



AUSTRALIAN
COPYRIGHT COUNCIL

**SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION
RESPONSE TO COPYRIGHT AND THE DIGITAL ECONOMY DISCUSSION
PAPER**

JULY 2013

ABOUT THE AUSTRALIAN COPYRIGHT COUNCIL

The Australian Copyright Council (ACC) supports a creative Australia by promoting the benefit of copyright for the common good.

We believe in the values copyright laws protect: creative expression and a thriving, diverse, sustainable, creative Australian culture. A society's culture flourishes when its creators are secure in their right to benefit from their creative work and when access to those creative works is easy, legal and affordable. Copyright effectively and efficiently enables this balance between protection and access.

The ACC is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies.

We are advocates for the contribution of creators to Australia's culture and economy and the importance of copyright for the common good. We work to promote understanding of copyright law and its application, lobby for appropriate law reform and foster collaboration between content creators and consumers.

We provide easily accessible and practical, user-friendly information, education and forums and pro bono legal advice on Australian copyright law for content creators and consumers.

The ACC has 24 member organisations. Many of them are making separate submissions to this Inquiry. We have had the opportunity to review some of those submissions in draft form. Where appropriate, we refer to them in this submission

A full list of our members is attached at Appendix 1.

The Copyright Council Expert Group was a group of academics convened by the ACC during 2011. Its views do not necessarily reflect those of the ACC or its members.

The Executive Director of the ACC is, in her personal capacity, a member of the Advisory Committee for this Inquiry.

EXECUTIVE SUMMARY

This submission responds to the Australian Law Reform Commission's (ALRC) Copyright and the Digital Economy Discussion Paper. It does not seek to repeat the matters raised in its earlier submission to this Inquiry, although these are referenced, where appropriate.

GENERAL POINTS

The ALRC has put forward an elegant construct for copyright in Australia. However we are concerned that in doing so it has:

- gone outside its terms of reference;
- not based its proposals on any evidence.

The ALRC appears to be using fair use to moderate all competing copyright interests.

- in doing so it is propping a fair use doctrine that would be unique to Australia;
- this is problematic in a global digital economy.

The ALRC's proposals demonstrate a disturbing lack of appreciation for the commercial realities of people earning a living from copyright.

It is important to remember that exceptions operate as defences to allegations of infringement and not as limitations of the rights of copyright owners. The ALRC's proposal for a broad fair use exception is likely to place an onus on rights holders to litigate.

We are concerned that the ALRC's proposals will:

- chill investment in creative industries; and
- exacerbate existing inequities faced by individual creators;

without any attendant benefit to Australians wanting to engage in legitimate uses of copyright material.

In our submission, the ALRC has erroneously focused on simplifying the Copyright Act. This is beyond its remit. Simplicity is required in licensing solutions. This does not require a wholesale overhaul of the legislation.

We reject the ALRC's proposals for reform of the Copyright Act.

INTRODUCTION

The ALRC has been charged with a daunting task: to inquire into whether the exceptions and statutory licences in the Copyright Act are adequate and appropriate in the digital environment.

The ALRC has been able to draw on the work of previous inquiries, both in Australia and overseas. In August 2012 it published an Issues Paper asking a series of detailed questions about existing exceptions and statutory licences and testing the scope of possible future exceptions. While the structure of the Issues Paper may have been designed to engage stakeholders on the substantive issues, rather than invite a statement of fixed views, in our submission, it also tended to highlight the complexity of the issues under examination.

It is evident that the Commission has diligently studied the almost 300 submissions it received in response to its Issues Paper. It has also clearly made a genuine attempt to grapple with the issues before it. By contrast with the Issues Paper, the Discussion Paper of June 2013 puts forward a series of proposals elegant in their simplicity. It does not, however, reveal the reasoning behind those proposals. While the ACC appreciates the work of the ALRC, it is worth remembering that this Inquiry is about whether the existing copyright exceptions and statutory licences are fit for the digital economy. It is not about simplification of the Copyright Act per se.

The ACC is concerned that the ALRC's proposals will:

- reduce incentives for makers of creative content;
- make it difficult for end-users to use third party copyright material with any confidence or certainty; and
- exacerbate existing inequities for individual creators.

In our submission, this will be to the detriment of the digital economy.

In the following submission, we make some general points about the ALRC's Discussion Paper, before addressing the specific proposals and questions the ALRC has set out.

THE TERMS OF REFERENCE

The ACC is concerned that the ALRC has lost sight of its Terms of Reference. Rather than begin with an examination of the policy rationale of the existing exceptions and statutory licences, the ALRC appears to have focused on the part of the Terms of Reference that asks it to look at possible new exceptions. As a consequence, the ALRC has arrived at a theoretical framework, without considering whether the existing exceptions and statutory licences are still adequate and appropriate in the digital environment.

FRAMING PRINCIPLES FOR REFORM

The ALRC has set out five framing principles for reform. The principles are commendable, but in our submission, it is sometimes difficult to reconcile the

principles with what is written in the Discussion Paper. Indeed sometimes there are logical inconsistencies between the principles and the ALRC's proposals.

1. Acknowledging and respecting authorship and creation

The ACC supports this as an important framing principle; however, we are concerned that, contrary to this principle, the ALRC's proposals will in fact exacerbate existing inequities for copyright creators.

Copyright is important to creators as a means of both income and artistic control. By proposing a broad fair use exception and the abolition of statutory licences, the ALRC risks diminishing both a creator's income and means of controlling use of their work.

Successive studies have pointed to the difficulty of earning a living as a creator in Australia.¹ Creators are poorly placed to access the legal system to enforce their rights or to negotiate licences. Yet, the ALRC's proposals are likely to create an imperative for creators to do both.

One of the means of promoting respect for creators is through the moral rights regime. As the then Attorney-General stated in his second reading speech introducing the legislation "[a]t its most basic, this bill is a recognition of the importance to Australian culture of literary, artistic, musical and dramatic works and of those who create them."² Yet, the ALRC fails to engage in a discussion of how its proposal for a new fair use exception will impact on moral rights. While the *Copyright Amendment (Moral Rights) Act 2000* is mentioned in passing in the ALRC's discussion of cultural policy, this is confused by a subsequent reference to the moral rights legislation as an example of amendments designed to free up competition.³

In reality, moral rights operate in parallel with the economic rights of copyright. While the ALRC briefly mentions that acknowledgement of moral rights might be relevant in assessing fairness and that fair use may lead to an increase in moral rights 'being asserted'⁴ it does not examine the issue in detail. For example, it does not discuss the impact that a fair use exception would have on remedies available for infringement of moral rights (for example, would a finding of fair use tend to support a reasonableness defence against infringement of the right of attribution or integrity). Nor does it discuss the practical reality of a creator litigating such a claim (both financially and given that the creator may hold the moral rights, but not the economic rights). In our submission, these are important considerations, and as we pointed out in our earlier submission, not ones that US legal system has had to consider.⁵ Arguably this is because the moral right of integrity may be considered an impermissible fetter on the First Amendment right to freedom of expression.

¹ D Throsby and A Zednik, *Do you Really Expect to Get Paid? An Economic Study of Professional Artists in Australia* 2010. See also submissions of the Australia Council for the Arts, the Arts Law Centre of Australia, the Australian Society of Authors and the National Association of the Visual Arts.

² Copyright Amendment (Moral Rights) Bill 1999 Second Reading Speech 8 December 1999 Hansard 13026.

³ Paragraphs 3.66 and 4.31 of the Discussion Paper.

http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Fwww.australiacouncil.gov.au%2F&ei=7rxUaLNlo2kigf7goHoDQ&usg=AFQjCNE8gOI3dxJXI_Xk-D8vL4ozjffaA&sig2=VjRlxeTh_ypD_2o3PWm7YA&bvm=bv.49784469,d.aGc

⁴ Paragraphs 4.151 and 10.30 Discussion Paper.

⁵ See our response to Question 17.

2. Maintaining incentives for creation of works and other subject matter

The ACC supports this principle, however, we remain concerned that the ALRC's proposals will have a chilling effect on incentives for creation of and investment in copyright material. In our submission, the ALRC's proposals to introduce a broad fair use exception (including illustrative purposes which cover activities which are currently licensed), abolish the statutory licences and prohibit contracting out will make it harder to receive a return on investment in copyright material. This in turn is likely to have an impact on willingness to invest in the creation of Australian copyright material.

For example, following the Canadian Supreme Court pentalogy, a number of educational institutions in that country have published policy statements suggesting that 'short extracts' of literary works can be copied under fair dealing. This includes up to 10% of a work, a chapter of a book, a journal article, an entire artistic work.⁶ It is not difficult to see that the Court's liberal interpretation of fair dealing for research or study has had a profound effect on the willingness of Canadian educational institutions to pay for their use of copyright material. One only needs a rudimentary grasp of economics to understand that the introduction of a fair use exception in Australia is likely to impact on the willingness of consumers to negotiate and pay for their use of copyright material. In our submission, it is not unreasonable to expect that this will impact on creation and investment in copyright. And in particular, riskier and more innovative projects.

3. Promoting fair access to and wide dissemination of content

The ACC supports this principle, but we note that there is nothing in the Discussion Paper to suggest that the existing exceptions and statutory licences do not facilitate fair access and wide dissemination of content. In our submission, while freedom of expression might be a fundamental value in Australia, as it is in any liberal democracy, it is not subject to a constitutional guarantee, as in the US. Nor is it articulated in some other instrument, such as in the European Convention on Human Rights.

4. Providing rules that are flexible and adaptive to technology

We note that this principle refers to flexible and adaptive 'rules' and yet the main reason the ALRC advances in favour of introducing a fair use exception is that a standards-based approach offers greater flexibility.

In our submission, an important consideration in moving to a standards-based approach is who should be deciding the 'rules'. For example, while there has been much criticism of the *Optus TV Now* decision,⁷ it may be argued that the Full Federal Court interpreted the legislation in exactly the way Parliament intended. On the other hand, a fair use exception leaves these controversies to be dealt with by the

⁶ See, generally S Trosow, "Fair Dealing Practices in the Post-Secondary Education Sector after the Pentalogy" in M Geist *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* 2013. For example, *Fair Dealing Guidelines for York Faculty and Staff* <http://copyright.info.yorku.ca/fair-dealing-requirements-for-york-faculty-and-staff/>

⁷ See, for example, Rebecca Giblin "Stranded in the technological dark ages: implications of the Full Federal Court's decision in *NRL v Optus*" [2012] 34 *European Intellectual Property Review* 632-641.

adversary system and the courts. We query whether this is appropriate and whether it will lead to better outcomes?⁸

It is also appropriate to say something about technology and copyright policy. 'Technological neutrality' has long been espoused as a goal of copyright legislation. However, it is not something that the legislation has ever fully achieved. One explanation is that there are policy reasons as to why different mechanisms of content delivery should be treated differently under copyright law. It would be helpful if the ALRC examined these issues. For example, Chapter 16 includes a useful discussion of broadcasting. In our submission, copyright policy in relation to broadcasting is closely related to the costs of that particular medium.

5. Providing rules consistent with international obligations

While the ALRC accepts the importance of the three-step test, it makes some striking statements in its Discussion Paper. For example, it states its proposals are consistent with the three-step test. However, in our submission, consistency of a law will also depend on its interpretation.⁹ While it is true that the US fair use doctrine has not been challenged at the WTO, in our submission, it does not necessarily follow that all US fair use decisions are consistent with the three-step test. As APRAIAMCOS indicate in their submission, there may be a range of reasons for this. Indeed, in our submission, some decisions in recent years at least raise questions about consistency with the three-step test.¹⁰

The ALRC refers to moves toward a more flexible interpretation of the three-step test, for example, in the Munich Declaration.¹¹ We note, however, that such interpretations are not without controversy.

Also striking, in our view, is the ALRC's statement that 'the availability of a licence is an important, but not determinative, consideration in both crafting exceptions, and in the application of the fair use exception. Other matters, including questions of the public interest, are also relevant.'¹² The ACC finds this statement difficult to reconcile with our understanding of the three-step test.

THE POLICY CONTEXT

The Digital Economy

The context of the Inquiry is the digital economy. The ALRC states that 'it is clear that the economic contribution of Australia's copyright industries is significant. What is contentious is how to increase that contribution to the benefit of copyright owners, users and the community, and what reform, if any, would effect this.'¹³

⁸ We deal with this issue further in our response to Proposal 4-3.

⁹ See, for example, Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* 2003.

¹⁰ This is particularly so in relation to recent cases dealing with 'transformative use' such as *Cariou v Prince*, No 11-1197-cv F 2d (25 April 2013) and *Cambridge University Press & Ors v Becker & Ors (Georgia State)*, both of which we understand are on appeal.

¹¹ *Declaration on On A Balanced Interpretation of the Three-Step Test*
<http://www.ip.mpg.de/de/pub/aktuelles/declaration-threestepstest.cfm>

¹² Paragraph 6.100

¹³ Paragraph 3.22

The ALRC appears to adopt the ACCC's comments about the importance of data about the transaction costs of licensing. However, as the Australian Publishers Association (APA) notes, when dealing with its proposal to abolish the Part VA and VB statutory licences, the ALRC states that 'it would prefer not to ground reform in this area by referring to the comparative cost of licensing'.¹⁴

Despite calling for evidence as part of its Issues Paper, the Discussion Paper does not deal with the evidence submitted to it. Instead, the ALRC relies on academics to assert that the transaction costs of fair use are overstated.

In our submission the lack of appreciation of the commercial reality of people making their living from copyright is stark and is the most disturbing aspect of the Discussion Paper.

Complexity of Copyright Law

While the ALRC states that its Inquiry is not aimed at overall simplification,¹⁵ in our submission, the proposals, taken together, favour simplicity over the nuanced and carefully negotiated exceptions and statutory licences. As APRAIAMCOS notes in its submission, this approach is likely to have unintended consequences.

Cultural Policy

Creative Australia acknowledges that copyright underpins the creative economy. This Inquiry is the centrepiece of copyright initiatives in the National Cultural Policy, yet in our submission, the ALRC's proposals run a very real risk of undermining the cultural policy.

Australians are already early adopters of technology and great consumers of content.¹⁶ But we want to experience Australian content and encourage a thriving and sustainable Australian culture. In our submission, the ALRC's proposals diminish the position of creators and make it harder for them to earn a living. In our view this is likely to make the cultural sector less sustainable and entrench its reliance on government funding.

The role of government is to enable culture.¹⁷ We are concerned that these proposals would in fact disable Australian culture.

Current regulatory models

The ALRC discusses current regulatory models as part of its broader discussion of the policy context of the Inquiry. It refers to ACMA's submission without any discussion of the range of regulatory models currently operating in Australia.

It is important in this context, to say something about copyright in Australian law. Copyright is a form of personal property.¹⁸ A copyright owner may assign, license or bequeath their copyright. It is also generally up to a copyright owner to take an

¹⁴ Paragraph 6.84.

¹⁵ Paragraph 3.52

¹⁶ See, for example, *CCI Digital Futures 2012*, referred to in our previous submission in response to Question 11.

¹⁷ *Creative Australia* p 32.

¹⁸ Section 196(1) *Copyright Act 1968*.

action for infringement of their copyright.¹⁹ Inherent in our system is that it depends on an individual rights holder whether they are going to object to infringements of their copyright. The exceptions which are the subject of the Inquiry, operate as defences to allegations of infringement.

In our submission, this is important in framing the discussion about standards and rules. In its Discussion Paper, the ALRC refers to provisions of the *Competition and Consumer Act 2010* and the *Privacy Act 1988* as examples of standards in Australian legislation. While this may be so, we note that both pieces of legislation empower a regulator to take enforcement action. Therefore, the standards-like nature of the provisions need to be understood in terms of a broader debate about providing a regulator with appropriate discretion in the fulfilment of their statutory duties. We remain doubtful that a standards-based approach is appropriate for defences to the enforcement of personal property rights in Australia.

Copyright is generally subject to other laws. Hence, as we noted in our earlier submission, general contract law will apply to copyright contracts.²⁰ A significant exception to this proposition is s 51(3) of the *Competition and Consumer Act* which provides an exemption for misuse of market power and resale price maintenance in relation to licences and assignments of copyright and other types of intellectual property.²¹

The other major focus of this Inquiry is statutory licences. Collecting societies declared for the purposes of administering a statutory licence are regulated by the Attorney-General. Declarations are made pursuant to Guidelines.²² Declarations may be referred to the Copyright Tribunal of Australia.²³ We note that a consequence of the ALRC's proposals to abolish the statutory licences in Part VA, VB and VC of the *Copyright Act* is that there will no longer be any declared collecting societies. This will mean that they are no longer regulated by the Attorney-General and subject to the same kind oversight by the Copyright Tribunal. For example, collecting societies administering voluntary licences generally apply for authorisation by the ACCC. In our observation, authorisation processes do not generally provide for the same level of transparency and accountability as declaration.

Both statutory and voluntary licence schemes may be referred to the Copyright Tribunal. The ACCC may be made a party to proceedings relating to voluntary licence schemes. The ACCC may also issue guidelines in relation to collective licensing of copyright. A draft set of guidelines was released for public consultation in 2006. According to the ACCC's submission the ALRC of 16 November 2012, these guidelines are still being drafted.²⁴

¹⁹ Section 115. Some infringements amount to criminal offences and are dealt with by law enforcement agencies.

²⁰ Response to Question 55.

²¹ We note that the ACCC has submitted that s 51(3) should be abolished. The House of Representatives Standing Committee on Infrastructure and Communications has also recommended the abolition of s 51(3) in its report *At what cost? IT Pricing and the Australia Tax*
http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm

²² See
<http://www.ag.gov.au/RightsAndProtections/Documents/Guidelines%20for%20declaring%20Collecting%20Societies.pdf>

²³ Part VI Division 3, Subdivisions C, D and E.

²⁴ Submission no 165.

There is also a voluntary Code of Conduct for copyright collecting societies in Australia.²⁵ This is to be compared with mandatory industry codes under the *Competition and Consumer Act 2010*.

In our submission, a closer examination of copyright and existing regulatory tools is required. We do not think that the ALRC's proposals represent an appropriate regulatory framework.

THE CASE FOR FAIR USE

The ACC does not accept the ALRC's proposals for a new fair use exception. We are concerned that the ALRC is looking at fair use as a mechanism for moderating all competing copyright interests. In our submission, this is not how fair use operates in other jurisdictions and, if implemented, would create a fair use doctrine peculiar to Australia.

Likewise, we are concerned that in drafting their proposals, the ALRC has failed to take into account differences between the US and Australian copyright systems. Apart from the different Constitutional settings, which we detailed in our earlier submission, the absence of a doctrine of exhaustion or a system of statutory damages in Australia is notable. The operation of a moral rights regime in Australia is another significant difference. We also can't help but wonder whether the process for the appointment of the American judiciary and the tenure of those appointments has a bearing on the so-called predictability of fair use decisions in American jurisprudence.

For these reasons, we agree with the ALRC that, if a fair use exception is enacted, it should not include a provision requiring Australian courts to take into account American jurisprudence. This will not prevent courts from taking persuasive authority from other jurisdictions into account where appropriate, in accordance with the traditions of the Common Law.

Patry refers to fair use and fair dealing as 'kissing cousins'.²⁶ We caution against the coupling of such close relatives, lest it result in mutant offspring.

The Changed Environment

Given the number of previous reviews in this area, the ALRC refers to the 'changed environment' to explain why a different approach is now warranted.

We agree with the ALRC that the maturation of the digital economy has changed how people create and consume copyright material. In our submission, while some of these changes had yet to occur, they were clearly contemplated by previous reviews.

Further, while it is true that competition has played a more prominent role in copyright policy since the 1990s, we reject the ALRC's assertion that this is something new since these issues were considered by other reviews. After all, the Competition Principles Agreement dates back to 1994 and all the relevant reviews occurred well

²⁵ The Code of Conduct is available on the website of all member collecting societies. See, for, example, <http://www.copyright.com.au/>

²⁶ *Patry on Fair Use: 2012 Edition*, West 2012, p 13.

after that date. Further we are concerned that moral rights is seen as anything to do with competition, as suggested in paragraph 4.31 of the Discussion Paper.

What has undoubtedly changed in the intervening period is the appetite for reform. Copyright is out of fashion. Issues with clearing rights have been used as a basis to challenge the copyright system itself. Industry's initial slowness in adapting to the new conditions has made it possible to cast copyright as a brake on innovation. In our submission it is wrong to see copyright as an obstacle to innovation. In our view, it is a driver of the digital economy. An appropriate regulatory model will ensure that copyright continues to drive the digital economy. This cannot be achieved by focusing only on exceptions to copyright. An appropriate regulatory model will have regard to the entire copyright ecosystem.

PROPOSALS AND QUESTIONS

Proposal 4-1 Fair Use

The ACC does not support the ALRC's recommendation to introduce a broad fair use exception into Australian law.

Proppsal 4-3 Fairness Factors

In our submission, it is very important that the fairness factors are right, as they will shape the boundaries of any future exception.

In our earlier submission in response to the Issues Paper, we suggested that the five factors that currently apply to the fair dealing exceptions for research or study might provide an appropriate starting point. The ALRC has not adopted this approach. Instead, it has proposed four non-exhaustive fairness factors (largely based on the factors for other types of fair dealing in our current legislation). In doing so, it seems to have taken the view that the 'the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price' is subsumed by the fourth proposed factor 'the effect of the use upon the potential market for, or value of, the copyright material.' In our submission, the former factor deals with the existing market and the latter deals with future markets. The former factor provides a concrete means of assessing the effect on the existing market and therefore provides an insight into what might be a 'normal exploitation' of the relevant copyright material. In our submission this factor should be a fundamental part of any fair use exception.

We note that the ALRC intends for the fairness factors to be non-exhaustive. Presumably this is to enable other relevant public policy factors to be taken into account. For example, one factor that the ALRC mentions is whether the author has been attributed (one of the conditions that currently applies to fair dealing for research or study, criticism or review and news reporting). As we note above, the interplay between a fair use exception and an author's moral rights raises difficult issues which are yet untested. This is particularly so in relation to the right of integrity.

We also note that this proposal gives the courts very broad discretion. As Screenrights notes in its submission, this could be seen as an abdication of law making power to the court.²⁷ Not only does this run contrary to the principle of

²⁷ Screenrights submission, p 8.

separation of powers, it can lead to divergent outcomes. For example, some commentators have criticised the narrow approach to fair dealing of the Australian courts²⁸ while others have criticised the expansive interpretations of the Canadian Supreme Court.²⁹ Likewise in the US, it is not always possible to reconcile the approach of the courts to fair use.³⁰ In our submission, at the very least, this approach has the potential to take the exception outside the three-step test.

Interpretation of the factors under the US fair use doctrine continues to be a source of debate.³¹ At paragraph 10.22 of the Discussion Paper, the ALRC states '[w]hether Australian courts should follow the recent trend in US case law to put transformativeness at the heart of fair use is an important question, on which the ALRC hopes to receive further submissions.' We agree with the ALRC that this is an important question. Our answer is a categorical: no. Nor do we think that Australian courts should focus instead on the overall fairness of the use, as advocated by Patry.³² In our submission, to do so would go against the principle that judicial decisions are to be made according to legal standards rather than undirected considerations of fairness.³³

In our submission, should a fair use exception be implemented in Australia, the courts should apply the normal principles of statutory interpretation to the fairness factors. Assuming that the fairness factors were conjunctive, they would each require consideration. Section 15AA of the *Acts Interpretation Act 1901* provides:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

As we have noted previously, the US copyright power is for progress of 'science and the useful arts'.³⁴ US copyright law needs to read in that context.³⁵ By contrast, copyright falls under the plenary power (peace, order and good governance) of the Australian Constitution.³⁶ In the absence of any specific objects in the Copyright Act itself, it cannot be assumed that the purposes of the Act are on all fours with the US Act. Therefore, in our submission, it would be open to Australian courts to interpret the fairness factors differently from US courts.

Question 4-1 Illustrative Purposes

We caution the ALRC against adopting an extensive list of illustrative purposes. This is for both in principle and practical reasons.

²⁸ See, for example, Burrell et al, submission no 278.

²⁹ See, for example, B Sookman *The Supreme Court Rules on Copyright* <http://www.barrysookman.com/>

³⁰ The Kernochan Center for Law, Media and the Arts Columbia University submission no 291.

³¹ See, for example, R Dannay "Factorless Fair Use?" 60 *Journal of the Copyright Society of the USA* 127.

³² *Patry on Fair Use: 2012 Edition*, p 66.

³³ *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 60 per Barwick CJ cited in a speech delivered by the then Chief Justice, the Hon Murray Gleeson "Courts and the Rule of Law" University of Melbourne, 7 November 2001.

³⁴ Article 1, section 8 US Constitution.

³⁵ See, for example, R May and S Cooper, "Literary Property: Copyright's Constitutional History and Its Meaning for Today", *Perspectives from Free State Foundation Scholars*, 25 July 2013, vol 8 no 19.

³⁶ S 51 (xviii).

1. One of the ALRC's stated reasons for preferring fair use is the flexibility of a standards-based approach. In our submission, a lengthy list of illustrative purposes compromises this flexibility.
2. The proposed illustrative purposes lack a coherent policy basis.
3. We are concerned that by listing certain purposes in the legislation, they will have a special status, which may not be justified. As we noted in our earlier submission, in our experience of advising the public on the application of fair dealing, there is often a tendency to only look at the purpose, without having regard to the 'fairness' element. For example, a news broadcaster might argue that they can use third party copyright material for 'news reporting' without regard to the fairness of such use. One such instance recently received coverage by ABC's Media Watch.³⁷

In our submission, this is a very difficult issue for individual creators and small copyright owners to manage. The ALRC seems to be aware of this issue as demonstrated by its fall-back proposal to amend the fair dealing exceptions to expressly require consideration of fairness.³⁸ We are concerned that a long list of illustrative purposes is likely to compound the difficulties that creators have in addressing uses of their copyright material that purport to be fair.

4. In our view, rather than an extensive list of illustrative purposes, it may be preferable to have no list of purposes and to merely require fair use to be for a 'socially useful purpose'. Alternatively, the illustrative purposes should be limited to the existing fair dealings. That is, the purposes listed in (a) – (d) of the proposal. In our submission, that would give the law flexibility to evolve on a case-by-case basis. In this context, we note that the preamble to s 107 of the US Copyright Act lists relatively few purposes, derived from the case law at the time the provision was enacted.

Question 4-2 Exceptions to be repealed

While the ACC does not support the ALRC's proposal to introduce a fair use exception, we agree that if introduced, such an exception should replace, rather than be in addition to many existing exceptions. If the ALRC's thesis is that flexibility will make exceptions to copyright more appropriate for the digital economy, then this flexibility should clearly apply in both directions. That is, while a flexible standard may be broader than existing exceptions, it may also be narrower in some instances.

Clear examples of exceptions that should be repealed if a fair use exception were introduced are the current fair dealing exceptions and the flexible dealing exception in s 200AB. The issue is less clear when one considers other exceptions.

Burrell et al examine the existing exceptions in their submission to demonstrate 'that the majority of the existing provisions are not fit for purpose'.³⁹ In our

³⁷ 'Mean New Digital World for Freelancers', 17 June 2103.
<http://www.abc.net.au/mediawatch/transcripts/s3783641.htm>

³⁸ Proposal 7-4.

³⁹ Submission no 278, p 31.

submission, this places insufficient weight on the fact that the exceptions represent heavily negotiated and much debated policy positions. It also discounts the approach that the executive branch of government has traditionally applied to administration of the Copyright Act. The ALRC should be cautious about recommending the abolition of other exceptions, without undertaking an examination of their policy basis. Some exceptions may not easily fit within 'fair use'.

For example, Burrell et al examine the artistic work exceptions in ss 65, 66, 67 and 68 to highlight some less well-known drafting issues in the Copyright Act. These exceptions were introduced for pragmatic purposes and relate to activities such as incidental filming of artistic works and photographing public sculptures. Indeed, the Arts Law Centre of Australia and the National Association of the Visual Arts have submitted that these exceptions should be abolished precisely because they do not consider them fair.⁴⁰ These submissions echo the recommendations of the Myer Report.⁴¹ Copyright Agency/Viscopy also raised issues about the continuing policy justification for these exceptions by providing examples where licensing solutions would have been available for activities the exceptions cover.⁴²

It may be that the digital economy raises issues about the adequacy and appropriateness of these and other exceptions.⁴³ However, the ALRC should be cautious in trying to shoehorn all the existing exceptions into a fair use paradigm, simply because it has been suggested that there is an 'inherent weakness of a copyright exceptions model that seeks to define the scope of permitted conduct in advance.'⁴⁴ In doing so the ALRC runs the risk of creating a fair use doctrine unlike any other and to which no existing jurisprudence is applicable.

Proposal 6-1 Repeal Part VA, VB and VII div 2 Statutory Licences

The ACC strongly opposes this recommendation. Australia has a unique statutory licensing regime. The Explanatory Memorandum to the *Copyright Amendment Act 2006* noted that 'Australia has a unique regime that should be maintained'. In our submission, the reasoning of the ALRC does not support a move away from that position.

The ALRC contends that voluntary licensing is more efficient in the digital environment, yet it does not point to any evidence to support this proposition. Indeed, while voluntary licensing works well for the music industry in Australia, this may not be the case for all sectors.⁴⁵ As Screenrights indicate in its submission, voluntary licensing is likely to create significant difficulties for access to broadcast repertoire in Australia.⁴⁶

⁴⁰ See submissions no 171 and 234.

⁴¹ Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry*, 2002. pp141-142.

⁴² Submission no 249.

⁴³ For example, we note the APA's submission in response to the Issues Paper which stated that the library and archive provisions are impeding the ability of publishers to engage in the digital economy p16 and PPCA's submission in relation to s 199(2) which we address in relation to Question 15-2.

⁴⁴ Burrell et al, p 34.

⁴⁵ For example, APRA is able to offer a very extensive repertoire of about 2.5 million works. This is both because it is the oldest copyright collecting society in Australia (founded in 1926) and because it requires its members to assign the relevant rights in their musical works.

⁴⁶ Screenrights submission, p 17.

It is also important to not that the operation of the statutory licences in Australia does not preclude voluntary licensing.

To a large degree, voluntary licensing depends on capacity to negotiate. It is not apparent to the ACC that transaction costs will be lower and access greater under a voluntary licensing model. Indeed, as the submissions of Copyright Agency/Viscopy and Screenrights suggest, the opposite may indeed be true.

One of the ALRC's principal objections in relation to statutory licensing is that it is a derogation from the copyright owner's rights. While the ACC agrees that it is important that copyright not be regarded simply as a right to remuneration, this is contrary to what many scholars have opined is the appropriate way to look at copyright in the digital environment.⁴⁷ The statutory licences are well-established in Australia, and have achieved a high level of acceptance amongst rights holders. This is borne out in the submissions of the Australian Society of Authors, the Australian Directors Guild, the National Association of the Visual Arts, the Arts Law Centre of Australia and others including the many authors who have made submissions to the Inquiry.

While some stakeholders in the education sector have strongly argued for abolition of the statutory licences in Part VA and VB, the ACC notes that this view is often not shared by educators in the classroom.⁴⁸ In our experience of training and advising educators, they favour the certainty of the statutory licences over having to examine whether what they want to do is covered by a particular licence or by exceptions such as s 200AB or what would otherwise be considered fair. We note that we have extended invitations to officers from the ALRC to attend our educational seminars so that they can experience how educators approach the statutory licences. These invitations have not been taken up.

Similarly we note that the print disability statutory licence in Part VB provides greater certainty and access than either fair use or a voluntary licence.⁴⁹ We further note that the print disability scheme in the United States does not rely on the fair use doctrine, but is set out in s 31 of the US Copyright Act (the Chafee Amendment). In our view, the text of the *Marrakech Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled* is consistent with the Part VB licence (in so far as it applies domestically) and query the merit of the ALRC's proposal to abolish it.⁵⁰

While we note that some government agencies made submissions about the operation of the s 183 licence, none advocated for its abolition. We query the impact that such a recommendation would have on the machinery of government. For example, what would be the effect if government agencies had to be satisfied that their activity was either covered by an exception or a licence before they

⁴⁷ For example, Stef von Gompel *Formalities in Copyright Law: An Analysis of their History, Rationales and Possible Future* 2011; Daniel Gervais. "The Internet Taxi: Collective Management of Copyright and the Making Available Right, after the Pentology" *The Copyright Pentology how the supreme Court of Canada shook the Foundations of Canadian Copyright law*. Ed. Michael Geist. Ottawa: University of Ottawa Press, 2013. 373-401; Michael Fraser, *UTS Speak National Content Network Access*, 2010 <http://www.law.uts.edu.au/comslaw/pdfs/National-Content-Network-UTS-SPEAKS20APRIL2010.pdf>

⁴⁸ We note that the ALRC has received many submissions from teachers which support this position.

⁴⁹ We also note that Part VB is supplemented by s 200AB.

⁵⁰ We note that the ALRC has recently been asked to inquire into the legal barriers for people with a disability and hope that it will give further thought to its position.

could use copyright material? Would there be an impact on government timeframes and administrative costs?

As we have noted elsewhere in this submission, the ALRC's recommendations would also have regulatory implications.

Ultimately this proposal raises economic issues. We are concerned that the proposal exhibits some fundamental misunderstanding about how the statutory licences currently operate in Australia.⁵¹ We are also concerned that the ALRC could arrive at such a proposal without the benefit of any economic modelling.

Question 6-1 Statutory Licences

We do not accept that the statutory licences should be abolished. The submission of Screenrights highlights some of the practical difficulties with a 'license it or lose it' approach.

Proposal 7-1 and 7-2 Fair Dealing

The ACC does not support the ALRC's recommendation to repeal the existing fair dealing exceptions and replace them with a broad fair use exception.

Proposal 7-3 Fair dealing for professional advice

The ACC is not opposed to this proposal but notes that this provision has recently received attention as part of the *Intellectual Property (Raising the Bar) Act 2011*.

Proposal 7-4 Fairness factors

The ACC notes that fairness is already required under the fair dealing defences, therefore we query whether this proposal adds anything from a legal perspective. We refer to our comments about the proposed fairness factors, in response to proposal 4-3, however, we do not have an in principle objection to this proposal.

Proposal 8 -1 to 8-3 Non-consumptive use

We note that this issue squarely falls within the ambit of the digital economy, however we query the premise of the proposal. In this regard, we refer to the submission of APRAIAMCOS.

'Non-consumptive use' is a concept developed by the Hargreaves Review in the UK to refer to use of a work enabled by technology which does not trade on the underlying creative and expressive purpose of the work.⁵² However, it's not a term used in any international legislation, nor does it form part of the proposed legislative amendments arising out of the Hargreaves Review. We therefore do not support the incorporation of this term in Australian legislation, either as an illustrative purpose, or as a stand alone fair dealing exception.

As far as the ALRC's recommendations relate to caching, indexing and other related network functions, we note that these issues are linked to the safe

⁵¹ See the submissions of Copyright Agency/Viscopy and Screenrights.

⁵² I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 47.

harbour provisions which are currently under review. In our view, such non-consumptive uses are more properly considered in that context.

In relation to text and data mining, the ACC remains of the view that licensing solutions provide the best avenue for addressing these issues.⁵³

Proposals 9-1 to 9-5 Private and Domestic Use

Private copying is an issue with which the Australian legislature has long grappled.⁵⁴

A key issue when one is considering the digital economy is the longevity of digital copyright formats compared with analogue formats. For example, it might be expected that a much loved LP or cassette would require replacement. The same is not true of digital music files.

The difference between hard copy and digital has been prevalent in the recent litigation around the resale of digital files.⁵⁵ While in Australia, we have no doctrine of exhaustion, the House of Representatives Standing Committee on Infrastructure and Communications has recently recommended that the remaining parallel importation laws be abolished and that the Government consider introducing a right of resale in relation to digital content.⁵⁶

In our submission, the most effective way of addressing consumer expectations in this area is not through copyright exceptions, restrictions on geoblocking or 'resale rights' but through appropriate business models. The ACC is concerned that ALRC recommendations would have a chilling effect on these business models. We therefore do not support a fair use illustrative purpose or fair dealing exception for private and domestic use.

As Screenrights points out in its submission, the ALRC's proposal in relation to private and domestic use goes beyond the approach to fair use in the US.⁵⁷ It also differs from the European approach.⁵⁸ We note that the UK has proposed a private copying exception which has similar constraints to the existing Australian private copying exceptions. The major difference is that the draft UK legislation does not restrict the media on which copies can be made.⁵⁹ We query what impact this provision would have on business models, such as iTunes March.

We are concerned that the ALRC has not grappled with the current Australian provisions on their terms. We do not support the introduction of a private and domestic use as a fair use illustrative purpose or as a stand alone fair dealing exception.

⁵³ See response to Question 27.

⁵⁴ See, for example, *Australian Tape Manufacturers Association Ltd and Others v. The Commonwealth* (1993) 176 CLR 480 in which the levy on blank recoding media was struck down as unconstitutional.

⁵⁵ *Capitol Record LLC v ReDigi Inc*

⁵⁶ See recommendation 4

http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm

⁵⁷ Screenrights, p 7.

⁵⁸ See our earlier submission in response to Question 7.

⁵⁹ See draft private copying exception section 28B, UK Intellectual Property Office, June 2013.

<http://www.ipso.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>

Given the level of criticism the private copying exceptions have attracted, the ALRC may wish to consider recommending that they be abolished altogether. This would leave it to the market to address consumer demands.

Proposals 10-1 to 10-3 Transformative Use and Quotation

The ACC agrees that there should be no special exception for transformative use. This is regardless of whether fair use is adopted or not.

As stated above, if fair use is introduced, we do not think that ‘transformativeness’ should form the basis of an analysis of fairness.

We also reject the proposal that quotation be a separate illustrative purpose or fair dealing exception.

We do not repeat our earlier observations about quotation here.⁶⁰ However, we note that a quotation exception might work better for some types of copyright material than others. For example, quotation has a natural meaning when applied to literary works. For other types of copyright material, licensing models exist for quotations. Music and film sampling are examples that come readily to mind. In our submission, this issue is better mediated by the concept of substantial part than by a specific exception.⁶¹

In our submission, quotation is already inherent in fair dealing for criticism or review. We note that the UK proposal for a quotation exception is based on the existing exception for fair dealing for criticism or review. This is much narrower than the ALRC’s proposal and addresses the policy rationale for such an exception.⁶²

Proposals 11-1 to 11-7 Libraries and Archives

The ALRC links its discussion of the libraries and archives provisions to the National Cultural Policy. It is important to note that the policy is linked to key cultural institutions with a special role in promoting and preserving Australian culture rather than libraries and archives per se.⁶³ For example, *Creative Australia* covers initiatives such as extending the legal deposit scheme for the National Library of Australia.⁶⁴

The libraries and archives provisions in the Copyright Act are the product of detailed negotiation. Many of the exceptions related to Australia’s geographic isolation rather than concepts of fairness. As the APA stated in its submission in response to the Issues Paper, many of these exceptions may no longer be

⁶⁰ See our response to Question 47 of the Issues Paper.

⁶¹ The Discussion Paper deals with the *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* in some detail. As we have remarked in our previous submission, the controversial thing about that case is not the legal issues, but the factual matrix.

⁶² See draft quotation exception s 30A, UK Intellectual Property Office, June 2013.

<http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>

⁶³ For example, libraries in a commercial business, municipal libraries, libraries offering services for a fee.

⁶⁴ p100.

justified in the digital economy. Indeed, they may in fact inhibit the participation of publishers in the digital marketplace.⁶⁵

Having regard to the history of the libraries and archives exceptions in Australia, we do not think that they lend themselves to treatment under a broad fairness standard. We do not support the introduction of a general fair use exception that would apply to libraries and archives. Nor do we support a fair dealing exception for libraries and archives.

In our submission, fair use is likely to pose as many difficulties for librarians to apply in practice as s 200AB. While guidelines may offer some assistance, these present their own difficulties.⁶⁶ As we indicated in our earlier submission, there is a threshold issue about the transparency of guidelines. We note that transparency was a key object of the *Legislative Instruments Act 2003*.⁶⁷ Furthermore, guidelines which impact on people's rights may also raise administrative law issues.

Furthermore, as the Australia Council for the Arts and the APA noted in their submissions in response to the Issues Paper, there are fundamental issues about whether copyright owners should be required to subsidise cultural institutions by waiving their rights to royalties.

We note that the ALRC has also proposed the amendment of the existing exceptions in relating to preservation copies. While we note that the ALRC proposes that this exception be limited to copyright material that is not commercially available, we have some reservations about the breadth of the proposal. We note that similar amendments are currently receiving consideration in the UK.⁶⁸ We refer to the submission of the APA in this regard.

We do support the changes to the provisions relating to document supply for research and study in proposal 11-7 and similarly refer to the submission of the APA.

We note that issues associated with technological protection measures are not part of this Inquiry. We address the issue of contracting out in our response to Proposal 17-1 below.

Question 11–1 Voluntary extended collective licensing and digitisation

In our submission, the current regime already facilitates voluntary extended collective licensing. However, as Screenrights illustrates in its submission, this solution may not be effective for all sectors.

⁶⁵ Submission no 225.

⁶⁶ As seen in the current Canadian situation, it may be difficult for parties to reach agreement on guidelines. The US experience of government issued guidelines also has some downsides as referred to in Screenrights' submission.

⁶⁷ See s 3.

⁶⁸ Draft research, library and archives exceptions, UK Intellectual Property Office, June 2013.

<http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>

Proposal 12-1 to 12-3 Orphan works

As has been apparent in relation to the recent UK legislation, orphan works are a major concern for some creators, such as photographers.⁶⁹

In our submission, the ALRC's proposal for dealing with orphan works is somewhat half-hearted.

For example, it does not address the issue of works being orphaned in the first place, which is a significant concern of photographers.⁷⁰ This occurs, for example, where metadata is stripped from digital files, so that the copyright owner cannot be traced.

In our submission the proposal that orphan works be considered as part of fair use has the potential to undermine the rights of copyright owners and provides little certainty for users.⁷¹ In our submission it is another example of the ALRC asking fair use to do too much work.

Further, the proposal that diligent search might be a factor in mitigating damage provides little comfort to someone wanting to use orphan works. In our observation, a competent lawyer might be expected to plead such matters in mitigation under the existing law. Likewise, the ALRC sets the standard for diligent search so low that this proposal does little to address the concerns of copyright owners.

While the ALRC acknowledges that extended collective licensing may play a role in facilitating use of orphan works, its proposals do little to support such a regime.

While the extent of the orphan works problem in Australia has not been quantified, in our submission, the ALRC's proposals fail to provide an adequate response to that problem.

Proposals 13-1 to 13-3 Proposal Educational Use

The ACC strongly opposes including educational use as either an illustrative purpose in a broad fair use exception or as a stand alone fair dealing exception.

Education clearly has an important social value. This is reflected in the many exceptions and statutory licences in our Copyright Act which are concerned with education.

A free use exception for educational purposes, at its heart, raises issues about the extent to which the education sector values culture, in particular, a thriving Australian cultural sector. In our submission it is vital that Australia's educational institutions play a leadership role in supporting culture and the role that copyright plays in that paradigm. In our submission, a free copyright exception for education is likely to undermine that role.

⁶⁹ Why UK photographers are upset with copyright reforms <http://www.copyrightagency.wordpress.com/>

⁷⁰ See the submission of the AIPP.

⁷¹ As the Australian Society of Authors state in their submission, the *Hathitrust* litigation is a striking example of how fair use and orphan works can work to the detriment of authors.

In our submission, this proposal has the potential to impact on the viability of the cultural sector. For example, if educational institutions pay less for their use of copyright material, that will mean fewer royalties for Australian creators. This is likely to have a significant impact on people who already find it difficult to make a living. It is also likely to have implications for the status of the professional creator in our society.

Proposal 14-1 to 14-3 Government Use

The ACC notes that the term ‘public administration’ is derived from UK Copyright legislation. It is not an equivalent to the ‘government use’ provisions in the Australian copyright legislation. We do not favour either inclusion of public administration as an illustrative purpose or as a separate fair dealing exception.

The ALRC discusses the application of the fair dealing exceptions to the Crown. In our submission, the extent to which the fair dealing exceptions apply to the Crown is largely an academic rather than a practical issue.

As *Creative Australia* stated, governments enable culture.⁷² Consistent with this, in our submission governments can and should pay for their use of copyright material.

Having said that, we note that there are some significant exceptions that apply in relation to parliamentary libraries and judicial proceedings.

We also note that other issues, such as the use of survey plans, have been the subject of controversy.⁷³

While the Discussion Paper raises issues about local government and copyright, we note that there is currently a proposal for a referendum on the status of local governments at the next federal election. In our view, this makes it inappropriate to make proposals about the use of copyright material by local councils at this time.

In our submission, it would be preferable for the copyright provisions relating to government use of copyright material to be examined together with the provisions relating to government ownership of copyright.

Proposal 15-1 to 15-3 Retransmission of Free-to-air broadcasts

The ACC strongly opposes the abolition of the retransmission statutory licence proposed in Option 1. We refer to and support the submission of Screenrights in relation to Option 2.

⁷² p 32.

⁷³ *Copyright Agency Limited v State of New South Wales* [2013] A Copy T 1.

Question 15-2 clarification of s 155ZZJA

The ACC does not support the premise of this question. We are not in favour of changes to s 155ZZJA. In this regard, we refer to and support the submission of Screenrights.

The Discussion Paper contains a useful explanation of the relationship between broadcasting and copyright.

Many of the rights conferred on broadcasters relate to the investment required in the broadcast. It is not immediately apparent to us that those same rights should attach to other types of communication.

We therefore do not support the extension of broadcast exceptions to Internet delivery of television and radio programming. We also note that there are voluntary licensing frameworks already in place between rights holders such as PPCA and APRA/AMCOS and internet content service providers, as evidenced by the large number of internet radio and television services already operating in the Australian market.

In relation to the internet simulcasting issue, we strongly support the view of the Attorney-General's Department's response to the questions on notice from the Senate Standing Committee on Environment and Communications in which it detailed some of the implications of a determination by the Minister conflating radio broadcasts with internet transmissions. We support the view that broadcasting and internet simulcasts should be treated separately in accordance with international practice. As the Attorney-General's Department has noted, to do otherwise would mean overturning settled law, shifting the structure of the Copyright Act for the narrow purpose of meeting the commercial objectives of the radio industry and distorting the market for the licensing of sound recordings on the Internet.⁷⁴

Further, we note that WIPO is looking at the issue of broadcast rights in relation to audio-visual material.⁷⁵

In our submission, it might be timely to consider decoupling copyright and broadcasting policy. In this context, we note that the Senate Standing Committee on Environment and Communications has recommended that the Government 'fully and urgently address in a comprehensive and long-term manner all of the related broadcasting and copyright issues identified in numerous reviews'.⁷⁶

Also, we support PPCA's submission that section 199(2) of the Copyright Act should be repealed because it is an inequitable free use exception.⁷⁷

Question 16-1 Framing of Broadcast Exceptions

As we noted in our submission to the Simulcast Inquiry, the Internet is fundamentally different from broadcasts.⁷⁸ Therefore, as discussed above, we do

⁷⁴ Paragraph 2.57, *Effectiveness of current regulatory arrangements in dealing with radio simulcasts*, 12 July 2013.

⁷⁵ *Working Document on a Treaty for the Protection of Broadcasting Organisations* SCRR 24/10.

⁷⁶ *Effectiveness of current regulatory arrangements in dealing with radio simulcasts*.

⁷⁷ See our response to Question 4-2 above.

not think that the same exceptions should apply to communications via the Internet as to broadcast.

Question 16-2 Broadcast Caps (one percent and ABC caps)

In our submission, both caps should be repealed. As noted in our submission to the Simulcast Inquiry, they are inequitable, completely arbitrary and do not involve any analysis of economic efficiency. The caps constitute an unfair subsidisation of the radio industry by performers and sound recording copyright owners.⁷⁹

Question 16-3 Abolition of section 109

For as long as the statutory licence under section 109 is subject to the inequitable one percent and ABC caps imposed on the equitable remuneration of performers and copyright holders in sound recordings, this statutory licence does not support nor properly incentivise the creation of sound recordings and accordingly should be repealed.

We refer to and support the submission of PPCA.

Proposal 17-1 Contracting Out

The ACC does not support this proposal. Indeed, as noted in our earlier submission, we consider that such a proposal may be ill-suited to the digital economy.⁸⁰ We also query whether there is an inconsistency between this proposal and the ALRC's reliance on voluntary licensing.

While we note that the UK is currently proposing that there be an express prohibition against contracting out of some of its new copyright exceptions, this approach is unique. We query the value of this approach in the digital economy, which of its very nature, applies across national borders.

The ACC would be happy to explain its positions or provide further information to the Commission as it drafts its final report.

Fiona Phillips

Executive Director

⁷⁸ ACC submission to Simulcast Inquiry, April 2013. <http://www.copyright.org.au/admin/cms-acc1/images/16538215375179f8c221a5f.pdf>

⁷⁹ ACC submission to Simulcast Inquiry, April 2013.

⁸⁰ See response to Question 55.

Appendix 1: Australian Copyright Council Affiliates

The Copyright Council's views on issues of policy and law are independent, however we seek comment from the 24 organisations affiliated to the Council when developing policy positions and making submissions to government. These affiliates are:

Aboriginal Artist Agency
Ausdance
Australian Commercial & Media Photographers
Australian Directors Guild
Australian Institute of Architects
Australian Institute of Professional Photography
Australian Music Centre
Australasian Music Publishers Association
Australian Publishers Association
APRAIAMCOS
Australian Recording Industry Association
Australian Screen Directors Authorship Collecting Society
The Australian Society of Authors Ltd
Australian Writers' Guild
Christian Copyright Licensing International
Copyright Agency
Media Entertainment & Arts Alliance
Musicians Union of Australia
National Association For The Visual Arts Ltd
National Tertiary Education Industry Union
Phonographic Performance Company of Australia
Screen Producers Association of Australia
Screenrights
Viscopy