

**Submission to the Copyright Consultation: Department of Communications
and the Arts**

Dr Emily Hudson, King's College London & University of Queensland

Professor Tanya Aplin, King's College London

Professor Robert Burrell, University of Sheffield & Melbourne Law School

A. Background

1. We are three intellectual property academics who are based in the United Kingdom but maintain links to, and interest in, Australian copyright law. As a group we have written extensively on copyright exceptions, with publications that include *Copyright Exceptions: The Digital Impact*¹ and the forthcoming monograph, *The Optimal Drafting of Copyright Exceptions*.²
2. We are already on the record as: (i) supporting a robust role for exceptions, i.e., one where exceptions perform meaningful work in the copyright system and are not read as narrow exclusions to owner rights; and (ii) accepting that there are problems with Australia's existing suite of exceptions, in particular as this relates to the excessive utilisation of prescriptive drafting, which causes problems with over and under-inclusiveness, lack of responsiveness to technological and other change, etc.³ We have previously argued in favour of Australia adopting an open-ended fair use exception based on section 107 of the *Copyright Act of 1976* (US), such a provision also being the preferred reform model of the Australian Law Reform Commission (ALRC) and the Productivity Commission.⁴ However, our support for fair use should not be taken as inferring that we have rejected other reforms, such as expansion to fair dealing. On the contrary, we accept that there are various ways to effect a significant

¹ R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (CUP, 2005).

² E. Hudson, *The Optimal Drafting of Copyright Exceptions* (CUP, forthcoming 2019).

³ See, e.g., R. Burrell, M. Handler, E. Hudson and K. Weatherall, 'ALRC Inquiry into Copyright and the Digital Economy: Submission in response to Issues Paper No. 42' (14 December 2012); R. Burrell, M. Handler, E. Hudson and K. Weatherall, 'ALRC Inquiry into Copyright and the Digital Economy: Submission in response to Discussion Paper No. 79 (DP 79)' (31 July 2013); E. Hudson, 'Implementing Fair Use in Copyright Law: Lessons from Australia' (2013) 25 *Intellectual Property Journal* 201; E. Hudson, 'The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?' [2017] *Intellectual Property Quarterly* 346.

⁴ Australian Law Reform Commission, *Copyright in the Digital Economy* (Report No. 122, November 2013); Productivity Commission, *Intellectual Property Arrangements* (Report No. 78, September 2016), ch. 6.

improvement on the legislative status quo in countries like Australia, and that new fair dealing purposes – and more expansive judicial and user interpretation of the existing provisions – could do much to improve experiences and deal with copyright overreach.⁵

3. The purpose of this submission is to draw from UK experiences to help inform some of the matters in the Consultation. We have grouped these around: (1) expansions to fair dealing; (2) orphaned works; and (3) contracting out.

B. Expanded Fair Dealing

4. The Consultation refers to three new fair dealing purposes:
 - a. quotation;
 - b. illustration for instruction; and
 - c. incidental or technical use.
5. Subject to our comments in the following paragraphs, we **support** the addition of new fair dealing purposes. The ALRC secondary recommendation countenanced a much longer list of new purposes,⁶ however, we believe that these three additions would still represent a worthwhile change.

UK backdrop

6. In 2014 the UK introduced new fair dealing exceptions for quotation and illustration for instruction,⁷ and new closed exceptions, including for text and data analysis.⁸ To the extent this Consultation is informed by UK law and experiences, it is worth emphasising that the drafting of exceptions in the UK is affected by the partial harmonisation of copyright in the EU. Of particular relevance is the Information Society Directive ('ISD'), which harmonises the law in relation to three rights: reproduction, communication and making available to the public, and distribution. Article 5 of the ISD provides a list of situations in which Member States may (or for the temporary copying exception in Art. 5(1), must) provide an exception. Article 5 has been interpreted to comprise an exhaustive list, meaning that, for instance, a US-

⁵ See, e.g., M. Handler and E. Hudson, 'Fair Use as an Advance on Fair Dealing? Depolarising the Debate' in H. Sun, S. Balganes and W. Ng-Loy (eds), *Comparative Aspects of Limitations and Exceptions in Copyright Law* (CUP, forthcoming 2018).

⁶ ALRC, n. 4 above, ch. 6.

⁷ Copyright, Designs & Patents Act 1988 ('CDPA 1988') ss. 30(1ZA), 32, inserted by the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 and the Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014.

⁸ CDPA 1988, s. 29A.

style fair use exception has been understood as being outside the permissible cases in the ISD.⁹ This is relevant to the Consultation as there may be drafting choices in the CDPA that are influenced by the ISD and which do not, therefore, need to be transposed to Australian law.

Quotation

7. Our starting point is that a quotation exception is mandatory under Art. 10(1) of the Berne Convention, as seen in the language of that Article ('it shall be permissible'), indications in the *travaux*, and scholarly commentary on this provision.¹⁰ As such, Australia **must** amend the *Copyright Act 1968* (Cth) to include a quotation exception. Aside from this mandatory obligation, we believe that a quotation exception is desirable and should be introduced into Australian law. We believe that the term 'quotation' goes beyond text in quotation marks to apply to many instances where a segment of a preexisting work (and in some cases the whole work¹¹) is re-presented in a new way for a variety of purposes. Lest this appear broad, we emphasise that there are other requirements that must be satisfied – according to Art. 10(1) Berne, the work having been lawfully made available to the public, fair practice and 'proportionality' (i.e., that the extent of quotation 'does not exceed that justified by the purpose'), and according to Art. 10(3), attribution of the source and author. A quotation exception would not, therefore, give a *carte blanche* for any form of re-use.
8. In terms of drafting, we believe that an Australian quotation exception:
 - a. should apply to all copyright works – for instance, Art. 10(1) Berne applies to all works protected under that Convention and this is confirmed by the *travaux*;
 - b. should not be qualified or limited by purpose, no such limitation appearing in Berne, this being confirmed by the *travaux*; and
 - c. can use the fairness infrastructure of fair dealing to capture the Berne requirements that there be fair practice and proportionality.¹² In this regard, when it comes to the proposed fairness factors, these being the factors for

⁹ See, e.g., I. Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011) at para. 5.19.

¹⁰ For a full analysis of this point and others made in this submission, see L. Bently and T. Aplin, 'Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism' in S. Frankel (ed), *Is Intellectual Property Pluralism Functional?* (Edward Elgar, forthcoming 2018); T. Aplin and L. Bently, 'Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use' in H. Sun, S. Balganesch and W. Ng-Loy (eds), *Comparative Aspects of Limitations and Exceptions in Copyright Law* (CUP, forthcoming 2018).

¹¹ For instance for quotation of the entire surface of a 2d artistic work.

¹² See esp. Aplin and Bently, n. 10 above.

research or study in ss. 40 and 103C, the role of the licensing factor (the possibility of obtaining the work within a reasonable time at an ordinary commercial price) is not relevant and **should not be included**. This is for two reasons: (1) the licensing market may have arisen precisely because the mandatory quotation exception was not properly implemented in Australian copyright law; and (2) the concern of economic harm to the owner of the quoted work is adequately addressed by the other factors, notably para. (d): the effect of the dealing upon the potential market for, or value of, the work. We will return to this point later.

9. As noted in para. 7 above, Art. 10 Berne also refers to two additional limbs:
 - a. that the work has been made available to the public; and
 - b. that the source be mentioned, and the name of the author if it appears on the work.
10. In relation to the requirement that the work has ‘already been lawfully made available to the public’, this covers published works as well as situations where works have been made available to the public by any means, including where works have been circulated pursuant to a compulsory licence. This requirement would need to be specifically included in any fair dealing for quotation exception. In relation to the attribution requirement, the language of Art. 10(3) Berne is flexible. Thus, ‘mention’ of the source and author could encompass attributions in abbreviated form, ones that indirectly accompany the use of the quotation (e.g. in a list of credits or acknowledgments) or which are implicit (because of the recognisability of the work or source from which the quotation is taken). This requirement would also need to be included in any fair dealing for quotation exception and it is suggested that the language of Art. 10(3) is utilised.¹³

Education

11. The Consultation has requested views on a new fair dealing exception covering illustration for instruction. In 2014 the CDPA was amended to substitute the existing text of s. 32 with a fair dealing exception in relation to dealings ‘for the sole purpose of illustration for instruction’. New s. 32 applies to dealings for non-commercial purposes, by those giving or receiving instruction (and preparing for same) and requires a sufficient acknowledgement (if practical). It is not limited to educational institutions as such. In introducing revised s. 32, the UK government relied on Art. 5(3)(a) ISD, which permits exceptions and limitations for the ‘sole purpose of

¹³ *Ibid.*

illustration for teaching or scientific research’. There is debate regarding the breadth of s. 32, including the degree to which it extends beyond in-classroom activity.¹⁴ We believe that a broader interpretation is suggested by the statutory language and history,¹⁵ and have heard of broader interpretations being adopted by members of the higher education sector (e.g., that s. 32 can apply if a lecture is recorded, and students can listen to or watch that lecture through the university’s virtual learning environment).

12. That said, given doubt and debate around the terms ‘illustration’ and ‘instruction’ in the UK, the Australian government may wish to consider whether it should utilise alternative language – for instance, when Canada reformed its fair dealing exceptions in 2012, it simply added ‘education’ as a purpose,¹⁶ and the ALRC also recommended this form of words in 2013.¹⁷ We see merit in this approach as it might circumvent debates around the meaning of the prescribed purpose and instead keep the focus where it should be: on fairness and the relationship between the new fair dealing exception and other provisions of the *Copyright Act*.
13. The Consultation has asked whether any of the current education-related exceptions should be repealed if Parliament proceeds with this reform. We believe that if a new standard-like exception is introduced, it may be desirable to repeal some of the rule-like exceptions, for instance to avoid duplication or confusion regarding the relationship between different provisions. We do not feel close enough to the day-to-day mechanics of copyright management in Australian schools and universities to undertake this exercise ourselves. In contrast, we retain serious doubts about the utility of s. 200AB, and believe that repeal of s. 200AB(3) (uses by bodies administering educational institutions) should accompany fair dealing for the purpose of education.

Incidental or technical use

14. In its 2013 final report, the ALRC identified various deficiencies in Australian law in relation to what it termed ‘incidental or technical use’.¹⁸ In its secondary

¹⁴ For instance, guidance issued by the Intellectual Property Office might be interpreted to suggest that s. 32 has a very limited operation, e.g., that short quotes that could previously be written by hand on a blackboard under old s. 32 can now be included on PowerPoint slides: Intellectual Property Office, *Exceptions to copyright: Education and Teaching* (October 2014) pp. 3-5.

¹⁵ For similar, see L. Bently and B. Sherman, *Intellectual Property Law*, 4th edition (CUP, 2014) pp. 253-254.

¹⁶ Copyright Act (RSC 1985, c. C-42), s. 29.

¹⁷ ALRC, n. 4 above, ch. 14.

¹⁸ *Ibid.*, ch. 11.

recommendation for expanded fair dealing, it recommended ‘incidental or technical use’ as a new fair dealing purpose.¹⁹

15. An initial question relates to the intended coverage of these words. The term ‘incidental’ is used not only in exceptions dealing with technological processes but in relation to ‘incidental inclusion’ (rights of panorama)²⁰ and incidental recording for the purposes of broadcast.²¹ Looking at the ALRC report, it would seem that it was never intended that ‘incidental or technical use’ should cover these latter activities. If this remains the case then it may be worth mentioning this in the Explanatory Memorandum (‘EM’) for the avoidance of any doubt.
16. More significant is that the proposed exception is intended to cover text and data mining for non-commercial purposes. In chapter 11 of its final report, the ALRC addressed incidental or technical use and data and text mining in two separate parts, with this structure seeming to reflect a broader intellectual division. Thus while ‘incidental or technical use’ was identified as a possible illustrative purpose (for the primary recommendation of fair use) or fair dealing purpose (for the secondary proposal), data and text mining was identified as a possible example of a highly transformative fair use – but the ALRC did ‘not consider it necessary to include ‘non-expressive use’ or ‘data and text mining’ in the list of illustrative purposes’.²² It noted that data and text mining activities ‘for illustrative purposes of fair use, such as ‘research or study’, ‘education’, ‘library or archive use’, are more likely to be fair.’²³
17. In our view, text and data mining is not easily caught by the term ‘incidental’, which has been interpreted, in a UK and EU context at least, to mean copies that do not exist independently of, or do not have a purpose independent of, a technological process.²⁴ Therefore, it may be preferable to deal with this type of use under a different, new exception or to expand an existing exception, such as fair dealing for the purpose of research or private study. Should a fair dealing framework be used, we would also suggest that it is unnecessary to limit any exception to non-commercial purposes, given that the fairness factors will be applied. Consideration of (i) the purpose and character of the dealing and (ii) the effect of the dealing upon the potential market for, or value of, the work, should suffice to deal with any concerns about economic harm to the rightsholder.

¹⁹ *Ibid.*, paras. 6.6, 11.46-11.47.

²⁰ CDPA 1988, s. 31 (incidental inclusion of copyright works in artistic works, sound recordings, films and broadcasts); *Copyright Act 1968* (Cth) s. 67 (incidental filming or televising of artistic works).

²¹ CDPA 1988, s. 68.

²² ALRC, n. 4 above, para 11.75.

²³ *Ibid.*, para 11.78.

²⁴ *PRCA Ltd v NLA Ltd*, Case C-360/13 (5 June 2014), para. 50.

Fairness factors

18. We have already referred at a number of points to the fairness factors, and wish to reiterate a point made above regarding the use of the factors in ss. 40C and 103C, and in particular the licensing factor. We are not only of the view that this factor is not relevant to quotation,²⁵ but believe that this factor is unnecessary for the other proposed fair dealing exceptions, as concerns regarding economic harm to rightsholders are adequately addressed by the other factors, including ‘the effect of the dealing upon the potential market for, or value of, the work’.
19. We wonder whether this reflects a broader issue in the consultation documents, namely the level of deference to licensing markets. The mere fact that rightsholders are willing or able to offer a licence does not mean that an exception is undesirable or unnecessary. We would not, therefore, support the inclusion in the EM of statements to the effect that the quotation exception ‘is intended to enable more quotation, where licensing is not available.’ Similarly, whilst we agree that quotation and educational use exceptions are ‘not intended to *prevent* ... licensing’ (indeed this is so obvious it goes without saying), we have concerns about any statement that such exceptions are ‘not intended to ... *significantly reduce* licensing’ as this rests on unstated empirical claims about the current operation of those markets and unstated normative judgments about how those markets should operate in the future. We therefore believe that any statement in the EM should be very carefully worded so as not to unduly limit the flexibility and responsiveness these exceptions are able to provide.

C. Orphaned Works

20. Following reforms in 2014, there are now two new mechanisms for dealing with orphaned works in the UK: an exception in CDPA sch. ZA1 directed to the digitisation activities of cultural institutions and other bodies, and a centralised licensing scheme for orphaned works set up under CDPA s. 116A and administered by the Intellectual Property Office (IPO).²⁶ Schedule ZA1 implements obligations under the Orphan Works Directive of 2012.²⁷ It provides that a ‘relevant body’ does not infringe copyright in an orphaned ‘relevant work’ in its collection by various acts of digitisation, making available, etc. There are administrative and other requirements for this protection to apply, including that the relevant body has undertaken in good faith, and maintain records of, a diligent search for the rightsholder(s), and that information about the work and the body’s use is reported to the European Union

²⁵ See para. 8.c.

²⁶ Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, made pursuant to powers in CDPA s. 116A.

²⁷ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

Intellectual Property Office (EUIPO). If a rightsholder comes forward, fair compensation is payable, either agreed by the parties or determined by the Copyright Tribunal. Schedule ZA1 therefore embodies a remunerated exception.

21. The IPO scheme covers copyright works and protected performances, and allows the IPO to grant a non-exclusive licence in the UK for a term not exceeding seven years. Like Schedule ZA1, a licence is available only where a diligent search has been carried out, defined as ‘a reasonable search of the relevant sources’, including the EUIPO register and sources set out in Part 2 of Schedule ZA1. As at 2018, application fees range from £20 (for an application relating to a single work) to £80 (for an application in relation to 30 works).²⁸ Licence fees vary, with the IPO reporting that it charges a nominal fee of £0.10 per work for non-commercial uses, and a higher fee (based on market rates) for commercial uses.²⁹
22. Analysis of the EUIPO and IPO databases reveals that neither scheme has been embraced with gusto by UK cultural institutions. Empirical work with UK institutions suggests that the IPO licensing scheme is viewed with particular scepticism due to its expense, limitations (e.g., on the number of works per application, the licence duration, and its restriction to the UK) and practical difficulties in the licensing process. It is not seen as useful for large-scale activity of the sort that many institutions undertake. The Schedule ZA1 exception is viewed as providing some additional assurance beyond pure risk assessment, but the administrative burdens have been noted (including EUIPO notification and the logging of search activity). The exception has not yet led to any marked changes in practices, in contrast with other 2014 reforms (e.g., new exceptions for dedicated terminals and quotation).
23. The reason for explaining the UK approach is twofold. First, we are glad to see that certain matters have **not** made their way into the proposal for an Australian response to orphaned works. We would not, therefore, recommend that Australia introduce a centralised licensing scheme modelled after that administered by the IPO. We also have reservations about making reliance on an orphaned works exception conditional on notification to a central register. This provides a further administrative step for cultural institutions; requires a bureaucracy to ensure the register is usable, searchable and up-to-date; and may be of little practical benefit if the register neither causes copyright owners to resurface nor provides a hub in which cultural institutions can share information with one another.

²⁸ IPO, *Costs: application and licence fees*, <https://www.gov.uk/guidance/copyright-orphan-works#costs-application-and-licence-fees> (accessed 19 May 2018).

²⁹ IPO, *Orphan Works: Review of the First Twelve Months* (2015), p. 4.

24. Secondly, whilst we see a justification for having a direct exception where the other orphaned works mechanism is a centralised licensing scheme,³⁰ it is not clear that the Consultation's proposed exception makes sense given the proposal for a remedies limitation covering commercial and non-commercial uses. That is, as described in the Consultation documents, the direct exception is functionally equivalent to the remedies limitation for non-commercial use: both apply to all orphaned copyright material, require a diligent search, and are subject to reasonable compensation for future uses if an owner resurfaces. The only practical difference is that reliance on the direct exception requires institutions to maintain records of their diligent searches.³¹
25. We therefore recommend that unless cultural institution respondents identify a compelling reason why the hybrid model adds something of real value,³² the Australian government **should simply enact a general remedies limitation**. This would avoid the unnecessary complexity that often characterises Australian copyright law,³³ and provide a signal to users (including new creators) in relation to the utilisation of orphaned material. This provision should be along the lines recommended in the Consultation documents:
- a. *A requirement for a diligent search but without specifying the precise steps involved*. This is an area where prescriptive rules are impossible. Those who undertake rights clearance often develop a strong working knowledge of the avenues most likely to locate rightsholders, these being work-specific, informal and changing over time. There is no point trying to capture this or require a tick-a-box approach. It would be worth noting in the EM that the intensity of a diligent search will vary, and that users are only expected to undertake what is reasonable in the circumstances. For instance, a mixed collection in an archival or special collection might contain much non-attributed material for which it is difficult or impossible to guess authorship. For those works, the steps of a diligent search may be exhausted very quickly.
 - b. *Compliance with the moral right of attribution, ie, attribution unless it is reasonable not to do so*. The ability to satisfy this requirement will depend on

³⁰ For instance, one might argue the direct exception has a lower administrative burden, a lower cost (as any licence fee is not paid until an owner resurfaces) and has a signaling effect for cultural institutions.

³¹ The proposal states that permitted uses under the direct exception 'extend to exercising all rights'. No such similar wording appears for the general remedies limitation, but nor is there any statement to suggest that this limitation only applies to a sub-set of uses.

³² One possibility is the rhetorical significance of reliance on an exception rather than a remedies limitation. However, it is not obvious that the risk and relationship management preferences of cultural institutions are such that this would be significant in practice. This is discussed further below.

³³ Another example of relevance to the cultural institution sector is separate preservation copying exceptions for 'libraries and archives' and 'key cultural institutions'.

what authorial information is available, a matter that should be noted in the EM for the avoidance of any doubt.

- c. *Limbs for commercial and non-commercial use.* The line between commercial and non-commercial use can be difficult to draw, and we think the Consultation has probably struck the best approach by focusing on ‘direct commercial advantage or profit’. For instance, the IPO has released guidance in relation to its orphaned works licensing scheme suggesting that non-commercial licences can be granted for, e.g., use in a live event or exhibition; use in a newsletter or non-commercial promotional material; digitisation and making available online (including social media); preservation; use on stage or in performance; educational use such as learning and training materials; and personal use.³⁴ The breadth of these examples and the fact that some would seem to encompass activities that might be commercial supports the view that such a classification often depends on fees, any revenue stream and other commercial indications, rather than the type of use.
- d. *Remedies limitation.* For the commercial purposes limb, we think there is a very strong case that the only remedy for both past and future uses should be reasonable compensation. That is, we do not believe that an ‘account of profits’ should be available for past uses. There are both practical reasons and reasons of ‘coherence and fit’ for adopting this approach. The practical reason is that determining the amount to be awarded under an account of profits can be expensive, time-consuming and controversial. For example, working out the amount of deduction that the defendant is entitled to make for its expenses (bearing in mind that the defendant will have to account for its profits, not its gross revenue) is often particularly difficult. The reason of coherence and fit is that an account of profits is a restitutionary remedy that is designed to strip defendants of profits made through their wrongdoing. There is no place for a restitutionary remedy in cases where the defendant cannot (as here) be categorised as a wrongdoer. It must also be remembered that an account of profits can produce a windfall for the plaintiff and it is far from clear that plaintiffs in orphaned work cases should ever be entitled to such a windfall.
- e. *Works and rights.* In addition to relating to all types of orphaned copyright material, we would recommend that the permitted uses also extend to exercising all rights.

³⁴ IPO, *Orphan works commercial and non-commercial licences*, <https://www.gov.uk/government/publications/orphan-works-commercial-and-non-commercial-licences/orphan-works-commercial-and-non-commercial-licences> (published 2 August 2016).

26. We have three final points. First, we believe that some issues with orphaned works can be resolved through exceptions, only fortifying arguments in favour of expanding the reach of fair dealing, especially through quotation. Secondly, and as noted above,³⁵ we believe that the cultural institution sector is growing increasingly comfortable with the utilisation of orphaned works via a risk-informed (and often purely risk managed) strategy. A remedies limitation might help reinforce the legitimacy of this approach, and perhaps cause some expansion in the use of orphaned works in commercial scenarios, although we would not expect it to cause a significant turning of the page as institutions are also aware of the need to respect creator rights and maintain good relationships with creators, content producers, donors and so forth.
27. Finally, if the Australian government decides that it does not favour a general remedies limitation, we would support, as an alternative measure, the proposed direct exception for cultural institutions. We would repeat many of the observations made above, and add:
- a. *Record of diligent searches.* Just as the nature of a diligent search should not be defined, so too should cultural institutions be given flexibility to determine the best form of record-keeping for any given project.
 - b. *Provision of works to third parties.* The consultation documents suggest that the exception ‘would not permit institutions to provide orphan works to their parties in reliance on the exception’. However, in permitting institutions to digitise and communicate works to the public, it would need to be accepted that third parties will be able to access and re-use those works without any further steps by the institution. Indeed, if public access was not permitted, the exception would be rendered virtually useless.
 - c. *Repeal of exceptions?* We would not suggest the repeal of any of the existing libraries and archives provisions should the Australian government proceed with the direct exception. However, we wish to make some comments in relation to s. 200AB, which as noted earlier is a provision about which we have great concern.³⁶ For instance, empirical evidence suggests that s. 200AB has comprehensively failed to achieve its stated aim of capturing, for cultural institutions, some of the benefits of fair use.³⁷ At least for cultural institutions, the limited utilisation of s. 200AB has related mostly to orphaned materials, and it may be that the direct exception could facilitate that activity if s. 200AB(2) were repealed. However, the direct exception is very different

³⁵ See n. 32 above.

³⁶ See para. 13 above.

³⁷ See Hudson, ‘Implementing Fair Use’, n. 3 above.

from fair use or a fair dealing exception for library or archive use.³⁸ As such, it should not be viewed as a comprehensive substitute for s. 200AB(2) in the same way that fair dealing for the purpose of education could replace s. 200AB(3).³⁹

D. Contracting Out

28. We have two brief comments regarding the UK experience in relation to contracting out. First, prohibitions on contracting out of copyright exceptions have been part of UK law since 1993.⁴⁰ Since then there has been a growing list of circumstances in which it is not permissible to contract out of an exception in the UK,⁴¹ and the 2014 reforms further expanding these situations.⁴² There is no evidence that these prohibitions are proving problematic or unworkable; on the contrary, they have been mentioned in fieldwork with UK cultural institutions as having helped support a robust role for exceptions.
29. A rather different issue thrown up by the UK experience, however, is the possibility that a statutory prohibition on contracting out may be rendered ineffective by the strategic use of choice of law clauses.⁴³ We would therefore recommend that the Australian Government seek specialist advice from an expert in private international law with a view to identifying whether this might be a problem for an Australian contracting out prohibition, and if so, whether it can be avoided through the way in which the prohibition is drafted.

³⁸ See the secondary recommendation by the ALRC, n. 4 above, para. 6.6.

³⁹ See para. 13 above.

⁴⁰ The first such restriction was introduced by Copyright (Computer Programs) Regulations 1992.

⁴¹ See, e.g., Broadcasting Act 1996, s. 137; Copyright and Rights in Databases Regulations 1997.

⁴² See, e.g., CDPA 1988, ss. 30(4) (quotation); 30A(2) (parody, caricature or pastiche); s 29A(5) (text and data mining), s 29(4B) (research and private study), s 32(3) (illustration for instruction).

⁴³ See *Gloucester Place Music Ltd v Le Bon* [2016] EWHC 3091 (Ch) (Duran Duran case).