

**Productivity Commission, *Intellectual Property Arrangements* Inquiry**

**Submission in response to Issues Paper (October 2015)**

**Kimberlee Weatherall,<sup>\*</sup> Isabella Alexander<sup>\*\*</sup> and Michael Handler<sup>\*\*\*</sup>**

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This two-part Submission is directed to two broad areas of the Productivity Commission's *Intellectual Property Arrangements* inquiry:

Part 1: The Commission's proposed approach and the copyright regime (in particular, as it relates to exceptions to copyright infringement); and

Part 2. Treaty-making and IP.

The three of us have extensive experience teaching and researching in intellectual property law, especially copyright law. We are, in addition, creators of copyright works and educational users of copyright materials in the course of our teaching, research and publishing. This Submission draws on our experience with, and our published work on, various aspects of Australian and international copyright law.

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<sup>\*</sup> Associate Professor, Sydney Law School, University of Sydney.

<sup>\*\*</sup> Associate Professor, Faculty of Law, University of Technology Sydney.

<sup>\*\*\*</sup> Associate Professor, Faculty of Law, University of New South Wales.

## Part 1: Submission in relation to the law of copyright

### 1.1 Scope of this submission

We endorse the overarching objective identified by the Commission that the IP system should operate in such a manner as to **maximise the well-being of Australians**. While it is true that Australian copyright law forms part of a complex, global network which gains value from both the import and export of creative and cultural works, it must not be forgotten that there are very good reasons to encourage *local* creativity and innovation. Copyright law (along with other legal instruments such as the *Broadcasting Services Act 1992* (Cth), regulations on content standards, etc) must reflect society's decisions about access to knowledge, distribution of cultural resources, and the relative values of local and global creativity, information and innovation. These are decisions that ought to be made by reference to Australian social, cultural and economic interests, first and foremost.

In relation to copyright law, we submit that there are a number of impediments which prevent the system from operating in the most effective, efficient, adaptable and accountable manner possible. In particular, in Part 1 we wish to make two broad submissions:

- The *Copyright Act 1968* (Cth) is overly complex, opaque, contradictory and often incomprehensible (even to those with expertise in the field) (Part 1.2); and
- The existing exceptions are seriously deficient and should be reformed by replacing many of them with an open-ended fair use exception, in line with the Recommendations made by the Australian Law Reform Commission in Report No 122, *Copyright and the Digital Economy* (2013) (Part 1.3).

### 1.2 The over-complexity and incoherence of Australian copyright law

Complaints about complexity and incoherence in copyright law are not new. In 1878, a Royal Commission appointed by the British government to investigate copyright law called it 'wholly destitute of any sort of arrangement, incomplete, often obscure, and even where it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it'.<sup>1</sup> Over a century later, the problem has only worsened. In 1998 and 1999, the Copyright Law Review Committee was invited to review and simplify the *Copyright Act 1968*, producing two Reports containing some fairly radical proposals, which were never acted upon.

Complexity is not the problem *per se*. Copyright law will always be complex, seeking as it does to embrace a range of different interests and objectives, many of which can be reconciled only after significant compromise, if at all. The problem lies in a level of complexity which leads to internal contradiction and consequent incoherence in the statutory and regulatory schemes. It flows from an approach to copyright law-making which has been largely the product of deal-making between interest groups, overlaid in recent decades by the imperatives of complying with international treaties and the perceived need to respond as rapidly as the legislative process allows to

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<sup>1</sup> John James Robert (Lord) Manners, 'Royal Copyright Commission on Laws and Regulations relating to Home, Colonial and Foreign Copyrights' (C (2<sup>nd</sup> series) 2036, 1878), vii.

technological change, rather than the outcome of thoughtful, holistic, forward-looking and principle-driven law reform.<sup>2</sup>

We submit that the current *structure and formulation of copyright law* has led to the law being insufficiently **effective, efficient, adaptable** or **accountable**. The *Copyright Act* is replete with examples of poor draftsmanship, leading to confusion and uncertainty. A few examples will suffice (although it should not be pretended that this is close to being a comprehensive list of the problems with the drafting of the Act):

- Copyright law is frequently said to be about ‘authors’ (ie, human creators) and the ‘works’ they create.<sup>3</sup> However, these concepts are defined in the Act in unhelpful and/or conceptually empty ways. ‘Author’ is defined in s 10(1) only in relation to photographs, while a ‘work’ is defined as ‘a literary, dramatic, musical or artistic work’ (drawing a distinction with ‘non-authorial’ subject matter, such as sound recordings and films). Later in the Act, however, in the context of a provision about the denial of copyright protection to citizens of countries that do not give adequate protection to Australian subject matter, ‘work’ is defined to include ‘a sound recording or a cinematograph film’ and ‘author’ is defined for such purposes as ‘the maker of the recording or film’ (s 185), thus contemplating a non-human author of such subject matter. For the purposes of moral rights only, ‘work’ includes a ‘cinematograph film’, and the ‘author’ for these purposes is deemed to be ‘the director of the film, the producer of the film and the screenwriter of the film’ (s 189), even though none of these parties need to make the sort of contribution that is functionally equivalent to that which would be needed to give rise to ‘authorship’ under other parts of the Act.
- Similarly, ‘infringing copy’ is defined in s 10(1) and ‘non-infringing copy’ is defined in ss 10AA, 10AB and 10AC, but numerous other provisions set out ways in which non-infringing copies can turn into infringing copies. Further, the interaction between the restrictions in s 243B(2) and s 111B(2), the definition of ‘infringing copy’ in s 10(1) and the exclusions for legitimately imported material is difficult to interpret.
- The various definitions of ‘infringing copy’ are part too of Australia’s needlessly complex parallel importation provisions. In order to determine whether an act of import infringes copyright, one must navigate quite literally pages of legislation dotted throughout the Act and acquire an understanding of both Australian and overseas law and ownership of copyright. Relevant provisions include:
  - Sections 37 and 102, which makes it an infringement to import an article for certain purposes without the licence of the copyright owner, *if* it would be infringement for the importer to make the article;
  - Exceptions in ss 44A, 44D, 44E, 44F, 112A, 112C, 112D and 112DA that contradict s 37 in that they allow certain imports of ‘non-infringing copies’ (the details of which in some cases require one to work out the state of copyright law in the country of export at a certain time); and
  - Sections 10AA, 10AB and 10AC, which define non-infringing copy.

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<sup>2</sup> See further Kimberlee Weatherall, ‘Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia’s Recent Copyright Reforms’ (2007) 31(3) *Melbourne University Law Review* 967.

<sup>3</sup> *IceTv Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at [22], [24] (French CJ, Crennan and Kiefel JJ).

- Another area of copyright law which leaves much to be desired in terms of clarity and consistency is the protection for performers introduced in 2005. Here, the legislature's determination to distinguish between the protections for audio-visual performances and simple audio performances, the limitation of rights to apply solely to 'live' performances and the approach of dividing ownership of the rights between performers and producers has led to a labyrinthine regime of performers' rights.<sup>4</sup>
- The criminal measures in the *Copyright Act* are also confusing and overbroad. One of the more bizarre provisions is s 203D, which makes it an offence for a person (presumably an archivist or librarian) to fail to arrange their copyright declarations in alphabetical order. Another is s 132AL(2) which creates an indictable offence for behaviour which could include owning a computer and intending to use it to make unauthorised copies of copyright works (ranging from running unlicensed software to making a video for friends with a pop song backing to forwarding an email). It gets worse: consider s 132AL(5), under which a person commits a *summary* offence if:

- (a) the person possesses a device; and
- (b) the device is to be used for copying a work or other subject-matter [the fault element for this is recklessness as to whether the device will be used for copying]; and
- (c) the copy will be an infringing copy and the person is negligent as to that fact; and
- (d) copyright subsists in the work or other subject-matter at the time of the possession and the person is negligent as to that fact.

Note that no commercial intent (intent to sell or distribute copies commercially) is required for liability under this provision. Section 132AL(5) creates a criminal offence (albeit summary) which could readily be applied to most people who possess general purpose computers and laptops, depending on how the law relating to criminal recklessness and negligence is applied (and there is no guidance in the *Act*, or its legislative history, on how either standard is expected to be applied in the context of IP cases). While prosecution of such offences is highly unlikely to occur often, the point is that these criminal provisions are both unclear and extensive in their potential application.

Our essential point is that if copyright law is to be effective, efficient, adaptable or accountable, clearer drafting of the entire *Act*, involving removing uncertainties and inconsistencies, is needed. This is to say little about whether more fundamental reform is needed, an issue to which we now turn.

### **1.3 The ALRC's recommendations in favour of fair use should be adopted**

Our second broad submission in this Part is that the current Australian approach to *copyright exceptions* is neither effective, efficient, adaptable nor accountable. Adopting the ALRC's Recommendations to introduce a 'fair use' defence to copyright infringement, to introduce a list of illustrative purposes, and to repeal a large number of current exceptions (as set out in its Report No 122 (2013)) would be the best way to reform copyright law in line with these principles and to achieve the goal of ensuring copyright law maximises the well-being of Australians.

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<sup>4</sup> Kimberlee Weatherall, 'Pretend-y Rights: On the Insanely Complicated New Regime for Performers Rights in Australia and how Australian Performers got Ripped Off' in Fiona Macmillan and Kathy Bowrey (eds), *New Directions in Copyright Law, Vol 3* (Edward Elgar, 2007).

In this part of the submission we draw on the evidence provided by Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall in their joint Submission 278 to the ALRC's Issues Paper 42 and Submission 716 to the ALRC's Discussion Paper 79 in the ALRC's inquiry into *Copyright and the Digital Economy*.<sup>5</sup>

### 1.3.1 The current approach

#### (a) The current approach to copyright exceptions is not effective

There are a number of reasons why we believe that the current system of copyright exceptions is not operating as effectively as it could be in terms of encouraging additional IP, providing incentives to ensure active dissemination of copyright works and promoting the dissemination of innovation and ideas. First, the fair dealing exceptions are drafted in such a manner that a considerable amount of activity involving 'research', 'study', 'criticism', etc is not excluded from liability. This is explained in considerable detail in Submission 278, pp 12-24. Likewise, the provisions designed to allow certain types of dealings with artistic works are drafted with such limitations as leave considerable gaps in protection and with incoherent inconsistencies (see Submission 278, pp 32-34).

Second, notwithstanding the existence of over 70 specific exceptions, it is still possible to point to a great number of activities which provide benefit to the public, do not harm copyright owners, but which are prohibited or discouraged under the existing regime. The ALRC identifies a number of these in its Report No 122 (at pp 102-4).

#### (b) The current approach to copyright exceptions is not efficient

The current approach to drafting copyright exceptions on a case by case basis is not efficient. It is far from desirable to continue making copyright law on a reactive basis that requires user groups to identify specific uses that they should be entitled to make and then to invest time and resources in convincing the legislature of the need for such uses to be made exceptions to infringement, and then for the legislature to invest time and resources in attempting to draft, revise and re-draft appropriately worded provisions. History has demonstrated, time and again, that this approach leads to lengthy delays between a new use emerging and legislation being passed to address it, and that as technological change gathers apace, the time lag becomes ever more problematic. For example, (as the ALRC Final Report noted at p 96) a copyright exception permitting time shifting was not enacted until 22 years after it was found to be a fair use in the US, notwithstanding the fact that the majority of Australians were taping their favourite television shows to watch later, in breach of the law. Likewise, Australians had been (illegally) copying music onto their (legally purchased) iPods for many years before a format-shifting exception was introduced in 2006.

History also demonstrates the difficulties attendant upon the need to draft specific exceptions in such a way that they can appropriately reflect the compromises hammered out by interested parties. The previously mentioned format-shifting exception found in s

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<sup>5</sup> Also available at <http://www.alrc.gov.au/sites/default/files/subs/278.burrellhandlerhudsonweatherall.pdf> and [http://www.alrc.gov.au/sites/default/files/subs/716.org\\_r\\_burrell\\_m\\_handler\\_e\\_hudson\\_k\\_weatherall.pdf](http://www.alrc.gov.au/sites/default/files/subs/716.org_r_burrell_m_handler_e_hudson_k_weatherall.pdf).

109A was drafted in such a narrow and technology-specific manner that, only nine years later, it is already outdated.<sup>6</sup> Similarly, s 200AB, the section inserted into the *Copyright Act* in 2006 to allow greater flexibility of copying materials to cultural and educational institutions included the three-step test language of the TRIPS Agreement as a mechanism to break a deadlock between negotiating parties, but the uncertainty of the drafting language rendered the provision a failure as very few cultural institutions have ever relied upon it.<sup>7</sup>

Identifying such uses and drafting specific exceptions to cover them is not an efficient use of the resources of user and consumer groups, rightholders, or of Parliament. Moreover – and this is in some ways the fundamental problem with the Anglo-Australian model of exceptions – it is simply not possible or realistic to expect policy makers to be able to identify and draft *ex ante* all of the precise circumstances in which exceptions should be available (see Submission 278, p 35).

It is sometimes argued by those opposing the introduction of fair use that it will be inefficient as it will lead to uncertainty on two bases: first, because detailed, closed-ended provisions (rules) are more certain than open-ended, general provisions (standards); and second, because Australian courts, lawyers and stakeholders are accustomed to the current exceptions and how they operate. However, we submit that it is far from the case that the current exceptions provide certainty on either basis.

In relation to the first argument, the current operation of many of the exceptions is far from certain. Many of them have significant drafting problems and the extraordinarily detail in which they are expressed has not resulted in precision. Numerous examples are set out in Part 2 of Submission 276. Others are not hard to identify. An example is s 40, the highly detailed fair dealing exception for research and study. On its face, s 40 would seem to offer a great deal of certainty. Yet this is far from the case. Academics and students frequently make copies of journal articles in the course of pursuing research and study; s 40(3) is therefore a welcome release from potential liability if they choose to make copies rather than take longhand notes while sitting in a library. What, however, is one to make of the rider in s 40(4) which provides that subs (3) does not apply if that academic or student wishes to make a second copy of an article for a different course of study or different research? According to the Explanatory Memorandum, the section ‘prohibits the reproduction of large portions of unrelated articles from a periodical publication.’ But it is not clear why should a student enrolled, say, in a joint BA/LLB be unable to make copies should it so happen that they find a journal with articles relevant to both their BA and their LLB courses (the BA and LLB potentially being ‘different courses of study’ within the meaning of s 40(4)). Nor is it clear why should an academic working concurrently on several research projects be able to copy only one article from a journal, even if they should find several of use to different projects in that same publication, but be able to copy as many as they like from the same journal if relevant to the same project. The Explanatory Memorandum states: ‘New sub-s 40(4) is intended to reduce the uncertainty associated with the meaning of the

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<sup>6</sup> For further examples, see Catherine Bond, ‘“There’s Nothing Worse than a Muddle in All the World”: Copyright Complexity and Law Reform’ (2011) 34 *University of New South Wales Law Journal* 1145.

<sup>7</sup> ALRC Report No 122, p 270 and the Submissions referred to therein.

term “different subject-matter” used in previous sub-s 40(4).’ Whether uncertainty has been removed is debatable; that illogic has been introduced seems incontrovertible.

In relation to the second argument, while there have been few Australian judicial decisions interpreting the provisions, those that have done so have not furthered the cause of certainty. One example is the relationship between the statutory licensing scheme for educational institutions and the fair dealing defence for research or study (s 40). In *Haines v Copyright Agency Ltd*,<sup>8</sup> the Full Federal Court stated that the Act required a distinction to be drawn between an institution making copies for teaching purposes and copies made by individuals concerned with research or study, without explaining the nature of the overlap, if any, between the two.<sup>9</sup> The subsequent decision of *De Garis v Neville Jeffress Pidler Pty Ltd*<sup>10</sup> interpreted the section as applying only where the research or study was being conducted by the person carrying out the act of reproduction, with the dual effect that intermediaries such as librarians or copying services cannot rely on the defence and nor can a publisher publish the product of the research in reliance on the provision.<sup>11</sup> There is further uncertainty as to whether the defence would apply to commercial research or research with a partially commercial objective.<sup>12</sup>

While the *Copyright Act* provides a list of factors to be taken into account for a finding of fairness in relation to research and study, no such guidance is provided in relation to the other fair dealing exceptions. Not only does this make little sense, but the Australian courts have provided little guidance on how ‘fairness’ would be determined for the purposes of criticism, review, news reporting and so on. In *The Panel Case*, neither the judge at first instance,<sup>13</sup> nor the Full Court of the Federal Court,<sup>14</sup> articulated a clear set of principles for applying the exceptions for criticism or review or news reporting, instead applying them on an *ad hoc* and impressionistic basis (and in the process coming up with different decisions in relation to a number of the same extracts).<sup>15</sup>

### **(c) The current approach to copyright exceptions is not adaptable**

Many of the current exceptions are drafted in an inflexible and technology specific way, with the result that they are quickly becoming redundant. The chief culprits here are the private copying exceptions (found at ss 43C, 47J, 109A, 110AA and 111), and the problems are set out in detail in Submission 278, pp 26-28. Similar problems can be found in the exceptions

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<sup>8</sup> (1982) 64 FLR 184.

<sup>9</sup> *Ibid* 191 (Fox J).

<sup>10</sup> (1990) 37 FCR 99.

<sup>11</sup> See further Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005), 117-8.

<sup>12</sup> See Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Right of Copyright Owners* (AGPS, 1998), [4.18].

<sup>13</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235.

<sup>14</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417.

<sup>15</sup> See further Michael Handler and David Rolph, “‘A Real Pea Souper’: *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’ (2003) 27 *Melbourne University Law Review* 381.

for temporary copies (ss 43A, 111A, 43B, 111B, see Submission 278, pp 24-26), the exception allowing reproduction of computer programs to make interoperable products (s 47D, see Submission 278, pp 28-31 and Submission 716, pp 15-16), and the exception in favour of back up copies of computer programs (s 47C, see Submission 276, pp 31-2). The Copyright Advisory Group – Schools point to other illogical technological distinctions in Submission 231 to the ALRC’s Issues Paper 42, such as the fact that the current exceptions allow a teacher to write a quote from a book on a blackboard but not on an interactive whiteboard.<sup>16</sup>

**(d) The current approach to copyright exceptions is not accountable**

It is now the case that a number of official, government appointed bodies both in Australia and elsewhere in the Commonwealth have reviewed the state of copyright law and recommended the introduction of a more flexible approach to copyright exceptions. In 1998, the Copyright Law Review Committee recommended the adoption of fair use, as did the Australian Law Reform Commission in 2014.<sup>17</sup> Time and again users have made the case that reform is required,<sup>18</sup> and time and again their evidence and the recommendations of the bodies that accepted such evidence have been ignored.

Furthermore, it is our submission that asking users to identify permissible uses on a case by case basis is contrary to the role which exceptions ought to play in copyright law. As the Productivity Commission observes, IP in general (and by implication copyright law in particular) exists to maximise the well-being of Australians and in so doing must promote the creation and dissemination of innovation and ideas. Continuing to grant owners expansive and expanding rights over every possible use of their works assumes exclusive control as a default option and monetary reimbursement as the norm. This in turn relegates other important public interests, such as those of education, research and flourishing cultural institutions, to a secondary role. It fails to recognise the key importance of access to cultural, educational and creative material for the creation of further works and freedom of creative expression.

It is also not satisfactory for owner groups, when confronted by actual or hypothetical examples of copyright conflicting with other important rights or interests, or even everyday uses of works (such as forwarding an email or copying an image from the internet onto a party invitation), to counter that they would never sue anyone in such a situation. Maintaining a system in which almost everyone is an infringer by default and their liability to legal action depends solely on the goodwill, laxity or priorities of a copyright owner cannot

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<sup>16</sup> See [http://www.alrc.gov.au/sites/default/files/subs/cag\\_schools\\_submission\\_-\\_ip\\_42\\_-\\_corrected.pdf](http://www.alrc.gov.au/sites/default/files/subs/cag_schools_submission_-_ip_42_-_corrected.pdf), Part 2.

<sup>17</sup> See also, in the UK, *Gowers Review of Intellectual Property* (December 2006), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228849/0118404830.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf); and in Ireland, Copyright Review Committee, *Modernising Copyright* (October 2013), <https://www.djei.ie/en/Publications/Publication-files/CRC-Report.pdf>.

<sup>18</sup> Other Submissions to the ALRC Inquiry in favour of fair use included: Internet Industry Association, Submission 744; NSW Government and Art Gallery of NSW, Submission 740; Optus, Submission 725; ACCC, Submission 658; Telstra Corporation Limited, Submission 602; Google, Submission 600; Intellectual Property Committee, Law Council of Australia, Submission 284; Electronic Frontiers Australia, Submission 258; Universities Australia, Submission 246; Australian Digital Alliance and Australian Libraries Copyright Committee, Submission 213.



be satisfactory either as a matter of social policy, or conducive to instilling faith or respect in the copyright system amongst the general public.

### 1.3.2 The fair use recommendation

The ALRC's recommendations in this respect speak for themselves. The ALRC considered a considerable volume of evidence, provided by stakeholders ranging from user groups such as schools, universities, libraries through to rightholder groups such as ARIA, APRA|AMCOS and the Copyright Agency Ltd. Having considered all this evidence, and undertaken extensive in-person consultations, the ALRC recommended in its Report No 122 that a fair use defence be introduced into Australian copyright law. In painstaking detail, it set out the positive case for the benefits of fair use, and rejected the arguments and assertions that such reform would be undesirable.

We would simply comment that an open-ended, general fair use provision would provide the necessary effectiveness, efficiency, adaptability and accountability which the Productivity Commission has rightly recognised as being guiding principles for a modern copyright regime.

(a) Fair use **will be effective** because it will offer greater opportunities for innovators and creators to engage in transformative uses of copyright works, creating new works that in turn benefit creators and users alike. It will assist in the dissemination of and access to works, in particular in the educational sector (see ALRC Report No 122, p 101).<sup>19</sup>

It is sometimes argued by those opposed to fair use that it is an American doctrine that would not necessarily be able to be effectively transplanted to Australia, particularly in light of the fact that we do not have an equivalent constitutional framework and guarantee of free speech. We submit that, on the contrary, the fair use factors used in the US already form part of Australian copyright law, being found in s 40(2) of the Copyright Act 1968, and in case law. Moreover, the US doctrine of fair use evolved through the common law, being first articulated in the 1841 case of *Folsom v Marsh*.<sup>20</sup> In setting out the principle that would come to be enacted in §107 of the *Copyright Act 1976* (US), Story J relied on UK precedent from the 18<sup>th</sup> and early 19<sup>th</sup> century. Australia shares the same common law history; indeed, it applies with even stronger force in the Australian context, being part of our common law inheritance and the basis of Australian copyright law until the enactment of colonial copyright acts from the late 19<sup>th</sup> century.

In relation to the objections based on the non-existence of a constitutional guarantee of free speech equivalent to the First Amendment to the US Constitution, we would draw the Commission's attention to the detailed arguments made in Submission 716 (at pp 29-31), and to the ALRC's acceptance of this line of reasoning in Report No 122 at pp 152-55. We therefore do not expect that Australian courts would experience any real difficulty taking into account such considerations when considering fair use. Consequently, we submit that fair use will be effective in the Australian context and could be effectively applied by the Australian courts.

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<sup>19</sup> This point was also made in other submissions, such as those of Universities Australia, Submission 246 and Copyright Advisory Group – Schools, Submission 231.

<sup>20</sup> 9 F Cas 342 (CCD Mass, 1841) (No 4901).

(b) Fair use **will be efficient because it will be adaptable**. As the ALRC Report No 122 observes, it will allow those who create, own, use and adapt copyright works to ‘as the right questions’ in relation to any particular use. In deciding whether a use is fair, a number of principles or ‘fairness factors’ will need to be considered and this will focus attention on the most relevant issues, namely: the nature and purpose of the use, and, importantly, whether that use will unfairly harm a rightholder’s interests and thereby undermine incentives to create. Fair use will also be technology-neutral, making it better able to adapt to new technologies as they emerge and the new commercial and consumer practices that accompany them.

Fair use will also be **adaptable** and **efficient** because it moves the law away from a rules-based approach to a standard-based approach. While it is often assumed that rules provide more certainty than standards, a considerable body of scholarship is emerging from the law and economics field which queries these assumptions. This scholarship demonstrates that it is not necessarily the case that rules will lead to greater certainty than standards, particularly in fields which are complex and subject to change, and that much depends on other factors such as complexity of drafting (which can arise in either case), enforcement costs and the nature of users.<sup>21</sup> The shift to a standard-based approach, supplemented by illustrative examples of fair use, will inject much needed adaptability into the exceptions regime.

(d) Fair use will be **accountable** because it will have the effect of aligning copyright law with the reasonable expectations of consumers as to how they may use and deal with copyright works. It will not, however, legalise or even remotely legitimise piracy, or remove the need for users to acquire permission to deal with copyright works in circumstances where the criteria for fair use are not met.

We would hope that the Productivity Commission, like the ALRC before it, stands firm in the face of what was described in Submission 716 as an ‘inevitable tidal wave of obfuscation, mischaracterisation and political influence peddling that will be generated by vested interests’ opposed to the adoption of fair use, and that Productivity Commission supports in the strongest possible terms the ALRC’s detailed recommendations in its Final Report.

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<sup>21</sup> See Emily Hudson, ‘Implementing Fair Use in Copyright Law: Lessons from Australia’ (2013) 25 *Intellectual Property Journal* 201. See also ALRC Report No 122, pp 98-9 and the sources cited therein.

## **Part 2: Submission in relation to Australia’s approach to international obligations in intellectual property**

### **2.1 Summary**

In Part 1 we argued that the *Copyright Act 1968* is overly complex, opaque, contradictory and often incomprehensible, and that these features of the Act have the effect of preventing the system from operating in the most effective, efficient, adaptable and accountable manner possible. This part of the submission argues that Australia’s approach to negotiating international agreements relating to copyright (and other forms of IP) is problematic for similar reasons. International rules relating to IP which Australia has negotiated, particularly ch 17 of the *Australia-US Free Trade Agreement* (AUSFTA), and subsequent agreements, are *also* overly complex, opaque, and at times incomprehensible. Recently negotiated rules are not likely to make international IP more effective, efficient or adaptable, and the method by which these rules have been negotiated is not accountable. New international rules have also closed off various sources of flexibility Australia would otherwise have had to reform domestic IP law, and as a result have created real barriers to reform of Australian IP law in ways that would make domestic law more effective, efficient, and adaptable. Australia’s approach to negotiating international IP rules as evidenced in the results of recent agreements is not the only approach available: the appropriate response is not to conclude ‘nothing can be done’, but (1) actively to investigate approaches adopted by other countries; and (2) to identify remaining areas of flexibility and take steps to ensure preservation of that flexibility. The recently-concluded *Trans-Pacific Partnership Agreement* contains some evidence of moves towards a more strategic and thoughtful stance to IP chapters, but a more significant shift is needed.

### **2.2 Recent negotiations**

Since Australia concluded AUSFTA in 2004, Australia has entered into many international agreements which touch on copyright law:

- the plurilateral *Anti-Counterfeiting Trade Agreement* (ACTA) (which Australia signed, but has never ratified) (2010) (dedicated to rules relating mostly to IP enforcement);
- bilateral trade agreements with:
  - Chile (2008);
  - Malaysia (MAFTA 2012);
  - Korea (the *Korea-Australia Free Trade Agreement* or KAFTA 2014);
  - Japan (the *Japan-Australia Economic Partnership Agreement* or JAEPA 2014);
  - China (ChAFTA 2014); and
- regionally:
  - The *ASEAN-Australia-New Zealand Free Trade Agreement* (AANZFTA) (2009);
  - the recently-concluded *Trans-Pacific Partnership Agreement* (TPP); and
- Multilateral copyright treaties:
  - the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* (Marrakesh VIP Treaty 2013), designed to improve the access of the visually impaired to literary works; and
  - *Beijing Treaty on Audiovisual Performances* (2012) (to which Australia is not a signatory).

According to the website of the Department of Foreign Affairs and Trade (DFAT), Australia is also involved in a number of ongoing negotiations at various stages of development:

- Bilateral negotiations with India and Indonesia;
- Plurilateral negotiations with the Gulf Cooperation Council;
- Regional negotiations:
  - the Regional Comprehensive Economic Partnership (RCEP);
  - the Pacific Agreement on Closer Economic Relations (PACER Plus).

Most of the concluded agreements referred to above include extensive, detailed provisions that impact on substantive and procedural rules relating to IP as well as remedies and rules relating to enforcement.<sup>22</sup> There is evidence that at least for most of the period since the conclusion of AUSFTA, Australian negotiators have actively pursued detailed chapters of this kind and have seen them as positively desirable.<sup>23</sup>

There is evidence however that both the **approach** of negotiating very detailed IP chapters in every trade agreement in addition to pursuing plurilateral IP text (via the ACTA) and multilateral texts through WIPO, *and* the specific **rules** being negotiated, are not effective, efficient, adaptable, or accountable.

### **2.3 Both the current approach to, and IP rules in, international agreements are not effective**

There is little evidence that the IP chapters of Australia's recent trade agreements have been at all effective in terms of encouraging additional IP, providing incentives to ensure active dissemination of copyright works, promoting the dissemination of innovation and ideas or in improving rightholders' ability to enforce their IP rights. Such limited evidence as is publicly available regarding the trajectory of Australia's copyright industries does not suggest that Australia's shift to a greater focus on negotiating IP texts in trade agreements has improved their position.<sup>24</sup> Nor are we aware of any rightholder organisation ever having identified any concrete advantage that has arisen from or can be traced to these IP chapters.

In light of the clear problems which arise from this approach to trade agreements (outlined further below), we would argue that the onus is on DFAT, and/or on any rightholder who supports Australia's current approach and the agreements that have resulted, to show *tangible* benefits to Australian rightholders or Australian creativity and innovation which are attributable to the inclusion of these IP chapters *and* which outweigh the costs of negotiating in this way. It is a significant logical leap to move from the statement that 'IP is important' (or even that 'it is difficult to enforce IP overseas') to the conclusion that 'detailed 70 page chapters that dictate aspects of local law without adding concrete resources for enforcement' are a 'solution'.

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<sup>22</sup> The main exception is AANZFTA, with ASEAN and New Zealand, which includes a relatively short chapter emphasizing commitment to existing multilateral treaties and the establishment of mechanisms for cooperation.

<sup>23</sup> Kimberlee Weatherall, 'The Australia-US Free Trade Agreement's Impact on Australia's Copyright Trade Policy' (2015) 69 *Australian Journal of International Affairs* 538. DFAT's public statements suggest a policy in favour of such chapters; in addition it is notable that detailed chapters have been included in some bilateral trade agreements where *other* agreements of Australia's bilateral partner do not include similarly detailed provisions – this suggests that Australia has been the proponent of detailed provisions.

<sup>24</sup> Weatherall, *ibid*.

Furthermore, some significant part of the rules being included in trade agreements are ineffective because they add little or nothing. For example, the inclusion of detailed IP provisions in KAFTA provided little or no benefit for Australian rightholders *because Korea was already obliged to provide high levels of IP protection* as a result of Korea's trade agreement with the US. Korea is obliged to provide Australian rightholders with most favoured nation treatment as a result of TRIPS, Art 4.

## 2.4 Both the current approach to, and IP rules in, international agreements are not efficient

Complex, incoherent, incomprehensible rules are not efficient. In the context of international treaty, such rules:

- create costs for all stakeholders who need to understand the rules;
- add significantly to the costs incurred by government and by stakeholders in creating and assessing new policy proposals which touch on IP rights; and
- add to negotiating costs for future bilateral, plurilateral and multilateral agreements of all kinds, by creating a welter of overlapping rules with which any new agreement must be consistent.

Many of the rules included in the agreements outlined above cover the same issue with overlapping, but slightly (or significantly) different text. Some of the complexities that result are illustrated by **Appendix 1**, which consists of a table setting out the many little (or not so little) ways that the KAFTA IP text varied from AUSFTA in ways that expanded Australia's international IP obligations.

The recently-concluded TPP is an even stronger example of the extraordinary complexity of the international IP rules to which Australia is now subject. First, the text of the TPP is itself complex on its face. The IP chapter of the TPP (Chapter 18) extends to 74 pages, 83 articles, 159 footnotes, and 6 annexes.<sup>25</sup> In some areas, the TPP text offers not one set of rules to address an issue, but multiple sets of rules. In the case of intermediary liability, for example (ie provisions that provide rules relating to what steps online service providers must take to avoid liability for their users' copyright infringements), the TPP offers no less than four different models, two of which are available only to limited countries within the TPP region.<sup>26</sup> In some cases the TPP text is simply incoherent, with footnotes that contradict the apparent effect of the text.<sup>27</sup>

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<sup>25</sup> Analyses by Weatherall of the meaning of only a portion of these TPP provisions (not including any of the patent rules or the rules on intermediary liability, or the transitional provisions), and their relationship with existing bilateral and multilateral rules, together run to over 120 pages: see <http://works.bepress.com/kimweatherall/>.

<sup>26</sup> Ch 18, Section J sets up one set of rules, which largely mirror the AUSFTA safe harbour rules (at a slightly higher level of generality), providing relief from liability for online service providers that follow certain basic rules, including, for search engines and content hosts, a requirement to remove or disable access to infringing material on receipt of knowledge or a notice of the infringement (so, notice-and-takedown). Section J *coupled with footnote 154* contemplates a different system, where notices alleging infringement are sent to an independent organization for verification before being sent on to ISPs for action. Annex 18-E allows Canada to maintain its system of notice and notice (rather than notice-and-takedown) and statutory secondary liability. Annex 18-F allows a Party to implement Art 17.11.23 of the *US-Chile FTA* instead of Section J.

<sup>27</sup> For example, footnote 88, which qualifies text in Arts 18.68, 18.69 and 18.77. The text of these articles seeks to criminalise acts which are undertaken 'for the purposes of commercial advantage or financial gain'. However, footnote 88 states that a party may treat 'financial gain' as 'commercial purposes'. This means that Parties must criminalise acts for 'commercial advantage or commercial purposes' – which is surely

The situation is further complicated as a result of the way the TPP fits with the international IP framework. International IP obligations are subject to an *unqualified most favoured nation* rule (TRIPS, Art 4) – meaning that IP rules concluded in a bilateral agreement must be accorded to nationals of all WTO member countries. While a purported (early) goal of the TPP was to reduce complexity in the Asia-Pacific Region arising from the ‘noodle-bowl’ of bilateral and regional trade agreements, the TPP in fact preserves pre-existing bilateral arrangements, meaning that that IP obligations undertaken in bilateral deals between the TPP parties continue to bind regardless of the rules in the TPP (TPP, Art 1.2). Thus, a TPP Member’s actual IP obligations to another TPP party are not determined by reading the text of the TPP itself (which would be sensible). Instead, if you want to work out, say, Australia’s obligations, you must determine, it seems, the strongest rules that Australia has negotiated with any other country in the world, including any other TPP Member. Australia’s obligations vis-à-vis creators from Canada, for example, depend on what Australia has agreed via AUSFTA combined with KAFTA and the TPP itself (since, as noted, some rules in KAFTA and the TPP go beyond the rules in AUSFTA).

#### **2.4 Both the current approach to, and IP rules in, international agreements are not adaptable**

Almost by definition rules in an international agreement are less adaptable than rules embodied in domestic legislation, owing to the greater difficulty associated with any attempt to amend those rules in the future (requiring negotiation with and agreement from international partners). For this reason, treaties ought to be negotiated at a higher level of generality than legislation. Unfortunately, recent international IP texts in trade agreements have tended to be far more detailed than in the past. The fact that detailed IP rules negotiated in recent agreements are not adaptable is evidenced by the fact that within the first decade of its operation, technology-specific rules of the AUSFTA have already proved to be a block to sensible reform options, *including paths of reform potentially beneficial to, and considered desirable by, copyright owners.*<sup>28</sup>

IP treaties reduce adaptability by removing flexibility that countries would otherwise have to change local law to suit local conditions as technologies or economic conditions change. The provisions of AUSFTA and the TPP relating to anti-circumvention law, for example, greatly confine the considerable freedom countries would have under multilateral rules (the *WIPO Copyright Treaty 1996*) to shape their own rules relating to when, and how, people may seek to circumvent digital rights management.

Amazingly, Australia’s recent IP treaties continue to include rules which are increasingly viewed by commentators on all sides of the debate as anachronistic – for example, rules such as the massively

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tautologous. Another example is Art 18.62.3, which seems to extend copyright rights beyond TRIPS and the WPPT in granting general communication and broadcast *rights* to performers and phonogram copyright owners (where TRIPS/WPPT only provide for a right to remuneration rather than an exclusive right). However, this is qualified by footnote 70, which transforms the apparent exclusive right into a right of remuneration (WPPT, Art 15.1/15.2). *Further*, owing to Art 18.62.3(b) the right need not be applied at all or can be applied in a limited way only to analogue transmissions and non-interactive, free over-the-air broadcasts. This preserves some, but not all, of the freedom to enter reservations to the WPPT under WPPT, Art 15.3, and enables countries to maintain statutory licences they may already have in the (analogue) broadcast context.

<sup>28</sup> Weatherall, above n 23.

over-extended copyright term and the Berne prohibition on formalities.<sup>29</sup> These rules significantly reduce the universe of possible reforms to copyright law. While long terms and a prohibition on formalities are part of the multilateral framework in Berne and TRIPS, their continued incorporation into new agreements renders reform of these rules much more difficult.

#### **2.4 Both the current approach to, and IP rules in, international agreements are not accountable**

The Productivity Commission has not been tasked with investigating the *general* process by which Australia negotiates new treaties including new trade agreements. It has, however, been tasked with consideration of Australia's IP arrangements which appropriately encompasses the question whether Australia's *approach* to negotiating and agreeing to new IP rules in international agreements is consistent with an overall goal of maximising the well-being of Australians, and, in that context, with a goal of ensuring accountability. We would simply note here that Australians' opportunities for input into international treaty texts are far more limited than equivalent opportunities in the context of domestic legislative reform. This is particularly true in the context of the current approach to negotiating preferential trade agreements. The IP chapters of Australia's trade agreements, in particular, have been subject to frequent criticism by various Parliamentary Committees, including the various Committees that considered AUSFTA as well as in JSCOT's consideration of both KAFTA and JAEPA – with only limited evidence of a shift in stance over time (subject to the apparently less prescriptive text in the TPP).<sup>30</sup>

#### **2.5 Finding a more effective, efficient, and adaptable approach**

Australia's approach to negotiating international IP rules as evidenced in the results of recent agreements is not the only approach available. Considering both Australia's own history, and current approaches adopted by other countries, it is possible to identify at least two other possible approaches to negotiating IP provisions that might be considered as part of a process of finding a way to ensure more effective, efficient and adaptable outcomes:

- (1) Australia's pre-AUSFTA approach,<sup>31</sup> which focused on two broad priorities:
  - a. Ensuring that trading partners are party to significant multilateral conventions on IP; and
  - b. Establishing mechanisms for ongoing cooperation on matters relating to IP.

Notably, Canada and New Zealand had both, up until the TPP, continued to adopt a stance much more similar to Australia's pre-AUSFTA stance: supportive of multilateral negotiations;

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<sup>29</sup> For a detailed tracing of the way that both of these fundamental rules are increasingly seen in mainstream debates as inappropriate for the 21<sup>st</sup> Century, see Kimberlee Weatherall, 'So Call Me a Copyright Radical' (2011) 29(4) *Copyright Reporter* 123.

<sup>30</sup> It should be noted that the TPP text, while still far too prescriptive to be part of an agreement meant to last decades, is less inflexible than some other recently-concluded texts. Many parts of the copyright text of the TPP at least are written at a higher level of generality than, say, equivalent provisions of AUSFTA (such as the anti-circumvention provisions and intermediary liability provisions) or ACTA, and some provisions included in AUSFTA (such as the prohibition on formalities) are not included in the TPP at all. The TPP also includes a number of provisions clearly aimed at preserving existing flexibilities. It is not clear whether this is due to an amended stance on the part of Australia or the different dynamics involved in a plurilateral rather than bilateral negotiation (or some combination of those two factors).

<sup>31</sup> See Weatherall, above n 23, 547–49.

cautious about raising standards above international standards; and concerned to preserve domestic policy flexibility. In Canada's case, this is clear from the very different IP chapter Canada negotiated in its FTA with Korea. And both Canada and New Zealand adopted stances, in the TPP negotiations, that were more cautious regarding extensions of copyright and enforcement, and more protective of policy flexibility. Even other countries already subject to a US FTA and a similar IP chapter have not extended the US approach of negotiating extremely detailed provisions in their other trade negotiations. Singapore's trade agreements subsequent to the US-Singapore FTA, for the most part, contain IP chapters that are short, affirm multilateral standards and seek to promote cooperation – *even where* Singapore has negotiated with another US FTA country (like Costa Rica or Peru).

- (2) The current approach adopted in the bilateral relationship between the US and China, in which periodic negotiations appear to focus on *specific* issues of concern arising in the trade agreement and find (practical) ways to address those issues specifically, rather than attempting to negotiate an entire set of detailed, domestically-focused rules.<sup>32</sup> A similar approach would see Australia:
- a. Seek to identify, in the context of proposed trade negotiations *specific* problems *actually* encountered by stakeholders in the context of the bilateral relationship relevant to IP; and
  - b. Focus on developing ongoing cooperative mechanisms so as to address practical issues on an ongoing basis – rather than trying to write a set of comprehensive rules to apply for all time.

Other steps Australia might consider taking at this point in developing a more nuanced international IP position would be:

- Identify remaining areas of flexibility in the international framework, and take active steps to ensure preservation of that flexibility (especially in areas such as remedies, for example, and secondary liability, where few international rules apply).
- Initiate discussions in particular with the US with a view to rationalising IP obligations – preferably so as to leave just one set of rules (ie, the TPP rule) in place between Australia and the US, or, if that is not possible, *at least* to reconsider technology-specific rules in AUSFTA that no longer make sense.
- Initiate long-term discussions at a multilateral level around aimed at identifying parts of the multilateral framework that may no longer make sense (for example, a prohibition on formalities) with a view to modernising the multilateral IP framework.

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<sup>32</sup> The most recent outcomes of this US-China process address matters such as remedies for trade secrets breaches; procedures for cancelling GIs; and sports broadcasts. The full set of outcomes may be viewed here: <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/november/us-fact-sheet-26th-us-china-joint>.



**Appendix 1: Table of new international obligations relating to copyright and enforcement introduced by KAFTA**

Provision	Obligation	Comments
13.5.1	Requires protection for temporary copies of broadcasts in any manner or form, permanent or temporary.	<p>Copyright protection for temporary copies is contentious because it can convert copyright into a ‘right to use’ digital material, and turn every user of the internet, and every user of a digital book, CD, or DVD into an infringer. AUSFTA requires protection of temporary copies but AUSFTA does not extend that protection to broadcasting organisations (because the US does not recognize ‘broadcast copyright’). There is no international copyright convention with a similar obligation.</p> <p>Note that through this and other provisions, KAFTA is the <b>first international agreement Australia has signed that requires us to protect broadcasts with copyright</b>. We are required, by other agreements, to protect broadcasters from certain kinds of ‘signal piracy’ but we are <i>not</i>, outside KAFTA, required to do so through copyright law. KAFTA adds a new, significant constraint on policymaking in a space which is rapidly changing due to convergence of technologies.</p>
13.5.1 footnote 65	Limits exceptions to the reproduction right to ‘certain special cases that do not conflict with a normal exploitation of the [subject matter] and do not unreasonably prejudice the legitimate interests of the right holder’; states ‘for greater certainty’ that each Party may adopt <b>fair use</b> “as long as any such limitation or	<p>This footnote, together with 13.5.13, applies the well-known ‘three step test’ to copyright exceptions. Australia is already committed to the application of the three step test to limit copyright exceptions in most contexts (as a result of the Berne Convention, TRIPS, and AUSFTA).</p> <p>This footnote <b>extends</b> the three step test for the first time to <b>copyright in broadcasts</b>. This is not uncontroversial: broadcast copyright is limited in many ways to achieve the goals of media policy, and the Australian Attorney-General’s Department has previously taken the position that the exceptions we are allowed to have under the Rome Convention (which protects broadcasts) are broader than would be allowed under the three step test (this position, although contestable, is reflected in the drafting of Part XIA of the <i>Copyright Act 1968</i> (Cth)).</p> <p>The reference to <b>fair use</b> is odd and difficult to understand. An affirmation that Australia could introduce fair use is perhaps welcome, but the final phrase is hard to interpret. My view – and that of many</p>

	exception is confined as stated in the previous sentence”.	academics, as reflected in the recent ALRC Report on <i>Copyright and the Digital Economy</i> – would be that fair use clearly <i>is</i> consistent with the three step test and thus the last phrase has no force. But some might argue that the phrasing of footnote 65 suggests otherwise.
13.5.3	No formalities for rights of authors, performers, producers of phonograms and broadcasting organisations.	AUSFTA states that formalities may not be required for the rights of performers, producers of phonograms and broadcasting organisations. It says nothing about <b>authors</b> and formalities (although Berne does). The ban on formalities is contentious because it creates a significant ‘orphan works’ problem (works for whom the copyright owner cannot be identified). Impact of 13.5.3 is unclear: reform proposals occasionally suggest that the Berne Convention rule prohibiting formalities could be applied only for the Berne copyright term (life of the author plus 50 years) and that formalities could be introduced for term extensions. Whether or not this is correct, KAFTA article 13.5.3 precludes that argument and obliges Australia to refrain from imposing formalities for the full (life plus 70 year) term.
13.5.4	No hierarchy of rights: broadcast included	AUSFTA requires no hierarchy between rights holders (ie, getting permission from a musical work author does not preclude a need to get permission from the owner of a sound recording, and vice versa). But AUSFTA does not include owners of broadcast copyright in that rule. Inclusion of broadcasts here <b>removes</b> a flexibility from TRIPS article 14.3 (which would allow Australia to protect broadcasts through giving rights to underlying content owners).
13.5.6	50 year protection term for broadcasts	The Rome Convention requires Australia to protect broadcasting organisations for 20 years. AUSFTA does not address term for broadcasts: this is the first time Australia has committed internationally to a copyright term of 50 years for broadcasts.
13.5.9	Anti-circumvention law extended to protect broadcasts	Australia is not under any other international obligation to provide generalized protection of broadcasts from circumvention of technological protection measures. AUSFTA does require certain specific protection against provision of unauthorized decoders for encrypted satellite signals (AUSFTA art 17.7). Given the

		reach of existing anti-circumvention provisions and the generally unprotected nature of broadcasts the impact of including broadcasts is unclear. Such an obligation ought not be taken on without careful consideration of its potential future impact.
13.5.13	Three step test applied to broadcast copyright.	<p>As noted above re footnote 65: This provision <b>extends</b> the three step test for the first time to <b>copyright in broadcasts</b>. This is not uncontroversial: broadcast copyright is limited in many ways to achieve the goals of media policy, and the Australian Attorney-General's Department has previously taken the position that the exceptions we are allowed to have under the Rome Convention (which protects broadcasts) are broader than would be allowed under the three step test (this position, although contestable, is reflected in the drafting of Part XIA of the <i>Copyright Act 1968</i> (Cth)).</p> <p>Footnote 68, which affirms that exceptions allowed under other multilateral agreements (existing or future) continue to be allowed despite the text most likely protects any exceptions currently allowed under the Rome Convention (and Berne, and new treaties like the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled). A clause of this kind ought to be included in every bilateral negotiation, although it should be in <i>text</i> not stated in a footnote.</p>
13.9.10	Court power to order infringer to provide information	Article requires that courts have the power to order certain information that the infringer 'possesses or controls'. Requiring information that the infringer <b>controls</b> is a new international obligation: AUSFTA only refers to information that the infringer <b>possesses</b> (AUSFTA art 17.11.11). The reference to 'control' appears to come from ACTA (art 11). Australia has not ratified ACTA (about which JSCOT has previously expressed concern), and notably ACTA contains many more procedural and balancing protections for defendants and others than KAFTA (see body of submission).
13.9.13	Injunctions to prevent importation and exportation	AUSFTA addresses injunctions only in relation to exportation (17.11.14); TRIPS addresses injunctions (art

	of goods	44) but with exceptions. This is a new and oddly-worded provision.
13.9.15	Alternative dispute resolution	Requirement for ADR is not in AUSFTA, ACTA or TRIPS. Why include? Just because something is a good idea (and ADR is) does not mean it needs to be in a treaty.
13.9.18	Border measures must apply to 'all points of entry to its territory'	The requirement that suspension apply to all points of entry is new compared to AUSFTA (which does not mention this point: see equivalent art 17.11.19) and removes an option under ACTA if Australia ever chooses to ratify ACTA – ACTA art 17.2 allows a party to provide that a right holder be able to request that the order for suspension apply to selected points of entry – a flexibility that appears to be precluded by the KAFTA text. The reason for removing that flexibility is not clear to me.
13.9.20	Border measures: information to be provided to right holder	KAFTA text requires that border officials be able to provide to the right holder 'a description of the merchandise, ... and, if known, the country of origin of the merchandise'. This new compared to AUSFTA (see art 17.11.21) and is optional in ACTA (art 22) (ACTA contains more protections for defendants/importers etc).
13.9.27	Camcording prohibition: criminal measures against recording a movie in the cinema.	<p>This is TRIPS-plus, AUSFTA-plus, and ACTA-plus. Only ACTA contains a camcording provision (art 23.3) and there it is optional; here it is mandatory. This is bad policy for Australia: it would add yet another criminal provision in a context where there are multiple civil and criminal provisions already applicable. Owners of copyright in film are not without civil and criminal remedies in Australia:</p> <ol style="list-style-type: none"> <li>1. Filming a movie is copyright infringement, for which civil action lies (s101);</li> <li>2. In that civil action, a copyright owner can seek delivery up of any infringing copies and the equipment used in infringement (s116);</li> <li>3. If a person uploads the film online, they can be: <ol style="list-style-type: none"> <li>a. Civilly liable for communicating the film to the public (s101);</li> <li>b. criminally liable for engaging in conduct that results in copyright infringement having a substantial prejudicial impact on the owner of copyright and on a commercial scale (s 132AC);</li> </ol> </li> </ol>

		<p>c. criminally liable for distributing articles (including electronic files) to an extent that affects prejudicially the owner of copyright (s132AI);</p> <p>4. Even before the person uploads, if they plan to upload, they can be criminally liable for possession of an article with the intention of distributing it to an extent that will affect prejudicially the owner of copyright (s132AJ); <i>and</i></p> <p>5. Sitting in the cinema <i>with</i> the camera could cause a person to be criminally liable for having in their possession a device, intending it to be used to make an infringing copy of a work, or being negligent as to whether it would be infringing (s 132AL).<sup>33</sup></p> <p>Presumably the Australian negotiators have decided that, in light of all of these provisions, no change to Australian law will be required. However, many of these provisions <i>are</i> controversial because of the non-commercial activities they cover – particularly s 132AL. Including this requirement in KAFTA locks in bad criminal law policy.</p>
13.9.28	‘Each Party shall provide measures to curtail repeated copyright and related right infringement on the Internet’.	<p>This is TRIPS-plus, AUSFTA-plus (there is nothing vaguely similar in AUSFTA) and ACTA-plus. The wording of the provision is so general as to be impossible to interpret. Does it require that the measures be effective? If the measures fail (as so many measures have) to curtail online infringement, are the Parties required to keep introducing more measures until piracy <i>is</i> curtailed? What counts as ‘repeated’ copyright infringement? Why is the measure for ‘repeated’ infringement without any requirement that the infringement be egregious, or cause substantial prejudice to copyright owners? The text seems to extend even to harmless repeated infringement. Indeed, the text on its face (which is not limited to <i>piracy</i> but extends to <i>infringement generally</i>) seems to extend to legitimate commercial activity where the infringer had a good faith, but ultimately incorrect, view that their activity was not infringement. How does this relate to ‘innocent’ infringement? Given that providing a search engine currently infringes Australian law, is Australia required to curtail search engine activity if conducted within Australia?</p>

<sup>33</sup> Of course, strictly speaking, there are a lot of us who are criminals on this provision...

