



AUSTRALIAN
DIGITAL ALLIANCE

Submission to the

Productivity Commission

Inquiry into Australia's Intellectual

Property Arrangements

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A. Executive Summary

The Australian Digital Alliance (ADA) welcomes the opportunity to contribute to the Productivity Commission's review of Australia's intellectual property arrangements.

This submission aims to contribute primarily to the discussion regarding Australia's current copyright law, to ensure that copyright provides appropriate incentives for innovation, investment and the production of creative works and does not unreasonably impede further innovation, competition and access to goods and services.

As the Commission points out in its issues paper, copyright has faced significant challenges in adapting to the digital era. The technologies and markets used to create and deliver copyright works have changed significantly, yet Australian copyright law has not moved sufficiently to accommodate these changes. This has resulted in a system that, when taken in its whole, is neither efficient nor effective. It is inflexible and slow to adapt to new technologies and markets, and there is little transparency in or accountability about how changes to the system are determined.

The "one size fits all" approach of Australia's copyright system applies laws intended for 'premium' works to all creative works, even where high levels of protection are not intended or appropriate. This has resulted in a situation where:

- many common and socially desirable activities remain illegal;
- new and innovative uses cannot be accommodated, creating a significant disincentive for business investment;
- public interest uses attract unjustifiably high transaction and licensing costs;
- those wishing to make use of copyright material must parse complex, overly prescriptive, and technology specific exceptions; and
- large numbers of orphan works remain locked up, unusable, in perpetuity.

The limitations of the current copyright system have had a particularly negative effect on those sectors that are traditionally copyright users - schools; universities; libraries, archives, galleries and museums; those assisting people with disabilities; and the technology and innovation sector. Whereas private individuals can, to a certain degree, choose the extent to which they wish to follow copyright rules that do not align with what they see as reasonable behaviour, the risk to these sectors is far greater, meaning they are bound to comply with the law, no matter how counterintuitive, confusing or paradoxical it is. Licensing mechanisms provide only part of the solution, as they are not always efficient, cost effective or even available. Furthermore, uncertainty in the current law as to their relationship with copyright exceptions means that they are frequently used to exclude valuable public benefit uses.

To make the system more efficient and effective, limitations and exceptions to the rights of copyright owners should be used to carve out greater space for users to make use of copyright material in appropriate circumstances. At a minimum, these limitations should include a flexible exception modelled on the US fair use exception. This is necessary to cure inefficiencies in the system, ensure adaptability, maximise the benefits to innovation, and support the dissemination of knowledge.

To address these problems with the current copyright system, the ADA supports Recommendations 4-16 and 20 of the Australian Law Review Committee (ALRC) Copyright and Digital Economy Report,¹ and in particular:

- the introduction of a flexible exception based on the US fair use model;

¹ Australian Law Review Committee, *Copyright and Digital Economy* (ALRC Report 122), 13 February 2014, <http://www.alrc.gov.au/publications/copyright-report-122>

- the streamlining and modernisation of the educational exceptions and statutory licences - for more on this, see the submission of the Council of Australian Governments Education Council (CAG);
- the streamlining and modernisation of the library and archive preservation exceptions, to allow best practice preservation of all collection materials in all institutions - for more on this, see the submission of the Australian Libraries Copyright Committee (ALCC);
- changes to facilitate the use of orphan works, whether through a limitation of liability (as recommended by the ALRC) or direct exception;
- legislative changes to make it clear that contracts cannot overrule copyright exceptions.

Furthermore, we recommend the following additional amendments:

- the ending of perpetual copyright in unpublished works;
- the streamlining and modernisation of other library and archive exceptions, to remove unnecessary restrictions and simplify their application - for more on this, see the submission of the Australian Libraries Copyright Committee (ALCC);
- the reshaping of Australia's anti-circumvention provisions both to limit them to technologies that prevent copyright infringement, and to allow circumvention for non-infringing purposes - the ability to do this may be limited by international agreements. At a minimum, we recommend the introduction of more exceptions to the anti-circumvention provisions and an improved process for establishing them;
- the extension of the current ISP safe harbours to other service providers; and
- a prohibition on, or clear policy to limit, future extensions of the copyright term.

B. About the Australian Digital Alliance

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

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

C. Scope of this response

As indicated above, this submission focuses primarily on the questions posed in the copyright section of the Commission's Issues Paper. Our responses to those questions encompass our positions on questions raised elsewhere by the Commission.

D. Framework for assessing IP arrangements

The ADA supports the Commission's decision to base its assessment of IP arrangements, around the four principles of effectiveness, efficiency, adaptability and accountability. We agree that these represent appropriate goals for a modern IP system.

We also agree with the Commission that in assessing its effectiveness, efficiency, adaptability and accountability, it is important to ensure that the IP system serves the long-term interests of the Australian community. As is discussed further below, we contend that the purpose of IP, to which these principles should be directed, is not simply to provide economic rewards for creators in order to incentivise the creation of more IP; but rather to provide economic rewards to incentivise creation so that the IP created can be used for the benefit of society. With this in mind, we contend that it is important that the four principles be applied and interpreted with a view to the broader impact IP laws have on Australia's society and economy, and not just the impact on individual creators. We discuss this further for each of the principles below.

Effective

An effective IP regime is one that protects the commercial interests of creators, whilst also providing avenues for users and society in general to benefit from the system. As the Commission notes, it must not only provide incentives for the creation of IP, but also incentives "to ensure that IP is actively disseminated through the economy and community."² These incentives, we would argue, should be designed both to encourage creators to disseminate their own works and to encourage society to make broader use of those works in socially beneficial circumstances. This is a necessary part of ensuring that the system does not "impede further innovation, competition, investment and access to goods and services."³

The importance of dissemination is particularly relevant in the case of copyright, which does not have a disclosure requirement such as applies in the case of patents. Copyright applies to works whether or not they are published (and in the Australian context actually provides greater protection if they are unpublished - see further below). In this context exceptions and limitations which permit third party dissemination of material are just as important as creators' rights to restrict access to material, and the effectiveness of the system should be assessed taking both these mechanisms into account. If effectiveness is judged only by the number of works created, but not by the ability to access and use these works, the system is not achieving its aim.

Efficient

As the Commission notes, efficiency isn't just about the ready provision of exclusive property rights and mechanisms to encourage the generation of maximum IP at minimum cost. These aspects of the system must necessarily be tempered by an equal focus on ensuring that (a) creative works are able to be efficiently used to generate additional value to society and (b) that competition and innovation are not impeded. IP systems need to be shaped to minimise red tape that impedes uses that either are supported by overwhelming public interest, or don't harm creators.

Unfortunately, the current copyright regime in Australia often fails to satisfy these requirements, and increasingly presents a significant barrier to innovation and appropriate usage. It is inefficient in that it leaves large categories of goods, such as orphan works, effectively untradeable. It further discourages trade by imposing complex and almost

² Productivity Commission Issues Paper, Intellectual Property Arrangements (PC Issues Paper), Oct 2015, p.8, Figure 2

³ PC Issues Paper, p.iii

impossible compliance requirements on exceptions specifically intended to permit the dissemination and use of material in the public interest. Most damning, its focus on rigid and prescriptive rules for the use of material results in a default position under which new uses are presumptively illegal, effectively banning innovation.

Adaptable

Adaptability is particularly important for IP systems, which are intended in their core to encourage change and development. It underpins the first two framing principles outlined by the Commission, in that it is essential to ensuring that an IP regime remains effective and efficient over time. Without adaptability, IP laws quickly lose their relevance as new technologies and services are developed, and as society continues to absorb and adapt to these new creations.

Unfortunately, adaptability is also the area in which the Australian copyright regime performs most poorly. The current system is extremely 'adaptable' with respect to creators' rights, in that it ensures creators have legal control over new technologies and uses the moment they come into existence. However, it fails to apply this principle in reverse, and is almost chronically unable to adapt to permit the use of new technologies or recognise changing consumer needs and behaviour.

This is a direct result of the current discrepancy in its approach to creators' versus users' rights. Creators' rights are principle based, with a broad scope intended to 'cover the field' for all possible works and uses. In stark contrast, users' rights are extremely narrow and prescriptive - complex, rigid and unable to adequately cover the full range of existing uses, let alone new ones (see examples below). To appreciate the negative impact the current arrangements have on socially beneficial uses, imagine if the situation were reversed - copyright owners would be outraged if they had to go to parliament every time someone came up with a new machine or network configuration to ensure it was covered by copyright. Yet this is what is currently asked of users and innovators - every time a new product or service is developed it is presumptively illegal until (and only if) a licensing model arises or a new exception is introduced.

As is discussed further below, a lack of incentives to license combined with the political and bureaucratic difficulty of passing new exceptions has resulted in a situation where many everyday uses are illegal in Australia, from storing your DVDs on your computer to caching. It also significantly raises the risk for businesses seeking to discover or make use of new technologies in Australia, putting them at a disadvantage to their international counterparts.

A system which relies on specific exceptions to permit new and socially desirable uses will almost by definition never be adaptable - it will always be playing catch up, always acting as a drag on innovation rather than facilitating and encouraging it.

Accountable

In the ADA's view, accountability within the IP system would at minimum include the following:

- all copyright reform should be evidence based;
- monopoly rights should only be extended once a publicly available cost/benefits analysis has taken place;
- after implementation, reforms (whether rights, exceptions, enforcement mechanisms or institutional arrangements), should be assessed to determine whether they have been successful and whether they remain relevant against technological and societal changes;
- declared institutions such as collecting societies should be subject to public disclosure requirements regarding licensing models, collections, distributions and administration;

- international treaties that contain binding provisions should be subject to transparency requirements, including the regular disclosure of drafts and publicly available cost benefit analyses before negotiations are concluded.⁴

E. Answers to questions posed by the Commission

To what extent does copyright encourage additional creative works, and does the current law remain ‘fit for purpose’? Does the ‘one size fits all’ approach to copyright risk poorly targeting the creation of additional works the system is designed to incentivise?

As the Commission points out, the main aim of copyright in Australia is to incentivise the creation of works. But this is not an end in and of itself. We strive to encourage new works not for the benefits they provide directly to the copyright owner, but because of the value those works contribute to society through their dissemination and use. To quote Birnhack, “the public domain is not merely – or rather should not be – an unintended by product, or ‘graveyard’ of copyrighted works, but its very goal”.⁵ Therefore, as Dusollier notes, the aim of public policy makers should be to “insist on the intrinsic value of the public domain as raw material for new creation, innovation and development and to try to construct a regime that could protect and promote a rich and accessible public domain.”⁶ Thus the question to be asked is not just does copyright encourage additional creative works, but does it broaden the field of works available to the public?

Once we accept that the public domain and reuse activities in general are a valuable part of the copyright ecosystem, and should receive the same priority as the benefits granted to copyright owners in making policy decisions, it becomes clear that Australia’s current copyright law is not “fit for purpose.” As is demonstrated below, current policies which focus on the creation of wealth for copyright owners as a tool for incentivising new works often end up counter-productively limiting the value society gains from these works by providing insufficient flexibility in their use. Such policies defeat themselves by acting as a barrier to the dissemination of knowledge and a disincentive for innovation and creativity across the economy and society.

As the Commission suggests, this can be attributed at least in part to the ‘one size fits all’ approach of copyright law, which sees restrictive provisions designed for copyright owners of

⁴ For further feedback on accountability within the treaty making process see the ADA/ALCC submission to the *Senate Standing Committee on Foreign Affairs, Defence and Trade References Committee Inquiry into The Commonwealth’s treaty-making process*, available http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Submissions

⁵ Birnhack, Michael, ‘More or Better? Shaping the Public Domain’, in *The Public Domain of Information*, P. Bernt Hugenholtz & Lucie Guibault, eds., Kluwer Law International, 2005. p60 Available at SSRN:<http://ssrn.com/abstract=677301>

⁶ Séverine Dusollier, *Scoping Study on Copyright and Related Rights and the Public Domain*, World Intellectual Property Organisation, 2011 http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_inf_2.pdf. This is recognised at the international level by the WIPO Development Agenda, which includes the following in its 45 recommendations:

- Recommendation 16 - Consider the preservation of the public domain within WIPO’s normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain;
- Recommendation 20 - to promote norm-setting activities related to IP that support a robust public domain in WIPO’s Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions. <http://www.wipo.int/ip-development/en/agenda/recommendations.html>

a small percentage of 'premium' works (ie high worth works of longer than average commercial lifetimes) being applied equally to any creative material, whether or not this level of protection is desired or appropriate for the work - a classic case of monopoly overreach.

Evidence for the extent of this overreach can be seen by comparing copyright to other intellectual property rights. It by far exceeds them in relation to the:

- breadth of material captured - copyright applies automatically to all creative works, without the need for registration or other administrative steps, and with very low originality and effort requirements. This is the case even where these works are not intended for commercial or even public use: for example, a doodle or text message receives the same protection as an oil painting. Yet, as the Commission notes:

much creative and inventive work is done with no expectation of remuneration or reward, but is done for the personal benefit or joy it provides creators. Coding software as part of the open software movement, writing a travel blog, and tinkering in the shed to make better farm tools are all forms of creative and inventive work that do not rely on IP rights to take place. And many involved in basic research are motivated more by expanding the stock of human knowledge than by financial reward.⁷

- length of protection - most copyright materials receive the same term of protection in Australia of the life of the author plus 70 years. This is far beyond the economic life of all but a very small number of highly commercial copyright works. As Rebecca Giblin summarises in her paper *Rethinking Duration: Disaggregating Copyright's Rewards and Incentives via a System of Rolling Rights*:

In most music genres, for example, revenues are typically a tiny fraction of their starting point within half a dozen years of release; in the case of books, the number of copies sold tends to drop sharply within a year...Prior to the introduction of automatic renewals [of copyright registration in the US] in 1992, renewal rates ranged from 3% in 1914 to 22% in 1991, suggesting that even after a relatively short period, the vast majority of works had virtually no value to the owners of the rights.⁸

- scope of uses prohibited - all acts of reproduction, communication and performance are prohibited, even where they are non-commercial; private (at least in the case of reproductions); or (in many cases) temporary. The rise of digital technology and its reliance on reproduction and communication as part of technical processes, coupled with decisions by governments worldwide to count each of these acts as separate copyright uses, has significantly increased the reach of copyright law. Even watching a movie at home – an act which in the analogue age would not invoke any copyright use – now results in multiple separate uses of the copyright material. Each of these uses is potentially subject to control by the copyright owner, and damages if it is found to be unauthorised.

While copyright works are very important to our society and cultural development, it is difficult to justify the different treatment afforded to them in terms of protection as compared to other forms of intellectual property.

In an effort to allegedly incentivise the creation of new material we have instead locked up huge swathes of works with extremely broad rights that are demonstrably not achieving their

⁷ PC Issues Paper, p.4

⁸ Rebecca Giblin, 'Rethinking Duration: Disaggregating Copyright's Rewards and Incentives via a System of Rolling Rights' (Monash University Faculty of Law Legal Studies Research Paper No. 2014/09 February 5, 2015). Available at SSRN: <http://ssrn.com/abstract=2561108>

aims in the current socio-technological environment. This derogation of the public domain places a massive cost burden on user groups such as schools, libraries, businesses and individuals. Examples of (one presumes) unintended effects of copyright in its current form include:

- Australian schools paying millions of dollars a year to use freely available internet content that no one else in the world is paying for, and having to treat acts such as teachers emailing works from their home accounts to work as separate copyright uses;
- preventing libraries from copying and supplying works to members of the public for private and domestic use, criticism and review or any use other than research and study;⁹ and
- preservation exceptions for audiovisual works that only allow copying once a work is already been damaged, lost or stolen;¹⁰
- preventing the establishment of local online search businesses, or other innovative new businesses that involve the making of copies or transmissions, or invoke other of a copyright owners' exclusive rights.

Australian copyright in its current form is neither efficient nor effective and is extremely slow to adapt to changes in technology and norms. It imposes strict controls on works far beyond their owner's interest in them, resulting in a huge body of material being under-utilised (or in some cases, completely un-utilised).

Are the protections afforded under copyright proportional to the efforts of creators? Are there options for a 'graduated' approach to copyright that better targets the creation of additional works?

There are certainly many cases in which creators have put huge amounts of money and effort, and deserve to receive individual value from those works. Nevertheless, it is very hard to argue that the extensive protections currently afforded by copyright are in all cases, or even in the majority of cases, proportional to the efforts of the creators. A number of economists have examined this in detail in relation to the length of copyright protection, and found that the current term of protection cannot be justified in terms of economic incentives.¹¹

In the environment described above, where the tweet I send today receives the same copyright protection as a great work of literature, there is an argument that a graduated approach would have benefits. For example, a renewable registration as is used in patents, or reduced or variable terms for different types of works.

However, Australia's international commitments, and the global copyright framework in general, mean that these are not a realistic option at this point in time. The introduction of a registration system is specifically prohibited by the WIPO and TRIPs treaties which currently set the standards for copyright worldwide,¹² and the minimum terms for copyright protection are mandatory in a number of international agreements.¹³ The prospect of significant

⁹ Only supply for the purpose of research and study is supported under the s49 Copyright Act.

¹⁰ *Copyright Act 1968*, s110B

¹¹ See, for example, Economists Brief in *Eldred v Ashcroft*, 537 US 186 (2003) esp 4-7; Pollock, Rufus, 'Forever Minus a Day? Calculating Optimal Copyright Term' (July 19, 2009) in *Review of Economic Research on Copyright Issues*, Vol. 6, No. 1, pp. 35-60, 2009. Available at SSRN:<http://ssrn.com/abstract=1436186>; William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18(2) *Journal of Legal Studies* 325

¹² Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), Art 5(2) http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283698#P396_72979

¹³ For example, for life plus 50: Berne Convention for the Protection of Literary and Artistic Works, 1886, Article 7 for life plus 70: Australia United States Free Trade Agreement, 2005, Article 17.4(4)

movement towards a graduated approach to copyright being made in the foreseeable future is extremely low.

We would therefore recommend that in the immediate term the best approach is to focus on mitigating the effects of the current excessive scope of rights, by ensuring that:

- materials enter into the public domain quickly and with full effect;
- a regime of exceptions and limitations exists to allow appropriate use of material while it remains in copyright; and
- licensing occurs on an equitable basis, with protections to ensure that the rights of users are respected alongside those of copyright owners.

Is licensing copyright-protected works too difficult and/or costly? What role can/do copyright collecting agencies play in reducing transaction costs? How effective are new approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?

Licensing is an essential part of the copyright ecosystem, but the ADA is concerned about over reliance on it as a way of providing access to copyright works. In many cases it is too difficult and too costly, and it rarely includes flexibility for everyday and socially beneficial uses. It cannot and should not replace the role of exceptions and limitations in ensuring that the copyright system as a whole operates efficiently and effectively, and that the full value of all works to society is realised.

For example, licensing is not an appropriate mechanism where:

- it is impossible to obtain a licence because you cannot identify, find, contact or elicit a response from the copyright owner;
- the transaction costs of obtaining the licence are significantly higher than the market rate for the licence, and therefore disproportionate to the benefit to the copyright owner and the value to the user;
- a refusal to license would prevent the use of works for great economic and social benefit - for example for reporting the news, parody and criticism, preservation of collections, text and datamining, the indexing of web materials etc.

Licensing impossible for orphan works

It is clear that licensing is inefficient and ineffective in the case of large swathes of the copyright ecology. Certain categories of works are particularly difficult or costly to license, most obviously:

- orphan works - for which the copyright owner cannot be identified or located, meaning that permissions cannot be obtained and (in many cases) their copyright status cannot be identified;
- unpublished works - which currently remain in copyright in perpetuity under Australian law, meaning copyright owners must be identified and located potentially hundreds of years after the work was created.

These two categories make up large portions of our national collection, and currently can be accessed or used only in rare cases. For example, in August 2015, the ALCC conducted an informal survey of 14 Australian universities (over 20 collections covering roughly 1/3 of the university sector) to establish the incidence of unpublished works in their collections. Cumulatively, the universities surveyed reported that their collections included over 12.9km of unpublished works, or approximately 103,904,000 pages.¹⁴

¹⁴ Taking a conservative estimation of 100 files/8000 pages per linear metre

As unpublished works are often also orphan works, there are significant portions of our national collection for which licences can never be obtained. The National and State Libraries Australasia (NSLA) surveyed its members regarding unpublished orphan works prior to the ALRC Review and found that library collections comprised between 10% - 70% of unpublished orphan works, dependent on the type of works collected.¹⁵

The ADA contends the law should be changed to align the copyright term of unpublished works with their published equivalents, and that specific solutions should be introduced to enable the risk-free use of orphan works.¹⁶ This is the only way to ensure that all copyright materials can be accessed and used within a reasonable amount of time after their creation.

Licensing is too difficult or costly in many circumstances

Even beyond the extremely difficult areas of unpublished and orphaned works there are many circumstances in which the complexities of licensing have a chilling effect on access to and use of works.

The National Film and Sound Archive provides the following example:

The NFSA sought to use a radio serial from the mid 1940's on SoundCloud (an online distribution platform that allows NFSA to share rare interviews and unique recordings from the mid 1940's). While the broadcast rights have expired, the music and script were still in copyright. The NFSA approached who they believed held the underlying copyright and despite being unaware they held the copyright they granted permission for two episodes to be uploaded. In the process of researching the copyright status of more serials, the NFSA discovered that it was more likely that a second party held the rights to the copyright initially cleared. Faced with competing claims to copyright ownership, the NFSA made a business decision to stall the project, assessing that it would be too time-consuming and costly to negotiate with both parties, particularly given the extensive research and efforts made to date to clear copyright with the first claimant. As a result the NFSA, the industry and the general public lost the opportunity to easily access a unique part of Australia's audiovisual cultural heritage.¹⁷

There is an argument that the public use of this work, which is otherwise inaccessible, would have significantly added to its value. It certainly seems clear that no one would have suffered harm had this use proceeded. Ultimately, the net result was a loss to the public.

Importantly, these same factors can also prevent significant public interest uses such as access for those with a disability, research and study, parody and satire, and educational uses. It is for this reason that licences will never be sufficient for such uses, which must always be protected by exceptions. Any ability for copyright owners, or even just uncertainty and transaction costs, to constrain use of material in these circumstances would clearly be an inappropriate effect of the copyright monopoly. Yet, as is discussed below, many licences do seek to limit these exceptions.

Licensing is often restrictive or unavailable

¹⁵ National and State Libraries Australasia, Survey of Orphan Works (Unpublished, 2012) Page 12. Photographs were recorded as being the highest proportion of unpublished orphan works on average in library collections (38%), alongside pictures, manuscripts, maps, oral histories and other AV material comprising the bulk of unpublished orphan works. The ADA can supply the raw data to the PC if it proves useful.

¹⁶ The Library of Congress, for example, has suggested amendments which would limit the liability of institutions where they make use of orphan works. See Library of Congress Copyright Office, Orphan Works and Mass Digitization: A Report of the Register of Copyrights, June 2015, <http://copyright.gov/orphan/>

¹⁷ National Film and Sound Archive, Compliance Costs of Copyright (unpublished 2015) The ADA can provide the full evidence if it proves useful

A further issue with voluntary licensing is that, whilst as a mechanism it is in theory endlessly flexible and responsive to the market, power imbalances between monopoly rights holders and distributors/consumers often result in circumstances in which licences are used restrictively so as to effectively act to reduce access.

For example, in its recent copyright communication the European Commission has identified restrictive territorial licensing practices as a significant problem that needs to be addressed by legislative reform:

The territoriality of rights does not prevent the granting of multi-territorial licences, but there are instances where these are difficult or impossible to obtain. Right holders may decide to limit the territorial scope of licences granted to service providers and, as a result, services are limited to one or only certain territories. Service providers can also decide to confine a service to a particular territory, even when they have a licence to cover a broader territory, including the whole EU, or such licence is available to them. In addition, acquired licences, in particular for online rights, can remain unexploited.¹⁸

Such circumstances in which rightsholders have the ability to license but choose not to are, of course, a natural part of a market system. However, if used excessively they can distort the marketplace and become a barrier to the dissemination of knowledge which, as the European Commission has identified, warrants regulatory intervention.

Territorial restrictions on access are extremely common in Australia, particularly in relation to entertainment products such as television shows, movies and books. Lack of access to catalogues is often cited as a major cause of piracy in the local market.¹⁹ In its 2013 report on IT Pricing the Federal Government's House of Representatives Standing Committee on Infrastructure and Communications concluded that territorial licensing was distorting the market with respect to pricing and access to products for Australian consumers, and recommended a number of measures to correct this market failure, including that the government "consider the creation of a 'right of resale' in relation to digitally distributed content, and clarification of 'fair use' rights for consumers, businesses, and educational institutions, including restrictions on vendors' ability to 'lock' digital content into a particular ecosystem."²⁰

We note that similar causes and negative effects can be attributed to the refusal by a number of publishers to sell ebooks to libraries and archives. Where ebooks are available to institutions, they frequently pay significantly higher prices than the consumer (compare this to the print environment where they often get discounts) and often have to relicense after, for example, two years if they want to keep the ebook in the collection.²¹

¹⁸ European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on ensuring the cross-border portability of online content services in the internal market, Brussels, 9.12.2015 COM(2015) 627 final 2015/0284 (COD), p.4 available at <file:///C:/Users/User/Documents/ADA/Regulationonensuringthecross-borderportabilityofonlinecontentservicesintheinternalmarket.pdf>

¹⁹ See, for example, Ward, Miranda, "Piracy: Dispelling myths, why people pirate and the reasons behind the new laws", Mumbrella, 24 June 2015, available at <http://mumbrella.com.au/the-fight-against-piracy-dispelling-myths-the-reasons-why-rights-holders-wanted-new-laws-301433>

²⁰ The Commonwealth Parliament of Australia House of Representatives Standing Committee on Infrastructure and Communications, At what cost? IT pricing and the Australia tax, July 2013, Recommendation 7, p.xiii, available at <file:///C:/Users/User/Documents/ADA/http---www.aphref.aph.gov.au-house-committee-ic-itpricing-report-fullreport.pdf>

²¹ See discussed further in Vinjamuri, David The Wrong War Over eBooks: Publishers Vs. Libraries, Forbes, 11 December 2012 at <http://www.forbes.com/sites/davidvinjamuri/2012/12/11/the-wrong-war-over-ebooks-publishers-vs-libraries/>. In the last few days Penguin Random House have announced new ebook terms for libraries and Canada and the US which may indicate these policies are beginning to shift - see Enis, Matt, Penguin Random House Announces New Ebook Terms of Sale for Libraries, Library Journal, 3 December 2015,

Out of commerce works

Another circumstance in which voluntary licensing fails to meet market needs is in relation to “out-of-commerce works” ie works which have reached the end of their commercial life and so are no longer made available by their rightsholder. These works differ from orphan works in that the copyright owner is known and contactable but the results are effectively the same - permission for uses that fall outside the exceptions simply cannot be obtained, either due to lack of will or lack of resources on the part of the copyright owner. The European Commission has again identified this as a significant problem which warrants intervention, and in response has negotiated a Memorandum of Understanding (MoU) between libraries, publishers, authors, and collecting societies in which they have agreed to a set of Key Principles that will give European libraries and similar cultural institutions the ability to digitise and make available on line out-of-commerce books and journals which are part of their collections. The Key Principles are designed to encourage and underpin voluntary licensing agreements and only apply where rightsholders have not chosen to digitise and make available the out-of-commerce work.²²

Licensing is often used to exclude exceptions

The most concerning example of restrictive licensing practices is the use of licences to limit, or entirely eliminate, copyright exceptions.

This issue has been examined several times in recent year – first by the Copyright Law Review Committee in 2002²³ and later by the ALRC in its Digital Economy Review.²⁴ Both found that there was substantial evidence that (quoting the ALRC) “contractual terms excluding or limiting copyright exceptions under the *Copyright Act* remain common.”²⁵ Multiple international studies have reached similar conclusions - so many, in fact, that we contend it is unnecessary to revisit the debate as to whether such licensing practices exist.²⁶ The question is essentially settled as a matter of public record - contracts governing the use of electronic materials for copyright users including libraries, educational institutions and individuals regularly seek to overrule socially valuable use exceptions, preventing libraries from delivering interlibrary loans, preventing the reproduction and communication of materials for educational purposes, and preventing researchers and students from relying on the fair dealing exceptions.

This being the case, the pertinent question is what happens when a copyright exception and a contract come into conflict under Australian law?²⁷ Both the ALRC and the CLRC found (again quoting the ALRC) that “there are differing views on whether, and in what

http://lj.libraryjournal.com/2015/12/technology/ebooks/penguin-random-house-announces-new-ebook-terms-of-sale-for-libraries/#_

²² European Commission, Press Release, Copyright: Commission brokers agreement to increase the number of out-of-commerce books being made available again, http://europa.eu/rapid/press-release_IP-11-1055_en.htm?locale=en

²³ Copyright Law Review Committee, Copyright and Contract, 2012, <http://www.austlii.edu.au/au/other/clrc/2/2.html>

²⁴ ALRC Copyright and the Digital Economy (2014) Chapter 20.

²⁵ ALRC Copyright and the Digital Economy (2014) at 17.91

²⁶ Listed in the ALRC report alone are:

M Kretschmer, E Derclaye, F Favale and R Watt, A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy (2010)

D Clapperton and S Coronas, ‘Unfair Terms in Clickwrap and Other Electronic Contracts’ (2007) 35 Australian Business Law Review 152

R Wright, ‘Libraries and Licensing: the eFuture will Need Legal as well as Technical Skills’ (Paper presented at VALA 2012, Melbourne, 9 February 2012)

²⁷ For a fuller discussion of this issue, see Giblin, Rebecca and Weatherall, Kimberlee G., At the Intersection of Public Service and the Market: Libraries and the Future of Lending (August 1, 2015). (2015) 26 Australian Intellectual Property Journal 4-26; Sydney Law School Research Paper No. 15/71; Monash University Faculty of Law Legal Studies Research Paper No. 2015/11. Available at SSRN: <http://ssrn.com/abstract=2647705> from p14.

circumstances, contractual terms excluding or limiting exceptions to copyright may be unenforceable.”²⁸ The net result, due to factors such as power balances, uncertainty and risk aversion on the part of users, the contract is almost always treated as the defacto standard, and the exceptions are left to fall by the wayside. Yet not only are exceptions important user rights that should be given equal footing with owner rights, in many cases they are also important fixes for market failures. As the CLRC put it:

there is evidence that agreements are being used to exclude or modify the copyright exceptions. It is the Committee’s view that, should such agreements be enforceable, there would be a displacement of the copyright balance in important respects.²⁹

Meanwhile, the ALRC agreed with the UK Government in its *Modernising Copyright: A Modern, Robust and Flexible Framework* that such contractual terms are undesirable and can in many cases be seen as eroding “socially and economically important uses of copyright works.”³⁰

The CLRC therefore recommended that the: “Copyright Act be amended to provide that an agreement, or a provision of an agreement, that excludes or modifies, or has the effect of excluding or modifying [the majority of the exceptions] of the Act, has no effect.”³¹ The ALRC similarly recommended that “to ensure that certain public interests protected by some copyright exceptions are not prejudiced by private arrangements”³² the library and archives exceptions in the Act should be protected against contracting out.³³ These recommendations have not yet been responded to by the Australian government.

Mass licensing not always the solution

Copyright collecting agencies can play a valuable role in reducing transaction costs and facilitating licensing in certain circumstances. Mass voluntary licensing services such as the Copyright Hub and Creative Commons can play a similar facilitative role in a healthy marketplace.

However, we need to be wary of assuming statutory licences in particular will solve the problems discussed above. Such schemes can be useful, but:

- when run as a monopoly can become a tool to maximise profits for a small group of copyright holders at the expense of copyright users, rather than finding a market-appropriate price point for uses;³⁴
- compared to negotiated licences, provide “less pressure on a monopoly supplier to operate efficiently and to offer the types of products and level of service that consumers want.”³⁵

²⁸ ALRC Copyright and the Digital Economy (2014) at 20.29

²⁹ Copyright Law Review Committee, Copyright and Contract, 2012, <http://www.austlii.edu.au/au/other/clrc/2/2.html> at 2.05

³⁰ UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 19. See quote in ALRC Copyright and the Digital Economy (2014) at 20.76

³¹ Copyright Law Review Committee, Copyright and Contract, 2012, <http://www.austlii.edu.au/au/other/clrc/2/2.html> at 7.49

³² ALRC Copyright and the Digital Economy (2014) at 20.4 <http://www.alrc.gov.au/publications/recommendations>

³³ ALRC Copyright and the Digital Economy (2014) Recommendation 20-1 <http://www.alrc.gov.au/publications/recommendations>

³⁴ Australian Competition and Consumer Commission (ACCC), *Copyright Licensing and Collecting Societies: A Guide for Copyright Licensees*, Draft for comment, Canberra, November 2006, Chapter 8. See also Tyrone Berger, “Copyright, collecting societies and the ACCC: call for (new) guidelines”, in *Australian Intellectual Property Law Bulletin*, April 2011, p 37

³⁵ *Ibid*, p.34

- even in the best of environments, market realities can frequently result in a situation where the administrative cost of applying the licensing scheme outweighs the benefits to copyright owners.

On this last point, two statutory licensing schemes for orphan works that have been introduced in Canada and the UK provide particularly good evidence. Under the UK scheme, the Intellectual Property Office (IPO) uses an online system to grant seven-year licences for the use of orphan works and charges a licence fee, which they hold in trust for the copyright owner for up to eight years. For non-commercial use the licence fee is 10p, while the minimum administrative fee going to the IPO is £20 - making the administrative fees paid by the licensor up to 200 times the potential payment to the rightsholder.³⁶ And this doesn't include the administration costs of a diligent search the applicant is required to undertake before accessing the scheme, or the transaction costs for the preparation of the application. Even focusing on commercial licences, the average licence fee per work is a mere £228.02 - hardly a windfall for creators and just 10 times the minimum administrative fee. At the 12 month review stage the UK scheme had collected £8,001.97 plus a further £1492 in administrative fees, and no rights holders had come forward.³⁷ Considering the substantial cost of setting up and running the scheme, this hardly seems an efficient or effective mechanism to remunerate creators, let alone incentivise the creation of new works.

Ariel Katz reached the same conclusion when he examined the issue of costs versus outcomes in the context of Canada's orphan works licensing scheme.³⁸ Like the UK scheme, the Copyright Board of Canada is empowered to issue licences for the use of published works on behalf of unlocatable rightsholders, after the licensee has made reasonable efforts to locate the rightsholders.³⁹ Unlike the UK's IPO, the Copyright Board does not hold the licence fees in trust, but rather makes use of the money as it sees fit, and merely undertakes to compensate the owner if they come forward within 5 years of the licence's expiration.

When Katz examined the scheme it had been in operation for 18 years, in which time it had issued an average of 12 licences a year and set fees of C\$70,000, an average of C\$326 per licence.⁴⁰ Katz found that "the costs of maintaining the regime (for the applicants and for Canadian taxpayers) likely exceed the amount of license fees that it has generated, and even the cost of applying and processing a license likely exceeds the average license fee".⁴¹

As Katz points out, compulsory licensing is unlikely to ever be an efficient or effective solution for orphan works, which no longer have a commercial market:

It is possible that, almost by definition, the cost of the mechanism would be higher than the license fees that it would generate, no matter how streamlined the procedure is and regardless of the rate of the license fees. That is because the mechanism ignores the root cause of the orphan works problem: the fact that the cost of maintaining themselves locatable exceeds the license fees that owners expect to earn. If it is inefficient for owners to administer their rights under these conditions, it is unclear why the Board would be able to do that at a lower cost.⁴²

³⁶ licences can cover up to 30 works for an administrative fee of 80 GBP, or 26.6 times the licence fee.

³⁷ Intellectual Property Office, *Orphan Works: Review of the first twelve months*, (2015) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480742/orphan-works-review.pdf

³⁸ Katz, Ariel, 'The Orphans, The Market, and the Copyright Dogma: A Modest Solution to a Grand Problem (July 27, 2012). 27(3) *Berkeley Technology Law Journal*, 2012. Available at SSRN: <http://ssrn.com/abstract=2118886>

³⁹ Copyright Act, R.S., c 77. Copyright Board of Canada. 2005.

⁴⁰ Katz Ibid at 1326

⁴¹ Katz Ibid at 1327

⁴² Katz Ibid at 1329

Add to this the low probability of the copyright owner of an orphan work ever emerging, and the fees paid essentially become a “tax” on users for making valuable use of these otherwise abandoned works. Katz makes this observation about statements made by Bouchard, the General Counsel for the Canadian scheme, justifying their collection of fees whether or not a copyright owner is located:

Bouchard explains that while the Board acknowledges that non-contingent royalties payable to a collective society are controversial, the Board’s position is that the user must generally be required to pay because the Board [quoting Bouchard] “does not believe that it should be in the business of issuing free insurance policies against prosecutions for violation of copyright.” ... Even though Parliament clearly contemplated that if the owner does not emerge the user can keep the surplus, the Board views disgorging the user of this surplus as a closer purpose because “given the choice, the unlocatable copyright owner would prefer that the royalties be paid to a group that represents interests similar to those of the owner than to see the user take advantage of the owner’s copyright for free,” and “when a protected use of a protected work is contemplated, the payment of royalties should be the norm, not the opposite.”⁴³

In such a case, when:

- running costs outweigh the money provided to creators;
- licensing fees are merely being used to tax users and support the collecting organisation; and
- all in relation to works which have already been determined to have no more market value;

it is hard to see the economic or moral justification for the operation of a statutory licence scheme over the introduction of a flat out exception.

Although orphan works is an extreme example, the same factors apply to many other use scenarios, with transaction costs outweighing the benefits a licence could provide to copyright owners, making a licence, whether voluntary or compulsory, unsustainable. As is discussed below, unfortunately in Australia this frequently results in uses remaining illegal, rather than an appropriate exception being introduced to cover the use.

What have been the impacts of the recent changes to Australia’s copyright regime?

The changes to Australia’s law over the last few decades have served primarily to increase copyright owners’ rights at the expense of user rights. A large number of these changes have been as a result of international treaties such as the Australia-US Free Trade Agreement, which tend to provide prescriptive provisions in relation to copyright owner rights (see discussed further below). Examples of changes of this nature include:

- the extension of Australia’s standard copyright term from life of the author plus 50 years to life of the author plus 70 years (see discussed below);
- the addition of new criminal penalties for “commercial scale” infringements, which apply whether or not the infringing act was actually commercial in nature. This has criminalised acts such as uploading a video of yourself lipsyncing,⁴⁴ and

⁴³ Katz Ibid 1330. Katz’s quotes for Bouchard come from Mario Bouchard, The Canadian Unlocatable Copyright Owners Regime, in The Copyright Board of Canada: Bridging law and economics for twenty years 137, 153 (2011) at 153-154.

⁴⁴ Copyright Act 1968, s132AC. For debate around the use of this term in copyright law globally, see <http://www.ip-watch.org/2007/03/05/eu-enforcement-directive-stuck-what-is-commercial-scale-infringement/> and http://ec.europa.eu/internal_market/iprenforcement/docs/workshops/140919-workshop_en.pdf

- the introduction of technological protection measure (TPM) provisions - these prohibit the circumvention of technological measures used to prevent access to copyright material, whether or not the use in question is controlled by copyright⁴⁵ or would otherwise be legal. They effectively extend the rights holders rights to include prevention of any use of their material, even once the protected material has entered into the public domain, or even if the use has no copyright implications.⁴⁶ Since their introduction in the US in 1998 they have been used to lock mobile phones to particular service providers, render photographs unreadable on competitors' photo-editing programs,⁴⁷ and (unsuccessfully) to prevent the use of generic printer cartridges and garage door openers.⁴⁸

In the same timeframe, very few new user rights and exceptions have been introduced to the Copyright Act, and those that have have either been extremely limited in their application (eg private copying exceptions) or have applied to only a subset of users (eg s200AB), as we discuss below.⁴⁹

The interaction of these treaty-driven legislative changes with technological changes has resulted in a situation where copyright owners are now able to control and demand remuneration for uses of their work that would previously not have attracted copyright rights. For example, quoting from the CAG submission to the ALRC Digital Economy Review:

'Old technology' would see a teacher print copies of a scene from a play to hand out in class.

'New technology' might see a teacher save a scene from a play found on a website to their laptop's hard drive, email it to their school email account, upload it to the school's learning management system and display it on an interactive white board in the classroom.

Using old technology would involve one remunerable act under a statutory licence. Using new technology would involve 4 separately recorded remunerable activities.⁵⁰

This is compounded by the increasing use of licences to control the use of electronic works in ways that were not possible for physical works, through both TPMs and licensing (see discussed above). This has had the cumulative effect of reallocating a great deal of the public's share to copyright owners.

This reflects a global trend. To quote the *Washington Declaration on Intellectual Property and the Public Interest*, "The last 25 years have seen an unprecedented expansion of the concentrated legal authority exercised by intellectual property rights holders."⁵¹ Yet, the need

⁴⁵ Clapperton, Dale, The Elusive 'Link to Infringement in the Copyright Amendment Bill 2006 Now You See It, Now You Don't, *Australian Intellectual Property Law Bulletin*, vol 19, Issue 9, February 2007

At p.141, available at http://eprints.qut.edu.au/6631/1/Elusive_Link_article_for_eprints.pdf

⁴⁶ Exceptions do exist to permit circumvention for the purposes of some of the exceptions in the Act, but as is discussed below, these are essentially ineffective because they do not affect the prohibition on supplying a circumvention tool.

⁴⁷ David Kravitz, Apple v. EFF: The iPhone Jailbreaking Showdown, *Wired*, May 2, 2009, <http://www.wired.com/threatlevel/2009/05/apple-v-eff-the-iphone-jailbreakingshowdown/>.

⁴⁸ Clapperton, Dale, The Elusive 'Link to Infringement in the Copyright Amendment Bill 2006 Now You See It, Now You Don't, *Australian Intellectual Property Law Bulletin*, vol 19, Issue 9, February 2007

At p.141, available at http://eprints.qut.edu.au/6631/1/Elusive_Link_article_for_eprints.pdf

⁴⁹ These amendments were both introduced by the *Copyright Amendment Act 2006*.

⁵⁰ The Copyright Advisory Group – Schools of the Standing Council on School Education and Early Childhood Submission to the Australian Law Reform Commission (Nov 2012) at http://www.alrc.gov.au/sites/default/files/subs/cag_schools_submission_-_ip_42_-_corrected.pdf p.4-5. See also p.50

⁵¹ Washington Declaration on Intellectual Property and the Public Interest, 2011 <http://infojustice.org/washington-declaration-html>

for expansion of creators' rights is not supported by the economic evidence. While the internet has challenged traditional publishing models, it has also provided new opportunities. There is evidence that, despite the upheaval of the last few decades, the 'sky is rising' for copyright industries, with data from PricewaterhouseCoopers and iDate indicating that the global entertainment industry grew 66% between 1998 and 2010.⁵²

The Australian government should be cognisant that each time it ramps up copyright owner rights without including corresponding exceptions and limitations to protect the rights of users and intermediaries it is damaging Australia's learning, innovation and knowledge sharing economies.

Expansion of the copyright term

The most closely examined example of the direct expansion of copyright owners rights over the last few decades relates to the extension of copyright terms worldwide from the default standard of life of the author plus 50 years to life of the author plus 70 years, which was introduced in Australia in 2005 as a requirement of the AUSFTA.⁵³

A number of academic studies have shown that these copyright term extensions have merely resulted in a windfall benefit to existing copyright owners, and their estates, without encouraging the creation of additional material.⁵⁴ In the Australian context, the government's own assessments of the impact of the AUSFTA, both before and after its implementation, found that the copyright term extension cost Australia money in terms of lost public use and benefit. For example, Phillipa Dee's 2004 report for the Senate Select Committee on the Free Trade Agreement found that:

Extending the term of copyright protection would confer additional benefits of 0.33 per cent in net present value terms. The likely impact on the quantity of new works is miniscule. But the same assumptions can be invoked in order to put an estimate on the costs of extending the term of copyright ... According to this calculation, Australia's net royalty payments could be up to \$88 million higher per year as a result of extending the term of copyright. And the discounted present value of the cost to Australia of extending the copyright term is about \$700 million.⁵⁵

In its 2010 assessment of Australia's Bilateral and Regional Trade Agreements, the Commission itself also found that:

the analysis indicates that the extension in the duration of copyright required by AUSFTA imposed a net cost on Australia. This partly reflects Australia's status as a net importer of IP. However, even in the case of the United States, which is a significant net exporter of IP, the earlier, equivalent extension in the term of copyright is also likely to have entailed a net cost, reflecting adverse impacts on

⁵² Michael Masnick and Michael Ho, 'The Sky is Rising – A detailed look at the Entertainment Industry' (January 2012) <http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000586/TheSkyIsRising7-130.pdf>. at 2. See similar analysis of the current state of the entertainment industries in the 2013 (<http://www.ccianet.org/wp-content/uploads/library/Sky%20is%20Rising%202013.pdf>) and 2014 (<https://www.ccianet.org/wp-content/uploads/2014/10/Sky-Is-Rising-2014.pdf>) "Sky is Rising" reports

⁵³ *United States Free Trade Agreement Implementation Act 2004*, Schedule 9, ss120-128

⁵⁴ see summary in Rebecca Giblin, 'Rethinking Duration: Disaggregating Copyright's Rewards and Incentives via a System of Rolling Rights' (Monash University Faculty of Law Legal Studies Research Paper No. 2014/09 February 5, 2015). Available at SSRN: <http://ssrn.com/abstract=2561108>

⁵⁵ Phillipa Dee, 2004. The Australia-US Free Trade Agreement: An Assessment, A Report prepared for the Senate Select Committee on the Free Trade Agreement (June), at http://www.aph.gov.au/~media/wopapub/senate/committee/freetrade_ctte/rel_links/dee_fta_report_pdf.ashx, 22-23

consumer welfare (Akerlof et al. 2002). In turn, it is probable that further extensions in the term of copyright would add further net costs.⁵⁶

Extended copyright terms create a real barrier to access and use of works globally. This can be seen in the work of Paul Heald who, after examining the availability of works both in and out of copyright, found a “copyright black hole” resulting from the lack of alignment of copyright terms with the commercial lifetime of most works. Heald found that:

Copyright correlates significantly with the disappearance of works rather than with their availability. Shortly after works are created and proprietized, they tend to disappear from public view only to reappear in significantly increased numbers when they fall into the public domain and lose their owners. For example, more than twice as many new books originally published in the 1890’s are for sale by Amazon than books from the 1950’s, despite the fact that many fewer books were published in the 1890’s.⁵⁷

The European library data aggregator, Europeana, found a similar hole outside the commercial context when they examined the availability of copyright material online and found that:

collections that consist of works dating from the 20th century or that contain large proportions of works from that period are available online to a much lesser degree than collections from the periods before or after the 20th century...While we cannot show a causal relationship between this and the way copyright law interacts with digitization efforts by cultural heritage institutions, feedback from Europeana data partners makes it clear that many cultural heritage institutions tend to avoid digitizing 20th century collections because of their often complicated copyright status.⁵⁸

Is there evidence to suggest Australia’s copyright system is now efficient and effective?

To the contrary, there is significant evidence to show that the Australian system as it currently sits is not efficient and effective. It is not effective in that it includes many restrictions which do not promote the creation of new products and inhibit the dissemination of ideas; it is not efficient in that its many complexities and paradoxes combine to form a significant barrier to trade, even making whole categories of goods untradeable.

Directly untradeable goods - orphan works

The most obvious example of inefficiency within Australia’s current copyright system is the inability to trade or make use of large swathes of material where the copyright owner cannot be contacted ie orphan works. As permission from the copyright owner cannot, by definition, be obtained for such works they can only be used in the most limited of ways, as permitted under exceptions in the act such as fair dealing or s200AB. Similarly, the perpetual copyright

⁵⁶ Australian Productivity Commission, Bilateral and Regional Trade Agreements, Research Report (November 2010) at 259-260

⁵⁷ Heald, Paul J., How Copyright Keeps Works Disappeared (July 5, 2013). Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-07; Illinois Public Law Research Paper No. 13-54. Available at SSRN: <http://ssrn.com/abstract=2290181> or <http://dx.doi.org/10.2139/ssrn.2290181> at 3. See Summary <http://www.theatlantic.com/technology/archive/2013/07/the-hole-in-our-collective-memory-how-copyright-made-mid-century-books-vanish/278209/>

⁵⁸ See more at: <http://pro.europeana.eu/blogpost/the-missing-decades-the-20th-century-black-hole-in-europeana#sthash.zvLuiKzk.dpuf>

which currently applies to unpublished works cannot be justified under any economic model of IP protection. As unpublished works are also extremely likely to be orphan works, these two provisions have the cumulative effect of ensuring that many works remain locked within the complexities of Australian copyright law forever.

For example, the National Library of Australia holds over two million original letters in its collection from authors such as Jane Austen, Charles Darwin, Henry Lawson, Banjo Paterson and Dame Nellie Melba, all of which remain within copyright as unpublished works. The recent 'Cooking for Copyright' campaign saw the publication of a recipe for carrot marmalade contained in one of these letters, which was received by Captain Cook in 1771.⁵⁹ This use was almost certainly in breach of copyright law, as the publication as part of the campaign does not fall within any of the fair dealing exceptions and is unlikely to be classified as "for the purpose of maintaining or operating the library or archives", a requirement of s200AB. If any of these materials had been published they would have fallen into the public domain years or even centuries ago. Yet without a change in the law all of these works will remain in copyright, forever, unable to be used in all but the most limited of circumstances.

Inefficiency due to complexity and rigidity

Similarly, there are many examples in the Australian Copyright Act of inefficiencies arising from circumstances where, as the Commission writes, "the complexity of the arrangements raises disproportionate legal transaction costs." The user exceptions in the current Act are in general very specific and rigid, with little or no flexibility to allow for practicalities, changes in technology, or best practice (see examples below). These provisions are forever playing catch up, never quite adequate for the environment in which they are operating. They almost invariably contain long compliance requirements and caveats, limiting their scope and making their implementation difficult and costly.

In fact, the length and complexity of the current user exceptions seems almost to suggest a suspicion of user rights, as though any exceptions must be restricted as much as possible to stop them from leading to rampant piracy. As one library member commented in the ADA's ALRC submission:

The way library and archive exceptions are drafted, it's like public interest activities are being treated with suspicion. The legitimate use is begrudgingly defined, as restrictively as possible, and loaded with terms and conditions that are difficult for staff to understand, let alone follow efficiently! Exceptions should be drafted so as to facilitate a legitimate use of content, not impose unnecessary restrictions.

Below we discuss in detail two examples of the restrictive and complex exceptions currently provided in the Act - the private copying exceptions and the TPM exceptions. However, similar comments can be made about any number of other exceptions in the Act. In particular, the ADA supports the comments of the ALCC regarding the library and archives exceptions⁶⁰ and the National Copyright Unit regarding the Part VB statutory licence for reproduction and communication of works by educational institutions.

Private copying (ss43C, 109A, 110AA and 111)

The private copying exceptions are a series of exceptions in the Australian Copyright Act that allow the copying of material for private and domestic purposes. They were (for the most part) introduced in 2006 to update the Act in response to the rise of technologies such as

⁵⁹ See full explanation and description at <https://fair.alia.org.au/cookingforcopyright> See discussion <http://www.theage.com.au/comment/indefinite-copyright-is-a-joke--the-recipe-for-carrot-marmalade-proves-it-20150807-gjito59.html#ixzz3sfH71Gn5>

⁶⁰ Copyright Act 1968 ss49-52, 110A-110BA, 112AA and s200AB

video players and ipods (although not until 20 years after video players first entered the market). They allow for the copying of text-based works (books, newspapers and periodicals), photographs, sound recordings, videotapes and broadcasts to, for example, enable them to be viewed on a personal device or watched at a later time.

However, most of these exceptions are extremely complex and limited in their scope. The exception for text-based works (s43C), for example, runs to over 600 words and includes the following limitations:

- the copy must be in a different format to the original work - prohibiting, for example, photocopies of a newspaper article
- the original work must not be an infringing copy
- you may only make one copy in each format
- the copy may not be distributed “for the purposes of trade or otherwise” - the Act specifically clarifies that this does not include lending it to a family or household member, but leaves open the possibility that it includes lending it to a friend or neighbour
- the exception is taken never to have applied if at any point in the future you dispose of the original work.

Several, or even all, of these may be reasonable depending on your viewpoint - but there is no doubt that they add up to an extremely restrictive exception. Even more amazingly, the exception for format shifting of films (s100AA) includes all these same restrictions plus being limited only to copying of “videotapes”, a blatantly unnecessary technological limitation. The result is that film and DVD works still cannot be legally copied onto a computer or personal device for private and domestic use in Australia.

Similarly, s111, which permits the recording of broadcasts for private and domestic use, includes the following restrictions:

- it only applies to recordings made for replaying at more convenient time, meaning it doesn't include recordings that are watched as they are made
- the same prohibition on supplying the work to another discussed above, even if that person is merely a friend or neighbour, who could themselves have made a copy lawfully.

As any copying under each of these exceptions is subject to the principal requirement that it be for “private and domestic use”, it is difficult to see how these additional restrictions are needed to prevent economic harm to copyright owners. They simply seem to serve to make the exception so rigid as to apply to very few circumstances. Do we really believe that the copyright owners' interests are significantly harmed if a person makes photocopies of a newspaper article about their daughter to send to family members?

These exceptions are examples of the inadequacy and complexity that arises when you try to use specific exceptions to cover new behaviours and advances in technology. There is no question that they miss a large number of common behaviours that most people would deem as fair, behaviours which already existed by the time the exceptions were introduced.⁶¹ There is also no question that they are inadequate to deal with new technologies and the activities they enable, such as cloud storage and text and datamining (see further discussion below).

The difficulties caused by this complexity are only exacerbated by the fact that these exceptions are intended to be used by private individuals. Their capacity to understand, or even be aware of the extensive restrictions that apply to legal format and time shifting in Australia is practically nil. This results in the situation where the majority of Australians are

⁶¹ The first video-enabled ipod, for example, was released in 2005, a year before the exceptions were introduced as part of the Copyright Amendment Act 2006

regularly breaching copyright law unintentionally, simply by engaging in ordinary everyday behaviours.

It is valuable to compare each of these to the US fair use provision, which would permit most of these uses and which is by comparison extremely simple (only 175 words), intuitive (relying on common sense concepts such as fairness) and, most importantly, flexible to accommodate new uses as they emerge – not 20 years after the fact.

TPMs

As is discussed above, as currently written, the TPM provisions in the Copyright Act make it illegal to circumvent a TPM, even for a legal purpose.⁶² This has the effect of extending copyright owners' rights, enabling them to prevent otherwise legal uses and essentially creating a 'right of access.' However, the provisions are also problematic due to their complexity and apparent paradoxes, which make them difficult to understand and apply both for experts and for laypersons.

The ban on circumvention for legal purposes (arguably a confusing and paradoxical provision in its own right) is subject to a limited range of exceptions, allowing circumvention for certain purposes including assisting persons with a print disability and the principle library and archives exceptions.⁶³ However, these exceptions only apply to the act of circumvention, not to the provision of tools to enable circumvention, which is prohibited separately under the Act.⁶⁴ Therefore it is legal for a library, for example, to circumvent a TPM in order to provide the content it protects to a user for research and study, but it is illegal for anyone to supply them with a tool to do so. This provision appears to rely on the assumption that people and institutions will be able to manufacture their own circumvention devices. The technical skill and knowledge required to do this for the myriad of different TPM technologies currently on the market means this is unrealistic, making it essentially impossible for libraries to actually undertake the otherwise legal circumvention.

A review mechanism does exist ostensibly to allow the TPM provisions to be updated to create new exceptions as new technologies and norms emerge. However, these exceptions once again only apply to the ban on the act of circumvention, meaning that they provide no salve for the paradox above. Furthermore, even this limited review mechanism isn't being exercised - the last request for submissions closed in October 2012, and a response from the government is yet to be issued.⁶⁵

Licensing/exception 'gap'

Finally, Australian copyright law is inefficient in that there is a disjuncture between the scope of protection, the incentives and costs of licensing, and the current exceptions and limitations. This results in a situation where many common and socially beneficial uses remain illegal in Australia. This is arguably an unintended consequence of the broad reach of copyright, as the uses in question are not of the sort that would be regulated at all under other IP systems. This 'gap' between what is legally permitted under the Copyright Act and what you can obtain a licence for represents a significant barrier to the dissemination of ideas and the creation of innovative goods and services.

Copyright is unique in the IP ecosystem in that it impacts upon the daily behaviour of private individuals. Unlike other IP systems, it does not operate primarily/exclusively in the commercial space, but reaches across to control private and non-profit uses equally. This, coupled with the rise of digital technologies that require copying just to view a work, means

⁶² *Copyright Act 1968*, s116AN

⁶³ Copyright Regulations 1969, Schedule 10A

⁶⁴ *Copyright Act 1968*, s116AO

⁶⁵ See request for submissions at <http://www.ag.gov.au/Consultations/Documents/Guidance%20material%20-%202012%20TPM%20exceptions%20review200612.pdf>

that Australian copyright law prohibits many uses that copyright owners have no interest or ability to license. These uses often happen within the home, thousands of times a day across the country. They cause little or no harm to the copyright owner and could attract only extremely low (if any) rents. This means that there is little incentive for the copyright owner to provide a licence, or for the government to create a specific exception to permit these uses. Thus painting a mural featuring licensed characters on your child's bedroom wall, recording yourself singing karaoke and printing a poem in your wedding program all cannot be legally undertaken in Australia. Instead, such uses exist in a legal "don't ask don't tell" environment, where the activities remain illegal and we rely on both the good faith of the copyright owners and practicality barriers to stop the infringements from being enforced.

One particularly pertinent example of such a use is the home recording of television shows. This was essentially prohibited under Australian law for 20 years, with it unlikely to be covered by fair dealing and no specific exception to allow it. Yet no market ever arose to license it as administering the licences would have been impractical, and there was little or no harm caused to or benefit to be gained by copyright owners. As is discussed above, in 2006 a specific exception was eventually introduced to permit this use (s111), but it is extremely limited and does not cover common and arguably reasonable behaviours such as lending the video to a neighbour or watching the show simultaneously with recording, a practice common in houses with DVRs.

More concerning is that this effect applies not only to private and domestic activities, but also to many technical processes that impact on institutional and business uses. The principal example here is caching - the storage of information accessed over the internet so it can be more quickly accessed in future. This extremely common activity is essential to the technological operation of the internet and in particular assists with search functionality, reducing costs and improving performance. It is undertaken daily by Australia's ISPs, schools, libraries and any other number of entities. Lateral Economics, in its report for the ADA, estimated the value of search alone for Australian home internet users to be equivalent to approximately \$12.6 billion per year.⁶⁶ Yet it remains illegal in Australia, with no exception to permit it and licensing both impractical and inappropriate.⁶⁷

The same problem affects all other technological processes in Australia that involve the use of copyright material, meaning it is almost certainly illegal to host search services, or most user generated services in Australia. It is also illegal to conduct text and data mining, a growing field of research and business development. This demonstrates the impact the lack of flexible copyright exceptions can have on innovation and business development in Australia. Without fair use or its equivalent, new technological processes remain presumptively illegal until an exception is introduced to permit them - if that occurs at all. The cost impact of this is discussed further below.

What should be considered when assessing prospective changes to copyright, and what data can be drawn on to make such an assessment?

We agree with the Commission that maintaining an appropriate balance between the rights of copyright owners and those of copyright users is key when considering and assessing copyright reform. The importance of balance is also fairly well recognised at an international

⁶⁶ Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012), 19

⁶⁷ An exception to permit caching by schools does exist at s200AAA, but remains problematic due to technological limitation. For more discussion, see CAG's Submission to the ALRC.

level. For example, Article 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets as an objective of all IP rights:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.⁶⁸

However, we would argue that in applying this rule a number of important factors are often overlooked, including the below.

The value of the public domain and the benefits gained from the use of copyright material.

As is discussed above, a rich public domain which includes a large variety of works which can be used for the benefit of society should be the ultimate goal of copyright law. As such, the value of the public domain and the importance of maintaining its health and diversity should be an important consideration in any reform decisions. Several international studies have been conducted which could be referenced in efforts to quantify or otherwise demonstrate the value of the public domain and the use of copyright material. These include:

- WIPO's Scoping Study on Copyright and Related Rights and the Public Domain;⁶⁹
- UK Government's report Copyright and the Value of the Public Domain;⁷⁰
- Rufus Pollock's the Value of the Public Domain;⁷¹
- The Role of Scientific and Technical Data and Information in the Public Domain;⁷² and
- Paul Uhlir's Policy Guidelines for the Development and Promotion of Governmental Public Domain Information.⁷³

The importance of limiting monopolistic rights to ensure that they do not reduce tradeability in the market and derogate the public interest in access to knowledge.

The assumption should be against the expansion of monopoly rights unless strong justification is provided. Any expansions should be supported by cost/benefit analyses and evidence that they are necessary to achieve copyright's aims. Even then, they should always be accompanied by limits and exceptions to ensure an appropriate balance with the rights of individuals and society as a whole. To quote Jessica Litman:

Writers and publishers might bristle at suggestions that copyright should give them as much as they need and no more. Readers and listeners have at least as much reason to resent suggestions that so long as they have some opportunity to read or listen to copyrighted material, the system is working, or

⁶⁸ See https://www.wto.org/english/tratop_e/tratop_e/t_agm2_e.htm

⁶⁹ Dusollier, Severine, Scoping study on Copyright and Related Rights and the Public Domain, World Intellectual Property Organisation, Committee on Development and Intellectual Property (CDIP) Seventh Session Geneva, May 2 to 6, 2011, http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_inf_2.pdf

⁷⁰ Kris Erickson, Paul Heald, Fabian Homberg, Martin Kretschmer and Dinusha Mendis, *Copyright and the Value of the Public Domain: An empirical assessment*, Intellectual Property Office, (2015/44) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415014/Copyright_and_the_value_of_the_public_domain.pdf

⁷¹ Pollock, Rufus, *The Value of the Public Domain*, Institute for Public Policy Research, July 2006, http://rufuspollock.org/papers/value_of_public_domain.ippr.pdf

⁷² Julie M. Esanu and Paul F. Uhlir, *The Role of Scientific and Technical Data and Information in the Public Domain Proceedings of a Symposium*, The National Academies Press, 2003, <http://www.nap.edu/read/10785>

⁷³ Uhlir, Paul, *Policy Guidelines for the Development and Promotion of Governmental Public Domain Information*, United Nations Educational, Scientific and Cultural Organisation (UNESCO), Paris, 2004. <http://otp.unesco-ci.org/training-resource/open-source/policy-guidelines-development-and-promotion-governmental-public-domain>

that they should look for preservation of their liberties to the grace or greed of copyright owners, who will (eventually) do what the market demands.⁷⁴

Examples such as the term extension, orphan works and the TPM provisions show that this has not recently been the case in Australian copyright reform. In fact, the norm at the moment seems to be the other way around, with the assumption being that users rights must be limited as much as possible, subject to complex restrictions and requirements, and adapted to permit new uses only as a last resort.

Whether a licence (compulsory or voluntary) would be available or effective

As is discussed above, in many cases licences simply will not be available or effective to allow the appropriate use of copyright material. In determining whether new rights or exceptions are appropriate, policy makers should always consider:

- whether the market currently does or is likely to provide an appropriate licensing mechanism;
- whether such a mechanism is/would be practical or cost effective; and
- whether publicly valuable uses will still be permitted.

If none of the above are the case, then exceptions should be introduced to ensure the material remains useable.

The law should align as much as possible with reasonable consumer behaviour

Piracy, where a market sale is being maliciously replaced, should not be confused with ordinary and reasonable behaviours of consumers such as the format shifting of goods they own for their own use, or with transformative uses by innovators and other creators. The less the law aligns with common norms, the less likely it is that it will be obeyed. Lawrence Lessig argues that the current strict application of copyright law and its reluctance to acknowledge new technologies or societal norms is effectively choking creativity and making criminals of a generation.⁷⁵ This effect is particularly strong in Australia with its reliance on specific exceptions and lack of an “escape valve” such as fair use to accommodate reasonable and innovative uses.

Drafting Principles

In addition to the above principles for deciding whether reform is necessary, the ADA recommends that the following principles should be followed when drafting new legislation:

- technological neutrality - the technological specificity in the current Australian Copyright Act is bemusing, with references to video tapes and specific caching technologies. Without technological neutrality the law is unable to adapt and rapidly becomes outdated and ineffective.
- readability and simplicity - as discussed above, too many provisions of the Copyright Act are so complex as to make them effectively unusable, eliminating the benefits they were supposed to provide.
- minimal express restrictions - exceptions should be written to provide flexibility, with guiding principles for courts to apply (eg only for private and domestic use) but as few express restrictions as possible (eg not permitting the object to be leant outside the household). Each additional restriction reduces the flexibility of the exception to allow for everyday useage, again preventing it from adapting and making it rapidly obsolete.

⁷⁴ Jessica Litman, 'Lawful Personal Use' (2006-2007) 85 Texas Law Review 1871, 1909.

⁷⁵ See https://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity?language=en

How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance?

As is demonstrated many places in the above document, a broadly applicable, flexible exception, whether fair dealing and/or fair use, is necessary to remedy the current deficiencies in Australia's copyright system. Such an exception would permit innovative uses, encourage creativity and make the system more effective, efficient and, most importantly, adaptable.

A system based on specific exceptions can never be efficient.

Without an open-ended flexible exception Australian copyright law gives rise to regular absurdities, such as it being illegal to use a video player to record television for 20 years, or it still being illegal to undertake caching, text and data mining, or cloud storage.

This absurdity is perhaps best demonstrated by the recent introduction of a specific exception to the Act to support the government's own use of health information under the My Health Record System. The new s44BB of the Copyright Act (approximately 275 words) makes it legal to upload, download and use copyright works for the purpose of their use in the My Health Record system.⁷⁶ This exception sits right next to a similarly specific provision, s44B, which makes it legal to reproduce "on a label on a container for a chemical product ... any writing appearing on an approved label" - added as part of the Agricultural and Veterinary Chemicals (Consequential Amendments) Act 1994. An IP system that needs a new exception every time the government introduces a service that deals with copyright information or to allow use of public safety labelling is clearly not efficient.

Flexible exceptions benefits to business and investment

In a rapidly evolving digital environment, an open-ended, flexible exception is the only tool dynamic enough to respond to new technologies, services and consumer practices. The lack of such an exception is a substantial barrier to innovation and investment in new technologies and businesses in Australia. As the result of our specific copyright system that is unable to accommodate new uses and services, all "new" copyright uses are presumptively illegal in Australia. As has already been discussed, this includes not-so-new uses such as running a search engine, datamining, and even caching in most circumstances, none of which are currently permitted in Australia. This uncertainty in the law makes a real difference in calculating risk when setting up a business that takes advantage of such technologies.

The impact this has on those seeking to launch tech-based businesses is demonstrated by recent developments around cloud storage in Australia. In the 2012 *Optus TV Now*⁷⁷ case, the Full Federal Court of Australia found that a television recording service which allowed private individuals to record programs to a cloud storage system was not covered by s111, and so was illegal in Australia. The court's reasoning, that in 'capturing, copying, storing and streaming back' the program could not be divorced from the making of the copy, throws into

⁷⁶ See Health Legislation Amendment (eHealth) Bill 2015, Schedule 1, s1-2
http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5534_first-reps/toc_pdf/15157b01.pdf;fileType=application%2Fpdf. The amendments also added an equivalent exception for subject matter other than works (s104C). See discussed in the Explanatory Memorandum, pp39-42, http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5534_ems_211631f6-fc59-4890-8ab0-a99237f40152/upload_pdf/503821.pdf;fileType=application%2Fpdf

⁷⁷ *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.

doubt the legitimacy of a wide range of cloud-based (as well as non-cloud based) services.⁷⁸ And indeed, since the Optus TV Now decision, similar cloud-based recording services running in Australia have been suspended.⁷⁹ It's worth noting that this decision not only affects commercial cloud service providers, but schools, libraries and universities, who frequently use services which rely on remotely storage, such as intranets, content/learning management systems and media libraries.⁸⁰

The situation in Australian can be contrasted with that in the US, where the Second Circuit Court of Appeals' 2008 decision, *The Cartoon Network, et al v Cablevision*⁸¹ came to the opposite conclusion, finding that cloud recording and storage of a program at the request of a customer, supplying it back to them for timeshifting purposes and buffering of data (ie caching) were all legal under US law. A recent study by Josh Lerner found that venture capitalist investment in cloud computing firms had increased significantly in the US relative to the EU since the decision:

Our results suggest that the Cablevision decision led to additional incremental investment in U.S. cloud computing firms that ranged from \$728 million to approximately \$1.3 billion over the two-and-a-half years after the decision. When paired with the findings of the enhanced effects of VC investment relative to corporate investment, this may be the equivalent of \$2 to \$5 billion in traditional R&D investment.⁸²

This is supported by Lateral Economics in their *Excepting the Future* report, prepared for the ADA's submission to the ALRC Digital Economy Review. They concluded that investors value reduced risk and uncertainty from copyright limitations and exceptions in Australia at around \$2 billion per year.⁸³ In reaching this figure they draw on recent studies by Booz & Co looking at the impact of changes to copyright law on early stage investment in internet or digital content intermediaries.⁸⁴ Based on a survey of angel investors and interviews with venture capitalists, Booz & Co found that investors were highly averse to regimes that increased the cost of compliance or uncertainty of the size of damages in the event of non-compliance. 80% of US and 87% of European angel investors surveyed by Booz & Co indicated they were uncomfortable investing in an area with an ambiguous regulatory framework.⁸⁵

⁷⁸ Rebecca Giblin, 'Stranded in the Technological Dark Ages: Implications of the Full Federal Court's Decision in *NRL v. Optus*' (2012) 34.9 *European Intellectual Property Review* questions the validity of services like TiVo in light of the Full Federal Court's decision <http://works.bepress.com/giblin/16/>.

⁷⁹ Josh Taylor, *Cloud TVRs stop in wake of TV Now ruling* (May 24 2012) ZDNet <http://www.zdnet.com/cloud-tvrs-stop-in-wake-of-tv-now-ruling-1339338503/>. Beem and MyTVR are two services to have been suspended in the wake of the Optus decision.

⁸⁰ In their 2010 report, *Cloud Computing: Opportunities and Challenges for Australia*, the Australian Academy of Technological Sciences & Engineering (ATSE) noted the potential benefits to be gained from cloud services for education and research. See The Australian Academy of Technological Sciences and Engineering, *Cloud Computing: Opportunities and Challenges for Australia* (September 2010) ii.

⁸¹ *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)

⁸² Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (2012) <http://www.ccia.net.org/CCIA/files/ccLibraryFiles/Filename/000000000642/eu%20cloud%20computing%20white%20paper.pdf>. At 2

⁸³ Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012), 38.

⁸⁴ Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012) 36.

⁸⁵ Booz&Co, *The Impact of US Internet Copyright Regulations on Early-Stage Investment* (2012a) <http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf> and Booz&Co, *The Impact of EU Internet Copyright Regulations on Early-Stage Investment* (2012b) <http://www.booz.com/media/uploads/BoozCo-Impact-EU-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

We note that a number of other countries have recently adopted fair use-style exceptions, including the Philippines, Israel, South Korea and Singapore – all countries that have or are seeking to foster a strong technology and innovation sector.

Fair use encourages economic growth

Fears are often raised that a fair use exception will cause economic damage to Australia's creative and other copyright intensive industries. Yet this is simply not born out by the evidence. As noted in the Hargreaves *Review of Intellectual Property and Growth*:

the creative industries continue to flourish in the US in the context of copyright law which includes Fair Use. It is likewise true that many large UK creative companies operate very successfully on both sides of the Atlantic in spite of these differences in law. This may indicate that the differences in the American and European legal approaches to copyright are less troublesome than polarised debate suggests. But this does not stop important American creative businesses, such as the film industry, arguing passionately that the UK and Europe should resist the adoption of the same US style Fair Use approach with which these firms coexist in their home market.”⁸⁶

Recent international comparative studies also show that the existence of a flexible copyright exception is beneficial to the overall economy. Earlier this year the Lisbon Council and Innovation Economics published *The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity*.⁸⁷ The report considers the limitations and exceptions to copyright in eight OECD countries alongside the economic growth and finds that countries that employ flexible exceptions in copyright have higher rates of growth for their overall economy and their information technology, service and traditional media sectors. They also have higher wages overall and in the communications and technology sectors.⁸⁸ The report also notes other positive outcomes from more flexible copyright systems, such as the promotion of education, independent research, free speech, user-generated content, and text and data mining. Most importantly, the report makes the following conclusion:

Policymakers often perceive the positive externalities and innovations associated with exceptions to copyright as a trade off with the economic growth driven by strong intellectual property protection. Instead, the evidence suggests that broad and flexible exceptions to copyright embedded within a strong intellectual property framework may be the best way to achieve both simultaneously.⁸⁹

Similar results can be seen from the early results of an ongoing study by American University, which examines how a country's copyright exceptions affect its economic outcomes.⁹⁰ In its preliminary stages, the study compares the experiences of firms, categorized by industry, in countries with and without 'fair use style' copyright exceptions. It uses a dataset with 166,920 observations over 30 years from 5,564 firms in 91 countries, including the seven countries in the world with fair use – the U.S., the Philippines, Singapore,

⁸⁶ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), p.45

⁸⁷ Gilbert, Benjamin, *The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity*, Lisbon Council 2015, <http://www.lisboncouncil.net/publication/publication/122-the-2015-intellectual-property-and-economic-growth-index.html#sthash.Bh4kCsTY.dpuf>

⁸⁸ Gilbert, *Ibid*, pp.3-4

⁸⁹ Gilbert, *Ibid*, p.4

⁹⁰ Palmedo, Mike, Firm Performance in Countries With & Without Open Copyright Exceptions, Infojustice.org, May 2015, <http://infojustice.org/archives/34386>

Israel, Taiwan, Malaysia, and Korea. It has found that adoption of fair use style exceptions is associated with positive outcomes for these firms, and that this result doesn't change between user sectors (ie dependent on copyright exceptions) and rightsholder sectors (ie dependent on copyright protection) showing that "both internet firms and content providers can benefit in fair use systems."⁹¹

Non-economic benefits

Looking beyond purely economic assessments, a fair use exception would give confidence to libraries, schools, universities and other social enterprises to undertake public interest uses in a way they do not currently. According to reports from the library and education sectors, the s200AB "flexible use" exception isn't being used because of confusion and uncertainty as to its scope and impact.⁹² A fair use exception has been suggested by many quarters as a preferable option for introducing flexibility for these important user groups. As Policy Australia found in their report for the ADA's submission to the ALRC report:

It does appear from the evidence provided in consultations that despite their generally risk averse nature, educational institutions, libraries and cultural bodies would be more likely to use an exception that required them to engage in a fairness risk assessment. This, in our view, is significant. There would be little point seeking to replace s200AB with a provision such as fair use if the institutions intended to benefit from such an exception were no more likely to use it than they have been to use s200AB. Our consultations suggest that this would not be the case.⁹³

Policy Australia concluded that Australian cultural and educational institutions would fare better under a provision incorporating concepts of "fairness". The concept is already familiar to the Australian population and courts through the fair dealing exceptions, with many decisions providing guidance as to its meaning. It is also more natural and intuitive than the three step test used by s200AB. Most importantly, it is not a "free for all" exception, but provides a balanced approach which requires the court to take into account the rights of copyright owners, in deciding whether a use is permitted. Those uses that are fair will be allowed, and those that are not will not - a significant improvement on the current situation.

Fair use is also the only way to cure the "licensing gap" described above, in which ordinary uses and socially beneficial transformative uses that do not harm copyright owners remain illegal because they do not provide enough incentive for a licence but are simultaneously unable to attract specific exceptions. As noted in the Hargreaves *Review of Intellectual Property and Growth* countries without a fair use doctrine have "witnessed a growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people."⁹⁴ Most ordinary people don't even know about this mismatch – those that do are likely to see it as evidence that copyright law is out of touch and not worth obeying. Fair use "keeps copyright closer to the reasonable expectations of most people and thus helps make sense of copyright law."⁹⁵

As the system currently sits in Australia, courts do not have the flexibility to find uses they determine to be reasonable, or "fair", to be legal. At the same time, political realities -

⁹¹ Palmedo, *Ibid*

⁹² See submissions to the Inquiry by the ALCC and the Council of Australian University Libraries

⁹³ Policy Australia 'Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?' (October 2012), p.10 http://www.alrc.gov.au/sites/default/files/subs/213.org-attachment_adaandalcc.pdf

⁹⁴ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 43.

⁹⁵ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 43.

including pressure, cumbersome processes and plain old inertia - mean that it can take decades for new exceptions to be granted, if they are ever granted at all. The result is that copyright owners have the power to decide what uses should be permitted, without the public interest oversight that should always accompany a monopoly right. Fair use puts the decision-making power back in the hands of our judiciary to determine the appropriate application of our copyright law.

Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators? Does the degree of certainty vary for businesses relative to individual users?

An argument is often run by opponents to the adoption of fair use in Australia and internationally that it is too vague. Some of these parties will also argue that fair dealing exceptions are too vague and, in the extreme, that only licensing can provide certainty. The ADA believes strongly that this argument is highly flawed and that its central tenets are incorrect. However, we feel that these arguments have been dealt with adequately by the ALRC, which examined the issue at some length and found that “fair use is sufficiently certain and predictable, and in any event, no less certain than Australia’s current copyright exceptions.”⁹⁶ We also endorse the submission to the ALRC by US academics Gwen Hinze, Peter Jaszi and Matthew Sag, which refutes arguments that fair use is uncertain, taking the Australian context into account.⁹⁷ In particular, we support their endorsement of the language of ‘predictability’ rather than ‘certainty.’ Certainty lends itself to an interpretation that requires absolute consensus on its application to contested facts in every individual case – something that is rarely available in the application of legal principles. Predictability is a more achievable and useful in practice, as it emphasises the need for a fairly coherent set of principles that lend themselves to forward-looking application.

We are, however, concerned about another source of uncertainty that currently exists in the Australian Copyright Act - the lack of clarity that arises out of the complexity of the existing provisions in the Act. As is discussed above, the statutory licences, the library and archive exceptions, even the private copying exceptions, are extremely complex and difficult to apply. People trying to apply these provisions are often left less certain whether their use is covered than they would be if a simpler exception applied. As the ALRC put it “a clear principled standard is more certain than an unclear complex rule.”⁹⁸

This uncertainty due to complexity impacts individuals and small businesses/institutions disproportionately to larger organisations. When the user in question is an individual confusion over the scope of an exception will often lead to an intentional or unintentional breach, such as when a person copies purchased DVDs onto their computers to watch later despite the fact that they are not “videotapes” as required by s100AA of the Act. The effect of this uncertainty on institutions, which are naturally and necessarily conservative, is frequently to prevent them from using the exceptions at all. This is particularly the case for smaller institutions that do not have the resources to obtain expert advice on the exceptions and/or set policies and industry standards.

In their submission to the ALRC the National Library of Australia (NLA) provides a number of examples of document requests which were not fulfilled because of uncertainty as to whether

⁹⁶ ALRC Copyright and the Digital Economy (2014) para 41 at <http://www.alrc.gov.au/publications/4-case-fair-use/fair-use-sufficiently>.

⁹⁷ Hinze, Jaszi and Sag, The Fair Use Doctrine in the United States — A Response to the Kernochan Report, July 26, 2013 http://www.alrc.gov.au/sites/default/files/subs/483._g_hinze_p_jaszi__m_sag.docx

⁹⁸ ALRC Copyright and the Digital Economy (2014) para 4.117 at <http://www.alrc.gov.au/publications/4-case-fair-use/fair-use-sufficiently>

they were covered by s49. We highly recommend that the Commission view this submission in its entirety. Some examples include:

Request for 1983 recipe book for cooking at home

The work: Eating for immortality. Sydney: Raja Yoga Centre, 1983. 128 p.: ISBN 0959227105.

The request: Request for copy of entire work. Requester note: "To cook at home. I just want all the recipes, especially the one for tomato chutney".

Requester declaration: I will use the copy only for the purpose of research or study, I will not use it for any other purpose and declare that it has not previously been supplied by an authorized ... Request received 27/05/2012. National Library request no. CDC-10334145.

A 1984 Navy map to display at home

The work: Australia-east coast Queensland, Frankland Islands to Lizard Island. Author : Australia. Royal Australian Navy. Hydrographic Service. [Sydney]: Hydrographic Service, R.A.N., 1984. 1 map : col. ; 67 X 113 cm.

The request: Request for copy of entire work. Requester note: "Framing and display in my house". Requester declaration: I will use the copy only for the purpose of research or study, I will not use it for any other purpose and declare that it has not previously been supplied by an authorized ... Request received 10/11/2011. National Library request no. CDC-10295611.⁹⁹

Both of these were rejected because of questions as to whether the user's purpose qualified as "research and study." Thus we see that uncertainty over the scope of the licences leads the institution to reject the request. This is a frequent occurrence, with the library reporting that of the 767 requests for copies of sheet music they received in 2011/2012, they declined to supply 358 primarily due to this uncertainty.¹⁰⁰ They also provide examples of requests they believe were incorrectly rejected, due to the officers' uncertainty in applying the library and archive exceptions. Where the institutions do attempt to make use of the exceptions, the complexity of the provisions frequently leads to significant compliance costs, which has its own chilling effect.

To be efficient and effective in the modern era, what (if any) changes should be made to Australia's copyright regime?

The ADA supports Recommendations 4-16 and 20 of the ALRC Review, including:

- the introduction of fair use in Australia;
- the streamlining and modernisation of the educational exceptions and statutory licences - for more on this, see the submission of CAG;
- the streamlining and modernisation of the library and archive preservation exceptions, to allow best practice preservation of all collection materials in all institutions;
- changes to facilitate the use of orphan works, whether through a limitation of liability (as recommended by the ALRC) or direct exception;
- legislative changes to make it clear that contracts cannot overrule copyright exceptions.

Furthermore, we recommend the following additional amendments:

- the ending of perpetual copyright in unpublished works;

⁹⁹ National Library of Australia, 2012, http://www.alrc.gov.au/sites/default/files/subs/218.org_national_library_of_australia.rtf

¹⁰⁰ National Library of Australia, Ibid

- the streamlining and modernisation of other library and archive exceptions, to remove unnecessary restrictions and simplify their application;
- the reshaping of Australia's anti-circumvention provisions to limit them to technologies that prevent copyright infringement, and to allow circumvention for non-infringing purposes - the ability to do this may be limited by international agreements. At a minimum, we recommend the introduction of more exceptions to the anti-circumvention provisions and an improved process for establishing them;
- the extension of the current ISP safe harbours to other service providers – see discussed further below; and
- a prohibition on, or clear policy towards, future extensions of the copyright term.

How does Australia formulate its position on IP policy in the context of international agreements? What evidence and analysis informs decision-making and negotiating positions along the way and is this adequate and sufficiently transparent?

To what extent does the work of WIPO and the WTO impact on Australian policy settings? Are international institutions being sidelined or marginalised in an increasingly plurilateral or bilateral negotiating process?

WIPO and the WTO are still extremely influential on Australian copyright law. They provide the baseline for the whole global copyright system and control many aspects of our law and impose limits on domestic lawmakers, including through the prohibition of formalities and the prescription of the three step test.

Nevertheless, the details of domestic copyright law are increasingly being influenced by bi- and plurilateral agreements such as the Australian US Free Trade Agreement (AUSFTA) and the Trans-Pacific Partnership (TPP). There is little transparency in the negotiation of these agreements, and where consultation does occur it is frequently biased towards private industry, without including the public sector (eg schools and libraries) or civil society in discussions. They include extremely prescriptive provisions in relation to copyright, with mandatory requirements surrounding copyright owners' rights which go far beyond what would traditionally be expected of free trade agreements. User exceptions, in contrast, are encouraged but optional. Not only do such agreements often require their signatories to make significant changes to their copyright law,¹⁰¹ they also lock it down, potentially preventing future changes that would be advantageous for the domestic economy. Furthermore, the more recent agreements tend to include investor-state dispute settlement (ISDS) clauses, which open future copyright reform up to challenge by commercial companies.

The tide may be turning slightly in this matter, with the delivery of the Marrakesh treaty, the first WIPO treaty to focus on user rights. Similarly, the TPP includes language supporting the adoption of exceptions and limitations for users which has been absent from previous agreements. To quote the USTR, the TPP contains "an obligation to promote balance in copyright systems through exceptions and limitations to copyright for legitimate purposes, such as criticism, comment, news reporting, teaching, scholarship, and research."¹⁰² The actual language in the treaty is flexible and will be open to interpretation, but there is no question that it strengthens countries' rights (and motivations) to include balancing provisions

¹⁰¹ 70 pages of changes were made to the Australian Copyright Act 1968 in the *United States Free Trade Agreement Implementation Act 2004*, Schedule 9

¹⁰² United States Trade Representative, TPP Intellectual Property, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Intellectual-Property.pdf>

in their domestic implementation, and should help to defuse any potential ISDS challenge to new exceptions or limitations.

Nevertheless, the ADA strongly advocates for the implementation of a more rigorous and transparent assessment process before Australia commits to treaties that include detailed intellectual property chapters. We support the following recommendations of the government's Competition Policy Review (the Harper Review):

A separate independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded.¹⁰³

The ADA (in collaboration with the ALCC) provided detailed comments on Australia's treaty making process to the *Senate Standing Committee on Foreign Affairs, Defence and Trade References Committee Inquiry into The Commonwealth's treaty-making process*. Our submission included 16 recommendations designed to produce a more informed approach, greater stakeholder engagement; improved oversight; and effective implementation. Our complete submission is available on the Committee's website.¹⁰⁴

Is the role expected of ISPs a practical option?

The most important tenet in determining the role that ISPs should play in combating copyright infringement is that these bodies should not be required to take on the role of the courts, acting as judge and jury as to whether a particular use is infringing. Neither should rightsholders be given this power - uses can only be determined to be infringing by a court of law.

Importantly, this tenet must be extended not only to ISPs but to other service providers such as universities, libraries and the hosts of major user generated platforms. Of particular concern is the fact that Australia's service providers are at a disadvantage internationally, in that our notice and safe harbour provisions do not extend the same protections to them as are granted in the US. This is the result of what we believe to be an error made during the implementation of the AUSFTA. As part of this implementation we were required to introduce a "safe harbour" scheme - a system that aims to:

- give rights holders an efficient way to seek removal of infringing content;
- reward online service providers for collaborating with rights holders by granting legal protections under the scheme; and
- provide protections for consumers who wish to challenge incorrect claims of copyright infringement.

In the US this scheme applies to all "service providers" (ie, all providers of internet services, including schools and universities, libraries, online platforms like YouTube, Facebook and

¹⁰³ Harper, Anderson, McCluskey and O'Bryan, Competition Policy Review Final Report, March 2015, Recommendation 6, p.41

¹⁰⁴ The full submission is available at http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Submissions

Twitter, commercial ISPs like Telstra and iiNet and search engines like Yahoo! and Bing), a position which is replicated in the text of the AUSFTA. In contrast, Australia limited its scheme to the narrower term “carriage service providers” (ie, only to commercial ISPs). This mistake means that:

- Australian schools, universities and libraries are exposed to unintended and unnecessary legal risk when providing internet access to staff, students and library users.
- Commercial ISPs like Telstra receive legal protection for complying with copyright infringement notices, but there is no equivalent protection for schools, universities, libraries and other online service providers such as search engines and social media platforms. This risk is not merely theoretical - in 2003, music companies commenced proceedings against universities alleging that their IT systems had been used to infringe copyright.¹⁰⁵
- Australia is a high-risk environment for hosting content, when compared to countries with safe harbours. This puts Australia out of step with major trading partners such as the US, EU, Singapore and Korea, and makes Australia a less attractive place to start up an internet company;
- Australian rights holders do not have access to a localised and universally applicable anti-piracy notice and takedown system for addressing local copyright infringements; and
- Australian consumers do not have any local legal protections against erroneous notice and takedown claims.

There have been successive government consultations on whether this position should be remedied since 2005 and as recently as last year, in its Online Copyright Infringement Discussion Paper, the government acknowledged that the broader category of online service providers, including universities and online search engines "should be captured by the safe harbour scheme".¹⁰⁶

This simple amendment is long overdue and is critical to Australia’s digital future.

¹⁰⁵ See discussed at <http://www.theguardian.com/business/2003/mar/28/students.highereducation;http://www.smh.com.au/articles/2003/08/29/1062050658496.html>

¹⁰⁶ See consultation at <https://www.ag.gov.au/Consultations/Documents/OnlineCopyrightInfringement/FINAL%20-%20Online%20copyright%20infringement%20discussion%20paper%20-%20PDF.PDF>