked computer.



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

Section 200AB provides an apparently flexible exception for “special case” uses of copyright material that are nonetheless consistent with Australia’s obligations under international treaties.

In practice, the ABC has never had to test s 200AB.

The Corporation can see no reason why, given the requirements that such special-case uses “not conflict with a normal exploitation of the work or other subject-matter” nor “unreasonably prejudice the legitimate interests of the owner of the copyright”, access to this exception is limited to libraries, archives, educational institutions and persons with a disability. It submits that these restrictions on the scope of the section should be removed—that is, the requirement in s 200AB(1)(b) is removed and the balance of s 200AB(1) would continue to comply with the TRIPS Agreement, particularly, the requirement that the exception be a *special case*.

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

This question has been addressed under Question 19, above.

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

The ABC is not aware of any copyright issues in relation to Indigenous works that flow specifically from digitisation. Potentially complex issues surround the recording of oral works, which may be regarded by the Aboriginal or Torres Strait Islander community whose traditions or stories have been recorded as their property. While the Corporation would welcome amendment of the Act to provide appropriate protection of such oral works, such issues arise whether or not the recording is digitised.

## Orphan works

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

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

The ABC is addressing these two questions together.

The ABC frequently confronts situations in which copyright clearances are required for orphan works, particularly in relation to literary works proposed for inclusion in ABC Radio National programs. While the Corporation has for a number of decades kept very good records of the copyright subsisting in its productions, this was not always so. As a result, there are quite a number of copyright works held by the ABC for which the Corporation is unable to identify or trace the copyright owner. There have also been instances where the ABC has dealt with producers wishing to use third party content from regional museums and historical society archives for the *ABC Open* project where information about the copyright owners was not available for material which had been donated to local museums and archives.

The Corporation would welcome greater certainty in relation to orphan works. It believes that the simplest and most effective solution would be a statutory exception that restricts damages if a diligent search for the copyright owner has been undertaken.

The ABC acknowledges that different and more complex schemes have been adopted in other jurisdictions, most recently by the European Union with the formal adoption (on 4 October 2012) of the Orphan Works Directive.<sup>29</sup> A critical consideration for the Corporation in assessing potential mechanisms for dealing with orphan works is their timeliness. ABC radio programs, which are among the most frequent users of orphan works within the Corporation, will often go from conception to broadcast in a six-week period. As a result, the ABC would regard any mechanism for dealing with orphan works that takes longer than four weeks as unacceptably slow. Another critical consideration is the resources required to administer such a scheme.

The Corporation would also be supportive of a register of orphan works, as it would eliminate duplicate searches by different organisations and might create opportunities for the owners of orphan works to identify themselves. Should such a register be established, the Corporation would favour an arrangement where organisations choosing to list works would publish the details of the search they conducted as a justification for the inclusion of works, rather than a potentially costly and time-consuming process under which works proposed for inclusion were independently assessed by a third party.

## Data and text mining

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

To date, the ABC's use of data mining has not been impeded by the *Copyright Act* as the ABC generally uses data that is excepted under the Act (for example, fair dealing for news reporting) or is authorised under licence and open access schemes (for example, public sector information data sets available at [www.data.gov.au](http://www.data.gov.au) under Creative Commons licences).

The ABC uses data and text mining in a variety of contexts in support of the ABC's public service remit to inform, educate, entertain and promote the performing arts. In journalism (or "data journalism"), data mining is used to assist in conveying sometimes dispersed, dense or

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<sup>29</sup> [http://ec.europa.eu/internal\\_market/copyright/orphan\\_works/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm)

complex information in an accessible and engaging way. Examples include “Budget 2012, how it’s spent”,<sup>30</sup> “Census 2011: Australia, a nation transformed”,<sup>31</sup> Campaign Pulse<sup>32</sup> and “Coal seam gas by the numbers”.<sup>33</sup> Data mining is also used to facilitate discovery of new content through, for example, the use of open APIs (application programming interfaces) that draw in data from external websites (such as Last.fm<sup>34</sup> and SoundCloud<sup>35</sup>) to create pages, playlists, recommendations and artists’ profiles – see, for example, this artist’s profile page on ABC Dig Music,<sup>36</sup> which draws in data from Wikipedia, YouTube, Discogs and Twitter. Data mining and analytical tools are also used to create charts or lists of what is trending or popular with particular demographics – see for example the “artist buzz” section of triple’s coverage of the Splendour in the Grass event.<sup>37</sup>

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

The ABC does not currently see any need to introduce a specific exception to support data and text mining. In general, licensing and existing copyright exceptions (and perhaps a more flexible s 200AB exception) appear to be adequate.

The ABC remains cautious about the consequences which might flow from a specific exemption that would authorise large-scale copying and retention of data for the purpose of extracting patterns, trends and other information – especially for commercial gain.

The ABC is aware that content it broadcasts or makes available online is capable, simply by virtue of being publicly available, of being data-mined by others and – while extending the reach of its artists’ content to potentially new audiences – may not be authorised by the ABC.

In principle, where these services copy and use ABC content, the ABC’s preferred mechanism is for this to be authorised under licence and not through a newly-introduced statutory exception for data or text mining – particularly where ABC content is being used by external parties for commercial purposes, including access for a fee or by display on advertising-supported websites.

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<sup>30</sup> <http://www.abc.net.au/news/2012-05-08/interactive-budget-2012-how-its-spent/3971410>

<sup>31</sup> <http://www.abc.net.au/news/specials/census-2011/>

<sup>32</sup> <http://vimeo.com/14656701>

<sup>33</sup> <http://www.abc.net.au/news/specials/coal-seam-gas-by-the-numbers/>

<sup>34</sup> <http://www.last.fm/api>

<sup>35</sup> <http://developers.soundcloud.com/docs/api/>

<sup>36</sup> <http://abcdigmusic.net.au/artist/eels>

<sup>37</sup> <http://www.abc.net.au/triplej/events/splendour/12/#day=sunday&item=highlights>

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

Greater use of data and text mining could be facilitated through the increased availability and use of:

- more flexible exceptions relating to fair use and fair dealing;
- simple and standardised licences, such as Creative Commons licences;
- readily accessible open data sets, such as PSI (public sector information) on [www.data.gov.au](http://www.data.gov.au); and
- open APIs (application programming interfaces) made available by organisations to enable sharing and use of data sets and functionality across the digital environment.

## Educational institutions

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

The ABC is a creator and co-producer of audio and audiovisual content which involves significant investment of funding and resources.

The ABC provides a substantial amount of audio and audiovisual content that is used by educational institutions under Part VA and has in the past been the recipient of substantial revenues which have been reinvested in further content production. By making programs available to the public, the ABC facilitates an important stream of revenue for its independent co-production partners as well.

The ABC has a good working relationship with Screenrights and greatly values Screenrights revenue as a source of funding for future programming. The ABC submits that Part VA should be maintained.

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

The ABC provides a significant amount of text and images on its website which is used by educational institutions.

The ABC has a good working relationship with Copyright Agency Limited and greatly values the revenues collected by it. The ABC submits that Part VB should be maintained.

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

The ABC notes a submission from the education sector that a new technological protection measure exception be granted to facilitate copying of streamed online content. The ABC submits that if such an exception were introduced, Part VA should be extended to cover such activity so that the ABC and its co-producers could be remunerated for educational copying of streamed content, regardless of whether it was broadcast or made available online.

The ABC believes that where possible technological neutrality should be an underlying principle of copyright reform. Accordingly, the ABC submits that Part VA and Part VB should be extended to cover copying of all modes of delivery of the relevant copyright material by educational institutions except those allowed for in s 200AB.

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

Please see the ABC's responses to Questions 30 and 43.

## **Crown use of copyright material**

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

The ABC notes that Division 2 of Part VII is technology neutral and would have no objection to the extension of the statutory licence to local government.

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

The ABC does not wish to make a submission on this question.

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

The ABC does not wish to make a submission on this question.

## Retransmission of free-to-air broadcasts

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

The Corporation holds a neutral position on whether the *Copyright Act* should permit broadcasters to charge for retransmission of their signal.

The ABC is concerned that when retransmission occurs, the retransmitter clears the underlying rights properly with rights holders either directly or by participating in the statutory licensing scheme under Part VC.

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

Yes, the statutory licensing scheme for retransmission of free-to-air broadcasts should apply to retransmission over the internet.

The ABC wishes to promote the accessibility of its services, no matter what the platform. However, the following conditions should be placed on retransmission over the internet:

- Geo-blocking in the relevant area or a similar mechanism to avoid other legal risks such as contempt risk which is often state based. The Corporation notes that, while services for mapping IP addresses to geographical locations exist, their accuracy may currently be problematic.
- Retaining the editorial integrity of the broadcast service and the integrity of the ABC.
- Doing no more than retransmitting the broadcast—in order to maintain the principle set out in the *Foxtel* case.<sup>38</sup> That is, the retransmitter over the internet should not be permitted to tamper editorially with the content. For example, an internet retransmitter should not be permitted to surround the content with advertising or add anything material to the content, or add any value to the content, without the broadcaster's

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<sup>38</sup> *Amalgamated Television Services Pty Limited, HSV Channel 7 Pty Limited, Seven Network Limited, TCN Channel Nine Pty Limited, General Television Corporation Pty Limited, Nine Network Australia Pty Limited, Television and Telecasters (Sydney) Pty Limited, Te [1996] FCA 1424 (26 April 1996).*

permission. The source of the retransmission should be clear to the viewer or listener by retaining all trademarks, identifying surrounds and watermarks.

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

The ABC believes the application of the retransmission scheme for free-to-air broadcasts to IPTV needs to be clarified. The retransmission scheme should apply equally to IPTV services.

The term “IPTV” has no commonly accepted definition in the industry. There are a number of operators in the market place which might be described as providing IPTV services such as Fetch TV and Telstra T-Box. Some IPTV providers may be characterised as “broadcasters” under the *Broadcasting Services Act 1992* (Cth), while others may not be, even though they may provide similar services.

The current legal position of IPTV operators under the *Copyright Act’s* retransmission scheme is not clear as it might be argued that they are not able to access Part VC legally because they are retransmitting via the internet.

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

The ABC believes this Inquiry is the appropriate forum for considering questions on retransmission, especially given that there may be authorisation liability issues for broadcasters which arise by virtue of provisions in the *Copyright Act*. These issues need to be clarified.

Further, the existence of parties who genuinely wish to access the Part VC scheme to ensure clearance of copyright material being retransmitted via their IPTV services also supports this Inquiry as being the appropriate forum.

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

The implications for copyright law reform arising out of the Convergence Review are:

- a push towards technology neutrality in the treatment of copyright exceptions— copyright and communications regulatory policy should target the business and its outcomes and the use, not the technology.
- a move towards lighter touch regulation that focuses on areas where regulation is designed to prevent or address some clearly demonstrable harm.
- copyright laws need to be capable of enforcement.
- recognition of the limits on regulating content that flows across borders, such that interests of Australians are not unduly disadvantaged when operating internationally.
- the integral connection between the *Broadcasting Services Act* and the *Copyright Act* through the legal definition of “broadcast”. Even though the Convergence Review did

not focus on relevant copyright issues, this nexus means that consideration should be given to the exceptions to copyright infringement relating to broadcasting. There are various schemes within the *Copyright Act* that recognise the special status of broadcasters. Publicly funded broadcasters should continue to be given a special status within the *Copyright Act* with appropriate exceptions which reflect the role of broadcasters and the relationship between the media and its audience.

## Statutory licences in the digital environment

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

The digital economy presents the following opportunities for improving the operation of statutory licensing and access to content:

- transparency of bodies administering statutory licensing systems—both operationally and in terms of licence terms, licence fees, charges and repertoire. There is now the potential for collecting societies to publish more useful and clearer information about their repertoire, their distribution schemes, and the rights they can license. Collated information about licence schemes and recommended rate cards for licences could be published which would assist in the negotiation process.
- such transparency may also go some way to addressing criticisms relating to monopoly power of collecting societies in their negotiations with users. This would be consistent with recommendations made by the ACCC that collecting societies should provide publicly available information to counter-balance what otherwise might be anti-competitive behaviour. Such publication can be facilitated by digital technology.<sup>39</sup>
- easier copyright owner participation—registration, and monitoring of their copyright material.
- reduction in complexity in licensing copyright works with multiple rights holders.
- reduction in the cost of administration of copyright clearances for digital use. Digital transactions should reduce administration fees and overheads of collecting societies, and reduce involvement of collecting societies. The potential reduction of fees charged by collecting societies for transaction costs may lead to increase in quantum of fees received by copyright owners; and lower licence fees for users.
- lower administration costs in situations where bulk licences are required or low value/micro licence fees are payable.
- statutory licensing could be used as a means of licensing low value uses of copyright material but only if it is cost effective.

However, the digital economy has the capacity to increase costs for licensees under statutory licensing schemes due to technology costs and technology-driven reporting obligations.

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<sup>39</sup> See <http://www.accc.gov.au/content/index.phtml/itemId/784043/fromItemId/401858>

Phonographic Performance Company of Australia Ltd - Revocation & Substitution - A91041- A91042.



Investment in more digital technology systems, by high use copyright users such as the ABC to enable reporting, may actually be more financially onerous.

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

There are a number of statutory licences in the *Copyright Act* which facilitate broadcasting. They continue to be relevant to the ABC.

There remains a strong justification in policy to treat broadcasters as a special case when it comes to licensing schemes because of the role broadcasters play in Australian society, because of freedom of speech imperatives, and because of the vast quantity of copyright material that is used by broadcasters relative to other copyright users. The underlying policy which provides special status of broadcasters should continue to be recognised by way of statutory licences within the Act.

The following current statutory licences are the most relevant to the ABC:

- S 47—Reproduction for the purpose of broadcasting—literary, dramatic and musical works (not artistic works)
- S 70—Reproduction for purpose of including work (an artistic work) in a television broadcast
- S 107—Making of a copy of the sound recording for the purpose of broadcasting
- S 109—Copyright in published sound recording not infringed by broadcast in certain circumstances
- Part VA—Copying and communication of broadcasts by educational and other institutions
- Part VB—Reproducing and communicating works, etc by educational and other institutions
- Part VC—Retransmission of free-to-air broadcasts.

A broadcaster's services are no longer constrained by the technology which was available in the '60s and '80s when these broadcasting statutory licences were first enacted. Changes in technology should be reflected in these statutory licences by way of technology neutral language where possible.

As stated elsewhere, the ABC's audiences wish to engage in device-shifting (see Question 7). There is a need for these statutory licences relating to broadcasters to become platform- and device-neutral so that the ABC can achieve its mission to provide its content via all forms of technological delivery. The Inquiry should examine the viability of making the broadcasting statutory licences technology neutral so that the licence permits a broadcaster to use the copyright work across all of its platforms—broadcast, simulcast, streaming and on demand catch-up, no matter what the technology. The content divisions within the ABC—Radio, Television, News and Innovation no longer work on one specific platform. Consequently, none of the statutory licences should be platform specific. The statutory licences should reflect the contemporary reality of broadcasting.

The statutory licences should cover online communications at least by way of streaming. Further to *PPCA v CRA* the legal notion of what constitutes a “broadcast” is being clarified, and at the time of writing this submission includes a broadcaster’s online simulcast. However, as this case is on appeal, it is not clear what the ultimate interpretation will be. The ABC submits it should be made clear in the drafting of statutory licences that they extend to online simulcasts. The technological limitations around the definition of “simulcasting” in s 10 would also need to be addressed.

Due to technological changes, the statutory licences in ss 47, 70, 107 and 109 license the ABC only part of the rights that are necessary for the ABC to complete its delivery of content. If content is broadcast relying on one of these statutory licences, it is an inefficient use of the ABC’s resources, (it is administratively burdensome, complex and costly) to then have to seek licences when the content moves online. This renders the statutory licence ineffective in the digital economy.

In relation to s 107, the use of the words “solely” in the phrase “solely for the purpose of broadcasting”, for example, in s 107(1) needs to be removed to ensure the efficacy of the statutory licence. The statutory licence must recognise that broadcast material has a longer shelf-life than the broadcast alone – including, online archiving, and then to other distribution.

It has also been suggested to the ABC that the statutory licence in s 107 restricts the ABC to making *one* copy of the sound recording. This is unworkable in the digital age as multiple copies are necessary due to the pre-production and broadcasting processes being used by the ABC. It should be clear that the sections permit the number of copies “as necessary” to fulfil the purpose.

Finally, the ABC submits that the caps on radio broadcast licence fees set out in s 152 should remain in place. The ABC, along with others, successfully defended an action brought by the Phonographic Performance Company of Australia (“PPCA”) and major record companies. The plaintiffs claimed that the operation of those caps on sound recordings existing prior to 1969 amounted to an acquisition of property on unjust terms and were therefore invalid under the Constitution.

The High Court held seven judges to nil that the radio caps in the Act were not unconstitutional.<sup>40</sup>

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

The Act should provide for orphan works, and their clearance could be appropriately dealt with by way of a statutory licence although the ABC’s preference is for a free exception as expressed in its response to Question 24.

The ABC would also like the opportunity to experiment with bulk licensing schemes that might be modelled on the *Google Books* scheme<sup>41</sup> where the use does not conflict with the normal exploitation of the material and does not unreasonably prejudice the legitimate interests of the copyright owner. However, the Act does not allow for this. This model is

<sup>40</sup> *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* [2012] HCA 8 (28 March 2012)

<sup>41</sup> <http://www.googlebooksettlement.com/>

attractive where the content is old, has no commercial value, and forms part of a project where bulk copyright clearances are required. For no or low value copyright material such a model reduces liability risk, shifts the burden from the copyright user to the copyright owner, could allow an owner to opt out, provides a form of compensation for a value that is relative to the value of the material and its use, and removes the administration costs imposed by a collecting society. The ABC would like to explore whether this type of licensing model has the potential to unlock older archival content for use in the public domain, encourage innovation with that content within the digital economy, and possibly reinvigorate the value of copyright material which is currently not of high commercial value and currently unable to be used.

The ABC is also interested in exploring different approaches to copyright law reform which recognise some copyright material has a commercial value and some does not, and to allow licensing accordingly.

Please also see the response to Question 50, below.

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

The ABC advocates simplifying and removing complexity from the *Copyright Act* as an objective. If the statutory licences relating to broadcasting could be simplified and consolidated effectively then the ABC would support that.

Statutory licences which support broadcasting continue to be necessary. As a communicator of content, the ABC still relies heavily on statutory licences, and wishes to continue to do so. The underlying policies of the statutory licences which support broadcasting have not changed and are still necessary to support broadcasting in Australia. They are integral to the services provided by the ABC.

As above, the ABC has suggested that current statutory licences such as s47, s70, s107, s 109, and the ABC submits further Part VA, need to be rephrased in a technology-neutral way in order to support broadcasters as technologies converge.

The Corporation has not reached the stage where the ABC would say, as a large scale copyright producer and user, that new technology has improved contact with rights holders directly. One of the reasons is because of the differing nature of rights holders. Some rights holders are incorporated, highly successful, well geared, motivated and organised to protect their rights. However, many rights holders are not corporatised, organised entities (for example, producers, writers, actors, who move), or are corporations which have subsequently wound up, or whose personnel have moved on and taken corporate knowledge with them. Except for highly organised copyright owners, it is too broad an assessment to say that technology is facilitating direct contracting with rights holders.

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

No, the statutory licences currently relevant to the ABC should continue to be covered by statutory licences.

## Fair dealing exceptions

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

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news; and
- (e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

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

Reporting news, criticism or review, and parody or satire are the fair dealing exceptions most relevant to the ABC. The Corporation's comments relate only to those fair dealing exceptions.

### (b) Criticism or Review

The defence of fair dealing for the purpose of criticism or review is integral to the ABC's review programming and should be maintained.

The application of fair dealing for the purposes of criticism or review under s 103A to sports and other event/live broadcasts is unclear. In *The Panel* decision of the Full Federal Court in 2002, some judges suggested the broadcasting techniques themselves needed to be critiqued rather than the content itself.<sup>42</sup> Can an excerpt of a broadcast of a 100 metres race be used under fair dealing for criticism or review by another broadcaster, without a critique of the broadcasting techniques? The ABC requires clarity as to whether sport content and other content that is not underpinned by copyright works can be critiqued and reviewed as this is particularly important in the digital context.

The ABC advocates a broader approach in accordance with the principle set out in *Hubbard v Vosper*<sup>43</sup> which allows a critique or review of the subject matter of the broadcast. In the same

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<sup>42</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146 (22 May 2002). For example, Hely J at [para 112] [2002] FCAFC 146.

<sup>43</sup> [1972] 2 QB 84 at 94: "A literary work consists not only of the literary style, but also of the thoughts underlying it, as expressed in words. Under the defence of "fair dealing" both can be criticised. Mr Vosper is entitled to criticise not only the literary style but also the doctrine or philosophy of Mr Hubbard as expounded in the books".

way Mr Vosper was entitled to critique the style, doctrine or philosophy of Mr Hubbard, reviewers should be clearly able to critique not just the style of a broadcast (which may not have an underlying literary work to critique) but the subject matter contained in the broadcast, which may include sport and other live events. Criticism and review should revolve around the content not the medium.

The ABC seeks clarity on this issue.

### **(c) Parody or Satire**

The introduction of the defence of parody or satire has contributed significantly to Australian cultural materials and the digital economy. The ABC does not believe there are any significant problems with this defence.

### **(d) Reporting News**

This fair dealing defence for the purpose of reporting news is critical to the dissemination of news in Australia. The ABC relies heavily on this defence to publish news, and submits the defence should be maintained.

## **General Comments**

### **Inconsistent Drafting Amongst the Various Fair Dealing Provisions**

All fair dealing defences should be applicable to all works and subject matter, and there should be consistency in their application to “works”, and “subject matter other than works”, and “performances”. Presently, there is inconsistency.

In relation to drafting, ss 42(1)(b) and 103B(1)(b) both refer to “reporting of news by means of a communication or in a cinematograph film”. Presumably “communication” captures both radio and television broadcasting. However, we are concerned that these provisions do not include by means of a “sound recording” which is a medium used in broadcasting. This is an oversight in the drafting; and the ABC believes the practice of using sound recordings for reporting news is widely accepted within the industry.

It is arguable that a copyright user’s ability to fair deal with a performance under division XIA – *Performers’ Protection* differs from the fair dealing provisions in ss 41, 103A, 42 and 103B relating to works and subject matter other than works. For example, when reviewing a script of a film, the use of the cinematograph film and sound track and other underlying works would be permitted under s 41. However, a critique of a performance under s 248A in the definition of exempt recording (f) and (fa) (where arguably the review or critique must be of the performance) does not permit the use of other underlying works associated with that critique (and vice versa). This drafting inconsistency should be remedied.

### **Interaction between fair dealing and moral rights**

It should be made clear that a fair dealing (or indeed any statutory licence or free use provided for in the Act) is a defence to a moral rights infringement.

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

The ABC does not believe the fair dealing exceptions that it relies upon (fair dealing for reporting news, criticism or review, and parody or satire) could be usefully simplified. Unlike other provisions in the Act, including some of the statutory licences and other exceptions, they are relatively technology neutral and simply drafted. Too much prescription could narrow the exceptions and remove flexibility in the digital environment.

Please also see the ABC's comments in Question 45 which refer to the unintentional gaps in the drafting above.

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

Yes, the Act should provide expressly for some other fair dealing exceptions.

### Quotation

There should be an allowance in the Act for quotation. This is consistent with Article 10 of the *Berne Convention*. The need to include this type of specific fair dealing exception stems from uncertainty around the notion of "insubstantial part". By way of example, it is customary to quote from texts and song lyrics in *ABC Radio* programs. ABC program makers have indicated quotation is common in some genres of radio programming such as live talk-back and history programming. While the broadcast may be covered by s 45 – "Reading or recitation in public or for broadcast" which allows for the use of an extract of reasonable length, this does not cover recordings of such broadcast programming nor their use online.

Consideration might also be given to whether a similar concept should apply to audio, audiovisual and broadcast content.

### Governmental and Political Discussion

The ABC submits that the *Copyright Act* should make express reference to the implied constitutional right of political and governmental discussion by way of a fair dealing exception.<sup>44</sup> Such a principle was supported in obiter by Mason J in *Commonwealth v Fairfax*.<sup>45</sup> The ABC advocates the importance of free speech and the role of the media in being able to access and disseminate information that relates to political and governmental matters in a timely manner. However, the Corporation would not support an exception that would

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<sup>44</sup> See for example *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 1 *Stephens v. West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; *Coleman v Power* [2004] HCA 39 (1 September 2004).

<sup>45</sup> (1980) 147 CLR 39.

authorise use of its copyright material in ways that might, for instance, suggest that the ABC endorsed a political party or campaign.

### Public interest

It is often not possible to obtain clearance when the ABC intends to broadcast material that casts the copyright owner or related persons/entities in a critical light. For that reason the Corporation submits that the exception for reporting news should extend to current affairs and critical program making where it is in the public interest.

The ABC advocates the introduction of a specific fair dealing exception for the purpose of discussing matters of public interest, as an adjunct to fair dealing for reporting news, and any new fair dealing for the purpose of political and governmental discussion.

This is to ensure that the fair dealing exceptions cover the field of discussion that is within the public interest. As was suggested in *Commonwealth v Fairfax*, provision of information in the public interest may not be significantly covered by the existing fair dealing exceptions if there is in fact a distinction between “newsworthiness” and the “public interest”. The concept of “public interest” discussion is not foreign to Australian jurisprudence; it was previously part of the truth defence in NSW defamation law.<sup>46</sup>

### Browsing from Libraries and Archives

The ABC advocates the introduction of a browsing exception for libraries and archives. Please see the ABC’s submission at Question 19.

### Other free-use exceptions

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

Consistently with our previous comments, the ABC believes that technology neutrality would avoid redundancy within the *Copyright Act*.

As a general comment, in order for the exceptions to be relevant in the digital age, drafting should be consistent to ensure that both reproduction rights and communication rights are covered by the exceptions. This could be done by replacing the enumerated rights with a concept of “use” as it has been done by way of example in s 110(3)<sup>47</sup> or “purpose” as that term is used within the fair dealing provisions.<sup>48</sup>

<sup>46</sup> *Defamation Act 1974* (NSW), s 15(2)(b).

<sup>47</sup> S 110(3) says “Where the sounds that are embodied in a sound-track associated with the visual images forming part of a cinematograph film are also embodied in a record, other than such a sound-track or a record derived directly or indirectly from such a sound-track, the copyright in the cinematograph film is not infringed by any use made of that record.” [emphasis added]

<sup>48</sup> S 41A – Fair dealing for the purpose of parody or satire says “A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not

## Broadcasting exceptions

The exception set out in s 45 – *Reading or recitation in public of for a broadcast* – does not clear the underlying reproduction and online communication to the public of the “reading or recitation, of an extract of reasonable length”. It deals with the broadcast alone. Given convergence, a broadcaster such as the ABC makes various reproductions before and after the broadcast and communicates the content by transmitting the program online via its website, and catch-up services on various devices. Similarly, in s 67 – *Incidental filming of artistic works*, this free use exception allows inclusion of the artistic work in a film or broadcast, but does not deal with the normal consequential use of that film or broadcast.

## Libraries and Archives

Particularly, in the realm of libraries and archives, the exceptions under ss 110A, 100B and 100BA do not allow for the appropriate number of digital copies to be made as technology changes and updates. The ABC suggests the number of copies permitted should be “*as necessary*”. See the ABC’s response to Questions 19 and 21.

## Temporary

The concept of “temporary” within the free-use exceptions needs to be clarified to take into account long term caching in ss 43A, 43B and 111A and 111B. Please see the ABC’s response to Questions 3 and 4.

## Designs

The ABC seeks clarity around the use of mass-produced designs – such as figurines – in television programs and broadcasts under Division 8 – *Designs*. S 75 provides a limited exception for broadcasters but refers only to reproduction and not also to the communication to the public right. There should be a copyright infringement exception where articles comprising a design which has been industrially applied (i.e. more than 50 copies manufactured) appear in a cinematograph film or broadcast. The exception should extend to all subsequent uses of that audiovisual content.

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

The ABC does not advocate the removal of any specific exception from the *Copyright Act*.

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constitute an infringement of the copyright in the work if it is *for the purpose of parody or satire*.”  
[emphasis added].



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

Consideration should be given to a number of possible new exceptions.

### **Orphan works**

As noted above at Questions 23 and 24, there should be an exception for orphan works.

### **Unlocking archive of low value copyright material**

Please see the ABC's comments in Questions 13 and 42. The ABC is also interested in exploring other models of collective licensing which would facilitate bulk clearance of low value copyright material—particularly material which sits within the ABC archive, for projects such as the ABC's Education Portal, ABC Splash, and other archive projects such as Pool; and initiatives which use low-value archival content, such as ABC Open. The ABC has been deterred by the difficulty and cost of unlocking archival material where the content is not of high copyright value for community based projects because statutory licences are not adequate.<sup>49</sup>

The Corporation is interested in exploring the possibility of either a free use exception or fair dealing exception or statutory licence for public broadcasters, such as the ABC being a custodian of significant and historical Australian cultural material. This exception would allow dealing with archival content for a public, non-commercial purpose (if the term "non-commercial" can be satisfactorily defined) for copyright material of a certain age (say, for example, 20 years) provided that the content does not have demonstrative commercial value (again, if the term "demonstrative commercial value" could be appropriately defined), until such time as the copyright owner has opted out. These works are not necessarily orphan works, however, the cost and complexity in the administration to obtain clearances prevents reuse of archival content, particularly when audio and audiovisual material has many underlying rights holders. Such a provision would free up archival content that has no commercial value, to be used and reinvigorated within the public domain, and the use would not conflict with the normal exploitation of the material and would not unreasonably prejudice the legitimate interests of the copyright owner. In turn, access to this content may stimulate the digital economy. The ABC would also like to explore some mechanism which would facilitate the release of such material under licences such as Creative Commons and other licence schemes.

There is no value, economic, cultural or otherwise, in content sitting on a shelf because it cannot be used but for rights clearances.

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<sup>49</sup> See the BBC's submission to the Hargreaves Report at page 7 "Evidence from the BBC Archive Trial", Op cit n 4. See also McCausland op cit n 3; and Wilson, Jennifer, *The Digital Deadlock: How Clearance and Copyright Issues are Keeping Australian Content Offline*, August 2009, [http://arts.gov.au/sites/default/files/pdfs/ps-2010-aisp-australian\\_film,\\_television\\_and\\_radio\\_school\\_appendix\\_2.pdf](http://arts.gov.au/sites/default/files/pdfs/ps-2010-aisp-australian_film,_television_and_radio_school_appendix_2.pdf)

### **Public broadcaster exception**

In addition to the extension of preservation copying advocated by the ABC (see Question 19), the ABC proposes that a public broadcaster exception could be modelled on an extended version of the BBC exception under s 69 of the *Copyright, Designs and Patents Act 1988* (UK), which provides as follows:

*69 Recording for purposes of supervision and control of broadcasts and other services.*

Copyright is not infringed by the making or use by the British Broadcasting Corporation, for the purpose of maintaining supervision and control over programmes broadcast by them or included in any on-demand programme service provided by them, of recordings of those programmes.

Accordingly, the ABC proposes the following similar exemption:

Copyright is not infringed by the making or use by the Australian Broadcasting Corporation, for the purpose of maintaining supervision and control over programmes broadcast or communicated to the public by them, of recordings or records of those programmes.

Libraries and archives of key cultural institutions, like the ABC, which hold significant and potentially significant cultural material, should be able to digitise their collection to avoid obsolescence, and make copies as required in order to provide access above and beyond the limited preservation purposes currently provided for by the Act. Such access would include access for consideration for reuse by ABC program makers where the reuse would ultimately be appropriately licensed.

### **Crown copyright**

The ABC often experiences difficulty in licensing Crown copyright material not covered by the Creative Commons “By” licence. Examples of such difficulties are locating the relevant agency for clearance of old material where that agency no longer exists, the variable levels of experience in copyright licensing matters within agencies, and the time-consuming nature of such clearances for an industry needing a quick response. The ABC submits that in keeping with the Commonwealth’s policy on openness and transparency, an exception for public broadcasters to use Crown copyright material would be a consistent approach to deal with more complex copyright material such as audiovisual content that is unlikely to be licensed under Creative Commons. Such an exception could include a carve-out for non-Crown underlying rights holders.

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

In terms of simplification, the Corporation’s comments once again relate to removal of technology-specific drafting within the exceptions.

The ABC has already referred to s 45—*Reading or recitation in public of for a broadcast* in Question 48 as a demonstration that this exception does not clear the underlying works for reproduction and online communication for the “reading or recitation, of an extract of reasonable length”. It deals with the broadcast alone. Given convergence, a broadcaster such as the ABC makes various reproductions before and after broadcast, and communicates the content by transmitting the program online via its website, and catch-up services on all available devices. Similarly, in s 67—*Incidental filming or televising of artistic works*, the free use exception allows inclusion of the artistic work in a film or broadcast but does not deal with the normal consequential use of that film or broadcast.

In terms of structure, it may be better to draft and group together free use provisions by their underlying policy rather than distinguish the type of work or other subject matter and concentrate on “use” rather than qualify the provision by an inadequate set of rights.

## Fair use

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

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

The ABC addresses these two questions together.

The ABC has previously had reservations about importing the US concept of “fair use” into Australian jurisprudence. However, given technological developments, there may be some merit in trying to simplify and future-proof the Act. For that reason the fair use model is attractive. The ABC does not propose that the fair dealing provisions and free exceptions should be abolished in favour of fair use. However, the ABC considers there may be some benefit in a hybrid model. That is, a model where specific fair dealing and free exceptions are articulated, but also where there is a residual open ended exception for developing uses of copyright material where the use does not conflict with the normal exploitation of the material and does not unreasonably prejudice the legitimate interests of the copyright owner. This would allow new fair dealing and free use exceptions to develop in the future.

Given this, there should be a residual broad, flexible exception along the lines of s 200AB which meets the three step test, but drafted without limiting its use to libraries and archives, educational institutions and persons with a disability. It should remain as an open-ended fair use to allow the law to adapt to developed practices, to provide flexibility within the Act.

The ABC does not believe this new exception should replace all or some existing exceptions. This would ensure that established fair dealing jurisprudence is retained on the one hand, but would allow further exceptions to develop as technology and practices change on the other.

## Contracting out

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

Agreements which purport to exclude or limit copyright exceptions should not be enforceable. Copyright exceptions are fundamental to free speech, fair use and access to copyright material.

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

The ABC supports amendments to the *Copyright Act* to prevent contracting out of copyright exceptions. This has been previously recommended by the Copyright Law Review Committee.<sup>50</sup>

The ABC's activities are affected by the uncertainty in the relationship between contract restrictions and its rights to fair deal under the Act. The ABC is often placed in a worse position for having entered into a contract with a rights holder, where that contract restricts fair dealing, compared with its competitors for those rights, who have no such contract and who can fair deal with that content across platforms. This is particularly unfair when the ABC has paid a fee for access to the content.

For simplicity, there should be a general catch-all provision that covers all exceptions to copyright infringement in the form of s 47H which states:

An agreement or a provision of an agreement, that excludes or limits or has the effect of excluding or limiting, the operation of any exception to copyright infringement has no effect.

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<sup>50</sup> Copyright Law Review Committee, *Copyright and Contract Report*, 2002, Paragraph 2.05.  
<http://www.ag.gov.au/Documents/CLRC%20Copyright%20and%20Contract%20Report%20-%20Preliminary.pdf>