

**Department of Communication and the Arts, *Copyright Modernisation Consultation***

**Response to Consultation Paper**

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**Summary**

We are a group of Australian law academics, who individually and collectively have extensive experience teaching and researching in copyright law. This submission responds to both the *Copyright Modernisation Consultation Paper* (March 2018) (Consultation Paper) and the proposed 'models for further consultation' flowing from the roundtable discussions conducted by the Department of Communications and the Arts in May 2018.

Since 2012, all stakeholders in the debate over Australia's copyright exceptions have had ample opportunity to make their positions known. The Australian Law Reform Commission (ALRC), in its *Copyright and the Digital Economy* inquiry of 2012-13, and the Productivity Commission (PC), in its *Intellectual Property Arrangements* inquiry of 2015-16, received hundreds of written submissions and held extensive consultations on this issue. Both bodies made detailed recommendations for reform of the Australian exceptions regime, giving extensive reasons for their preferred models.

The case for more flexible exceptions to infringement has been made and justified, repeatedly. The government's task at this point is a simple one. In undertaking reform of the *Copyright Act 1968*, the government should be guided **exclusively** by the recommendations of the ALRC in its *Copyright and the Digital Economy* report, and the PC in its *Intellectual Property Arrangements* report.

**The best option for reform is to introduce a 'fair use' exception to infringement. This should be in the form outlined by the ALRC in its recommendations 5-1, 5-2 and 5-3 (as supported in principle by the PC in its recommendation 6.1).**

If the government wishes to expand the scope of the purpose-based ‘fair dealing’ defences, **we would support the ALRC’s alternative recommendation of introducing a number of new and expanded ‘fair dealing’ exceptions, in the form recommended by the ALRC in its recommendation 6-1.** However, to the extent that the Department’s models for further consultation emerging from the roundtable discussions seek to limit the flexibility of the expanded fair dealing model proposed by the ALRC in relation to quotation, education and technical and incidental use, we do not support those restrictions. Specifically, we do not support the suggestions that some of these exceptions should apply only to works and not to subject matter other than works; that some of these exceptions should operate only where a licence is not available; or that an education-focused fair dealing exception be limited to ‘illustration for instruction’.

In **Part I** we explain why fair use or expanded fair dealing remain the best options for reform, and why the government should resist seeking out positions that deviate from the ALRC’s recommendations. We also provide details of which exceptions to infringement could be repealed if fair use or expanded fair dealing were adopted.

In **Part II** we consider a troubling suggestion made in the Consultation Paper, and repeated in the models for further consultation, that the ‘five fairness factors’ currently contained in the research or study exception (in ss 40(2) and 103C(2)) should form part of a new fair use defence or the expanded fair dealing defences. The history of the ‘fifth’ fairness factor (that is, the possibility of obtaining the work, adaptation or audio-visual item within a reasonable time at an ordinary commercial price) reveals that not only would it be inappropriate to extend the operation of this factor, but also that it should not even have a role to play in a fair dealing exception for research or study. Our arguments in this Part provide further support for the ALRC’s recommendations 5-2 and 6-1 concerning the four fairness factors that should apply under a new fair use defence or the expanded fair dealing defences.

In **Part III** we outline our support for a statutory prohibition on ‘contracting out’ of the exceptions, and explain how such a prohibition could be drafted in the event that either a fair use exception or expanded fair dealing exceptions were adopted.

## Part I Support for flexible copyright exceptions

### 1.1 The case for fair use has been made and accepted

We welcome the Department's recognition that reform is urgently needed to modernise Australia's copyright law in order that it can continue to reflect the interests of creators, users and distributors. We also believe that the Department's task in implementing reform should be a straightforward one.

Over the last six years, the Australian Law Reform Commission<sup>1</sup> and the Productivity Commission<sup>2</sup> have undertaken extensive consultations on copyright exceptions. Overall, both bodies received almost 2000 submissions and carried out roundtable meetings, consultations and visits with stakeholders and other interested parties. Both Commissions carefully considered all the information they received and gathered in an objective and proper manner. Both Commissions concluded, on the basis of this information and evidence, that Australia should adopt a fair use exception. Following the ALRC's final report, the Department commissioned a cost benefit analysis from Ernst & Young, which concluded that the introduction of fair use was likely to have the largest net benefit to Australia, as compared to introducing further fair dealing exceptions.<sup>3</sup>

We do not seek to re-argue the case for fair use in our submission. The case has been made. We cannot improve on the summary given by the ALRC in the Executive Summary of its final report:

'The case for fair use made in this Report is based on several arguments, including:

- Fair use is flexible and technology-neutral.
- Fair use promotes public interest and transformative uses.
- Fair use assists innovation.
- Fair use better aligns with reasonable consumer expectations.
- Fair use helps protect rights holders' markets.
- Fair use is sufficiently certain and predictable.
- Fair use is compatible with moral rights and international law.

An important feature of fair use is that it explicitly recognises the need to protect rights holders' markets. The fourth fairness factor in the exception is 'the effect of the use upon the potential market for, or value of, the copyright material'. Considering this factor will help ensure that the legitimate interests of creators and other rights holders are not harmed by the fair use exception'.<sup>4</sup>

The ALRC's core 'fair use' recommendations are contained in recommendations 5-1, 5-2 and 5-3 of its final report. They should be adopted without amendment.

The ALRC noted that there might be two reasons why the government might seek to deviate from these recommendations: (1) concerns about whether 'fair use' is compatible with Australia's obligations under the *TRIPS Agreement*; and (2) opposition from rights holders. In relation to (1), the ALRC accepted, and numerous scholars have argued convincingly, that 'fair use' is consistent with

<sup>1</sup> Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013).

<sup>2</sup> Productivity Commission, *Intellectual Property Arrangements*, Inquiry Report No 78 (2016).

<sup>3</sup> Ernst & Young/Department of Communication and the Arts, *Cost Benefit Analysis of Changes to the Copyright Act 1968* (2016), at <https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968>.

<sup>4</sup> ALRC Report, 21-22.

the three-step test and Australia's international obligations. The arguments to the contrary are, in our view, not strong enough to form a barrier to the adoption of fair use. In relation to (2), we would urge the Department to keep in mind the importance of separating the extent of any opposition to fair use with the quality of the arguments against fair use. Fair use has been recognised and justified as the best possible model of reform, repeatedly. The Department should embrace it, fortified by the primary recommendations of the ALRC and PC, and not seek to deviate from these recommendations on the basis of arguments that did not persuade the ALRC or PC.

### **1.2 Any additional fair dealing exceptions must be drafted to enhance flexibility**

If the Department is minded to reform the Act by way of expanded, purpose-based fair dealing exceptions, we would support this being done in the manner recommended by the ALRC. That is, we would support the ALRC's alternative recommendation of introducing eleven new or expanded 'fair dealing' exceptions, as outlined in recommendation 6-1, with 'fairness' determined by reference to the four factors as described in recommendation 5-2. We agree that this model would be a 'considerable improvement'<sup>5</sup> on the existing exceptions regime, even if would not offer the same degree of flexibility as fair use.

We appreciate that the Department is attracted to this model, having structured consultations around potential fair dealing exceptions for purposes such as quotation, educational use, and technical and incidental use, as a means of seeking to achieve a compromise between diametrically opposed views on copyright reform. However, although we are open to the government embracing substantially more flexible fair dealing exceptions as outlined above, we are concerned that some aspects of the proposed 'compromise' models will not achieve the Department's aim of modernisation, but will instead have the potential to undermine it. If additional fair dealing exceptions are enacted, it is crucial that they are drafted in a manner that allows the right questions to be asked and achieves much needed flexibility.

The ALRC emphasised that new fair dealing purposes should be given a wide construction, so that the focus can remain on what is fair rather than on whether a given use falls into one of the prescribed categories.<sup>6</sup> If the purposes are drafted in a restrictive manner by narrowly defining the relevant terms, or accompanied by restrictive detail in an Explanatory Memorandum, the government's aim of modernising copyright by providing a law that can adapt to new technologies and changing markets will be frustrated. Treating copyright as an expansive right that covers all uses except those that are specifically identified and restrictively defined by statute has not only led to complexity and confusion, but has prevented Australian copyright law from being able to cope flexibly with new technologies.

We have particular concerns about the suggested form of some of the proposed exceptions, as outlined in the Department's 'models for further consultation'.

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<sup>5</sup> ALRC Report, [6.24].

<sup>6</sup> ALRC Report, [6.24]-[6.25].

### **1.2.1 Quotation exception**

If fair use is not adopted, it is imperative that Australia adopts a broad ‘quotation’ exception, as it is our view that Australia does not currently comply with the mandatory Art 10(1) of the Berne Convention.

On the Department’s draft model for a quotation exception, we would make two points. First, we note that other stakeholders have raised the idea that this exception should not apply to audio-visual material. This suggestion should be dismissed out of hand. There is no compelling reason why some copyright subject matters (such as AV material) should be exempted from a broad fair dealing exception. Rather, it is in the interests of clarity, simplicity and certainty that the same exceptions should apply to all copyright works and subject matters other than works. It is also consistent with the approach taken in the United Kingdom, the European Union and the US. Arguments that a quotation exception should not apply to all copyright material were rejected by the ALRC.<sup>7</sup>

Second, we note the suggestion that the quotation exception should apply only in circumstances where it would not prevent or reduce licensing. This argument was considered and rejected by the ALRC.<sup>8</sup> A copyright owner should not, for example, be able to prevent an otherwise fair quotation that does not interfere with the copyright owner’s market by offering an unreasonable licence. We are, for example, aware of a colleague who recently wished to use a single line from a popular song as an epigraph to an academic scholarly monograph, but who was told by her publisher that she would need to clear the rights. She located the relevant right holder who sought \$400 for the use. While quoting the line would be valuable and thought-provoking, our colleague could not justify the expenditure of public research funds for this purpose, and had little choice but to delete the epigraph (the publisher being unwilling to negotiate on a lower fee, even after being informed of the low print run of the monograph). While it may be the case that the availability of a licence is *relevant* to a consideration of whether the use in question is fair, allowing this to be a determining factor would undermine the goals of flexibility and reflecting the interests of creators, users and distributors. Indeed, it would end up creating a *more* restrictive regime of exceptions than the one currently in existence.

### **1.2.2 Education exception**

On educational use, we note that the Department is proposing a fair dealing exception for ‘illustration for instruction’. While we would welcome an expanded defence for educational use, we do not consider that there is sufficient justification for departing from the ALRC’s fully-considered recommendation of a fair dealing defence for ‘education’. The language of ‘illustration for instruction’ appears to be derived from s 32 of the *Copyright, Designs and Patents Act 1988* (UK), which has been criticised as being ‘awkward’ and capable of narrow interpretation.<sup>9</sup> Adopting such language is therefore inconsistent with the government’s policy goal of increasing flexibility. Similarly, we would not support any statement in the EM that the exception is not intended to

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<sup>7</sup> ALRC Report, [9.59]-[9.66].

<sup>8</sup> ALRC Report, [5.81]-[5.92].

<sup>9</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4<sup>th</sup> ed, 2014) 253 (“‘Instruction’ suggests a rather outdated understanding of learning, in which the student is a rather passive recipient of information or guidance. In turn, this might indicate that [the] defence is limited to use by the teacher of copyright-protected material to “illustrate a point”, such as use of the materials in handouts and slides’.)

‘significantly reduce licensing’ of copyright material for educational use. Such a statement can only reduce the flexibility of the new exception by artificially constraining the scope of what is a ‘fair’ dealing. It might be the case that in specific instances reliance on a new fairness exception will result in a reduction in licensing. It would be deeply problematic if a court’s decision as to what is otherwise ‘fair’ were unduly constrained by this factor.

On the other hand, we strongly support the Department implementing the ALRC’s recommendation 8-1, namely to amend the Act ‘to clarify that the statutory licences in pts VA, VB and VII div 2 do not apply to a use of copyright material which, because of another provision of the Act, would not infringe copyright’ so that educational institutions may rely on fair use, or a new fair dealing for education exception, to the extent that such an exception applies.

### **1.2.3 Incidental or technical use exception**

On incidental or technical use, we note the Department’s proposal to introduce fair dealing for technical or incidental use, which the Department intends (as proposed to be explained by the EM) would cover uses currently covered by the temporary copying and proxy/caching exceptions, and also text and data mining for non-commercial purposes; we note also the suggestion elsewhere in the Department’s documentation that enactment of such an exception might cover at least some computer software exceptions (and hence allow for repeal of s 47H). We have some concern that this proposal uncomfortably conflates two categories of use, justified by different rationales for an exception:

1. Uses currently addressed (imperfectly) by ss 43A, 43B, 111A, 111B, 116AB, and 200AAA: that is, ‘technical’ uses that are an inevitable result of some other act, such as playing a digital copy or perhaps search engine indexing; and
2. Uses such as data mining which are ‘non-expressive’ or perhaps ‘non-consumptive’ in that they do not trade on the underlying creative and expressive purpose of the material.<sup>10</sup>

These categories are quite different: uses falling within category 1 above could be characterised as expressive, or ‘consumptive’ – in that some occur in the course of ‘enjoying’ the copyright content for the purpose for which it was created (listening to music, or using software). Other possibly technical uses (eg search engine indexing) would not. We think the conflation of these categories could cause difficulties of interpretation. If an EM were to state, for example, that both are intended to be covered it is difficult to articulate what unites these categories, in order to work out what else is potentially covered.

We would suggest that the Department should resist any attempt to define ‘technical or incidental’ in the EM. Any attempt to further define precisely what counts as ‘technical’ or ‘incidental’ will inevitably undermine the intended flexibility and technology neutrality of the ALRC’s proposal. We think, for example, that referring to the currently covered exceptions might lead to a restrictive interpretation of the provision, as would any attempt that stakeholders might suggest to ‘itemise’ what is covered. Certainly any suggestion in the EM that *non-commercial* data mining is

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<sup>10</sup> The differences between these categories and their rationales, as well as the problems with language like ‘non-consumptive’ or ‘non-expressive’, are discussed at length in Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall, Submission 716 to the Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013), at [https://www.alrc.gov.au/sites/default/files/subs/716.org\\_r\\_burrell\\_m\\_handler\\_e\\_hudson\\_k\\_weatherall.pdf](https://www.alrc.gov.au/sites/default/files/subs/716.org_r_burrell_m_handler_e_hudson_k_weatherall.pdf).

covered could undermine the application of the exception to category 1 uses that are commercial (some of which are currently allowed). We would suggest that ‘technical or incidental’ is better left without further attempt at definition, or simply with reference to the ALRC report in which it is discussed.

We note further that data mining could be the subject of a separate exception – or could be addressed via the ALRC’s full secondary recommendation, which was not limited to ‘new’ fair dealing purposes. The ALRC characterised data mining as highly transformative, which should tend in favour of a finding of fair use subject to other considerations such as market impact, but the ALRC did not propose data or text mining as a separate fair dealing exception. The ALRC however recognised that existing fair dealing exceptions should be substantially broadened – for example, that there be a fair dealing exception for ‘criticism and review’, not limited to criticism or review of the work or audio-visual item being copied, and that s 40 (research and study) with all its limiting and technical language should be repealed. We would encourage the Department to revisit *all* of the fair dealing exceptions in undertaking reform of the Act. Drafted and interpreted broadly, the fair dealing exceptions envisaged by the ALRC could be apt to cover some data mining (for research, or for data journalism via fair dealing for reporting news).

### **1.3 What exceptions should be repealed?**

There are over 70 separate provisions in the Act creating exceptions to infringement, with widely varying details. Fair use or extended fair dealing would render many of these unnecessary. We have given further consideration to how much of this legislative over-complexity could be eliminated with the introduction of fair use, and summarise our suggestions at Appendix A. Note that this would not always expand currently free uses, where those uses in fact unfairly impact on copyright owners’ markets.

## Part II The inappropriate ‘fifth’ fair dealing factor

Regardless of whether ‘fair use’ or an expanded set of ‘fair dealing’ exceptions is adopted, it is essential that the four ‘fairness factors’ articulated by the ALRC in recommendation 5-2 are explicitly adopted. These factors are:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material;
- (c) the amount and substantiality of the part used; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

We are greatly concerned at the suggestion made in the Consultation Paper<sup>11</sup> that if fair use were to be introduced, the five fairness factors currently contained in ss 40(2) and 103C(2) would be retained. We are equally concerned at suggestions in the models for further consultation that potential fair dealing exceptions covering quotation, educational use, and incidental or technical use should be determined by reference to those five fairness factors.

The ALRC provided a thorough, detailed justification for the four fairness factors outlined above.<sup>12</sup> There is no reason to deviate from the ALRC’s recommendation. Indeed, there is a particularly significant problem with retaining the ‘fifth’ fairness factor, set out in ss 40(2)(c) and 103C(2)(c): the possibility of obtaining the work, adaptation or audio-visual item ‘within a reasonable time at an ordinary commercial price’. **This fifth factor should not have any role to play in a more flexible exceptions regime.** Indeed, even if the existing fair dealing exception for research and study were to be retained, there is a strong case for repealing this factor.

An examination of the history of the fair dealing factors reveals that the fifth factor was adopted to deal with a different problem and incorporated into s 40(2) without proper consideration. To explain, the five factors contained in s 40(2) were only introduced into the Act in 1980. Unlike the other four factors, the fifth factor is not derived from earlier British Commonwealth case law. Rather, it owes its origins entirely to the recommendations of the 1976 Franki Committee Report.<sup>13</sup> In chapter 2 of this Report the Committee set out its views on the scope of and problems with the then ‘fair dealing for research or private study’ exception. It recommended that the statutory purpose should be expanded to ‘research or study’ and that the fairness of the dealing be determined by reference to five factors – these were adopted verbatim in s 40(2).<sup>14</sup> However, the Committee did not in any way seek to explain what role the fifth factor was meant to play in this amended fair dealing defence.

Instead, the Committee was clearly interested in this factor having a role to play in expanding the scope of permissible copying **by libraries** under ss 49 and 50. As the law stood in 1976, a library could not make a copy of an entire literary, dramatic or musical work, other than an article in a periodical, for the benefit of a user engaged in research. The Committee sought to rectify this, recommending the addition of a provision drawing on what would become s 108(e) of the *Copyright*

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<sup>11</sup> Department of Communications and the Arts, *Copyright Modernisation Consultation Paper* (March 2018) 2, 11.

<sup>12</sup> ALRC Report, [5.11]-[5.109].

<sup>13</sup> *Report of the Copyright Law Committee on Reprographic Reproduction* (1976) (Franki Committee Report), at <http://copyright.com.au/wp-content/uploads/2015/05/R00507-Franki-Report.pdf>.

<sup>14</sup> Franki Committee Report, [2.60].

Act 1976 (US). In the Committee's view, a librarian's copying of an entire literary, dramatic or musical work should be permissible if the work formed part of the library collection and 'if the librarian has first determined on the basis of a reasonable investigation that an unused copy of the work cannot be obtained within a reasonable time at a normal commercial price and makes a declaration to this effect, and provided a declaration is also made by the user of the library that the copy is required "for the purpose of research or study"'.<sup>15</sup> This recommendation was implemented in 1980 through the new s 49(5) of the *Copyright Act 1968* (Cth). Similarly, under the law as it stood in 1976, a librarian's ability to copy an entire literary, dramatic or musical work to meet the request of another library was subject to a number of restrictions. The Franki Committee recommended that this provision should be amended to permit a librarian to ask another library to make a copy of certain entire works so as to include the copy in the first library's collection or to satisfy a researcher's request under s 49, provided the requesting librarian 'has first determined on the basis of a reasonable investigation that an unused copy of the work cannot be obtained within a reasonable time at a normal commercial price and makes a declaration to this effect'.<sup>16</sup> This recommendation was implemented in 1980 through the new s 50(7).<sup>17</sup>

In addition, the Franki Committee recommended that the factor should have a role to play in the new statutory licensing regime. Specifically, it recommended that educational institutions wishing to avail themselves of the statutory licence should be able to make copies of entire literary, dramatic and musical works 'where the work concerned has been separately published, but copies cannot be obtained within a reasonable time at a normal commercial price'.<sup>18</sup> This was implemented in 1980 through the new s 53B(5).

We have set out the Franki Committee's recommendations in detail to show what work the 'within a reasonable time at an ordinary commercial price' factor was intended to do. It was designed to operate as a liberalising measure, to ensure that potentially large parts of works, or even entire works, could be reproduced for highly specific purposes in the context of heavily regulated schemes involving copying within libraries and educational institutions. As the secretary of the Franki Committee said in 2011, these recommendations 'sought to respond to complaints about the unavailability of texts in Australia and the unreliability of delivery when ordered from overseas'.<sup>19</sup>

However, it is not clear how the factor was ever intended to work as something going to whether a researcher's dealing is or is not 'fair'. Indeed, the problem with making 'the possibility of obtaining the work within a reasonable time at an ordinary commercial price' a fairness factor is that, in this context, it seems to operate as a restriction on what might otherwise be permissible conduct. For example, if a Sydney-based researcher wishes to copy a 25 page chapter of a 200 page book, but the book is available for purchase in Sydney for \$200, the presence of this factor would

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<sup>15</sup> Franki Committee Report, [3.19].

<sup>16</sup> Franki Committee Report, [4.20].

<sup>17</sup> The 'within a reasonable time at an ordinary commercial price' factor was also contained in recommendations relating to the making of preservation copies by libraries (Franki Committee Report, [5.10]-[5.11]), which were implemented in the former s 51A of the Act.

<sup>18</sup> Franki Committee Report, [6.58].

<sup>19</sup> John Gilchrist, 'The Franki Committee (1976 Report) and Statutory Licensing' in Brian Fitzgerald and Benedict Atkinson (eds), *Copyright Future Copyright Freedom: Marking the 40th Anniversary of the Commencement of Australia's Copyright Act 1968* (Sydney University Press, 2011) 65, 67.

seem to weigh against the fairness of the copying – even if, to that researcher, the cost of purchasing the book would be prohibitive.<sup>20</sup>

The problem will be exacerbated if the fifth factor is made to apply in other fair dealing defences (such as quotation, educational use, or technical or incidental use), or in an open-ended fairness-based exception. As two Singaporean commentators have rightly argued, the presence of this factor is problematic ‘if courts choose to interpret [it] as a requirement that the infringer should have at least made some effort to request for a licence ... as high search and transaction costs would be incurred for what otherwise might be a permissible activity’.<sup>21</sup>

The ALRC was well aware of the problems with adopting a fairness factor that could be interpreted as meaning that a use would not be fair if a licence were available. It noted that the UK government had recently rejected the idea that the ‘mere availability of a licence should automatically require licensing a permitted act’,<sup>22</sup> and accordingly the ALRC rejected arguments for the retention of the fifth fairness factor in a new fair use defence or expanded fair dealing defences. The ALRC recognised that the factor would be inappropriate in determining the fairness of a range of uses, such as criticism or parody.<sup>23</sup> Furthermore, the sort of concerns sought to be addressed by the fifth factor were, in fact, adequately accommodated within its factor (d) outlined above (market impact).<sup>24</sup>

In summary, there are no good reasons for retaining a fairness factor that looks to the possibility of obtaining the work, adaptation or audio-visual item within a reasonable time at an ordinary commercial price. This factor found its way into the fair dealing defence in s 40 without proper consideration. If applied more generally, it has the potential to stifle the operation of an otherwise flexible exception. The ALRC was right to reject it, and the Department should too.

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<sup>20</sup> This is how the Singapore government understood the potential operation of this factor when, in 1986, it decided not to incorporate it in its ‘fair dealing for research or study’ provision that was otherwise modelled on Australia’s s 40. See *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] SGCA 28; [2017] 2 SLR 185, [75], at <http://www.commonlii.org/sg/cases/SGCA/2017/28.pdf>.

<sup>21</sup> David Tan and Benjamin Foo, ‘The Unbearable Lightness of Fair Dealing: Towards an Autochthonous Approach in Singapore’ (2016) 28 *Singapore Academy of Law Journal* 124, 137. The Singapore government is considering adopting a ‘fair use’ exception and removing the fifth fairness factor: Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation on Proposed Changes to Singapore’s Copyright Regime* (23 August 2016), at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/Public%20Consultation%20Paper%20on%20Proposed%20Changes%20to%20Copyright%20Regime%20in%20Singapore%20August%202016.pdf>

<sup>22</sup> UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012) 13, cited in ALRC Report, [5.89]. See also at [5.100].

<sup>23</sup> ALRC Report, [5.104].

<sup>24</sup> ALRC Report, [5.99].

### Part III Contracting out

Multiple reviews have recommended that contracts that seek to remove the ability of users to rely on copyright exceptions should be prohibited in at least some circumstances,<sup>25</sup> including the Copyright Law Review Committee in 2002,<sup>26</sup> the ALRC in 2013, and the PC in 2016. We note that the government response to the PC Report supported this recommendation in principle. We also note that many copyright exceptions in UK law now include a prohibition on ‘contracting out’.<sup>27</sup> These changes came into effect in the UK in 2014.<sup>28</sup> We are unaware of any evidence that these changes have significantly disrupted copyright markets or creation in the UK. In our view, this strengthens the presumption in favour of such reform in Australia.

The goal of the various independent bodies that have recommended a prohibition on contracting out of copyright exceptions is clear: the public interests (including creator interests) served by, and core to, the copyright system ought not to be overridden by contracts. There is indeed an argument that the law of contract **already prohibits** contracting out of certain exceptions on public interest grounds.<sup>29</sup> Another concern articulated in the various reports is that in many cases, and especially in the digital environment, copyright licences are presented to users on a ‘take it or leave it’ basis: ie, they come in the form of mass-market and/or non-negotiated contracts, rather than representing a negotiated outcome that reflects the interests of all parties to the contract. There may be less concern about the content of contracts that result from negotiations between significant, experienced copyright production and use interests.

The question is how to give effect to the goals of preserving the public interest in copyright while not preventing the market from operating. The ALRC noted with approval the drafting adopted in the UK, where the relevant provisions provide that:<sup>30</sup>

‘To the extent that the term of any contract purports to restrict or prevent the doing of any act which would otherwise be permitted by [the exception], that term is unenforceable.’

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<sup>25</sup> In addition to the Australian reviews listed in text, we note that the Hargreaves Report in the UK also recommended that new exceptions introduced into UK law should not be capable of being set aside by contract: Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (Department for Business, Innovation & Skills 2011) 51.

<sup>26</sup> Copyright Law Review Committee, *Copyright and Contract* (2002).

<sup>27</sup> *Copyright Designs and Patents Act 1988* (UK) s 30(4) (quotation), s 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), ss 41(5), 42A(6), 42 (certain library uses), ss 50A, 50B, 50BA (certain computer uses), s 50D (lawful use of databases), s 75 (recording broadcast for archival purposes) and s 31F(8) (acts for the purpose of providing access to a work to a person with a disability). Note also that a new UK exception s 29(4B) allowing the creation of personal copies for private use also included a provision (s 28B(10)) preventing contracting out. The exception was subsequently quashed in *R (on the Application of BASCA) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin), but that case did not examine the provisions on copyright and contract.

<sup>28</sup> We would not advocate matching this list, which has been criticised for *not* including core public interest exceptions in copyright – criticism, review, and news reporting: Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4<sup>th</sup> ed, 2014) 229.

<sup>29</sup> See generally JW Carter, Elisabeth Peden and Kristin Stammer, ‘Contractual Restrictions and Rights under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32 (arguing that most contractual provisions purporting to exclude a licensee’s rights under the *Copyright Act* are likely to be either void or unenforceable on public policy grounds). See also Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 69.

<sup>30</sup> ALRC Report, [20.107].

In our view, a provision of this kind, which is confined in effect to terms that *restrict or prevent the doing of permitted acts* (ie, acts that are considered ‘fair’), itself provides parties negotiating a contract with a degree of flexibility to articulate and clarify permitted acts (ie, what is and is not fair). The UK drafting does not prohibit *any* contractual term that touches on permitted acts; it only prohibits those that restrict acts that would otherwise be permitted (ie, fair acts). Fairness is assessed, whether under a fair use or a fair dealing exception, by reference to considerations such as the nature of the work, the nature and purpose of the activity, and the impact on the copyright owner’s market. It could therefore be expected that:

- where sophisticated parties engage in mutual negotiations leading to an agreement that articulates some agreed concept of what kind of acts are fair – for example, where news and sports organisations reach an agreement about the extent of re-use of clips that may be considered fair – this will influence the view of a court as to the scope of what acts are fair. In these circumstances it is unlikely that a court would consider that the resulting contract restricts acts that would otherwise be permitted; and
- where, on the other hand, contractual terms are presented on a ‘take it or leave it’ basis – for example, where consumers are offered a licence to read, view, or listen to copyright material, or researchers are offered a licence to view material in a database, or a key database licence is offered to a library or library system that purports to restrict interlibrary loans or the provision of copies to users, or authors or artists are offered a commissioning contract, and no negotiation on that provision is countenanced – they are more likely to be seen as restricting conduct that would otherwise be considered fair.

A provision of this kind has the potential to operate beneficially, by encouraging parties drafting licences to articulate a balanced provision allowing acts that would be considered fair and not harmful to copyright owners’ markets precisely in order to influence the analysis of the exception and avoid the impact of the prohibition on contracting out.

In our view, and notwithstanding the ALRC’s conclusions to the contrary, reasoning of this kind could also be applied if a fair use-style exception were to be introduced (and not merely if expanded fair dealing exceptions were introduced). Again, as the ALRC acknowledged, the contractual circumstances and any negotiations between the parties would be relevant in determining whether a use prohibited by contract is fair. At the very least, it would be possible to apply a prohibition on contracting out to illustrative purposes identified in a fair use provision in accordance with the ALRC’s recommendation 5-3. This would better achieve the ALRC’s overall concern to protect the public interest in copyright reflected in its recommendation for extended fair dealing.

Another option mentioned in the consultation paper would be provisions more along the lines of the National Employment Standards<sup>31</sup> and residential tenancy conditions.<sup>32</sup> We acknowledge that these provisions provide obvious precedents for the idea that certain public interest provisions

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<sup>31</sup> Terms in awards, registered agreements and employment contracts can’t exclude or provide for an entitlement less than the National Employment Standards, and those that do have no effect. See Fair Work Ombudsman, *Introduction to the National Employment Standards* (2017), at <https://www.fairwork.gov.au/ArticleDocuments/723/Introduction-to-the-national-employment-standards.pdf.aspx>

<sup>32</sup> Section 219 of the *Residential Tenancies Act 2010* (NSW) prohibits contracting out of that Act (whether purporting to exclude, limit or modify the operation of this Act or the regulations or having the effect of excluding, limiting or modifying the operation of this Act or the regulations).

cannot be overridden by private contract – to that extent, these examples strengthen the argument in favour of similar provisions in copyright. We would however argue against any attempt to articulate a pre-defined set of contracts where contracting out will be prohibited. We do not think that it is possible, in advance, to articulate an exclusive list of those contracts where concerns about the undermining of the public interest in copyright are likely to arise, simply owing to the large number and enormously varying circumstances in which copyright issues arise. It is not the case, for example, that concerns only arise where contracts are non-negotiated mass market contracts. Contracts between individual authors and performers and their publishers/distributors may equally give rise to concern *even though* they are in fact nominally open to negotiation. Negotiating imbalances of the kind long identified by Ruth Towse<sup>33</sup> and Richard Caves<sup>34</sup> – where there are more aspiring authors and performers than there are opportunities to become professional authors and performers – mean that authors and performers accept disadvantageous contracts out of fear of being rejected or labelled difficult.

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<sup>33</sup> See generally Ruth Towse, *A Textbook of Cultural Economics* (Cambridge University Press, 2010).

<sup>34</sup> See generally Richard E Caves, *Creative Industries: Contracts between Art and Commerce* (Harvard University Press, 2000).

## Appendix A

Table 1: Provisions that could be repealed if fair use were implemented<sup>35</sup>

Provision	Description	Comments
ss 40, 41, 41A, 42, 43(2), 103A, 103AA, 103B, 103C, 113E	Fair dealing defences	Fair use would render it unnecessary to have multiple separate fair dealing exceptions.
s 104(b), 104(c)	'Professional advice' exceptions (Part IV subject matter)	These exceptions are blanket exceptions not requiring assessment of fairness (unlike the Pt III equivalent s 43(2) which requires fairness). This inconsistency could be removed; fair uses could also be available to non-legal professions as appropriate.
ss 43A, 43B, 111A, 111B	Temporary reproduction/copy exceptions	Repeal, as recommended by ALRC.
ss 43C, 47J, 109A, 110AA, 111	Private use exceptions	Repeal, as recommended by ALRC. This would likely make some currently infringing personal uses free (eg, storage of material on pure cloud services) and make infringement less dependent on technological form, but might make other free uses paid.
s 28, 44, 200, 200AA, 200AB	Specific educational uses: performing in class, including material in a collection, use in exams, copying by hand, proxy web caching.	Repeal, as recommended by ALRC. It might be <i>necessary</i> to repeal these provisions so that their existence does not narrow the interpretation of fair use.
ss 44B, 44BA, 44BB	Information uses required under <i>Privacy Act 1988</i> and <i>My Health Records Act 2012</i> (s 44BB) Exceptions relating to material on approved labels for containers for	The ALRC proposed a new exception where statutes require public access to copyright material, and for correspondence with government. We would suggest these uses could potentially be addressed through fair use, although there are also arguments for a

<sup>35</sup> Table 1 draws on, but is not identical to, a similar table in Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall, Submission 716 to the Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013), at [https://www.alrc.gov.au/sites/default/files/subs/716.org\\_r\\_burrell\\_m\\_handler\\_e\\_hudson\\_k\\_weatherall.pdf](https://www.alrc.gov.au/sites/default/files/subs/716.org_r_burrell_m_handler_e_hudson_k_weatherall.pdf).

	chemical products / product information relating to medicines (ss 44B, 44BA)	simple blanket exemption confined to those cases where exercise of exclusive rights is <i>required</i> or <i>necessary</i> under the law of the Commonwealth, a State or Territory, or under local government rules. It might also be appropriate to remove required uses from the government use statutory licence.
s 45	Exception for reading/recitation in public or for a broadcast	Repeal. Such uses should be allowed if fair.
ss 47AB, 47A, 47B, 47C, 47D, 47E, 47F, 47G, 47H	Computer program exceptions	<p>The ALRC considered that certain such uses are fair (eg, back-up); others might be able to be repealed subject to further detailed consultation.</p> <p>There is room for debate here. It is arguable that case law on these exceptions has made clear that they are narrow, technical, and that the law and stakeholders would be better served with a fair use exception that asks the right questions. However, it would be necessary to consider this issue in conjunction with contracting out. The exceptions cannot currently be the subject of contracting out (s 47H). It is arguable that these provisions should only be repealed if this position is preserved, for example by making fair use an exception that cannot be the subject of contracting out.</p>
s 52	Publication of unpublished works kept in libraries or archives	This is a narrow orphaned works provision that applies to the publication of old, unpublished works from library and archival collections. If the ALRC's orphan works recommendations are adopted, it would seem that s 52 is no longer necessary and should be repealed.
ss 65, 66, 67, 68	Exceptions for uses of artistic works	Repeal, but there is room for debate. The provisions are narrow and unclearly drafted, and probably allow some uses that interfere with artists' markets. However, in some other countries,

		notably in Europe, questions are being raised about a 'right of panorama' or, in essence, the right to take photos in public places even where that involves reproduction of copyright works. Our view is that uses of this kind will often be fair, but we are conscious that repealing these provisions could create arguments and uncertainty for some commercial markets. These issues might be dealt with through the negotiation of fairness guidelines.
s 110	Special provisions for films (eg free showing/use of films after 50 years)	Repeal. Should be allowed if fair.
s 112	Reproductions of editions of work	Repeal. Should be allowed if fair.

Table 2 below sets out the exceptions that would likely remain in the Act, although perhaps in amended form:

*Table 2: Provisions that would remain if fair use were implemented*

Provision	Description	Comments
ss 44A, 44C, 44D, 44E, 44F, 112A, 112B, 112C, 112D, 112DA	Parallel importation provisions	Parallel importation cannot be analysed under fair use because it inevitably impacts markets.
ss 43(1), 104(a)	Judicial reporting exceptions	<p>The ALRC recommended retaining exceptions for conducting reporting judicial proceedings, and adding tribunal proceedings; royal commissions, statutory inquiries. The ALRC concluded that although likely to be fair, such uses were required in the interests of good government. We agree.</p> <p>The ALRC also proposed a new exception for where statutes require public access to copyright material, and for correspondence with government. We would suggest these uses could be addressed through fair use, although it might also be appropriate to remove required uses from the government use statutory licence.</p>
ss 48A, 104A	Exceptions for Parliamentary libraries	The ALRC argued that these exceptions should be retained, and extended to all types of copyright material and all exclusive rights, as this activity is necessary for the purposes of good government. We agree.
ss 46, 106, 199	Exceptions to allow use of broadcasts and records where people reside/sleep, as well as reception of broadcasts in public places.	These provisions intersect with and in part define the scope of various statutory licences, and are tied up with broadcast and communications policy. As suggested by the ALRC, these exceptions should be the subject of separate consideration.
ss 47, 47AA, 47A, 70, 105 107, 108, 109, 110C,	Special broadcasting/simulcasting provisions, including equitable remuneration	The intersection between copyright and broadcast/communications policy requires separate consideration. It may be that these provisions do not belong in the copyright act at all.

ss 49, 50, 51, 51AA, 110A	Libraries and archives provisions that relate to request-based copying services	Certain library uses ought to be allowed in the public interest. We suspect that if these provisions were repealed, libraries might cut back on these essential services under pressure from copyright owners.
ss 72, 73	Artistic works: repetition of themes by artists; reconstruction of buildings	These exceptions are narrow, but serve legitimate interests. While such activities could well be fair, we think there is little harm leaving these provisions in the Act.
ss 74, 75, 76, 77, 77A	Copyright/design overlap provisions	Currently the subject of separate consideration by IP Australia.
s 113F	Exception for institutions assisting persons with disabilities	This provision is not currently limited to acts that are fair. We think that requiring institutions to go through exhaustive processes to determine commercial availability would be counterproductive, and that the costs (in terms of transaction costs, and delays in access) would outweigh the small benefits that might accrue to some copyright owners who wish to charge additional fees for accessible versions.
ss 113H, 113J, 113K, 113M	Copying by libraries and archives for preservation, administration and research, and by key cultural institutions for preservation	These exceptions, introduced by the <i>Copyright Amendment (Disability Access and Other Measures) Act 2017</i> , were designed to rectify known problems with exceptions covering preservation and research-related copying by libraries, archives and related institutions, and should be left in place.