Cost benefit analysis of changes to the *Copyright Act 1968*

Department of Communications and the Arts

Building a better working world

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Glossary of key terms

Artistic works: Includes paintings, sculptures, graphics, cartoons, etchings, lithographs, photography, drawings, plans, maps, diagrams, charts, buildings, models of buildings, moulds and casts for sculptures.

Author: Refers to the person who put the work in material form, for example the writer of a literary work, the composer of a musical work or the artist who created an artwork.

Australian Copyright Law: Australian copyright law refers to the *Copyright Act 1968,* which protects ownership of copyright material and allows certain rights to both copyright owners and users of copyright material.

ALRC report into Copyright and the Digital Economy: The Australian Law Reform Commission was asked to consider whether the current exceptions and statutory licences in the Copyright Act are adequate and appropriate in the digital era. The Report, tabled on 13 February 2014, was the result of an 18-month Inquiry during which the ALRC produced two consultation documents, undertook 109 consultations and received 870 submissions.

Caching: Caching refers to the storage, usually temporary, of website material.

Collecting society: Refers to a body created either by private agreements or by statute to represent copyright owners and manage their rights in copyright works. The society may have the authority to license copyright works to the public on behalf of its members and collect license fees paid by individuals and groups for the use of those works. The society distributes these license fees to its members as royalty payments.

Communicate: Making copyright material available online or electronically transmitting copyright material. 'Making available' can include putting material on the internet or intranet. 'Electronic transmission' includes emailing, streaming or electronic reticulation.

Copy: Includes photocopying, audiotaping, scanning or saving to disc.

Copyright Agency Limited (CAL): CAL represents copyright owners of print and artistic works including publishers, authors and artists. Its main function is to administer the statutory license for the educational copying of print and artistic works.

Copyright: A form of legal protection given to the creators of original works of authorship, including literary, dramatic, musical, and artistic works.

Copyright owner: The copyright owner is usually the author or creator of the copyright material, unless ownership of the material has been signed over to someone else, e.g. a publisher.

Copyright permission: Copyright permission is authorisation from the copyright owner to use the copyright material in a certain way.

Data and text mining: Automated analytical techniques that work by copying existing electronic information, for instance articles in scientific journals and other works, and analysing the data they contain for patterns, trends and other useful information.

Education institutions: Educational institutions include schools, TAFE institutes and Universities.

Exclusive rights: Exclusive rights of the owners of copyright include the right to:

- reproduce the work in material form
- publish the work
- perform the work in public

- make an adaptation of the work
- do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work
- communicate the work to the public
- in the case of computer programs and sound recordings, enter into commercial rental arrangements
- in the case of broadcasts, re-broadcast or copy (visual images and sound recordings)

Fair dealing: Fair Dealing is one of the exceptions to copyright infringement. The *Copyright Act 1968* provides that copying a reasonable portion of a work for the purposes of research or study, criticism or review, news reporting or parody and satire will be a fair dealing.

Fair use: One of several legal limitations on the exclusive rights granted to copyright owners. Fair use permits the use of portions of copyrighted materials without permission of the copyright owner provided the use is fair. What is fair is assessed on a case-by-case basis against a number of 'fairness factors' including the purpose and character of the use, the nature of the original work, the amount and substantiality of the portion used in, and the effect of the use upon the potential market for or value of the original work.

Incidental or technical use: Copying activities undertaken by internet intermediaries necessary for the effective and efficient functioning of the internet, networks and other technologies that facilitate lawful access to copyright material.

Infringement: Infringement occurs when a person does with a copyright work anything that is defined as an exclusive right of a copyright owner that isn't a fair dealing, that is undertaken without the protection of the statutory educational use licenses, or is undertaken in the absence of explicit permission from copyright owners.

License: The grant of permission to use a copyright work in a particular way. A license may be exclusive or non-exclusive.

Mashup: A genre of derivative works that are built by creatively reusing and combining various portions of music, film, audio, and graphics

New fair dealing: The ALRC's recommendation 6-1 (the new fair dealing exception) consolidates the existing fair dealing exceptions and provides fair dealing for certain new purposes including quotation, non-commercial private use, incidental or technical use, library of or archive use; education and access for people with disability. The recommendation also provides that the fairness factors should be considered when determining whether the dealing is fair, along with any other relevant matter.

Non-commercial private use: Reproduction of legitimately acquired copyright content for use solely in the private sphere.

Orphan works: A work that may be covered by copyright but for which no copyright owner can be identified or contacted for the purpose of obtaining permission to use the work.

PwC Report: Refers to a report – *Understanding the costs and benefits of introducing a 'fair use' exception* – prepared by PwC in February 2016 for APRA, AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights.

Quotation: The taking of some part of a greater whole – a group of words from a text or a speech, a musical passage or visual image taken from a piece of music or a work of art – where the taking is done by someone other than the creator of the work.

Reproduction: Reproduction includes photocopying, audiotaping, scanning or saving to disc.

Screenrights: Screenrights is the declared collecting society for the:

- copying and communication of material from radio and television broadcasts by educational institutions
- copying and communication of material from radio and television broadcasts by government
- re-transmission of radio and television broadcasts

Statutory licenses: License schemes created under the Copyright Act for the educational use of copyright material. The two statutory license schemes are the Statutory Broadcast License and the Statutory Text and Artistic License.

Substantial part: Substantial part refers to any part which is copied or communicated from copyright material. Under Australian copyright law it is the quality or relevance of the copied part that is important, not only the amount that is copied.

Technological Protection Measure: TPM is a device or software placed on copyright material to prevent unauthorised access or copying. Examples include software locks or password protection measures.

Voluntary licenses: Licence schemes which are not enacted by statue and in this regard are "voluntary" arrangements between collecting societies and the public for the use of copyright works.

Works: A work refers to literary, dramatic, musical or artistic works.

Executive summary

Background

In Australia, the Copyright Act 1968 (Copyright Act henceforth) confers a number of exclusive rights to creators, including the right to reproduce, publish, perform, communicate, adapt and rent original works. However, copyright has always been based on a notion of balance. That is, balance between the incentives to invest in creative effort and the general interest of Australians to access, use and interact with content in the advancement of wider social and economic objectives.[1]

One way in which the copyright balance has been achieved is by granting copyright for a limited term that varies according to the nature of the copyright material and whether it is published. A further limitation of copyright is that it protects the expression of the protected ideas, but not the underlying ideas themselves. In addition, the Copyright Act provides over 50 exceptions to the general rules regarding copyright infringement.[2]

In Australia, exceptions may be categorised into three key groupings:

- Fair dealing exceptions for enumerated purposes (i.e. research/study; criticism/review; parody/satire; reporting news; legal practitioners; and professional advice)
- Statutory licenses (whereby certain uses of copyright material are allowed in return for fees to the owner or collecting society)
- Other exceptions (e.g. format shifting and time shifting).

The appropriate role and scope of copyright exceptions has been an ongoing matter of debate both internationally and in Australia, and even more so in the digital era. It is clear that the advent of digital technology has brought about new opportunities and challenges for both copyright owners and users. What is less clear is how this is affecting the desirable level of copyright protection.

Some commentators have suggested that 'the relative weight of costs and benefits will change with changing market conditions so that the desirable level of copyright protection is likely to vary over time'.[3] This has prompted a number of countries to seek greater flexibility in their copyright laws. In particular, attention has been gradually shifting away from purely close-ended copyright exceptions that are based on a prescriptive list of purposes (fair dealing); towards systems incorporating elements of the US-style open-ended exceptions, in which the merits of an exception are judged case by case on the basis of fairness standards (fair use).

The case for fair use has been prosecuted by a number of Australian reviews, and most recently by the Australian Law Reform Commission (ALRC). In 2013, the ALRC completed the final report of its review into copyright and the digital economy. Over the previous 18 months, the ALRC had considered whether the exceptions and statutory licenses in the Copyright Act are appropriate and adequate in the digital environment.

[1] Copyright Law Reform Commission, cited in: ALRC (2013), *Copyright in the Digital Economy: Final report*, p.91.

[2] Attorney-General's Department (2015), *Fair Use and other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age.*

[3] Handke, H (2010), *The Economics of Copyright and Digitization: A report on the literature and the need for further research,* research commissioned by the Strategic Advisory Board for Intellectual Property Policy, p.8.

Project scope

The Department of Communications and the Arts (the Department) has commissioned Ernst and Young (EY) to undertake cost benefit analyses (CBA) of a number of the ALRC's recommendations. The focus of the CBA is on the following ALRC recommendations:

- Recommendations 4 and 5 - Seek to remove the 'fair dealing' exception from the Copyright Act and replace it with a 'fair use' exception.
- Recommendation 6 –In the event that recommendations 4 and 5 are not adopted, seeks to broaden the current fair dealing exceptions of the Copyright Act to include the following six prescribed purposes:
  - Quotation
  - Non-commercial private use
  - Incidental or technical use/data and text mining
  - Libraries and archives
  - Education
  - Access for people with disability.

The ALRC's recommendations with relation to statutory licenses and orphan works will also be assessed in the context of the above recommendations.

A diagrammatic representation of the ALRC's recommendations, in the order in which they are assessed, is provided in Figure 1. This presents the ALRC's recommendations as a series of incremental changes, with new fair dealing building on the status quo, and fair use building on new fair dealing.

The Report has been constructed based on information current as of 30 March 2016 (being the date of completion of the analysis), and which has been provided by the Department and other stakeholders. Since this date, material events may have occurred since completion which is not reflected in the report. This Report may be relied upon by the Department for the purpose of understanding the impacts of amending the *Copyright Act 1968* to implement a number of the recommendations of the ALRC Report into Copyright and the Digital Economy ("the Purpose"). It should not be relied upon for any other purpose. Other persons accessing this report should do so for their general information only as Ernst & Young ("EY") has only acted for, and advised the Department, and has not acted for or advised anyone else in respect of the contents of this report. EY disclaims all liability to any party for all costs, loss, damage and liability that the third party may suffer or incur arising from or relating to or in any way connected with the provision of the deliverables to the third party without our prior written consent. Any decisions taken by the Department are not within the scope of our duty of care and in making such decisions you should take into account the limitations of the scope of our work and other factors, of which you should be aware of from sources other than our work.

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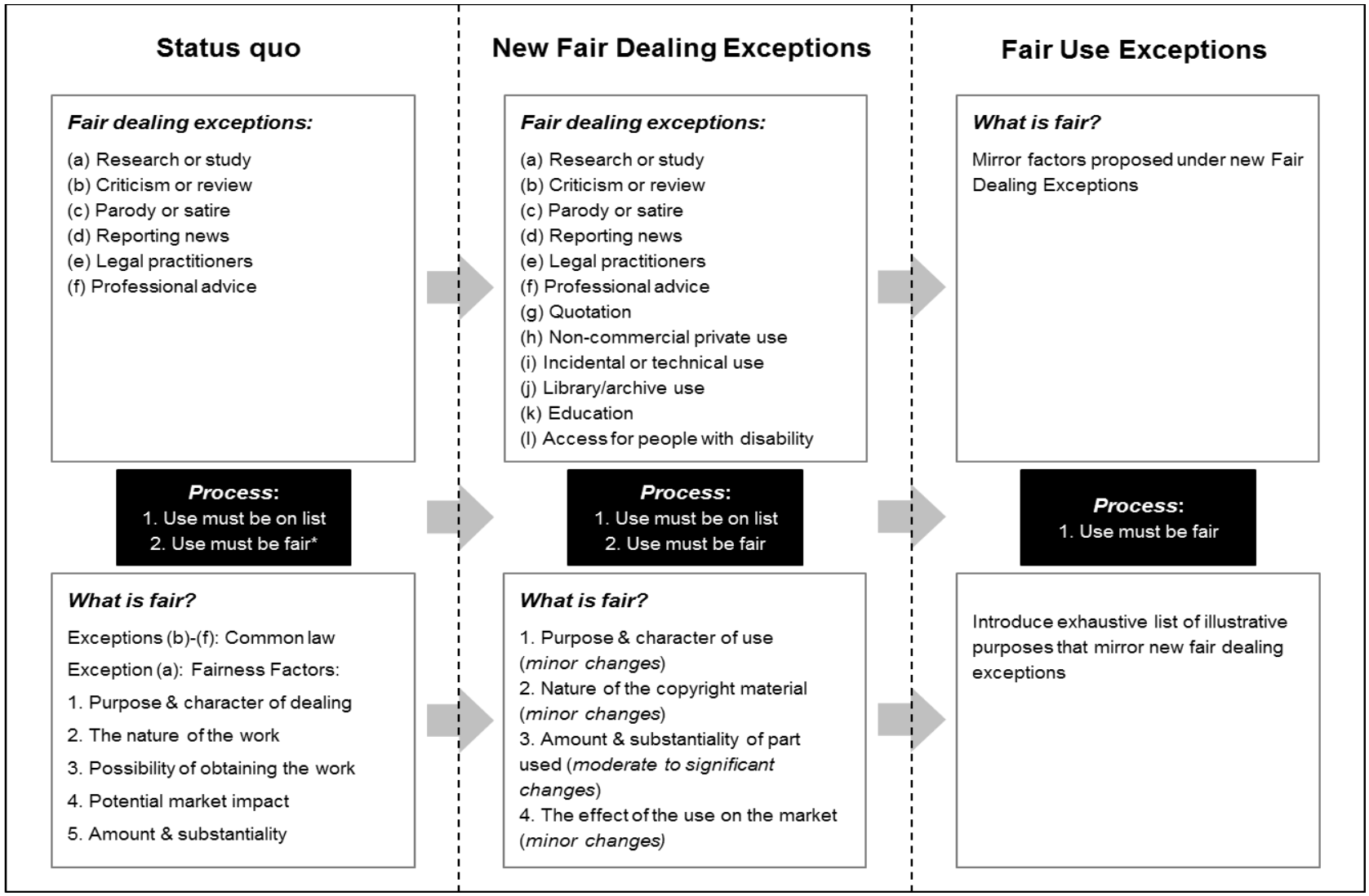
Structure of the report

The report is structured as follows.

- Section 2 outlines our approach to the analysis, with particular attention to the conceptual approach adopted for evaluating the costs and benefits of each recommendation; approach to stakeholder consultations; and key assumptions made in undertaking the analysis.
- Section 3 follows with an individual assessment of each proposed fair dealing exception as well as orphan works. The costs and benefits of each exception will differ due to the different nature of works and uses associated with each exception, and the different licensing and legal landscapes within which each exception operates.
- Finally, Section 4 compares the costs and benefits of a fair use system relative to a fair dealing system of exceptions from two perspectives, certainty and flexibility.

Figure 1: Key ALRC recommendations



Source: EY

Key findings

Overall, our analysis of new fair dealing suggests that the ALRC's proposed recommendations should be beneficial, albeit not substantially in some areas. From the standpoint of an 'open-ended' (fair use) or 'closed-ended' (fair dealing) system of exceptions, the former is likely to have the largest net benefit. In a rapidly changing digital environment, the costs and benefits associated with copyright will change over time. In this context, prescription can be a liability and flexibility an asset. Beyond a transition period, there is no evidence to suggest that fair use is inherently less certain than the status quo. Where it does differ is flexibility; it would be difficult to argue that fair use is less flexible than the status quo.

New fair dealing

Whilst, conceptually there is an optimal balance to be achieved between the incentives to invest in creative effort and the incentives to invest in new uses of creative content, in practice, striking that balance requires a 'judgement call'. This does not make an analysis of the proposed changes highly amenable to a traditional CBA. A lack of relevant and defensible data has also impeded our ability to undertake a traditional CBA, with monetisation of costs and benefits. Instead, to evaluate the impact of the ALRC's recommendations, we have adopted a stylised Multi Criteria Analysis (MCA) framework.

For each fair dealing exception, the MCA framework provides a consistent representation of the costs and benefits that economic theory suggests are most related to copyright.

Using the available evidence we then undertake a qualitative analysis of each fair dealing exception against the status quo, using quantitative evidence where available.

The framework identifies the timeframe of the impacts evaluated, the relevant stakeholders impacted (i.e. right holders, users, the economy and society), and includes a description of the impact as well as an indication of the magnitude of the impact.

Box 1 provides a high level summary of findings against each proposed new fair dealing exception. Table 1 provides a summary of the key impacts for each exception.

Box 1: Key findings – Fair dealing

- A **fair dealing exception for quotation** is associated with a small positive net benefit of around $1.5 million per annum, due to reduced transaction costs. Reduced transaction costs would be expected to increase the flexibility with which works are disseminated to the public and the value of those works to the consumer. Any downsides to rights holders are expected to be minimal, especially where use of quotations and extracts is transformative. If anything, increased exposure of some works may increase the sales of those works.

- A **fair dealing exception for non-commercial private use** is associated with limited benefits from greater alignment between copyright law and current practices. While arguably complex and outdated, current private copying provisions are relatively permissive. Where there is some legal uncertainty, industry appears to accept current copying behaviours as reasonable (e.g. format shifting of legitimately acquired material). In other areas, market solutions are removing the need for an exception altogether.

- A **fair dealing exception for incidental or technical use** is associated with possible benefits from an increase in certainty for Australian-based internet intermediaries. There is a lack of evidence on the extent to which Copyright law is currently constraining the activities of internet intermediaries in Australia. However, the exception is associated with limited downsides and potentially large upsides (given the value of the internet).

- A **fair dealing exception for data and text mining (DTM)** would have an ambiguous impact. In the short run, the exception would be expected to lead to a small reduction in transaction costs and commensurate increase in the level of DTM, with associated economic and social benefits. However, there is some concern that to the extent that rights holders may need to make investments in order to enable DTM (e.g.to introduce additional server capacity, bandwidth and monitoring), an exception may see a fall in DTM in the long run.
- A **fair dealing exception for libraries and archives** is associated with negligible changes relative to the status quo. Given the similarities between the current Section 200AB exception and the proposed exception and, until such time as the proposed exception is tested by cultural institutions, it is not possible to determine the impact for libraries and archives of moving to new fair dealing.
- A **fair dealing exception for education** is associated with a potentially significant transfer from rights holders to licensees, with concomitant benefits for education institutions with respect to effectiveness (i.e. with which public funds are currently spent) and efficiency (i.e. in the use of digital technologies to facilitate access to copyright content). Given the restriction of the exception to fair dealing, any impact on the original market for content (and thereby incentives to create) is likely to be marginal. The impact on transaction costs is highly variable and depends on the number of uses of copyright material currently managed by collecting societies that would be found 'fair' under the ALRC's recommendations.
- For the purposes of this assessment, it is assumed that a **fair dealing exception for access for people with disability is already in place** [i.e. included in the Exposure Draft – Copyright Amendment (Disability Access and Other Measures) Bill 2016].
- Given the voluntary nature of the **orphan work provisions**, we assume that orphan works would only be cleared if an institution or user believed that the value of that activity was at least enough to cover the costs. As such, the analysis estimates diligent search costs and coinciding benefits of between $10.3 million and $20.6 million per annum. Where there is no copyright owner and therefore no beneficiary of copyright, the provisions would not detrimentally affect a rights holder's revenue and thereby incentive to create new works.

Table 1: Key impacts by fair dealing exception

Impact type	Quotation	Private use	Incidental/ technical use	Data/text mining	Libraries/ archives	Education	Disability	Orphan works
Monopoly rents/ Access costs	?-/?+	0	?+	?	0	-/+		0
Incentives to create new works	?+	0	?+	?	0	0		0
Administration costs/ transaction costs	?+	0	?+	?+	0	?		-
Incentives to invest in new uses of works	?+	0	?+	?	0	0		0
Enhanced use of existing works	?+	?+	?+	?+	0	+		+
Economic and societal benefits	0	?+	?+	?+	0	+		+
Net expected impact:	**Positive, not strong**	**Positive, not strong**	**Positive, not quantifiable**	**Ambiguous**	**Negligible effect**	**Positive**	**No effect**	**Positive**

Key to potential magnitude of impact

Sign	Key to potential magnitude of impact	Sign	Key to potential magnitude of impact
+	Positive effect	?	Ambiguous effect
?+	Possible/Limited positive effect	-	Negative effect
0	No effect, or negligible effect	?-	Possible/Limited negative effect

While the impacts to different stakeholder has been identified by 'exception', due to our scope and limited data availability, we have not identified winners and losers at an overall 'option' level.

Comparing the new fair dealing exception with the fair use exception

Given the specified purposes of the new fair dealing exception match the illustrative purposes of the fair use exception, it is assumed that the impacts outlined in Table 1 would also apply, at a minimum, to the fair use exception. To explore the additional impacts associated with the fair use exception, both the fair use exception and the new fair dealing exception were assessed from the perspective of certainty and flexibility.

Certainty

Fair use exception

It is likely that implementation of the fair use exception (like any major reform to an established legislative framework) would lead to increased uncertainty for key stakeholders in the short term. This could lead to increased monitoring and enforcement costs, and a reduction or stagnation in the creation of copyright material and follow-on innovation based on copyright material. The magnitude of these impacts would be dependent on how the exception was implemented, particularly in relation to the quality of guidance material provided to rights holders and users on the application of fair use.

Beyond these short-term impacts, it is unlikely that the fair use exception, by its inherent nature, would materially reduce certainty for rights holders and users compared to the status quo. This judgment is based on the observations that: (1) the status quo is relatively uncertain; (2) fair use, as a concept, is likely to be relatively predictable; and (3) the available evidence does not suggest that the relationship between fair use and increased enforcement costs is as strong as commonly assumed.

New fair dealing exception

It is unclear from the available evidence that the new fair dealing exception would be more or less certain for stakeholders than the fair use exception. A more prescriptive approach may, however, become less effective in a rapidly changing digital environment. This is evidenced by the arguably complex and outdated provisions of the Copyright Act, discussed in more detail in Section 3.

Flexibility

Fair use exception

The fair use exception would be more flexible than the status quo. While it is acknowledged that the empirical evidence on the relationship between copyright flexibility and innovation is both limited and inconclusive, it is reasonable to expect that the increased flexibility associated with the fair use exception would stimulate more innovation (and, in turn, economic growth) than the status quo. This is because the flexibility of the fair use exception would enable:

- Individuals and organisations to respond more quickly to changes in technology and consumer behaviour, providing greater scope for experimentation and commercialisation
- Greater third party uses of copyright material, some of which, like cloud computing services, are likely to be key drivers of productive and dynamic efficiency.

New fair dealing exception

Given that the new fair dealing exception would be more prescriptive than the fair use exception, it is expected that the former would be less flexible than the latter, and thus would have a smaller impact on innovation and economic growth. The new fair dealing exception, however, would be more flexible than the status quo.

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1. Introduction

1.1 Background

1.1.1 The economics of copyright exceptions

The most conventional economic rationale for copyright is that it provides incentives for the creation and dissemination of original copyright works. As with other types of intellectual property, copyright is seen to rectify market failure due to the possible free-riding on investment of intellectual effort. It does so by granting exclusive rights for certain uses of original work to its creators. In Australia, the *Copyright Act 1968* (Copyright Act henceforth) confers a number of exclusive rights to creators including the right to reproduce, publish, perform, communicate, adapt and rent copyright material. However, copyright has always been based on a notion of balance. That is, balance between the incentives to invest in creative effort and the general interest of Australians to access, use and interact with content in the advancement of wider social and economic objectives.[4]

One way in which the copyright balance has been achieved is by granting copyright for a limited term that varies according to the nature of the copyright material and whether it is published. A further limitation of copyright is that it protects the expression of the protected ideas, but not the underlying ideas themselves. In addition, the Copyright Act provides over 50 exceptions to the general rules regarding copyright infringement.[5] In Australia, exceptions may be categorised into three key groupings:

- Fair dealing exceptions for enumerated purposes (i.e. research/study; criticism/review; parody/satire; reporting news; legal practitioners; and professional advice)
- Statutory licenses (whereby certain uses of copyright material are allowed in return for fees to the owner or collecting society)
- Other exceptions (e.g. format and time shifting).

Broadly speaking, the objective of exceptions is to increase access to creative works where this might be unduly constrained by copyright. Within this broad objective however, exceptions perform a number of different roles including to:

- Address market dysfunction (e.g. overcome the problem of missing markets for certain uses)
- Promote fundamental freedoms and social values (e.g. freedoms of expression and access to information)
- Promote public interest (e.g. support access to creative works to persons with disabilities).[6]

1.1.2 Trends in copyright reform

The appropriate role and scope of copyright exceptions has been an ongoing matter of debate both internationally and in Australia, and even more so in the digital era. It is clear that the advent of digital technology has brought about new opportunities and challenges for both copyright owners and users. What is

[4] ALRC (2013), *Copyright in the Digital Economy: Issues paper,* p.20.

[5] Attorney-General's Department (2015), *Fair Use and other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age.*

[6] Langus, G, Neven, D and Shier, G (2013), *Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU,* prepared for the European Commission, p.2.

less clear is how this is affecting the optimal level of copyright protection. Some commentators have suggested that 'the relative weight of costs and benefits will change with changing market conditions so that the desirable level of copyright protection is likely to vary over time'.[7] This has prompted a number of countries to seek greater flexibility in their copyright laws. In particular, attention has been gradually shifting away from purely close-ended copyright exceptions that are based on a prescriptive list of purposes (fair dealing); towards systems incorporating elements of the US-style open-ended exceptions, in which the merits of an exception are judged case by case on the basis of fairness standards (fair use).

Internationally, the recent Hargreaves Review 'was specifically asked to investigate the benefits of fair use and how these might be achieved in the UK'.[8] While the review rejected adoption of fair use as technically too difficult in the European Union's legal context, recommendations were made for changes to the existing fair dealing system 'with the aim of securing specific benefits of flexibility comparable with those afforded by fair use'.[9] A raft of new exceptions was introduced following the review including for text and data mining; quotation; parody; and education and teaching. Other governments have undertaken similar reviews which have resulted either in the adoption of fair use in those countries (e.g. Ireland, Israel, South Korea and the Philippines) or the adoption of fair use type multi factor tests within more traditional fair dealing systems (e.g. Canada and Singapore).

In Australia, the case for fair use has been prosecuted by a number of reviews, starting with the Copyright Law Review Committee's (CLRC) Simplification Review in 1996. The CLRC 'recommended the consolidation of the fair dealing provisions into a single section and the expansion of fair dealing to an open-ended model that would not be confined to the closed-list of fair dealing purposes'.[10] In 2000, the Intellectual Property and Competition Review Committee considered the CLRC's recommendation and determined that it did 'not believe there is a case for removing the elements of the current Copyright Act, which define certain types of conduct as coming within the definition of fair dealing'.[11] Finally in 2005, the AGD's Fair Use Review Committee was tasked with considering preceding reviews. While a final report was not issued, a number of reforms followed the review, including time and format shifting and fair dealing for parody and satire.[12]

1.1.3 The ALRC review

The debate was recently brought to a head with the commissioning of the Australian Law Reform Commission (ALRC) to undertake an inquiry into Copyright and the Digital Economy. The terms of reference required the ALRC to consider (amongst other things) whether existing exceptions are appropriate and whether further exceptions should:

- Recognise fair use of copyright material
- Allow transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit
- Allow appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes.[13]

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[7] Handke, H (2010), *The Economics of Copyright and Digitization: A report on the literature and the need for further research,* research commissioned by the Strategic Advisory Board for Intellectual Property Policy, p.8.

[8] Hargreaves, I and Hugenholtz, B (2013), 'Copyright reform for growth and jobs: Modernising the European copyright framework', *Lisbon Council Policy Brief,* 13:44.

[9] *Ibid.*, p.4.

[10] Copyright Law Reform Commission, cited in: ALRC (2013), *Copyright in the Digital Economy: Final report*, p.91.

[11] Intellectual Property and Competition Review Committee, cited in: ALRC (2013), *Copyright in the Digital Economy: Final report*, p.92.

[12] *Ibid.*

[13] ALRC (2013), *Copyright in the Digital Economy: Issues paper,* p.5.

The ALRC proposed an Issues Paper in August 2012 and a Discussion Paper in June 2013. The Final Report of the ALRC was delivered to the Government on 29 November 2013. A total of 30 recommendations were made by the ALRC.

1.2 Project scope

The Department of Communications and the Arts has commissioned Ernst and Young (EY) to undertake cost benefit analyses of a number of the ALRC's recommendations. The focus of the cost benefit analyses will be on the following ALRC recommendations:

- **Recommendations 4 and 5** - Seek to remove the 'fair dealing' exception from the Copyright Act and replace it with a 'fair use' exception.
- **Recommendation 6** –In the event that recommendations 4 and 5 are not adopted, seeks to broaden the current fair dealing exceptions of the Copyright Act to include the following six prescribed purposes:
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1.3 Report structure

The remainder of the report is set out as follows:

- Section 2 outlines our approach to the analysis, with particular attention to the conceptual approach adopted for evaluating the costs and benefits of each recommendation; approach to stakeholder consultations; and key assumptions made in undertaking the analysis.
- Section 3 follows with an individual assessment of each proposed fair dealing exception as well as orphan works. The costs and benefits of each exception will differ due to the different nature of works and uses associated with each exception, and the different licensing and legal landscapes within which each exception operates.
- Finally, Section 4 compares the costs and benefits of a fair use system relative to a fair dealing system of exceptions from two perspectives, certainty and flexibility.

2. Approach to analysis

2.1 Conceptual framework for evaluating costs and benefits

To evaluate the impacts of the ALRC's proposed changes to copyright policy it is necessary to develop and use a consistent framework that recognises the benefits and costs imposed by copyright. A vast amount of economic theory exists on this topic, helpfully disentangling the various impacts of copyright.[14] As exceptions may be thought as a weakening of copyright, the literature may also be used as a basis to assess the various impacts of copyright exceptions. Our summary of the key costs and benefits of copyright exceptions is provided in Figure 2.

Figure 2: Conceptual framework for costs and benefits of exceptions

	Short run	Long run
Costs of exception	• Reduction in monopoly rents for rights holders (i.e. sales and licensing income)	• Less incentives for rights holders to supply copyright works
Benefits of exception	• Administrative savings • Transaction savings (i.e. search, bargaining, monitoring and enforcement) • Reduced access costs for users • Enhanced used of existing copyright works by users	• Greater incentives for copyright users to invest in new uses of copyright works

Source: Adapted from Handke C (2010), The Economics of Copyright and Digitisation, SABIP.

The figure makes a distinction between short run and long run impacts. In the short run, copyright trades off the interests of rights holders (i.e. maximising income) against the interests of users (maximising access to the existing stock of creative works).

Prices charged by copyright owners generate access costs to users. To the extent that exceptions reduce access costs for users, this would be expected to lead to enhanced use of copyright works by users, and revenue losses for copyright holders. In this way, it would not appear possible to simultaneously improve the situation for rights holders and users in the short run. The copyright system also involves short-run administration and transaction costs (e.g. search costs, bargaining, monitoring and enforcement costs), which would typically be expected to fall for both rights holders and users with the introduction of an exception.

The long run impacts are the most pertinent. In particular if, under an exception for particular uses, rights holders find it harder to recoup the costs of creation, they may have fewer incentives to create and diffuse new works. However, very few empirical studies have been done on the impact of changes of copyright policy on the

[14] For a review of the literature on the economics of copyright see: Handke, H (2010), *The Economics of Copyright and Digitization: A report on the literature and the need for further research,* research commissioned by the Strategic Advisory Board for Intellectual Property Policy.

incentives to create new creative works.[15] This, it has been argued, 'constitutes probably the most fundamental gap in the entire [copyright] literature'.[16]

Conversely, to the extent that transaction costs fall with the introduction of an exception, this may be seen as a mechanism to enable investment in certain new uses of a work, which may otherwise have been inhibited, with concomitant longer term social and economic benefits. This shows that exceptions are likely to be beneficial when transaction costs for particular uses are high and the expected impact of rights holders' income is low (e.g. format and time shifting of legitimately acquired copyright content). It is important, however, to remember that when uses are valuable, market mechanisms may form in order to overcome high transaction costs (e.g. license access for making multiple copies or license access for the use of the same content over multiple devices).

Given the diverse nature of the exceptions and the markets within which they exist, not every cost and benefit has been explicitly discussed for every exception under scope. Instead, in our assessment of recommendations, we have focused on those cost and benefits we believe to be the most pertinent. Similarly, due to the scale of impacts and available data, certain impacts such as enforcement costs have been assessed at the 'option' (e.g. fair dealing/fair use) level rather than the 'exception' level (e.g. quotation/education).

For each new fair dealing exception, Section 3 summarises the expected impacts in annotated tables to provide a consistent representation of the costs and benefits.

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[15] Empirical research on copyright has mainly used unauthorised copying as a proxy for copyright strength. These studies deal mostly with the economic impact of unauthorised copying on the sales revenue of rights holders – mostly in the music sector. However, the extent of unauthorised copying undertaken is influenced by factors other than copyright, including improvements in copying technology.

Moreover, the results of these types of studies diverge significantly. Examining the impact of music file-sharing, for example, Oberholzer-Gee and Strumpf (2007), Andersen and Frenz (2010); and Handke (2012) find no impact on the revenue of right-holders in the US, Canada and Germany, respectively. Conversely, Leibowitz (2008) and Barker (2012) also examine unauthorised copying and find a significant impact on music sales in the US and Canada, respectively. Other studies such as Blackburn (2006), find differential impacts on more versus lesser known artists. Others found that while album sales fell, the impact on complementary revenue sources such as concert sales increased – e.g. Mortimer, Nosko and Sorensen (2012).

Empirical research on the broadening or narrowing of copyright has rarely supported any significant impact of copyright works [see Hui and Png (2002), Landes and Posner (2003), Khan (2004), Scherer (2008), Wang (2009)]. More recently, Long (2011), found that strengthened intellectual property rights can positively influence music sales, based on factors including GDP, economic openness, population and employment rate. A study by Giorcelli and Moser (2015) found that the adoption of copyright laws within Italy led to a significant increase in the number of new operas between 1770 and 1900. However, this study has drawn some criticism for not controlling for the impact of other factors such as the differential influence of wealth.

See:

Andersen, B and Frenz, M (2010), 'Don't Blame the P2P File-Sharers: The impact of free music downloads on the purchase of music CDs in Canada', Journal of Evolutionary Economics, 20:715-40; Barker, G.R (2012), Evidence of the effect of free music downloads on the purchase of music CDS in Canada. *Review of economic research on copyright issues,* 9(2), 55-78; Blackburn, D (2006) (older version 2004). A Study of Online Piracy and Recorded Music Sales. Working paper, Harvard University. Online: http://www.katallaxi.se/grejer/blackburn/blackburn_fs.pdf (older version); Giorcelli, M and Moser, P (2015), 'Copyright and Creativity: Evidence from Italian operas'; Handke, C (2012), 'Digital copying and the supply of sound recordings', *Information Economics and Policy*, 24(1):15-29; Handke, C (2012), 'Digital copying and the supply of sound recordings', *Information Economics and Policy*, 24(1):15-29; Hui, K-L and Png, IPL (2002), 'On the supply of creative work: Evidence from the movies', *The American Economic Review*, 92(2):217-220; Khan, BZ (2004), 'Does Copyright Piracy Pay? The effects of US international copyright laws on the market for books', NBER Working Paper No. 10271; Scherer, F.M (2008) 'The emergence of musical copyright in Europe from 1709 to 1850', *Review of Economic Research on Copyright Issues* 5(2); 3-18; Landes, W.M and R.a Posner (2003), *The Economic Structure of Intellectual Property Law,* Cambridge, MA: The Belknap Press of Harvard University Press; Leibowitz, S.J (2008) 'Testing File-Sharing's Impact by Examining Record Sales in Cities', *Management Science* 54(4); 852-859; Long, X. (2011), Intellectual property rights protection and recorded music sales – focus on 26 OECD countries panel data, *Frontiers of Economics in China*, 6(2):211-28; Mortimer, JH, Nosko, C and Sorensen, A (2012), 'Supply responses to digital distribution: Recorded music and live performances', *Information Economics and Policy*, 24:3-14; Oberholzer-Gee, F and Strumpf, K (2007), 'The Effect of File Sharing on Record Sales: An empirical analysis', *Journal of Political Economy*, 115(1):1-42.;Png, I.P.L. and Q.H. Wang (2009) *Copyright Law and the Supply of Creative Work: Evidence from the Movies*, Working paper, National University of Singapore; Scherer, F.M (2008) 'The emergence of musical copyright in Europe from 1709 to 1850', *Review of Economic Research on Copyright Issues* 5(2); 3-18;

[16] For a review of the literature on the economics of copyright see: Handke, H (2010), *The Economics of Copyright and Digitization: A report on the literature and the need for further research,* research commissioned by the Strategic Advisory Board for Intellectual Property Policy.

Table 2 provides the template used to complete the CBA in Section 3. A key for interpreting the rating is provided overleaf.

Table 2: Template for presenting the costs and benefits of each recommendation

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact'	Rating
Monopoly rents/ Access costs	Rights holders Users	Short run	Can it be quantified?		-/+
Incentives to create new works	Rights holders	Long Run	Can it be quantified?		
Administration costs/ transaction costs	Rights holders Users	Short run	Can it be quantified?		?-
Incentives to invest in new uses of works	Users	Lon run	Can it be quantified?		0
Enhanced use of existing works	Users	Short run	Can it be quantified?		
Economic and societal benefits	Economy/ Society	Both	Can it be quantified?		
Net expected impact					

Source: EY

Key to potential magnitude of impact

Sign	Key to potential magnitude of impact	Sign	Key to potential magnitude of impact
+	Positive effect	?	Ambiguous effect
?+	Possible/Limited positive effect	-	Negative effect
0	No effect, or negligible effect	?-	Possible/Limited negative effect

Each new fair dealing exception is evaluated against the status quo and impacts are evaluated in the short term and the long term. Each row of the table identifies the relevant stakeholders impacted, and includes a description of the impact as well as an indication of the magnitude of the impact. For example, a "+" in a cell indicates that a policy option is likely to have a positive impact on the given stakeholder for the given time-span considered. In some cases, it is difficult to conclude on the direction and/or magnitude of the impact. This is signified by a question mark. Hence, the signs "?+" and "?-" should be interpreted as limited or possible, respectively, positive and negative effects. A solitary question mark indicates an ambiguous impact. A "0" indicates nil or negligible impacts.[17] Finally, where we have been able to quantify impacts, this is identified in the grey cells.

[17] Langus, G, Neven, D and Shier, G (2013), *Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU,* prepared for the European Commission, p.11.

Section 4 looks at the difference between the status quo, new fair dealing and fair use from the perspective of certainty versus flexibility and how this drives differences in the costs and benefits of each option (e.g. innovation and enforcement).

It is commonly observed that the availability and accessibility of data for the purposes of copyright research is problematic.[18] The Hargreaves review points to three key obstacles:

> *First, copyright use is not well documented and traceable. Secondly, evidence relating to policy questions involving new technologies (e.g. computer programs, digital communication and biosciences) is problematic, as the characteristics of these markets are not well understood or measured. Third, much of the data needed to develop empirical evidence on copyright is privately held and, when it enters the public domain as 'evidence', cannot be independently verified.*[19]

These have been the leading factors in determining the extent to which quantification of the costs and benefits identified has been possible. A second factor was the scope of the research, which did not extend to primary research.

A lack of relevant and defensible data has impeded our ability to undertake a traditional CBA, with monetisation of costs and benefits. Instead, we have undertaken a qualitative Multi Criteria Analysis (MCA) of the costs and benefits, using quantitative information where available.

[18] Boyer, M (2004), *Assessing the Economic Impact of Copyright Reform,* CIRANO, p.31.

[19] Hargreaves I (2011), *Digital Opportunity – A review of intellectual property and growth,* p.18.

2.2 Stakeholder consultations

Recognising the significant consultation undertaken by the ALRC in the course of its review, EY undertook a more limited consultation exercise aimed at drawing out evidence on the costs and benefits of the recommendations under scope. Appendix A provides a list of the 25 stakeholders nominated by the Department that we consulted with over the period February 1st to 19th. The consultations were undertaken with a view to choosing representative samples from each stakeholder group as shown by Figure 3. The figure provides a high level illustration of a typical copyright value chain.

New creative works originate from content creators such as composers, artists, sculptors and architects. Frequently creative content may also be commissioned by and taken to market by content developers such as publishers or record companies who will hold the rights for that copyright content. Content intermediaries (e.g. broadcasters and telecommunications providers) and consumers incur access costs for the use of these materials, unless an explicit exception is provided in the Copyright Act for that use.

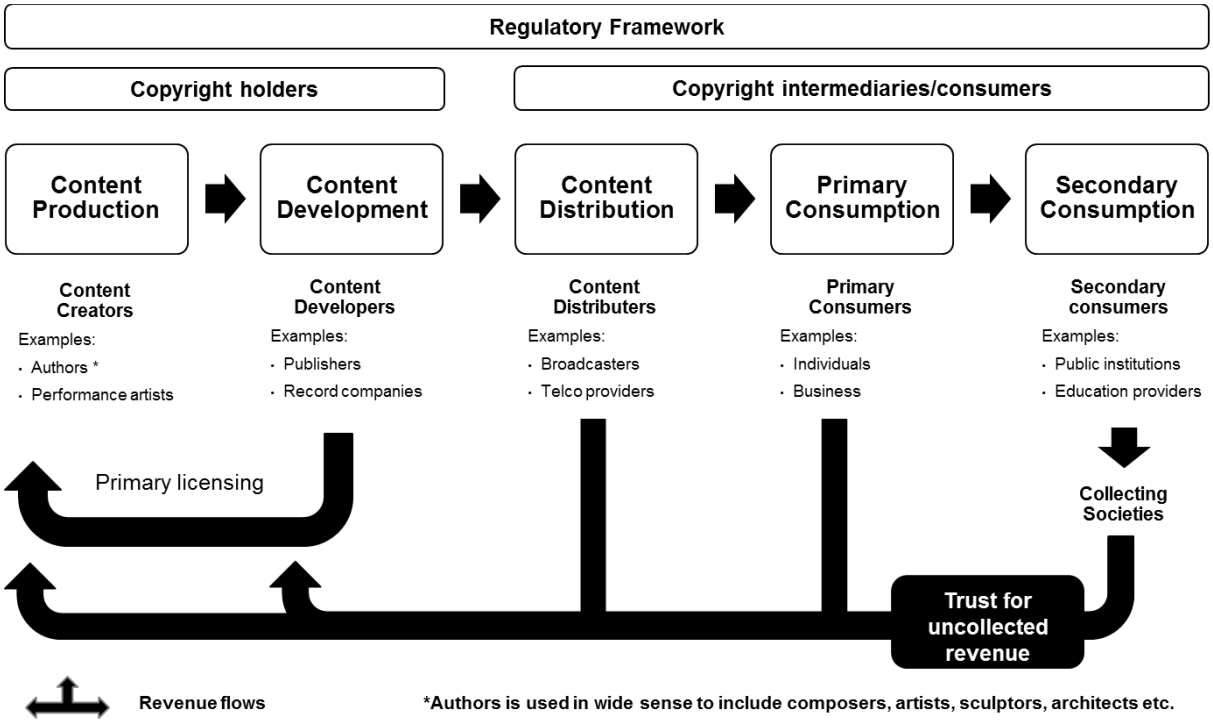
Figure 3 distinguishes between primary consumption (e.g. individuals and businesses) and secondary consumption (e.g. public institutions and education providers). Whereas compulsory statutory licensing arrangements are in place for public and education institutions, primary consumers rely on voluntary licensing arrangements for the use of copyright. Screenrights and the Copyright Agency are the declared Collecting Societies for Part VA (educational statutory licenses for radio and television broadcasts) and Part VB (educational statutory licenses for print and artistic works) of the Copyright Act. Rights holders are unable to opt out of the statutory licenses.

While an understanding of the copyright value chain is essential to understand the incentive mechanisms by which a change in copyright policy may impact on different groups, the landscape is often not as straight forward as the above discussion suggests. For example, Telstra considers itself 'a rights holder, licensor, licensee, user and intermediary of copyright works and our customers are enthusiastic consumers of digital content'.[20] In the same vein, follow-up creators are also users of copyright works, who will both be advantaged and disadvantaged by the introduction of exceptions for particular uses of copyright.

Views expressed during consultations diverged significantly. For example, there is disagreement about the extent to which the status quo is limiting innovation/investment (e.g. Massive Open Online Courses [MOOCs] are used as both a case-study for demonstrating flexibility and inflexibility in the current arrangements). In some cases, this inconsistency has constrained our ability to clearly define the status quo. This is exacerbated by the nascent nature of some markets and technologies under scope, which means there is a lack of publicly available information on the topic. For example, we still do not have a clear picture of data and text mining practices in Australia. A third related challenge is separating what is legislated in law and what is applied in practice. In undertaking a CBA we would have a preference for the latter.

[20] Telstra (2012), ALRC submission.

Figure 3: Copyright value chain



Source: Adapted from PwC, An economic analysis of copyright, secondary copyright and collective licensing, March 2011.

2.3 Key assumptions

In undertaking the CBA we have had to make a number of assumptions. These were progressively developed throughout the course of the project and have been agreed to by the Department of Communications and Arts. It is important to note that the following assumptions represent our understanding of the ALRC's recommendations from an economic perspective. We do not purport to provide any legal advice.

Our key assumptions are as follows:

- Uses under the existing fair dealing exceptions (e.g. research or study) would continue to be fair under the proposed new fair dealing and fair use system of exceptions.
- The proposed fairness factors codify existing case law and are similar to the factors currently used under the existing research or study exception. As a result, there is negligible impact.
- Recommendations on statutory licenses would be in place for the purposes of assessing the costs and benefits of the new fair dealing exception on education.
- Recommendation 8-2 (statutory licenses – alternative licenses) clarifies existing law. As stated by the ALRC, 'arguably, the statutory licenses are already, as a matter of law, "voluntary for users"'.[21]
- Recommendation 8-3 (statutory licenses – government) is out of scope for the purposes of our analysis
- Recommendation 8-4 (statutory licenses) would already be in place for the purposes of our analysis [i.e. included in in the Exposure Draft – Copyright Amendment (Disability Access and Other Measures) Bill 2016]

[21] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.196.

- Recommendation 12-2 (libraries & archives) would already be in place for the purposes of our analysis [i.e. included in in the Exposure Draft – Copyright Amendment (Disability Access and Other Measures) Bill 2016]

- Recommendation 16-1 (access for people with disability) would already be in place for the purposes of our analysis [i.e. included in in the Exposure Draft – Copyright Amendment (Disability Access and Other Measures) Bill 2016]

- The new fair dealing exceptions would be broader, more flexible and technology neutral compared to existing prescriptive exceptions. Where fair use has illustrative purposes that mirror new fair dealing exceptions, many of the impacts would be expected to be the same. As quoted by the ALRC,

  Many of the benefits of fair use would also apply to a confined fair dealing exception. They are both flexible standards, rather than prescriptive rules. They both call for an assessment of the fairness of particular uses of copyright material. In assessing fairness, they both require the same important questions of any given unlicensed use, when deciding whether it infringes copyright.[22]

  An exception for fair dealing for non-commercial private use, for example, would not need to be amended to account for the fact that consumers now use tablets and store purchase copies of copyright material in personal digital lockers in the clouds.[23]

[22] *Ibid*. p.163.
[23] *Ibid*.

3. Impact of fair dealing exceptions

3.1 Quotation

3.1.1 What is quotation

Quotation is not defined by the Copyright Act. For this reason, the ALRC has referred to international copyright law to describe quotation as the 'taking of some part of a greater whole – a group of words from a text or a speech, a musical passage or visual image taken from a piece of music or a work of art – where the taking is done by someone other than the creator of the work'.[24]

International case law has resulted in a number of useful parameters that may be placed around the use of the term. For example, in Germany, where a quotation exception is in place, courts have stated that (amongst other things):

> *The quotation must further the discourse of the quoting work; it must be there to make a point. This in turn indicates that the quoting work must have its own intellectual structure and integrity, into which the quotation can be placed.*[25]

Interpreted in the context of the above, quotation can be seen as belonging to the so-called 'transformative uses' of copyright material. That is, when people use quotes or extracts from copyright work (e.g. books, films, music) as inputs into their own works (e.g. academic texts, biographies, documentaries, blogs and social media).

3.1.2 Current law

In Australia, whether a person requires permission to use quotes and extracts depends on whether or not a 'substantial part' of a work is used in one of the ways exclusively reserved for rights holders. In determining whether the part taken is substantial, the quality of the part has been held to be more important than the quantity. For example, in the case of EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd. Judge Emmett J stated that "whether he [an alleged infringer] has copied a substantial part depends much more on the quality than on the quantity of what has been taken".[26] According to guidance provided by the Australian Copyright Council, 'a part may be considered "substantial" if it is an important, essential or distinctive part'.[27]

If a substantial part of copyright content is quoted or extracted, infringement will generally occur unless the use is covered incidentally by one of the current fair dealing exceptions for research or study; criticism or review; parody or satire; reporting and news; and legal practitioners and advice. However, even if a particular use falls under one of the fair dealing exceptions, the use must also be deemed to be 'fair'.

The fairness inquiry will differ case by case. However, it generally needs to be answered in consideration of factors such as 'whether the source work is published or otherwise available to the public, the context of the taking, and the interference with the copyright owners' financial interests'.[28] Research and study has a specific list of five factors to guide the fairness inquiry – i.e. the purpose and character of a dealing; the nature of the work; possibility of obtaining the work; potential market impact; and amount and substantiality.

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[24] Ricketson, S and Ginsburg, J, cited in: ALRC (2013), *Copyright in the Digital Economy: Final report.*

[25] Adeney, E (2013), 'Appropriation in the Name of Art: Is a quotation exception the answer?', *Australian Intellectual Property Journal* 23(3):142.

[26] *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited [2010] FCA 29.*

[27] Australian Copyright Council (2014), 'Information Sheet: Quotes & extracts', available at: http://www.copyright.org.au/acc_prod/ACC/Information_Sheets/Quotes___Extracts.aspx.

[28] Adeney, E (2013), 'Appropriation in the Name of Art: Is a quotation exception the answer?', *Australian Intellectual Property Journal* 23(3):144.

3.1.3 The problem

The ALRC found current arrangements to be insufficiently flexible to support copyright users. arguing that 'there are many examples of uses that may be considered fair but are not covered by existing exceptions, and the substantiality principle is insufficient to protect these uses'.[29]

Box 2 provides a number of examples of quotation not currently covered by fair dealing exceptions where submissions to the ALRC have highlighted potential gaps. According to the ALRC, this is largely the result of a 'lack of foresight' in the drafting of existing provisions. For example:

> *The reason quotation from a book cannot be used in the course of reviewing film is that the relevant fair dealing exception only applies where the criticism or review is of that work or another work, and 'work' specifically does not include a 'cinematograph film'.*[30]

A second problem raised by the ALRC, is the 'purpose-based' or 'close ended' nature of the existing provisions. For example:

> *In many cases, quotations will not be directly for 'criticism or review' or 'research or study', but for other purposes, such as academic publication, that serve important public interests.*[31]

Box 2: Examples of quotation not covered by fair dealing exceptions

- Use of images in a presentation or seminar to illustrate a point being made
- Use of short quotations in academic publications
- Reproduction of an extract from a book in the course of reviewing a film of that book
- Reproduction of an extract from a play in the course of reviewing a performance of a play
- Use of quotations or thumbnails in exhibition catalogues or publicity material for museums and galleries
- Use of quotations as epigrams at the beginning of novels; and
- Use of quotations in a range of artistic practices such as 'sampling', 'mashups' and 'remixes'.

Source: Australian Government (2013), Copyright in the digital economy: final report, p.211.

3.1.4 The policy options

1. **Status quo – Do nothing**. The use of quotations and extracts from a copyright work is permissible if it does not constitute a 'substantial part' of that work. Copyright exceptions permitting use of 'substantial' quotes and extracts remain limited to use for research or study; criticism or review; parody or satire; reporting and news; and legal practitioners and advice.
2. **New fair dealing – Introduction of an exception permitting fair dealing with any extract or quotations**, where what is fair is judged according to four factors:
    a. The purpose and character of the use.
    b. The nature of the copyright material used.
    c. The amount and substantiality of the part used.
    d. Effect of the use upon the market.

[29] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.217.
[30] *Ibid.*, p.211.
[31] *Ibid.*, p.212.

3.1.5 Impact analysis

3.1.5.1 Summary

A fair dealing exception for quotation is associated with a small positive net benefit of around $1.5 million per annum, due to reduced transaction costs. Reduced transaction costs would be expected to increase the flexibility with which works are disseminated to the public and the value of those works to the consumer. Any downsides to rights holders are expected to be minimal, especially where use of quotations and extracts is transformative.

The analysis estimates a saving of $1.6 million per annum in transaction costs associated with the clearance of 7,000 less extracts for use in academic publications. This is a conservative figure, as we have not been able to quantify the impact on transaction costs for non-academic and non-literary works.

Reducing transaction costs would be expected to increase the flexibility with which works are disseminated to the public. Consumers would also be expected to benefit from works with higher informative value, as the most relevant extract would be used where currently, due to high transaction costs or a lack of permission, it may not be used, or an inferior used in its place.

The analysis estimates a transfer from individual copyright owners to licensees of $123,000 per annum associated with 7,000 less extracts in academic publications requiring clearance. Given existing provisions in the Copyright Act as well as the fair dealing nature of the proposed exception, we expect costs to rightsholders in non-literary and non-academic works to be of a similar scale.

Similarly, the primary market for copyright owners would remain relatively unaffected from the proposed exception. A quotation exception would not permit free access to original works. Moreover, once lawfully acquired, quotes or extracts of original works in new works are more likely to be transformative, and thereby less likely to interfere with the market for original works. On the contrary, there is evidence from the music industry that increased exposure of some works can increase sales of those works. This is particularly true for lesser known artists, increasing the contestability of the market.

Given that both the primary and secondary markets for rights holders would be relatively unaffected by a quotation exception, any negative impacts on incentives to create new works are likely to be marginal. This is particularly the case as follow-up creators are also users of copyright works and, while an exception may decrease licensing revenues from supplying creative works, it should also decrease the costs of supplying them. Moreover, to the extent that an exception increases contestability in the market, this may provide incentives for new entrants into the market, and an increase in the overall supply of works.

However, fair dealing is a flexible concept, and its limits will be ultimately determined by the courts. For this reason we cannot rule out the prospect of more significant losses for some copyright owners. Of particular concern, are the impacts on certain business models - specifically in relation to audio-visual works and sound recordings – as raised in the submissions.

Overall, Option 2 would give an estimated net benefit of around $1.5 million per annum, due to reduced transaction costs.

Table 3: Summary of costs and benefits of fair dealing exception for quotation

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Monopoly rents/ Access costs	Rights holders Users	Short run	Option 2 would be expected to lead to a limited transfer from rights holders to licensees.	Estimated transfers from publishers to academics of $123,000 p.a. in the context of reduced permissions for academic publications.	?-/ ?+
Incentives to create new works	Rights holders	Long Run	The primary market for copyright owners would remain relatively unaffected by Option 2. If anything, the impact would likely be positive. Empirical evidence from the music industry suggests that increased exposure of some works can increase the sales of those works.	-	?+
Administration costs/ transaction costs	Rights holders Users	Short run	Option 2 would be expected to lead to positive but limited transaction savings.	Estimated savings of $1.6 million p.a. to publishers and academics from lower transaction costs related to clearances of short extracts in academic publications.	?+

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Incentives to invest in new uses of works	Users	Long run	Any negative impacts on the incentives of rights holders from Option 2 are likely to be negligible. Follow-up creators are also users of copyright works. To the extent that the exception increases contestability in the market, this may provide incentives for new market entrants.	-	?+
Enhanced use of existing works	Users	Short run	Reduced transaction costs would be expected to increase the flexibility with which works are disseminated to the public and the value of those works to the consumer	-	?+
Economic and societal benefits	Economy/ Society	Both	-	-	0
Net expected impact	**-**	**-**	**Positive, not strong**		**?+**

3.1.5.2 Benefits to copyright holders and users arising from reduced administration costs

Absent an exception or similar provision, use of a copyright work for quotation may require permission from the creator of the quoted work. Since the nature of each use is likely to be different (e.g. depending on the extent of use, the purpose of the work and intended audience), it is unlikely that a standard set of contract terms would suffice to cover all possible uses of quotation.[32] Rather, absent exceptions, bi-lateral negotiations would likely ensue between rights holders and users in order to account for the specific circumstances of each transaction.[33] For this reason, transaction costs are expected to be high compared to the often low 'value-in-use' of a quote or extract.[34] And, while it is recognised that improvements in digital technology have automated many clearance processes and reduced transaction costs, it is also recognised that there are gaps. Therefore, to the extent that use of copyright content for quotes currently requires permission, the proposed new fair dealing exception would be expected to lead to savings in transaction costs for both rights holders and users.

3.1.5.3 Number of uses

To estimate the total transaction savings to rights holders and users, estimates are required of how many uses are currently made and how many permissions are sought. Obtaining such estimates is difficult. A very high estimate could include the 68 per cent of internet users in Australia who use social networking sites such as Facebook, LinkedIn and Instagram.[35] Many of these internet users will use small quotes or extracts from other people's work in generating their own content on these sites. However, most will do so without asking for permission (whether lawfully or unlawfully) and, for this reason, this group of people is not appropriate for our estimates.

The group most likely to seek permission for quoting copyright content is authors/publishers and, of this group, academics and other scholars. A recent report on the state of Australian university research showed that more than 430,000 books, book chapters, journal articles and conference papers were produced between 2008 and 2013, an average of around 70,000 new pieces of content per year.[36] This is a useful starting point for estimating the savings in transaction costs from introducing an exception for quotation. However, it is likely to underestimate the total number of uses, as it does not include non-academic works or non-literary works.

In addition to the number of works impacted, estimates are required of the number of quotations per work that require clearance. In the absence of reliable data, we borrow the crucial but untested approach used by the UK Intellectual Property Office in its own impact assessment of fair dealing for quotation, and assume that 10 per cent of the 70,000 titles identified above will use one extract that requires clearance, resulting in 7,000 permissions sought.[37] This figure should be viewed as a very conservative estimate, given that there is a high likelihood of academic publications using more than one quotation or extract per work. Conversely, many publishers adhere to permissions guidelines that permit the use of 'insubstantial' parts without explicit permission. This is recognised in the practices of over 60 publishers worldwide that are signatories to the STM Permissions Guidelines.[38] The guidelines encourage the use of small portions of material from published journal articles by academics in subsequent publications. For example, while policies vary a lot between publishers, use of a maximum of two figures from a journal article and single text extracts of less than 100 words is generally

[32] Langus, G, Neven, D and Shier, G (2013), *Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU,* prepared for the European Commission, p.3.

[33] *Ibid.*

[34] *Ibid.*

[35] Sensis (2015), 'Sensis Social Media Report – How Australian people and businesses are using social media', available at: https://www.sensis.com.au/assets/PDFdirectory/Sensis_Social_Media_Report_2015.pdf.

[36] Australian Research Council (2015), *State of Australian University Research 2015-16.*

[37] UK Intellectual Property Office (2014), *Impact Assessment: Exception for use of quotation and extracts in copyright works,* p.4.

[38] International Association of Scientific, Technical and Medical Publishers (2014), 'STM permissions guidelines' available at: http://www.stm-assoc.org/2016_02_26_STM_Permissions_Guidelines_2014.pdf. Also see publisher permission guidelines, for example, Wiley (http://au.wiley.com/WileyCDA/Section/id-302870.html) and Taylor and Francis (http://authorservices.taylorandfrancis.com/using-third-party-material-in-your-article/).

encouraged without explicit permission needed.[39] For this reason, the use of a conservative estimate is appropriate.

3.1.5.4 Costs of clearing permission

Both rights holders (either the author or publisher) and users will incur time in the process of obtaining permissions for the 7,000 extracts. To estimate the transaction costs, we use the findings of a PwC report, which estimates the time taken to clear permissions under an atomised higher education licensing system.[40] The report found that the average time spent by users on rights clearance was five hours and included searching for the rights holder, making contact with the rights holder, negotiating with the rights holder, and administration required to undertake payment. The average time spent by rights holders was estimated at four and a half hours and included negotiating with the user; invoicing the user; and receiving and processing payments. In total, the time taken to clear permissions is estimated at 9.5 hours. However, this estimate is likely to be inflated as a number of automated platforms such as the Copyright Agency Rights Portal (Australian-based) and RightsLink (US-based) are known to facilitate the clearance of permissions in a fraction of the time. According to publisher Wiley:

> *This service [RightsLink] is owned and operated by the Copyright Clearance Centre and is accessible directly from a participating publishers' content on their web site. The majority of Wiley content includes a 'request permission' link online. This enables users to quickly and easily clear permissions for a range of different purposes online, download their license and (where applicable) pay the required fee through an automated system. This process can take as little as 5 minutes but especially for some commercial reuses where further clarification of usage is required the complete process may take up to 15 working days. Many academic permission requests are automatically granted free of charge.*

To account for this, we assume that 30 per cent of clearances are undertaken through automated platforms such as RightsLink and 70 per cent are undertaken manually. We use hourly costs from the 2014 Survey of Employee Earnings and Hours for administrative and support services, inflated by the Wage Price Index. Based on the above, we calculate transaction savings of around $1.6 million per annum.

3.1.5.5 Enhanced use of existing copyright works

A fall in transaction costs in the context of academic works is unlikely to lead to an increase in use of protected works by academics. However, it may result in an increase in the flexibility with which these academic works are disseminated to third parties and the public.

One example provided by Universities Australia is the case of student theses.[41] Upon completion of their higher degree, universities require students to publish their thesis on an online repository. Students have several other publishing options, for example, publishing their thesis as a book or journal articles with a commercial publisher or self-publishing. Whatever the option chosen, students are not able to rely on the fair dealing exception for research and study to reproduce quotes and extracts in published material. To avoid the risk of infringement, universities generally require their students to obtain permission for use of third party content.[42] In many cases, the required permissions are too costly or not possible to obtain and students are either forced to remove the content from their work or replace it with an inferior substitute. The result, as put by Universities Australia, is 'that the integrity of the thesis is compromised, and the academic community is denied the opportunity to engage fully

[39] International Association of Scientific, Technical and Medical Publishers (2016), 'Guidelines for quotation and other academic uses of excerpts from journal articles', available at: http://www.stm-assoc.org/2016_01_05_Guidelines_for_Quotation_From_Journal_Articles.pdf.

[40] PwC (2011), *An economic analysis of copyright, secondary copyright and collective licensing,* p.75.

[41] Universities Australia (2012), ALRC submission.

[42] For example, see the University of Sydney's website 'Copyright and Your Thesis': http://sydney.edu.au/copyright/students/research.shtml#publish.

with the work'.[43] By permitting use of extracts in academic publications where not currently possible – either due to high transaction costs or because the copyright owner could not be located – a fair dealing exception may increase the ease with which content is currently disseminated by academics; and enhance the value of these works to consumers.

More broadly, by codifying fairness principles that already exist in common law, the new fair dealing exception is not expected to *significantly* increase certainty with respect to the treatment of quotation in the Copyright Act. However, neither would it be expected to increase uncertainty. Depending on the sector approached, there appears to be some existing uncertainty with respect to what currently constitutes a quote or extract and when use without permission is accepted. The Australian Copyright Council provided us with a 2015 snapshot of website traffic, which showed that information sheets on the subject of 'quotes and extracts' were in the top 20 most downloaded.[44] Similarly, analysis undertaken by the Copyright Agency showed that of 353 intellectual property related Federal court cases between 1 July 2006 and 30 June 2012, 94 (27%) were tagged 'copyright'. Of these copyright cases, 'substantial part' was provided as the main copyright issue for 16 (17%) of these cases.[45]

3.1.5.6 Costs and benefits from foregone revenue

To the extent that uses of quotations and extracts that are currently paid for are found to be fair under the proposed exception, the new fair dealing exception would lead to a transfer from rights holders to licensees. The following looks at the impact of a fair dealing exception in the context of text quotations and non-text extracts separately.

3.1.5.7 Text quotations

We use the example of the 7,000 clearances, to estimate the potential transfer from rights holders to licensees in the context of academic publications. Again, this is a conservative estimate as it does not include non-academic literary works. Guidance by the Australian Society of Authors recommends a fee of $350 per annum per 1000 words of published materials in digital form.[46] Assuming an average quotation of 100 words, we estimate an average fee per quotation of $35.

However, as discussed in the previous section, many publishers permit the use of short quotations and extracts without explicit permission or, where permission is required, free of charge. Such an approach is in the interests of both parties, given the high transaction costs associated with obtaining permission for short extracts and the relatively low value in-use of these extracts.

Common practices in the industry suggest that a licensing fee of $0 is more likely to be charged for the use of a 100 word extract rather than the estimated fee of $35. Using these values as upper and lower limits, and multiplying by the 7,000 clearances, gives a transfer of $123,000 per annum on average.

3.1.5.8 Non-text extracts

Use of copyright content for quotes and extracts is already permitted to a great extent under the current arrangements. As discussed in Section 3.1.2 copyright exceptions permitting use of extracts are in place for research or study; criticism or review; parody or satire; and news or reporting. Quotations and extracts for other uses are also permissible as long as they do not constitute a 'substantial part' of that work.

[43] Universities Australia (2012), ALRC submission.

[44] Unpublished data provided by the Australian Copyright Council.

[45] Copyright Agency | Viscopy (2012), ALRC submission.

[46] Australian Society of Authors (2010), 'ASA Online Use Rates', available at: https://www.asauthors.org/files/lib/ASA_Papers/ASA_Online_Use_Rates.pdf. The website does not provide any additional guidance on whether the fees are pro rata.

Where permission is required, a number of market mechanisms are currently in place to facilitate the use of quotations and extracts, including a number of licensing arrangements. According to Free TV Australia, for example, the majority of licensed content between television stations consists of short extracts of footage that is less than 60 seconds. While Free TV Australia was not able to provide any further data, this is consistent with other international evidence. In its submission to the Hargreaves Review, for example, a UK commercial broadcaster(Independent Television Network) provided evidence showing that, in 2011, '42 per cent of licenses were for clips under 60 seconds long, with a further 45 per cent of clips between one and four minutes in duration'.[47]

There is also an established market for licensing transformative uses of musical works, including the licensing of music samples and sound recordings.[48] To the extent required, derivative uses of music works such as sampling and mash-ups are currently licensed from rights holders directly. This makes it difficult to determine total revenue from such uses. Nevertheless, APRA/AMCOS provided us with data, which showed that in 2014-15 approximately 4.5 per cent of all dance works included a sample. These works represented 7.3 per cent of the total value of the dance music distribution in the same year.[49] While this may seem like a small proportion of total licensing revenue, according to APRA/AMCOS, the use of samples in some genres (especially dance) is increasing.

Little in the way of evidence has been provided on the impacts of a fair dealing exception for quotation on the licensing streams of these and other non-literary markets. However, any impact is likely to be limited due to the restriction of any exception to fair dealing. In particular, use of quotations and extracts that compete with the original work quoted would weigh against fair dealing.[50] For example, commercial TV broadcasters make their money from leveraging exclusivity. Use of 'extensive' or 'essential' extracts from a TV broadcast in another TV broadcast or placed on a social network is unlikely to be considered fair, as it would compete with the original broadcast. The availability of licenses and the commercial use of quotations would also be relevant factors in the fairness inquiry. This is evidenced by a number of sampling cases in the US, where the commercial use of music samples or sound recordings without permission was found to constitute copyright infringement.[51] Given this, it would be difficult to argue that fair use has had a negative impact on the US market for music sampling.

However, fair dealing is a flexible concept, and its limits will be ultimately determined by the courts. For this reason we cannot rule out some costs to rights holders as a result of introducing an exception on quotation. However, any such impact is likely to be muted due to two factors raised here. The first is the presence of existing provisions under the Copyright Act already permitting the copying of 'insubstantial parts' of creative works. The second would be the restriction of a further exception under Option 2 to fair dealing – where the nature of the copyright material, the purpose it is used, the extent taken and the effect of the use on the original are relevant factors.

3.1.5.9 Incentives to supply new copyright works

The primary market for copyright owners would remain relatively unaffected from a fair dealing exception for quotation. To the extent currently required, creators would still need to pay for access to original works. That is, a quotation exception would not permit free access to original works. Once lawfully acquired, quotes or extracts of original works in new works are more likely to be transformative, and thereby less likely to interfere with the primary market for creators. For example, it is generally acknowledged that use of quotes in academic

[47] UK Intellectual Property Office (2012), 'Exception for use of quotations or extracts of copyright works', available at: http://www.legislation.gov.uk/ukia/2014/164/pdfs/ukia_20140164_en.pdf.
[48] APRA/AMCOS (2012), ALRC submission.
[49] Unpublished data provided by APRA/AMCOS.
[50] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.213.
[51] For example, see *Bright Tunes Music v. Harrisongs Music*; and *Bridgeport Music, Inc. v. Dimension Films.*

publications is necessary to place the new works in the context of the research or to comment on the quoted work itself, and that there is negligible potential in such uses interfering with the market for original content.[52]

Rather than interfering with the market for original works, there is evidence from the music sector that increased exposure of some works may increase sales of those works. For example, a study by Michael Shuster found that within the bounds of Girl Talk's All Day, unlicensed sampling actually benefitted sales of the sampled songs (to a 92.5% degree of statistical significance).[53] This aligns with the results of a number of previous studies, which have found that 'unauthorised' copying can boost sales for lesser known artists, who seem to gain more from exposure of their works than they lose due to substitution effects.[54] To the extent that a fair dealing exception for quotation could increase contestability in the market, this may provide incentives for new entrants into the market.

Given that both the primary and secondary markets for rights holders would be relatively unaffected by a quotation exception, any impacts on incentives to create new works are likely to be marginal. This is particularly the case as follow-up creators are also users of copyright works. And, therefore, while an exception may decrease licensing revenues from supplying creative works; it should also decrease the costs of supplying them.

[52] International Association of Scientific, Technical and Medical Publishers (2016), 'Guidelines for quotation and other academic uses of excerpts from journal articles', available at: http://www.stm-assoc.org/2016_01_05_Guidelines_for_Quotation_From_Journal_Articles.pdf.

[53] Schuster, W. Michael (2013) 'Fair Use, Girl Talk, and Digital Sampling: An empirical study of music sampling's effect on the market for copyrighted works', *Oklahoma Law Review* 67:443.

[54] See: Blackburn, D (2004), 'A Study of Online Piracy and Recorded Music Sales', available at: http://www.katallaxi.se/grejer/blackburn/blackburn_fs.pdf; Bhattacharjee, S, Gopal, RD, Lertwachara, K, Marsden, JR and Telang, R (2007), 'The Effect of Digital Sharing Technologies on Music Markets: A Survival Analysis of Albums on Ranking Charts', *Management Science* 53(9):1359-1374; Mortimer, JH, Nosko, C and Sorensen, A (2010). 'Supply Responses to Digital Distribution: Recorded Music and Live Performances', NBER Working Paper No. 16507; Chiou, L and Tucker, C (2011), 'Copyright, Digitisation and Aggregation', NET Institute Working Paper No. 11-18; Belleflammea, P and Peitz, M (2014), 'Digital piracy'; Liebowitz, S (2014). *The Impacts of Internet Piracy. In The Economics of Copyright: A Handbook for Students and Teachers,* Watt, eds. Edward Elgar Publishers, pp. 225-240.

3.2 Non-commercial private use

3.2.1 What is non-commercial private use?

Non-commercial private copying is limited to the reproduction of copyright content for use solely in the private sphere. Hence, it is assumed – as others have done in similar context – that 'commercial use of reproductions, as well as communication to the public, distribution to the public, public performance or adaptation is by definition out of scope of private copying.'[55]

Private copying can take different forms depending on type of copyright content reproduced. This is important since the value of private copying varies according to what is copied (e.g. how close a substitute the copy is compared to the original).[56] Transaction costs may also vary depending on the type of content. For example, it may be in practice difficult to make sure that a licensee adheres to the terms of sale related to non-digital content (e.g. copies of physical books' pages).[57] In comparison, anti-circumvention technology protection measures (TPMs) have made the monitoring of, and protection against, digital content copying activities less costly.[58]

3.2.2 Current law

In Australia, private copying is addressed through three types of private use exceptions currently provided by the Copyright Act:

- **Format shifting**: Allows for the copying for private use of books, newspapers, periodicals, photographs and films on videotape (not DVDs or copies downloaded from the internet). The exception only applies if:
  - The owner of the original makes the copy and the original is not an infringing copy
  - The copy must be made in a different format to the original
  - Only one private use copy can be made into any one different format.
- **Time shifting:** Allows for the making of 'a cinematograph film or sound recording of a broadcast solely for private use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made'.[59] The exception does not apply to content made available on the internet, unless the content copied is being streamed by a radio or TV broadcaster.
- **Space shifting:** Allows the copying of sound recordings for private use to different media devices or media. The same restrictions apply as format shifting except that sound recordings can be copied multiple times into any format for private use with a device owned by the user.

3.2.3 The problem

The current exceptions are criticised by the ALRC for their level of complexity and for being outdated relative to current consumer practices and emerging technologies. The Copyright Act currently provides for different treatments of the same types of private uses depending on the technology platform under consideration. The result has been widespread copyright infringement. For example, the current format shifting exception on films only applies to copies made from films in analog format. This means that copies of legally acquired films on

[55] Boulenger, J, Carbonnel, A, De Coninck, R and Lungus, G (2014), *Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options,* for the European Commission, p.82.
[56] *Ibid.*, p.82-3.
[57] *Ibid.*, p.95.
[58] *Ibid.*
[59] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.229.

DVDs or from the internet cannot be made for non-commercial private use.60 Further, the format shifting exception (specifically for books, newspapers and periodicals) only allows user to make one copy in each format. This raises the question of whether storing legally acquired copyright content in the cloud is permissible, given that this may require multiple copies to be made.[61] Similarly, the current time shifting exception is restricted to 'broadcasts', raising the question of whether a cinematograph film or sound recording from the internet is covered by the exception.[62]

3.2.4 The proposed policy options

1. **Status quo – Do nothing.** The private use of copyright content would continue to be permissible in the context of exceptions for format, time and space shifting.
2. **New fair dealing exception – Current exceptions would be repealed and replaced with a fair dealing exception allowing copying for non-commercial private use**, where what is fair would be guided by the following four factors:
    a. Purpose and character of use
    b. Nature of the copyright material
    c. Amount and substantiality of part used
    d. The effect of the use on the market

3.2.5 Assumptions

The following assumptions have been made in undertaking the analysis:

- A third party facilitator would not itself be considered a private non-commercial user and so would not be covered by a fair dealing exception for non-commercial private use.[63]
- Sharing content online with larger groups of people would not be considered a private use and would therefore not be permitted under an exception.[64]
- Whether the consumer purchased a permanent copy, or whether they were entitled to have access to the content for a limited period of time, would be relevant to any fairness enquiry.[65] For example, the exception would not permit:
    - The copying of illegally-acquired content or the distribution of copies.[66]
    - The copying of rented, borrowed or streamed content.[67]

3.2.6 Impact analysis

3.2.6.1 Summary

A fair dealing exception for non-commercial private use is associated with limited benefits from greater alignment between copyright law and current practices. While arguably complex and outdated, current private copying provisions are relatively permissive. Where there is some legal uncertainty, industry appears to accept

[60] *Ibid.*, p.228.
[61] *Ibid.*
[62] *Ibid.*, p.229.
[63] *Ibid.*
[64] *Ibid,*p.240.
[65] *Ibid*, p.238.
[66] *Ibid.,* p.243.
[67] *Ibid.*, p.240.

current copying behaviours as reasonable. In other areas, market solutions are removing the need for an exception altogether.

Although arguably complex and outdated, the current private copying provisions are relatively permissive. Where there is currently some legal uncertainty around copying activities for personal use – e.g. storing multiple copies of legally acquired copyright content on the cloud – industry appears to accept such copying as reasonable. Indeed, much of the copyright infringement currently taking place (in the context of legally acquired copyright content) is considered common place and not enforced by rights holders. In other areas, market solutions are removing the need for an exception altogether, driving greater consumer access and choice. Taken together, these factors suggest that while a positive economic benefit would be expected from an exception, the magnitude of this impact would be expected to be small. The greater impact on consumers is likely to come from the social benefits of greater alignment between copyright law and current practices.

Equally, this means that the costs to rights holders from a broader exception would also be expected to be small. For example, it is unlikely that many people currently purchase two or more copies of the same copyright content, just because of the restrictions currently placed by the Copyright Act on format and time shifting. For this reason, any impact on sales revenue would be considered marginal. Moreover, economic research discussed in this section suggests the value of private copying can be factored into the prices of content, which would (in theory) leave rights holders no worse off compared to the status quo.[68] Where a broader exception around private copying may lead to perverse behaviours with respect to piracy, this is considered to be a risk. However, a number of studies have shown that the main drivers of piracy are accessibility and affordability (rather than copyright law), suggesting that any risk would be minimal.

[68] See: Liebowitz, S (1985), 'Copying and indirect appropriability: Photocopying in journals', *Journal of Political Economy,* (93)5; and Camerani, R, Grassano, N, Chavarro, D and Tang, P (2013), *Private Copying*, prepared for the UK Intellectual Property Office.

Table 4: Summary of costs and benefits of fair dealing exception for non-commercial private use (relative to the status quo)

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Monopoly rents/ Access costs	Rights holders Users	Short run	Consumer behaviour is unlikely to change greatly following the introduction of an exception. Given this and evidence around 'pricing-in', it is expected that the costs to rights holders due to lost sales would be minimal to nil.	-	0
Incentives to create new works	Rights holders	Long Run	Given the discussion on foregone sales income, we would expect negligible impacts on incentives to supply new copyright works.	-	0
Administration costs/ transaction costs	Rights holders Users	Short run	-	-	0
Incentives to invest in new user of works	Users	Long run	Given the limited impact on consumers, any downstream impact on innovation in copying devices/services by technology would be expected to be negligible.	-	0
Enhanced use of existing works	Users	Short run	Given existing exceptions and consumer practices around private copying of copyright content, it is expected that the proposed exception would deliver a small net benefit to consumers.	-	?+
Economic and societal benefits	Economy/ Society	Both	The adoption of a technology-neutral exception on private use is expected to provide social benefits by aligning copyright law with existing social norms.	-	?+
Net expected impact	-	-	**Positive, not strong**		**?+**

3.2.6.2 Enhanced use of existing works

Given current exceptions and consumer practices around private copying of copyright content, it is expected that the proposed exception would deliver a small net benefit for the following reasons:

- Since 2006, consumers have been able to format shift, space shift and time shift legally obtained copyright content, albeit with a number of restrictions imposed on the application of these exceptions. Therefore, much of the change in behaviour is likely to be marginal.
- Where there is currently some legal uncertainty around copying activities for personal use –e.g. storing multiple copies of copyright content on the cloud – industry appears to accept such copying as reasonable. We are not aware of any copyright owners enforcing their rights for copying of legally acquired content in the private sphere.
- As discussed in Section 3.2.3, much of the copyright infringement (in the context of legally acquired copyright content) currently taking place is considered common place among many consumers. This suggests that much of the additional private copying likely to be permitted under the proposed exception is already pervasive.
- Many digital copies are sold under licenses that remove the need for an exception altogether. With respect to cloud computing, for instance, copyright owners may offer licenses for making multiple copies or license access for the use of the same content over multiple devices.
- Licensing models for much digital content (e.g. video games and DVDs) are protected by TPMs, which it is assumed could not be displaced by a fair dealing exception for non-commercial private use due to Australia's international trade agreements.

Taken together, these factors mean that most of the benefits of format shifting, time shifting and space shifting are already being enjoyed by consumers, both inside and outside the Copyright Act's provisions. The consumers who would experience direct economic benefits from introduction of the exception are those consumers who follow copyright law; and for copyright content that is not explicitly licensed and not protected against copying by TPMs; wish to:

- Store copies of legally acquired copyright content on a cloud/digital locker
- Make more than one copy of legally acquired copyright content in any one format for non-commercial private use
- Make copies of legally acquired DVDs for non-commercial private use
- Make copies of legally acquired copyright content from the internet for non-commercial private use.

While this may still represent a sizeable number of people, the economic benefits to consumers would be expected to be small overall.

3.2.6.3 Social benefits

Theories of deterrence generally argue that 'it is more difficult to induce law-abiding behaviour when underlying social norms do not support the law'.[69] When exceptions for private copying were introduced in 2006, this was in

[69] Moohr G (2005), 'Defining overcriminalization through cost benefit analysis: The example of criminal copyright law', *American University Law Review,* 54:794.

recognition that failure to acknowledge social norms 'diminishes respect for copyright and undermines the credibility of the Act'.[70] Despite the motivations of the *Copyright Amendment Bill 2006*, it appears that the technology-specific nature of its provisions has caused the Copyright Act to be, once more, out of step with social norms.

There is a lack of empirical evidence measuring consumer activities and perceptions with respect to copyright infringement of legally obtaining content. Nevertheless, anecdotal evidence presented by the ALRC suggests that much of the copyright infringement currently taking place is considered common place among consumers.[71] The adoption of a technology-neutral exception on private use would thus be expected to provide social benefits by aligning copyright law with existing social norms.

3.2.6.4 Costs to rights holders in foregone revenue and incentives to produce new works

Currently, absent a licensing solution, the format shifting exception means that if a consumer wants to legally view a digital copy of a newspaper on their computer, their phone and their laptop, they would have to buy a second subscription, as the current law limits the exception to one copy in any one format. If that consumer acts lawfully and purchases duplicate copies of the same content in order to use across his or her three devices, the introduction of a broader exception would be expected to decrease sales to rights holders. However, the number of people who routinely buy two or more copies of copyright content in any one format just because the law currently restricts them to one copy is expected to be small.

Indeed, according to a consumer survey undertaken by TNS in 2015, consumer behaviour around online copyright infringement is more likely to be influenced by practical factors rather than legal factors. For example, when asked what would encourage people to stop infringing, the cost of legal content was the most commonly cited factor (39%), closely followed by legal content being more readily available (38%) and being available as soon as it is released elsewhere (36%).[72] In comparison, approximately 25 per cent would be encouraged to stop infringing if it was clearer what is legal and what isn't, 23 per cent would be impacted if they thought they might be sued; and 21 per cent would be impacted by the threat of receiving a letter from their ISP.[73]

A number of stakeholders interviewed are concerned that the introduction of a broad exception around private copying may lead to perverse behaviours with respect to piracy. They are concerned that an exception would be interpreted by consumers as open license to access and/or distribute illegally sourced content. However, it is understood from the ALRC's report that an exception would only apply when the source of access is legal. For this reason, the concerns are identified here as a potential risk.

In any case, a number of studies show that the main drivers of piracy are accessibility and affordability (rather than copyright law). A consumer survey undertaken by choice in 2015, for example, showed that as consumer choice has been increasing, piracy rates have been falling.[74] Moreover, the TNS survey showed that only 12 per cent of people who consumed online content illegally had already owned that content in another format, reinforcing the argument that people are more likely to engage in piracy when their demand for legal content goes unsatisfied.[75]

Broader evidence on the cost of private copying exceptions to copyright owners is limited. Most of the literature is concerned with unauthorised copying or file sharing, which are not of concern to this analysis. However, it is

[70] Explanatory Memorandum, Copyright Amendment Bill 2006, (Cth) 6.

[71] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.233-5.

[72] TNS (2015), *Online Copyright Infringement Research,* prepared for the Department of Communications, p.6.

[73] *Ibid.*

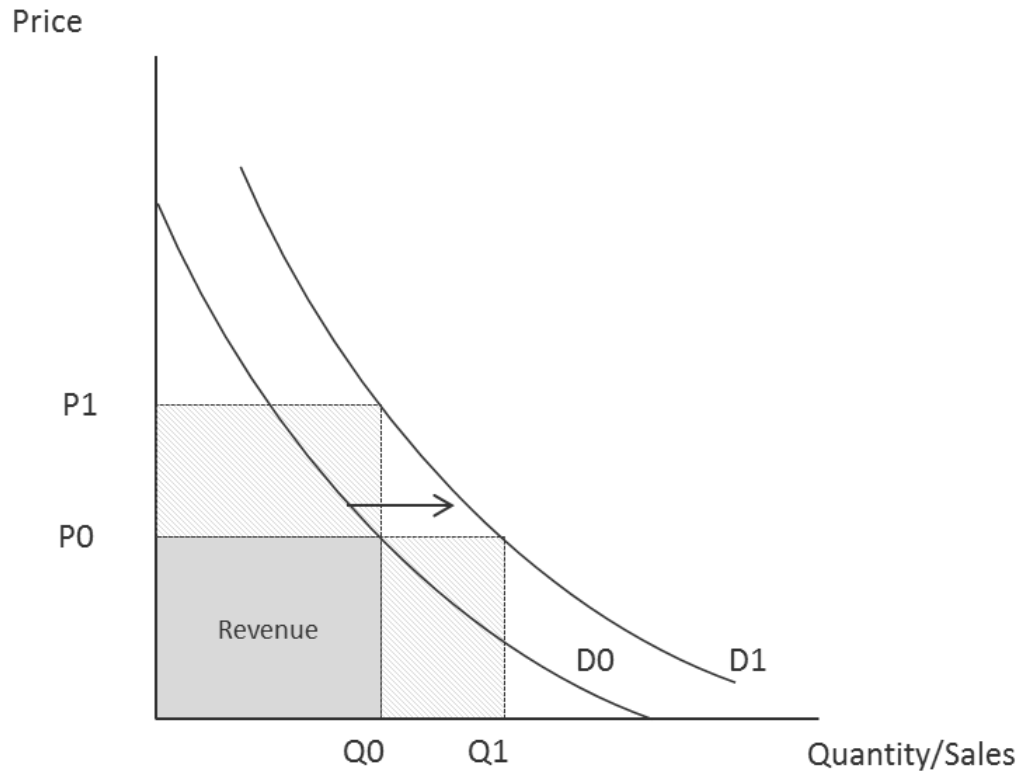
[74] Choice (August 2015), *Desperately Seeking Streaming,* Research update Digital consumers paying for content behaviours and attitudes, p.4

[75] *Ibid.,* p.62

important to note that 'private copying does not necessarily imply harm for rights holders'.[76] An exception can only lead to economic harm for rights holders, if prices do not reflect the values attached by consumers for the ability to make more copies. [77]

Rogers et al note that when a consumer purchases a CD or any product, it is assumed that they include in their valuation an estimate of the entire benefits derived from that product – e.g. listening to the CD now, next month or next year, listening to it with friends and family, and listening to it over multiple devices.[78] Economists summarise the valuations for all consumers of a specific product into a demand curve, as shown in Figure 4. At any point in time, the value of copyright exceptions will be reflected in the demand curve. If copyright exceptions are increased, the demand curve will shift to the right (D0 to D1), causing an increase in revenues, either through increased prices (P0 to P1) or sales (Q0 to Q1). In this way, the theory of indirect appropriability shows that copyright owners automatically extract value from changes in exceptions.[79]

Figure 4: Demand curve



Ultimately, the question of whether the prices for original content reflect the value attached by consumers of additional copying is an empirical one. The UK Intellectual Property Office commissioned independent research based on a comparison of prices of copies of different media sold under different usage restrictions. The conclusion based on this research was that 'pricing-in is possible, and is taking place'.[80]

[76] Langus G, D Neven and G Shier (2013), *Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU,* prepared by Charles River Associates for the European Commission, p.83

[77] *Ibid.*

[78] Rogers, M, Tomlin, J and Corrigan, R (2009), *The economic impact of consumer copyright exceptions: A literature review,* p.7.

[79] Liebowitz, S (1985), 'Copying and indirect appropriability: Photocopying in journals', *Journal of Political Economy,* (93)5.

[80] UK Intellectual Property Office (2012*),* 1mpact Assessment: Copyright Exception for Private Copying', available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308743/ia-exception-privatecopy.pdf.

Closer to home, it is possible to draw on a number of examples, which suggest that pricing-in is also taking place in an Australian context. The first example was the introduction by iTunes of DRM-free music for download in Australia in 2007. Meaning 'without digital rights management', DRM-free music can be copied freely for non-commercial personal use on any number of devices. When DRM-free songs were introduced they were priced 20 per cent more than their DRM counterparts, which could be copied to a more limited extent.[81] Hence, the price increase reflected the added value to consumers of removing restrictions on the number of copies they could make. Current differential pricing rates for e-books offered to libraries, as opposed to consumers, also illustrates the concept of pricing in.

Taken together, the evidence presented above suggests that the costs to rights holders through lost sales and licensing revenue from the new fair dealing exception would be outweighed by the benefits of such an exception for consumers. While it is not possible to quantify these impacts, we draw on one last illustrative example from Rogers et al. to demonstrate the theory (see Box 3 below).

Box 3: Illustrative example of why benefits to consumers of private copying exceptions are larger

Suppose there are 10,000 consumers of music who buy a recording per year. Let there be two formats and each recording costs £10 in either format. Currently, format shifting is prohibited hence a consumer has to buy two copies if they want to use both formats. This relatively high price of using both formats suggests relatively few consumers will buy an extra copy. Suppose only 100 consumers buy two copies of a recording. If a format-shifting exception is introduced, a first assessment of the economic damage is the loss of 100 sales (revenue loss = 100 x 10 = 1,000), although this needs further analysis. The gain to consumers is likely to be much more than this since many more will use format-shifting if there is a zero price. Let us assume 2,000 consumers now use format-shifting. The total benefit to consumers is the overall benefit to these consumers. This must be greater than the economic damage, since the original 100 consumers no longer pay and a further 1,900 customers now also benefit.

Source: Rogers M, J Tomlin, R Corrigan (2009), The economic impact of consumer copyright exceptions – A literature review, p.19

[81] PC World (2007), 'EMI to offer DRM-free music, but for a price', available at: http://www.pcworld.idg.com.au/article/180808/emi_offer_drm-free_music_price/.

3.3 Incidental or technical use

3.3.1 What is incidental and technical use

Incidental and technical uses are taken to refer to activities undertaken by internet intermediaries 'necessary for the effective and efficient functioning of the internet, networks and other technologies that facilitate lawful access to copyright material'.[82] Examples of activities most commonly associated with incidental and technical uses include providing network access; search and indexing; caching; and hosting. Examples of internet intermediaries include:

- Internet access providers – e.g. Telstra, Optus and iiNet
- Internet hosts – e.g. Google Docs and Gmail
- Search engines and portals e.g. – Google, Ask and Yahoo!
- E-commerce intermediaries – e.g. eBay, Amazon and App Stores like iTunes
- Internet payment systems – e.g. Visa and PayPal
- Participative networked platforms – e.g. YouTube, Facebook, LinkedIn.[83]

3.3.2 Current law

Currently, Australia has two kinds of exceptions written with the goal of protecting the activities of internet intermediaries referred to above. These are:

- Specific exceptions that apply to temporary reproductions in the digital environment. These are:
    - ss 43A and 111A—allowing for the temporary reproduction of a work and an adaptation of a work or an audiovisual item as part of the 'technical process of making or receiving a communication'
    - ss 43B and 111B—providing that copyright is not infringed by a temporary reproduction 'incidentally made as a necessary part of a technical process' of using a copy of the work or subject matter
    - s 116AB—allowing for the reproduction of copyright material on a system or network controlled or operated by, or for, a 'carriage service provider' in response to an action by a user to facilitate efficient access to that material by that user or other users
    - s 200AAA—allowing automated caching by computers operated by or on behalf of an educational institution
    - ss 47, 70 and 107 – allowing copying to make broadcasts technically easier and to enable the making of repeat or subsequent broadcasts.[84]
- Currently, the Safe Harbours provisions limit the remedies available against 'carriage service providers' for copyright infringement that takes place on their systems, which they do not control, initiate or direct.[85] A

[82] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.250.

[83] Weatherall, K (2011), *Internet Intermediaries and Copyright: An Australian Agenda for Reform,* prepared for discussion by the Australian Digital Alliance, p.7-8.

[84] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.250.

[85] *Ibid.*, p.260.

Draft Bill issued as an exposure draft in December 2015 would extend current safe harbour provisions to include search engines, universities and libraries.[86]

3.3.3 The problem

Some of the most common internet activities – including providing network access, searching, caching and hosting – involve copying copyright content. For example:

> *Google's search engine works by using automated 'web crawlers' that find and make copies of websites on the internet. These copies are then indexed and stored on its cache. When a user enters a search query, Google uses the cached version to judge if the page is a good match for the query, and displays a link to the cached site.*[87]

While such incidental copying of copyright material is vital to the functioning of the internet, the way reproduction rights are currently defined by the Copyright Act means that such copies potentially constitute copyright infringement. For example:

> *ss 43A and 111A only permit a 'temporary' reproduction, but copyright material may need to be stored in a cache for long periods of time. Similarly, it was submitted that the exceptions allow only a single reproduction, whereas the digital environment demands and that multiple reproductions are necessary.*[88]

A traffic light comparison of the risk of copyright infringement on common online activities in Australia relative to other countries (e.g. the EU and UK), shows that carriage service providers and education institutions have the most legal clarity as to what activities they can undertake.[89] Everyone else faces moderate to significant risk of copyright infringement depending on the type of activity undertaken. They accordingly require permission from copyright owners. Weatherall argues that the Copyright Act makes Australia 'a less conducive investment environment for internet intermediaries than competitor countries'.[90] For example, it was submitted that:

> *While copyright holders suggested that nothing in the Copyright Act has impeded search engines from providing services to Australians, it remains the case that the 'servers that these services run on are all located overseas, and mostly in the US, because they simply can't operate in Australia'*[91]*.*

3.3.4 The proposed policy options

1. **Status quo – Do nothing.** The incidental and technical use of copyright content by internet intermediaries is permissible in the context of the limited exceptions on temporary reproductions and the safe harbour scheme.
2. **New fair dealing - Introduction of an exception permitting the incidental and technical use** (e.g. providing network access, caching, search/indexing and hosting) of copyright material where it is fair, as determined by the following four factors:
    a. Purpose and character of use
    b. Nature of the copyright material

[86] Department of Communications and the Arts (2015), 'Exposure Draft – Copyright Amendment (Disability Access and Other Measures) Bill 2016', available at: https://www.communications.gov.au/have-your-say/updating-australias-copyright-laws.
[87] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.250.
[88] *Ibid.*, p.252-3.
[89] Weatherall, K (2011), *Internet Intermediaries and Copyright: An Australian Agenda for Reform,* prepared for discussion by the Australian Digital Alliance.
[90] *Ibid.*, p.8.
[91] *Ibid.,* .254.

c. Amount and substantiality of part used

d. The effect of the use on the market

Incidental and technical uses are many and varied. For the purposes of this impact assessment we focus on incidental and technical use for the purposes of searching, indexing and caching. The ALRC considers that:

> *Caching and indexing are transformative and that this would weigh heavily in favour of fair use. Other incidental or technical uses may not be transformative, but may nevertheless be fair for other reasons.*[92]

3.3.5 Impact analysis

3.3.5.1 Summary

A fair dealing exception for incidental or technical use is associated with possible benefits from an increase in certainty for Australian based internet intermediaries. There is a lack of evidence on the extent to which Copyright law is currently constraining the activities of internet intermediaries in Australia. However, the exception is associated with limited downsides and potentially large upsides (given the value of the internet).

It is generally accepted that the activities of internet intermediaries such as searching, indexing and caching) involve an act of reproduction, which is an exclusive right belonging to copyright owners. To the extent that Option 2 would provide more legal certainty for internet intermediaries operating in Australia, it would be expected to lead to a fall in the transaction costs required to manage the risk associated with these activities. For example, Lateral Economics found that without an exception, transaction costs associated with clearing permissions by search engines would exceed $150 billion per year.[93] While some of the assumptions underlying this estimate may be disputed, even with moderate costs per transaction, the large number of players involved in such activities could lead to very high transaction costs overall.

To the extent that an exception would reduce legal ambiguity, this would also be expected to lead to greater incentives for innovative uses of copyright works by internet intermediaries, with concomitant social and economic benefits. There is a lack of evidence on the extent to which Copyright law is currently constraining the activities of internet intermediaries operating in or intending to operate Australia. To date, arguments put forward in Australia have been largely qualitative. Quantitative evidence is scarce. Nevertheless, data gathered by the World Startup Report on the number and value of internet start-ups across 50 countries appears to show that Australia is relatively competitive.[94] However, this does not mean that Australian-based internet start-ups could not fare better under a more certain Copyright regime. Indeed, a number of studies of investor perceptions have shown that risk and uncertainty around regulation, and copyright law in particular, play an important part in investment decisions.[95]

Where an exception would increase the activities of Australian-based internet intermediaries, this would not be expected to negatively interfere with the markets for original content. Rather than being detrimental to rights holders, internet activities such as search and caching make website content more accessible and useful, attracting traffic to websites. In this way, the activities of internet intermediaries would be expected to have a positive impact on sales and thereby incentives to produce new works. However, fair dealing for incidental and technical use is a flexible concept. While defined here predominantly as searching, caching and indexing, its

[92] *Ibid.*, p.256.

[93] Lateral Economics (2012), *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions,* prepared for the Australian Digital Alliance, p.5.

[94] World Startup Wiki (2016), 'Internet Hall of Fame – Things you need to know about the world of internet companies', available at: http://www.worldstartupwiki.org/page/Internet_Hall_Of_Fame.

[95] See: Booz&Co (2012), *The Impact of U.S Internet Copyright Regulations on Early-Stage Investment,* prepared for Google Inc; Booz&Co (2012), *The Impact of E.U. Internet Copyright Regulations on Early-Stage Investment: A quantitative study,* prepared for Google Inc.; Fifth Era (2016), *The impact of internet regulation on investment.*

limits will be ultimately determined by the courts. For this reason we cannot rule out some costs to rights holders as a result of Option 2.

Table 5: Summary of costs and benefits of fair dealing exception for incidental or technical use

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Monopoly rents	Rights holders	Short run	The impact on the revenue of copyright holders from a fair dealing exception for incidental or technical use is more likely to be positive than negative.	-	?+
Incentives to create new works	Rights holders	Long Run	Given the above, incentives to create new works are likely to be either preserved or improved under the exception.	-	?+
Administration costs/ transaction costs	Rights holders Users	Short run	Greater legal certainty would be expected to lead to a fall in the transaction costs required by internet intermediaries to manage the risks associated with copyright.	-	?+
Enhanced use of existing works	Users	Short run	A growth in activities by Australian-based internet intermediaries would be associated with short-term benefits for consumers, businesses and government.	-	?+
Incentives to invest in new uses of works	Users	Long run	Greater incentives for investments in innovative uses of copyright works by existing and new internet firms.	-	?+
Economic and societal benefits	Economy/ Society	Both	In the long term, growth in internet firms would be expected to induce broader productivity benefits.	-	?+
Net expected impact	-	-	**Positive impact, not quantifiable**		**?+**

3.3.5.2 Benefits from reduced administration costs

It is generally accepted that internet activities such as searching, indexing and caching involve acts of reproduction, as the activities entail making technical copies of copyright content in order to facilitate its use. The act of reproduction of a copyrighted work is covered by an exclusive right that belongs to the rights holder. Therefore, internet intermediaries currently providing services from Australia are currently (knowingly or unknowingly) potentially liable for copyright infringement.

To fully protect themselves against this liability, internet intermediaries would have to expend large transaction costs to obtain the required permissions from all rights holders involved. This is neither realistic nor practical. An argument made even as early as 2000 by the *Review of Intellectual Property Legislation under Competition Principles Agreement*.

> *The Committee recognises that, at least at present, caching appears to be of considerable significance to the efficiency of the Internet; and that the transaction costs to secure licenses to cache could be prohibitive for ISPs. As a result, Government policy should help ensure that an efficiency-enhancing activity is not prohibited.*[96]

Considering the number of websites on the internet and the continual stream of new additions, the transaction costs associated with the reproduction of works relating to searching, indexing and caching would be very high. Lateral Economics found that without a copyright exception, transaction costs associated with clearing permissions by search engines would exceed $150 billion per year (Box 4).[97] While some of the assumptions underlying this estimate may be disputed, it is important to note that with 'large numbers of content publishers and intermediaries involved in such transaction activities, even transactions with modest costs involved lead to very high transaction costs'.[98]

Therefore, to the extent that the proposed exception would provide more legal certainty for internet intermediaries operating in or intending to operate in Australia, it may lead to a fall in the transaction costs required to manage the risk associated with copyright infringement.

Box 4: Lateral Economics estimates for the transaction costs related to search engines

If the 170 search engines listed at << www.philb.com/webse.htm >> transacted with all 3.8 million Australian domain name registrants (proxy for online content publishers), it would involve 645 million transactions. If each transaction took 9.5 hours, then, at average weekly wages of $26 per hour, the transaction costs would exceed $150 billion a year. And that is just for the Australian domain names.

Source: Lateral Economics (2012), p.29.

3.3.5.3 Economic and societal benefits

A report by Deloitte Access Economics estimated that the internet contributed $79 billion (or 5.1%) to Australia's GDP in 2013-14.[99] According to the report, the internet is driving benefits across all sectors of society:

[96] Intellectual Property and Competition Review Committee (2000), *Review of intellectual property legislation under the Competition Principles Agreement,* p.113.

[97] Lateral Economics (2012), *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions,* prepared for the Australian Digital Alliance, p.29.

[98] *Ibid.*

[99] Deloitte Access Economics (2015), *The Connected Continent II: How digital technology is transforming the Australian economy,* prepared for Google Australia, p.1.

- For **consumers**, the internet's value is discussed in terms of search, variety, convenience and recreation. The ability to search for information on the internet alone was estimated to be worth around $8.4 billion per annum.[100]

- The internet is transforming **businesses** by providing future drivers of growth as well as contributing to improved employee flexibility and engagement.

- The internet is also driving efficiencies and better outcomes in **government services**, particularly in administration and safety, education, and health care and social services.

- At the macroeconomic level, the **productivity impacts** of the internet are driving improvements in Australia's living standards. This has occurred through a number of mechanisms including 'increased competition, reduced prices, enabling efficiencies within businesses, and driving innovation for better goods and services'.[101]

These are benefits of the internet rather than a fair dealing exception for incidental or technical use. However, to the extent that an exception would decrease transaction costs and spur the activities of internet intermediaries, this may lead to an increase in these benefits.

There is a lack of evidence on the extent to which Copyright law is currently constraining the activities of internet intermediaries in Australia. Thus far, arguments put forward have been largely qualitative. On the one hand, those supporting the status quo, argue that the Act does not impede search engines such as Google providing services to Australians. Conversely, proponents of the ALRC's recommendations, argue that there is a difference between overseas-based and Australian-based search engines, with the former relying on more flexible copyright arrangements in their host countries to provide services in Australia. The more pertinent question, therefore, appears to be to what extent the status quo is impacting on Australian-based intermediaries.

Based on evidence of around 500 internet service providers (ISPs) in Australia in June 2010, the report by Lateral Economics estimated that there were around 1,000 internet intermediaries providing caching, searching and hosting services in Australia.[102] Data gathered by the World Startup Report on the number and value of internet start-ups across 50 countries appears to show that Australia is relatively competitive. In 2013, Australia had in excess of 1,000 internet firms[103], five of which were valued over $1 billion (Table 6). Looking at the biggest internet firms by value, Australia's search engine REA (realestate.com.au) was ranked eighth, with a net worth of $6.6 billion.[104] While REA does not trade on copyright content, the data shows that relative to the rest of the world and, especially given its small market size, Australian internet start-ups appear to be quite competitive.

Table 6: Highest valued internet company by country - ranked

Country	$ Billion	Country	$ Million
USA	$410 B	Malaysia	$800 M
China	$200 B	Taiwan	$696 M
South Africa	$46 B	Belgium	$484 M
Korea	$28 B	Ukraine	$303 M
Japan	$28 B	Netherlands	$284 M

[100] *Ibid.*, p.35.

[101] *Ibid.,* p.2.

[102] Lateral Economics (2012), *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions,* prepared for the Australian Digital Alliance, p.27.

[103] World Startup Wiki (2016), 'Internet Hall of Fame – Things you need to know about the world of internet companies', available at: http://www.worldstartupwiki.org/page/Internet_Hall_Of_Fame.

[104] Ibid

Country	$ Billion	Country	$ Million
Russia	$15.8 B	Turkey	$225 M
Israel	$13.6 B	Thailand	$157 M
Australia	$6.6 B	Lithuania	$150 M
Brazil	$6.4 B	Colombia	$109 M
Canada	$6.3 B	Kenya	$80 M
United Kingdom	$6.1 B	Indonesia	$80 M
Sweden	$6 B	Latvia	$60 M
Germany	$5.3 B	Philippines	$55 M
Finland	$5 B	Chile	$40 M
New Zealand	$4.7 B	Costa Rica	$20 M
Ireland	$4.6 B	Iran	$15 M
France	$3.5 B	Kuwait	$5 M
Italy	$2.5 B	Peru	$4 M
India	$2.5 B	Algeria	$3 M
Estonia	$2.5 B	Kosovo	$1.8 M
Spain	$2.3 B	Ethiopia	$1.7 M
Czech Republic	$1.4 B		
Denmark	$1.2 B		
Hungary	$1.1 B		
Vietnam	$1 B		
Slovenia	$1 B		
Singapore	$1 B		
Poland	$1 B		
Argentina	$1 B		

Source: World Startup Wiki (2016), 'Internet Hall of Fame – Things you need to know about the world of internet companies'

This does not mean that Australian-based internet start-ups could not fare better under a more certain Copyright regime. Two studies by Booz&Co have explored the impact of changes to copyright regulations in the US and EU on early stage investment in internet or digital content intermediaries. Based on a survey of angel investors and interviews with venture capitalists, Booz&Co found that risk plays an important part in investment decisions. For example, the studies found that increasing liability for content providers would have a greater negative impact on early-stage investment than would a weak economy and an increased competitive environment combined. Moreover, clarifying copyright regulations to allow websites to resolve legal disputes quickly would expand the pool of interested investors by 111 per cent in the US and 19 per cent in Europe.[105] These findings apply equally to an Australian setting. For example, a recent report on the impact of internet regulation on investment, found that 90 per cent of Australian investors believe that the legal environment has a negative impact on their investing activities.[106]

Internet firms require capital to fuel their growth. To the extent that an exception would reduce ambiguity around the legal position of Australian-based internet intermediaries, this would be expected to increase both investment in and the growth of such firms and in new uses of copyright content by these firms, with concomitant public benefits. However, to place a value around these impacts is not possible, as Copyright law is one of many factors in the investment decisions and business decisions of internet intermediaries and their investors.

[105] Booz&Co (2012), *The Impact of U.S Internet Copyright Regulations on Early-Stage Investment,* prepared for Google Inc; Booz&Co (2012), *The Impact of E.U. Internet Copyright Regulations on Early-Stage Investment: A quantitative study,* prepared for Google Inc.

[106] Fifth Era (2016), *The impact of internet regulation on investment*, p.36.

3.3.5.4 Costs in foregone revenue to rights holders and incentives to produce new works

The activities of internet intermediaries such as searching or caching do not generally interfere with the markets for original content (or incentives to create new works). In both cases, search engines reproduce copyright content, 'but only do so in the course of enabling and facilitating its discovery and delivery'[107]. In this context, the use of copyright content by internet intermediaries may be seen as transformative. Where the original work is supplanted or superseded, it is assumed that incidental or technical uses would count against fair dealing. Moreover, where web site creators have concerns, they are able to block unwanted caching of their websites.

Rather than being detrimental to rights holders, the impact of search and caching would be expected to have a positive impact on sales and thereby incentives to produce new works. Much of the content placed online is in the form of 'free-to-use' website information put there for promotional purposes or to communicate with clients. Other websites offer information for access and download on a paid basis, often behind 'paywalls'. Either way, search and caching makes content more accessible and useful, and so should increase traffic to these websites, including paying customers.[108]

A good example of how broader exceptions can benefit both users and copyright owners is the Google Books service. Google Books is much like a web search that searches the full text of books and magazines that Google has scanned and stored in its digital database. For books out of copyright, or where the publisher has given permission, the search returns 'full view' copies of books. For other books, Google will show 'snippets' - two to three lines of text surrounding the queried search term. In 2013, the US Authors Guild brought an action against Google's Book Service for copyright infringement. Finding in Google's favour, the Judge highlighted a number of benefits of Google Books including that it helps authors and publishers gain audience and income:

> *By helping readers and researchers identify books, Google Books benefits authors and publishers. When a user clicks on a search result and is directed to an "About the Book" page, the page will offer links to sellers of the book and/or libraries listing the book as part of their collections. The About the Book page for Ball Four, for example, provides links to Amazon.com, Barnes&Noble.com, Books-A-Million, and IndieBound. A user could simply click on any of these links to be directed to a website where she could purchase the book. Hence, Google Books will generate new audiences and create new sources of income.*[109]

While this cannot be quantified, the impact on the revenue of copyright holders from a fair dealing exception for incidental or technical use is more likely to be positive than negative.

[107] Lateral Economics (2012), *Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions,* prepared for the Australian Digital Alliance, p.12.

[108] *Ibid.*, p.33.

[109] *Authors Guild, Inc. v. Google Inc., 05 CIV. 8136 DC, 2013 WL 6017130, (S.D.N.Y. Nov. 14, 2013).*

3.4 Data and text mining

'Non-consumptive use' is defined by the ALRC as the 'use of copyright material that does not trade on the underlying and expressive purpose of the copyright material'.[110] Both *incidental or technical use* and *data and text mining* are identified by the ALRC as examples of 'non-consumptive use' and for this reason are considered under the same new fair dealing exception.

3.4.1 What is data and text mining

Data and text mining (DTM) refers to 'automated analytical techniques that work by copying existing electronic information, for instance articles in scientific journals and other works, and analysing the data they contain for patterns, trends and other useful information'.[111]

Researchers in several sectors – including medicine, astronomy, genetics, meteorology and history – are making increasing use of DTM. For example, a medical researcher into obesity may cross-examine vast quantities of medical and lifestyle data from patient records and investigations across many countries. A political historian can analyse the incidence and meaning of 'digital technologies' as used by the media in first half of the 19th century, compared to the second half.

However, the benefits of DTM extend beyond scientific researchers to include heritage institutions, technology firms, data management companies, pharmaceuticals, newspapers, healthcare providers, advertising agencies and many more.[112] For example, retailers can combine their knowledge of shoppers' spending patterns with analysis of demographic data from the census such as their age, gender and income. DTM is also amenable for more speculative purposes, such as applying knowledge from one field (e.g. animal biology) to another (e.g. manufacturing design).

3.4.2 Current law

According to the ALRC, there is currently no provision in the Copyright Act that covers DTM. [113]

3.4.3 The problem

DTM extracts data from digital content to establish new facts and relationships, building new findings from pre-existing works. According to the ALRC, 'where the data or text mining processes involve the copying, digitisation or reformatting of copyright material without permission, it may give rise to copyright infringement'.[114]

There is currently no exception in the Copyright Act that covers DTM. Nor is it clear whether such activities would incidentally fall under other provisions of the Copyright Act. For example, the reach of the research/study exception only extends to a 'reasonable portion' of the work concerned, while DTM often needs to make copies of entire datasets.[115] Similarly, the ALRC considers it unlikely that DTM would incidentally fall under Section 43B, relating to temporary reproduction of works as part of a technical process.[116]

Copyright was not intended to prevent use of ideas or facts. As such, the ALRC 'considers that the unlicensed use

[110] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.258.
[111] ALRC quoting: UK Government Intellectual Property Office, Consultation on Copyright (2011), p.80.
[112] European Commission (2014), *Standardisation in the area of innovation and technological development, notably in the field of text and data mining*, p.3.
[113] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.262.
[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*

of copyright material for non-expressive purposes, such as data and text mining, should be considered under the fair use exception'.[117]

3.4.4 The proposed policy options

1. **Status quo – Do nothing**. Permission is required from rights holders where DTM processes involve the copying, digitisation or reformatting of copyright material.
2. **New fair dealing exception**– Use of copyright works for DTM would be considered under **the fair dealing exception for incidental or technical use.**[118]

3.4.5 Impact analysis

3.4.5.1 Summary

A fair dealing exception for data and text mining (DTM) would have an ambiguous impact. In the short run the exception would be expected to lead to a small reduction in transaction costs and commensurate increase in the level of DTM with associated economic and social benefits. However there is some concern that to the extent that rights holders may need to make investments in order to enable DTM an exception may see a fall in DTM in the long run.

Due to the absence of publicly available data on the incidence of DTM in Australia, it has not been possible to quantify the costs and benefits from a new fair dealing exception. While publishers report a low incidence of DTM requests, time series data on the number of DTM publications and citations, shows a growing interest in the tool both here and abroad. Accompanying this growth has been an increasing degree of standardisation in DTM licenses and tools at low (or no) additional fees, especially for non-commercial research. While these measures are likely to reduce transaction costs for users significantly, it has yet to be seen how and to what extent they will benefit DTM users in Australia. Nevertheless, it is unlikely that all constraints would be removed. In an industry where the top 100 publishers (1-2% of all publishers) own about 70 per cent of all journals globally, for example, it would take only one publisher to undermine the integrity of a mining project.

Therefore, where use of copyright content for DTM is considered fair, we would expect a small reduction in transaction costs from users no longer required to seek permissions from publishers in order to mine their content. It would also prevent possible 'hold-up' situations in which DTM users have searched for the relevant rights holders only to have their request for permission denied.

A small reduction in transaction costs would be expected to lead to a commensurate increase in the level of DTM in Australia. This would be expected to have a positive short term effect for researchers, as the use of analytical techniques on large data sets can facilitate research. It would also be expected to have equivalently sized economic and societal benefits including higher quality research, productivity gains and innovative new service development. Moreover, given that over 70 per cent of research in the higher education sector is funded by government, DTM may maximise the public's return from these investments.

The revenue streams of rights holders (and their incentives to produce new works) would not be expected to be significantly impacted by an exception for a number of reasons:

- The business models of both publishers and individual authors are not based on providing DTM as the main source of revenue

[117] *Ibid.*, p.264.

[118] While the ALRC recommended DTM as an illustrative purpose under fair use only, a fair dealing exception on incidental or technical use may extend to DTM activities, and therefore is considered also.

- DTM does not generally lead to derivative information products that would be considered to 'supersede' or 'supplant' the original work (although there is a risk that it could)[119]
- Rights holders would not be expected to suffer from fewer subscriptions to their content relative to the status quo.

There is some concern that should an exception lead to a significant and unexpected increase in DTM activity, this may require additional investments in server capacity, bandwidth and monitoring by publishers. To the extent that DTM is covered by an exception and is therefore unremunerated, rights holders may not have sufficient incentives to undertake these investments, which may have a negative impact on DTM in the long run. However, very little evidence on this exists domestically. This cost is therefore raised as risk, with little ability to confirm its likelihood or severity.

[119] For the purposes of this analysis, it is assumed that where DTM creates substitutes of the original work, use would be considered less fair.

Table 7: Summary of costs and benefits of fair dealing exception for data and text mining

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Monopoly rents	Rights holders	Short run	Some concern that a significant increase in DTM due to the exception may be harmful for rights holders by inducing more traffic on servers and creating possible technical issues. Due to a lack of evidence, this impact cannot be validated.	-	?
Incentives to create new works	Rights holders	Long Run	Rightsholders may no longer have the incentives to invest to facilitate DTM. Due to a lack of evidence, this impact cannot be validated.	-	?
Administration costs/ transaction costs	Rights holders Users	Short run	• Expect a small reduction in transaction costs from some users no longer required to seek permissions to mine content. • Prevent possible hold-up situations in which DTM users have searched for the rights holders only to have their request for permission turned down	-	?+
Incentives to invest in new uses of works	Users	Long run	To the extent that rights holders may need to make investments in order to enable DTM, DTM may fall in the long run if researchers encounter technical issues. Due to a lack of evidence, this impact cannot be validated.	-	?
Enhanced use of existing works	Users	Short run	In the short run, a reduction in transaction costs would be expected to increase the level of DTM. This is associated with a positive effect for researchers, as the use of analytical techniques on large data sets can facilitate research.		?+

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Economic and societal benefits	Economy/ Society	Both	An increase in DTM is associated with broader benefits including higher quality research, productivity gains, and innovative new service development.	-	?+
Net expected impact	-	-	**Ambiguous**		**?**

3.4.5.2 Benefits from reduced administration costs

As briefly discussed in Section 3.4.1 , the group most likely to undertake DTM are researchers. DTM requires researchers to first obtain access to pre-existing works. Generally, in the case of academic and scientific publications, obtaining access involves the acquisition of a license, unless the material is an Open Access work.

It is generally accepted that DTM involves an act of reproduction. Therefore, once access has been lawfully obtained, researchers and publishers must also agree on DTM terms. The current market for DTM is relatively nascent in Australia. For this reason, requests for permissions tend to be considered on a case-by-case basis, and therein lay the transaction costs.

DTM involves a large number of works and the rights of these works can be dispersed over numerous publishers and/or authors. Box 5 presents a case study by Wellcome Trust on the possible magnitude of such transaction costs from a single DTM project. However, even when transaction costs are not high on a per transaction basis, they can still be prohibitively large relative to the value-in-use of the particular collection of works. This may lead to the 'hold-up' problem. Search costs are an investment that DTM users must incur before they can request permission from the relevant rights holder. The hold-up problem typically occurs when rights holders refuse the user's request for permission or ask for large licensing fees, which, when added to these search costs, exceed the value-in-use of the particular collection of works.[120] In some cases, this could be expected to lead to an underinvestment in DTM.

Box 5: Wellcome Trust case study on transaction costs in DTM projects

Wellcome Trust set up an experiment in which it simulated a mining project based on the title keyword "malaria" to be searched among the articles in the UK PubMed Central repository. It found around 3,000 such articles, 62% of which could be mined without the prior authorisation of rightholders. For the remaining 38%, permissions had to be sought. These 38% represented about 1,100 copyrighted articles, which were published in 187 journals and by 75 different publishers. Assuming that one hour would be necessary to obtain a license for each journal (this estimate is rather conservative, given that negotiation will also usually take place), that would add up to 187 hours on aggregate. Assuming that the researcher conducting this project had a salary of £30,000, Wellcome Trust found that the transaction costs associated to the project would be equal to £3,399. When Wellcome Trust took a more realistic example in which they looked for the term "malaria" not only in the title but in the entire text of the articles in UK Pubmed central repository, they found (using similar computations) that transaction costs increased to £18,630.

[120] Langus, G, Neven, D and Shier, G (2013), *Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU,* prepared for the European Commission, p.68-9.

Source: Wellcome Trust (2012), Box 2, p.10.

Publicly available data on the incidence of DTM in Australia is scarce. For their part, publishers are reporting that there is little demand for DTM in Australia, suggesting the absence of a market is not an issue.[121] This is consistent with evidence presented to a UK review on DTM in 2014.[122] An earlier study by Smit and van der Graff (2011), reported that while 77 per cent of surveyed publishers received DTM requests, 38 per cent of them received less than five requests per year, and only 21 per cent reported having more than 10 requests per year.[123]

However, the fact that publishers are reporting a low incidence of requests does not necessarily mean that demand for DTM in Australia is low overall. Researchers may be undertaking DTM without permission or refraining from engaging in the activity due to high transaction costs. This would lead to low requests despite higher demand. Indeed, data assembled by Tsai from the Social Science Citation Index (SSCI) covering almost 6,000 academic journals over two decades, shows rapid growth in the number of DTM related publications and citation counts (Figure 5).[124] This aligns with the results of a more recent study undertaken by the EU Commission using Google Scholar search results.[125]

[121] Association of Learned Professional Society Publishers (2012), ALRC submission.

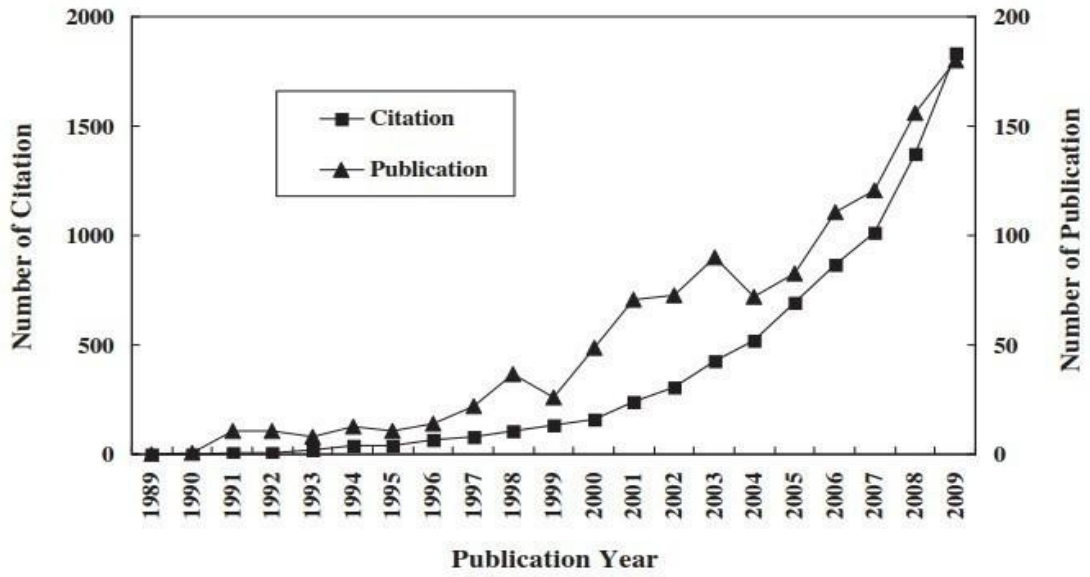
[122] European Commission (2014), *Standardisation in the area of innovation and technological development, notably in the field of text and data mining*, p.15.

[123] Smit, E and van der Graaf, M (2011), *Journal Article Mining: A research study into practices, policies, plans … and promises*, Amsterdam: BV Bronfonteyn.

[124] Tsai, H (2012), 'Global data mining: An empirical study of current trends, future forecasts and technology diffusions', *Expert Systems with Applications* 39: 8172-81.

[125] European Commission (2014), *Standardisation in the area of innovation and technological development, notably in the field of text and data mining*, p.70-6.

Figure 5: DTM related publications and citation counts – 1989 to 2009



Source: Tsai (2012), p.8174

Tsai also provides data on the share of DTM-related, academic publications in various countries (Table 8). Ranked sixth overall, the data suggests that Australia accounts for a relatively large share of DTM publications and citations, especially on a per capita basis.

Table 8: Country share of publications with title header "data mining" and citation counts, 1989 to 2009

Rank (in publications)	Country	Number of publications	% Share of publications	Citations	Citations per publication
1	US	551	47	4781	9
2	Great Britain	131	11	1159	9
3	Taiwan	104	9	436	4
4	Canada	67	6	547	8
5	China	54	5	187	3
6	Australia	47	4	350	7
7	Germany	32	3	177	6
8	South Korea	32	3	232	7
9	Spain	27	2	79	3
10	Netherlands	21	2	135	6

Source: Tsai (2012), p.8175

While the Australian DTM market is new, it is growing. Accompanying growth in DTM has been an increasing degree of standardisation in DTM licenses and tools at no (or low) additional fees, in particular in the context of non-commercial scientific research (Box 6). This has important implications for transaction costs, which tend to fall when users have access to standard licenses.

Box 6: Recent development in DTM licenses and tools

Publishers worldwide have been developing specific licenses and tools to facilitate DTM:

- **Science, technology and medical (STM) publishers** have issued a declaration setting out their commitment to facilitate DTM for non-commercial, scientific research. The declaration has so far been signed by 16 publishers who represent approximately 50% of the world's literature in STM, social science and humanities.

- **Crossref** – the industry content identification and linking platform has developed 'Prospect,' designed especially to facilitate DTM by non-commercial researchers and their institutions. Researchers will be able to select publishers of interest, accept their license terms and conditions, and then receive a unique Client API token which facilitates access to the publishers' content.

- **Copyright Clearance Center (CCC)** – a US based licensing and rights broker piloted a process to make it easier for commercial researchers to gain quick access to full-text content for mining in a centralised manner with a common interface. CCC estimates that if the 5 publishers in the pilot were each to negotiate DTM rights, feeds and data standards with corporate users it would require 25 negotiations, with each negotiation typically taking 2-4 months. The 'hub and spoke' product reduces the time involved in the process.

- **PLSclear** is a web service to simplify the process of making and managing requests to access publisher content for DTM, working as an online clearing-house for research requests.

Source: European Commission (2014), p.16-17

It has yet to be seen how and to what extent these licenses and tools will benefit DTM users in Australia. However, it would not be expected that transaction costs would be removed in their entirety. While the majority of publishers may move towards more standardised licenses, it would only take one publisher to undermine the integrity of a mining project.[126] For example, UK-based National Centre for Text Mining highlights the experience of JISC Collections, which had sought to introduce a clause in its model license to permit DTM activities. According to JISC Collections:

> *Of 17 journal license agreements negotiated with major journal publishers, 6 publishers accepted the clause, 6 rejected the clause in its entirety and 5 made significant amendments to the clause.*[127]

This is particularly pertinent in an industry that is characterised by only a few major players. Ware and Mabe (2015) estimate that there are between 5,000 and 10,000 journal publishers worldwide.[128] They report that the 'distribution of journals by publisher is highly skewed', with the top 100 publishers (representing 1-2% of all publishers) owning about 70 per cent of all journals.[129] Given that DTM projects rely on large amounts of existing research, this appears to place some market power in the hands of relatively few publishers.

Therefore, where use of copyright content for DTM is considered fair, we would expect a small reduction in transaction costs from users no longer required to seek permissions from publishers in order to mine their content. It would also prevent possible hold-up situations in which DTM users have searched for the relevant rights holders only to have their request for permission turned down.

3.4.5.3 Economic and societal benefits

[126] Universities Australia (2012), ALRC submission.

[127] European Commission (2014), *Standardisation in the area of innovation and technological development, notably in the field of text and data mining,* p.19.

[128] Ware, M and Mabe, M (2015), *The STM Report – An overview of scientific and scholarly journal publishing*, p.45.

[129] *Ibid.*

Research funding in Australian higher education was $3.7 billion in 2014.[130] The main research output of this funding is publications. In 2013, Australian universities published over 45,000 journal articles, more than double the volume of such articles prepared in the previous 10 years.[131] The total value of this stock of knowledge has been estimated at $160 billion (equivalent to almost 10 per cent of GDP in 2014).[132] It follows that any tool or measure that can derive additional value from these research outputs, has potentially large economic and societal benefits. For example, a report by the UK Joint Information System Committee found that the benefits of DTM include:

> *… increased researcher efficiency unlocking hidden information and developing new knowledge exploring new horizons improved research and evidence base and improving the research process and quality. Broader economic and societal benefits include cost savings and productivity gains, innovative new service development, new business models and new medical treatments.*[133]

While these are benefits of DTM rather than the fair dealing exception, to the extent that the exception removes barriers to these uses when they are considered fair, greater public benefits may be realised. Given that over 70 per cent of research in the higher education sector is funded by taxpayers' money, an argument could be made that DTM maximises the public's return from its investments.[134]

The argument has also been made that 'access to DTM increases the productivity of research because it increases research output with unchanged labour inputs'.[135] As it is not possible to quantify these benefits with any rigour, Box 7 replicates some analysis undertaken in the UK context in order to demonstrate the potential magnitude of these gains.[136] Given a number of factors including the relatively nascent nature of DTM in Australia, growing standardisation of licenses, and the fact that not all academics will have use for DTM, the benefit would not be expected to be as large as this. Nevertheless to the extent that a fall in transaction costs increases the rate of DTM, some broader socio economic benefits would be expected.

Box 7: Productivity gain as a result of an exception

According to the most recent data from the Department of Education, in 2015 there were 15,000 researchers (FTE) in the higher education sector.[137] Using data from the Grattan Institute (based on University Enterprise Agreements), we calculate the median salary for Australian academics fell within the range of $106,000 and $141,000 in 2014 (2016 prices), which translates to between $61 and $82 per hour.[138] To the best of our knowledge, there are no empirical estimates on the impact of DTM on research productivity. For this reason, the UK study assumed that DTM increases the volume of data accessible to researchers and thereby increases the productivity of research by 2 per cent.[139] If we use this central but untested assumption, a 2 per cent increase in productivity corresponds to 45 minutes per academic per week and 506,000 working hours saved in total per

[130] Department of Education and Training (2015), '2014 Research Income and Publications Data by Sub Category', available at: https://docs.education.gov.au/node/39111.

[131] Deloitte Access Economics (2015), *The importance of universities to Australia's prosperity*, prepared for Universities Australia, p.81.

[132] *Ibid.*, p.30.

[133] Joint Information System Committee (2012), *The Value and Benefits of Text Mining to UK Further and Higher Education.*

[134] Department of Education and Training (2015), '2014 Research Income and Publications Data by Sub Category', available at: https://docs.education.gov.au/node/39111.

[135] European Commission (2014), *Standardisation in the area of innovation and technological development, notably in the field of text and data mining*, p.33.

[136] Joint Information System Committee (2012), *The Value and Benefits of Text Mining to UK Further and Higher Education.*

[137] Department of Education and Training (2015), 'Selected Higher Education Statistics - 2015 Staff data', available at: https://www.education.gov.au/selected-higher-education-statistics-2015-staff-data.

[138] Norton, A (2014), *Mapping Australian higher education,* report by the Grattan Institute, p.36.

[139] Joint Information System Committee (2012), *The Value and Benefits of Text Mining to UK Further and Higher Education.*

year. This would imply productivity gains between $31 million and $41 million in researcher working time per year.

3.4.5.4 Costs in foregone revenue to rights holders and incentives to produce new works

There is currently no Australian data on the number of licenses granted and associated revenue collected per year specifically for DTM. Nevertheless, anecdotal evidence suggests that requests for DTM licenses per provider are small. Moreover, DTM access is usually negotiated as part of the license renewal cycle, rather than as separate access. That is, requestors are most often existing customers who hold a corporate or institutional license and who now wish to have the flexibility to undertake DTM. In the context of non-commercial research, tools such as Crossref (Box 6) already allow access to subscribed content sets for DTM at no additional cost.[140] Given that the current business models of publishers do not appear to be based on providing DTM as the main source of revenue, rights holders are not likely to be significantly harmed by an exception.

DTM should typically not be a concern for publishers or creators (or impact on incentives to create content), as it does not generally lead to 'derivative information products' that would 'supersede' or 'supplant' the original work. Rather DTM, especially for research purposes, leads to the discovery of new insights, and in this sense is transformative. For the purposes of this analysis it is assumed that where DTM creates substitutes of the original work, use would be considered less fair.

It is also assumed that an exception would only cover DTM activities carried out on content that has been lawfully accessed. For this reason, publishers and authors would not be expected to suffer from fewer subscriptions to their content relative to the status quo.

3.4.5.5 Other costs to rights holders

There is some concern in the industry that, should there be a significant increase in DTM activity due to an exception, publishers may need to act to manage this traffic on their servers. In the context of an EU review on DTM, for example, Reed Elsevier submitted that '20 researchers crawling their site would significantly reduce its functionality for others'.[141] Thomson Reuters supported this view, arguing that, 'should the volume of DTM requests rise substantially, it would have to introduce additional server capacity, bandwidth and monitoring to deliver an online on demand text mining service'.[142] A few responses on this topic from our consultations suggests similar concerns from publishers operating in Australia.

Researchers submitting to the same EU study, however, submitted that these concerns are largely unwarranted. For example, the Association of Europe Research Libraries noted that 'publishing infrastructures are already ably dealing with heavy demand from services such as Reddit'.[143] Moreover, they argued that publishers have a number of techniques for managing DTM related traffic including appropriate use of caching; having effective monitoring techniques, using load balancers, and blocking access to robots that exceed a certain rate or threshold.[144]

There is insufficient information available to determine whether or not this constitutes a large risk in an Australian context. Nevertheless, to the extent that DTM is covered by the exception, rights holders may not have

[140] It is unclear how prevalent these tools are currently in Australia.

[141] European Commission (2014), *Standardisation in the area of innovation and technological development, notably in the field of text and data mining*, p.21.

[142] *Ibid.*

[143] *Ibid.*

[144] *Ibid.*

sufficient incentives to continue current investments needed to facilitate DTM. This would be expected to have a negative impact on DTM in the long run.

3.5 Education

3.5.1 Current law

The Copyright Act already recognises the public interest in educational uses of copyright materials by way of exceptions to the exclusive rights of owners and statutory licenses.

3.5.1.1 Exceptions

- The Copyright Act contains a number of provisions specific to educational institutions:
  - Section 28 - performing material, including playing music and films, in class
  - Section 44 – including short extracts from material in a collection
  - Sections 135ZG, 135ZMB – copying insubstantial portions
  - Section 200 – use of works and broadcasts for education (copying works by hand in class, for example, on a blackboard; examination copying; making a record of a sound broadcast)
  - Section 200AAA – proxy web caching by educational institutions.

There is also a general open-ended flexible exception (Section 200AB), which was inserted into the Copyright Act in 2006 'to enable copyright material to be used for certain socially useful purposes'.[145] The provision applies to libraries, archives and educational institutions, as well as people and institutions assisting those with a disability. It was intended to be a 'flexible' exception that operates like fair use.[146] However, the exception in Section 200 AB can only be used in a special case, when no other exceptions in the Copyright Act apply.

3.5.1.2 Statutory licenses

- Part VA of the Copyright Act permits educational institutions to copy radio and television programs from free-to-air radio and television broadcasts. Screenrights is the declared collecting society that acts for the copyright owners of those works and administers the Part VA statutory license. In 2014, schools paid around $22 million in license fees to Screenrights under the Part VA license.[147] Universities pay around $5 million per annum under the Part VA license.[148]
- Part VB of the Copyright Act permits education institutions to make multiple copies of literary, dramatic, musical and artistic works for educational purposes. Copyright Agency Limited (CAL) is the declared collecting society that acts for the copyright owners of those works and administers the Part VB statutory license. In 2015, schools paid around $62 million in license fees to the Copyright Agency under the Part VB license.[149] Universities pay around $30 million per annum under the Part VB license.[150]

3.5.2 The problem

Most of the problems raised by the ALRC with respect to the current arrangements relate to what gets counted and paid for under statutory licenses. The main advantage of statutory licenses is that they provide education institutions with considerable flexibility to use copyright material without the transaction costs associated with obtaining permission, provided they pay equitable remuneration to the collecting society for the use. Remuneration is determined by conducting a sample of educational institutions to determine the material being

[145] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.269.

[146] Australian Digital Alliance and the Australian Libraries Copyright Committee (2009), *A User's Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions,* p.4.

[147] Provided by the COAG Education Council.

[148] Provided by Universities Australia.

[149] Provided by the COAG Education Council.

[150] Provided by Universities Australia.

copied. In practice this has meant that uses that nobody else is paying for are being remunerated for by schools and universities under the licenses.[151]

This view has been heavily criticised by the statutory collecting societies – the Copyright Agency and Screenrights - who argue that education institutions pay a flat rate for all content they use in reliance on the statutory licenses, which 'does not vary according to actual use of content during the period of the agreement'.[152] However, the ALRC does not consider this to be a convincing argument stating that:

> *The objection that some uses are 'zero-rated' and that institutions pay a flat fee per student or per employee does not seem to undermine the key objections, that the uses are nevertheless counted and that payment for the uses can be sought and negotiated and may go to the final per person flat rate.*[153]

The internet has fundamentally changed the nature of learning and teaching in the digital age. To the extent that the Copyright Act requires every act of copying and communication to be accounted and paid for, the ALRC argues that 'it may prevent licensees from taking full advantage of the efficiencies of new digital technologies'.[154]

3.5.3 The proposed policy options

1. **Status quo – Do nothing.** Unremunerated use of copyright material by educational institutions continues to be permitted under the education-specific exceptions listed in Section 3.5.1. Statutory licensing schemes continue to permit remunerated use of copyright material for educational purposes, within certain limits. Activities outside of these remunerated and unremunerated provisions are permitted under Section 200AB for educational instruction, to the extent that they meet requirements under the three-step test.
2. **New fair dealing – New fair dealing exception for education use.** Introduction of an exception permitting the copying and communication of copyright content for educational purposes where it is fair, as determined by the four fairness standards. Statutory licensing schemes would continue to permit the use of copyright material for educational purposes, within certain limits. However, the Copyright Act would clarify that statutory licences would no longer 'apply to the use of copyright material which, because of another provision in the Copyright Act, would not infringe copyright'[155] (Recommendation 8-1). In addition, the Act would clarify that statutory licences would no longer 'apply to use of copyright material where a government, education institution, or an institution assisting people with disability, instead relies on an alternative license' (Recommendation 8-2).[156]

[151] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.203.
[152] Copyright Agency | Viscopy (2012), ALRC submission.
[153] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.203.
[154] *Ibid.*
[155] *Ibid.* p. 15.
[156] *Ibid.*

Figure 6: Current versus proposed education exceptions

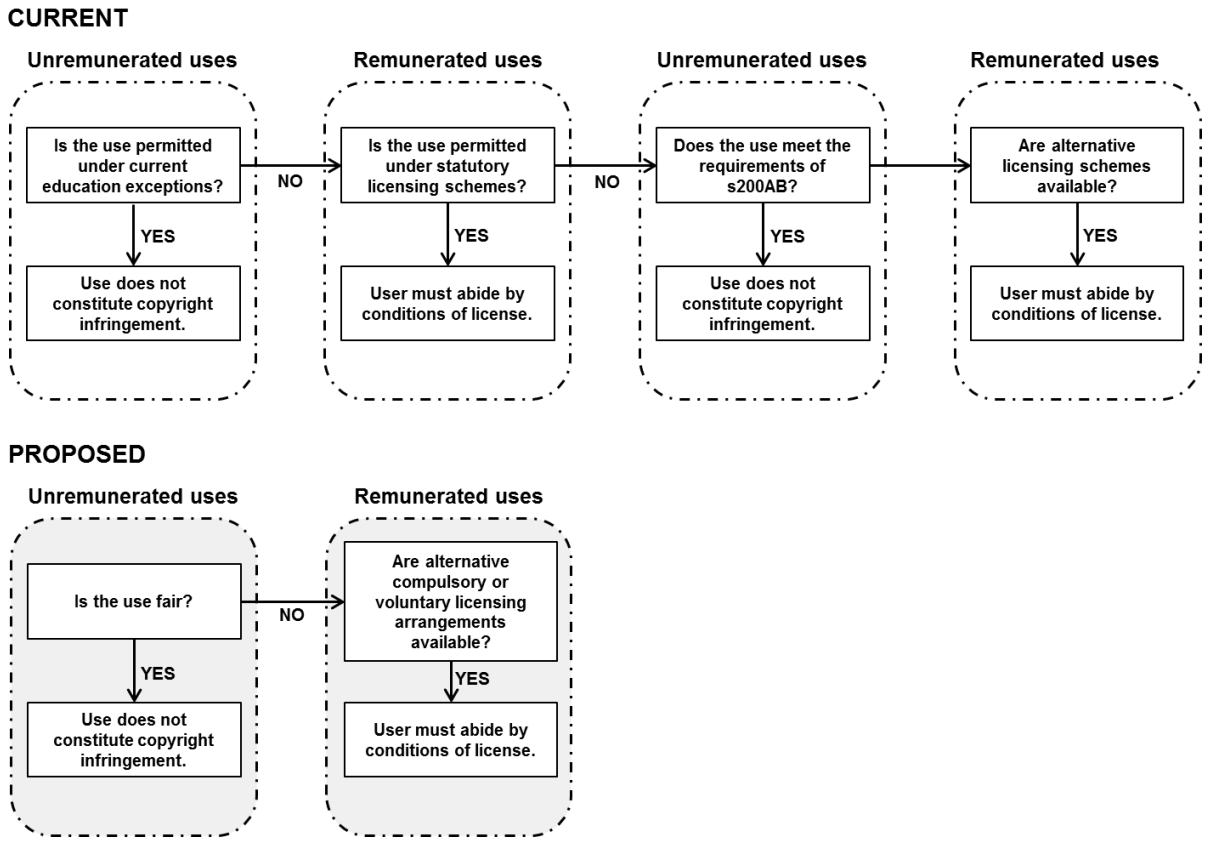


Figure 6 summarises the current versus proposed provisions for education institutions, broken down at a high level by remunerated and unremunerated uses. Placing the arrangements side-by-side in this way, a number of similarities and differences become immediately clear.

a. Existing specific provisions for education institutions would be repealed (see Section 3.5.1).

   - There may be some administration savings from removing the provisions, where the Copyright Act puts in place compliance requirements over and above what would be normally undertaken by collecting societies and licensees. For example, Sections 135ZG and 135ZMB require mechanisms to identify whether the content used is only 1 per cent or two page of a work in an edition and; whether or not the same work has been copied in the previous 14 days. However, the administration costs associated with these provisions would be expected to be largely removed by the streaming of statutory licenses (ALRC Rec 8-4), which has been included in in the Exposure Draft – Copyright Amendment (Disability Access and Other Measures) Bill 2016.

b. An open-ended exception is in place under both the **status quo** (under Section 200AB) and **new fair dealing** (under the fair dealing exception). Statutory licences would also remain in place under the proposed arrangements. In theory, this means that there should be no discernible difference between the two arrangements. In practice, however, Section 200AB can only be relied upon when a use would not be permitted under another exception or statutory licensing arrangement. Statutory licences in Australia start from a position that all uses are covered by the license, unless (amongst other factors) they are covered under a specific exception for education institutions.

c. Conversely, under the proposed arrangements, the starting position would be whether the use is fair. If a particular use is found to be fair, requirements under the statutory licences would no longer be binding. This means that rather than consider the availability of statutory licences exclusively, 'courts might instead

consider whether a particular use is being licensed voluntarily, either directly or collectively, in Australia or overseas'.[157]

3.5.4 Impact analysis

3.5.4.1 Summary

Analysis in this section shows a potential reduction in licensing revenues paid by schools to the Copyright Agency of $18.3 million per annum (or 30% of school payments under the Part VA license) as a result of a fair dealing exception on education. Given the absence of equivalent data from schools for the Part VB license and from universities and TAFEs more broadly this should be considered as a conservative estimate. The experience of Canada after the introduction of a similar exception in 2012 suggests that the impact on licensing revenues could be much larger. More specifically a recent decision by the Copyright Board of Canada found that 98 per cent of copies made by schools constitute fair dealing.[158]

These impacts, while significant for the educational publishing industry, represent a transfer from creators to users, and are not economic costs. According to the Copyright Board of Canada, there appears to be circularity in using the loss of licensing revenues to argue market harm in a fair dealing and fair use context.[159] That is, non-payment of licensing fees would be a finding of fairness, which would already account for any harm on the primary market of works. As an illustration of this argument we consider the impact on the original market for content, if freely available internet materials became fair for educational purposes.

Nevertheless, the loss of licensing income has been attributed in a recent PwC report as the trigger for the closure of a number of Canadian publishers and expected detrimental longer term impacts on incentives to create new content. Citing evidence from the Copyright Board of Canada, it is not clear that the introduction of a fair dealing exception in Canada has led to significant and widespread impacts of this sort. In particular, the Board highlighted a number of factors that could have explained the declining trend in sales including 'the use of open educational resources, the sharing of lessons by teachers, the creation of resources by teachers, the availability of free materials on the Internet as well as portals and repositories of educational material'.[160]

The report by PwC also argued that implementing fair use (and presumably the fair dealing exception for education) would increase transaction costs through loss of economies of scale. Using a simplified interpretation of PwC's atomised model, we find that 86 per cent or more of copies made by education institutions would have to constitute fair dealing for the education statutory licenses to become unviable. The additional administrative costs (i.e. relative to the status quo) associated with the remaining 'remunerable' uses would range from $23.6 million (if 86% of uses are found to be fair) and -$14.2 million (if 100% of uses are found to be fair, equal to current transaction costs).

Finally, to the extent that a fair dealing exception for education would mean that some uses are no longer a remunerable act in usage surveys, this would be expected to lead to some increase in effectiveness (i.e. with which public funds are currently spent) and efficiency (i.e. in the use of digital technologies to facilitate access to copyright content).

Table 9: Summary of costs and benefits of fair dealing provisions for an education exception

[157] *Ibid.* p.319.

[158] Copyright Board of Canada (2016), Access Copyright – Elementary and Secondary School Tariff (2010-2015), Decision (Table 4, p.170).

[159] Copyright Board of Canada (19 Feb 2016), Access Copyright – Elementary and Secondary School Tariff (2010-2015), Decision XIII (I)(2)(a)[327], p,92.

[160] Copyright Board of Canada (19 Feb 2016), Access Copyright – Elementary and Secondary School Tariff (2010-2015), V)(B)[97],p.25

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Monopoly rents	Rights holders	Short run	Transfer of wealth from rights holders to licensees.	Conservative estimate of $18.3 million per annum, through likely to be greater.	- +
Incentives to create new works	Rights holders	Long Run	No evidence to suggest significant and widespread impacts on the incentives or rights holders to produce educational content.	-	0
Administration costs/ transaction costs	Rights holders Users	Short run	Impact on transaction costs dependent on the extent of the impact of the exception on licensing revenues	86% or more copies would have to constitute fair dealing for collecting societies to become unviable. The additional transaction costs associated with the 'remaining remunerable' uses would range from $23.6 million and -$14.2 million	?
Incentives to invest in new uses of works	Users	Long run	-	-	0
Enhanced use of existing works	Users	Short run	To the extent that a fair dealing exception for education would mean that some uses are no longer a remunerable act in usage surveys, this would be expected to lead to some increase in effectiveness (i.e. with which public funds are currently spent) and efficiency (i.e. in the use of digital technologies to facilitate access to copyright content).	-	+

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Economic and societal benefits	Economy/ Society	Both	To the extent that a fair dealing exception for education would mean that some uses are no longer a remunerable act in usage surveys, this would be expected to lead to some increase in effectiveness (i.e. with which public funds are currently spent) and efficiency (i.e. in the use of digital technologies to facilitate access to copyright content).	-	+
Net expected impact	-	-	**Positive**		+

3.5.4.2 Costs in foregone revenue to rights holders

As per the status quo, education institutions and collecting societies would continue to negotiate the terms of equitable remuneration. However, whereas Section 200AB can only be used where no other exception or statutory license is available, under the proposed provision, if a particular use is found to be fair, requirements under the statutory licenses would no longer be binding.

To the extent then that uses currently 'remunerable' under the statutory licenses are found to be fair, this means the proposed exception would lead to a transfer from rights holders to licensees. So-called 'freely-available' internet content, 'technical copies' and 'orphan works' are all examples of uses (amongst others) that education institutions argue should be fair. To the extent that they can be quantified, each of these examples is dealt with in turn below.

Schools have concerns about education budgets being directed to pay significant amounts of resources for freely available internet materials. Recognising these concerns, the Copyright Agency has developed a methodology that groups websites into 10 categories– the Metcalfe Categories. Content from websites categorised as non-remunerable is deducted when processing records from electronic use surveys (EUS) so that licensees are not paying for this content. Following this methodology, 50 per cent of electronic uses in schools in 2014 were excluded for remuneration purposes (Table 10).

Table 10: Proportion of all pages on the electronic use survey by inclusion/exclusion category - 2014

Terms & conditions of use	No. of TM Pages	% total use
Included		
Metcalfe 1: Personal use	91,596	7.7
Metcalfe 6: No terms and conditions but contains © statement	80,452	6.7
Metcalfe 7: No terms and conditions	52,704	4.4
Metcalfe 8: Copying not permitted	155,186	13.0
Metcalfe 9: Reference to the Australian Copyright Act/ Educational Statutory License	61,457	5.1
Metcalfe 10: Password protected	2,141	0.2
Other – Included [1]	146,552	12.2
SUB-TOTAL	**590,088**	**49.3**
Excluded		
Metcalfe 2: Non-commercial use	21,982	1.8
Metcalfe 3: Use in your organisation	14,768	1.2
Metcalfe 4: Free copying	21,783	1.8
Metcalfe 5: Free for education	52,948	4.4
Other – excluded [2]	488,260	40.8
SUB-TOTAL	**599,741**	**50.1**
Quarantined [3]		
Quarantined items	7,151	0.6
TOTAL	**1,196,980**	**100.0**

Source: AMR, 2014 Australian Schools Electronic Use System – Draft Annual Review V.2. Table 12, p.26

[1] Includes digital non-web material e.g. scanning of a book.

[2] Includes CAG Global Register, Individual Register, US Federal Government, Copyright Owner Notified Exclusion, NEALS Non-Remunerable, Out of scope, no further information.

[3] Quarantined items are those items submitted that comprise interactive material.

According to the Copyright Advisory Group (CAG), however, schools are still paying too much for online material. CAG argues that 'much of this material is made available online for promotion or information, for which no one ever expected to be paid, and for which there is no commercial market'.[161] If content is placed freely online, it may be argued that there is an implicit license for users to view and reproduce the content; unless the materials are protected by TPMs, include a clearly visible notice prohibiting certain uses (not just a copyright symbol), or are suspected of being unauthorised copies themselves.

It is expected that the proposed arrangements would make it easier for education institutions to prove that unpaid uses of 'freely available' internet material do not harm a rights holder's market and therefore are more likely to be fair. However, what is 'free' is hotly debated. Moreover, what is actually being paid for by education institutions for the use of online materials is also a source of contention. This makes it difficult to estimate impacts of the proposed fair dealing exception.

Nevertheless, the following replicates analysis provided by CAG of the expected reduction in licensing payments under a fair dealing exception, assuming educational uses of certain websites would be found fair. This analysis has been provided by CAG 'as a "best endeavour" estimation of what proportion of annual license fees might be related to a particular activity'[162]. For example, if total license fees are $100 million, and Category A represents 5 per cent of pages copied, CAG assumes that $5 million in fees may be reasonably equated with Category A

[161] National Copyright Unit, COAG Education Council (2015), Productivity Commission submission.

[162] CAG response to our questions, unpublished.

uses. In practice, however, schools and collecting societies reach a commercial rate for all usage across the sector, and volume is just one of the commercial factors taken into account. Therefore, estimates must be interpreted with care.

In 2014, licensing fees paid by schools under Part VB were around $60 million. CAG uses records allocated as Metcalfe category 1 (personal use), 6 (no terms and conditions but contains a copyright statement) and 7 (no terms and conditions) as a proxy for freely available internet material. Overall, Table 11 shows that 9 per cent of all total multiplied (TM) pages recorded in the electronic use and print surveys were recorded as either Metcalfe 1, 6 or 7. This equates to **$5.6 million** in licensing revenues (i.e. $60 million x 9%), which CAG argues could be attributed to uses of freely available internet material.

Table 11: Percentages of freely available material using the Metcalfe proxy – 2014 surveys

TM pages	'Included' pages[1]	Metcalfe 1,6,7 pages	% Total pages
Electronic Usage Survey[2]	590,088	224,752	38%
Print Survey[3]	4,711,359	267,956	6%
Total	**5,301,447**	**492,708**	**9%**

Table notes

[1] 'Included' pages under Metcalfe categories 1, 6, 7, 8, 9 and 10.

[2] Sourced from AMR (2015), *2014 Australian Schools Electronic Use System – Draft Annual Review V.2* (raw data not validated by EY)

[3] Sourced from 2014 Print Survey Datasets (raw data not validated by EY)

3.5.4.3 'Technical copies'

A second criticism by schools is that statutory licenses impose a 'one-copy-one-view-one-payment' model of remuneration, which does not reflect the realities of modern education institutions, where digital technologies require multiple acts of copying and communication – so-called technical or incidental uses.[163] The ALRC has noted that use of copyright material by educational institutions purely for incidental or technical use should not be licensed.[164] This means that the exception would be expected to lead to a transfer between rights holders and licensees *up to* the amount currently paid for these uses.

It has not been possible to obtain estimates of the total amount currently paid in licenses for these uses. However, one example of a classroom activity where use of copyright content is treated differently depending on the technological platform used is classroom performance. As discussed earlier, Section 28 of the Act permits schools to communicate and perform copyright material in class including music and films. However, according to CAG, the exception cannot be used to display some types of text in the classroom (e.g. on a whiteboard), even where what is displayed may constitute freely available internet materials.[165] CAG provides examples of six teachers essentially performing the same act (i.e. classroom performance); however, only one of these uses (i.e. a teacher displaying a PDF from a USB drive on a screen in class) is potentially not covered by Section 28 (Box 8). Teachers are taught in EUS training materials that they are to record this activity under the 'display/project' category.

Box 8: Examples of classroom performance using different technology platforms

Teacher A is an English teacher. She reads an extract from a novel out loud to her class.

[163] *Ibid.*

[164] ALRC (2013), *Copyright in the Digital Economy: Final report*, p.325.

[165] National Copyright Unit, COAG Education Council (2015), Productivity Commission submission.

Teacher B is an art teacher. He brings his laptop to class and plugs it into the classroom's interactive whiteboard to show students some pictures of modern art works.

Teacher C is a music teacher. She plays a MP3 file from her iPod via bluetooth speakers to her class.

Teacher D is a drama teacher. He plays a DVD of a scene from a film to his students in class.

Teacher E is an economics teacher. She brings her laptop to class and plugs it into the classroom's interactive whiteboard to show students the text of a page from a freely available website that discusses recently released economics data.

Teacher F is a history teacher. He found a copy of historical document on a website. He saves a PDF copy of the text to his USB drive then plugs that into an interactive whiteboard to show his class on screen.

Source: National Copyright Unit, COAG Education Council (2015), p.10

CAG data shows that the 'display/project' category of use represented around 51 per cent of all TM pages recorded on the EUS.[166] Given that the EUS component was around 11 per cent of total remunerable datasets in 2014, this means that around **$3.5 million** in license fees could be attributed to the 'display/project' category (i.e. $60 million x 11% x 51%).[167].

3.5.4.4 Orphan works

Statutory licenses allow the copying and communication of materials for education, whether or not they are orphaned, subject to the payment of reasonable remuneration to the declared collecting societies. Fees collected by the collecting societies from uses of an orphan work are held in a trust for a period of four years. At the end of this period, if the rights holder of this work has not been identified, or if the rights holder is not a member of the collecting society, the fees are redistributed among the current members of the collecting society.

Under the proposed arrangements for orphan works (see Section 3.7), uses of works found to be orphaned following a reasonably diligent search, may no longer be remunerable. Therefore, a transfer would be expected between rights holders and licensees up to the amount currently paid for these uses. Table 12 shows that orphan works represented around 15 per cent of all TM pages in the 2014 Part VB survey, equating to license payments of around $9.2 million to the Copyright Agency (i.e. $60 million x 15%).[168]

Table 12: Percentage of orphan works using 'unknown' pages – 2014 surveys

TM pages	Total TM pages	Unknown TM pages	% Total pages
Electronic Usage Survey[1]	590,088	23,837	4%
Print Survey[2]	4,711,359	785,526	17%
Total	**5,301,447**	**809,363**	**15%**

Table notes

[1] Sourced from 2014 EUS Datasets (raw data not validated by EY).

[2] Sourced from 2014 Print Datasets (raw data not validated by EY). Includes 'Unknown Title – No URL – No Publisher' and 'Unknown Title – No URL – But publisher noted'.

[166] *Ibid.*
[167] *Ibid.*
[168] *Ibid.*

3.5.4.5 Summary

Together, the above analysis shows a potential transfer from rights holders to licensees of around $18.3 million per annum (or around 30 per cent of school licensing payments in 2014 under the Part VA license).[169] This should be interpreted as a very conservative estimate, given that equivalent data could not be obtained from schools for the Part VB license nor from universities and TAFEs. The experience of Canada after the introduction of a similar fair dealing exception in 2012 also suggests that the transfer could be much larger. In February 2016, the Copyright Board of Canada (the Board) released its decision in the case of Access Copyright versus Elementary and Secondary Schools, finding that 98 per cent of copies made by schools constitute fair dealing.[170]

3.5.5 Incentives to create new works

3.5.5.1 The Canada Case Study

A recent report by PwC points to the experiences of Canada following the introduction of a fair dealing exception on education in 2012, and argues that similar impacts should be expected in Australia. In the short run, the report links the reduction in revenues from the education sector to the closure of a number of Canadian publishers and a collecting society.[171] In the long run, the report links the loss of producer surplus to reduced incentives by creators and publishers to invest in new works, impacting on the supply of educational content.[172] The merits of each argument are worth considering separately.

3.5.5.2 Closures in the book publishing industry

Firstly, the report provides evidence showing that between 2011 and 2013 Canada's education publishing sector saw its share of GDP decline by 16 per cent from $740 billion to $620 billion, coinciding with the closure of a number of publishers.[173] Figure 7 shows that sales of educational books in Canada had been falling long before 2012, suggesting that the industry was already undergoing change when the exception was introduced. The question then is whether the decline in sales was related to copying behaviour post the exception or a continuation of sales trends?

[169] Due to possible overlaps in the uses and categories, it is not ideal to sum potential savings from the three categories in this way. This is provided solely for illustrative purposes.

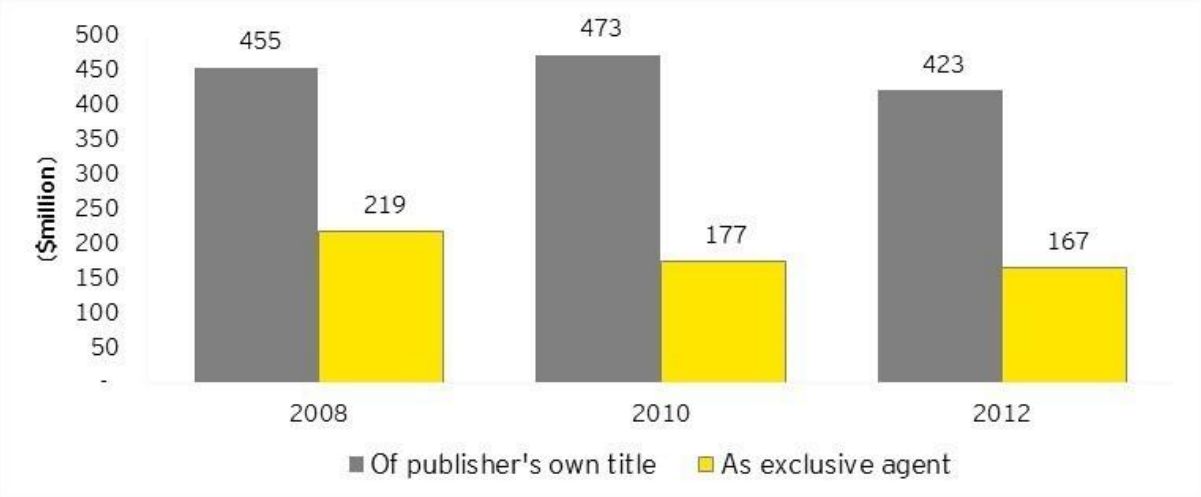
[170] Copyright Board of Canada (19 Feb 2016), Access Copyright – Elementary and Secondary School Tariff (2010-2015), Decision (Table 4, p.170).

[171] PwC (2016), *Understanding the costs and benefits of introducing a 'fair use' exception*, prepared for APRA AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights, p.iii.

[172] *Ibid.*

[173] *Ibid.,* p.16

Figure 7: Sales of educational books – Canada



Source: Statistics Canada, Book Publishers (87F0004X)

Evidence presented to the Copyright Board of Canada (the Board) highlighted a number of reasons to explain the declining trend in sales including 'the use of open educational resources, the sharing of lessons by teachers, the creation of resources by teachers, the availability of free materials on the Internet as well as portals and repositories of educational material'.[174] While the Board was unable to separate these factors from the impact of the exception on the market for the works, it found that only 20 per cent of copying done by education institutions 'tended towards unfairness'.[175] This suggests that the impact of copying on the primary market for copyright owners was relatively small.

3.5.5.3 Impact of a reduction in licensing revenues on incentives

Secondly, the report provided evidence from three overseas surveys (including one from Access Copyright in Canada) to show that licensing revenues are important drivers of incentives for creation.[176] However, Access Copyright presented similar survey evidence as part of court proceedings, from which the Board highlighted two significant findings:

- Creators surveyed received 21 per cent of their income as writers from Access royalty payments in 2012
- Under the hypothetical scenario where creators would cease to receive royalties from Access, 60 per cent of respondents indicated that this would have no impact on the number of works they create, and 23 per cent indicated that they would reduce the number of works they create.[177]

The Board used this evidence to argue that the money earned from Access royalties are a relatively small proportion of the overall income for writers and that Access royalties do not have a strong effect on incentives to create new works.[178] The Board concluded:

[174] Copyright Board of Canada (19 Feb 2016), Access Copyright – Elementary and Secondary School Tariff (2010-2015), V)(B)[97],p.25
[175] *Ibid.*, Appendix B, Table 1.
[176] PwC (2016), *Understanding the costs and benefits of introducing a 'fair use' exception*, prepared for APRA AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights, p.20.
[177] *Ibid.*
[178] *Ibid.*

> *According to this evidence, the impact of copying on the market for future works is small. Any individual copying event has a much smaller impact on the market than does the decision to stop paying royalties to Access. Even collectively, the impact of all the copying not being compensable is still relatively small.*[179]

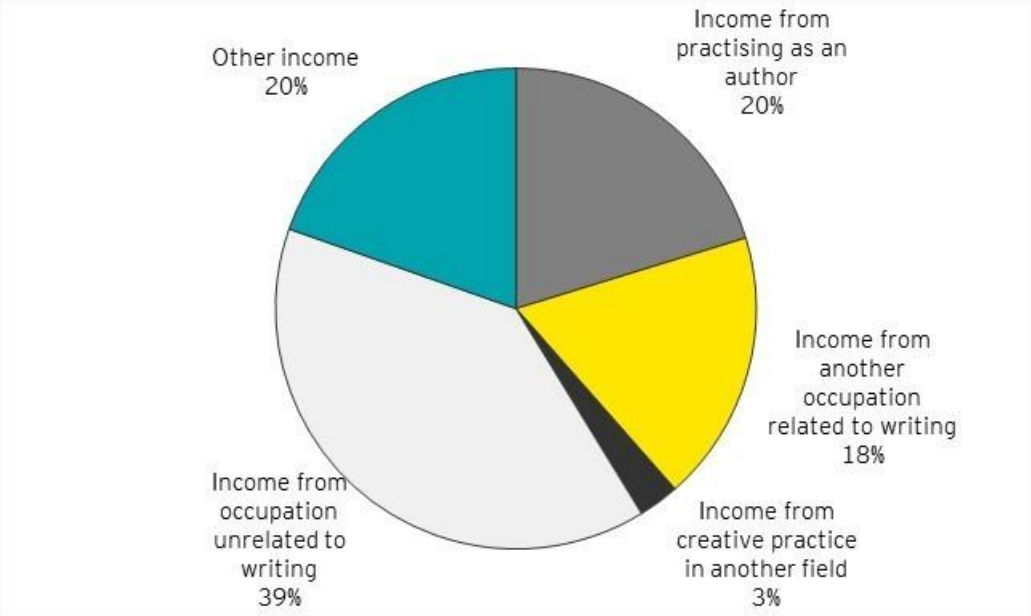
A similar argument could be made on the basis of results from a recent survey undertaken by Macquarie University into the Australian book industry. Of the 993 respondents, 47.6 per cent identified as members of the Copyright Agency Ltd (CAL), and 37 per cent had published an educational work.[180] In 2013-14, the average gross income of an author in the education sector was $143,000.[181] Figure 8 shows that only 20.3 per cent of this income was gained from practising as an author, roughly the same as writers in Canada.

[179] Copyright Board of Canada (19 Feb 2016), Access Copyright – Elementary and Secondary School Tariff (2010-2015), Decision XIII (I)(2)(b)[337], p,94.

[180] Throsby, D, Zwar, J, and Thomas, L (2015), *Book authors and their changing circumstances: survey method and results*, Macquarie University Economics Research Paper, Appendix, Table 1.7 and Table 3.1.

[181] Macquarie University (2015), Australian Authors – Industry Brief No.3: Author's Income, *The Australian book industry: Authors, publishers and readers in time of change.*

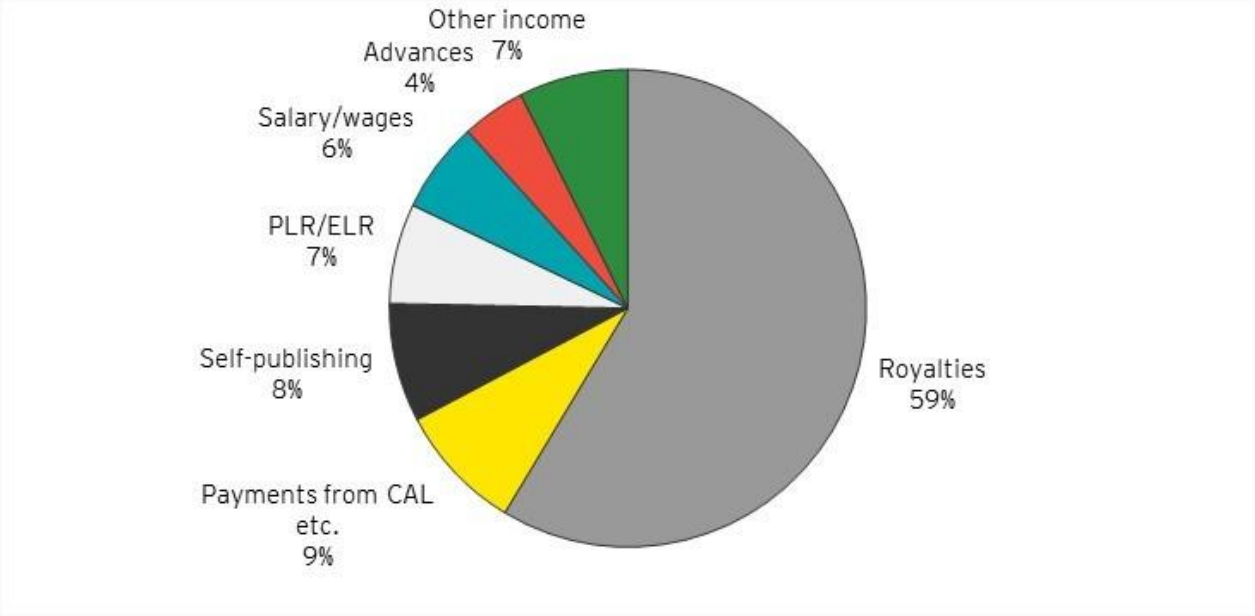
Figure 8: Proportion of income from practising as an education author versus other sources–2014-15



Source: Macquarie University (2015), Australian Authors – Industry Brief No.3: Author's Income

Moreover, of the income gained from practising as an author, the majority was obtained from royalties (59%), with only 9 per cent obtained as copyright payments directly from CAL or similar organisations (Figure 9). On average, this suggests that authors receive less than $3,000 in licensing fees from collecting societies, per annum. It is not clear what proportion of the royalties may have been passed down by publishers indirectly from collecting societies. Nevertheless, it is still true that earnings from practising as an author, on average, comprise a small share of an author's overall income.

Figure 9: Proportion of income earned from practising as an education author – by source, 2014-15



Source: Macquarie University (2015), Australian Authors – Industry Brief No.3: Author's Income

Importantly, the Board argued that there appears to be an element of circularity in using the loss of licensing revenue to argue market harm in a fair dealing context. [182] In particular, the Board argued that the non-payment of such licensing fees should not be considered as an impact on its own as this would be a consequence from a finding of fairness, which already considers economic harm on the copyright owner's market for original content.[183]

As an illustration of this argument we consider the impact on the primary market for rights holders, if freely available internet materials became fair for educational use. The impact of additional exceptions for incidental or technical use (i.e. technical copies) and orphan works is discussed in other sections, and found to have a negligible impact on the primary market for sales.

3.5.5.4 Freely available internet materials

A distinction must first be drawn between non-education and education-specific online materials. In the case of the former, reproductions and communications are much less likely to interfere with the market for the original content (and thereby incentives to create). For example, news and current affairs, which comprise around 12 per cent of audio-visual material copied by education institutions[184], are not made for educational purposes. These programs will be produced whether or not schools pay to show them in class. Therefore, the educational use of news and current affairs programs is more likely to be fair. Conversely, creators and publishers of online education-specific content may be more significantly impacted. However, we would suggest that any impact on incentives to create would be muted for a number of reasons.

First, the question posed by creators and publishers under the new fair dealing exception is less likely to be "how much new content will I create?" but "how much of it do I place online when I do?" Moreover, where creators and publishers do not expect to be remunerated for the content, no impact would be expected on incentives.

Second, with EUS data from 2009 showing that 64 per cent of remunerable online material copied under the Part VA license in schools is sourced from international websites, the question must be asked to what extent a relatively small market such as Australia's can impact on incentives in a global context.[185] Moreover, where online material originates from other English-speaking countries the UK, Canada and the US – these countries already have in place (to varying degrees) education exceptions covering the use of online material.

Third, publicly funded content should also be considered separately. Government activity is not driven purely by profit motives but also to serve the public good. For example, one of the specified functions of the ABC under the *Australian Broadcasting Corporation Act 1983* is that it must provide high quality broadcasting programs of educational content.[186] The SBS also has a charter obligation to, as far as practicable, inform, educate and entertain Australians in their preferred languages (ss 6(2)(e) of the Special Broadcasting Service Act 1991). This is complimented by the commercial networks, for which the *Children's Television Standards 2005* determine minimum amounts and scheduling of children's television programming.

3.5.5.5 Administration costs

A PwC report recently stated that implementing fair use would likely increase transaction and monitoring costs 'through a loss of economies of scale that would individually have to be borne by professional content creators,

[182] Copyright Board of Canada (19 Feb 2016), Access Copyright – Elementary and Secondary School Tariff (2010-2015), Decision XIII (I)(2)(a)[327], p,92.
[183] *Ibid.*
[184] Screenrights (2015), 'Annual Report 2014-15', available at: https://www.screenrights.org/sites/default/files/uploads/2014-2015_Screenrights_Annual_Report.pdf.
[185] CAG (2012), ALRC submission.
[186] *Australian Broadcasting Corporation Act 1983*, section(6)(1)(a)(ii).

owners, and some users'.[187] Though it is not clearly stated, the implication of this argument is that the fair use exception (and presumably the new fair dealing exception) would make collecting societies unviable; thus requiring rights holders and users of copyright material to interact and operate in an 'atomised' manner. Comparing the status quo to a scenario where collecting societies do not exist, the modelling within the report estimated that collecting societies 'save copyright owners and professional content creators a combined $940 million in administrative and transaction related costs annually'.[188]

In our view, the new fair dealing exception (or the fair use exception) could threaten the viability of a collecting society if:

- The exception leads to a drop in the uses of copyright material managed by the collecting society (i.e. because the uses have been found to be 'fair')
- This drop in managed uses is large enough that it causes the licensing income of the collecting society to fall below its operating costs.

As discussed earlier, the available evidence suggests that the new fair dealing exception on education would likely lead to a reduction in the volume of copyright material managed by collecting societies. To explore the potential impacts associated with this reduction in managed uses, we created a simplified model. This model is:

- Focused on the two collecting societies responsible for managing the statutory licenses for education (i.e. Copyright Agency and Screenrights). Between them, Copyright Agency and Screenrights account for approximately 90 per cent of the fees paid by the education sector to collecting societies[189]
- Underpinned by publicly available data and the same assumptions used by the report to estimate the value of transaction costs
- Deliberately conservative – in that it assumes: (1) the operating costs of Copyright Agency and Screenrights are fixed (and thus would not decrease commensurately with reductions in licensing income); and (2) that Copyright Agency and Screenrights would not subsidise (either in part or in full) the operation of the education statutory licenses from other revenue streams.

Based on our simplified model, we found that:

- A significant proportion (>86 per cent) of the relevant uses of copyright material managed by Copyright Agency and Screenrights would need to be found to be 'fair' in order for the 'education licensing income'[190] of both entities to fall below their 'education operating costs'[191] (Figure 10)
- If this did occur, and the education statutory licenses ceased to operate, the additional administrative costs borne by rights holders and users (i.e. relative to the status quo) would likely be significantly less than that implied by the modelling within the report. For instance:

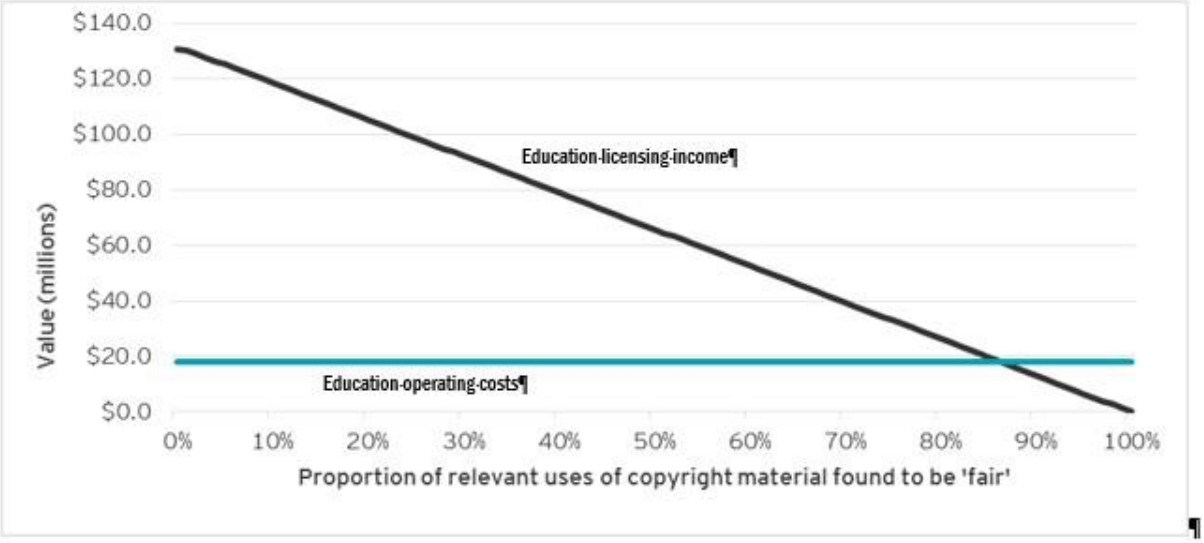
[187] PwC (2016), *Understanding the costs and benefits of introducing a 'fair use' exception*, prepared for APRA AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights.
[188] Ibid.
[189] National Copyright Unit, COAG Education Council (2015), Productivity Commission submission.
[190] That is, the income generated by the collecting societies under the education statutory licences.
[191] That is, the costs borne by the collecting societies in managing the education statutory licences.

- If 86 per cent of relevant uses of copyright material were found to be 'fair', and the education statutory licenses ceased to operate, we estimate that rights holders and users would incur an increase in transaction costs (relative to the status quo) of approximately $24 million annually (Figure 11)

- If 98 per cent[192] of relevant uses of copyright material were found to be 'fair', and the education statutory licenses ceased to operate, we estimate that rights holders and users would enjoy a decrease in transaction costs (relative to the status quo) of approximately $9 million annually (Figure 11).

[192] As noted above, a recent decision by the Copyright Board of Canada found that 98 per cent of copies made by schools constitute fair dealing. It is reasonable to expect that this proportion represents the upper bound of the potential impact of the new fair dealing exception on education would have on the volume of copyright material managed by collecting societies.

Figure 10: Impact of a reduction in the volume of copyright material managed by Copyright Agency and Screenrights under the education statutory licences



Sources: EY analysis: Copyright Agency (2015), Annual Report 2014/15; Screenrights (2015), Annual Report 2014/15.

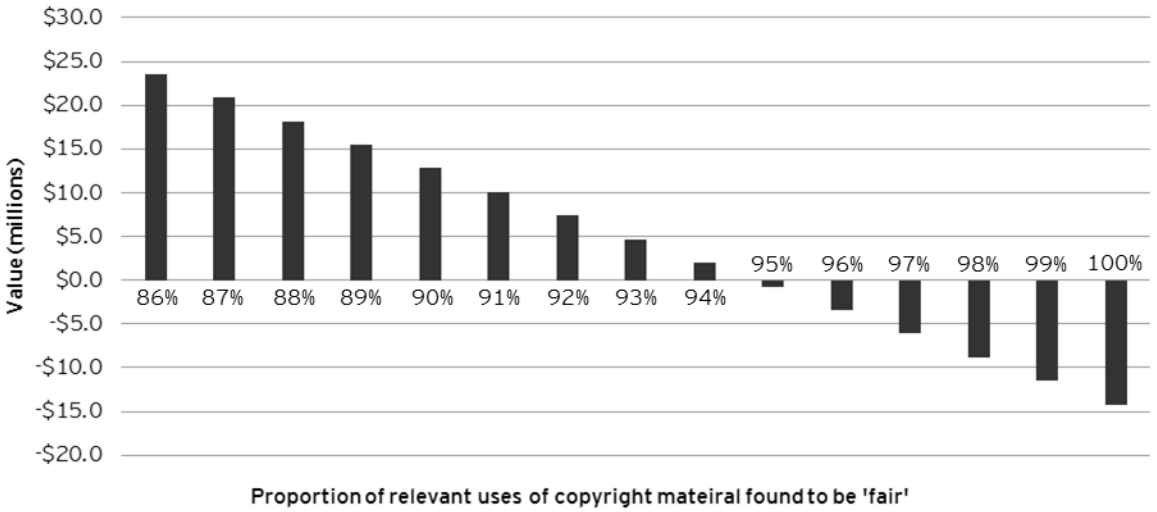
Notes:

'Education licensing income' is derived from the 2014/15 annual reports of Copyright Agency and Screenrights.

'Education operating costs' is derived from the 2014/15 annual reports of Copyright Agency and Screenrights. It is based on education-related licensing income as a share of total licensing income. As we lacked information on fixed/variable cost ratios, we assumed that operating costs would remain unchanged across all scenarios.

We have assumed a linear relationship between uses of copyright material, and the value of licensing income associated with these uses.

Figure 11: Additional transaction costs (relative to the status quo) if the education statutory licences ceased to operate



Source: EY analysis; : Copyright Agency (2015), Annual Report 2014/15; PwC (2016), Understanding the costs and benefits of introducing a 'fair use' exception, prepared for APRA AMCOS, PPCA, Copyright Agency│ Viscopy, Foxtel, News Corp Australia and Screenrights; Screenrights (2015), Annual Report 2014/15.

Notes:

Our estimates of the value of transaction costs associated with the status quo is derived from PwC's assumption that 'roughly 78.3 percent of [collecting society] operating costs are related to supporting purely transaction related functions.'

Our estimate of the value of transaction costs if the education statutory licenses ceased to operate is derived from PwC' assumption that 'collecting societies reduce administrative duplication by over 18 times'. While the basis of this assumption has been questioned, it is used here only for illustrative purposes. Uses of copyright material found to be fair would not have any associated transaction and monitoring costs.

3.5.5.6 Economy and society

Education has been highlighted by the ALRC as 'one of the clearest examples of a strong public interest in limiting copyright protection'.[193] The preamble of the World Intellectual Property Organisation Copyright Treaty refers to the 'need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information'.[194] It is in the context of statements such as these that the Franki Committee recommended the introduction of a statutory license for education institutions:

> *The very considerable element of public interest in education, together with the special difficulties that teachers and others face in Australia in obtaining copies of works needed for educational instruction, justifies the institution of a system of statutory licenses in non-profit educational establishments.*[195]

It would be hard to mount the argument that, when it comes to use of copyright content for instruction, statutory licenses are anything but flexible. This is ably demonstrated by Screenrights in its traffic light comparison of educational uses of broadcast material permitted under Australian copyright legislation relative to other legal regimes.[196]

[193] Garnett, K, Davies, G and Harbottle, G (2011), *Copinger and Skone James on Copyright,* 16th edition, p.9-96.

[194] World Intellectual Property Organization Copyright Treaty, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002), preamble.

[195] Copyright Law Committee (1976), *Report on Reprographic Reproduction* (the Franki Report).

[196] Screenrights (2012), ALRC submission.

However, the nature of teaching and learning is changing in the stead of new digital technologies. The NSW Government, for example, is investing over $1 billion to roll out new classroom technologies, described by the Sydney Morning Herald as the classroom of the future:

> *Mobile touch sensitive screens, cloud computing across all devices, walls and desks upon which students can write, and Lego-style furniture that allows students to sit, stand, crouch or lay their way around a classroom will become standard.*[197]

As stated by the ALRC, 'digital technologies allow for new, innovative, and efficient uses of copyright material.'[198] Many of these uses, however, rely on multiple acts of reproduction and communication. To the extent that statutory licenses currently account for each act in usage surveys, this comes at a cost of both effectiveness and efficiency. Effectiveness with respect to the best possible use of public funds to promote educational outcomes. Efficiencies with respect to the extent educational institutions can take full advantage of digital technologies on a day to day basis.

To the extent that a fair dealing exception for education would mean that some uses are no longer a remunerable act in usage surveys, this would be expected to lead to some increase in effectiveness (i.e. with which public funds are currently spent) and efficiency (i.e. in the use of digital technologies to facilitate access to copyright content).

[197] Bagshaw, E (2015), 'The classroom of the future comes alive', *The Sydney Morning Herald*, 6 November, available at: http://www.smh.com.au/national/education/the-classroom-of-the-future-comes-alive-20151106-gksgt3.html#ixzz3qwi8ydFlb.
[198] ALRC (2013), *Copyright in the Digital Economy: Final report,* p.203.

3.6 Libraries and archives

The figure below summarises the current versus the proposed provisions for libraries and archives, broken down at a high level by remunerated and unremunerated uses. Placing the arrangements side-by-side in this way, it is possible to see many similarities between the current and proposed arrangements for use by libraries and archives.

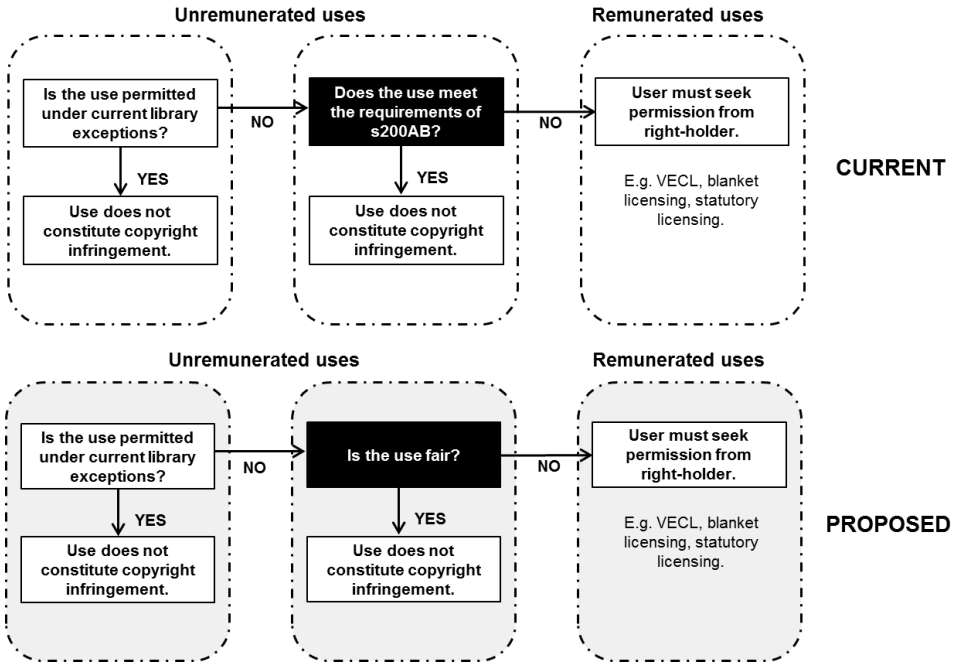
Essentially, the only difference would be in the standards applied to the 'flexible exceptions' under the two arrangements (boxes highlighted in yellow). Currently, Section 200AB applies standards equivalent to the three step test found in the *Agreement on Trade Related Aspects of Intellectual Property* Rights (Trade Agreement). The proposed fair dealing exception would codify a number of fairness standards that are already in use by the courts.

At their core, the current and proposed standards have distinct cross overs. For example, under both sets of standards, use will more likely found to be permissible if it does not compete with the way a copyright holder normally exploits (or makes a profit from) his or her work; non-commercial uses are viewed more favourably; and the quantity of the material used is a factor considered.

The current Section 200AB standards have been criticised for being complex and ambiguous. Many cultural institutions view the exception as a failure and many have never relied on it. This has been cited both to support repealing s 200AB and as evidence against the introduction of another flexible exception – the new fair dealing exception. Despite being widely criticised for its complexity, there is anecdotal evidence that libraries and archives are increasingly using Section 200AB as they gain comfort with guidelines and as precedents emerge.

Given the similarities between the two regimes and, until such time as the new fair dealing exception is tested in the courts and by cultural institutions, it is not possible to determine the impacts of moving to the new fair dealing exception for libraries and archives.

Figure 12: Current versus proposed library exceptions



3.7 Orphan works

3.7.1 What are orphan works

While the term "orphan work" is not defined by the Copyright Act, it is generally taken to mean a work that may be covered by copyright but for which no copyright owner can be identified or contacted for the purpose of obtaining permission to use the work.[199]

There are many different types of works that may come to be orphan works, including literary works, audio-visual materials and still photos. The scope of orphan works also encompasses both published and unpublished copyright material. The uses of orphan works are similarly diverse, impacting on sectors including cultural institutions; computer and internet industries; and photographers. Orphan works are also used for both commercial and non-commercial purposes.

3.7.2 Current law

There is currently no provision in the Copyright Act that specifically addresses orphan works. If an orphan work is used without permission, the user may be infringing the Act and may be liable to legal remedy should the copyright owner come forward at a later stage. However, there are several provisions within the Copyright Act that allow for the use of works, including orphan works, for specific uses. The main provisions are summarised below:

- **Statutory licenses** 'allow for the copying and communication of materials for education, for government, to assist persons with disabilities, and for the retransmission of free-to-air broadcasts'.[200] These licenses apply to all works (including orphan works) and are subject to the payment of reasonable remuneration to a declared collecting society.

- **Fair dealing exceptions** in sections 40 to 42 of the Copyright Act allow works to be used in certain circumstances for research or study; criticism or review; parody or satire; and reporting and news. These apply equally to all works, including orphan works.

- **Section 200AB** of the Copyright Act may be used by libraries, archives and education institutions for the use of works in special cases, provided the use is not for commercial advantage or profit and would not unreasonably prejudice the interests of the copyright owner.

- **Other provisions** including library and archive specific provisions for preservation purposes and personal use provisions including format and time shifting exceptions.

3.7.3 The problem

In its review *Orphan works: balancing the rights of owners with access to works,* the Attorney-General's Department identified two main problems with the current application of the Copyright Act with respect to orphan works.

Firstly, the current approach is piecemeal and inconsistent. While the use of orphan works may be incidentally covered by a large number of exceptions and statutory licenses that generally apply to all works, orphan works are not directly addressed by the Copyright Act. This means that there are many potential uses of orphan works that are still restricted including use of orphan works for transformative and creative purposes; for personal and community use; and for broadcasts (where material is held in broadcasters' collections).[201]

[199] Australian Government (2012), *Works of untraceable copyright ownership. Orphan works: balancing the rights of owners with access to works, r*eview undertaken by the Attorney-General's Department, p.4.
[200] *Ibid.*, p.11.
[201] *Ibid.*, p.13.

Secondly, uncertainty in the wording of the Section 200AB provision is currently constraining its application by education institutions, libraries and archives to orphan works. In particular, the Australian Digital Alliance and the Australian Libraries Copyright Committee note that the 'two main stumbling blocks to using flexible dealing for orphan works are the process for ascertaining whether a work is orphaned in order to assess normal exploitation and unreasonable prejudice, and whether the special case requirement permits large scale uses of specific collections.[202]

This orphan works problem is also exacerbated by a number of other factors including the mass digitisation of the collections of cultural institutions; the extension of the copyright term by 20 years, and the absence of term durations for unpublished works.

Some individuals and organisations have used orphan works by taking a 'risk management' approach, for example, by undertaking a diligent search for the creator before use of an orphan work or by setting money aside in case the rights holder comes forward.[203] However, the larger the volume of orphan works involved with a particular use (e.g. mass digitisation), the less likely such risk management approaches will be sufficient in the current legal landscape.

A solution to the orphan works problem has been called for to avoid leaving large parts of content unavailable. The Attorney General's Department review into orphan works (the AGD Orphan Works Review) noted that enabling uses of orphan works could contribute to 'research, education, culture and to the creation of further transformative works' as well as 'commercial purposes, thus increasing the already considerable contribution of copyright industries to the Australian economy.[204]

3.7.4 The proposed policy options

1. **Option 1 – Status quo.** The use of 'substantial parts' of copyright orphan works would continue to infringe the Copyright Act unless the specific use is incidentally covered by current statutory licensing arrangements, fair dealing exceptions, section 200AB, or other provisions that apply generally to all works.
2. **Option 2 – Limited remedies where a reasonably diligent search has been undertaken.** The option has two parts:
    a. The Copyright Act would be amended to limit the remedies available in an action of infringement of copyright, where it is established that, at the time of infringement:
        - A reasonably diligent search for the rights holder has been conducted and the rights holder has not been found; and
        - As far as reasonably possible, the use of the work has clearly attributed it to the author.
    b. The Copyright Act would provide that, in determining whether a reasonably diligent search was conducted regard may be had to, among other things:
        - The nature of the copyright material
        - How and by whom the search was conducted
        - The search technologies, databases and registers available at the time

[202] Matt Dawes, cited in: Australian Government (2012), *Works of untraceable copyright ownership. Orphan works: balancing the rights of owners with access to works, r*eview undertaken by the Attorney-General's Department.
[203] ALRC (2013), *Copyright in the Digital Economy: Final report,* p.291.
[204] Australian Government (2012), *Works of untraceable copyright ownership. Orphan works: balancing the rights of owners with access to works, r*eview undertaken by the Attorney-General's Department, p.3.

- Any guidelines, protocols or industry practices about conducting diligent searches available at the time.

3.7.5 Impact analysis

3.7.5.1 Summary

The main costs of Option 2 are the administration costs associated with undertaking diligent searches. Given that a large proportion of orphan works reside in the collections of libraries and archives it is expected that much of these costs would be borne by these cultural institutions in order to aid access for research education and cultural heritage. The analysis estimates diligent search costs of between $10.3 million and $20.6 million per annum. This represents a conservative estimate of the likely searches as it does not include private searches (e.g. by academics) and commercial searches (e.g. by TV broadcasters) also likely to be undertaken under the legislation.

The main benefit of Option 2 is the value to users of being able to use content that is currently orphaned. As we cannot accurately estimate the public benefits associated with these uses, we assume that orphan works would only be cleared if an institution or user believed that the value of that activity was at least enough to cover the costs. Therefore, the benefits of an orphan works provision would at least equal the search costs

However, these are just the cost-based benefits. Enabling the use of orphan works to be unlocked for commercial and non-commercial purposes could assist the growth of Australian copyright industries. To put this into perspective, industry value-add for libraries and archives would only have to increase between 0.9 per cent and 1.7 per cent over 10 years in order to break even with the estimated search costs. This would appear to be a feasible outcome, given the high proportion of orphans residing in the collections of libraries and archives (around 40%). To the extent that proposed changes reduce barriers to the use of orphan works, Option 2 would facilitate socially beneficial goals such as learning, cumulative knowledge creation, access to information, and innovation.

There is broad consensus that an orphan work, where there is no copyright owner and therefore no beneficiary of copyright, will not detrimentally affect a rights holder's revenue and thereby incentive to create new works. The ALRC heard concerns from photographers, whose works, once digitised, are orphaned due to metadata being stripped from them, and appropriated by third parties for commercial gain. The analysis argues that while the proposed changes would not prevent such activities, they are unlikely to exacerbate them either.

Table 13: Summary of costs and benefits of fair dealing provisions for orphan works

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Monopoly rents/ Access costs	Rights holders Users	Short run	Where there is no copyright owner and therefore no beneficiary of copyright, Option 1 will not detrimentally affect a rights holder's revenue and thereby incentive to create new works.	-	0

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Incentives to create new works	Rights holders Users	Long Run	Where there is no copyright owner and therefore no beneficiary of copyright, Option 1 will not detrimentally affect a rights holder's revenue and thereby incentive to create new works.	-	0
Administration costs/ transaction costs	Rights holders Users	Short run	Given that a large proportion of orphan works reside in the collections or libraries and archives, it is expected that much of the search costs would be incurred by these cultural institutions in order to provide access to such works in their collections to aid research, education and access to cultural heritage.	Between $10.3 and $20.6 million p.a.	-
Incentives to invest in new uses of works	Users	Long run	-	-	0
Enhanced use of existing works	Users	Short run	► Benefits would at least have to equal diligent search costs to warrant undertaking the voluntary searches in the first place. ► Enabling the use of orphan works to be unlocked for commercial and non-commercial purposes would assist the growth of Australian copyright industries.	Between $10.3 and $20.6 million p.a.?	+

Impact type	Stakeholder Group	Short or long-run	Description of impact	Magnitude of impact	Rating
Economic and societal benefits	Economy/ Society	Both	To the extent that proposed changes reduce barriers to the use of orphan works, Option 1 would facilitate socially beneficial goals such as learning, cumulative knowledge creation, access to information, and innovation.	-	+
Net expected impact			**Positive**		**+**

3.7.5.2 Administration costs of undertaking a reasonably diligent search

Option 1 would allow the use of orphan works provided a reasonably diligent search for the rights holder has been conducted and the rights holder has not been found. Searches are likely to be carried out by users of the orphan works, in accordance with non-binding industry guidelines.

Submissions to the ALRC indicated a general willingness by stakeholders to cooperate on the development of such guidelines.[205] It is also assumed that much of the work required to produce such guidelines has already been undertaken. For example, a position paper on 'reasonable search on orphan works' has already been published by National and State Libraries Australasia.[206] These factors combined suggest that the costs of developing such guidelines would be negligible.

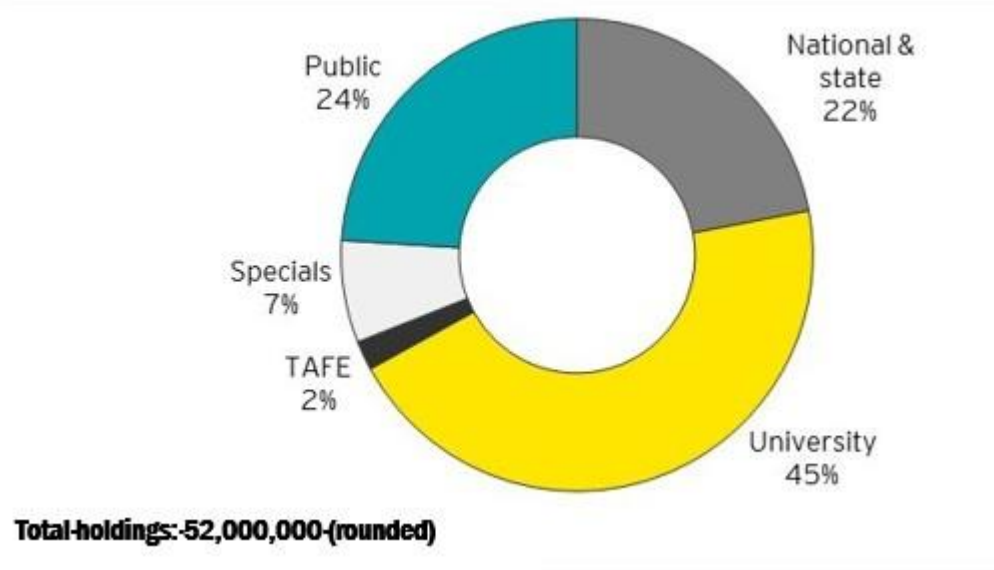
3.7.5.3 Number of orphan works

To estimate diligent search costs we need an estimate of how many items are likely to be searched under the new legislation. Given that a large proportion of orphan works reside in the collections or libraries and archives, it is expected that much of the search costs would be incurred by these cultural institutions in order to digitise and provide access to such works in their collections to aid research, education and access to cultural heritage. This represents a conservative estimate of the likely searches, as it does not include private searches (e.g. by academics) and commercial searches (e.g. by TV broadcasters) also likely to be undertaken under the legislation.

According to IBISWorld research, there were around 1,900 libraries and archives in 2014-15.[207] The report does not provide information on the size of the collections held by these institutions. For this, we use the National and State Libraries Australasia (NSLA) bibliographic database, which estimated a total collection size for Australian libraries of around 52 million items in 2014-15 (Figure 13). The ANBD does not provide a further breakdown of holdings by content type.

[205] ALRC (2013), *Copyright in the Digital Economy: Final report,* p.305.
[206] *Ibid.*
[207] Anning, J (2015), IBISWorld Industry Report J6010: *Libraries and archives in Australia,* p.28.

Figure 13: ANBD holdings by library type – 2014-15



Source: Australian National Bibliographic Database, EY Analysis

In preparation for the ALRC review, the NSLA conducted a survey of orphan works in their members' collections. Depending on the types of works collected by each institution, the survey showed that library collections could comprise between 10 to 70 per cent of unpublished orphan works (40 per cent on average across all works).[208] The survey did not include published orphan works, musical works, or other literary ephemera. Nonetheless, its findings were broadly in line with a mass digitisation project undertaken in the UK, which showed that of the total number of potentially in-copyright works around 40 per cent were orphan works.[209] Using this assumption, gives us an estimate of around 21 million orphans held by libraries and archives.

3.7.5.4 Cost of searching

To establish the costs of undertaking a diligent search, we take assumptions used by the Intellectual Property Office, informing its own impact assessment of the UK's orphan works system (Table 14).[210] Given the absence of a breakdown of orphan works by content type, we use the average search time of 3.2 hours per item. To get an hourly cost of labour we use the 2014 Survey of Employee Earnings and Hours for administrative and support services, inflated by the Wage Price Index.

Table 14: Estimated hours to undertake a diligent search

Content		Hours to clear
TV & radio	Low estimate	3.3
TV & radio	High estimate	6.5
Still photos		3.5
Sundry items	Low estimate	1.0
Sundry items	High estimate	3.5
Newspapers		3.5
Books	Low estimate	1.0
Books	High estimate	3.5
	Average	**3.2**

Source: UK Intellectual Property Office (2012).

Our estimates of search costs are highly dependent on the assumptions in Table 14 . As observed by the ALRC, what constitutes a diligent search will vary by a number of factors including the age, type of work and amount of identifying information. [211] Early results of a three-year research project (EnDOW) in the UK, Netherlands and Italy has shown that the diligent search requirement established by the Orphan Works Directive 'has been proving more burdensome to satisfy than expected'.[212] This is because of the large and diverse sources of information that must be consulted and the fact that a sizeable share of these resources is not easily accessible.

However, the time required to undertake a diligent search could be cut down significantly through technological means and by creating databases such as the UK's *Accessible Registries of Rights and Orphan Works* (ARROW) or the UK's *Copyright Hub*. The objective of these projects is to assist users in finding ways to identify rights holders, clarify the rights status of works, and facilitate the permissions process. A report prepared by the British Library found that 'whilst it could take 1,000 years for one person to clear the rights of just 500,000 books manually – equating to 4 hours per book - the use of the ARROW system would reduce this dramatically to less

[208] Australian Digital Alliance and Australian Libraries Copyright Committee (2012), ALRC submission.

[209] British Library (2011), 'Electronic clearance of orphan works significantly accelerates mass digitisation', available at: http://www.bl.uk/press-releases/2011/september/electronic-clearance-of-orphan-works-significantly-accelerates-mass-digitisation.

[210] UK Intellectual Property Office (2014), *Impact Assessment: Orphan Works,* available at: https://www.gov.uk/government/publications/impact-assessment-opinion-orphan-works.

[211] ALRC (2013), *Copyright in the Digital Economy: Final report,* p.304.

[212] Favale, M, Schroff, S and Bertoni, A (2016), *Requirements for diligent search in the United Kingdom, the Netherlands and Italy,* prepared for Heritage Plus and EU Commission.

than 5 minutes per title to upload the catalogue records and check the results'.[213] While the ALRC acknowledges the benefits of these tools, it does not recommend the implementation of such a register or database.

3.7.5.5 Adjusting search costs

Finally, a number of assumptions are made to account for:

- The proportion of orphan works that would be cleared per annum. For any given institution, it is not expected that such a large task would be undertaken immediately and would not cover the entire archive. In the absence of data on current activities, we make the conservative assumption that over 10 years libraries and archives would clear between 5 per cent and 10 per cent of all orphan works.

- The number of searches that are currently undertaken. For example, the National Gallery of Australia submitted that it already adopts a 'risk management' approach by undertaking a diligent search before using an orphan work.[214] Similarly, in a Statement on Orphan Works released in 2011, the SBS noted the use of 'reasonable searches' to use archival content.[215] Others (i.e. education institutions, libraries and archives) might currently rely on Section 200AB for the legal use of orphan works. As this requires users to assess potential market harm to the rights holder, it is assumed that a reasonable search for the rights holder would be undertaken as part of this test. To account for searches that would be undertaken anyway, we reduce the search cost by 10 per cent.

Taken together, the above suggest diligent search costs of between $10.3 million and $20.6 million per annum.

3.7.5.6 Economic and societal benefits

As discussed in Section 3.7.3, there is currently much uncertainty around the use of orphan works by libraries and archives. The provision of a framework around diligent searches and the limitation of remedies available (in an action of copyright infringement) when such searches have been undertaken would be expected to increase legal certainty. This would remove the 'legal risk premium' currently associated with use of orphan works in Australia, and remove the need for institutions to keep money aside in case rights holders later come forward.

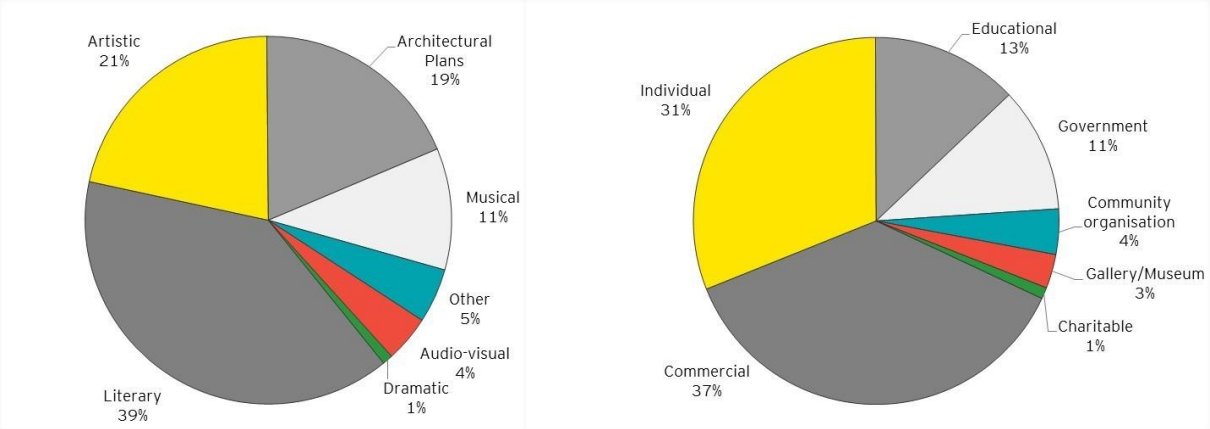
To the extent that proposed changes reduce barriers to the use of orphan works, Option 1 would facilitate socially beneficial goals such as learning, cumulative knowledge creation, access to information, and innovation. The AGD Orphan Works Review noted that enabling uses of orphan works could contribute to research, education, culture and to the creation of further transformative works. [216] It may also buttress commercial reuses of lost works.[217] In the digital environment, reducing barriers to orphan works could facilitate other socially beneficial uses such as DTM and mass digitisation.[218]

Orphan works schemes in Canada and the UK may provide an indication of potential users and uses of orphan works in Australia. In Canada, where licenses for use of published orphan works are administered by the Canadian Copyright Board, 49 per cent of applications between 1990 and 2009 were for commercial uses. Commercial enterprises accounted for 37 per cent of all applications, while individual applicants followed

[213] British Library (2011), 'Electronic clearance of orphan works significantly accelerates mass digitisation', available at: http://www.bl.uk/press-releases/2011/september/electronic-clearance-of-orphan-works-significantly-accelerates-mass-digitisation.
[214] National Gallery of Victoria (2012), ALRC submission.
[215] SBS (2011), 'SBS Statement of Orphan Works', available at: http://www.sbs.com.au/aboutus/corporate/view/id/541/h/SBS-Statement-on-Orphan-Works-1.0-February-2011.
[216] Australian Government (2012), *Works of untraceable copyright ownership. Orphan works: balancing the rights of owners with access to works,* review undertaken by the Attorney-General's Department, p.3.
[217] *Ibid.*
[218] ALRC (2013), *Copyright in the Digital Economy: Final report,* p.290.

closely at 31 per cent (Figure 14). The majority of applications were received for literary and artistic works (over 60%, combined) followed by architectural plans (19%).

Figure 14: Applications by content type (LHS) and by user (RHS), 1990 – 2009



Source: De Beer J and M Bouchard (2009), Canada's 'orphan works' regime: Unlocatable copyright owners and the copyright board.

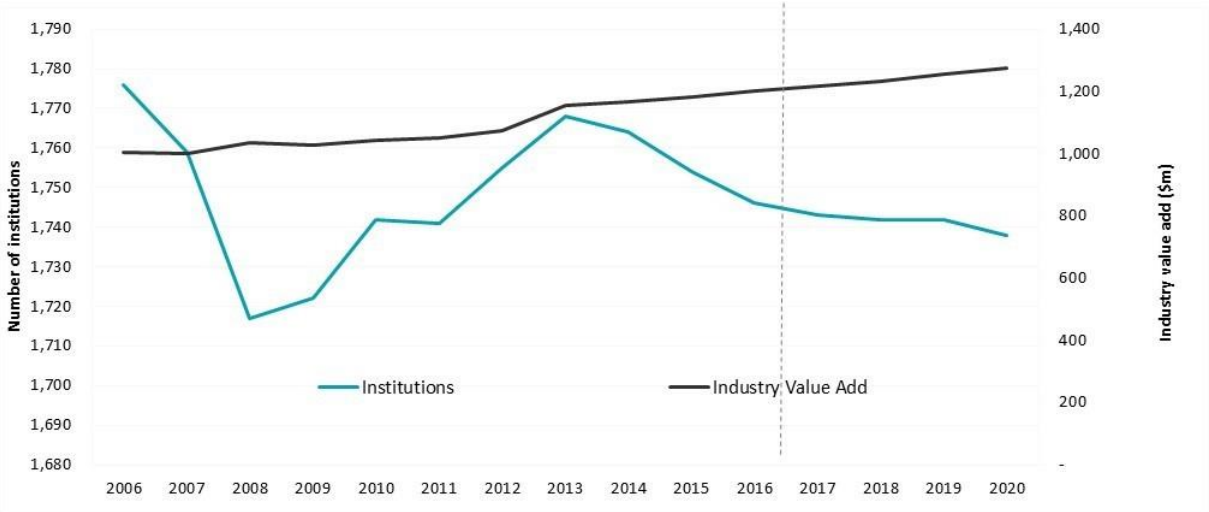
In the UK, a 12 month review into the country's online licensing system for published and unpublished orphan works found that 26 per cent of licenses granted were for commercial uses. The majority of applications were received for still works (78%), with the remaining applications received for written works (16%).[219]

As we cannot accurately estimate the public benefits associated with these uses, we assume that orphan works would only be cleared if an institution or user believed that the value of that activity was sufficient to cover the costs. Therefore, the benefit would equal the search costs.

However, these are just the cost-based benefits. Enabling the use of orphan works to be unlocked for commercial and non-commercial purposes could assist the growth of Australian copyright industries. In 2014 Australia's core copyright industries contributed $7.4 billion to Australia's economy and 4.7 per cent of gross domestic product, and employed more than 600,000 people.[220]The industry value add of libraries and archives alone (i.e. contribution of the sector to overall GDP) was $1.2 billion in 2014-15. To put the search costs into perspective, the industry value-add of libraries and archives would only have to increase between 0.9 per cent and 1.7 per cent over 10 years in order to break even with the estimated search costs. Given the high proportion of orphans residing in the collections of libraries and archives (estimated to be around 40 per cent), this is an entirely feasible outcome. The UK's impact assessment placed the potential benefit of orphan works between £50million and £130 million per annum.[221]

[219] UK Intellectual Property Office (2015), 'Orphan works: review of the first 12 months', available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/487209/orphan-works-annual-report.pdf.
[220] PwC (2015), *The Economic Contribution of Australia's Copyright Industries 2002-2014, p*repared for the Australian Copyright Council.
[221] UK Intellectual Property Office (2014), *Impact Assessment: Orphan Works,* available at: https://www.gov.uk/government/publications/impact-assessment-opinion-orphan-works.

Figure 15: Number of institutions and total industry value add over time – Libraries and Archives



Source: IBISWorld Industry Report J6010: Libraries and archives in Australia.

3.7.5.7 Impact on rights holder's revenue and incentives to create new works

There is broad consensus that an orphan work, where there is no copyright owner and therefore no beneficiary of copyright, will not detrimentally affect a rights holder's revenue and thereby incentive to create new works. Professor Jennifer Urban submitted to the ALRC that:

> *If a reasonably diligent search has been conducted and the copyright owner cannot be found, there is a high probability that the work has been 'economically abandoned'. In a case where the work can truly be said to be an orphan, there is little difference between it and one in which the copyright holders would allow free use, such as through a creative commons license.*[222]

There may be some perverse incentives created by the proposed changes, whereby orphan works might be chosen over copyright works where the user has to pay. However, this would largely depend on how substitutable the works are.

The ALRC also heard concerns from photographers, whose works, once digitised, are orphaned due to metadata being stripped from them, and appropriated by third parties for commercial gain. The proposed changes would not prevent such abuse of copyright, but neither should they exacerbate the problem. Option 1 would only allow the use of orphan works provided a reasonably diligent search for the rights holder has been conducted and the rights holder has not been found. Where infringement occurs despite a diligent search having been undertaken, a rights holder will still be able to claim 'reasonable compensation'. Experience of licensing orphan works in Canada has shown that 22 per cent of applications do not need to be pursued as the search process identifies the rights-holder.[223] As commented by the ALRC therefore, 'rather than harming markets, searches for the creators of orphan works may, in some instances, reunite copyright owners with their works and thereby revive the market and provide new streams of work'.[224]

3.7.5.8 Relationship between statutory licenses and the proposed orphan works arrangements

Statutory licenses under Parts VA and VB of the Copyright Act allow the copying and communication of materials for education, whether or not they are orphaned, subject to the payment of reasonable remuneration to the

[222] ALRC (2013), *Copyright in the Digital Economy: Final report,* p.298.
[223] De Beer, J and Bouchard, M (2009), *Canada's 'orphan works' regime: Unlocatable copyright owners and the copyright board*, p.33.
[224] ALRC (2013), *Copyright in the Digital Economy: Final report,* p.299.

declared collecting societies. For example, data submitted by the COAG Education Council, shows that orphan works represented around 20 per cent of all pages in the 2014 Part VB survey, equating to license payments of around $9.2 million to the Copyright Agency.[225]

Fees collected by the collecting societies from uses of an orphan work are held in a trust for a period of four years. At the end of this period, if the rights holder of this work has not been identified, or if the rights holder is not a member of the collecting society, the fees are redistributed among the current members of the collecting society.

Under the proposed arrangements, uses of works found to be orphaned following a reasonably diligent search, may no longer be remunerable. Therefore, there would be a transfer of income from rights holders to users equal to the amount currently paid for these uses. However, even where money is held in a trust and redistributed to copyright holders, the recipients may have no connection with the orphan work, which is inconsistent with copyright's purpose of providing an incentive to create by remunerating the author of a work.

This impact is considered in Section 3.5 – Education.

[225] National Copyright Unit, COAG Education Council (2015), Productivity Commission submission.

4. Fair dealing and fair use compared

4.1 Certainty

4.1.1 Fair use exception

There is a view that the fair use exception would be less certain than the current fair dealing exceptions. More specifically, it is argued that moving from the status quo (which is characterised by a closed list of prescriptive exceptions) to the fair use exception (which would be characterised by an open-ended, principle-based exception) would reduce certainty on what constitutes infringement of copyright material. Stakeholders maintain that the impacts of this reduction in certainty could include:

- **Increased monitoring and enforcement costs** – less certainty could lead to an actual or perceived increase in unauthorised use. As a consequence, rights holders may increase their monitoring activities, and initiate more undertakings to enforce their copyrights. Less certainty could also increase the likelihood that enforcement undertakings proceed to trial, as the parties involved may have different interpretations of their respective chances of winning at trial. The perceived difference in litigation rates and costs between the American copyright system (based on fair use) and, more prescriptive copyright systems (such as those of the United Kingdom and Australia), is typically seen as evidence of the greater uncertainty associated with fair use. Such comparisons are also used to inform estimates of the potential increase in enforcement costs that rights holders and users in Australia would experience, if fair use was adopted. For instance, PwC recently estimated that implementing fair use could increase legal costs fivefold – based on a comparison of the number of fair dealing and fair use cases in the United Kingdom and the United States, respectively.[226]

- **Reduced incentives for the creation and distribution of copyright material** – as the ALRC states, 'if rights holders are unsure whether they will be able to exploit their rights exclusively, this could inhibit creation and distribution.'[227]

- **Reduced follow-on innovation** – as Palmedo states, 'if companies and innovators do not know in advance whether new types of uses would be found "fair" in a potential court case, they will not take advantage of flexibilities offered by the letter of the law.'[228]

In our view, it is reasonable to expect that implementing the fair use exception, like any major reform to an established legislative framework, would increase uncertainty for key stakeholders in the short term. The increased uncertainty could lead to:

- Increased monitoring and enforcement costs – a number of stakeholders maintained during our interviews that adopting fair use could trigger a spike in litigation as rights holders and users of copyright material sought to test the boundaries of the new exception and establish precedent

- A reduction or stagnation in the creation of copyright material and follow-up innovation based on copyright material.

[226] PwC (2016), *Understanding the costs and benefits of introducing a 'fair use' exception*, prepared for APRA AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights.
[227] ALRC (2013), *Copyright and the Digital Economy: Final report*.
[228] Palmedo, M (2015), 'Firm Performance in Countries With & Without Open Copyright Exceptions', May, available at: http://infojustice.org/archives/34386.

The magnitude of these impacts is difficult to estimate. Their significance would be dependent on how the fair use exception was implemented - particularly in relation to the quantity and quality of guidance material developed by government, rights holders and user bodies.

International experience suggests that guidance material can play a strong role in increasing stakeholder understanding of fair use and providing greater certainty about its application. For instance, a number of stakeholders highlighted the example of the *Documentary Filmmakers Statement of Best Practices in Fair Use*. Released in November 2005, this guidance material is widely seen as providing clear direction on how documentary filmmakers could apply fair use, as well as enabling complaint films to secure 'errors and omissions' insurance and expand their distribution.[229]

It is important to note that not all guidance material developed in the United States has proved successful in enhancing stakeholder understanding of the application of fair use.[230] This notwithstanding, the American experience does provide a number of lessons on how to maximise the effectiveness of guidance material. As Hinze et al recently stated:

> *'The United States experience under the Copyright Act of 1976 indicates voluntary guidance documents can be a means by which to achieve greater levels of certainty, and provide predictability and normative guidance to users. In our experience, such voluntary guidance documents have proven most useful when they have (i) evolved organically (rather than being developed in the context of a legislative reference or government facilitation), (ii) been perceived as being balanced (rather than, for instance, reflective of only one side of the copyright balance), (iii) been widely accepted by the copyright user community, and (iv) been widely adopted in that communities' actual practice.'*[231]

Beyond implementation, it is unlikely that the fair use exception, by its inherent nature, would reduce certainty for rights holders and users of copyright material compared to the status quo. This contention is based on the following three observations:

1. The status quo itself is relatively uncertain
2. The fair use exception is likely to be relatively predictable
3. The relationship between fair use and increased enforcement costs is unclear.

4.1.1.1 The relative uncertainty of the status quo

It is clear from stakeholder feedback that the current fair dealing exceptions provide sufficient certainty to some stakeholders. Box 9 provides a sample of stakeholder views to this effect.

Box 9: Select stakeholder feedback on the certainty provided by the current fair dealing exceptions

'The current [fair dealing] exceptions, as drafted, together with the guidance provided by judicial interpretation of these exceptions, provide sufficient certainty as to the respective rights of content producers and users. The existing exceptions also strike an appropriate balance between the interests of copyright owners and those who have a legitimate basis for using copyright material without consent.

Australian Associated Press (2012), ALRC submission

[229] Augderheide, P and Jaszi, P (2011), *Reclaiming Fair Use: How to put balance back in Copyright*, University of Chicago Press, Chicago.
[230] The Kernochan Center for Law, Media and the Arts, Columbia University School of Law (2012), *Copyright Exceptions in the United States For Educational Uses of Copyrighted Works*, ALRC submission.
[231] Hinze, G, Jaszi, P and Sag, M (2013), 'The Fair Use Doctrine in the United States – A Response to the Kernochan Report'.

'There is no evidence that the current exceptions in Australia's law are either difficult to understand or unworkable in practice. Had this been the case, it would have been expected to feature in decisions of the Courts. In practice there are very few cases in which copyright exceptions have been tested. Where they have been tested, the user has frequently succeeded in relying on the exceptions. Absent empirical evidence to suggest that the system is not working, the evidence points to the system operating efficiently and with sufficient clarity for copyright owners and users.'

Australian Film/TV bodies (2015), Productivity Commission submission

'Members of Free TV rely upon fair dealing for criticism and review, parody and satire and most importantly, reporting of news, on a daily basis in compiling programming. These exceptions provide clarity and certainty for broadcasters around the uses of copyright material that can be made for free and should not be removed.'

Free TV Australia (2015), Productivity Commission submission

On the whole, however, it is unlikely that the current fair dealing exceptions provide sufficient certainty to all stakeholders. The reasons for this are threefold. First, in contrast with the opinions outlined in Box 9, a number of stakeholders have questioned the certainty provided by the status quo – either in general (e.g. 'existing Australian fair dealing jurisprudence is anything but certain'[232]) or in relation to specific uses of copyright material (including data and text mining, education, incidental and technical use, libraries and archives, and time and format shifting[233]).

Second, the Copyright Act and its exceptions are complex. This complexity is likely to limit the predictability of the law for non-specialists and those that lack the resources to invest in understanding the law.[234] The complexity of the Copyright Act is evident from expert opinion,[235] observed deficiencies in the drafting of the law,[236] and international comparisons. With reference to the last point, a quick comparison reveals that the Copyright Act has, on average, 3.5 times more sections and 3 times more pages than the copyright laws of New Zealand, the United Kingdom, the United States and Canada (
Table 15). It was based on a similar comparison that led Sainsbury to conclude in 2011: 'a case can be made that the Australian Copyright Act is the most complex in its form in the common law world.'[237]

Table 15: Comparison of copyright laws in select common law countries

[232] National Copyright Unit, COAG Education Council (2015), Productivity Commission submission.

[233] For example, see: Australian Competition and Consumer Commission (2015), Productivity Commission submission; Australian Communications Consumer Action Network (2015), Productivity Commission submission; Australian Digital Alliance (2015), Productivity Commission submission; Google Australia (2015), Productivity Commission submission; Universities Australia (2015), Productivity Commission submission.

[234] As the Attorney-General's Department states: 'Complex legislation can create uncertainties about the law. This can impose unnecessary burdens on business and restrict the ability of those affected by the law to understand their legal rights and obligations.' See: Attorney-General's Department (2016), 'Reducing the complexity of legislation', available at: https://www.ag.gov.au/LegalSystem/ReducingTheComplexityOfLegislation/Pages/default.aspx.

[235] See: ALRC (2013), *Copyright and the Digital Economy: Final report*; Stewart, A, Griffith, P and Bannister, J (2010), *Intellectual Property in Australia*, Sydney, LexisNexis; Australian Copyright Council (2012), ALRC submission; NSW Department of Attorney-General and Justice (2012), ALRC submission.

[236] For examples, see: Weatherall, K, Alexander, I and Handler, M (2015), Productivity Commission submission, pp:3-4.

[237] Sainsbury, M (2011), 'Context or Chaos: Statutory Interpretation and the Australian Copyright Act', *Statute Law Review* 32(1), 54–75.

Jurisdiction	Legislation†	Number of sections	Number of pages‡
Australia	*Copyright Act 1968*	740	671
New Zealand	*Copyright Act 1994*	338	237
United Kingdom	*Copyright, Designs and Patents Act 1988**	229	98
United States	*Copyright Act of 1976*	136^	366
Canada	*Copyright Act, RSC 1985, c. C-42*	99	164

*Note: † accessed 1 March 2016; ‡ based on PDF version, excluding notes; * limited to Part 1 and Schedule 1; ^ excludes two repealed sections (509 and 601).*

Third, the nature of the current fair dealing exceptions is likely to engender uncertainty in relation to new uses of copyright material. Under the status quo, exceptions are both prescriptive and exhaustive[238] – that is, they only provide a defence to infringement for uses that are explicitly referenced in the exception. While such specificity may provide certainty in relation to specified uses, its utility is limited in relation to uses that were not foreseen at the time of drafting the exceptions. As Weatherall and Hudson state:

> *'In a rapidly changing technological environment, the search for certainty through specificity … is destined to fail. Beyond a certain point, specificity leads to more uncertainty for most stakeholders in the copyright system, because it is unclear whether specific exceptions apply to new technologies or analogous uses.'*[239]

It is worth noting that the pace of technological change appears to be increasing – a trend that will likely place further strain on the ability of the current fair dealing exceptions to provide certainty to stakeholders. The growth in technological change is evident from:

- **The expansion of the digital economy** – according to Deloitte Access Economics, the value of Australia's digital economy increased by a compound annual growth rate (CAGR) of 12.1 per cent from 2009/10 to 2013/14[240], compared to 2.7 per cent for the economy as a whole[241]
- **The increase in diffusion of new technologies** – according to Comin and Mestieri, adoption lags for key technological breakthroughs have declined significantly over the past 200 years (Figure 16)[242]
- **The increase in patent fillings** – data published by the World Intellectual Property Office indicates that global patent fillings have nearly doubled in per capita terms since the late-1990s (Figure 17).

[238] Fitzgerald, B and Fitzgerald, A (2004), *Intellectual Property in Principle*, Lawbook.

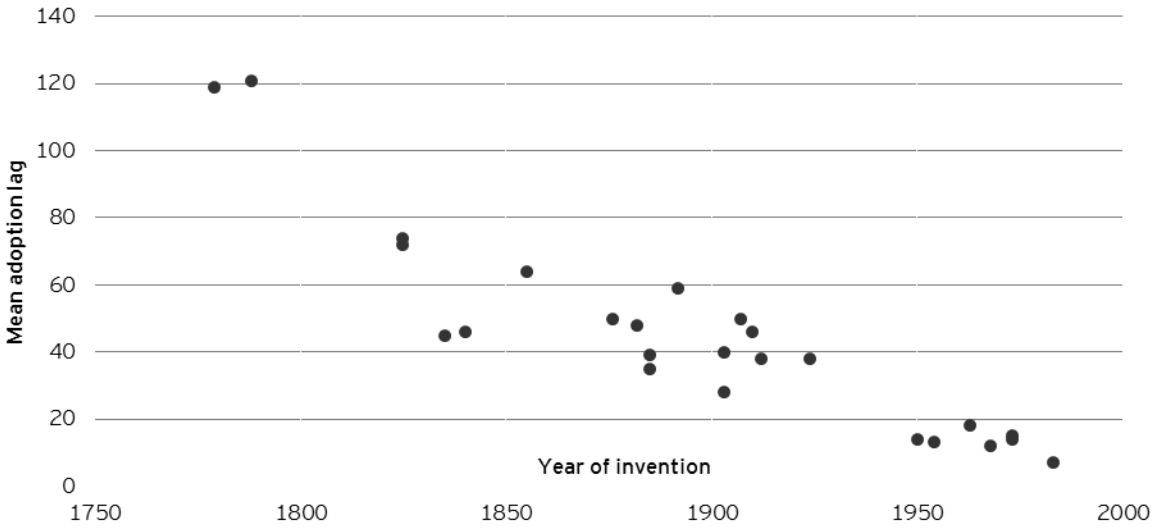
[239] Weatherall, K and Hudson, E (2005), *Response to the Issues Paper: Fair Use and Other Copyright Exceptions in the Digital Age*, available at: http://works.bepress.com/kimweatherall/6/.

[240] Deloitte Access Economics estimates that Australia's digital economy increased from $50 billion in 2009/10 to $79 billion in 2013/14. See: Deloitte Access Economics (2011), *The Connected Continent*, prepared for Google Australia; Deloitte Access Economics (2015), *The Connected Continent II*, prepared for Google Australia.

[241] ABS (2016), 'Australian National Accounts: National income, expenditure and product', cat. no. 5206.0.

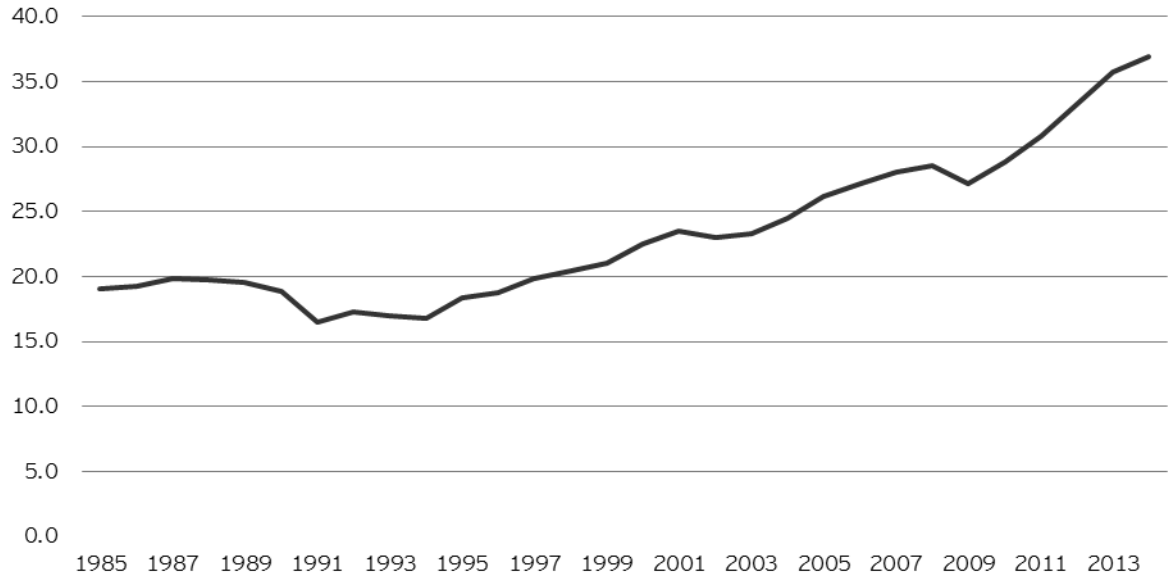
[242] Comin, D and Mestieri, M (2013), 'If Technology has Arrived Everywhere, why Has Income Diverged?', May.

Figure 16: Adoption lags of 25 select technological breakthroughs



Source: Diego Comin and Martı Mestieri (2013), 'If Technology has Arrived Everywhere, why Has Income Diverged?', May.

Figure 17: Global patent applications, per 100,000 people



Source: World Intellectual Property Office (2016), WIPO statistics database.

4.1.1.2 The relative predictability of fair use

Fair use is often portrayed as being synonymous with uncertainty. The available evidence, however, suggests that the fair use exception would be relatively predictable, and should support effective decision-making by both rights holders and users of copyright material. The reasons for this are twofold.

First, the fair use exception would, to some extent, involve a continuation of the status quo. As the ALRC noted in its final report:

'The test of fairness is also not novel in Australian law. The existing fair dealing exceptions require the application of a fairness test and the fairness factors that [underpin the fair use exception] are substantially the same as those currently provided in the fair dealing exceptions for research or study.'[243]

Second, empirical and system-level studies of the operation of the fair use exception in the United States indicate that fair use is relatively predictable. This research includes:

- Beebe's 2008 empirical study of 306 opinions that made substantial use of fair use between 1978 and 2005. Beebe found, among other things, that 'fair use case law … has not been marked by especially high reversal, dissent or appeal rates', 'judges do not generally stampede the factor outcomes'[244] , and certain sub-factors (e.g. non-commerciality) 'were far more important to the outcome of the fair use test than is generally thought'.[245] Beebe recently reaffirmed his original findings, based on an empirical analysis of 460 opinions that made substantial use of fair use between 1978 and 2014.[246]

- Samuelson's 2009 qualitative assessment of fair use case law, which involved grouping decisions into policy-relevant clusters. Samuelson concluded that 'if one analyses putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair'.[247]

- Netanel's 2011 quantitative analysis of fair use case law from 1995, which highlighted the growing dominance (and predictability) of the transformative use paradigm. He concluded that '[i]f the use is transformative and the defendant has not copied excessively in light of the transformative purpose, the use will most likely be held to be a fair use'.[248]

- Sag's 2012 quantitative assessment of the predictability of fair use outcomes (based on a dataset of 280 fair use cases decided between 1978 and 2011). Sag found (among other things) that transformative use and the amount and substantiality of the defendant's unauthorised use are important predictors of a finding of fair use. He concluded that, 'while there are many shades of grey in fair use litigation, there are also consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection'.[249]

Some recent studies have questioned the predictability of fair use in the American context. For instance, in connection with the ALRC inquiry, the Kernochan Center for Law, Media and the Arts at Columbia University School of Law conducted a review of the American fair use provisions ('the Kernochan Review'). This review concluded that '[f]air use is not entirely unpredictable. But it cannot be denied that fair use is sometimes difficult to assess — even for attorneys — and reasonable, knowledgeable people often disagree'.[250] In our view, this conclusion carries less weight than the results of the studies outlined above because:

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[243] ALRC (2013), *Copyright and the Digital Economy: Final report*.

[244] Some scholars have argued that Courts 'stampede' fair use decisions. That is, 'courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can.' See: Nimmer, D (2003), '"Fairest of them all" and other fairy tales of fair use', *Law and Contemporary Problems* 66:263-87.

[245] Beebe, B (2008), 'An empirical study of U.S. copyright fair use opinions, 1978-2005', *University of Pennsylvania Law Review* 156(3):549-624.

[246] Beebe, B (2015), 'An Empirical Study of U.S. Copyright Fair Use Cases, 1978-2014', presentation to the New York City Bar Association Copyright Law Committee, 14 April.

[247] Samuelson, P (2009), 'Unbundling fair uses', *Fordham Law Review* 77:2537:621.

[248] Netanel, NW (2011), 'Making sense of fair use', *Lewis & Clarke Law Review* 15(3):715:71.

[249] Sag, M (2012), 'Predicting fair use', *Ohio State Law Journal* 73(1):47-91.

[250] The Kernochan Center for Law, Media and the Arts, Columbia University School of Law (2012), *Copyright Exceptions in the United States For Educational Uses of Copyrighted Works*, ALRC submission.

- It holds fair use to an unreasonably high standard – as Hinze et al stated in response to the Kernochan Review:
  - *'For a legal doctrine to be predictable does not require an absolute consensus on its application to contested facts in every individual case. Like the common law, it is helpful to think of fair use as both a mechanism for generating decisions about particular issues (i.e., as a system) and as a collection of actual decisions (i.e., as a body of case law). At a system level, the last 30 years of case law have generated a fairly coherent set of principles that lend themselves to forward-looking application. At the level of individual cases, it is true that no copyright expert agrees with every court decision on fair use, but we are not aware that such consensus exists in any other significant area of the law.'*[251]
- It is seemingly based on 'anecdata' (i.e. examples of complex fair use cases), rather than empirical analysis of the broader case law.

4.1.1.3 The unclear relationship between fair use and increased enforcement costs

As we note above, the perceived differences in litigation rates and costs between the American copyright system and more prescriptive copyright systems is typically seen as evidence of the greater uncertainty associated with fair use. An examination of the available evidence, however, suggests that the relationship between fair use and higher enforcement costs is unclear (and seemingly less strong than is commonly assumed).

The sections below explore the enforcement costs of the status quo, before analysing enforcement-related data from Singapore, the United Kingdom, the United States, and Australia.

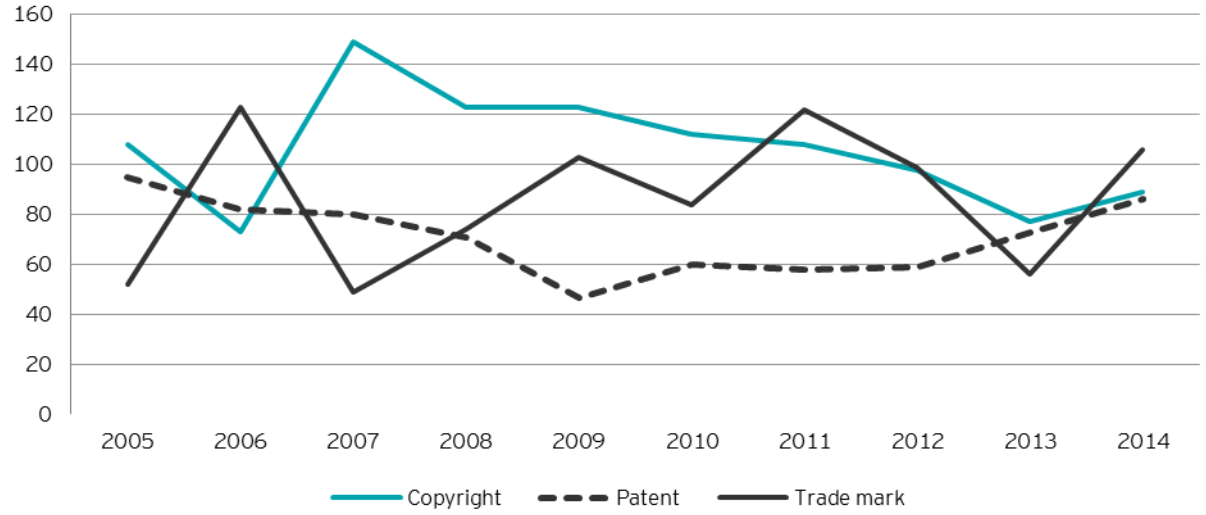
4.1.1.4 Status quo

Copyrights can be enforced through both criminal and civil litigation. As we have excluded government costs from our analysis, we focus here primarily on the costs associated with civil litigation.

Civil copyright cases are typically handled by the Federal Court of Australia (FCA) and the Federal Circuit Court of Australia (FCCA) (formerly the Federal Magistrates Court). Based on our analysis of annual reports and judgments published by both institutions (see
Figure 18), we estimate that there was an annual average of 106 copyright case filings from 2005 to 2014, compared to an annual average of 87 trade mark case filings and 71 patent case filings over the same period.

[251] Hinze, G, Jaszi, P and Sag, M (2013), 'The Fair Use Doctrine in the United States – A Response to the Kernochan Report'.

Figure 18: Number of intellectual property cases filed in the FCA and FCCA, 2005 – 2014



Source: FCA Annual Reports, available at: http://www.fedcourt.gov.au/publications/annual-reports; FCCA Annual Reports, available at: http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/annual-reports/; LexisNexis AU, accessed on 7 March 2016.

Note: The FCA does not publish data on copyright case filings. To derive estimates for copyright, patent and trade mark case filings, we: (1) used LexisNexis AU to identify all copyright, patent, trade mark, design and circuit layout judgments published by the FCA per calendar year from 2005 to 2014; and (2) then applied the proportion of copyright, patent and trade mark judgments (relative to the total number of intellectual property judgments, and accounting for duplicate entries) to the intellectual property case filing data published by the FCA. We used a similar method to estimate copyright and trade mark case filings for the FCCA; but only for 2014, as the FCCA (and its predecessor) published copyright case filing data from 2004/05 to 2012/13. We identified judgments in LexisNexis AU using the relevant act in the 'legislation considered' search field (e.g. Copyright Act 1968) and the relevant term in the catchword search field (e.g. copyright).

Both plaintiffs and defendants incur costs as a result of civil litigation. These costs include:

- Administrative costs (e.g. staff time spent collecting information and attending hearings)
- Professional services costs (e.g. costs associated with purchasing legal advice and representation)
- Opportunity costs (e.g. lost investment and sales opportunities associated with legal uncertainty).

Estimates of the costs associated with copyright civil litigation are typically drawn from the report of the Standing Committee on Legal and Constitutional Affairs' inquiry into the enforcement of copyright in Australia. During this inquiry (which was conducted in 2000), a number of stakeholders estimated that the average cost of infringement proceedings ranged from $23,000 to $150,000 (adjusted for inflation).[252] It is likely (though not certain based on the data available) that these estimates only encompass professional services costs (as opposed to administrative costs and opportunity costs).

Based on the information above, we estimate that the annual cost of copyright proceedings under the status quo is between $2.5 million and $16 million. This estimate is likely to be conservative, given the questions of data completeness raised above.

[252] Standing Committee on Legal and Constitutional Affairs (2000), *Cracking Down on Copycats: Enforcement of copyright in Australia*, November. The $23,000 relates to the $15,000 estimate provided by the Anti-Counterfeiting Action Group (ACAG), while the $150,000 relates to the $100,000 estimate provided by Musing Industry Piracy Investigations. We have not referenced the $50,000 to $250,000 estimate provided by IP Australia in *Cracking Down on Copycats*, as it relates to patent litigation.

It is important to note that not all enforcement costs are incurred through copyright proceedings. Costs are also incurred through enforcement undertakings that are resolved before proceedings are commenced. A number of estimates exist on the likely scope of such undertakings.[253] There are, however, no reliable estimates of the average costs incurred during copyright enforcement undertakings that do not result in a court filing.

4.1.1.5 Singapore's experience with fair use

The Singaporean Government introduced new copyright legislation in 1987. This included some fair dealing exceptions, but these 'were limited to very specific purposes: (a) private study or research; (b) criticism or review; and (c) reporting current events or news'.[254] In 2005, the Singapore Government amended its copyright legislation to add a clause that 'strongly echoes' the fair use clause of American copyright legislation.[255]

Figure 19 outlines the number of copyright decisions in Singapore (excluding public prosecutions), and the number of decisions per million people, from 1987 to 2014. This figure illustrates that:

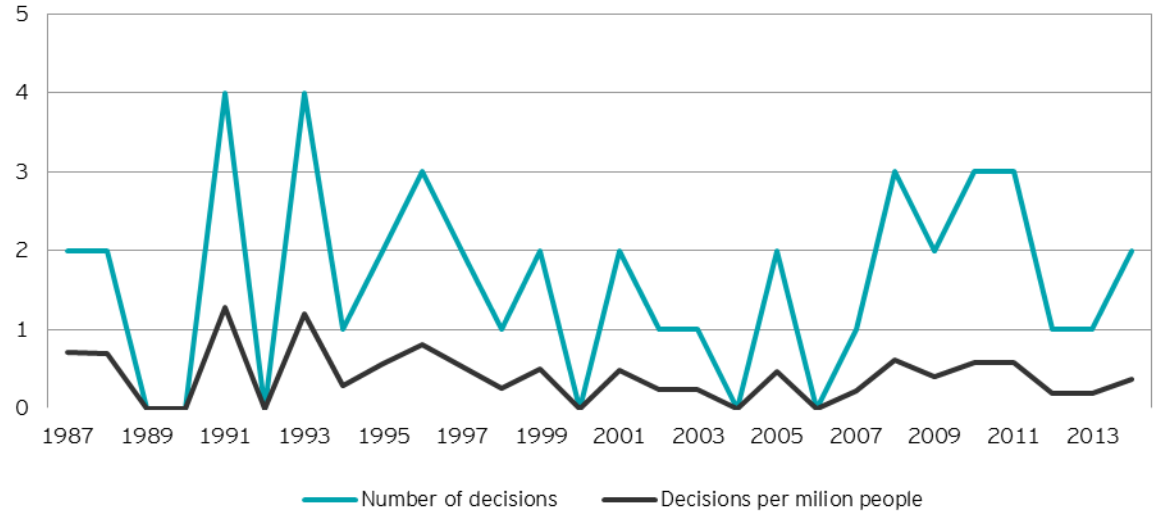
- There was an increase in the number of copyright decisions following the 2005 amendment – from 1987 to 2004, the average number of decisions was 1.44. This increased to 1.80 from 2005 to 2014
- Controlling for population, there was a slight decrease in the number of copyright decisions following the 2005 amendment – from 1987 to 2004, the average number of decisions per million people was 0.42. This dropped to 0.36 from 2005 to 2014.

[253] Both Lateral Economics and PwC suggest that the ratio of filed cases to undertakings that do not result in a court filing is likely to be between 1:10 and 1:20; though the evidence supporting this contention is unclear. See: Lateral Economics (2012), *Excepting the Future Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions*, prepared for the Australian Digital Alliance; PwC (2016), *Understanding the costs and benefits of introducing a 'fair use' exception*, prepared for APRA AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights.

[254] Gahfele, R and Gilbert, B (2014), 'A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in Singapore', *Laws,* 3:327-52.

[255] *Ibid*.

Figure 19: Number of copyright decisions and decisions per million people, Singapore, 1987 – 2014



Source: LawNet (2016), 'Legal research basic module', available at: https://www.lawnet.sg; The World Bank (2016), 'Population, total', available at: http://data.worldbank.org/.
Note: Copyright decisions were identified using LawNet categories. Cases involving public prosecutors were excluded.

4.1.1.6 The United Kingdom and the United States

To support its submission to the Hargreaves review of intellectual property and growth, the British Copyright Council (BCC) engaged Taylor Wessing LLP to prepare a comparison of the British and American copyright regimes. This comparison made two key findings. First, that from 1978 to 2010, there were approximately four-to-five times more reported fair use decisions/opinions made under American copyright legislation[256] than reported fair dealing decisions made under British legislation.[257] The significance of this finding, however, is unclear; given that, over the same period:

- The population of the United States was, on average, four-to-five times bigger than that of the United Kingdom[258]
- The gross domestic product (GDP) of the United States was, on average, six times bigger than that of the United Kingdom.[259]

The second key finding was that 'the costs of bringing or defending a copyright case which goes to a full trial and a reported decision is likely to be somewhere between £250,000 and £500,000 [US$350,000 and US$700,000][260] (excluding any appeals)'; whereas 'the average cost to defend a copyright case [in the United States] is just under [US]$1 million'.[261]

[256] Taylor Wessing LLP found that there was an annual average of eight reported fair use decisions in the United States from 2006/07 to 2009/10. Taylor Wessing LLP also highlighted empirical analysis conducted by Beebe that found there was an annual average of 11 reported fair use opinions in the United States from 1978 to 2005. See: Beebe, B (2008), 'An empirical study of U.S. copyright fair use opinions, 1978-2005', *University of Pennsylvania Law Review*, 156(3):549-624; British Copyright Council (2011), *Submission to the Hargreaves review of intellectual property and growth.*

[257] Taylor Wessing LLP found that, from 1978 to 2010, there were 67 reported fair dealing decisions in the United Kingdom (or an average of two decisions per year). See: British Copyright Council (2011), Submission to the Hargreaves review of intellectual property and growth.

[258] The World Bank (2016), 'Population, total', available at: http://data.worldbank.org/.

[259] The World Bank (2016), 'GDP at market prices (current US$)', available at: http://data.worldbank.org/.

[260] Based on a June 2011 conversion rate of 1.4118 USD to 1 GBP.

[261] British Copyright Council (2011), Submission to the Hargreaves review of intellectual property and growth.

Assuming these estimates are reliable[262], it remains unclear the extent to which the variation in litigation costs between the United Kingdom and the United States is attributable to differences in copyright regimes, as opposed to other factors (such as differences in legal systems and the relative importance of the American market to global copyright industries).

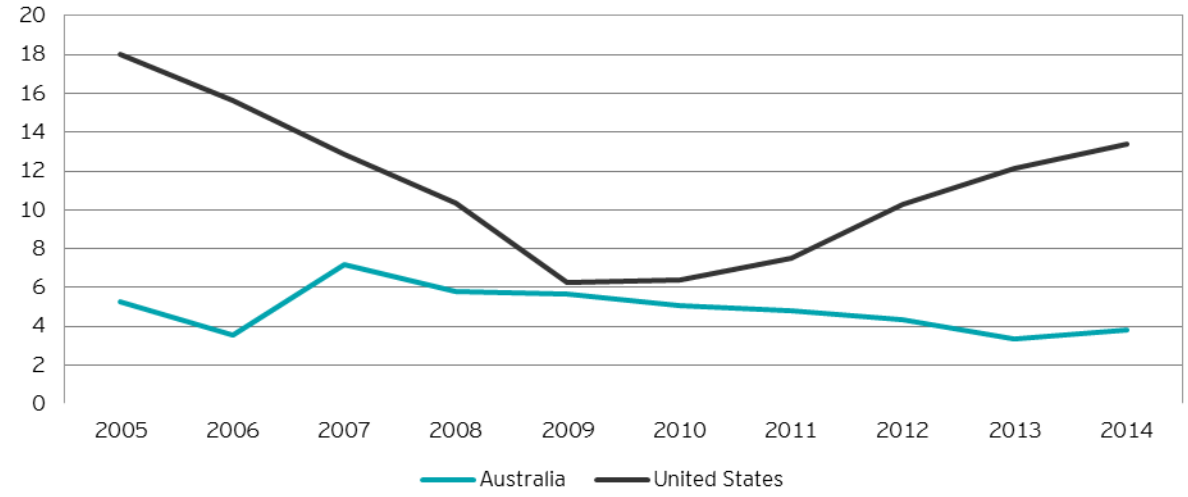
4.1.1.7 Australia and the United States

As noted above, we estimate there was an annual average of 106 copyright case filings in Australia from 2005 to 2014. In contrast, there was an annual average of 3,469 copyright case filings in the United States over the same period.[263] Controlling for population, there were approximately 2.5 times more copyright case filings in the United States (an annual average of 11.3 per million people) compared to Australia (an annual average of 4.9 per million people) from 2005 to 2014 (Figure 20).

[262] The ultimate source of the US$1 million figure cited by Taylor Wessing LLP is a 2006 article by Fisher and McGeveran, which states that '[a] report by the American Intellectual Property Law Association estimates that the average cost to defend a copyright case is just under one million dollars.' The report in question is not cited. We note that a 2005 survey conducted by the American Intellectual Property Law Association found that median litigation costs for copyright infringement suits ranged from US$138,000 to US$975,000. See: Fisher, W and McGeveran, W (2006), 'The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age', Research Publication No. 2006-09; American Intellectual Property Law Association (2013), *Report of the Economic Survey 2013*.

[263] Sag, M (2016), 'Dataset - IP Litigation in US District Courts 2015 Update', available at: http://matthewsag.com/?page_id=19. This data is based on cases filed in 94 U.S. federal district courts in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.

Figure 20: Number of copyright cases filed per million people, Australia and the United States, 2005-2014



Source: EY analysis (see

Figure 18 for more detail); Matthew Sag (2016), 'Dataset - IP Litigation in US District Courts 2015 Update', available at: http://matthewsag.com/?page_id=19; The World Bank (2016), 'Population, total', available at: http://data.worldbank.org/.

Note: The Australian data is based on cases filed in the FCA and FCCA. The American data is based on cases filed in 94 U.S. federal district courts in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.

Interestingly, this ratio appears to be slightly less than that for all civil lodgements in both countries. For instance, a 2010 study found that, controlling for population, there were approximately 3.8 more civil lodgements (per 100,000 people) in the United States than Australia in 2006.[264] Our own analysis, meanwhile, found that, controlling for population, there were approximately 2.6 more civil lodgements (per million people) in the United States than Australia in 2013.[265] These findings indicate that factors beyond prescriptive/flexible exceptions may play a larger role in explaining the variation in copyright litigation rates between both countries.

As part of its submission to the ALRC inquiry, the Copyright Agency | Viscopy conducted an analysis of 94 reported cases from single judges of the FCA from 1 July 2006 to 30 June 2012. Of these cases, the Copyright Agency | Viscopy identified four where 'the operation of an exception [was] a key issue'[266] – equal to 0.7 cases a year. In its submission to the Productivity Commission inquiry, the Copyright Agency | Viscopy highlighted recent analysis conducted by Beebe, which found that there were approximately 154 copyright decisions that made substantial use of fair use in the United States from 2006 to 2014[267] – equal to 17.1 cases per year. Even accounting for population and GDP differences, these findings indicate there is greater fair use litigation in the United States compared to copyright exception litigation in Australia (approximately two times more). It is not clear from the available data, however, how much of this variation is driven by the nature of each country's respective copyright systems, rather than other factors such as legal systems, culture and the relative importance of the American market to global copyright industries.

4.1.2 New fair dealing exception

Few stakeholders have commented on the relative certainty of the new fair dealing exception compared to either the status quo or the fair use exception. The scant evidence that does exist, however, suggests that the new fair dealing exception would be, at the very least, as certain as the fair use exception.

On the one hand, as the ALRC noted, 'it can … be argued that the new fair dealing exception is more certain than fair use, because it is clear that any use not for one of the listed purposes, cannot be found to be fair'.[268] Conversely, it can also be argued that the new fair dealing exception (because of its prescriptive nature) would provide less certainty in relation to new and emerging uses of copyright material compared to the open-ended fair use exception.

[264] Ramseyer, JM and Rasmusen, EB (2010), 'Comparative litigation rates', The Harvard John M. Olin Discussion Paper Series.

[265] According to the Productivity Commission, there were 2,106 civil lodgments per 100,000 people in 2012/13. See: Productivity Commission (2016), 'Courts', in *Report on Government Services*. According to the National Centre for State Courts, there were 16.9 million civil lodgments in state courts in 2013. The United States Federal Courts report that there were an additional 303,820 civil lodgments at the federal level (from April 2013 to March 2014). The World Bank notes that the population of the United States was 316.5 million in 2013. See: National Centre for State Courts (2015), *Examining the Work of State Courts: An overview of 2013 state court caseloads*; United States Federal Courts (2014), 'Federal Judicial Caseload Statistics 2014 Tables', available at: http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014-tables; The World Bank (2016), 'Population, total', available at: http://data.worldbank.org/.

[266] Copyright Agency | Viscopy (2012), ALRC submission.

[267] In 2008, Beebe identified 306 decisions that made substantial use of fair use between 1978 and 2005. In 2015, Beebe identified 460 decisions that made substantial use of fair use between 1978 and 2014. See: Beebe, B (2008), 'An empirical study of U.S. copyright fair use opinions, 1978-2005', *University of Pennsylvania Law Review*, 156(3):549-624; Beebe, B (2015), 'An Empirical Study of U.S. Copyright Fair Use Cases, 1978-2014', presentation to the New York City Bar Association Copyright Law Committee.

[268] ALRC (2013), *Copyright and the Digital Economy: Final report*.

4.2 Flexibility

4.2.1 Fair use exception

There is a view that the fair use exception would be more flexible than the current fair dealing exceptions. More specifically, it is argued that, because the fair use exception would require 'the consideration of principles or factors in an assessment of fairness, rather than setting out in detail the precise circumstances in which the exception [would] apply'[269], it would be able to accommodate new technologies and uses of copyright material more easily and without the need for legislative intervention. It is maintained that this increase in flexibility would stimulate innovation; which, in turn, would lead to broader economic benefits.

In our view, it is difficult to dispute that the fair use exception would be more flexible than the status quo. From a theoretical perspective, principles-based regulation (i.e. the fair use exception) should be more flexible than rules-based regulation (i.e. the current fair dealing exceptions).[270] From a practical perspective, it is clear that the status quo has been relatively slow at adapting to new technologies and uses of copyright material (particularly compared to fair use copyright regimes internationally). As the ALRC noted in its final report, '[a] copyright exception permitting time shifting was not enacted in Australia until 22 years after time shifting had been found to be fair use in the US. The exception for parody and satire came 12 years later, and for reverse engineering of computer programs, seven years'.[271] Furthermore, it is fair to say that the vast majority of stakeholders accept that the fair use exception would be more flexible than the status quo – though some stakeholders have questioned the extent of flexibility a fair use exception would provide.[272]

The question, however, of whether the increased flexibility associated with the fair use exception would stimulate innovation (and lead, in turn, to broader economic benefits) is more complicated. This is primarily due to two, interrelated factors. First, while it is broadly recognised that copyright is important to innovation, isolating the contribution of copyright flexibility to innovation from other factors (both related – such as enforcement – and unrelated – such as investor culture and market size) is difficult. Second, empirical research on the relationship between copyright flexibility and innovation/economic growth is both limited and inconclusive (see Box 10 for a summary).

[269] *Ibid*.

[270] ALRC (2008), 'Regulating privacy', in *For Your Information; Australian privacy law and practice*, Report 108, August.

[271] ALRC (2013), *Copyright and the Digital Economy: Final report*.

[272] For example: 'While we accept that a fair use defence appears to be more flexible (at least on its face) than limiting fair dealing to one of the established purposes, the nature of the defence means that the supposed flexibility, 'dynamism', 'agility' and 'malleability' of fair use to respond to changing conditions can actually only be established through testing through the Courts. In Foxtel's view, this is unacceptable.' Foxtel (2012), ALRC submission.

Box 10: Summary of empirical analysis on the relationship between copyright flexibility and innovation/economic growth

Impacts of copyright protection strength (various studies)

A number of studies[273] have examined the economic impact of copyright protection strength (in relation to productivity, research and development, foreign-direct investment and technology transfers) across countries. While comprehensive, these studies provide only limited insight on the relationship between copyright flexibility and innovation/economic growth. This is because the studies are: (1) primarily focused on the strength of copyright regimes, rather than their quality; and (2) based on unweighted indices of copyright strength that comprise four factors – only one of which relates to usage/exceptions (and then sometimes only partly).

The Economic Value of Fair Use in Copyright Law (2012)

This study uses a difference-in-differences methodology to evaluate counterfactually 'the impact on selected industrial groups of flexible fair use amendments introduced in Singapore in 2005'.[274] It found that 'five years after the policy intervention, Singapore's fair use amendments are correlated with a 3.33% increase in value-added (as % of GDP) for private copyright technology industries', and 'a -0.23% reduction in value-added (as % of GDP) for copyright industries'.[275] According to the authors, these results 'show that fair use policy is correlated with higher growth rates in private copying technology industries while having a very limited impact on copyright industries'.[276]

The reliability of these findings, however, are questioned by criticisms raised by Barker[277] and Ford[278] – particularly in relation to the proper use of the difference-in-differences methodology, and the difficulty of isolating the impact of the fair use amendment from other reformas and economic 'shocks' over the study period.

Intellectual Property and Economic Growth Index (2015)

This study examined the 'relationship between exceptions and limitations to exclusive rights in copyright law and economic growth in leading, intellectual property producing countries [i.e. the United States, the United Kingdom, Germany, Sweden, Spain, the Netherlands, Japan and France]'.[279] It found that:

- 'Countries that employ a broadly "flexible" regime of exceptions in copyright also saw higher rates of growth in value-added output throughout their economy.
- 'Countries with broader flexibility in their copyright regimes also saw higher levels of compensation in the overall economy, and specifically in information and communication technology goods and services and consumer manufacturing sectors

[273] For example: Cepeda, RC, Lippoldt, DC and Senft, J (2010), 'Policy Complements to the Strengthening of IPRS in Developing Countries', *OECD Trade Policy Papers*, no. 104; Park, WG (2005), 'Do Intellectual Property Rights Stimulate R&D and Productivity Growth? Evidence from Cross-national and Manufacturing Industries Data', in *Intellectual Property Rights and Innovation in the Knowledge-Based Economy*, Jon Putnam (ed.), Industry Canada, Ottawa; Park, WG (2015), 'Multinational Investments, Technology Transfers, and Copyright Protection', March; Park, WG and Lippoldt, DC (2008), 'Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries', *OECD Trade Policy Papers*, no. 62.

[274] Ghafele, R and Gilbert, B (2014), 'A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in Singapore', *Laws*, 3:327-52.

[275] *Ibid*.

[276] *Ibid*.

[277] Barker, G (2013), 'Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions', presentation to the 2013 Annual Congress of the Society for Economic Research on Copyright Issues.

[278] Ford, GS (2016), 'The Economic Impact of Expanding Fair Use in Singapore: More Junk Science for Copyright Reform', February.

[279] Gilbert, B (2015), *The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity*, revised, May.

- 'Greater scope and flexibility of exceptions to copyright have valuable positive externalities, specifically in the promotion of education, independent research, free-speech, user generated content and text and data mining'.[280]

The reliability of these findings, however, are questioned by criticisms raised by Ford[281] – particularly in relation to the study's sample size, statistical techniques and treatment of data.

Firm Performance in Countries With and Without Open Copyright Exceptions (2015)

In 2015, researchers from American University posted preliminary findings from an ongoing study on how country's copyright exceptions affect economic outcomes. Specifically, they found that 'adoption of fair use clauses modeled on U.S. law is associated with positive outcomes for the firms in our dataset, both those that may be more dependent on copyright exceptions, and those that may be more dependent on copyright protection'.[282] Further information is required, however, to determine the validity and reliability of these findings.

Understanding the Costs and Benefits of Introducing a 'Fair Use' Exception (2016)

As part of its broader analysis of the costs and benefits associated with introducing the fair use exception, PwC conducted a regression analysis of the relationship between copyright flexibility and: (1) GDP per capita; and (2) investment per capita.[283] This analysis suggested a weak relationship in the case of the former, and a positive relationship in the case of the latter.

[280] *Ibid*.

[281] Ford, GS (2015), 'The Lisbon Council's 2015 Intellectual Property and Economic Growth Index: A Showcase of Methodological Blunder', June.

[282] Mike Palmedo (2015), 'Firm Performance in Countries With & Without Open Copyright Exceptions', May, available at: http://infojustice.org/archives/34386.

[283] PwC (2016), *Understanding the costs and benefits of introducing a 'fair use' exception*, prepared for APRA AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights.

The above notwithstanding, we believe it is reasonable to expect that the flexibility associated with the fair use exception would stimulate more innovation (and, in turn, economic growth) than the status quo. The reasons for this are threefold.

First, the flexibility of the fair use exception would enable individuals and organisations to respond more quickly to changes in technology and consumer behaviour or, as Dnes states, 'to absorb high-tech developments as they unfold'[284]. This enhanced responsiveness would provide greater opportunities for experimentation, as well as the commercialisation of new business models, products and services, in relation to technologies and uses of copyright material not yet covered by an existing fair dealing exception. It would also likely bolster the competitiveness of Australian businesses competing in markets based on technologies and uses of copyright material not yet covered by an existing fair dealing exception.

Second, the flexibility of the fair use exception would enable greater third party uses of copyright material. In this context, third party use refers to 'the unlicensed use of copyright material by third parties to deliver a service, sometimes for profit, in circumstances where the same use by the "end user" would be permitted under a license or unremunerated exception'.[285] Third party uses are not only innovations themselves, but are seen by a number of stakeholders as crucial to supporting further innovation and economic growth. A prominent example is cloud computing services. Most cloud services are considered third party uses, as they involve facilitating end user access to copyright material. According to the Australian Competition and Consumer Commission, cloud services are 'important to the emergence and sustainability of competitive digital services industries'.[286] By allowing end users to share computing resources and achieve economies of scale, cloud services have the potential to be a driver of both productive and dynamic efficiency.[287]

While the current fair dealing exceptions do not prohibit third party use, they do hinder such use. Under the status quo, third party use is only permissible if the purpose of the use of the copyright material by both the third party and the end user matches a specified purpose listed in an exception. This can be difficult to establish, given:

- The prescriptive nature of the current fair dealing exceptions[288]
- That the purpose of the use of copyright material by a third party is typically different to that of the end user.

Such difficulties are less likely under the fair use exception, due to its open-ended nature. This does not mean that all third party uses would be found to be fair under fair use. It does mean, however, that the fairness of a third party use would determine its permissibility, rather than its purpose.

Fair use has played an instrumental role in the United States in enabling the emergence of third party uses that have created new markets, as well as enhanced the value of copyright works. A key example is the rise of videocassette recorders (VCRs). In 1984, in response to a lawsuit filed by Universal City Studios, the United States Supreme Court ruled that private copying of television broadcasts for time-shifting purposes constituted a fair use, and that manufacturers of VCRs could not be found liable for copyright infringement.[289] This decision not only allowed the market for VCRs to flourish, but it also facilitated the creation of new markets – both for new technologies (such as video cameras) and uses of copyright material (i.e. home viewing of movies). As von

[284] Dnes, AW (2011), 'A Law and Economics Analysis of Fair Use Differences Comparing the US and UK', prepared for the UK Intellectual Property Office, April.
[285] ALRC (2013), *Copyright and the Digital Economy: Final report*.
[286] Australian Competition and Consumer Commission (2012), ALRC submission.
[287] Department of Communications (2014), *Cloud Computing Regulatory Stocktake*, Version 1, May.
[288] *Ibid*.
[289] *Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).*

Lohmann states, '[t]he VCR made possible the home video market, a market which today generates more than double the revenues collected at the box office—at a time when box office admissions have also shown strong growth'.[290] Lee estimates that 'consumer spending on rentals and sales of videotapes and DVDs alone totaled a staggering $343.2 billion between 1981 and 2006'.[291]

Available research also suggests that fair use has helped stimulate investment in cloud computing companies in the United States. For instance, Lerner and Rafert recently used a difference-in-differences methodology to explore the impact of the United States Second Circuit Court of Appeals' decision *The Cartoon Network, et al. v. Cablevision* ('which was widely perceived as enhancing the property rights of cloud computing companies relative to the content owners such as major movie studios and publishers'), as well as court rulings in Germany and France (which took a narrower view of the property rights of cloud computing companies).[292] Lerner and Rafert found that:

- 'VC investment in cloud computing firms increased significantly in the U.S. relative to the EU after the Cablevision decision, particularly in the geographies and sectors most affected by the decision' – the value of the additional incremental investment was estimated to range from '[US]$728 million to approximately [US]$1.3 billion over the two-and-a-half years after the decision'[293]

- The court rulings in Germany and France 'had significant negative impacts on investment. Specifically, we find that VC investment in cloud computing firms declined in Germany and France, relative to the rest of the EU, after the French and German rulings'.[294]

4.2.2 New fair dealing exception

The new fair dealing exception would be more flexible than the status quo. While it would be based on specified purposes, these purposes would be more broadly defined – making them 'more flexible and adaptive to new technologies and services than detailed, prescriptive exceptions, such as the [current] time shifting exception'.[295]

The new fair dealing exception, however, would be less flexible than the fair use exception. While the specified purposes of the new fair dealing exception are broad and intended to be technologically neutral, they do (like the current fair dealing exceptions) place constraints on the ability of the Copyright Act to adapt to new technologies and uses of copyright material.

The new fair dealing exception is also less likely to enable third party use of copyright material compared to the fair use exception. As the ALRC noted in its final report:

> *'the new fair dealing exception leaves less room for unlicensed third parties to use copyright material in circumstances where they facilitate private uses. This is because the new fair dealing exception is confined to uses for specified purposes. Sometimes the purpose of a third party use will be nearly indistinguishable from the purpose of the end user. At other times, the third party use may be quite different.'*[296]

[290] von Lohmann, F (2008),'Fair use as innovation policy', *Berkeley Technology Law Journal* 23:1-26.
[291] Lee, E (2010), 'Technological fair use', *Southern California Law Review* 83:797-874.
[292] Lerner, J and Rafert, G (2015), 'Lost in the Clouds: The Impact of Changing Property Rights on Investment in Cloud Computing Ventures', Working Paper 15-082, Harvard Business School.
[293] *Ibid*.
[294] *Ibid*.
[295] ALRC (2013), *Copyright and the Digital Economy: Final report*.
[296] *Ibid*.

Appendix A Stakeholder Consultation Plan

Stakeholder	Location	Consultation method	Stakeholder type
APRA/AMCOS	Sydney	Face to face	Collecting Society
PPCA (same as ARIA)	Sydney	Face to face	Collecting Society
Copyright Agency | Viscopy	Sydney	Face to face	Collecting Society
Screenrights	Sydney	Face to face	Collecting Society
iGEA	Sydney	Face to face	Right holders representatives
Arts Law Centre	Sydney	Face to face	Right holders representatives
APA	Sydney	Face to face	Right holders representatives
News Limited	Sydney	Face to face	Right holders representatives
Australian Copyright Council	Sydney	Face to face	Right holders representatives
ADA/ALCC	Canberra	Face to face / telephone	Copyright users/consumers representatives
ACCAN	Sydney	Face to face	Copyright users/consumers representatives
AIMIA	Sydney	Face to face	Copyright users/consumers representatives
Copyright Advisory Group	Sydney	Face to face	Copyright users/consumers representatives
Universities Australia	Canberra	Face to face / telephone	Copyright users/consumers representatives
Google	Sydney	Face to face/ telephone	Telecommunications/internet service providers or advocates
Telstra	Sydney	Face to face	Telecommunications/internet service providers or advocates
Free TV Australia	Sydney	Face to face	Telecommunications/internet service providers or advocates
Communications Alliance	Sydney	Face to face	Telecommunications/internet service providers or advocates
Commercial Radio Austraia	Sydney	Face to face	Telecommunications/internet service providers or advocates
Department of Education	Canberra	Face to face / telephone	Government
Ministry for the Arts	Canberra	Face to face / telephone	Government
ACCC	Melbourne	Face to face / telephone	Government
K Weatherall	Sydney	Face to face	Other
Cyberspace Law & Policy Centre	Sydney	Face to face	Other
Law Council of Australia	Canberra	Face to face / telephone	Other

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