



**Submission to Productivity Commission
Intellectual Property Arrangements
Issues Paper**

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1 SUMMARY OF POSITION

Australia is recognised internationally for its creativity, an attribute that should be valued and developed. The role of innovation in Australia's future prosperity is widely acknowledged, as are the major current barriers such as lack of venture capital and appetite for risk. Intellectual property is usually regarded as a measure of innovation rather than a barrier.

Overall, Australia's copyright system remains fit for purpose, and meets the Commission's criteria:

- **Effectiveness:** Copyright-based industries make a significant contribution to the Australian economy. In 2014 Australia's core copyright industries contributed \$7.4 billion to Australia's economy and 4.7% of gross domestic product, and employed more than 600,000 people (with further contribution by partial, interdependent and non-dedicated support industries).
- **Efficiency:** Copyright industries involve complex value chains. The copyright system enables the unlocking of value in content by providing incentives for acquiring and trading in rights and adding value. For example, a piece of writing might be published in a printed book, ebook, adapted for film, translated, exported and photocopied in schools (with additional value being added in each of those exploitations, as exemplified in submissions to the Commission from publishers and others). Copyright management organisations like Copyright Agency offer efficient licensing solutions for a large range of scenarios, enabling the use of copyright content by millions of Australians with minimal transaction costs, and investment in the production and dissemination of new content.
- **Adaptability:** The copyright system has adapted reasonably well to technological and other developments through some legislative changes and business arrangements that have evolved to meet changing environments. There is scope for iterative legislative change, but the costs of any wholesale change outweigh any benefits.
- **Accountability:** In our experience, most changes to copyright legislation have involved consultation with affected stakeholders and scrutiny by Parliamentary committees. The Copyright Tribunal also has an important role in reviewing licensing and distribution by copyright collecting societies.

There are, however, changes that could be made to the copyright system that would improve effectiveness and efficiency. These are not confined to the regulatory framework; there is also room for improvement in other areas of what is a highly functioning but complex ecosystem. In considering options for improvements, regard must be had to the costs and benefits of change, and to the costs of change (both for the myriad existing arrangements, and for the confidence necessary for future arrangements).

The terms of reference ask for greater certainty. One of the consequences of 'open-ended' exceptions like the US 'fair use' exception is reduced certainty and predictability. The filing of copyright cases in the US is vastly greater (per capita) than that in Australia, and the fair use exception is raised in a significant (and growing) proportion of them. An analysis of copyright cases filed in 2014 showed that a defence of fair use was raised in 43% of the defended cases.

By contrast, an analysis of reported cases from single judges of the Australian Federal Court between 2006 and 2012 showed that 94 involved copyright, but in only four of those was the operation of a copyright exception a key issue.¹

The following are proposals for improvement where the benefits clearly outweigh any costs:

¹ Copyright Agency submission to Australian Law Reform Commission (November 2012) at Appendix 2, available at http://www.alrc.gov.au/sites/default/files/subs/249_org_copyrightagency.pdf

- **Simplification of certain areas of the regulatory framework.** We propose four areas: the statutory licence for governments; a consolidated fair dealing provision; special provisions for libraries and other cultural institutions; and a consolidated private use exception.
- **Support for licensing solutions.** We propose an extended collective licensing framework (in accordance with recent developments in the UK, US and elsewhere), and government support for industry-led licensing initiatives such as the Copyright Hub.
- **Guidelines:** Greater certainty can be provided by guidelines that are issued by government and/or supported by all affected stakeholders. For example, the UK government issues 'Copyright Notices' to provide guidance about the application of the legislation. The Australian government has recently said it was considering guidelines on accessible format materials for people with disabilities.

1.1 ABOUT COPYRIGHT AGENCY | VISCOPY

Copyright Agency | Viscopy is a not-for-profit copyright management organisation that manages copyright licensing arrangements for writers, artists and publishers.² It collects and distributes more than \$100M a year in copyright fees and royalties. It is affiliated with similar organisations in other countries, enabling the licensed use of foreign content in Australia, and revenue to Australian creators from the use of their content in other countries.

2 CONTEXT FOR INQUIRY

2.1 AUSTRALIA IS RANKED THE MOST CREATIVE COUNTRY IN THE WORLD

The World Economic Forum recently reported a study that ranked Australia the most creative country in the world.³ It is a position worth retaining, and taking into account in reviewing Australia's IP arrangements, particularly for copyright.

2.2 AUSTRALIA'S COPYRIGHT INDUSTRIES MAKE SIGNIFICANT CONTRIBUTION TO ECONOMY

In its report *The Economic Contribution of Australia's Copyright Industries 2002–2014*,⁴ PwC found that in 2014 Australia's core copyright industries:

- contributed \$7.4 billion to Australia's economy;
- contributed 4.7% of gross domestic product; and
- employed more than 600,000 people.

The study is based on methodology developed for the World Intellectual Property Organization (WIPO), which defines 'core' industries as those that 'exist only because of copyright and are primarily involved in the creation, manufacture, production, broadcast and distribution of copyrighted works'. These include: press and literature; music; theatrical productions; motion picture and video; radio and television; photography; software and databases; visual and graphic arts; advertising services; and copyright collecting societies.

The methodology identifies three other classes of copyright-related industries: partial, interdependent and non-dedicated support. The PwC report also estimates the contribution of each

² Copyright Agency and Viscopy are separate legal entities, but Copyright Agency manages all Viscopy services under a services agreement.

³ <https://agenda.weforum.org/2015/10/most-creative-countries-in-the-world>. The study was from the Martin Prosperity Institute and is available at <http://martinprosperity.org/media/Global-Creativity-Index-2015.pdf>.

⁴ copyright.com.au/wp-content/uploads/2015/08/PWCRReport-EconomicContribution-AustraliaCopyright-Industries.pdf

of these sectors to the Australian economy, and compares Australia to other countries in which similar studies have been done using the same methodology.

In its report *Cover to cover: A market analysis of the Australian book industry*,⁵ PwC found that in 2010 the total value of books sold in Australia was \$2.3 billion: \$1.5 billion for trade book sales and \$820 million for educational book sales.

2.3 AUSTRALIAN FIRMS ARE INNOVATIVE BUT THERE IS ROOM FOR IMPROVEMENT

The WIPO 2015 Global Innovation Index ranks Australia at 17,⁶ the Bloomberg 2015 index at 13.⁷ The WIPO index involves 79 indicators grouped into seven areas: institutions; human capital and research; infrastructure; market sophistication; business sophistication; knowledge and technology output; and creative outputs. The Bloomberg report looks at six factors: research and development; manufacturing; high-tech companies; postsecondary education; research personnel and patents.

The 2014 report on Australia's innovation system from the Chief Economist of the Department of Industry⁸ recognises that Australian firms are innovative, particularly in the SME sector, but could do better (particularly in export).

The report identifies impediments to Australian innovation as:

- poor networking and collaboration;
- poor levels of venture and private equity capital investment in innovation;
- some fragmented and/or obstructive government policies or regulations, such as tax treatment of employee share schemes, government procurement of innovation and low incentives for research commercialisation/collaboration in the public research sector;
- a small geographically isolated economy dominated by small businesses and/or lifestyle entrepreneurs that are seeking local competitive advantage through cost reduction rather than pushing the innovation frontier to capture world markets through value creation;
- poor business culture of innovation and risk aversion in Australia; and
- relatively poor business management capability, leading to underinvestment in innovation and related activities.⁹

Tellingly, copyright and other forms of intellectual property are *not* listed as an inhibitor to innovation.

To the contrary, the report highlights the importance of investment in intangible capital which it says includes 'assets such as data, software, designs, new organisational processes, management quality, R&D, patented technology, reputation (brand equity) and firm-specific skills' (much of which is covered by IP rights).

The *World Intellectual Property report 2015: Breakthrough Innovation and Economic Growth*¹⁰ examines three historical breakthrough innovations and three areas with future breakthrough potential. It concludes:

... continuously investing in innovation will remain imperative for policymakers and business alike. The report's case studies document the long time it takes to turn promising ideas into

⁵ Report for Department of Innovation, Industry, Science and Research (May 2011): industry.gov.au/industry/IndustrySectors/booksandprinting/BookIndustryStrategyGroup/Documents/PwCCovertocover.pdf

⁶ <https://www.globalinnovationindex.org/userfiles/file/reportpdf/GII-2015-v5.pdf>

⁷ <http://www.bloomberg.com/graphics/2015-innovative-countries/>

⁸ <http://www.industry.gov.au/Office-of-the-Chief-Economist/Publications/Documents/Australian-Innovation-System/Australian-Innovation-System-Report-2014.pdf>. The 2015 report is due for release in November 2015, focussing on innovative entrepreneurship.

⁹ Ibid at p6 'What is holding Australia back?'

¹⁰ http://www.wipo.int/edocs/pubdocs/en/wipo_pub_944_2015.pdf; see also commentary here: <http://ipkitten.blogspot.com.au/2015/11/break-on-through-world-ip-report-2015.html>

workable technologies, for those technologies to be refined, and for companies and consumers to embrace them. Successful innovation, whether at the level of the firm or the economy as a whole, requires perseverance – not least in periods of low growth when innovation budgets come under pressure.

Policymakers will also need to ensure that the IP system contributes to an ecosystem conducive to innovative breakthroughs. Since the onset of the industrial revolution, the IP system has continuously adapted to the demands and challenges of newly emerging technology. This trend is bound to continue, and is best guided by careful consideration of available evidence and openness to the direction of technological change.

2.4 INNOVATION IN AUSTRALIAN CONTENT PRODUCTION AND DELIVERY

The Department of Industry report adopts the internationally recognised firm-level definition of business innovation from the OECD:

Innovation is the implementation of a new or significantly improved product (good or service), process, new marketing method or a new organisational method in business practices, workplace organisation or external relations.

Examples of innovation in Australian content production and delivery are myriad. Here are a few examples:

- LearningField is a world-first online subscription platform that enables Australian students and teachers, with a single sign-on, to read, copy and share educational resources from a range of publishers in accordance with their needs and choices;¹¹
- Mathletics and Reading Eggs are locally developed online learning platforms for children that have been exported all over the world;
- Cengage Brain,¹² an online platform that enables customers to purchase content in a range of formats, including print, eBook and by chapter; and
- Origo's online maths platform, Stepping Stones, was recently adopted by the State of Hawaii for their core curriculum.

There are other examples in submissions to the Commission from publishers and others.

2.5 CREATIVE CONTENT AS INPUT TO 'INNOVATIVE' PRODUCTS AND SERVICES

A source of much current debate about copyright is the extent (if any) to which creative inputs to 'innovative' products and services should be licensable, or allowed without permission or payment. Factors influencing this debate are:

- that these creative inputs are sometimes incorporated into 'user-generated content' (e.g. videos uploaded to, and viewable from, YouTube);
- that the benefits to online service providers from content inputs are indirect (e.g. sale of data; advertising); and
- scale (e.g. Google digitisation of millions of books for the Google Books project).

Licensing arrangements have been (and can be further) developed and should be given an opportunity to do so.

It also worth noting that the rather crude dichotomy of 'creators vs innovators' belies the significant investment of tech companies in their own IP (as well as, of course, the level of innovation in 'core' creative industries).¹³

¹¹ learningfield.com.au

¹² cengagebrain.com.au

3 RESPONSES TO QUESTIONS IN ISSUES PAPER: OVERVIEW

Question	Response (references are to heading levels in submission)
Effectiveness	
Do copyright rights encourage genuinely innovative and creative output that would not otherwise have occurred?	<p>Yes, as evidenced by:</p> <ul style="list-style-type: none"> • contribution to economy • innovation by content creator • use of Copyright Agency Viscopy payments to invest in production of new content. <p>See further: 2.2 and 2.4 above and Appendix 1 below.</p>
To what extent does the copyright system actively disseminate innovation and creative output?	<p>In 2014–15 Copyright Agency Viscopy’s licences enabled copying and sharing of content from Australia and the world by millions of Australians.</p> <p>See further 5.1.</p>
Efficiency	
Do copyright rights provide rewards that are proportional to the effort to generate copyright?	<p>Copyright provides rewards that are proportional to the value to users.</p> <p>Works that result from a higher level of skill and effort effectively have a higher level of protection because copying is more likely to infringe.</p> <p>See further 4.2.2.</p>
What are the merits and drawbacks of using other methods to secure a return on innovation?	<p>Investors in content-related innovation may use ‘other methods’ <i>in addition to</i> copyright to achieve a return.</p> <p>The main drawback of methods other than copyright is that copyright is enforceable against the world, whereas ‘other methods’ are not (e.g. breach of confidence is only available against people who have received information in confidence).</p>
Are there obstacles in the copyright system that limit the efficient trade of copyright between creators and users?	<p>Obstacles include:</p> <ul style="list-style-type: none"> • opportunities for unauthorised use of content; • copyright exceptions that inhibit the development of licensing solutions that would better serve users; and • lack of regulatory and other government support for development of licensing solutions. <p>See further 6.1, 5.8, 5.9, 5.10 and 7.4.</p>
Are there particular areas where trade, licensing and use of copyright could be more	<p>Measures include:</p> <ul style="list-style-type: none"> • introduction of regulatory framework for extended collective

¹³ O’Connor, *Creators, investors, and appropriation mechanisms*, available at <http://www.georgemasonlawreview.org/wp-content/uploads/2015/06/OConnorCreators.pdf>; commentary at <http://cpip.gmu.edu/2015/08/11/creators-innovators-and-appropriation-mechanisms>. See also Mossoff, *How Copyright Drives Innovation in Scholarly Publishing*, Michigan State Law Review, available at <http://cpip.gmu.edu/wp-content/uploads/2013/08/How-Copyright-Drives-Innovation-in-Scholarly-Publishing-Adam-Mossoff.pdf>

Question	Response (references are to heading levels in submission)
readily facilitated?	licensing; <ul style="list-style-type: none"> • ensuring copyright exceptions do not inhibit the development of licensing solutions; and • government support for initiatives like the Copyright Hub. See further 6.1, 5.8, 5.9, 5.10 and 7.4.
Are there sufficient safeguards to ensure that copyright does not lead to unduly restrictive market power?	Yes, including from: <ul style="list-style-type: none"> • Australian Consumer and Competition Commission; and • Copyright Tribunal See 5.1.3 on role of Tribunal.
Adaptability	
How well has Australia's copyright system adapted to changes in the economic, commercial and technological environment?	Reasonably well as a result of: <ul style="list-style-type: none"> • some amendments over time to address major technological change; • scope for the legislation to apply to new developments; and • changes in licensing and other arrangements to account for new developments. See further 4.3 and Appendix 2.
How well is it placed to adapt to such changes in the future?	Reasonably well, but it requires a better framework for supporting the development of licensing solutions that address users' needs better than overly detailed copyright exceptions. See further 7.
Is a principles based approach preferable to a prescriptive approach?	The best approach depends on the circumstances, and is influenced by a need for a level of 'certainty' for users, as recognised in the terms of reference. In some circumstances there is scope for additional 'prescription' to be provided in Regulations, and/or in guidelines (provided they are supported by all relevant stakeholders). For example, there is definitely scope for clearer guidelines for cultural institutions, particularly given their noted risk aversion. See further 4.3.1.
What additional challenges do technological change and new methods of diffusion, including digitisation, present for the adaptability of the copyright system?	Digitisation and diffusion are not really 'new' in the copyright system. The World Intellectual Property Organization developed some new standards in the 1996 'internet' treaties, which were adopted in Australia's 'digital agenda' amendments in 2000. Those standards remain appropriate. The major challenge currently is development of licensing systems that enable reasonably 'seamless' legitimate consumption and use of content. That both requires harnessing of technological capabilities (such as is being done with the Copyright Hub) and measures to convert unauthorised to authorised use (such as the recent anti-piracy measures). See further 7.4.

Question	Response (references are to heading levels in submission)
Accountability	
How the parameters of the copyright system came to be set.	<p>A review of the history of Australian copyright law shows that there have been two across-the-board extensions in the scope of protection, some additional rights for classes of rightsholders, a number of measures to address unauthorised use of content, and many new limitations or exceptions.¹⁴ While some changes have resulted from international developments and treaty obligations, most have resulted from changes sought by Australian stakeholders (both content creators and users). All changes have involved stakeholder consultation in various forms. All amendments have for some time been accompanied by a Regulatory Impact Statement.</p> <p>See further 4.4.2 and Appendix 1.</p>
In a global context, which approach best suits Australia?	<p>A key consideration is enabling Australian rights to be traded globally. While this has always occurred to different extents, there are new opportunities both from expanding export markets and from technological change. It is also important to note that acquisition of Australian rights for foreign content (e.g. by Australian publishers) can help support Australian content. A reasonable level of consistency between Australia’s copyright system and those of trading partners increases efficiencies in trade.</p> <p>See further submissions from publishers.</p>
Copyright	
Does the current law remain ‘fit for purpose’?	<p>Generally yes. In most respects the law is being applied as intended, and supporting a complex ecosystem of commercial and other arrangements. There is, however, scope for some improvements in the legislation, but policy makers need to be careful to assess the implications of those changes for the entire ecosystem. There is also scope for non-legislative measures such as support for licensing solutions and better guidelines on the application of the legislation.</p> <p>See further 7.</p>
Are there options for a ‘graduated’ approach to copyright?	<p>There are already different requirements for copyright protection, and different levels of protection, for different forms of content (e.g. films are covered differently to musical works). And the effective scope varies for different types of use and user because of the many exceptions and limitations.</p> <p>See further Appendix 3.</p>
Is licensing copyright-protected works too difficult or costly?	<p>In most cases, no. There is a vast array of licensing solutions available, and users can often choose to use content that is very easy to get a licence for (e.g. an image from an image library, or even that is available under a Creative Commons licence).</p>

¹⁴ See Appendix 2.

Question	Response (references are to heading levels in submission)
	<p>There are, however, a range of licensing initiatives under development to make more content more easily available for use (particularly for low-value high volume uses), such as the Copyright Hub.</p> <p>See further submission from the Copyright Hub.</p>
<p>What role can/do copyright collecting agencies play in reducing transaction costs?</p>	<p>Copyright Agency Viscopy offers a range of licensing solutions for a range of customers and uses. Most of the licences are ‘blanket’ or whole of repertoire.</p> <p>In 2011, PwC estimated that the transaction costs for higher education licensing under the collective licensing system in the UK were about £6.7M a year, compared to the estimated cost of an ‘atomised’ model (negotiation for each use) of between £145M and £720M a year.¹⁵ We will provide the Commission with a similar estimate for Australia.</p> <p>There are also some licences for selected content (e.g. the online ‘pay-per-use’ licence offered through the RightsPortal; images for auction catalogues and public galleries).</p> <p>The UK has recently introduced a legislative framework for extended collective licensing, which assists collecting societies to extend their licence offerings and reduce transaction costs.</p> <p>See further 5.1.</p>
<p>How effective are new approaches such as the Copyright Hub in enabling value realisation to copyright holders?</p>	<p>The Copyright Hub and similar initiatives are in relatively early stages of development, but they demonstrate how technology can be harnessed to offer simple, workable licensing solutions for both remunerated and non-remunerated uses (where conditions of use include, say, attribution and notification of use to the rightsholder, but not payment).</p> <p>See further submission from the Copyright Hub.</p>
<p>Are moral rights necessary?</p>	<p>Yes, partly because an obligation to attribute a creator is difficult to enforce otherwise.</p> <p>See further 5.4.</p>
<p>What is the economic impact of providing moral rights?</p>	<p>Moral rights can assist creators to get work, particularly from their works being attributed to them.</p>
<p>What should be considered when assessing prospective changes to copyright?</p>	<p>Considerations for changes to copyright law and arrangements include:</p> <ul style="list-style-type: none"> • the extent to which an issue is having a detrimental impact in practice; • whether the issue can only resolved by legislative change or whether there are other options such as industry agreements or guidelines reflecting a consensus position; • the implications for Australian cultural production; and • the costs of change (both for existing licences and

¹⁵ An economic analysis of copyright, secondary copyright and collective licensing, at page 42.

Question	Response (references are to heading levels in submission)
	<p>arrangements, and for future licences and arrangements).</p> <p>See further 7.</p>
<p>What balance should be struck between creators and consumers?</p>	<p>The interests of creators and consumers are not oppositional or mutually exclusive. The broad aim of the copyright system is to support creation of new content for the benefit of society as a whole. The ‘balance’ is enabling access that benefits society on terms that do not undermine the creation of new content for the longer term.</p> <p>This means in part that you need to differentiate consumer consumption of entertainment products like films, music and TV programs from, say, access to copyright content for education or research.</p> <p>See further 7.</p>
<p>What role can fair dealing and/or fair use provisions play?</p>	<p>The ‘fair dealing’ exceptions are some of the many exceptions and limitations in Australia’s copyright law. They allow a large range of uses without the permissions usually required. They largely reflect an adjustment for market failure: the use is recognised as enhancing social welfare but, at the time the exception was introduced, the transaction costs of getting a licence were too high.</p> <p>The term ‘fair use’ is used by many people to mean uses that they do not think should require a copyright clearance. It is also a technical term used in an exception in US copyright law that allows use for any purpose, subject to the consideration of four ‘factors’.</p> <p>The main issue is the extent (if any) to which an exception should inhibit the offering or development of a licensing solution (which may or may not involve payment, but has conditions of value to the content creator such as attribution or notification).</p> <p>See further 5.6 to 5.12 and Appendix 3.</p>
<p>Are copyright exemptions sufficiently clear?</p>	<p>There is certainly scope for simplifying many of the current exceptions to improve ‘certainty’ for users. There is also scope for additional clarity in regulations, or guidelines from the government or from all affected stakeholders.</p> <p>Exceptions such as the US ‘fair use’ exception are recognised as <i>not</i> being clear, resulting often in long-running litigation.</p> <p>See further 5.8 and 5.11.</p>
<p>What changes should be made to Australia’s copyright regime?</p>	<p>See 7 below.</p>
<p>The broader copyright landscape</p>	
<p>How does Australia formulate its position on copyright policy in the context of international</p>	<p>Nearly all changes to copyright law reflect domestic considerations, even if they followed developments internationally reflected in multilateral and other treaties.</p>

Question	Response (references are to heading levels in submission)
agreements?	Extension of copyright terms is an exception. But the effects of that change have been relatively minor having regard to the entire system. See further 6.2.
Is the role expected of ISPs a practical option?	Yes. See further the comments of the Director General of World Intellectual Property Organization at 6.

4 FRAMEWORK FOR ASSESSING IP ARRANGEMENTS

4.1 EFFECTIVENESS

Submissions to the Commission from content creators and industries outline the range, extent and evolution of content-based products and services developed in Australia. Australian publishers have harnessed digital technologies in a range of ways, but particularly to support direct engagement with their customers, and respond to customer feedback and requirements.

4.2 EFFICIENCY

As noted above, copyright industries are significant contributors to the Australian economy. As widely recognised, the industries are broad reaching and involve complex value chains. The copyright system enables the unlocking of value in content by providing incentives for acquiring and trading in rights and adding value.

For example, copyright enables a book publisher to acquire the rights to a book, invest in editing and creation of accompanying content (such as illustrations or a foreword), invest in production, distribution and marketing, and on-sell rights for foreign territories and 'derivative' content products such as films and television programs, audio books and translations. The acquirers of those rights will again invest in new forms of copyright (e.g. the film or television program; a translation), and the production, distribution and marketing for those new forms of content.

Copyright management organisations such as Copyright Agency | Viscopy form an integral part of the copyright ecosystem. They offer efficient licensing solutions for a large range of scenarios, mostly involving access to entire repertoire, but also for more specific requirements. The licences managed by Copyright Agency | Viscopy enable the copying and sharing of copyright content by millions of Australians with minimal transaction costs, and investment in the production and dissemination of new content.

Submissions to the Commission from publishers and others involved in content-based industries also demonstrate how the copyright system supports the production, dissemination and export of Australian content.

4.2.1 Copyright 'evidence'

The database of copyright 'evidence' (Copyright Evidence Wiki) established by CREATE at Glasgow University gathers together a lot of the research in this area.¹⁶ The Review of Economic Research on Copyright Issues, published by the Society for Economic Research on Copyright Issues (SERCI), is also a source of academic research on the economics of copyright.¹⁷

4.2.2 'Proportionality' of copyright protection

While copyright protection requires, in most cases, a degree of effort and skill, the level of protection is not (and is not intended to be) directly proportionate to the *level* of effort. Given that

¹⁶ http://www.copyrightevidence.org/evidence-wiki/index.php/Copyright_Evidence

¹⁷ <http://www.serci.org/rerci.html>. See also *The economics of copyright and digitisation*, Strategic Advisory Board for Intellectual Property Policy (SABIP), <http://www.sabip.org.uk/home/research/research-copyright/research-copyright-economics.htm>; *An empirical analysis of the economics of copyright: how valid are the results of studies in developed countries for developing countries?*, Richard Watt, http://www.wipo.int/export/sites/www/ip-development/en/economics/pdf/wo_1012_e_ch_3.pdf; Macquarie University research project *The Australian Book Industry: Authors, Publishers and Readers in a Time of Change*, http://www.businessandeconomics.mq.edu.au/our_departments/Economics/econ_research/book_industry_project

copyright is intended both to reward content creators as well as contribute to an environment that encourages creation and dissemination of content, the value of the work to the consumer is also important.

For example, the Copyright Tribunal, in assessing equitable remuneration payable by the school sector under the statutory licence for education, said that the 'process will involve giving a value to the utility the educational institutions will obtain from the use of the copyright material'.¹⁸

In any event, it is difficult to envisage how a test for different levels of 'originality', resulting in different levels of protection, might be formulated.

The level of protection does depend, however, on the enforceability of the right in any given situation. This can be affected by:

- the degree of 'originality' (skill and labour) involved in the material used;¹⁹
- the application of any exceptions (which can be affected by type of material— e.g. image or sound recording – and whether the type of use and/or user is privileged by the legislation); and
- the legal remedies a court will order (such as the amount of damages, if any).

The legislation allows the use of content without authorisation for a large number of purposes regarded as socially desirable. There is a list of these uses in Appendix 3.

In practice, users commonly make a risk assessment of both the likelihood of an unauthorised use being discovered, and its consequences. A trivial use of a low value work is unlikely to result in enforcement action. This is not peculiar to copyright.

4.2.3 Relationship between copyright and competition

The *Report on Intellectual Property legislation under the Competition Principles Agreement* described the relationship between intellectual property and competition as follows:

Intellectual property laws on one hand and competition policy on the other are ... largely complementary. The intellectual property system serves to promote innovation, which is a key form of competition. Competition policy, by keeping markets open and effective, preserves the primary source of the pressure to innovate and to diffuse innovations.

In a similar vein the National Competition Council said in a 1998 report said:

... properly understood, intellectual property rights and competition laws are compatible and consistent. They share the same overall objective of enhancing community welfare. Competition enhances community welfare by ensuring that, over time, new and better products, and existing products at lower cost, are offered to consumers. Intellectual property laws seek to enhance community welfare by encouraging innovation and invention through granting exclusive property rights. Innovation and invention result in new and better products becoming available to consumers. Competition can spur innovation and invention by providing incentives to undertake research and development.

4.3 ADAPTABILITY

The objectives underlying the copyright system continue to be sound, and the system has adapted better than is sometimes acknowledged. There have been amendments to the legislation in response to technological and other developments (see Appendix 2), but many technological developments have been accommodated without legislative change. For example:

¹⁸ <http://www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acopyt/2002/2002acopyt01>

¹⁹ In assessing whether use of a part of a work infringes copyright, a court looks at its 'originality'.

- a court found 20 years ago that a computer game was protected by copyright even though there is no explicit reference to computer games in the legislation;
- the statutory licence for education allows universities to offer Massive Open Online Courses (MOOCs); and
- the statutory licence for governments allows digitisation of collections libraries and other cultural institutions.

Some developments do, however, require a change to the regulatory framework. For example, the development of the online environment enabled a new form of publishing – making available online – that didn't involve making copies. This was recognised in a new international norm developed by the World Intellectual Property Organization in 1996, and implemented in Australia in 2000. Similarly, the processes involved in digital distribution produce 'technical' intermediate copies, and exceptions have been introduced for those.

It is naïve to think that a 'set and forget' approach can be taken to copyright regulation. It will continue to require periodic review and adjustment. Not everything is foreseeable. In considering changes, however, it is important to recognise that there is a vast range of business arrangements based on the copyright system and radical changes may cause disruptions that are not beneficial to anyone. Having said there, there is room for improvement in the current regulatory environment.

4.3.1 Principles based vs prescriptive

The copyright legislation currently has both principles-based and prescriptive aspects. For example, the fair dealing exceptions have both prescriptive elements (the type of activity that is allowed), and principles-based elements (whether the activity is 'fair').

While principles-based provisions can provide greater 'adaptability', they are also less certain and there can be unacceptable costs associated with that. For example, it is widely accepted that the way a court will interpret the application of the US 'fair use' exception is not predictable, and that this can result in lengthy and expensive litigation. One of the high profile fair use cases in the US, involving Google's digitisation of millions of books, has been running for a decade and is still not resolved.

On the other hand, some 'certainty' can be provided by other means such as regulations, and by guidelines (provided they are accepted by all stakeholders). There is greater scope for guidelines in some areas than others.

4.4 ACCOUNTABILITY

4.4.1 Factors affecting changes to the copyright legislative framework

We have set out the legislative changes made over the last 35 years in the table in Appendix 2.

In nearly all cases, the changes were driven by domestic considerations. In some cases, these changes were led by new international standards such as the 1995 WIPO 'internet' treaties (implemented in the 2000 'Digital Agenda' amendments).

The exception is the extension of copyright terms that resulted from the Australia–US Free Trade Agreement. But the consequences of that change have been vastly exaggerated by some.²⁰

4.4.2 'Transparency' of processes

In our experience, most changes to copyright legislation have involved consultation with affected stakeholders. In many cases proposed amendments have been released as an exposure draft

²⁰ See further 6.2 below.

before introduction. All major amendments have been scrutinised by Parliamentary Committees. And all amendments are accompanied by a regulatory impact statement.

One observation would be that processes such as the recent Australian Law Reform Commission inquiry into copyright and the digital economy tend to result in very polarised statements that do not assist policy makers. By contrast, a recent process initiated by the government to facilitate development of consensus proposals for amendments to the copyright legislation was successful.²¹

As regards treaty negotiations, we understand that treating proposals by various parties as confidential can assist a successful outcome in complex negotiations. We have been involved in many government consultations, which are open to all interested stakeholders. We support the government's general approach of avoiding any additional requirements regarding domestic law, while at the same time seeking to improve export prospects for creative industries.

5 COPYRIGHT ISSUES

5.1 ROLE OF COPYRIGHT MANAGEMENT ORGANISATIONS (COLLECTING SOCIETIES)

As noted by Handke and Towse:

*Economists have developed a relatively stable rationale of [copyright collecting societies] CCS. These cooperative membership organisations pool the costs of rights management and exploit economies of scale in the services of copyright administration. CCS hereby reduce the cost per member and make licensing cheaper for both copyright holders and users. They thus make some markets for copyrights more efficient and they can even assist the creation of markets for copyrights that would otherwise not exist.*²²

5.1.1 Effectiveness of collective licensing

Australia has well-established systems of licensing through copyright management organisations underpinned in part by statutory licensing provisions.

Statutory licences have been introduced for situations in which it was assumed 'that, if left to themselves, the parties will be unable to reach a satisfactory resolution of the terms for the access desired' for reasons that include 'unacceptably high transaction costs in cases where individual uses would be too difficult to identify and control' and 'the user is in a powerful initial position and has been able to obtain a statutory solution in its favour'.²³

The licences managed by Copyright Agency | Viscopy enable copying and sharing of content by millions of Australians without the individual copyright clearances otherwise required. This includes nearly 3.7 million school students,²⁴ one million university students, nearly 300,000 teaching staff, 100,000 university staff,²⁵ and 855,000 government employees. These licences enable use of text and images from anywhere in the world, from any source and in any format. They allow modification and incorporation into other resources. The compliance requirements are minimal.

²¹ Amendments to simplify the statutory licence for education.

²² Handke and Towse, *Economics of Copyright Collecting Societies*, 2008, *International Review of Intellectual Property and Competition Law*, vol. 38, no.8, 2007, pp. 937-957, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085. See also Furnival, *The Economics of Collective Copyright*, *Copyright Reporter Vol 33 No 2* (August 2015), available at http://copyright.com.au/wp-content/uploads/2015/09/R01297-CR33n2_Furnival.pdf.

²³ Ricketson & Creswell, *The Law of Intellectual Property: Copyright Designs & Confidential Information* at [12.0].

²⁴ abs.gov.au/ausstats/abs@.nsf/mf/4221.0

²⁵ universitiesaustralia.edu.au/australias-universities/key-facts-and-data

At the same time, the licensing arrangements support the future production and distribution of products and services built on creative content. In 2014–15, Copyright Agency paid \$136.6M to more than 10,200 content creators.

5.1.2 Efficiency of collective licensing

In 2011, PwC estimated that the transaction costs for higher education licensing under the collective licensing system in the UK were about £6.7M a year, compared to the estimated cost of an ‘atomised’ model (negotiation for each use) of between £145M and £720M a year.²⁶

We will provide the Commission with similar estimates for Australia.

5.1.3 Role of Copyright Tribunal

Terms of licences managed by copyright management organisations can be referred to the Copyright Tribunal if negotiations fail (which is rare). The Tribunal can also oversee distribution arrangements. Other oversight mechanisms include the Code of Conduct for Copyright Collecting Societies and the appointment (and revocation of appointment) of copyright management organisations to manage statutory licences.

We have previously referred the Commission to determinations of the Copyright Tribunal, particularly those relating to equitable remuneration.²⁷

5.2 LICENSING INITIATIVES LIKE THE COPYRIGHT HUB

While copyright management organisations largely manage ‘blanket’ licences that enable licensees to use an entire repertoire, they are also developing systems for ‘pay per use’ or ‘transactional’ licences. An example is Copyright Agency’s RightsPortal: an online licensing platform for newspaper content (currently being extended to scholarly journal articles).²⁸

Other initiatives include:

- the Copyright Hub: a set of tools to enable ‘right click licensing’, whereby a user can click on digital content and transact a licence online according to the rightsholders’ terms (which may or may not involve payment);²⁹
- UsePLUS: a similar initiative from image holders to enable online licensing transactions for images;³⁰
- iCopyright (<http://www.icopyright.com>); and
- Copyright Clearance Center’s ‘RightFind’ licences, including RightFind XML Mining for text and data mining.

While many of these initiatives are in the early stages, they demonstrate that simpler licensing is achievable, and is rapidly becoming easier with technological developments.

²⁶ An economic analysis of copyright, secondary copyright and collective licensing, at page 42.

²⁷ <http://copyright.com.au/about-copyright/policy-and-research/court-decisions>; see <http://www.copyrighttribunal.gov.au/decisions> for all Tribunal decisions. See also Justice Kevin Lindgren "Market Power, Collecting Societies and the Role of the Copyright Tribunal" available at <http://www.austlii.edu.au/au/journals/FedJSchol/2005/16.html>; and Copyright Law Review Committee Jurisdiction and Procedures of the Copyright Tribunal (available from Attorney-General’s Department)

²⁸ Online newspapers include a ‘button’ that links to RightsPortal to get a clearance for re-use of the content. RightsPortal also has the potential to cover other types of content such as images.

²⁹ <http://www.copyrighthub.co.uk/>

³⁰ <https://www.useplus.com/aboutplus/system.asp>

5.3 DIFFICULTIES IN GETTING LICENCES

It is helpful to distinguish situations that involve substitutable content from those that don't. In some cases, licensees can make licensing easier by choosing content that is easily available (such as images available from image libraries, APRA's production music, or content available under 'open' licences such as Creative Commons licences).

People who use Google Images to 'discover' images available online can use the Advanced Search facility to find images that are 'free to use or share' (that is, covered by a Creative Commons licence), and other images that are linked to licensing terms (e.g. Getty Images). There is scope for this to be further enhanced.

It is also useful to distinguish 'low volume, high value' licensing (like film rights for a book) from 'high volume, low value' licensing, which is the focus of initiatives like the Copyright Hub and licensing solutions managed by copyright management organisations.

5.4 MORAL RIGHTS

Moral rights are part of the international norms on copyright set out in the Berne Convention managed by the World Intellectual Property Organization. They are recognised in most countries. They enable creators to take legal action if their work is not attributed, is falsely attributed, or is treated in a derogatory way.

While false attribution may give rise to legal claims other than breach of moral rights (such as misleading or deceptive conduct), there are no or limited legal avenues other than breach of moral rights for failure to attribute, particularly against people with whom the author has no contractual relationship.

Moral rights are not tradeable like other copyright rights; they cannot be enforced by anyone other than the author (or the author's legal personal representatives after the author's death). The author can choose to consent to not being attributed, or to changes or modifications, and could seek payment in return for that consent.

Moral rights affect an author's professional reputation and opportunities to earn revenue that follow from it. Attribution of a work enables viewers or consumers to link it to the author, which may assist the author's development of an audience or customer base for their work. Similarly, the right to manage the integrity of works assists an author to manage their reputation as a creator of works of a certain quality.

5.5 DIFFERENT UNDERSTANDINGS OF WHAT 'FAIR USE' MEANS

One of the challenges of an open-ended exception like the US fair exception is that it signals a subjective decision about whether a use is 'fair', particularly when it is introduced as an *additional* exception to a large range of existing exceptions for socially useful purposes.

It is clear from the submissions to the Australian Law Reform Commission that there were vastly different levels of understanding about what 'fair use' meant as a legal concept, and what they regarded in a non-technical sense to be 'fair'.

5.6 THERE ARE OPTIONS FOR 'UPDATING' COPYRIGHT LEGISLATION

It is also clear from the submissions that while many thought that copyright legislation should be 'updated', they had different views about how that might be done.

For example, in its submission, Australian Industry Group (Ai Group) supported 'a more flexible and less technology specific model for copyright law' but noted that its members 'have different views

on whether this is best addressed by specifically legislating what is permitted or by leaving this to the courts to determine based on principles set out in amendments to the Act'. It also noted that:

*there are complex issues associated with these reforms, such as the ability of third parties to make copies for private and domestic use on behalf of individual users. Great care is needed to strike the right balance in allowing innovative new services and fair access to legitimately acquired content in a multi-device environment, without undermining new commercial markets.*³¹

However, in its report the ALRC refers to the Ai Group submission under the heading *Fair use assists innovation*, suggesting that the Ai Group supports the ALRC proposal for a fair use' exception.³² This indicates a misunderstanding, that is also evident elsewhere, that updating copyright legislation necessarily entails the adoption of an open-ended exception like the US 'fair use' exception.

5.7 ECONOMICS OF EXCEPTIONS

In a report for the Hargreaves inquiry in the UK in 2011, PwC described the economic rationale for copyright exceptions as correcting for market failure 'when the transaction costs of licensing are so high that a licensing market will not operate voluntarily', but that policy makers also need to avoid

*a premature or broad exception could undermine incentives for the development of market mechanisms that reduce transaction costs and make economic exchanges possible (such as investment by CMOs in setting up a licensing system).*³³

It set out the follow criteria for copyright exceptions:

- *where consumers' demands could be met by a collective licensing scheme, exceptions should not be applied;*
- *where market development is unlikely, and transaction costs associated with licensing remain significant, an exception should be applied; and*
- *where a market could develop if copyright was enforced, and transaction costs are reduced, the absence of an initial market should not automatically lead to the implementation of an exception.*

And noted that:

If an exception is granted in a market which would otherwise have operated (i.e. the transaction costs are small in relation to the value consumers attach to the material) then business models which rely on the production and distribution of content may be compromised.

5.8 UNPREDICTABILITY OF 'OPEN-ENDED' EXCEPTIONS

It is widely acknowledged that the application of the fair use exception in US law is unpredictable. While there are some academics who argue that it is more predictable than often thought,³⁴ the US Copyright Office noted recently:

³¹ http://www.alrc.gov.au/sites/default/files/subs/728._org_the_australian_industry_group_ai_group.pdf

³² 4.78 The Australian Industry Group submitted that the current Copyright Act does not provide the optimal foundation for Australia to succeed in the digital economy, and supported the ALRC's movement towards a more flexible and less technology specific model for copyright law':

http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf

³³ PwC, *An economic analysis of copyright, secondary copyright and collective licensing*, 2011 available at cla.co.uk/data/corporate_material/submissions/2011_pwc_final_report.pdf

The Office is not persuaded that fair use has achieved the predictability and stability that [some] commenters ascribe to it. To be sure, courts have concluded thus far that the mass reproduction and limited display uses at issue in the Google Books cases (full-text search, access for the print-disabled and display of “snippets”) are protected by fair use. But while these cases are important, and reflect both the evolution of the fair use doctrine and the need to reconcile exclusive rights with other public policy priorities, they were decided on the basis of the highly fact-specific inquiry prescribed by 17 U.S.C. § 107, and therefore they do not extend to the wider dissemination of copyrighted works without permission or compensation.³⁵

The Kernochan Center for Law and Media and the Arts Columbia Law School has said that claims that law concerning fair use is ‘consistent and predictable’ is (with regards to US law) ‘a rather optimistic assessment’:

Many in the United States – including users, legal practitioners and courts – do not regard the law of fair use as consistent and predictable, although they wish it were. ... Courts have described the issue of fair use as “the most troublesome in the whole law of copyright”, a sentiment shared by numerous courts, commentators, legal practitioners and users.³⁶

5.8.1 Complexity of copyright cases in the US

In *Copyright's Topography: An Empirical Study of Copyright Litigation*,³⁷ Cotropia and Gibson observed:

We ... find, interestingly, that when compared to civil litigation in general and to patent and trademark cases more specifically, copyright cases end up in about the same place—a settlement or voluntary dismissal—but take longer to get there and contain more substantive decisions and docket entries. Copyright cases also result in a higher percentage of trials. All of this suggests that copyright law’s complexity, uncertainty, and standard- and fact-driven doctrine cause litigants and courts to work harder to reach the typical civil litigation result.³⁸

5.8.2 Fair use litigation in the US vs litigation in Australia, UK

A recent report indicated that in 2013 and in 2014 there were about 4,000 copyright cases filed in the US in each year, of which about half were filesharing cases.³⁹

An analysis of 881 copyright cases filed in the first three months of 2014 showed that 289 cases were defended, and 124 of those (43%) raised the fair use defence.⁴⁰

³⁴ e.g. Pamela Samuelson ‘Unbundling Fair Uses’, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323834; Matthew Sag, ‘Predicting Fair Use’, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1769130.

³⁵ Orphan Works and Mass Digitization at p 76.

³⁶ Kernochan Center for Law and Media and the Arts Columbia Law School: Comments on ALRC Discussion Paper, available at http://www.alrc.gov.au/sites/default/files/subs/649_org_kernochan_center_for_law_and_media_and_the_arts_columbia_law_school.pdf

³⁷ 92 TEX. L. REV. 1981, 1982 (2014)

³⁸ Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 1982 (2014).

³⁹ <https://lexmachina.com/lex-machina-publishes-copyright-litigation-report>. See also Matthew Sag, “IP Litigation in United States District Courts: 1994 to 2014” *Iowa Law Review*, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2570803>, 2016, which includes analysis of copyright cases Filed in US District Courts between 1994 and 2014.

⁴⁰ Parness Law Firm (New York). In a handful of cases, the issue was raised by the plaintiff (saying the defence did not apply), but nearly all raised the issue as a defence. The cases in which fair use was not raised were predominantly those in which the defence was not relevant (e.g. the case did not involve copyright infringement, or a fair use defence was unlikely to be successful).

In two studies, NYU IP Law Professor, Barton Beebe, identified US Federal Court decisions that involved fair use, and which of those ‘made substantial use’ of the fair use exception.⁴¹

	involved fair use		‘substantial use’ of fair use	
	Total	Per year	Total	Per year
1978–2005	578	21	328	12
2005–2014	354	39	132	15

The data indicates a substantial increase in the number of cases per year involving fair use since 2005, and an increase in the number of cases per year where fair use was a ‘substantial’ issue.

By contrast, data from the Australian Federal Court shows that there were 28 cases dealing with copyright and/or designs filed in 2013–14, and 23 cases in 2014–15.⁴² And an analysis of reported cases from single judges of the Federal Court between 1 July 2006 and 30 June 2012 showed that 94 involved copyright, but in only four of those was the operation of a copyright exception a key issue.⁴³ In only one of them (the TV Now case) did the case turn on the court’s interpretation of an exception (the exception for ‘time-shifting’ broadcasts).

An analysis of cases in the UK from 1 January 1978 to 2011 involving fair dealing and/or other exceptions that allow uses that may be allowed by the fair use defence in the US concluded that there were 67 cases in the period (about two per year), of which 21 involved fair dealing defences.⁴⁴

5.9 THE ‘WINNER TAKES ALL’ PROBLEM

One of the recognised problems with the US fair use exception is that it results in ‘winner takes all’: either the use does occur at all, or it does but without any regard to the value of the creative input.

As far back as 1999, Alex Kozinski, Chief Judge of the US Court of Appeals for the Ninth Circuit suggested a licensing system to enable ‘derivative’ works with compensation to the rightsholder of the content used.⁴⁵

More recently, Professor Jane Ginsburg has argued in an influential paper:

Fair use is an on/off switch: Either the challenged use is an infringement of copyright, or it is a fair use, which Section 107 declares "is not an infringement of copyright." As a result, either the copyright owner can stop the use, or the user not only is dispensed from obtaining permission, but also owes no compensation for the use. The unpaid nature of fair use introduces pressures that may distort analysis, particularly of the "transformative" character of the use, and of potential market harm. Faced with a use, particularly in the context of new technologies, that a court perceives to be socially beneficial, a court may overemphasize its

⁴¹ Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005, 156 PA. L. Rev. 549 (2008); Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Cases, 1978-2014, presentation to NYCBA. Neil Netanel in ‘Making Sense of Fair Use’ 15 LEWIS & CLARK L. REV. 715 (2011) identified 79 opinions arising out of 68 unique cases in the period 2006 to 2010.

⁴² Report provided by the Federal Court to Copyright Agency.

⁴³ Copyright Agency submission to Australian Law Reform Commission (November 2012) at Appendix 2, available at http://www.alrc.gov.au/sites/default/files/subs/249._org_copyrightagency.pdf

⁴⁴ Submission by British Copyright Council to Hargreaves Inquiry.

⁴⁵ What’s So Fair About Fair Use? The 1999 Donald C. Brace Memorial Lecture, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521059. The lecture was partly prompted by a recent decision involving a book about the OJ Simpson trial written and illustrated to look like a Dr Seuss book. The court held that the fair use defence didn’t apply. Judge Kozinski said he would have come to a different decision, and it is likely that a different decision would be reached by today’s courts given the development of the ‘transformative use’ doctrine since then.

"transformativeness," and correspondingly underestimate the market consequences, in order to prevent the copyright owner from frustrating the social benefit. Distortions can appear in the other direction as well: A court sensitive to the economic consequences of the unpaid use may feel obliged to downplay the public interest fostered by the use. Statutory licenses or privately negotiated accords within a statutory framework can alleviate the tension, by ensuring that uses that the legislator perceives to be in the public interest proceed free of the copyright owner's veto, but with compensation – in other words, "Permitted but Paid."⁴⁶

The paper is cited in the recent US Copyright Office report, referred to above, that found the US fair use exception an inadequate solution for mass digitisation of library collections, and instead recommended a licensing solution based on 'extended collective licensing'.

5.10 EXCEPTIONS AND AUTOMATED LICENSING AND ENFORCEMENT

One of the recognised difficulties with exceptions that are too uncertain is that it is difficult to allow for them in automated processes for licensing and enforcement that make provision for exceptions. For example, the US Supreme Court recently held that fair use must be taken into account in determining whether an online service provider must act on a takedown notice from a copyright owner. One of the consequences is:

... how this ruling will affect the technologies and automated processes that many copyright owners use to police their works online, often through copyright monitoring services like MarkMonitor, Muso, Friend MTS, Entura, and various others. These services use fingerprinting and other techniques to identify content online, create takedown notices from templates, and send them — many thousands per day — to online services.⁴⁷

Similar issues apply to systems and processes designed to determine whether a licence is needed, and/or whether content can be provided.

5.11 CLARITY OF EXCEPTIONS

There is scope for simplifying exceptions, as exemplified by the recent development of a consensus proposal for simplification of Australia's statutory licence for education.

Our experience is that clarity is particularly appreciated by certain classes of user, such as libraries, cultural institutions and teachers. For example, in its submission to the ALRC on copyright and the digital economy, the Parliamentary Library said:

The Parliamentary Library disputes that a fair use exception could adequately replace [the special exceptions for parliamentary libraries]. Fair use is a flexible concept to be determined on a case-by-case basis and the need to delve into the finer questions involved in the practical application of such provisions is inappropriate in a parliamentary environment. As the Discussion Paper notes, even where a use may fall into one of the named illustrative purposes, it does not necessarily mean that the use will be fair. In every case, the fairness factors must be explored, and the results weighed together, in light of the purposes of copyright. In contrast, the parliamentary library exceptions provide the necessary certainty with no need for a case-by-case assessment of the facts.

...

⁴⁶ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2444500

⁴⁷ Copyright and technology, Ninth Circuit Calls for Takedown Notices to Address Fair Use, <http://copyrightandtechnology.com/2015/09/15/ninth-circuit-calls-for-takedown-notices-to-address-fair-use/>

*Clear legislation, rather than reliance on common law, is more likely to give the certainty and clarity that all libraries need in their dealings with copyright.*⁴⁸

Clarity can be assisted by practical guides. But, as recently noted by the US Copyright Office, guides need to reflect a widely accepted view of the law to be useful.

*Given that [Codes of Practice on fair use] typically are developed without the input of copyright owners, these codes cannot reflect an industry-wide consensus as to the lawfulness of the uses they describe, let alone a judicial determination.*⁴⁹

Certainty is also important to the business community, as noted recently by the Attorney General's Department in evidence to a Parliamentary inquiry:

*But one of the things we have learnt through the ALRC process about fair use and fair dealing is that, because we are dealing with commercial matters, uncertainty itself raises a high cost—or the prospect of a cost—which, whether or not it is incurred, becomes a barrier to action.*⁵⁰

While businesses may be less risk averse than cultural institutions and the government sector, the consequences of getting it wrong can be much greater.

The focus should be on facilitating licensing solutions (not necessarily for payment) that can address use requirements that arise over time and technological developments. There are a range of oversights for licensing arrangements, particularly for those managed by collecting societies, including competition and consumer laws and the Copyright Tribunal.

5.12 RECOGNISING THE COSTS OF CHANGE

In a presentation to the Copyright Symposium in 2014, Professor Henry Ergas noted that introducing a broad new copyright exception:

requires looking not only to evidence but also to the standard of proof required to justify change. It's not merely a question of the evidentiary material, but also of the threshold test and those need to be considered together from the point of view of the efficient adaptation of the copyright system to its changing environment.

...

*You need to have substantial evidence, and it has to clear a fairly high hurdle before you disturb existing arrangements. The risks involved must be manageable. There must be ways of handling those risks in the transition, and also should the change provide unpleasant surprises.*⁵¹

6 THE BROADER INTELLECTUAL PROPERTY LANDSCAPE

The Director General of the World Intellectual Property Organisation said in 2011:

Law was for many decades, if not centuries, considered to be the way to make copyright policy. It must still be the final arbiter, but we know that it is a rather rigid and limited instrument in the digital environment. In that environment, the volume of traffic, the

⁴⁸ http://www.alrc.gov.au/sites/default/files/subs/694._org_the_parliamentary_library.pdf. The Parliamentary Library said that it 'while broadly supporting the concept of fair use, ... care needs to be taken in drafting such legislation'.

⁴⁹ P 78

⁵⁰ Report of Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Copyright Amendment (Online Infringement) Bill 2015, at [2.62], available at

aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Copyright_Bill_2015/Report
⁵¹ (2014) 32 Copyright Reporter No 1 at 35.

international or multi-jurisdictional nature of so many relationships and transactions and the loose regulation of the Domain Name System, which permits a large degree of anonymity, all make law a mere shadow of itself in the physical world, a weakened force. Its institutions and their reach are trapped in a territorial cage, whereas economic and technological behaviour burst out of that cage some time ago. In consequence, the culture of the Internet is such that platforms influence behaviour as much as, if not more than, law.

Recognizing the limitation of law, and its inability to provide a comprehensive answer, should not mean that we abandon it. There are many important legal questions to be addressed. Among them, I believe that the question of -- and here I use, or misuse, advisedly a term from civil law -- the responsibility of intermediaries is paramount. The position of intermediaries is key. They are at once, service providers to, as well as partners, competitors and even clones of creators, performers and their business associates; hence the difficulty that we have in coming to a clear position on the role of intermediaries.⁵²

The comments highlight both the importance of non-legislative measures as part of the copyright system, and also the key role and responsibilities of intermediaries (particularly those operating in the online environment). In looking at their role, the benefits to them from the distribution of content via their systems (albeit often indirect) must be recognised.

6.1 CONSEQUENCES OF INFRINGEMENT

There have been a range of studies on the consequences of infringement (particularly online infringement) for markets for legitimate sources of content, and particularly for the development of new markets and delivery mechanisms. The focus has largely been on the music and film industries, but other content creators are affected as well.

For example, a recent survey of nearly 2,000 professional photographers in the US showed that 67% have had photographs used without their permission. Photographers are particularly vulnerable to online infringement, partly because metadata identifying them and their licence conditions is often stripped out of digital image files by the uploading process, and that the copyright status of images people discover online (e.g. via Google Images) is often not clear.

6.2 ROLE OF INTERNATIONAL DEVELOPMENTS IN DOMESTIC POLICY

International standards for copyright systems facilitate global trade in rights and copyright-based products and services. Countries that adopt these standards, together with effective enforcement mechanisms, both support their domestic content industries, including licensing arrangements via copyright management organisations and become more attractive for export for Australian content industries.

The major multilateral copyright treaties allow countries to have exceptions and limitations in their legislation that meet the three-step test: exceptions must be for a special case, not conflict with normal exploitation, and not unreasonably prejudice the legitimate interests of rightsholders. This test is now also reflected in the IP chapters of trade agreements such as the Trans Pacific Trade Agreement (TPP).

The TPP goes further and requires each country to:

endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news

⁵² http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html

*reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.*⁵³

This reflects the TPP's objectives for IP:

*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.*⁵⁴

We think the concerns about IP provisions in trade agreements are vastly overstated.

For example, the estimates of the costs of the extensions of copyright terms, which were referred to by the Parliamentary committees that reviewed the Australia–US Free Trade Agreement and have been referred to in other contexts since, were based on a clearly flawed premise. In its submission to the Joint Standing Committee on Treaties (JSCT) on the Australia-US Free Trade Agreement in 2003, the Australian Copyright Council said:

In its report, the JSCT refers at para 16.3ff to costs and benefits of extending the term of copyright in Australia. The report notes, at para 16.17 that “the Committee understands from most parties that estimating the economic impact is virtually impossible”. The report goes on to refer, at para 16.19, to Dr Philippa Dee’s view that the cost “could amount to up to \$88 million per year, or up to \$700 million in net present value terms”. These estimates are meaningless, as they are based on an assumption that there is a constant flow of royalties to each author. This assumption is completely contrary to common sense, and contrary to the statement on page 22 of Dr Dee’s report that “Some products, such as computer software, have a very short economic life. For these products, the extension of copyright term will have no effect at all”.

An analysis by Copyright Agency⁵⁵ of books copied in schools between 2012–15 shows:

- 50% were published in the last 10 years;
- 70% were published in the last 15 years;
- 95% were published after 1985;
- 99% were published after 1968; and
- 0.03% were published before 1945.

Similarly, an analysis of books copied in universities between 2012–15 shows:

- 40% were published in the last 10 years;
- 62% were published in the last 15 years;
- 95% were published after 1985;
- 99% were published after 1968; and
- 0.05% were published before 1945.

⁵³ Article 18.66

⁵⁴ Article 18.2

⁵⁵ The analysis was based on 24,357 titles from schools and 17,736 titles from universities, recorded in surveys of copying, for which the year of publication could be identified.

7 CHANGES TO COPYRIGHT ARRANGEMENTS

7.1 CONSIDERATIONS

Considerations for changes to copyright law and arrangements include:

- the extent to which an issue is having a detrimental impact in practice;
- whether the issue can only be resolved by legislative change or whether there are other options such as industry agreements or guidelines reflecting a consensus position;
- the implications for Australian cultural production; and
- the costs of change (both for existing licences and arrangements, and for future licences and arrangements).

7.2 SIMPLIFICATION OF THE COPYRIGHT SYSTEM

The Director General of WIPO said in 2011:

I believe that we need more simplicity in copyright. Copyright is complicated and complex, reflecting the successive waves of technological development in the media of creative expression from printing through to digital technology, and the business responses to those different media. We risk losing our audience and public support if we cannot make understanding of the system more accessible.⁵⁶

Simplifying copyright has three key dimensions:

- simplifying the legislative framework;
- simplifying licensing and permissions; and
- simpler, clearer guides to how copyright works.

7.3 SIMPLIFYING THE LEGISLATIVE FRAMEWORK

At the instigation of the government, the education sector and content creator representatives have developed a proposal for simplifying the statutory licence for education. The process demonstrates the potential for similar exercises for other areas of the legislation.

Areas with potential for simplification include:

- (1) the statutory licence for governments;
- (2) a consolidated fair dealing exception;
- (3) activities by libraries and other cultural institutions; and
- (4) private use by individuals of legitimately acquired content;

7.3.1 Simplified statutory licence for government

A simplified statutory licence for governments would repeal the prescriptive provisions in sections 183A–183C, and instead enable arrangements regarding negotiation of equitable remuneration and assistance by licensees with the collection and distribution of licence fees to be determined by agreement from time to time or, in the absence of agreement, determined by the Copyright Tribunal. This would follow the approach in the consensus proposal for simplification of the education

⁵⁶ http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html

statutory licence.⁵⁷ The application of the statutory licence to the local government sector could also be clarified.

7.3.2 Consolidated Fair dealing exception

The following is an indication of how a simplified fair dealing provision could be drafted. It would consolidate 10 separate sections into one.⁵⁸

Fair dealing

- (1) Subject to subsection (2) a fair dealing with copyright material for the following purposes does not constitute an infringement of copyright:
 - a) research
 - b) study
 - c) criticism
 - d) review
 - e) parody
 - f) satire
 - g) reporting the news
 - h) professional advice by:
 - (i) legal practitioner; or
 - (ii) a person registered as a patent attorney under the *Patents Act 1990*; or
 - (iii) a person registered as a trade marks attorney under the *Trade Marks Act 1995*.

provided in the case of (c), (d) and (e) sufficient acknowledgement of the material is made.
- (2) The matters to which regard shall be had in determining if a dealing is fair include:
 - a) the purpose and character of the dealing;
 - b) the nature of the copyright material;
 - c) the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price;
 - d) the effect of the dealing upon the potential market for, or value of, the copyright material; and
 - e) in a case where part only of the copyright material is used—the amount and substantiality of the part.
- (3) The Minister may issue guidelines on any or all of the matters in subsection (2).
- (4) In this section **copyright material** means a work, sound recording, cinematograph film, broadcast or published edition.

The proposal is consistent with Article 18.66 of the Trans Pacific Partnership Agreement, which refers to exceptions and limitations for purposes such as criticism; comment; news reporting; teaching, scholarship, research; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.⁵⁹ The term 'exceptions and limitations' includes statutory licences.⁶⁰ The Copyright Act includes a range of 'free' exceptions for teaching and a

⁵⁷ A simplified statutory licence for governments would retain a role for collecting societies 'declared' by the Copyright Tribunal to negotiate with governments on behalf of content creators, ensuring efficiencies for governments in not having to notify individual content creators regarding each use.

⁵⁸ Sections 40, 41, 41A, 42, 43, 103A, 103AA, 103B, 103C, 103D

⁵⁹ 'Exceptions and limitations' include

⁶⁰ See, for example, the 2003 World Intellectual Property Organization (WIPO) Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment says: '[Education] is an area where statutory licenses of the kind

statutory licence for education (which the government proposes to amend in accordance with a consensus proposal from the education sector and content creators), and for people with disabilities (which the government also proposes to amend).⁶¹

7.3.3 Libraries and other cultural institutions

There is scope for development of a consensus proposal, guided by government, to simplify the exceptions for libraries and other cultural institutions. Australia's library exceptions are generous by world standards, but have become complex as a result of a series of amendments over time.

7.3.4 Consolidated private use exception

There is also scope to consolidate the four separate provisions on private copying of 'owned' legitimate copies⁶² into one, possibly using the UK legislation as a model.⁶³

7.4 BETTER SUPPORT FOR LICENSING SOLUTIONS

Recent and current copyright reviews in the UK, US and Europe are looking at measures to support simpler, more comprehensive and more efficient licensing to both enable the use and repurposing of content, and to support future content creation.

7.4.1 Extended collective licensing

The UK has recently introduced a legislative framework for extended collective licensing (ECL), which enables broader licensing solutions to be developed by copyright management organisations. The US Copyright Office has also recommended ECL as a solution for mass digitisation of library and cultural collections, and has suggested it as a solution for educational use of content.

This would be a relatively simple change to introduce into Australian law given the existing infrastructure. The Copyright Tribunal could be given jurisdiction to consider, in addition to its existing jurisdiction to approve a proposal licence scheme, granting an extended mandate to the collecting society to enable it to offer a more comprehensive (and thus more efficient) licensing solution. That mandate could include 'orphan' works.

7.4.2 Tools for automated, integrated online licensing

The Copyright Hub has made a submission to the Commission, and the Commission has referred to it in the Issues Paper. Copyright Agency is partnering with the Hub to develop use cases for the Australian environment.

The Hub was a key recommendation from the UK Hargreaves review, and has received government support in the form of funding for the initial feasibility study and technical support through the government-funded Digital Catapult.

There are a range of other developments for enabling efficient online licensing of content, including developments to enable micro-payments.

found in the Australian Act may be appropriate, and this will be allowable under both the three-step test and Article 10(2): available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf.

⁶¹ The single fair dealing provision may need to encompass accessible format materials for people with disabilities in accordance with the government's proposed amendments.

⁶² Sections 43C (books and newspapers), 47J (photographs), 110AA (video), 109A (sound recordings)

⁶³ Section 28B. The provision has recently been challenged in the UK courts, but for reasons associated with requirements in the European Union Directives that are not applicable to Australia.

Practical support from the Australian government for industry-led initiatives such as the Copyright Hub, as has occurred in the UK, would assist Australian industries to develop innovative solutions that are both suited to the Australian environment and may be suitable for export.⁶⁴

7.5 SIMPLER, CLEARER EXPLANATIONS AND GUIDANCE

Greater certainty can be provided by guidelines that are issued by government and/or supported by all affected stakeholders. For example, the UK government issues 'Copyright Notices' to provide guidance about the application of the legislation.⁶⁵ The Australian government has recently said it was considering guidelines on accessible format materials for people with disabilities.

Education and awareness programs are also important, such as the recent program launched in the UK.⁶⁶

APPENDIX 1: INNOVATION, EMPLOYMENT AND EXPORT IN AUSTRALIAN PUBLISHING

CAMBRIDGE UNIVERSITY PRESS

Examples of recent education resources that have harnessed the possibilities of digital learning are:

- Dynamic Science: a fully digital resource with a learning management system (LMS) and test generator, aligned to the Australian and NSW curricula;⁶⁷
- Essential Maths for the Australian Curriculum: fully integrated textbook content in an online platform with rich media, an LMS and test generator⁶⁸ – the first time Cambridge has developed both print and digital products to be fully complementary, presenting maths in a responsive design format.
- Senior Maths for the Australian Curriculum:⁶⁹ another project where Cambridge fully integrated textbook content in an online platform and developed rich media resources (animations, video walkthroughs of examples), fully worked solutions, extensive teacher resources, an LMS and test generator.

All of the above required extensive market research, development and IT planning and management, as well as new workflows. They also required changes in the roles and responsibilities of the internal teams, and considerable development working with typesetters to transform content into customised HTML. Sales teams and customer service also needed to have intensive product training and improved understanding of the technologies that underpin the products.

Over the last two years, Cambridge has produced 395 new products for the school sector, and 71 new products for the tertiary sector.

Cambridge Australia's tertiary textbooks are exported to the UK and US and several have been adapted for use in India. Cambridge HOTmaths⁷⁰ has been adapted for use in the UK for the new GCSE curriculum (BETT award finalist in 2016) and for India and South Africa so far.

Cambridge has used licence fees distributed by Copyright Agency for new product development especially in recent years to help fund major new ways of delivering maths in a format that suits

⁶⁴ For example, Copyright Agency has licensed the technology for its online licensing platform, RightsPortal, to South Africa.

⁶⁵ <https://www.gov.uk/guidance/copyright-notices>. The Australian Attorney General's Department has also proposed guides on aspects of the exceptions for people with a print disability.

⁶⁶ <http://ipkitten.blogspot.co.uk/2015/11/encouraging-creativity-and-ip-awareness.html>

⁶⁷ <https://dynamicsscience.cambridge.edu.au/>

⁶⁸ <https://www.youtube.com/watch?v=Bbfwn5Maspw>

⁶⁹ <https://www.youtube.com/watch?v=OrQq8Anop5Q>

⁷⁰ <http://www.hotmaths.com.au/>

differentiated learning and also for Dynamic Science. Its authors have also received a share of the fees to support their future writing.

HARPERCOLLINS

On average, HarperCollins publishes 150 to 160 brand new Australian titles in Australia every year. This number does not include products such as second formats, special print runs and repackages, which would add approximately 50 to 60 more titles each year. Since 2010, HarperCollins has published approximately 700 individual author/illustrators.

In the last five years, HarperCollins has invested extensively in systems and IT development in order to be able to create, distribute and sell ebooks. Ebook sales now make up a significant proportion of its overall business.

HarperCollins continuously invests in reformatting existing IP for special sales market. It is also continuously investing in its bibliographic system, Books Plus, as it now has to disseminate information online to aid discovery of its authors and their titles.

It has created a number of apps, including Donna Hay's 'What's for Dinner', which has been downloaded over 160,000 times.

It has also created a digital only imprint, Impulse, and published approximately 30 titles in the last 12 months under this imprint.

Each year, it invests in market research via Nielsen Bookscan to analyse and research the market, market trends, and category performance in order to tailor its consumer offer.

Copyright Agency licence fees to HarperCollins have effectively funded 13 new projects over the last two and a half years.

It has generated significant revenue from rights sales for Australian titles to overseas publishers. It has also sold rights for a large range of film and television productions.

HarperCollins Australia employs 198 people across two sites in Sydney and Moss Vale, which includes 89 people at its distribution centre. In addition, it has used the services of approximately 160 freelance editors, designers, marketers, IT contractors over the last two years.

HarperCollins has also made its own separate submission to the Commission.

HAZEL EDWARDS

Hazel Edwards OAM is a writer and self-publisher (and a former teacher) who has established her own online bookstore (hazeledwards.com). She is best known for her enormously successful children's book *There's a Hippopotamus on Our Roof Eating Cake*, which has been reprinted annually since 1980, developed for a series of picture books, a junior chapter book, classroom plays, a stage production and a short movie. It has also been translated into Chinese, Braille and Auslan.

Hazel has also published more than 200 other titles for both adults and children in different media. These include *Authorpreneurship: The Business of Creativity*, in which she says:

Today a creator needs to be an 'Authorpreneur': an originator and an entrepreneur. Apart from creating words or images for specific audiences, this means learning the marketing, publicity, technological, legal and entrepreneurial skills to establish and maintain self employment in the business of ideas.

Payments from Copyright Agency have enabled Hazel to maintain and develop her website, which includes a range of materials for her readers, and her online bookstore.

AUSTRALIAN TEACHERS OF MEDIA

The Australian Teachers of Media (ATOM) is an independent, non-profit, professional association in Australia for teachers of media and teachers who wish to use media effectively in their classroom.

Amongst other things, ATOM publishes Metro Magazine, Screen Education and a range of study guides (about 130 in 2014) and education kits. It also sells third party education material from Australian content producers.

The articles published in the magazines and the study guide are used by thousands of teachers and tens of thousands of students throughout Australia, New Zealand and now the US, UK and Asia, each year. The articles that ATOM commissions from freelance writers are licensed to EBSCO (a major supplier of library resources) which reports quarterly. On average there are 13,000 to 15,000 downloads of the articles for which ATOM receives a royalty fee from the USA.

ATOM employs five full-time and three part-time employees, but also commissions a large range of writers for its publishing activities. For example, last year's Metro magazine (issues 184 to 187) included 90 articles commissioned from freelance writers. The past four issues of Screen Education included 67 articles commissioned from freelance writers.

Over the last two years, ATOM also published five books and four ePubs/ibooks.

ATOM has also invested time and money into developing a new online Education Shop where it makes available for free or sells all educational material. They are also building a streaming service to stream education films and documentaries into schools. And it has invested in new accounting software in order to better report on sales or downloads on over 5,000 individual products now on the Education Shop.

ATOM says:

All this work is completely funded by the money we earn from sales of the magazines and royalty payments ATOM receives from CAL [Copyright Agency]. If the CAL payments were to dramatically decrease ATOM would probably have to close one or both of its magazines and greatly reduce the number of study guides we currently produce.

THE HEFFERNAN GROUP

The Heffernan Group is a very small, niche publisher of trial maths exams and solutions for secondary schools, operating since 1996. It operates a website that is an online student resource for VCE maths students.

The website required the services of a web development company that had the skill and expertise to build a custom website 'from scratch', given that the website has a different focus and different features to other online student websites. This required close collaboration between the publishers and the web developer over the course of a year.

Apart from writing the trial exams, it commissions people to produce the documents, and to review the trial exams and website material.

It is continually developing new content, including trial exams for additional subjects and new content for the website.

Its future plans include further developing the website so its content is applicable to countries other than Australia.

The Heffernan Group says:

There is no doubt that without the fees from Copyright Agency which stemmed from my core business of trial maths exam writing and publishing, the online student maths resource would not have come to fruition. Simple as that.

SCHOLARLY PUBLISHING

Scholarly publishers – ranging from large multinational companies to small niche publishers – were early adopters of technology. Their core function – selecting, reviewing, editing and disseminating scholarly writing – remains,⁷¹ but they have embraced technological and other developments to all aspects of their processes, from digital submission and review processes⁷² to digital publication.

Digital publishing requires significant investment, including in infrastructure and digital delivery. A consequence, however, has been vastly increased access to scholarly writing. For example, 2013 Reed Elsevier maintained 90 terabytes of digital storage capacity, enabling downloads of 700 million articles in 120 countries.⁷³

Publishers have also used digital technologies to develop additional features for readers such as video animations (e.g. that allow 3D images to be rotated along multiple axes for different perspectives, a particularly valuable feature for medical and biochemical researchers).⁷⁴ They have also expanded their delivery technology to encompass new devices such as tablets and smartphones. They have also developed services for authors such as alerts, metrics such as number of downloads and citations.

Some years ago, publishers developed Cross-Ref, a not-for-profit network that has created an infrastructure for linking citations across publishers, based on the Digital Object Identifier (DOI) System.⁷⁵ They also support Kudos, a web-based service that helps researchers and their institutions and funders to maximize the visibility and impact of their published articles.⁷⁶

More recently, a number of publishers have partnered with DeepDyve.com, providing articles on a pay-per-use model similar to Apple iTunes.

Other investments include:

- Linked Content Coalition (www.linkedcontentcoalition.org/), aimed at increasing legitimate use of digital content through better management of rights data automated licensing;
- Arrow project in the European Union (www.arrow-net.eu/), a tool to facilitate rights information management in any digitisation project involving text and image based works; and
- Copyright Hub.

Publishers have developed mechanisms to meet the needs of academics and researchers wanting to undertake text and data mining of scholarly content.⁷⁷ These include CrossRef's text and data mining services⁷⁸ and Copyright Clearance Center's recently launched RightFind XML for Mining.⁷⁹

The following is an indication of scholarly publishing in Australia:

- CSIRO publishes 27 journals; about 50% of the authors are Australian;
- Wiley publishes 78 journals on behalf of Australian societies, professional organisations and associations; and

⁷¹ In 2009 almost 1.5 million articles in just the scientific, technical and medical fields were published by over 2,000 different publishers. H. Frederick Dylla, *One publisher's journey through the public access debate* 32 INFORMATION SERVICES AND USE, 65, 66 (2012), available at https://www.aip.org/sites/default/files/aipcorp/files/publishers_journey.pdf

⁷² Which has resulted in a huge increase in submissions: see Global Publishing: Changes in submission trends and the impact on scholarly publishers.

⁷³ Adam Mossoff, *How Copyright Drives Innovation in Scholarly Publishing* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243264.

⁷⁴ Mossoff supra

⁷⁵ <http://www.crossref.org/01company/16fastfacts.html>

⁷⁶ growkudos.com/about/faqs

⁷⁷ http://www.stm-assoc.org/2015_11_10_Text_and_Data_Mining_Declaration.pdf

⁷⁸ <http://tdmsupport.crossref.org/>

⁷⁹ <http://www.copyright.com/copyright-clearance-center-launches-text-mining-solution/>

- Taylor & Francis manages and publish 110 journals with editors based in Australasia, with most of these journals published on behalf of Australian learned and professional societies.

OTHER EXAMPLES

Other examples are set out in submissions to the Commission, such as those from Oxford University Press, RIC, Pearson, Cengage and Macmillan.

APPENDIX 2: OVERVIEW OF AUSTRALIAN COPYRIGHT REFORM

We have set out below a history of amendments to the Copyright Act. There have been only two general increases in the scope of protection since 1968: the introduction of the ‘making available online’ right in 2000, and the extension of terms of protection in 2004. Other extensions of scope are relatively minor, and only apply to a class of works or rightsholders.

There have been amendments over time aimed at assisting the effectiveness of the copyright system, particularly to address challenges introduced by digitisation (principally new opportunities for large-scale unauthorised copying and sharing of content that imperil development of legitimate sources of content).

At the same time, there have been many amendments reducing the scope of protection, introducing new or extended exceptions and statutory licences.

year	New rights		Implementation/enforcement	Exception/limitation	
	general	class of work/rightsholder		general	class of user ⁸⁰
1980 ⁸¹			<ul style="list-style-type: none"> penalties for importation of infringing copies 	<ul style="list-style-type: none"> extension of fair dealing exception for research or study 	<ul style="list-style-type: none"> extension of library exceptions for users extension of library exceptions for preservation statutory licence for copying of text and images for education statutory licence for print disabled
1984 ⁸²		<ul style="list-style-type: none"> computer programs 			
1986 ⁸³		<ul style="list-style-type: none"> satellite broadcasts 	<ul style="list-style-type: none"> New criminal penalties for piracy 	<ul style="list-style-type: none"> fair dealing for criticism, review for audiovisual content fair dealing for reporting news for audiovisual content 	<ul style="list-style-type: none"> Library exceptions for audiovisual content Statutory licence for people with disabilities Sound broadcasts by holders of print-handicapped radio licences
1989 ⁸⁴		<ul style="list-style-type: none"> performers’ rights 		<ul style="list-style-type: none"> limitation on copyright protection for industrial designs fair dealing for research or study for audiovisual material 	<ul style="list-style-type: none"> statutory licence for recording broadcasts for education extension of statutory licence for copying text, images and print music for education extension of statutory licence for people with disabilities fair dealing for external students
1991 ⁸⁵				<ul style="list-style-type: none"> importation of books 	
1994 ⁸⁶		<ul style="list-style-type: none"> Rental right for sound 	<ul style="list-style-type: none"> Extension of rightsholder-initiated customs seizure 		

⁸⁰ Where an exception has a ‘who’ requirement as well as a ‘what’ requirement.

⁸¹ Copyright Amendment Act 1980

⁸² Copyright Amendment Act 1984

⁸³ Copyright Amendment Act 1986

⁸⁴ Copyright Amendment Act 1989

⁸⁵ Copyright Amendment Act 1991

⁸⁶ Copyright (World Trade Organization Amendments) Act 1994

year	New rights		Implementation/enforcement	Exception/limitation	
	general	class of work/rightsholder		general	class of user ⁸⁰
		<ul style="list-style-type: none"> recordings and computer programs • Extension of performers' rights 			
1998 ⁸⁷				<ul style="list-style-type: none"> • Importation of labelling and packaging • Limitation on remedies for conversion and detention 	<ul style="list-style-type: none"> • Reduction of compliance for government statutory licence • Retention of 'master copies' of accessible-format material for print disabled • Exception for Australian Archives
1998 ⁸⁸			<ul style="list-style-type: none"> • increase penalties for infringement 	<ul style="list-style-type: none"> • Importation of sound recordings 	
1999 ⁸⁹				Computer programs: <ul style="list-style-type: none"> • Normal use • Study • Backup • Interoperable products • Correct errors • Security testing • Agreements prohibiting exceptions invalid 	
2000 ⁹⁰	<ul style="list-style-type: none"> • make available online⁹¹ 		<ul style="list-style-type: none"> • prohibitions against TPM circumvention • prohibitions against encrypted broadcast circumvention • prohibitions against removal of rights management information • clarification of authorisation liability 	<ul style="list-style-type: none"> • Temporary reproductions made in the course of communication 	<ul style="list-style-type: none"> • Extension of exceptions for libraries to digital content and uses • extension of statutory licences for education to digital content and uses • [extension of other exceptions] • exception for 'mere use' of service provider facilities • statutory licence for retransmission of free-to-air broadcasts
2000 ⁹²		<ul style="list-style-type: none"> • moral rights for authors 			
2003 ⁹³				<ul style="list-style-type: none"> • importation of computer programs, 	<ul style="list-style-type: none"> •

⁸⁷ Copyright Amendment Act (No. 1) 1998

⁸⁸ Copyright Amendment Act (No. 2) 1998

⁸⁹ Copyright Amendment (Computer Programs) Act 1999

⁹⁰ Copyright Amendment (Digital Agenda) Act 2000

⁹¹ The 'right of communication' introduced in 200 has two elements: electronic transmission and making available online. The transmission component largely reflecting the existing rights to broadcast and transmit by cable.

⁹² Copyright Amendment (Moral Rights) Act 2000

⁹³ Copyright Amendment (Parallel Importation) Act 2003

year	New rights		Implementation/enforcement	Exception/limitation	
	general	class of work/rightsholder		general	class of user ⁸⁰
				electronic literary or music items, [and accessories]	
2004 ⁹⁴	<ul style="list-style-type: none"> terms of protection extended 	<ul style="list-style-type: none"> additional rights for audio performers 	<ul style="list-style-type: none"> additional prohibitions against TPM circumvention additional prohibitions against encrypted broadcast circumvention additional prohibitions against removal of rights management information additional remedies for copyright infringement 	<ul style="list-style-type: none"> temporary reproductions in technical process of use 	<ul style="list-style-type: none"> 'safe harbour' for ISPs
2005 ⁹⁵		<ul style="list-style-type: none"> compensation right for film directors 			
2006 ⁹⁶			<ul style="list-style-type: none"> Additional prohibitions for TPM circumvention Additional criminal penalties? 	<ul style="list-style-type: none"> time-shifting: TV programs 'space-shifting': music 'format-shifting': books, periodicals, photos, videocassettes parody satire 	<ul style="list-style-type: none"> maintaining or operating a library or archives; giving educational instruction assisting a person with a disability preservation by key cultural institutions educational use of podcasts vodcasts
2012 ⁹⁷			<ul style="list-style-type: none"> customs seizure of counterfeit products 		
2015 ⁹⁸			<ul style="list-style-type: none"> court power to order ISPs to block access to foreign infringing websites 		

⁹⁴ US Free Trade Agreement Implementation Act 2004; Copyright Legislation Amendment Act 2004

⁹⁵ Copyright Amendment (Film Directors' Rights) Act 2005

⁹⁶ Copyright Amendment Act 2006 (Cth)

⁹⁷ Intellectual Property Laws (Raising the Bar) Act 2012

⁹⁸ Copyright Amendment (Online Infringement) Act 2015

APPENDIX 3: EXCEPTIONS IN AUSTRALIAN COPYRIGHT ACT

The Australian Copyright Act includes exceptions that allow use of copyright content without permission or payment for the following purposes:

- by libraries and other cultural institutions:
 - copying by Parliamentary libraries for members of Parliament
 - supplying copy of published work from library collection for research or study
 - making digital resources available online on library premises
 - supplying copy of published work from another library's collection for research or study
 - supplying copy from library collection to another library for its collection
 - supplying copy of unpublished work from library collection for research or study
 - supplying copy of unpublished work in library collection for publication
 - supplying copies of works held in the National Archives
 - preserving manuscripts and other original items in a library collection
 - replacing lost, stolen, damaged or deteriorated items in a library collection
 - copying or communication for administrative purposes
 - making digital preservation copies of artworks available online on library premises
 - preserving historically or culturally significant published works
 - maintaining or operating a library
 - notices on machines in libraries: no authorisation liability
- educational instruction:
 - giving educational instruction
 - inclusion of extracts in collections for educational use
 - reproducing 'small portions' of works for educational purposes
 - images accompanying text used for educational purposes
 - reproduction for education on non-copying device
 - reproduction for exams
 - sound broadcast for education
 - proxy web caching by educational institution
 - performance for non-profit educational instruction
 - communication of broadcast to facilitate performance non-profit educational instruction
 - communication of artwork to facilitate the work being seen for non-profit educational instruction
- people with disabilities:
 - providing accessible-format version for person with print disability
 - accessible-format copies for person with a print disability
 - accessible-format copies for person with an intellectual disability
 - recording broadcast for person with intellectual disability
 - sound broadcasting by print disability radio
- importation:
 - importation of books
 - importation of sound recordings
 - importation of computer programs
 - importation of electronic literary or music items

- accessories (e.g. labels) for imported articles
- computer programs:
 - normal use of computer program
 - study of computer program
 - backup of computer program
 - making interoperable products for computer programs
 - correcting errors in computer programs
 - security testing of computer programs
- public performance and broadcasting:
 - reading, recitation or broadcast of an extract
 - performances in residential properties
 - reproduction for simulcasting
 - playing in public or broadcast of certain foreign sound recordings
 - playing sound recording in guesthouse or club
 - retransmission of free-to-air broadcasts
 - broadcasts played to an audience
- technical processes:
 - temporary reproduction in technical process of making or receiving a communication
 - temporary reproduction as part of technical process of using a work
 - mere use of communication facilities: no authorisation
- private format-, space- and time-shifting:
 - format shifting for private use: books, newspapers, periodicals
 - format-shifting of photograph for private use
 - space-shifting recorded music for private use
 - format-shifting video-tape for private use
 - time-shifting broadcasts for private use
- artworks and designs:
 - photographing public art
 - photographing buildings
 - incidental inclusion of artwork in film or broadcast
 - publishing photograph of public art
 - publishing photograph of building
 - inclusion of part of artwork in later artwork by same artist
 - reconstruction of buildings
 - making articles from designs
- comment and news:
 - criticism
 - review
 - parody
 - satire
 - reporting news
- other

- research
- study
- giving professional advice
- judicial proceeding or of a report of a judicial proceeding
- writing on approved label for containers for chemical product
- product information relating to medicine
- publishing old unpublished works in library collections

There are also statutory licences that allow:

- recording and communicating broadcasts for educational purposes
- reproducing and communicating works for educational purposes
- services of governments
- reproduction for broadcasting
- recording performances of musical works
- playing sound recordings in public
- broadcasting sound recordings

APPENDIX 4: ACTIVITIES ALLOWED UNDER CURRENT LAW

In support of its recommendation for a broad new exception, the ALRC gave the following examples of activities that would be allowed. They are all activities that are already occurring, and mostly accommodated by the current system.

The list highlights that many of the ‘problems’ raised are non-existent or less than imagined.

There is certainly scope for improving the current arrangements (and some simplification proposals are already underway). The case for a major disruptive change to the legislation is less clear, particularly when the costs of that change are taken into account.

Activity	Under current law
accessible formats of texts for blind or vision impaired persons	<p>Allowed by number of exceptions in the Act, including statutory licence for print disability and s200AB.</p> <p>Also supported by voluntary arrangements for provision of files, separate to copyright arrangements.</p> <p>The Government is about to introduce amendments to simplify these provisions.</p>
caching and indexing by search engines and internet service providers	Allowed by express or implied licences.
the sparing and appropriate incorporation of third party copyright material into educational course content delivered via massive open online courses (MOOCs)	Allowed by education statutory licence.
placing development applications, including architects’ plans, surveys, and environmental impact statements, on a website for the purpose of public consultation	Allowed by government statutory licence.
the communication to the public of the datasets underlying research results that could assist in independent verification of those results, particularly for online qualitative research	A dataset may be not protected by copyright at all, depending on how it was compiled. If it is, it can be released with permission. Most governments now have policies to release datasets to the public.
use of copyright material with no owner that can be identified— known as ‘orphan works’	<p>All current exceptions, statutory licences and other blanket licensing solutions (such as Copyright Agency’s licences for corporations) apply to orphan works.</p> <p>Digitisation by public libraries can be covered by the government statutory licence.</p> <p>The mere fact that a work is an orphan is insufficient, of itself, to warrant its use (particularly where work can be substituted with another equally suitable). But the fact that a work is an</p>

	orphan will generally make it more likely that it can be used by libraries, galleries, museums, archives and educational institutions when no other specific provision is available. ⁹⁹
use of technologies that analyse copyright material looking for patterns and trends—known as ‘data mining’	Publishers license text mining. Text mining is allowed under educational and government statutory licences.
copying legally acquired copyright material between computers and other devices for personal use	Copying of legally acquired content is allowed under licence conditions (e.g. iTunes). Existing copyright exceptions allow space shifting for music, time shifting for television shows and format shifting for books, periodicals and photos.
storing legally acquired copyright material on remote servers	Storage of legally acquired content is allowed under the licence conditions for much content, and commonly impliedly licensed otherwise.
using material to satisfy personal curiosity, rather than to undertake formal research	Research and study are public interest purposes identified as overriding the private interest of copyright owner. Research and study are broader than formal research. Other uses can be addressed by licensing arrangements overseen by Copyright Tribunal.
the communication to the public of works created by students and researchers using museum collections	The mere fact that a person has got access to an item through a cultural institution (e.g. a painting or a book) should not, of itself, diminish the creator’s copyright. Online publication by cultural institutions can be managed through licensing arrangements overseen by the Copyright Tribunal.
use of third party images or text in a presentation to illustrate the point being made	Current exceptions allow the use of images for criticism or review. If the image is merely illustrative, a presenter can choose an image for which is licence is available. There are many licence options for images, including Creative Commons, other freely licensed images, and image libraries. Presentations made by people covered by blanket licences (e.g. for educational institutions or corporations) are covered.
use of short quotations in academic publications	A quotation that is less than a substantial part of a work does not require permission Current exceptions allow the use of other people’s material for criticism or review Permissions for quotations are managed through licensing arrangements
a university’s creation of an open digital repository of theses and	Universities get consent from authors of theses and other

⁹⁹ Under section 200AB.

<p>other research publications;</p>	<p>research material to include their works in repositories. This is proper and should continue, though there may be opportunities to streamline these permissions processes.</p>
<p>sharing copyright works with colleagues for the purpose of discussion, including a university's reproduction and distribution of reference material to a research team</p>	<p>Allowed under the education statutory licence and/or other licensing arrangements.</p>
<p>the use by a student of extracts from a state Hansard or state government media releases in a play</p>	<p>No permission required if less than a substantial part. Current exceptions allow use of content for criticism, review, parody and satire. Most governments have IP policies that would allow this if permission were actually required.</p>
<p>the reproduction of a passage from a book in a review of a film based on the book</p>	<p>The exception for criticism or review allows the use of a work to critique it or another work.</p>
<p>copying portions of a confidential document, such as a Cabinet minute, for the purpose of commenting on a matter of public importance</p>	<p>Subject to the application of other laws, if in the public interest likely to be allowed by exceptions for criticism or review and/or reporting news</p>
<p>use of material to support commentary or the expression of opinion rather than reporting of events—for example, humorous topical news programmes or some types of newspaper opinion piece</p>	<p>This can be covered under existing licensing solutions.</p>
<p>some practices that go beyond parody or satire, such as pastiche or caricature</p>	<p>Pastiche and caricature can be parody or satire (they are not mutually exclusive), or indeed criticism or review If more than a substantial part of someone else's work is used, and it's not covered by the existing public interest exceptions, then it is consistent with the public interest that the use either be licensed or avoided</p>
<p>professional legal or law-related services such as preparing and executing agreements, preparation of trade mark or patent applications, mediation, alternative dispute resolution, or arbitration</p>	<p>Specific exceptions allow use of copyright content for legal and other professional advice, and in connection with legal proceedings Other uses are covered by licensing arrangements available to commercial entities such as law firms</p>
<p>3D printing</p>	<p>3D printing may be allowed if ss 75 or 77 applies (i.e. it is a design that has been registered, or is registrable, under the Designs Act) Otherwise, it is not clear why 3D printing without permission</p>

	is, of itself, in the public interest
copying for the purpose of back-up and data recovery	These activities are routinely done without any threat of copyright infringement, based on current exceptions and licensing arrangements