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Executive summary

Digital technologies are not only changing the way society communicates but the way we search for and use information. Individuals are increasingly able to draw on digital content to generate new ideas and innovations and to distribute them to ever wider audiences.

The digital economy represents a major opportunity for Australia. Digital technologies will contribute \$139 billion to the Australian economy by 2020 (an additional \$60 billion from 2016) and help grow the digital workforce by more than 66,000 ICT workers.¹

However, those opportunities will not be maximised unless the legal framework supports innovation. Few aspects of the legal framework are more important in that respect than copyright law, and especially the provisions that control the range of permitted uses of copyrighted material.

This report finds that Australia's current copyright system does not support innovation as much as it could.

In Australia, the legal provisions permitting uses of copyrighted material take the form of 'fair dealing' exceptions and other prescriptive exceptions that specify types of uses which may be made of copyrighted material without infringing copyright. In contrast, a number of other countries—most notably the United States—rely on a 'fair use' test which, rather than specifying particular uses, sets out principles a use must meet to be regarded as non-infringing. Those principles include whether the proposed use is substantially new and creative—whether it is, in other words, genuinely 'transformative'—and whether it might have an adverse effect on the market for the copyrighted material it proposes to use.

Were legislators omniscient and legislative drafting perfect, there would be no difference between these approaches: after all, every use which met a set of principles that sensibly defined when an exception should be granted would be specified in legislation. In reality, the pace of technological change and the creative opportunities such change provides has increased exponentially in the last few decades as a result of the digital revolution - rendering rules-based regulations obsolete in a short period of time. The inherent dynamic and flexible nature of creativity means that a principles based approach is likely to be needed, all the more so in the digital era.

These challenges have been comprehensively documented by the Australian Law Reform Commission (ALRC) in its report on copyright law: our prescriptive approach has fallen further and further behind, leaving major areas of innovation in a legal limbo.² Instead of predictability and simplicity, the attempt to narrowly specify what should and should not be permitted has ultimately resulted in increased complexity and uncertainty in many areas of copyright law.

¹ Deloitte Access Economics. (2016). Australia's digital pulse – developing the digital workforce to drive growth in the future.

² Australian Law Reform Commission (2013). *Copyright and the Digital Economy (ALRC Report 122)*. [online] Available at: <http://www.alrc.gov.au/publications/copyright-report-122>.

The ALRC's conclusions have been echoed by the Productivity Commission;³ they follow earlier recommendations for a more flexible copyright exception by the Copyright Law Review Committee,⁴ the Parliamentary Joint Standing Committee on Treaties,⁵ and the House of Representatives Standing Committee on Infrastructure and Communications.⁶

In short, it would be hard to reasonably contend that our current system is performing as it should. The question is whether a move to an approach based on fair use would perform better. That is the conclusion Ernst & Young (EY) reached in their 2016 cost benefit analysis of changes to the *Copyright Act 1968* (Cth) (**'the Copyright Act'**), commissioned by the Department of Communications and the Arts.⁷ This report similarly finds that fair use would better support innovation and creativity in Australia than the current fair dealing system.

In particular, we find that:

- because of the narrow scope of the fair dealing provisions, major new uses of copyright material are occurring outside of any clear, supportive legal framework, including vitally important growth areas such as text and data mining and cloud computing;
- at the same time, the allowed scope of transformative uses of creative materials, such as digital remixing, remains shrouded in uncertainty and hindered by unnecessarily high transaction costs, leaving smaller, individual creators and public institutions such as universities vulnerable to litigation that seeks, or inadvertently seeks, to stymie innovation and creativity;
- a move to a fair use approach would cut through these problems. Instead of trying to shoehorn new uses into narrow legislative provisions, by instead focussing on whether those uses meet clear principles, a fair use approach would make it more likely that any contentious issues would be resolved in a manner that promotes creativity, innovation and growth;
- while there may be some initial uncertainty as to precisely how the new arrangements would work, such uncertainty is likely to be short lived. International experience, including in the United States, indicates that there is nothing particularly uncertain about fair use as a principles based legal doctrine. In Israel, for example, there was no significant increase in litigation resulting from the introduction of a fair use exemption;⁸
- the change would not in itself alter the balance between users and copyright owners. Rather, it would clarify and simplify the relationship between new creators, who should be able to 'stand on the shoulders of giants', and their predecessors, preserving and protecting the interests of both;

³ Productivity Commission (2016) Intellectual Property Arrangements (No. 78, 23 September 2016). [online] Available at: <http://www.pc.gov.au/inquiries/completed/intellectual-property#report> [Accessed 10 April 2017].

⁴ Copyright Law Review Committee report on *Simplification of the Copyright Act Part I: Exceptions to the Exclusive Rights of Copyright Owners*, para 6.12.

⁵ Joint Standing Committee on Treaties. *Report 61 Australia - United States Free Trade Agreement* para 16.50.

⁶ House of Representatives Standing Committee on Infrastructure and Communications. *At What Cost? IT pricing and the Australia tax* (July 2013) at xiii.

⁷ Ernst & Young (2016) Cost benefit analysis of changes to the *Copyright Act 1968*, commissioned by Department of Communications and the Arts. Available from: <https://www.communications.gov.au/departmental-news/economics-fair-use>.

⁸ Elkin-Koren, Niva. "The New Frontiers Of User Rights". *American University International Law Review* Vol 32 Issue 1 (2016).

- the claim that such a change would undermine the incentives for investment in creative effort flies in the face of the proposed fair use test, which explicitly takes market impacts into account. It is also inconsistent with the spectacular growth and international competitiveness of the U.S. copyright industries since fair use was statutorily recognised in 1976.

Subsequent sections of this Executive Summary set out, in summary form, the bases for our conclusions.

This report's approach

Robustly quantifying the impacts of changes to copyright law is challenging. Rather than rehearse the limitations of such approaches here, this report serves three functions: to explain what fair use is and how it works in a rapidly changing technological environment; second, to provide case study evidence of activities likely to be encouraged or carried out with greater legal predictability under fair use; and third, to qualitatively review other evidence about the impacts of fair use.

A range of organisations were consulted for this report including: the University of Melbourne; Universities Australia; State Library of New South Wales; *if:book* Australia; Alexander Street Press; Google; and the NSW Data Analytics Centre.⁹ Together, these industry insights provide examples of how fair dealing and fair use impact on the day-to-day operations of organisations in using and developing copying materials.

The evidence suggests that innovative digital activities are more likely to develop in countries with fair use exemptions as compared to fair dealing exemptions. While there are few examples of innovative activities which the report says would not happen at all under the current copyright system, or that they will definitely occur under a more flexible system; the evidence is that they are more likely to occur, or operate with greater certainty under a more supportive legal framework.

While there may be some initial costs in transitioning to a fair use exemption, these are likely to be relatively small in practice given the experience of a range of other countries in transitioning to fair use. Overall, the report reaches a similar conclusion to reports by the Australian Law Reform Commission, Productivity Commission and Ernst & Young, namely that a transition to fair use would have net benefits, enabling innovation, encouraging new forms of creative endeavour and providing a more flexible and responsive legal regime so Australia can make the most of opportunities provided by the digital age.

Fair dealing and fair use

Fair dealing and fair use are both designed to ensure appropriate public interest uses are permitted, and promote creative effort and output within the broader copyright scheme. However, the difference between the two approaches is how the two serve that overall design.

Under fair dealing, the legislature specifies purpose-based exceptions to the general rule that a person must seek permission to use another person's copyrighted material. In contrast, under fair use, the legislature defines a general defence against claims of infringement, where making out that

⁹ Where these organisations are referred to throughout this report, references are based on findings arising from consultations with these organisations.

defence requires establishing, in the light of specified 'fair use' factors, that the impugned use is fair.

The objectives of fair use and fair dealing are the same, namely to promote creativity through the appropriate and proportional reuse of previous works. The difference between the two, however, is that while fair dealing pursues that objective by specifying in legislation permissible uses, fair use does so by setting out a standard that can be applied to potential uses of copyright material.

Enabling innovation

Most innovations, including those in creative output, build upon the work of earlier innovators. A key challenge for intellectual property law generally, and for copyright law in particular, is to ensure the right balance is struck between creating incentives for first generation innovations while also encouraging second generation innovations that build on first generation innovation.

The digital age has led to the proliferation of new technologies that allow individuals to access, use and transform existing works in a variety of ways. Fair use provides a copyright framework that accommodates digital innovation and experimentation because it is neutral both with respect to the technological form creative output takes and with respect to the specific nature of its content. Fair use can be applied to any use of material as long as the proposed use is consistent with the principles of fair use. These principles—which include the impact of the proposed use on the market for the original material—ensure that the value of second generation innovations is appropriately balanced against the need to promote incentives for first generation innovators, particularly as the market for new technologies changes rapidly.

By comparison, in a world where digital innovations are difficult to predict before the event, fair dealing can constrain the development of uses which do not fall readily within existing fair dealing exceptions. Moreover, as technology blurs the boundaries between types of purposes and uses, it becomes more difficult to specify the precise reach of the fair dealing exceptions, creating uncertainty for all those involved in the production, distribution and financing of creative output. Australian innovators run the risk of having new uses prevented in Australia due to an innovation failing to fall into a recognised legal category, even where their uses would be otherwise in the public interest and considered to be fair.

Non-expressive uses of copyright material are an important case in point. Text and data mining, for example several years ago, was estimated to generate revenues of nearly \$700 billion for global end users of personal location data.¹⁰ Equally, digital analytics of ready access government data (or public sector information) can generate value of up to \$25 billion per year for Australia.¹¹ However, this entire area of text and data mining is in a legal limbo in Australia, as there is no specific provision for it under Australia's fair dealing exceptions.

¹⁰ McKinsey & Company. (2011). Big data: the next frontier for innovation, competition and productivity.

¹¹ Gruen, N. Houghton, J. & Tooth, R. (2014). Open for business: how open data can help achieve the G2 growth target, a Lateral Economics report for Omidyar Network, Australia.

Much the same is true of the cloud computing market, which will grow strongly and generate estimated revenues in Australia of \$4.6 billion by 2018.¹² Despite this growth, it remains uncertain whether the exceptions in the *Copyright Act* apply to cloud computing.¹³ There is evidence of cloud providers leaving the Australian market, where as a result of the uncertainty created by the Optus TV Now decision, a number of remote Digital Video Recording services operating within Australia shut down.¹⁴

Transformative uses of existing works are another area which remain poorly dealt with under Australia's fair dealing regime. For example:

- literary innovators who seek to remix a range of material such as *if:book Australia* are unlikely to be able to move beyond material that is in the public domain or licensed under Creative Commons;
- the scope visual artists have to remix other materials in their work across a range of mediums is hampered by the need to determine whether a fair dealing exception such as 'criticism or review' applies to their work—even when their work will not adversely affect the commercial value of the material they remix;
- while amendments were made to the *Copyright Act* so as increase the ability of software developers and start-ups to use copyrighted software interfaces for the purpose of developing compatible programs to existing commercial software, those amendments have not worked well, hindering Australia's competitiveness in software development.

Incentives to supply new works

A key concern expressed by some around the introduction of fair use is that it may undermine the incentives for investment in creative effort, both by reducing the returns rights owners secure and by increasing the uncertainty they face. However, the objective of fair use is not to alter the balance in the copyright system between the interests of rights holders and those of consumers. Neither fair use nor fair dealing permit universal 'free use', promote piracy or in any other way deprive creators of a legitimate return on their investment. Moreover, there is no evidence of any contraction of investment in creative works in the United States since the adoption of fair use in 1841, nor more recently in the countries that have adopted fair use style provisions: Singapore, Korea, or Israel.

Rather, the objective of fair use is to promote creative effort by ensuring the exclusive rights are not used to prevent the continued growth of creative output — in other words, to ensure that those exclusive rights do not serve to stifle further creation. As a consequence, determinations of fair use focus on both:

- whether genuinely new works are created, as opposed to mere substitutes (i.e. does it enrich public knowledge by adding to the supply of creative works); and

¹² Frost & Sullivan. State of Cloud Computing in Australia report 2014.

¹³ Department of Communications (2014), 'Cloud Computing Regulatory Stocktake', available from: <https://www.communications.gov.au/file/420/download?token=r9MuQIoV>.

¹⁴ See Gibling, Rebecca, Stranded in the Technological Dark Ages: Implications of the Full Federal Court's Decision in *NRL v. Optus* (June 18, 2012). (2012) 35 *European Intellectual Property Review* 632-641. Available at SSRN:<http://ssrn.com/abstract=2086396> p 640.

- whether it has an adverse impact on the potential market for or value of the copyrighted work (and hence whether it might undermine the incentive to create new works).

Analysis by the ALRC found that fair use is unlikely to result in a reduction in original creative output, consistent with the underlying principles of fair use. Indeed, the more likely outcome is to promote the growth of creative output, both by reducing uncertainty and by eliminating the obstacles to transformative and other uses of copyrighted material in situations where those uses do not adversely impact on the commercial value of existing material. That the United States, which has fair use provisions in its copyright laws, has thriving content and software industries that are world leaders in their fields merely confirms the ALRC's finding.

Education and information access

The ability to innovate is equally as important as having the necessary environment required for innovation. Innovation is very much dependent upon the capacity of Australian schools and universities to equip Australian students with the necessary skills for workplaces of the future. These workplaces will increasingly leverage digital-based skills. In recent times, the government has introduced a STEM education agenda as part of one of its four key pillars of its innovation policy.¹⁵ This highlights schools and universities as a crucial part of the innovation agenda in Australia.

There are a number of ways in which Australia's current fair dealing exceptions constrain the ability of academics, students and libraries to make the most of the educational opportunities available in the digital age. Evidence from a range of stakeholder consultations indicated that these constraints take a variety of forms:

- the Australian copyright system is quite prescriptive as academics have to deal with a combination of limits placed by the statutory and fair dealing exceptions. Australian academics are currently constrained in their ability to use extracts from other research or tables (even if it is their own research) in public presentations or in collaboration with industry due to the costs of negotiating access to this material with copyright holders under the Australian fair dealing system¹⁶ and statutory licensing;
- Australian universities may find it hard to compete in providing high quality Massive Open Online Courses (**MOOCs**) with overseas universities operating in fair use jurisdictions;
- universities are similarly prevented from publishing third party material contained in student theses, limiting the ability for universities to disseminate this research;
- fair use would considerably simplify the current fair dealing system concerning access to library materials. In particular, fair use may be relied upon by:
 - libraries supplying portions of works for reasons other than research and study;
 - libraries and researchers using text and data mining to interrogate existing resources;
 - library patrons using small parts of orphan works;

¹⁵ Australian Government (2018) *National Innovation and Science Agenda*, available at: <http://www.innovation.gov.au/page/agenda>.

¹⁶ Australia's fair dealing system can be considered as comprising a combination of fair dealing exceptions and specific rules-based exceptions (also known as 'statutory exceptions').

- historians using excerpts from primary sources in their research publications; and
 - authors and other creators who wish to incorporate quotations from library resources in their works.
- fair use is likely to reduce transaction costs for libraries and universities seeking to navigate the complexity of the current fair dealing system as well as reduce transactions costs of negotiating with rights holders in circumstances where the proposed use has no significant impact on the value of the copyright material.

Predictability, flexibility and responsiveness

One of the major advantages of a principles-based approach such as fair use over a highly prescriptive approach such as fair dealing is its ability to respond to a world in which technology and commercial circumstances are changing rapidly and unpredictably.

While there may be some initial costs associated with obtaining legal advice and testing the new exception through the courts, there is no reason to believe that these costs will be any greater than costs incurred when other laws have changed or that such costs will outweigh the associated economic benefits. Further, the substantial body of U.S. and international case law, the development of best practice guidelines, and the similarity of fair use with some of the existing Australian fair dealing provisions, will also greatly assist litigants and the courts with navigating this change to the law.

Moreover, if issues which require interpretation arise, in many cases they will reflect the emergence of new developments which challenge the status quo. The ability of fair use to accommodate that challenge, rather than stifling it, is at the heart of its advantages. Indeed, the greater the extent to which uses are truly innovative and difficult to predict *ex-ante*, the greater will be the relative advantage of a principles-based approach over one based on prescriptive, static, rules. This is a key reason why fair use supports innovation.

From an economic perspective, reliance on prescriptive rules, such as fair dealing, will incur especially high error costs (being the costs of incorrectly determining the permissible range of uses of copyright work) in situations where technology and commercial circumstances are changing rapidly and unpredictably, as is presently the case. This report includes a theoretical model for considering the error costs arising under fair dealing and fair use. It finds that in the current environment error costs are greater under fair dealing relative to fair use. It also finds that the relative costs are likely to increase over time as a result of rapid digital transformation.

While the potential increase in litigation associated with the introduction of fair use has been identified as a significant concern by some people, the experience in fair use jurisdictions has not borne this out. During the 7 year period between 2009 to 2016,¹⁷ there have only been 7 fair use trials in the U.S. from a total of 60 cases.¹⁸ More than 76 percent of those cases were dealt with by summary judgment, meaning a decision was made without a trial; 80 percent of those decisions were upheld on appeal.¹⁹

¹⁷ 1 January 2009 to 30 September 2016.

¹⁸ Lex Machina, Copyright Litigation Report 2016: Figure 18, p.13.

¹⁹ Thomson/Reuters, Westlaw legal database, Cases, U.S. Court of Appeals, 2009-2016. For more detail, see remark made by William Patry at the Australian Digital Alliance Forum 2017, 24 February 2017.

At the same time, the experience of fair dealing in Australia has been that legislative change has significantly lagged behind technological developments:

- Australia did not introduce an exception for parody and satire until 20 years after it was recognised in the U.S. while the lag in introducing an exception for time shifting of television recordings was 22 years; and
- fair dealing exceptions have not expanded to encompass everyday activities in the digital age such as the ability to copy a book to both a laptop and a tablet or to share an excerpt from an online video in a presentation.

The delay in achieving these legislative changes under fair dealing has the potential both to chill new uses directly, and even when they occur, to impose a significant degree of legal uncertainty, making Australia a relatively less attractive place to innovate.

Deloitte Access Economics²⁰

²⁰ Deloitte Access Economics acknowledges the contributions of Professor Henry Ergas and Nathalie Samia to the material in this report.

1 Introduction

Copyright law serves an important purpose in today's digital economy. In economic terms, it seeks to encourage economic efficiency in the production, management and use of creative output. It does so by providing appropriate incentives for the creation of new content, by ensuring creators are appropriately rewarded for their work when it is distributed or used by others.

Copyright has never been an absolute right in any country. Ideas, systems, methods of operation, and *de minimis* copying have always been excluded from the scope of copyrightable material. Criticism and comment, book reviews, and news reporting that utilize portions of copyrighted works have also typically been permitted. As U.K. Lord Chief Justice Ellenborough wrote in an 1802 fair use opinion, "while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science."²¹ The question for all legislatures has been how to formulate a law that achieves the desired social goals, which is inevitably a difficult task given the flexible nature of creativity and technological progress.

The concept of copyright under English (and Australian) law originated in the late seventeenth century when the roles of authors, publishers, booksellers, and a consuming public were separate, and all works were fixed in "hard copies."²² The digital economy has significantly changed the way works are created and used. Individuals can now share their content – be it pictures, music, videos, or apps – with the world at the touch of a button.

Traditional producers of creative works – like television networks, film studios, publishers and record labels – now face more competition from independent creators in a market with fewer barriers to entry than ever before. In turn, individuals can creatively transform portions of existing works into new works with readily available software packages. The steady march of digitisation on the enormous catalogue of older printed works makes historical knowledge that might have been accessible to a small number of people, in one library or museum, available to the entire world. Likewise, universities are now able to teach anyone with an internet connection through services like Massively Open Online Courses (MOOCs), where copyright laws are sufficiently flexible to permit this.

This shift in the way people create and interact with intellectual property has led to a debate about the need to reform many areas of copyright law. One such debate is about determining the circumstances in which copyright material should be made freely available for socially beneficial uses where it does not have an adverse commercial impact on the copyright holder.

1.1 The nature, purpose and scope of copyright

As a general matter, intellectual property rights are limited powers conferred by statute and interpreted by case law. Copyright is the primary form of intellectual property in respect of literary, musical, dramatic and artistic works, as well as non-traditional works such as film, software and websites. Indeed, thanks to digital technology, it covers virtually any form of

²¹ *Cary v Kearsley* (1802) 4 Esp 168, 169; 170 ER 679, 679.

²² De Zwart, Melissa. 'A historical analysis of the birth of fair dealing and fair use: lessons for the digital age' (2007) 1 *Intellectual Property Quarterly* 60, 63.

expression fixed in a tangible medium of expression, from an email to a video taken on a smartphone.

Copyright's primary economic role lies in encouraging efficiency in the production, management and use of creative output, including by reducing search and transactions costs, facilitating trading and contracts, and structuring the terms and conditions of access. To the extent to which it succeeds in doing so, copyright serves the broader economic and social goal of promoting creative effort and the experimentation, diversity and innovation it brings.

Especially important, in considering the design of a system of copyright that advances those objectives, is the fact that creative effort is inherently cumulative, with the work of each creator drawing on the public domain constituted by the accumulated creative endeavour of humankind, as well as by contemporary creators who collectively form a creative context in which all dip. A well-designed copyright system should therefore preserve, protect and ultimately enlarge that public domain, and its broader contemporary context, thus allowing creators to "stand on the shoulders" of ever-taller "giants", to adapt the expression Isaac Newton famously used in 1676.

As with other intellectual property rights, restrictions on the duration and breadth of the exclusive privileges copyright confers on rights holders are the primary means by which the intellectual property system ensures that wider pool all creators can draw on is maintained and enriched over time.²³ As they balance "the effect of copyright protection in encouraging the creation of new works by reducing copying" on the one hand, with "its effect in discouraging the creation of new works by raising the cost of creating them" on the other, those restrictions advance the interests of all creators.²⁴ Moreover, since "from an ex ante viewpoint, every author is both an earlier author from whom a later author might want to borrow material and the later author himself",²⁵ they reflect an inter-temporal form of fairness that corresponds with the Lockean stricture limiting the appropriate scope of property rights to what can be taken while leaving "enough, and as good ... for others".²⁶

Determining the socially desirable limitations on the breadth of the exclusive rights is not a matter amenable to mechanical formulations. Nor can it be undertaken by a process that "involves ... simply providing a clear set of property rights and then getting the government out of the way;" rather, throughout "the long period during which property owners use rights to control and exclude other people", governments "must keep track of how these property rights are assembled and deployed, and what consequences—economic and social—follow from their use in specific settings".²⁷

1.2 The legal environment in Australia

Many countries with legal systems derived from English law, including Australia, have a copyright exceptions regime known as "fair dealing". This provides specific purpose-based exceptions to the general rule that a person

²³ Landes, William M and Richard A Posner. *The Economic Structure Of Intellectual Property Law*. Cambridge, Mass.: Harvard University Press, 2003, p 33; Merges, Robert P. *Justifying Intellectual Property*. Cambridge, Mass.: Harvard University Press, 2011, p 52.

²⁴ Landes, William M and Richard A Posner. *The Economic Structure Of Intellectual Property Law*. Cambridge, Mass.: Harvard University Press, 2003, p 69.

²⁵ *Ibid*, p 68.

²⁶ Merges, Robert P. *Justifying Intellectual Property*. Cambridge, Mass.: Harvard University Press, 2011, p 50.

²⁷ *Ibid*, p 12.

must seek permission to use another person's copyrighted material. These exceptions are generally justified by particular social benefits, or the public interest nature of the use at hand – for instance, uses in education, research or study, or parody and satire. These exceptions also require an assessment of whether the particular use is "fair", taking into account competing social interests such as:²⁸

- whether the alleged fair dealing is commercially competing with the original copyright work;
- whether the work has been previously published; and
- the amount and importance of the portion of the original work that has been taken.

Some explicit general exceptions to copyright have also developed through changing consumer uses – for instance, permitting a person to record a television program to watch it later (time-shifting), or to copy music from a CD they own onto their computer (format-shifting). These do not require an assessment of fairness and thus do not fall under the banner of fair dealing, but rather are prescriptive exceptions – a given use either is, or is not, permitted by the section.

Australia's fair dealing system can therefore be considered to be a combination of:

- fair dealing exceptions - where a use is permitted if it is **both** for a specified purpose (such as research or study, parody or satire) **and** fair; and
- specific rules-based exceptions (also referred as statutory exceptions), where a use is permitted if it meets the conditions set out in the exception (such as a time shifting exception which allows a copy to be made from a videotape, but not a DVD).²⁹

Together, these exceptions are referred to in this report as Australia's Fair Dealing System.

In addition to these, the *Copyright Act* provides for statutory licences. These allow individuals and organisations to use copyright material without permission from the copyright holder. However, the user of the material must pay equitable remuneration or royalties to the copyright holder. These licenses cover a wide field, including several uses of copyright material by educational institutions³⁰ and government,³¹ along with various types of public broadcast.³²

²⁸ *Ashdown v Telegraph Group* [2002] Ch 149, [70] (Lord Phillips MR for the English Court of Appeal).

²⁹ *Copyright Act 1968* (Cth) s 110AA.

³⁰ *Copyright Act 1968* (Cth) Part VA.

³¹ *Copyright Act 1968* (Cth) s 183A.

³² See, eg, *Copyright Act 1968* (Cth) s 109 (permitting free to air broadcast of sound recordings provided royalties are paid).

Under Australian copyright, fair dealing exceptions exist for:

- research or study;³³
- criticism or review;³⁴
- parody or satire;³⁵
- reporting news;³⁶ and
- lawyers and patent attorneys giving professional advice.³⁷

The research or study exception sets out specific fairness factors, which are broadly similar to those under the U.S. system of fair use (discussed below).³⁸ The other fair dealing exceptions do not explicitly define what is or is not fair.³⁹

As noted above, there are also specific rules-based exceptions which allow uses of copyright material in particular non-commercial contexts. These do not involve a consideration of fairness. For example:

- Libraries are entitled to make copies of certain works for specific preservation purposes (for example, where a published work has been lost, stolen, damaged or destroyed, and is unavailable commercially);⁴⁰
- Sound recordings (for instance, CDs or legitimate downloads of musical recordings) may be copied for private and domestic use on other devices;⁴¹
- Broadcasts of television, film or sound can be recorded for private and domestic viewing at a more convenient time;⁴² and
- Limited uses may be made by educational institutions for the purpose of education.⁴³

Australia's fair dealing provisions have generally been narrowly construed. Consequently, there are numerous restrictions on their application as expressed in precedents by Australian courts.⁴⁴ For example:

- Any use of a work in criticism or review must be in criticism or review of the work itself or another work – and not of something else, like an actor's performance or of a politician's actions.⁴⁵

³³ *Copyright Act 1968* (Cth) ss 40(1) – literary, dramatic, musical or artistic works and adaptations, 103C(1) – audio visual items.

³⁴ *Ibid* ss 41 – literary, dramatic, musical or artistic works and adaptations, 103A – audio visual items.

³⁵ *Ibid* ss 41A – literary, dramatic, musical or artistic works and adaptations, 103AA – audio visual items.

³⁶ *Ibid* ss 42 – literary, dramatic, musical or artistic works and adaptations, 103B – audio visual items.

³⁷ *Ibid* s 43(2).

³⁸ *Ibid* s 40(2).

³⁹ The *Copyright Amendment (Disability and Other Measures) Bill 2017*, which at the time of writing had been passed by Parliament but not yet become law, would also introduce a fair dealing exception for the purpose of access by persons with a disability. This provision would set out four factors for how fairness should be determined, which are also very similar to the U.S. fair use factors.

⁴⁰ *Copyright Act 1968* (Cth) s 51A.

⁴¹ *Ibid* s 109A.

⁴² *Ibid* s 111.

⁴³ See, eg, *ibid* s 28.

⁴⁴ Stellios, J & Burrell, R (2005), 'Copyright and Freedom of Political Communication in Australia', in Jonathan Griffiths and Uma Suthersanen (ed.), *Copyright and Free Speech: comparative and International Analyses*, Oxford University Press, New York, pp. 257-286.

⁴⁵ *Copyright Act 1968* (Cth) ss 41, 103A; *Ashdown v Telegraph Group* [2001] Ch 685, Ch D, 697-8. There is some legal uncertainty as to whether section 41 provides a defence in relation to fair dealing with respect to unpublished works. See Copinger and Scone *James on Copyright*, 11th ed. (1971), par. 463).

- The use of material for reporting on news and current events may not extend to commentary or the expression of opinion on those events. This was famously demonstrated in the so-called “Panel” case.⁴⁶ Channel 10, having broadcast a segment from a rival network, commented on then-Prime Minister John Howard’s appearance in the segment. This was held not to fall within the reporting exceptions by two of three judges of the Federal Court.

1.3 Fair use and fair dealing under copyright law

While Australia currently has a fair dealing system, several countries have a system of ‘fair use’, including the U.S. Singapore, Israel, South Korea and the Philippines. Rather than allowing particular uses of copyright material, fair use considers the nature of any given use against a set of principles.

The United States has applied the doctrine for some time, though its origins derive from the English case law of the 18th century. These principles were distilled in an 1841 case, *Folsom v Marsh*. In this sense, the principles of fair use are not radically new to common law countries like Australia. Indeed, Australia’s fair dealing provisions for research or study already incorporate similar factors as noted above.⁴⁷

The common law doctrine of fair use (developed by the U.K. courts under the 1710 Statute of Anne) was statutorily recognised in the U.S. by the *Copyright Act of 1976*. The U.S. *Copyright Act of 1976* provides an indication of the type of principles considered in determining whether a use of copyright material is “fair”, with a similar focus to the assessment of fairness under Australia’s fair dealing exceptions:

1. *The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;*
2. *The nature of the copyrighted work;*
3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
4. *The effect of the use upon the potential market for, or value of, the copyrighted work.*

The objective of fair use is not to alter the balance in copyright law between users and rights owners. Indeed, the existing fair dealing exceptions in Australia already require an assessment of fairness, based on very similar factors.⁴⁸ Rather, it allows that balance to be applied to any number of uses and purposes, based on principles derived from almost 300 years of case law, rather than being confined to specific legislated purposes as is the case under Australia’s existing fair dealing exceptions.

In this respect, fair use and fair dealing represent different decision-making frameworks which can be used to the similar purpose of determining permissible exceptions to copyright law.

Box 1.1 below discusses how both these decision-making frameworks can be seen from a theoretical perspective. It discusses the extent to which fair dealing can be seen as a ‘rules based approach’ while fair use can be seen as a ‘standards based approach’, as well as the limits of applying this analogy to these regimes.

⁴⁶ *Channel Nine v Network Ten* [2002] FCAFC 146. The case was successfully appealed to the High Court on a separate ground: *Network Ten v Channel Nine* [2004] HCA 14; however, the principles relating to fair dealing still stand.

⁴⁷ *Copyright Act 1968* (Cth) ss 40 and 103C.

⁴⁸ *Copyright Act 1968* (Cth) s 40(2).

Box 1.1: Fair use and fair dealing – different decision-making frameworks

“Fair use” and “fair dealing” provisions are one important element in a broader legal fabric that exists so as to promote learning, creative effort, and technological innovation. They are consequently not outliers to the copyright scheme, but rather points in the spectrum of an overall scheme. As U.S. Judge Pierre Leval said of fair use in an influential *Harvard Law Review* article: “Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design”.⁴⁹ The question, to which we now turn, is how well fair use and fair dealing each serve that overall design.

Because the fair dealing provisions designate particular classes of uses as potentially non-infringing, they can be, and often are, assimilated to “rules”,⁵⁰ where a rule can be defined as a “legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events—that is, determinations of fact”.⁵¹ Equally, put in those terms, fair use would be a “standard”, which “may be defined broadly as a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspect of general human experience”.⁵²

While possibly helpful as an analogy, this distinction—which purports to contrast a procedure that is “hard and fast” with one that is inherently vague—is questionable in theory and can be misleading in practice. Thus, as a matter of theory, the mere fact that a provision is *specific* does not mean it is *precise*, much less that it is capable of being sensibly implemented without reference to its underlying purpose;⁵³ to believe otherwise would be to overlook the inescapably open textured nature of language, which is especially pronounced in statutory drafting. Additionally, and importantly, although the fair dealing provisions specify classes of uses that are potentially non-contravening, they leave substantial discretion both as to the precise boundaries of those classes and as to what constitutes fair dealing within those classes. For example, it is clear that a dealing for the purposes of parody or satire can be a fair dealing; the question of whether a particular dealing falls within that class is still a question that must be resolved in the precise circumstances of that dealing.

This point has been illustrated in Canada, which has fair dealing provisions in its copyright statute. The Canadian Supreme Court, has determined that “The fair dealing exception ... is a user's right” that “must not be interpreted restrictively” (rather than merely a defence against a claim of infringement). It has, on that basis, found that “[the term] Research must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained”.⁵⁴ As a result of that interpretation, Canadian fair dealing law is, in some respects, broader and more elastic than U.S. fair use law. Labels can consequently be misleading; and it would be equally misleading to characterise fair dealing provisions as necessarily certain and self-

⁴⁹ Leval, Pierre. “Toward a Fair Use Standard.” 103 *Harvard Law Review* 1103, 1990, p 1110.

⁵⁰ See, for example, Australian Law Reform Commission (2013) above n 2, p 98.

⁵¹ Hart, Henry M, Albert M Sacks, William N Eskridge, and Philip P Frickey. *The Legal Process: Basic Problems in the Making and Application of Law*. Westbury, N.Y.: Foundation Press, 1994.

⁵² *Ibid.*

⁵³ Twining, William and David Miers. *How To Do Things With Rules*. London, Dublin, Edinburgh: Butterworths, 1991, p 133.

⁵⁴ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 at 50, cited in Patry, William F. *Patry On Fair Use*. [Eagan, MN]: Thompson Reuters, 2015, p 670.

implementing or as merely hinging, for their determination, on findings of fact.

The main respect in which the fair dealing provisions are “rule-like” is therefore not in defining the criteria which might determine—in a more or less mechanical manner—whether a particular instance was or was not a “fair dealing”; rather, it is that the legislature limits fair dealing to particular classes of uses, while leaving open, and hence subject to judicial determination, the question of whether a particular instance of use falls, as a matter of fact, within one of those classes and if so, whether that use is indeed fair.

In contrast, under fair use, the question the court addresses, when a defence of fair use is invoked, is not whether a particular use falls within a predetermined class of permissible uses; rather, it is whether in the specific fact situation at issue, the use is or is not fair. That is not to suggest that the court, in making that determination, exercises a quasi-legislative power, permanently altering the class of permissible uses: on the contrary, its decision is bound by the facts. The point, however, is that its consideration of those facts is not hemmed in by a legislated set of permissible uses into which it would have to shoehorn the cases it regards as being indeed fair, as a court in a fair dealing jurisdiction has to do.

It is, in other words, “the absence of continuous malleability, rather than the presence of limited specificity”, that is the hallmark of, and central issue with, rules such as those embodied in the fair dealing provision; and, as Professor Schauer emphasises, that absence of ongoing malleability means that even were such a rule capable of being “crafted in such a way as to incorporate within the rule every conceivable relevant distinction and qualification”, it would inevitably remain “vulnerable to the phenomenon of open texture”, as “it might still turn out that some new and heretofore unexpected event arose, such that now the application of the highly specific rule generated a result inconsistent with the specific rule's background justification”.⁵⁵ Put slightly differently, the central features of these rules is that, with the statute limiting the range of permissible uses, “something from the past controls the present ... resisting current efforts to mould [the rules] to the needs of the instant”.⁵⁶ In this respect, a rules based approach is less well equipped to address rapidly changing technological circumstances.

1.4 Proposals to reform copyright law

Since the 1990s, several countries have reformed, or recommended reform, to copyright law in favour of greater flexibility.⁵⁷ The Hargreaves Review, conducted in the United Kingdom, recommended more flexible exceptions to copyright law that sought to achieve similar objectives to the U.S. system, though the restraints of European Union law prevented the review from recommending such a system in name.⁵⁸ Similarly, Canadian law has significantly expanded the scope of acceptable fair dealings with copyright

⁵⁵ Schauer, Frederick F. *Playing By The Rules: A Philosophical Examination Of Rule-Based Decision-Making In Law And In Life*. Oxford, England: Clarendon Press, 1991, pp 83-84.

⁵⁶ *Ibid*, p 82.

⁵⁷ See, eg, *Copyright Act 1967* (South Korea) art 35–3; *Copyright Act 2007* (Israel) s 19; *Intellectual Property Code of the Philippines*, Republic Act No 8293 (the Philippines) s 185.

⁵⁸ Prof. Ian Hargreaves, ‘Digital Opportunity. A review of intellectual property and growth’, May 2011, p5. [online] Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf Prof. Ian Hargreaves, ‘Digital opportunity: powering innovation through copyright’ (Speech delivered at the Australian Digital Alliance Forum, National Library of Australia, Canberra, 18 March 2016): <https://www.youtube.com/watch?v=DojugJQk3lc>.

material.⁵⁹ In this respect, fair dealing regimes may in some cases be more permissive than fair use regimes, depending on how the fairness factors are applied by courts in a given jurisdiction.

Recently, both the ALRC, the Productivity Commission and EY recommended the adoption of fair use in Australia.⁶⁰ These follow earlier recommendations for a more flexible copyright exception by the Copyright Law Review Committee,⁶¹ the Parliamentary Joint Standing Committee on Treaties,⁶² and the House of Representatives Standing Committee on Infrastructure and Communications.⁶³

There have also been debates in Hong Kong, New Zealand and Japan and a range of other countries including the Netherlands and Ireland about whether existing exceptions to copyright law are functioning well. However, each country brings its own context to the debate:

- In Hong Kong, copyright law reform is intertwined with debate about freedom of speech.⁶⁴ Advocates of fair use have expressed concern that existing and proposed new fair dealing exceptions do not sufficiently protect speech commenting on current events;
- In New Zealand, public debate has surrounded the harmonisation of intellectual property laws under the proposed Trans-Pacific Partnership (TPP) agreement. The extension of the protection of copyright that would have occurred under parts of the TPP led to calls for a “rebalancing” in favour of copyright flexibility;⁶⁵ and
- In Singapore, the government has been considering whether its fair use exception should be strengthened in light of significant technological and market changes over the last decade.⁶⁶
- In Japan, numerous fair dealing provisions have been developed intending to encompass a broad range of activity. Several prominent lawyers and jurists have called for a shift towards true “U.S.-style” fair use.⁶⁷

⁵⁹ Marles, J and Scott, C (2013) The Copyright Modernization Act: Big Changes to Copyright Law in Canada. [online] Available at: <http://www.patentable.com/the-copyright-modernization-act-big-changes-to-copyright-law-in-canada/> [Accessed 15 May 2016].

⁶⁰ Australian Law Reform Commission (2013) above n 2; Productivity Commission (2016) above n 3; Ernst & Young (2016) above n 7.

⁶¹ Copyright Law Review Committee report on Simplification of the Copyright Act Part I: Exceptions to the Exclusive Rights of Copyright Owners, para 6.12.

⁶² Joint Standing Committee on Treaties. Report 61 Australia - United States Free Trade Agreement para 16.50.

⁶³ House of Representatives Standing Committee on Infrastructure and Communications. At What Cost? IT pricing and the Australia tax (July 2013) at xiii.

⁶⁴ Yu, P.K., (n.d) Digital Copyright Reform in Hong Kong: Promoting Creativity Without Sacrificing Free Speech, Journalism and Media Studies Centre, The University of Hong Kong.

⁶⁵ Google NZ (2016) Submission to the Ministry of Business, Innovation & Employment, 30 March 2016. [Online] Available at: <http://www.mbie.govt.nz/info-services/business/intellectual-property/tpp-intellectual-property-chapter/submissions/26-Google.pdf>. Accessed 16 November 2016.

⁶⁶ Ministry of Law and the Intellectual Property Office of Singapore (2016) Public consultation on proposed changes to Singapore’s copyright regime, 23 August 2016. Available at: <https://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/Public%20Consultation%20Paper%20on%20Proposed%20Changes%20to%20Copyright%20Regime%20in%20Singapore%20August%202016.pdf>

⁶⁷ Nakayama, Nobuhiro. (2014). Chosakukenhō = Copyright law. Tōkyō : Yūhikaku.

1.5 Findings of previous reviews into fair use

A number of domestic reviews have considered replacing or supplementing Australia's Fair Dealing System with a broader system allowing fair use. As noted above, the ALRC's 2013 report recommended the introduction of a fair use exception. The Commission pointed out that a fair use exception would be technology-neutral. At present, the only way for new fair dealing exceptions to be permitted is through Acts of Parliament, which can result in lengthy delays to the introduction of new exceptions. As this report notes in chapter 5, it was not until 2006 that "time shifting" (the recording of broadcast television to watch at a more convenient time) was enacted in Australian law – 22 years after it was found to be a fair use by the U.S. Supreme Court. These time-shifting and format-shifting statutory exceptions also remain more limited and contentious in Australia than in the U.S. For instance, while section 110AA of the *Copyright Act* permits a consumer to format shift a cinematograph film from a videotape onto their smartphones or tablets, they cannot shift them from DVDs.

Fair use, in contrast, is designed to give courts the latitude to determine whether a new use of copyright material is fair based on a series of principles. From an economic perspective, prescriptive rules at best create uncertainty about the impact of legal regulation in developing areas of technology, like cloud computing and 3D printing.⁶⁸ At worst, a restrictive approach can simply prohibit such innovative developments.

The ALRC considered that a shift to fair use would make Australia a more attractive market for technology investment and innovation.⁶⁹ In particular, in a submission to the ALRC, the Copyright Advisory Group to the COAG Education Council (CAG Schools) stated that:

*"the flexibility of the fair use exception in the U.S. has in effect operated as innovation policy within the copyright system because it creates incentives to build innovative products, which yield complementary technologies that enhance the value of copyright works."*⁷⁰

Perhaps even more importantly in the digital economy, the ALRC found that fair use promotes transformative uses of material. It is easier than ever before to transform existing creative works into radically new ones. Easy-to-use software to create and edit video, music, written works, and programs are readily available.

The ALRC report highlighted that in spite of the complexity and number of fair dealing exemptions, consumers' expectations about what they could do with copyright material that they had purchased were not reflected in copyright law. Fair use, in the ALRC's view, would better align with reasonable consumer expectations. A principles-based approach would also reduce uncertainty around whether particular uses fell within the many varied and quite technical exceptions:

Not only will consumers value the certainty of knowing that they can make certain unpaid uses of material without infringing copyright, but businesses that make transformative uses of copyright material also need certainty, so that they

⁶⁸ Australian Law Reform Commission (2013) above n 2.

⁶⁹ Australian Law Reform Commission (2013) above n 2, p 23.

⁷⁰ Copyright Advisory Group—Schools, Submission 231 citing Fred von Lohmann, 'Fair Use as Innovation Policy' (2008) 23 Berkeley Technology Law Journal 289.

*have the confidence to invest in new business models and services.*⁷¹

A high-profile example of restrictive exceptions creating uncertainty can be seen in the legal proceedings surrounding Optus's 'TV Now' service (**Optus TV Now**).⁷² The service allowed users to record free-to-air programs. The programs were stored on Optus's servers and could be streamed by the user on demand to their web browser or mobile phone. The Full Federal Court found that because Optus was making the recording, rather than the home user, this type of service could not be protected by the time shifting exception in section 111 of the *Copyright Act*. Optus was refused leave to appeal to the High Court in the matter,⁷³ with the court noting that any decision in the case was unlikely to provide further clarity around the application of section 111.⁷⁴ As one online content provider put it, although there are many provisions allowing some range of fair dealings with copyright works, "*Under Australia's existing copyright regime, very many socially useful and economically beneficial technological innovations would simply have no breathing space to emerge.*"⁷⁵ Because of the inflexibility of those provisions, and the rigid legal definitions that may be read into those provisions, some groups may choose not to undertake beneficial activity that may or may not be legal, or choose to undertake that activity in a location with a more favourable legal environment for innovation.

More recently, the Productivity Commission considered fair use and fair dealing in an inquiry into Australia's intellectual property arrangements. The Commission considered several illustrative examples of the way copyright material is used both on- and off-line. Thumbnail images from search engines, text and data mining and many educational uses were all highlighted as "fair uses" under the U.S. system that would not be permitted under Australian fair dealing rules.

The Productivity Commission also advanced a number of economic arguments in favour of fair use:⁷⁶

- high transaction costs may make it a barrier to negotiate a license for every use of material;
- the value of new content to society as a whole (including parody and satire, and news) exceeds the costs to individual rights-holders of the use of their material without a licence;
- Australia adopting a broad fair use provision would help the growth of Internet intermediaries and content-dependent industries.

The Productivity Commission in its final report, in fact recommended that the Australian Government implement the ALRC's final recommendations for the introduction of a flexible fair use exception to copyright.⁷⁷

⁷¹ Australian Law Reform Commission (2013) above n 2, p 133.

⁷² *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

⁷³ *SingTel Optus Pty Ltd & Anor v Australian Rugby Football League Limited & Ors* [2012] HCATrans 214.

⁷⁴ See Giblin, Rebecca, *Stranded in the Technological Dark Ages: Implications of the Full Federal Court's Decision in NRL v. Optus* (2012) 35 *European Intellectual Property Review* 632-641. Due to the uncertainty created by the Optus TV Now decision, a number of remote Digital Video Recording services operating in Australia shut down.

⁷⁵ Australian Law Reform Commission (2013) above n 2, p 104 (Yahoo!7 submission).

⁷⁶ Productivity Commission (2016) above n 3, pp. 143-6.

⁷⁷ Productivity Commission (2016) above n 3, Recommendation 6.1, p.33.

However, many individuals and industries who create and distribute copyright content expressed concern about the nature of a new fair use exception:

- It was argued that fair use was “inherently uncertain”, requiring litigation to establish the boundaries of any new certainty;⁷⁸
- Fair dealing was said to offer sufficient flexibility as it stood in Australia;⁷⁹ and
- Some stakeholders noted the mixed response to fair use in the Hargreaves review⁸⁰ and the impact on the Canadian education industry of expansions to copyright exceptions. The Productivity Commission, however, considered that fair use did not make a significant contribution to this downturn.⁸¹

A report by PwC⁸² commissioned by APRA AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights considered a number of potential costs fair use might impose on producers and the economy as a whole. In particular, the report argued that certain uses that previously required a license (at a cost to the user) may be covered by the doctrine of fair use, reducing the return to producers of copyright material and eroding the commercial incentive to make new material.⁸³

The Productivity Commission found several shortcomings with PwC’s policy analysis and its methodology in determining costs and benefits. In general, the analysis assumes that current copyright settings are optimal, which the Productivity Commission questioned.⁸⁴ The Commission also found flaws with the report’s assessment of the decline of the Canadian publishing industry, and noted that PwC did not give much consideration to sectors other than the publishing sector. EY’s report agreed with these criticisms, and also considered a number of estimates used in the PwC report to have been inflated.⁸⁵ For instance, the PwC report assumes that collecting societies could not effectively function if fair use were introduced in Australia, because a significant number of present copyright uses would no longer need to be licensed, limiting the capacity of collecting societies to utilise economies of scale. However, EY found that nearly 90 percent of present education uses covered by statutory licenses would need to be covered by a fair use for such an impact to be realised.

⁷⁸ Submissions to the ALRC by: Australian Film/TV Bodies, Submission 739; ARIA, Submission 731; Kernochan Center for Law and Media and the Arts Columbia Law School, Submission 649; COMPPS, Submission 634.

⁷⁹ Submission to the ALRC by: ARIA, Submission 241. See Ch 11 for a discussion of the considerable dissatisfaction with s 200AB.

⁸⁰ See; (1) Hargreaves, I. (2011). *Digital Opportunity: A Review of Intellectual Property and Growth*, p. 101. (2) Australian Law Reform Commission (2013) above n 2.

⁸¹ See speech by Karen Chester, Deputy Chair, Productivity Commission, *What is Fair?*, Presentation to the Australian Digital Alliance Forum. Available at: <http://www.pc.gov.au/news-media/speeches/fair/20170224-fair.pdf>

⁸² PwC. *Understanding the costs and benefits of introducing a ‘fair use’ exception*, February, 2016.

⁸³ The report also submitted that a standards-based system would replace a known and certain system of fixed exceptions, requiring litigation to establish the boundaries of a new fair use doctrine; and that reform in favour of flexibility in Canada and Singapore led to the decline of copyright industries. These costs are examined further later.

⁸⁴ Productivity Commission (2016) above n 3, p 179.

⁸⁵ Ernst & Young (2016) above n 7.

1.6 Limitations to quantification

There are several challenges to rigorously quantifying the economic impact of a shift from fair dealing to fair use. First, it is difficult to compare copyright laws across countries and rank the level of flexibility offered across countries given the different interpretations of fair use. This makes it difficult to test whether fair use has a statistically significant impact on economic growth. Copyright is just one factor among many others that affects economic growth.

Second, there are potentially many non-market benefits and outcomes of fair use which are best addressed qualitatively because they are not captured in standard measures of economic output such as GDP (such as the effect of fair use on education and training or consumer surplus). So instead this report seeks to make a contribution to the literature by marshalling qualitative evidence from a range of industries to highlight the potential impact of a shift to fair use on the Australian economy.

The challenges associated with quantifying the benefits and costs of fair use as in a traditional cost benefit analysis have been covered extensively elsewhere, and need not be repeated here. For example, the limitations of the Scope and Flexibility to Exclusive Rights Index (SFEER) from the Lisbon Council and the International IP Index from the U.S. Chamber of Commerce have been explored in the past.⁸⁶ Some studies such as the 2015 Intellectual Property and Economic Growth Index have found that countries with more flexible copyright regimes experienced higher rates of economic growth. However, there have been criticisms of the robustness of these findings, including concerns about sample size used and statistical techniques.

The 2016 EY report also noted that while a number of studies looked at the economic impact of copyright on various aspects including productivity, they did have their drawbacks.⁸⁷ For example, one limitation was that the studies were said to be mainly focused on the strength of copyright regimes, instead of their quality.⁸⁸ This is not to suggest that the studies do not nevertheless make a valuable contribution to the literature in this area.

1.7 Structure of the report

This report analyses the impact of shifting from the current fair dealing system to a more flexible approach to copyright law in Australia such as fair use. Key benefits and potential costs of a transition to fair use in Australia are identified and discussed with reference to industry evidence. The remainder of this report is structured as follows:

- Chapter 2 outlines a range of areas in which fair use is likely to support innovation in the economy by providing a copyright framework that is more adaptable to new technologies. It explores both non-expressive uses of copyright material such as text and data mining and transformative uses of copyright material;
- Chapter 3 examines the potential impact of fair use on the incentive to supply new works;
- Chapter 4 examines the ways in which fair use is likely to enable greater educational opportunities in the digital age and support greater access to information; and

⁸⁶ See, for example, George S. Ford (2015) *The Lisbon Council's 2015 Intellectual Property and Economic Growth Index: A Showcase of Methodological Blunder*. Available at: <http://www.phoenix-center.org/perspectives/Perspective15-03Final.pdf>.

⁸⁷ Ernst & Young (2016) above n 7.

⁸⁸ Ibid.

- Chapter 5 explores the extent to which fair use supports a predictive, flexible and responsive copyright regime.

2 Enabling innovation

Key findings

Innovations almost invariably build upon the work of earlier innovators. The creative industries are no exception to that principle. A key challenge for copyright law is therefore to ensure the right balance is struck between providing incentives for first generation innovations while also encouraging second generation innovations that transform first generation innovation into new creations.

Ensuring that copyright law is sufficiently flexible is all the more important given that digital transformation is critical to the growth of the Australian economy and its international competitiveness. Digital technologies will contribute \$139 billion toward the Australian economy by 2020 (an additional \$60 billion from 2016) and help grow the digital workforce by more than 66,000 ICT workers.⁸⁹

The digital age has led to the proliferation of new technologies that allow individuals to access, use and transform existing works in a variety of ways. Fair use provides a copyright framework that accommodates digital innovation and experimentation because it is neutral as between technologies and applications. It permits any use of material as long as it is consistent with the principles of fair use.

2.1 Non-expressive use of copyright material for innovation

Beyond the production of creative works, there are many non-expressive (or non-consumptive as they are sometimes called) uses of copyright works that have been developed into successful commercial product offerings. Some of the examples identified by the ALRC which are permitted in the U.S., but whose legality is uncertain in Australia, include:

- Caching and indexing by search engines and internet service providers;⁹⁰
- Data mining – that is, the technological analysis of copyright materials for patterns, trends, and uses other than their intended purpose;
- Software that matches the audio stream of a television program against a database to inform the user what program they were watching; and
- A commercial database which provides information to lawyers on how other litigators had framed successful arguments on particular legal issues in court.

Beyond these specific examples, the ALRC also noted that technology has moved at a faster pace than the expansion of the fair dealing system. This means that Australian industries may fall further behind in innovative industries which depend upon the non-expressive use of copyright material relative to their competitors in countries with more flexible copyright laws.

In recent decades there has also been growth in the development of 'complementary goods' – the types of technological devices and programs that permit users to enjoy content on new devices. For instance, personal audio and video players, like iPods, smartphones and gaming devices, were

⁸⁹ Deloitte Access Economics. (2016). Australia's digital pulse – developing the digital workforce to drive growth in the future.

⁹⁰ At a time where the internet contributes around \$79 billion to the economy, legal uncertainty affects caching and indexing. For further detail see Deloitte Access Economics (2015) 'The Connected Continent II: How digital technology is transforming the Australian economy'.

complementary goods to copyrighted audio and video, and benefited from the ability to create a digital copy of sound recording for personal use (an exception to permit this was introduced into Australian law in 2006, eight years after inexpensive flash drive sound devices came onto the market). These complementary goods increase the value of content, and hence boost consumers' willingness to pay for new material. The ability of fair use to promptly accommodate new complementary digital technologies that facilitate the use and proliferation of works can contribute to greater demand for traditional works.

2.1.1 Text and data mining

Text and data mining technologies enable automated searches of vast quantities of text and data to look for patterns, trends and other useful information. These technologies are transforming research, not only in the sciences, but also in the humanities. Applications which rely on text and data mining are being increasingly used to enhance research and improve communication technologies.

Text and data mining uses are wide and encompass a variety of government, business and research needs. For example, security applications use text mining to monitor online text for national security purposes, identify spam or stop credit card fraud. Businesses rely on data mining to gather and analyse intelligence about products, customers, and competitors to help them make strategic decisions. In healthcare, medical experts analyse data to identify trends or red flags that may lead to improved diagnoses and treatment. And text and data mining is being used to detect patterns in language making it possible for language to be translated by a machine rather than a human.

A previous study by EY looked at the potential benefits of text and data mining for researchers. Using data from the Department of Education, the Grattan Institute and a U.K. study, their analysis found that a "2 per cent increase in productivity corresponds to 45 minutes per academic per week and 506,000 working hours saved in total per year".⁹¹ Their conclusion was that text and data mining would be likely to result in "productivity gains between \$31 million and \$41 million in researcher working time per year".⁹²

Since these technologies involve reproduction of works at many levels (including digital scanning of works to enable them to be searched and reformatting of works into a similar format), they can infringe copyright unless the rights holder has granted permission or a copyright exception applies.

In Australia, there is no specific exception in the *Copyright Act* for text and data mining. Where the text and data mining process involves the copying, digitisation, or reformatting of copyright material without permission, it may give rise to copyright infringement. Seeking permission is, in many cases, completely impractical (if not impossible) given that text may be mined from publicly accessible content that has been obtained from thousands of distributed sources.

However, in the United States, the use of copyrighted text for text and data mining purposes is permitted - it falls under fair use because it is transformative and does not serve as a substitute for the original work. The United States courts have also noted the benefit that text and data mining provides to the public, because they 'enhance information-gathering

⁹¹ Ernst & Young (2016) above n 7.

⁹² Ibid.

techniques.⁹³ As it is permitted, text and data mining in the United States has been used for a variety of purposes including for research, machine learning and to check for plagiarism. For example, Google (discussed in more detail below) relies on fair use to advance its machine learning technology.

In the United States, the courts have heard several cases in relation to text and data mining. In the case of *White v. Westlaw* (S.D.N.Y. 2014), two publishers, Westlaw and LexisNexis, analysed legal filings, including motions and briefs, through their online subscription databases. Westlaw and LexisNexis added metadata to the copied legal filings that were collected into its databases, creating an interactive legal research tool. The intention was to provide guidance to litigators in how to draft similar documents. White, an attorney, claimed that the use of his filed briefs amounted to copyright infringement. The search results included the full text of the legal filings. The courts ruled in favour of Westlaw and LexisNexis on the basis that:

- their databases transformed the litigation briefs, using it toward the end of creating an interactive legal research tool;
- the briefs at issue were functional presentations of fact and law rather than creative; and
- the databases were not a substitute for the primary market for the briefs (that is, as a service to an attorney's clients).

In another text and data mining case, high school students from Arizona and Virginia brought a copyright infringement action against iParadigms because of the archiving of their essays in the plagiarism detection website Turnitin.com. The website compares student papers to a database of other essays to find instances of plagiarism. Turnitin.com had been contracted by both schools in an effort to decrease plagiarism, which had become a major problem in both schools. The court ruled in favour of iParadigms given the students had signed an agreement that shielded iParadigms from liability. More importantly, however, it ruled that iParadigms' use of each of the plaintiffs' written submissions qualified as a "fair use" - it was transformative in nature because its purpose was to prevent plagiarism by comparative use.

The absence of an exception for text and data mining is placing Australian universities and research institutions at a competitive disadvantage when compared with other jurisdictions. The same applies to libraries and archives. High priority projects these institutions can offer such as mass digitisation, GLAM Hacks (Galleries, Libraries, Archives, Museums use of open source data and content in these institutions) and text and data mining cannot be undertaken because the current fair dealing and statutory exceptions for library and archives in the *Copyright Act* are prescriptive and rigid, making them not fit for purpose in the digital age.

In the U.K., the mining of copyright works without the permission of the copyright owner was not legal until the law was changed in June 2014 to reflect the recommendations made in the Hargreaves report. Copying content from online journals or other texts is now permissible although only as long as the purpose is for non-commercial research.

The impact of the absence of a fair dealing exception for text and data mining on universities and the NSW Data Analytics Centre is discussed in the box below.

⁹³ *Kelly v. Arriba-Soft*, 336 F.3d 811 (9th Cir. 2003).

Box 2.1: Case studies on the impact of text and data mining on the university and research sector

Universities Australia

Copy-reliant technologies such as text and data mining are becoming increasingly prevalent across a number of research sectors including medicine, business, marketing and genomics.

Universities Australia noted that the requirement to obtain approval prior to using material for data mining is placing Australian universities and research institutions at a competitive disadvantage when compared with other jurisdictions such as the U.K. (which recently enacted a text and data mining exception) as well as the U.S., Singapore, South Korea and Israel, where academics can rely on fair use for this activity.⁹⁴

Universities Australia also noted that much research is conducted through international collaboration, and expressed concern that more restrictive copyright laws in Australia risked making Australian research institutions less desirable research partners.

The NSW Data Analytics Centre

In Australia, the NSW Data Analytics Centre was established to help facilitate better data sharing between agencies; develop stronger data analytics capabilities within government; and provide real time analysis (e.g. predictive and 'what if' analysis) across a variety of areas to help inform better government policymaking. Examples include analysing and combining insights across:

A variety of diverse datasets including:

- real estate and job listing, car, business advertising and local council data on building construction and occupancy information;
- Child, business and household information to better understand and explain complex issues such as foster child behaviour;
- Various datasets to predict the probability of events as well as understand what factors help determine community vibrancy; and
- Government and sensitive datasets to help predict latent demand and stress/risk indicators for social housing and domestic violence.
- A year since its establishment, the NSW Data Analytics Centre has worked with 9 different organisations and 5 research centres including CSIRO, National ICT Australia (NICTA) and University of Technology Sydney (UTS).

In the future, the NSW Data Analytics Centre is interested in investigating sourcing data from other places including information from websites to better understand traffic volumes and areas of user difficulty to help drive better customer experiences between citizens and government. Although initiatives such as Service NSW have helped drive better and simpler government interactions and experiences, further refinements to these services informed by data driven analysis in the future may deliver significant benefits.

For the NSW Data Analytics Centre, current copyright issues include seeking permission for the use of data for secondary purposes and the need for further clarity around what qualifies as infringement.

⁹⁴ See the submission to the Productivity Commission Intellectual Property review by the University of Sydney, http://www.pc.gov.au/__data/assets/pdf_file/0004/194863/sub104-intellectual-property.pdf p 13.

Given the current copyright system in Australia, and the lack of a fair use exception, negotiations and commercial deals may be required in order to utilise data such as real estate and job listing information for analytical purposes to inform better government policy and strategy. This also applies to datasets that were developed with no direct intent to inform government policy in the first place and where no commercial harm would occur nor does a secondary market for the data. Obtaining copyright clearance can sometimes be impractical and challenging given the pace and nature of volume, velocity and variety in data analytics.

2.1.2 Cloud computing and technological innovations

Cloud computing has become an important part of the digital economy. Cloud services which involves access, use and storage of copyright works (and so inevitably result in copies being made) are impacted by copyright law.

That means that a failure to get copyright policy right will have significant consequences for the ability of Australian businesses – and consumers – to take full advantage of cloud technologies, and for Australian start-ups to offer them. Getting copyright policy right is also essential if the Government is to be in a position to fully implement its policy of increasing uptake of cloud services by government agencies.⁹⁵

The value of a more flexible copyright law for cloud computing is highlighted in a study by Lerner and Rafert (2015) which examined venture capital investment in cloud computing firms in the U.S. relative to the EU after the *Cablevision* decision, particularly in the geographies and sectors most affected by the decision. Cablevision was a cable television producer who sought to create a hosted Digital Video Recorder Service in which customers were able to pause, record and replay content stored on the companies' servers rather than on a hard drive in the subscribers' home. The Circuit Court held that Cablevision's system was not copyright infringing since it only transmitted the copy requested and recorded by a particular user to that user.⁹⁶ The Cablevision decision, along with court rulings in France and Germany, was estimated to lead to additional incremental investment in U.S. cloud computing firms that ranged from \$728 million to approximately [U.S.] \$1.3 billion over the two-and-a-half years after the decision.⁹⁷

A 2014 report by the Department of Communications – the Cloud Computing Regulatory Stocktake report⁹⁸ - highlighted the ways in which existing copyright exceptions are creating very real uncertainty for cloud computing services in Australia:

The extent to which the exceptions under the Copyright Act may apply to cloud services is unclear and will depend on the specific facts of the case, including the manner in which the cloud service is configured and used. ...The ALRC has noted that it is unclear whether the current law enables backups of

⁹⁵ See The Coalition's Policy for Better and More Accessible Digital Services (available at <https://www.liberal.org.au/coalitions-policy-better-and-more-accessible-digital-services>) and the Australian Government Cloud Computing Policy (available at: <https://www.finance.gov.au/sites/default/files/australian-government-cloud-computing-policy-3.pdf>).

⁹⁶ *Cartoon Network LP, LLP v. CSC Holdings, Inc.* 536 F.3d 121 (2008).

⁹⁷ Lerner, J. and Rafert, G. (2015), 'Lost in the Clouds: The Impact of Changing Property Rights on Investment in Cloud Computing Ventures', *Harvard Business School Working Paper* 15-082.

⁹⁸ Cloud Computing Regulatory Stock Take Report, June 2014
<https://www.communications.gov.au/file/420/download?token=r9MuQIoV>

*copyright material to be copied and downloaded from remote cloud servers.*⁹⁹

The Department of Communications Stocktake report also noted that cases, including the Optus TV Now case, have given rise to growing concerns regarding the risk that inflexible exceptions pose to innovation in cloud services in Australia:

Submissions to the ALRC inquiry have raised concerns with the existing exceptions, particularly in light of the Optus TV Now case, potentially inhibiting innovation in the growth and delivery of services that allow improved ways of consumers accessing copyright material. Some submissions showed support for a fair use exception to specifically address caching and indexing functions. For example, Optus noted that much of the traffic in data centres involves copying and backing up data, which may currently amount to an infringement of copyright law. ...The Law Council of Australia indicated that the existing treatment of caching under copyright law has resulted in 'several overlapping, but distinct provisions aimed at the same basic phenomenon and offering only partial and uncertain protection'.¹⁰⁰

The ALRC said that while it was not clear whether the Optus TV Now service would be found to be fair use or not - particularly without properly considering the potential for harm to rights holders' markets - a flexible exception to copyright, such as fair use, would

*...allow the right questions to be asked of a third party use, and should make Australia more fit for a digital age in which remote cloud technologies are becoming increasingly common.*¹⁰¹

The importance of cloud services to the Australian economy has been recognised by a number of bodies. The Australian Competition and Consumer Commission has noted that "innovation in services, such as cloud services, are important to the emergence and sustainability of competitive digital services industries",¹⁰² while the Government's policy agenda in the last election included the adoption of cloud technologies to deliver better digital services.¹⁰³

Given the push towards greater adoption and use of the cloud in industry and in government, a more accommodating legal framework is required. The issue of uncertainty arising from the current 'fair dealing' provisions means that Australia is being held back as a whole from fully realising the benefits of the technology. A fair use regime is likely to provide a more conducive legal environment for cloud computing in Australia.

⁹⁹ Ibid.

¹⁰⁰ Cloud Computing Regulatory Stock Take Report, June 2014, p 18
<https://www.communications.gov.au/file/420/download?token=r9MuQIoV>.

¹⁰¹ Australian Law Reform Commission (2013) above n 2, para 7.26.

¹⁰² ACCC submission to the ALRC Copyright and the Digital Economy review.

¹⁰³ The Liberal Party of Australia (2016) The Coalition's Policy for Better and More Accessible Digital Services, <https://www.liberal.org.au/coalitions-policy-better-and-more-accessible-digital-services>.

2.1.3 Machine learning

As a significant technological breakthrough, machine learning is taking a more prevalent place in society, following on from previous breakthroughs such as the internet. The improved ability to analyse larger and more complex datasets in recent times has brought machine learning to the fore of business, government and society. Growing volumes of data, cheaper and more powerful processing and affordable data storage has further enabled this technology to uncover connections and help make better decisions without human intervention. For example, machine learning can be utilised by businesses to gain deeper insights into markets and make more informed decisions. An indication of its importance over the next few years is found in the forecast growth of revenue generated from the direct and indirect application of artificial intelligence software across the world from \$1.38 billion in 2016 to \$59.75 billion by 2025.¹⁰⁴

Machine learning is based on computer algorithms that autonomously learn from data and information. Instead of being programmed by humans, machine learning allows for algorithms to learn by experience.

Machine learning received its kick-off in 1950 when Alan Turing created the "Turing Test" to determine if a computer has real intelligence. Soon after that Arthur Samuel wrote the first computer learning program - a game of checkers. The computer improved at the game the more it played, studying which moves made up winning strategies and incorporating those moves into its program. Machine learning algorithms have come a long way since then, enabling computers to communicate with humans, autonomously drive cars and translate languages.

Despite its long history, the legal status of machine learning under Australian copyright law remains uncertain. Machine learning technologies frequently depend on having large sets of data and information to analyse. Use cases such as self-driving cars, authoring of business content and deep-dive analytics for businesses are now reality, due to the improved methods of examining these data. However, these data sets may in some cases include material protected by copyright. These instances can pose barriers to the potential that machine learning could have for the economy, via excessive or unnecessary costs and time delays. For the potential of machine learning to be completely unlocked, there should be minimal barriers to accessing the data. An example of a product that uses machine learning is Google Translate, which is examined in the box below.

¹⁰⁴ Tractica (2017) Artificial Intelligence Market Forecasts, available at: <https://www.tractica.com/research/artificial-intelligence-market-forecasts/>.

Box 2.2: Case study of Google Translate

Google Translate is used by more than 500 people monthly to translate 140 billion words per day in some 103 different languages. Ninety-two percent of translations come from outside of the United States. In Australia, there have been more than 6 billion translations using Google Translate over the past three or so years, with English and Mandarin being the top two translated languages.

Google Translate has several uses including the translation of online materials, text captured in images and real-time translation of spoken language.

Google Translate was launched in 2006 as a rule-based system, where rules of grammar and syntax, along with vocabulary for each language, were manually coded into a computer. In 2007 Google Translate switched to statistical machine translation system. Rather than relying on rules, statistical machine translation uses statistical models, or algorithms, to make translations based on patterns found in large amounts of texts.¹⁰⁵

In November 2016, Google Translate moved to a machine learning based system, referred to as Neural Machine Translation. In general terms, the Neural system translates whole sentences at a time, rather than individual words at a time as was the case with both rules based and statistical machine translation based systems. It uses this broader context to help it identify the most relevant translation, which it then rearranges and adjusts to be more human like. This is all possible because the learning system built on Neural Machine Translation continues to learn over time to create better, more natural translations.

The initial move to Neural Machine Translation improved the accuracy of translations on Google Translate by more than the aggregate gains of the old system over its entire lifetime of development.¹⁰⁶ Today, for many languages, Google Translate produces translations that are comparable to professional human translators.

For the purposes of training the Neural system, Google requires large amounts of training data in the form of millions of translated texts, many of which are protected by copyright. Google sources this data from a range of places including books, government documents, the United Nations, and websites from all around the world, relying in part on fair use.

2.2 Transformative use of copyright material

Among the major beneficiaries of a transition to fair use are creators who seek to use copyright material for transformative uses in circumstances where such use does not clearly fall within existing fair dealing restrictions. In understanding the nature of transformative use, it is important to recognise that copyright does not grant an absolute right to creators or copyright holders to protect their works. The ALRC said of the rights granted to copyright holders:

Copyright protection is vital in allowing creators and rights holders to exploit the value of their materials, and to increase the incentive to create those materials—but this monopoly need not extend indefinitely or into markets which the creator had no real interest in exploiting. Copyright must

¹⁰⁵ Inside Google Translate, uploaded 9 July 2010 [online] <https://www.youtube.com/watch?v=GdSC1Z1Kzs>.

¹⁰⁶ Found in translation: More accurate, fluent sentences in Google Translate, Barak Turovsky 15 November 2016 [online] <https://blog.google/products/translate/found-translation-more-accurate-fluent-sentences-google-translate/>.

leave 'breathing room' for new materials and productive uses that make use of other copyright material.¹⁰⁷

In the U.S., this transformative use doctrine was adopted by the U.S. Supreme Court in *Campbell v Acuff-Rose* (1994) 510 U.S. 569. Courts in the U.S. consider how transformative a work is in determining whether it is a "fair use" within the fairness factors. In *Campbell*, the Court stated at 579):

Although such transformative use is not absolutely necessary for a finding of fair use, ...the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright ... and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

2.2.1 Literary innovation and digital publishing

Derivative works created by combining, integrating or editing existing materials have historically been an important aspect of innovation across software, music, film and literary works. Digital technologies have made it easier for anyone to reproduce and combine content across different media to create new products and services.

One organisation that uses this remixing approach to develop new forms of literature is *if:book Australia*, an initiative out of the Queensland Writers Centre. Typically, these works involve remixing; multiple media formats (e.g. web, social media, print); and collaboration between multiple authors on open source platforms.

Previous works by *if:book Australia* include *Willow Pattern*, a book created in 24 hours by a group of authors on an open platform with every edit and change tracked; *Lost In Track Changes* which was completed by 5 different writers over 5 "generations" of edits; and *I Shall Say This Only Once*, a text search-based literary piece of around 150 pages that required 28 volumes of data (around 1 metre long) to complete. The data from these projects are available online for other users to transform into new works.

if:book Australia is a non-commercial initiative. All content used to create these works are under either public domain or licensed under open Creative Commons schemes. *if:book Australia* avoids using copyright works because of the inflexibility of the current exceptions. As a small organisation, the legal costs of exploring the use of the fair dealing system exceptions are too high to justify expanding the range of works it might use. However, fair use could provide individuals and organisations like *if:book Australia* more flexibility in remixing other works to create innovative literary content.

2.2.2 Creative industries

The internet has given rise to new cultural genres - such as remix and mashups - that are transforming the cultural landscape.¹⁰⁸ It is also providing new ways for creators to distribute and monetise their works: a

¹⁰⁷ Australian Law Reform Commission (2013) above n 2, Executive Summary.

¹⁰⁸ Catherine G. Latterell, *Remix: Reading and Composing Culture* (3d edition, 2016); (2) *Sound Unbound: Sampling Digital Music and Culture*, edited by Paul D. Miller (2008).

recent Screen Australia report¹⁰⁹ found that new forms of online distribution are “breaking down the barriers between creators and audiences”, and potentially allowing films to be marketed and distributed to a global marketplace. Screen Australia says:

*For lower-budget niche films in particular, the Internet has become a powerful tool to finance and release projects that would previously not have been conceivable.*¹¹⁰

Australian creators are limited in the ways in which they can take advantage of digital technology. Unlike their peers in jurisdictions with more flexible copyright laws, Australian digital creators are often prevented from using small extracts of works in remixes and mashups. While Australian artists may potentially rely on criticism and review fair dealing exception,¹¹¹ and the parody and satire fair dealing exception,¹¹² if their use cannot be pigeon holed into one of these uses, no exception applies. That is not the case in fair use jurisdictions where the only question is whether the use is “fair”.

Wibbitz in Israel operates an online platform that translates text into videos. The technology uses language algorithms to scan the submitted text to understand the story and create video clips, photographs or infographics in seconds. Israel is a country which has adopted fair use. By comparison in Australia, the scope to develop innovative remixes of third party content depends on the ability of users to demonstrate that their remix falls within one of the existing fair use exceptions.

Many of the groups currently opposing the introduction of fair use raise the spectre of fair use causing harm to artists by allowing anyone to use their content without payment. For example, in a recent speech criticising the draft recommendation of the Productivity Commission for Australia to enact a fair use exception, the chair of Copyright Agency, Kim Williams, said that fair use would result in a world with “far less creativity, far fewer opportunities, far shallower intellectual and artistic depth, and far lower rewards for those who create new work”. He said the only bulwark against this was “the preservation of the concept of enforceable copyright, which is now under threat”.¹¹³

However, the artists themselves often do not see it this way. In a recent update on law reform matters of interests to their artist client base, Melbourne law firm, Studio Legal, noted:

This might be the year we start to see some movement on ‘fair use’ in Australia. At the moment, if you don’t have permission to use somebody else’s copyright work, you will be liable for copyright infringement unless your use of the material falls within a list of exceptions in the Copyright Act. The list covers things like parody and satire, research, study and reporting the news.

¹⁰⁹ Screen Australia. (2015). Issues in feature film distribution, July. See; http://www.screenaustralia.gov.au/getmedia/9598b9f7-321b-45f3-b5e8-7870166487fc/IssuesInFeatureFilmDistribution_2015-07-30.pdf.

¹¹⁰ Ibid.

¹¹¹ *Copyright Act 1968* (Cth), ss 41 and 103.

¹¹² *Copyright Act 1968* (Cth), ss 41A and 103A.

¹¹³ Kim Williams, "Safeguarding Australian creativity – what's really at stake over copyright reform", address to Melbourne Press Club 17 August 2016.

Artists and creatives have long said that we need expanded, more flexible exceptions to copyright infringement to cover situations that fall outside the current list. If a 'fair use' exception is introduced, a court would simply need to consider whether a given use was 'fair' or not by referring to a list of 'fairness factors'.

The Australian Law Reform Commission released a report in 2013 which supported the introduction of fair use in Australia, but we haven't yet introduced laws acting on this recommendation....

If you're a remix artist or you use samples in your music, this is a big one for you, so stay tuned.¹¹⁴

What these comments highlight is that new creative works inevitably build on existing works; that digital tools have made this easier than it has ever been; and that Australian creators are at a disadvantage to their peers in fair use jurisdictions.

A 2014 report on the health of the U.S. content industries¹¹⁵ found that there has been an explosion in creative output in the U.S. over the past couple of decades:

While the nature of the various industries may have changed, the simple, undeniable fact is that there is a cornucopia of amazing new content being produced, consumed, shared and monetized in the United States.¹¹⁶

In other words, creativity is thriving in a fair use jurisdiction, and could be expected to do so in Australia as well if fair use was enacted. Australian digital artists such as Soda Jerk¹¹⁷ and Pogo,¹¹⁸ whose work is unlikely to fall within the current fair dealing system exceptions currently operate in the U.S. Pogo has been exhibited at the Guggenheim and Highline Ballroom, but remix art is at best legally uncertain in Australia under the current fair dealing system.

2.2.3 Software development

Another type of transformative use can be seen in the software industry. Australia's *Copyright Act* currently permits some limited reproduction of computer programs for back-up purposes, to make interoperable products, and for error or security testing.¹¹⁹ The ALRC found several limitations with the current state of the law:

- The *Copyright Act* provides an exception for backing-up computer programs, but not other digital files;
- Computer programs, as defined in the Act, only includes the *literary work* of the code – not images, audio and films that form part of a program (such as a computer game); and

¹¹⁴ Copyright in 2016: Remix rights, online piracy and the final (maybe) word on Dallas Buyers Club, Studio Legal, 8 February 2016

¹¹⁵ The Sky is Rising, Michael Masnick, Michael Ho, Joyce Hung and Leigh Beadon, October 2014 <https://www.ccn.net.org/wp-content/uploads/2014/10/Sky-Is-Rising-2014.pdf>.

¹¹⁶ Ibid p 4.

¹¹⁷ <http://www.sodajerk.com.au>.

¹¹⁸ <http://pogomix.net/pogo/>.

¹¹⁹ *Copyright Act 1968* (Cth), Division 4A.

- The interoperability exception does not allow programs to be reproduced in the interoperable program, and does not extend to copying necessary to make software work with hardware. Further, it is difficult to reproduce programs “only to the extent reasonably necessary”, as the exception requires.

Fair use has permitted broader uses of software packages in the U.S.,¹²⁰ which commentators have noted protects startups and open-source developers who must be able to access and reimplement proprietary software interfaces in order to make their products compatible with software programs and online services created by customers and competitors.¹²¹ In this respect, fair use supports greater transformative uses of software interfaces. An advantage of fair use in this context is that potential uses of software interfaces can be assessed on a case by case basis rather than needing to fall within a specified exception as is the case for fair dealing.¹²²

¹²⁰ <https://www.theguardian.com/technology/2016/may/26/google-wins-copyright-lawsuit-oracle-java-code>.

¹²¹ See, for example, Pamela Samuelson (2016) *Google’s fair use victory is good for open source*. Available at: <https://arstechnica.com/tech-policy/2016/06/googles-fair-use-victory-is-good-for-open-source/>

¹²² While a broader fair use provision may result in some loss of potential licence revenue for software companies, the loss of revenue simply reflects a transfer between software companies and users, not an economic cost. The only true economic cost would arise from the impact of fair use on the incentive to innovate.

3 Incentives to supply new works

Key findings

While fair use is likely to provide greater scope for secondary innovators to make transformative use of existing works or to use copyright material in non-expressive ways such as text and data mining, a key question sometimes expressed around the introduction of fair use is whether it would undermine the incentives for investment in creative effort, both by reducing the returns rights holders secure and by increasing the uncertainty they face.

However, far from undermining incentives for creative effort, both the effect and intent of fair use is to promote creativity. The objective of fair use is not to alter the balance in the copyright system between the interests of rights holders and those of consumers. As a consequence, determinations of fair use focus on both:

- whether the new work is transformative (and in that way enriches public knowledge by adding to the supply of creative works); and
- whether it has an adverse impact on the potential market for, or value of, the copyrighted work (which might then reduce the incentive to create new works).

Analysis by the ALRC found that fair use is unlikely to result in a reduction in creative output, consistent with the underlying principles of fair use. Indeed, the ALRC found that “[content] providers can have a substantial effect on the scope of fair use, by responding to market demand”.¹²³ This is because courts must assess the availability of a copyright work on market terms in determining whether a use is fair. It is important to also recognise the potential of fair use to promote subsequent innovations that draw on earlier works. In particular, the growth of transformative and non-consumptive uses has blurred the boundaries between ‘producers’ and ‘consumers’. As these uses continue to develop, it is inevitable that the current, prescriptive, framework will come under rising pressure, creating uncertainty and increasing the risks faced by innovators.

Neither fair dealing nor fair use aim to provide universal ‘free use’ or promote piracy in any way. A core element of a fairness assessment in both fair dealing and fair use is whether the intended use causes harm to copyright owner markets. Both seek to ensure public interest uses are permitted, and to promote creative output. Thus the main effect of a move from fair dealing to fair use is not to alter the balance between rights owners and rights users, but to allow that balance to evolve as technology and applications develop.

Furthermore, in a recent EY analysis of the impact of copyright law on piracy, it was stated that rather than copyright law, “the main drivers of piracy are accessibility and affordability”.¹²⁴ Their study made reference to a Choice consumer survey from 2015 showing that piracy rates have been on the

¹²³ Australian Law Reform Commission (2013) above n 2, 4.108.

¹²⁴ Ernst & Young (2016) above n 7.

decline as consumer choice has risen.¹²⁵ Additionally, EY's report referred to a study by TNS Global Market Research, conducted on behalf of the Department of Communications, which found that 12 per cent of people who consumed online content illegally had already owned that content in another format.¹²⁶ The same finding was made by Kantar Public in a 2017 study commissioned by the Department of Communications.¹²⁷ This adds weight to the idea that people are more likely to engage in piracy when their demand for legal content goes unsatisfied.¹²⁸

3.1 The impact of fair use on the incentive to supply new works

One of the key concerns around the introduction of fair use, raised in some submissions to the ALRC and the Productivity Commission reviews, is that a fair use regime would undermine the incentives for investment in creative effort, both by reducing the returns rights owners secure and by increasing the uncertainty and cost involved in prosecuting uses that are not considered fair.

The veracity of this concern is considered in more detail below, by first considering the broader objective that fair use seeks to achieve and then discussing in more detail the ways in which fair dealing and fair use are likely to impact the incentives for the supply of new creative works in Australia.

3.1.1 The objective of fair use

In assessing the impact of fair use on the incentive to supply new works it is important to first recognise that the objective of fair use is not to alter the balance in the copyright system between the interests of rights holders and those of consumers.

Indeed, the vast majority of fair use cases are not between creators and final consumers but between creators. As has been emphasised by the U.S. courts, the mere fact that consumers would be better off (for instance, by paying lower prices and hence enjoying greater access to the initial work) were the use of a work determined to be a fair use, is largely irrelevant to decision-making under the fair use principles, as "nearly every unauthorized reproduction or distribution increases access to some degree".¹²⁹

Instead, fair use aims to encourage creation and building upon the existing stock of copyright works. It is for that reason that the overriding question in determining whether conduct qualifies as fair use has always been whether the impugned use is genuinely 'transformative' or 'productive', with the Supreme Court directing the inquiry to "whether the new work merely 'supersede[s] the objects' of the original creation ... or instead adds something new, with a further purpose or character ...".¹³⁰ This is because "the more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching

¹²⁵ Ernst & Young (2016) above n 7, p 27.

¹²⁶ TNS Market & Social Research (2015) Consumer survey on Online Copyright Infringement 2016. A marketing research report, June 2015, Prepared for Department of Communications and the Arts.

¹²⁷ Kantar Public (2017) Consumer Survey on Online Copyright Infringement 2017. A marketing research report June 2017. Prepared for: Department of Communications and the Arts.

¹²⁸ Ernst & Young (2016) above n 7, p 27.

¹²⁹ *Sony BMG Music Entertainment v. Tenenbaum*, 2009 WL 4547019 (D. Mass. 3009), vacated on other grounds, 660 F.3d 487 (1st Cir. 2011), cited in Patry, William F. *Patry On Fair Use*. [Eagan, MN]: Thompson Reuters, 2015, p 311.

¹³⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-579, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994) (citation omitted); Patry, William F. *Patry On Fair Use*. [Eagan, MN]: Thompson Reuters, 2015, p 129.

public knowledge and the less likely it is that the appropriation will serve as a substitute for the original, or its plausible derivatives, shrinking the protected market opportunities of the copyrighted work".¹³¹

The fact that fair use is directed at promoting, rather than discouraging, creation, also explains why so much emphasis has been placed, in applying the statutory provisions, on the "effect of the use upon the potential market for or value of the copyrighted work".¹³² The Supreme Court may have erred in referring to this as the "most important element of fair use",¹³³ but there is no doubting this factor's significance, nor the relatively broad manner in which it has been interpreted—extending, for example, not merely to the immediate effect of the impugned use, but to "the harm that might result if the use were widespread".¹³⁴

As a result, fair use does not seek or serve to erode the legitimate return to the holder of rights in a work; instead, it serves, like similar provisions in other intellectual property laws, to prevent that rights holder from claiming a "disproportionate reward" which would chill innovation and slow the growth of creative output.¹³⁵ Its effects, if properly implemented, should therefore be to unlock opportunities for creative effort, rather than to restrict them.

3.1.2 How fair use and fair dealing impact the incentive to supply new works

To assess the relative impact of fair use and fair dealing on the incentive to supply new works, it is important to recognise that the key difference between fair use and fair dealing is that one prescribes a limited set of purposes which 'could' be considered fair, which may inadvertently prejudice against certain classes of works, and the other enables the consideration of an open category of purposes which could be considered to be fair.

As discussed above, fair use seeks to promote creative effort by balancing the importance of providing incentives that support the production of new works with the importance of enabling subsequent creative output that builds on earlier work in cases where such use does not have a substantial adverse commercial impact on the initial rights holders. Similarly, fair dealing only permits use of material without remuneration to the copyright holder for specified types of uses which are seen as having a broader social benefit.

In principle, both fair dealing and fair use seek to promote creative output. While fair use, consistent with its goal of providing flexibility in order to achieve copyright's innovation goals, may allow a particular use not currently allowed, any adverse commercial impact on rights holders will be a relevant consideration in assessing whether a particular use is fair. Thus the main effect of a move from fair dealing to fair use is not to alter the balance between rights holders and users but to allow that balance to evolve as technology and applications develop over time.

Rights holders have nonetheless expressed concern about the impact of the introduction of a "fair use" system. PwC, among others, argue that some uses that were previously made through licences would become fair uses.¹³⁶

¹³¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591.

¹³² 17 U.S.C. § 107(4).

¹³³ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566, 105 S. Ct. 2218, 85 L.Ed.2d 588 (1985); see the discussion in Patry, William F. *Patry On Fair Use*. [Eagan, MN]: Thompson Reuters, 2015, p 562-563.

¹³⁴ Australian Law Reform Commission (2013) above n 2, p 139.

¹³⁵ Merges, Robert P. *Justifying Intellectual Property*. Cambridge, Mass.: Harvard University Press, 2011, p 162.

¹³⁶ PwC (2016), above n 82.

Accordingly, it is alleged, returns to those copyright holders may fall, insofar as licences are no longer necessary to use the material.¹³⁷ It focussed on the experience in the Canadian education publishing sector as evidence of this.¹³⁸ However, this ignores the market assessment that is required by a fair use provision. The Productivity Commission noted that this approach was inappropriate, as even if education were an illustrative fair use purpose, "*not all education purposes will be considered fair, and Australian courts will make judgements based on the facts of each case.*" Further, the claimed extent of the financial difficulties of the Canadian education publishing sector and the causes of those difficulties are strongly disputed.¹³⁹

Concerns have been raised that copyright holders in this situation might decide that the available returns do not provide an adequate incentive to produce copyright material. If this occurred, this would lead to a reduction in the quantity of copyright works available for transaction, which would be a cost to society at large.

The ALRC considered this criticism in several ways and found it to lack evidence:

- It noted that a court determining if a use of copyright material is 'fair' under the U.S.-style exception must consider the impact of the use on the commercial market for the material. It argued: "*Considering this factor will help ensure that the legitimate interests of creators and other rights holders are not harmed by the introduction of fair use*";
- It observed that the U.S. fair use system did not appear to inhibit "*the creation of films, music, books and other material in the world's largest exporter of cultural goods*";
- In the U.S., many beneficiaries of fair use were businesses and producers of copyright material (for instance, media companies).

It is important to also recognise the potential of fair use to promote subsequent innovations that draw on earlier works. In particular, the growth of transformative and non-consumptive uses has blurred the boundaries between 'producers' and 'consumers'. As these uses continue to develop, it is inevitable that the current, prescriptive, framework will come under rising pressure, creating uncertainty and increasing the risks faced by innovators.

¹³⁷ Although this may affect returns to producers within those industries, this is not strictly a cost to society at large – rather, it is a *transfer* from copyright holders to those who are able to use the copyright material as a public good. At the net society level, this is neither a cost nor a benefit. Undoubtedly, any loss of licensing fees may have an asymmetric impact on certain organisations, sub-industries and sectors but to the extent that these simply reflect transfers between industries or individuals there is no net impact on societal welfare.

¹³⁸ The Canadian Supreme Court (2012) noted that a range of factors other than changes to fair dealing provisions also helped explain the downturn in education publishing revenue in Canada: *... as noted by the [educational representatives], there was no evidence that this decline was linked to photocopying done by teachers. Moreover, [they] noted that there were several other factors that were likely to have contributed to the decline in sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning* (2012 SCC 37, para.33).

¹³⁹ See Ariel Katz, Associate Professor at the Faculty of Law, University of Toronto, *The Loss of Access Copyright Royalties and the Effect on Publishers: Sifting Fact from Fiction* (Part 1) 4 June 2014 [online] Available at: <https://arielkatz.org/archives/3281> [Accessed 9 June 2017].

The economics of second generation innovation and the extent to which fair use is likely to assist innovations that draw on earlier works is discussed in box 3.1 below.

Box 3.1: The economics of second generation innovation

One of the core objectives of copyright law is to ensure that the right balance is struck between creating incentives for first generation innovations while also supporting second generation innovations.

This tradeoff has been recognised in other areas of intellectual property law such as patent law. Scotchmer (1991)¹⁴⁰ notes that in the context of patents there is an inherent trade-off between broad and narrow patent protection. Overly broad patent protection can stymie the development of second generation innovations that build on initial research. This can ultimately reduce the benefits for first generation patent holders who are unable to benefit from licensing their technology to second generation innovators or to work co-operatively with them to generate new products. By comparison, overly narrow patent protection can reduce the incentive for first generation innovation.

The key insight of this research is that there is a balance to be struck in facilitating incentives for both first and second generation innovations. As such, the right to experiment by building on existing research is an option that should be valued by society. To the extent that fair use would permit such experimentation in areas which would not be covered by existing fair dealing exceptions, or may be difficult to anticipate *ex-ante*, fair use will help support a greater level of secondary experimentation and innovation. In that sense, fair use creates additional options for innovators.

Moreover, under fair use (but not under fair dealing), the scope of those options can adjust to some degree automatically as innovations evolve. For example, where robust licensing develops for copyrighted works after a finding of fair use, subsequent fair use determinations would take note of the new licensing scheme in weighing the important fourth factor. In the American Geophysical Union v. Texaco case, 60 F.3d 913 (2d Cir. 1995), the court of appeals relied on the advent of a blanket licensing scheme (as contrasted with an earlier per work license), to find that what might have been reasonable and customary in the past, was no longer.¹⁴¹

While the impact of fair use on incentives to create new works is ultimately an empirical question, the analysis here suggests, it does not automatically follow that fair use would adversely impact the production of new works. To the contrary, its historic role has been to encourage the production of new works as demonstrated by the central role of the U.S. in generating new creative works and technological innovations.

It is also important to recognise that Australia is a major importer of copyright material with much of it coming from the U.S. In 2014-15, Australia imported approximately \$8.7 billion and exported \$3.6 billion of copyright-intensive goods and services, leaving a net import amount of \$5.1 billion. This has increased over time, largely due to an increase in copyright-intensive imports of services.¹⁴² Insofar as imported (foreign-produced)

¹⁴⁰ Scotchmer, S. 1991, 'Standing on the Shoulders of Giants: Cumulative Research and the Patent Law', *Journal of Economic Perspectives*, 5(1): 29-41.

¹⁴¹ In the American Geophysical Union v. Texaco case, 60 F.3d 913 (2d Cir. 1995), it was held that the photocopying of subscription material by Texaco was not a transformative use of the material and therefore not fair use. In the dissenting judgment of Jacobs J, it was noted that a blanket license would still not offer Texaco a safe harbour to copy as much material as they want.

¹⁴² Productivity Commission. (2016). *Intellectual Property Arrangements – Draft Report*, see; <http://www.pc.gov.au/inquiries/completed/intellectual-property/draft>.

works can be transformed into new works or services delivered in Australia, fair use reform could help expand the supply of new creative works in Australia.

4 Education and information access

Key findings

Having a nurturing educational environment is equally as important as having a flexible legal environment required for encouraging innovation. Innovation is very much dependent upon the capacity of Australian schools and universities to equip Australian students with the necessary skills for workplaces of the future. These workplaces will increasingly leverage digital-based skills.

In a speech given by Deputy Chair of the Productivity Commission, Karen Chester, it was noted that:

*"[Fair use is] not just about the creators vs the tech giants. And it's not a zero sum game between rights holders and content users as some would have us believe. It is about school kids, uni students, less tech savvy older people, less tech savvy younger people, documentary film makers, 55 year old redundant workers, universities and TAFEs trying to teach in a more accessible way, and the cost for anyone down under consuming the creative or innovative endeavour of others. For at the end of the day, out of kilter IP settings have and will continue to create a largely silent and growing class of 'have-nots'."*¹⁴³

In recent times, the government has introduced a STEM education agenda as part of one of its 4 key pillars of its innovation agenda. This highlights schools and universities as a crucial part of the innovation agenda in Australia.¹⁴⁴ In addition, to help ensure students will be digitally equipped for the future, the National Curriculum now has a provision for a digital technologies curriculum, which directly addresses knowledge and understanding of digital technologies.¹⁴⁵

There are a number of ways in which Australia's current fair dealing exceptions constrain the ability of academics, students and libraries to make the most of the educational opportunities available in the digital age. Evidence from a range of stakeholder consultations indicated that these constraints take a number of forms:

- Australian academics are currently constrained in their ability to use extracts from other research or tables (even if it is their own research) in public presentations or in collaboration with industry due to the costs of negotiating access to this material with copyright holders under fair dealing.

¹⁴³ See speech by Karen Chester, Deputy Chair, Productivity Commission, What is Fair?, Presentation to the Australian Digital Alliance Forum. Available at: <http://www.pc.gov.au/news-media/speeches/fair/20170224-fair.pdf>

¹⁴⁴ Australian Government (2018) *National Innovation and Science Agenda*, available at: <http://www.innovation.gov.au/page/agenda>.

¹⁴⁵ Australian Curriculum, Digital Technologies, available at <http://www.australiancurriculum.edu.au/technologies/digital-technologies/rationale>.

- Australian universities may struggle to compete in providing high quality MOOCs with overseas universities operating in fair use jurisdictions.
- Universities are similarly prevented from publishing third party material contained in student theses, limiting the ability for universities to disseminate this research.

Fair use would considerably simplify the current fair dealing system concerning access to library materials. In particular, libraries would be more likely to be able to rely on fair use to provide:

- digital access to unpublished or orphan works (where the author cannot be determined or contacted);
- researchers with the ability to use text and data mining to derive insights from old records;
- diaries to authors looking to incorporate them in autobiographies or historical novels; and
- Australians with the means to undertake appropriate research and engage in cultural uses with these collections.

Fair use is likely to substantially reduce transaction costs for libraries and universities seeking to navigate the complexity of the current statutory exceptions as well as reduce transactions costs of negotiating with rights holders in circumstances where the proposed use has no significant impact on the value of the copyright material.

4.1 Presenting academic research and collaborating with industry

Australia's current fair dealing exceptions place considerable constraints on the ability of Australian academics and students to present their research in public fora or to use it to collaborate with industry. The ability to present research and collaborate with industry is necessary for ideas exchange - an important component of innovation.

None of the educational exceptions or statutory licences in Australia's *Copyright Act* apply when academics and researchers are engaging with the broader community, or with business and industry. In some circumstances lecturers have been unable to present extracts such as tables from their own research in public presentations due to either the prohibitive cost of obtaining permission for such uses or the transaction costs involved in negotiating the rights to use such material.

Box 4.1: Quotation analysis

Quotation is an example of an area not properly dealt with under Australia's fair dealing regime. Indeed, the ALRC recommended that were fair use not enacted, a new fair dealing exception with respect to quotation should be adopted. A previous study by EY found that a fair dealing exception for quotation would result in a "small positive net benefit of around \$1.5 million per annum, due to reduced transaction costs".¹⁴⁶ Quotation can be defined 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".¹⁴⁷ EY also found an estimated "transfer from individual copyright owners to licensees of \$123,000 per annum associated with 7,000 less extracts in academic publications requiring clearance".¹⁴⁸ In this situation, copyright owners or rights holders are the publishers, while the academics are the users or licensees. The estimated costs for rights holders of non-literary and non-academic works are similar, while "the primary market for copyright owners would remain relatively unaffected".¹⁴⁹

Australian academics are also prevented from including small amounts of third party material in a journal article or conference paper. Universities Australia noted in a submission to the Productivity Commission that if the use amounts to a "criticism or review", then it may be permitted by the criticism and review fair dealing exception, but if the content is being included merely as a support for the academic points being made, then none of the existing exceptions clearly apply. Universities Australia says that academics are being forced to decide whether to use the material most relevant to their research and risk litigation, incur the transaction costs of rights clearances, or replace it with something less appropriate:¹⁵⁰

This is the case even when it is clear that the use of third party content would cause no prejudice to the rights holder. If the use cannot be pigeonholed within one of the purpose-based fair dealing exceptions, then it is not permitted, however fair it might be and whatever social benefit may flow from the use.

As a result of our inflexible copyright exceptions, a commercial news program is permitted to use third party content for the purposes of criticism and review, but an academic may well be prevented from using the same content in a conference paper or journal article. There is no public policy justification for treating commercial organisations more favourably than universities, academics and students.

Universities in fair use jurisdictions typically rely on the fair use exception for this use.

¹⁴⁶ Ernst & Young (2016) above n 7, p 14.

¹⁴⁷ Ricketson, S. and Ginsburg, J. (2006), cited in: ALRC. (2013). Copyright in the digital economy, Final Report, p. 23.

¹⁴⁸ Ernst & Young (2016) above n 7, p 14.

¹⁴⁹ Ibid, p.15

¹⁵⁰ Universities Australia (2016) *Submission to the Productivity Commission's Draft Report on Intellectual Property Arrangements*. Available at: https://www.pc.gov.au/data/assets/pdf_file/0019/201187/subdr453-intellectual-property.pdf.

Universities Australia points to student theses as a particularly egregious example of inflexible exceptions limiting the dissemination of knowledge that is such a central part of the university mission:¹⁵¹

Students can rely on the fair dealing research and study exception to include small amounts of third party content into a thesis, but the university itself risks being sued for copyright infringement if it uploads this content into a digital repository to enable other students and members of the public to access it. To avoid this risk, universities generally require their students to obtain permission for use of third party content - which can be highly costly, and in many cases impossible - or, alternatively, to remove this content from their thesis. The result is that the integrity of the thesis is compromised, and the academic community is denied the opportunity to engage fully with the work.

While universities have been encouraged to collaborate increasingly with industry in recent years, none of the existing exceptions under the fair dealing system or statutory licences permit universities – or their academics – to use small amounts of copyright content when engaging in these kinds of collaborative projects. There is no such automatic limitation with fair use.

As discussed earlier, a necessary aspect of innovation is that there is capacity for people to innovate effectively. Collaboration facilitates an exchange of ideas which complements information gaps and offers new perspectives for innovative thinking. As such, people need to be equipped with the skills and appropriate experience to innovate effectively. Education is able to provide these skills. For example, the Pathway in Technology Early College High School (P-TECH) pilot, funded by the STEM component of the National Innovation and Science Agenda has received \$500,000 in funding. The P-TECH model is based on a partnership between education and industry, and aims to support young people to make a successful transition from school to further education, training and work.¹⁵²

However, while these measures may be adopted by education providers, the legal framework must accommodate and encourage innovation, whether it is collaborating with third parties or utilising digital technologies. The law is required to be flexible to allow educational institutions to develop innovators.

As an example, copyright issues are impeding schools from engaging with the broader community and industry in ways that are being encouraged by the Government as part of its STEM education initiatives. The copyright roadblock arises because none of the existing educational copying provisions apply when schools undertake the kinds of collaborative uses that are envisaged by these initiatives. Neither the educational statutory licences in Parts VA and VB of the *Copyright Act*, nor any of the existing fair dealing exceptions (including the exception that permits fair dealing by an individual for the purpose of his or her own research or study), would permit schools to use small amounts of copyright material when engaging in the broader collaborative projects that are a central part of government STEM strategies.

Schools in fair use jurisdictions do not face this limitation. In its submission to the Productivity Commission's Intellectual Property Arrangements public inquiry, the Copyright Advisory Group to the COAG Education Council (**CAG**) highlighted the extent to which collaborative uses are automatically

¹⁵¹ Ibid.

¹⁵² Education Council National STEM School Educational Strategy, December 2015.

prevented under the existing educational copying regime, “regardless of whether they would be socially useful, regardless of whether they are required by government policy, and regardless of whether or not they would unreasonably prejudice rights holders”.¹⁵³ The CAG submission said that this made the existing copyright regime “singularly unsuited to enabling schools to fully engage with the broader community and industry”.¹⁵⁴ CAG submitted that a flexible exception such as fair use would be “much better suited to an environment where schools and other educational institutions are increasingly expected to engage with industry and the wider community, and bring us in line with countries such as Israel, South Korea, Singapore and the United States that have laws that facilitate this collaborative engagement”.¹⁵⁵

4.2 Use of teaching material

Section 40 and 103C of the *Copyright Act* permits the use of copyright content for the purposes of research or study. They permit material to be copied for use in developing teaching materials or sharing teaching materials with organisations also covered under the relevant statutory licensing, but not if that material is to be made available to students (in which case, for works, a statutory licence under Part VB of the *Copyright Act* will apply).¹⁵⁶ As a consequence, an academic researcher may obtain a copy of an article to use for their own research purposes but the material cannot be used if it is shared to a different audience, for example, during teaching in a lecture or to share with other students, unless a statutory royalty is paid.

Universities noted that the introduction of fair use is unlikely to negate the need to negotiate licences for the use of teaching material to be distributed to students. However, a transition to fair use may provide greater scope for universities to include copyright material in MOOCs, as discussed below.

4.2.1 Massive Open Online Courses

MOOCs present new opportunities for Australian universities to reach international markets.¹⁵⁷ They are an innovative way of delivering and distributing educational content online, with interactive participation and open access. They allow students to access online courses provided by universities from all over the world.

Copyright, however, is limiting the ways that Australian universities can participate in MOOCs. While universities operating MOOCs in fair use jurisdictions can rely on fair use when incorporating appropriate amounts of third party content into MOOC courses, in Australia, none of the existing Australian copyright exceptions or statutory licences apply to MOOCs, with the result that there are barriers for Australian universities wanting to use content that would be available to universities operating MOOCs in fair use jurisdictions. The university sector drew attention to this in submissions to the Productivity Commission Intellectual Property Review. Their findings included one university paying excessive licence fees in order to utilise a

¹⁵³ Copyright Advisory Group to the COAG Education Council Submission DR 429, p 11.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Thomson Reuters, *The Laws of Australia* (as at 15 October 2013) '23 Intellectual Property' [23.1.3700]. Note: Part VB of the Copyright Act will be replaced by a simplified statutory licence introduced by s 113P of the *Copyright Amendment (Disability and Other Measures) Act 2017* (Cth) on its commencement.

¹⁵⁷ According to State of the MOOC (2016), the total number of MOOCs has grown from 3 in 2010 to over 4,500 worldwide in January 2016.

single table that had been created by the academic running the course and was included in a scholarly journal.¹⁵⁸

The nature of MOOCs, particularly in terms of their scale and different business model, provides additional challenges to obtaining content.¹⁵⁹ However, while fair use would only likely permit unremunerated copying in certain limited circumstances, it is likely that a shift from fair dealing would alleviate the extent of the problems faced by providers.

According to the University of Melbourne and Universities Australia, current fair dealing laws in Australia make the development of MOOCs more difficult than in jurisdictions with fair use. Statutory licences for educational use in Australia – including with respect to lecture slides, textbook extracts and video – apply only to courses delivered in the normal university format. This material cannot be used in MOOCs, and accordingly, only course material outside of copyright may be used for MOOCs unless a licence agreement is reached with the copyright holder.

Because universities may choose to rely only on publicly accessible material for their MOOCs to avoid potential infringement and transaction costs, they are limited in the breadth and quality of material they can provide to students of MOOCs.¹⁶⁰ Both the University of Melbourne and Universities Australia argue that allowing fair use would assist Australian universities in competing effectively on the international stage with counterparts in fair use jurisdictions (such as U.S. universities) in the provision of MOOCs.

In the absence of a fair use provision in Australia, the development process for MOOCs typically requires substantive negotiation and direct permissions from copyright holders outside of the system of statutory and voluntary licenses. Because these need to be negotiated on a case-by-case basis, the process is time consuming and expensive for universities.¹⁶¹

However, uses that fall within fair use could be included in a MOOC without having to negotiate with the rights holder, as Australian universities are currently required to do for all uses of copyright material.

4.3 Library visitors

Access to library materials is an important benefit to consumers. Section 49 of the *Copyright Act* aims to secure this by allowing libraries to reproduce works for individuals' 'research or study'. However, libraries receive many requests which might fall outside this definition. If the request cannot be clearly described as being for the purpose 'research or study' then libraries may not wish to run the risks involved in reproducing the work. Examples provided by the Australian Libraries Copyright Committee (ALCC) included a request for a copy of old sheet music to play at home, and a request for a 1983 recipe book for cooking at home. Section 200AB potentially allows libraries to make materials available to users for a broader range of

¹⁵⁸ Universities Australia Submission to the Productivity Commission's Draft Report on Intellectual Property Arrangements, 3 June 2016. Available at: https://www.pc.gov.au/data/assets/pdf_file/0019/201187/subdr453-intellectual-property.pdf

¹⁵⁹ Association of Research Libraries (2012) Massive Open Online Courses: Legal and Policy Issues for Research Libraries <http://www.arl.org/storage/documents/publications/issuebrief-mooc-22oct12.pdf>

¹⁶⁰ Palmer, Charis (2013) *Universities seek copyright law reform to enable MOOCs*. The Conversation. [online] Available at: <http://theconversation.com/universities-seek-copyright-law-reform-to-enable-moocs-11524> [Accessed 8 August 2016].

¹⁶¹ Bovell, Astrid (2013) MOOCs and the Copyright Office. The University of Melbourne [online] <http://copyblog.e.unimelb.edu.au/?p=1412> [Accessed 8 August 2016].

purposes. However, the ALCC notes that in practice its provisions are too complex for many libraries to understand, potentially limiting the ability of libraries to provide access to copyright materials.¹⁶²

Fair use could play a role in facilitating greater access to library materials where such use is consistent with the fairness factors. Although the current fair dealing exceptions come along with the statutory exceptions for libraries and provide potential avenues for access to library materials, those exceptions are, as the ALCC noted, incredibly complex relative to fair use.

Importantly, not all library materials would necessarily be digitised as a result of fair use. However, fair use would provide libraries with greater predictability on the legality of digitising materials such as orphan works, potentially reducing travel time and associated costs for individuals seeking to access such works. The nature of library catalogues is also such that certain 'niche' works may not be available in more than one library.

4.4 Preservation and digitisation of library and archive materials

The specific rules-based exceptions applying to libraries in Australia's copyright system have affected the ability of libraries to publish and preserve cultural content and share orphan works with the public and academic researchers.

Section 200AB of the *Copyright Act* currently provides for the use of copyright material administered by libraries or archives¹⁶³, for the purpose of maintaining or operating their services where that use does not conflict with the normal exploitation of the work. However, the ALCC has submitted that this exception is of limited benefit:¹⁶⁴

... the utility of this provision is limited by its confusing and complex nature. Many library and archive officers are uncertain as to how to apply the provision, and so by default do not use it. This is particularly a problem in relation to larger scale digitisation and access projects - indeed, advice made publicly available by some stakeholders suggests that s200AB cannot be used for such projects.

The ALCC also noted that:

s 200AB does nothing for the ability of library clients to make use of orphan works. Allowing a library to scan material and provide it online is one thing, but if library clients are unable to download and make further use of the material, its full benefit to society remains unrealised.¹⁶⁵

The State Library of New South Wales (**SLNSW**) estimates that there are many millions of pages of orphan works and unpublished content that are currently not available for copying by the public which represents significant loss in consumer benefit and in cultural gain to Australian society more broadly.

¹⁶² Australian Libraries Copyright Committee (2016), Submission to the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements.

¹⁶³ A definition that includes the archival collections of museums and galleries.

¹⁶⁴ Australian Libraries Copyright Committee (2013) *Copyright and the Digital Economy*. [online] Available at: http://www.alrc.gov.au/sites/default/files/subs/586.org_the_australian_digital_alliance_and_australian_libraries_copyright_committee.pdf [Accessed 8 August 2016].

¹⁶⁵ Ibid.

However, a transition to fair use would make it easier for libraries to consider publishing or digitising unpublished and orphan works to share with public audiences. This is because a fair use:

- would not be restricted to the specific permitted uses in the *Copyright Act*; and
- would consider several 'fairness factors', including the effect of any use on the market for the work; where a work is unpublished or not being protected by the copyright holder, its commercial value is likely to be limited.

Current fair dealing exceptions place limitations on these orphan works being used, even where no individual or organisation will be adversely affected by their use. Some potential digitisation examples that have been considered by the SLNSW that may be more easily accommodated under fair use include:

- **Newspaper backfiles** – for socially and historically valued content from post 1955, where there is currently no commercial market;
- The **digitisation and transformation of culturally significant orphan works** such as photographs and maps. These images are not available for use by others presently, but could be used for published books, t-shirts and coffee cups;
- **Text mining** – for example, SLNSW collaborating with CSIRO to analyse emotional aspects of language in literary works over time to examine how authors and the general population have responded to social or cultural events in joyful, angry, apprehensive or enthusiastic ways; and
- **Data analytics** – including examining around 80,000 social media messages during the Martin Place siege before and after the event.

4.5 Transaction costs

The earlier sections have discussed instances where different activities may have been stymied by the absence of fair use. However, there may also be instances where activities continue to occur under fair dealing but impose transaction costs on users or these transaction costs themselves prevent activities from occurring.

One of the key benefits of fair use that has been recognised in economic theory is that fair use allows users to consume or draw on material that has no adverse commercial impact on rights holders but is not covered by an existing fair dealing exception without having to incur the costs of locating and negotiating such a use with rights holders.

The following sections look at how fair use might reduce transaction costs for libraries and universities.

Libraries and other cultural institutions

Libraries and other holders of copyright material must follow strict rules when providing access to material to patrons. Interviews with the SLNSW, along with previous work by the ALCC brought to light many of the idiosyncrasies required in complying with the present fair dealing exceptions.

Specifically:

- Section 49 of the *Copyright Act* permits the copying and communication of published works to users for research and study where the work cannot be obtained in a reasonable time and at an ordinary commercial price. However, the section is over 1600 words long and contains multiple caveats, limitations and compliance requirements. Notably, it constrains permitted uses to "research or study", and does not permit

any other socially beneficial use of copyright work which cannot otherwise be obtained.

- Where a library makes an electronic copy of a work under s 49, they must destroy the copy after the request has been supplied to the user. This creates a significant cost and administrative burden to libraries. The Australian National University, for instance, had more than three thousand titles requested more than twice in 2011-12 from its offsite Hume repository. Because of this requirement, they had to re-scan the work each time it was requested, a pointless waste of resources.

The SLNSW notes that introducing fair use would save a substantial amount of time for library services in Australia by simplifying and clarifying the law. These effects would also be pronounced in other cultural institutions such as museums and archives that have large collections of historical and orphan works. Based on confidential data for the month of June 2014, the State Library of South Australia; National Library of Australia; and the State Library of Victoria spent around 438 staff hours to help comply with copyright laws. These activities included administration, providing advice to colleagues and customers, researching the origins of orphan works and obtaining permission from various organisations to publish material digitally but with a great proportion of the time spent fruitlessly as the copyright owners are unknowable.

Universities

Universities Australia notes that the university sector currently pays almost \$300 million a year to commercial publishers for access to academic journals, and says that this money would continue to be paid if fair use was enacted.

Universities pay a further \$36 million a year to collecting societies Copyright Agency/Viscopy and Screenrights for use of third party content in reliance on the educational statutory licences in Parts VA and VB of the *Copyright Act*.¹⁶⁶ Universities Australia says that while most of this would continue to be paid if fair use was enacted, some of what is currently paid for under the statutory licences would most likely come within a fair use exception:¹⁶⁷

This would include freely available internet content, including content uploaded onto blogs and freely available wikis that no one ever expected to be paid for, and orphan works. Currently, Australian universities pay for this content, but the money goes to Copyright Agency/Viscopy members who have no connection to the works that were copied. That's because Copyright Agency/Viscopy has no one else to distribute it to. These uses would most likely amount to fair use in the U.S. and other fair use jurisdictions, and we do not consider that the loss of this windfall payment could in any way be said to cause rights holders any unreasonable prejudice.

Additionally, these complexities in the combination of statutory licensing and the current fair dealing exceptions have been noted to create significant transaction costs for universities as a result of legal ambiguity. The University of Melbourne noted that often it failed to successfully negotiate

¹⁶⁶ These statutory licences in Parts VA and VB of the *Copyright Act* will be replaced by new streamlined statutory licences introduced by s.113P of the *Copyright Amendment (Disability and Other Measures) Act 2017* (Cth) on its commencement. Statutory licence arrangements will continue.

¹⁶⁷ Universities Australia (2016) *Submission to the Productivity Commission's Draft Report on Intellectual Property Arrangements*. Available at: https://www.pc.gov.au/data/assets/pdf_file/0019/201187/subdr453-intellectual-property.pdf.

access to licenses because the benefits to the rights owner was small compared to the cost of negotiation:¹⁶⁸

The University is also a creator of copyright material and we receive many requests from consumers seeking to use our content. In most cases, the administrative costs of responding to these requests far outweigh the value of the work and any possible licensing fees. A fair use exception would provide a welcome alternative pathway for legitimate reuse of materials in circumstances where it is not economically feasible to licence material.

4.5.1 Low-value uses of copyright material

In a similar manner, both the ALRC and Productivity Commission considered that in many instances, uses of copyright material are likely to be of relatively low individual value. Fair use is likely to assist in making these materials available for the creation of transformative works in cases where such a use is unlikely to impact incentives for creating new works but where the cost of licence negotiations may be otherwise prohibitive under fair dealing.

Where such low value uses do not presently fall into a fair dealing exception, it is likely to be costly to both the copyright holder and any potential user to negotiate a license. As Landes and Posner (2003) put it:

*"the fair use privilege confers a clear benefit on [a low-value user of copyright material] but does not harm [the owner of the material]; it imposes no out-of-pocket cost on him and it "deprives" him of a benefit (that is, imposes an opportunity cost) that transaction costs would in any event prevent him from receiving."*¹⁶⁹

Individually, each of these instances may be of low value; but their overall number is likely to be considerable. To that extent, the aggregate social loss from foregoing these uses merits serious policy attention.

¹⁶⁸ University of Melbourne 2015, 'Response to the Productivity Commission's Issues Paper: Intellectual Property Arrangements', December 2015.

¹⁶⁹ Landes, William M and Richard A Posner. *The Economic Structure Of Intellectual Property Law*. Cambridge, Mass.: Harvard University Press, 2003, p 116.

5 Predictability, flexibility and responsiveness

Key findings

One of the principal advantages of a standards based rule such as fair use over a prescriptive or rules based approach such as fair dealing is its ability to respond to a world in which technology and commercial circumstances are changing rapidly and unpredictably. Previous literature on the impact of technology on copyright has stated that the “relative weight of the costs and benefits of copyright will change with changing market conditions so that the desirable level of copyright protection is likely to vary over time”.¹⁷⁰

While there may be some initial uncertainty as to precisely how the new arrangements would work, such uncertainty is likely to be short lived. International experience, including in the United States and Israel, indicates that there is nothing particularly uncertain about fair use as a principles based legal doctrine. Similarly, there is no inherent reason to believe that the costs for both individuals and the legal system in establishing the legal principles underpinning such an exception would be large, or more relevantly, greater than the economic benefits that would result. Australia would also be in the position of having the substantial benefit of overseas jurisprudence and best practice guidelines upon which both litigants and courts could draw.

Moreover, to the extent that there are new cases from time to time under a fair use exception, they are likely to reflect the fact that technological innovations have emerged. The ability of fair use to provide a framework to consider such innovations is a key advantage of a standards based approach over a rules based approach such as fair dealing. Indeed, the experience of fair dealing in Australia has been that legislative change has significantly lagged behind technological developments.

While the potential increase in litigation associated with the introduction of fair use has been a significant concern for some, the experience in fair use jurisdictions has not borne this out.

While concerns have also been raised about the potential for fair use to increase legal uncertainty, academic analysis of fair use in the U.S. has demonstrated that the uncertainty critique of fair use is overstated and that there are consistent patterns of decision-making in relation to fair use. The Motion Picture Association of America similarly notes that:

¹⁷⁰ Handke, C. 2010, 'The Economics of Copyright and Digitisation: A report on the literature and the need for further research', *Research commissioned by the Strategic Advisory Board for Intellectual Property Policy*, p.8.

*Our members rely on the fair use doctrine every day when producing their movies and television shows – especially those that involve parody and news and documentary programs. An uncertain doctrine would not be relied on by major U.S. media companies every day.*¹⁷¹

At the same time, aspects of the current fair dealing exceptions create a high level of uncertainty for core elements of the digital economy such as cloud computing, text and data mining and machine learning.

Finally, a shift towards fair use would be consistent with the trajectory of other areas of policy. In short, a move from the current fair dealing regime to a fair use approach that is neutral as between sectors, technologies and uses, and which relies on principles rather than prescriptions would be entirely aligned with the thrust of change both in economic legislation and in intellectual property laws. In all those areas, the benefits of reform include greater flexibility, enhanced openness to technological change and ultimately, a more competitive, creative and innovative society.

5.1 Fair use and responsiveness

This section first considers, from a theoretical perspective, why laws which are promulgated as standards rather than rules such as fair use are likely to provide an environment that is more responsive to technological or social change. It then examines how effective fair dealing has been in responding to technological changes relative to fair use jurisdictions such as the U.S.

5.1.1 Rules versus standards: developing a more responsive copyright framework

Kaplow (1992)¹⁷² and the literature Kaplow's work has spawned, explore the relative merits of laws which are promulgated as rules versus standards. The key insight of this analysis is that rules, which specify what is appropriate behaviour in particular circumstances *ex-ante* tend to be more costly to promulgate since they need to precisely define appropriate behaviour in a defined set of future circumstances.

As well as the fixed costs involved in trying to frame a prescriptive rule correctly, reliance on prescriptive rules will incur especially high error costs in situations where technology and commercial circumstances are changing rapidly and unpredictably. Because the rules are likely to adapt only with a substantial lag (as occurred in Australia with the rules applying to software compatibility), there is a serious risk of chilling socially desirable behaviour.

For example, Australian libraries waited more than 20 years for the *Copyright Amendment (Disability Access and Other Measures) Act 2017*, which at the time of writing has been passed by Parliament but not yet commenced. In addition, at the time of writing, the *Copyright Act* still does not have a specific exception that permits the copying or reproduction of copyright material for the purpose of caching or indexing, even though there are provisions in the *Copyright Act* that deal with proxy caching by educational institutions.¹⁷³

¹⁷¹ Sheffner, B, 'MPAA and Fair Use: A Quick History', available from: <http://www.mpa.org/mpaa-and-fair-use-a-quick-history/>.

¹⁷² Kaplow, L. 1992, 'Rules versus Standards: An Economic Analysis', *Duke Law Journal*, 42: 557-629.

¹⁷³ Australian Law Reform Commission (2013) above n 2.

Last but not least, prescriptive rules encourage socially costly “line testing” behaviour, where the parties “walk the line” of a rule, trying to twist it to their advantage.

By comparison, standards which involve an *ex-post* determination of the content of the law based on particular circumstances can initially be more costly for individuals to interpret (either themselves or through the need to seek legal advice) and more costly for legal systems to enforce. However, over time, precedent will help guide their interpretation: in the specific case of fair use, it is relevant that there is a considerable body of international experience which could be drawn on.

That stickiness in the face of changing circumstances has the potential to create error costs, imposing social losses. Of course, those error costs under fair dealing need to be compared to the potential for error under fair use, including that of erroneously determining that a particular use is fair. But while the error costs of fair dealing apply with respect to entire classes of uses, fair use findings are specific to the facts of individual cases; that makes it easier for courts to distinguish a given case from prior decisions if applying those prior decisions would be inappropriate.

A theoretical model for considering the error costs associated with fair dealing and fair use is set out in Appendix A.

The principal result of that model is that the error costs arising from the rigidity of fair dealing are likely to be greater than the error costs under fair dealing when:

- Technology is undergoing rapid change, creating new forms and uses of creative output which may justify altering the scope of uses that have been permitted;
- Courts are reasonably able to determine whether there will be a public benefit from such a change; and
- The social cost of the failure to adjust is high, while that of occasionally making changes which shouldn't have been made is not.

Digital transformation has undoubtedly increased the rate at which creative material is produced and used, developing entirely new uses while altering the landscape of copyright in ways that are inherently unpredictable but rich in potential. Given the changes that is bringing, the model implies the costs of relying on a fair dealing approach are likely to have increased compared to the more flexible alternative of fair use.

5.1.2 How effective has fair dealing been in responding to technological change?

Even were it accepted that, as concluded above, the costs of relying on fair dealing have increased compared to those of relying on fair use, it could still be argued—along the lines of numerous submissions put to the ALRC and to the Productivity Commission—that fair dealing remains preferable on balance, because legislative adjustment, despite the delays it involves, would ultimately be less costly in resources and less prone to error than litigation.

The reality, however, is that as the pace of technological change has accelerated, legislative adjustment has proven neither timely nor effective. The current Australian fair dealing system was largely introduced in Australian law well after similar uses were considered ‘fair’ by U.S. courts. Table 5.1 shows the time lag between the acceptance of particular uses as “fair” in the United States and the introduction of relevant fair dealing exceptions in Australian law. However, Table 5.1 does not include those uses

considered fair in the U.S., which arguably remain outside the scope of Australia's *Copyright Act*, such as system level caching to provide a search engine, text and data mining and cloud computing.

Table 5.1 Current copyright laws and digital devices

Use	U.S. introduction	Australian introduction	Time taken to introduce Australian exception
Reverse-engineering of computer code for interoperability	1992 ¹⁷⁴	1999 ¹⁷⁵	7 years
Parody or satire	1994 ¹⁷⁶	2006 ¹⁷⁷	12 years
Time-shifting of television recordings	1984 ¹⁷⁸	2006 ¹⁷⁹	22 years

A standards-based fair use framework can develop over time without incurring the costs, delays and rent-seeking inevitably associated with introducing statutory amendments. This will reduce the costs associated with lobbying and the legislative process. For example, the introduction of the time-shifting and format shifting exceptions for television recordings and sound recordings took two and a half years to introduce after they were first proposed, which was in turn 22 years after time-shifting had been held to be legal under fair use in the United States and 26 years after the introduction of VCRs to Australia.¹⁸⁰ While such changes should have been uncontroversial, a number of groups strongly opposed them. For example, in submissions:

- APRA/AMCOS stated - referring to both the format and time shifting amendments - "such exceptions legitimise infringement in the absence of any benefit to the public". Referring to time shifting amendment it stated

¹⁷⁴ *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

¹⁷⁵ Copyright Amendment (Computer Programs) Act 1999 amending Copyright Act 1968 (Cth) s 47D.

¹⁷⁶ *Campbell v Acuff-Rose Music Inc* (1994) 510 U.S. 569.

¹⁷⁷ *Copyright Amendment Act 2006* (Cth) Schedule 6, s 9A amending *Copyright Act 1968* (Cth) s 41A.

¹⁷⁸ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

¹⁷⁹ *Copyright Amendment Act 2006* (Cth) Schedule 6, s 1 amending *Copyright Act 1968* (Cth) s 111.

¹⁸⁰ Consumer time and format shifting exceptions were introduced in *Copyright Amendment Act 2006* and commenced on 11 December 2006. VCRs were first imported into Australia in 1980, the U.S. case which held time-shifting of television recordings was fair use was decided in 1984 (*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417). The first Australian government reviews to recommend a similar exception were the two government committee inquiries into the Australian-U.S. Free Trade Agreement in 2004: Joint Standing Committee on Trade Report 61 (June 2004) [online] http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/usafta/report.htm and Senate Select Committee on the Free Trade Agreement between Australia and the United States (August 2004) [online] http://www.aph.gov.au/binaries/senate/committee/freetrade_ctte/report/final/report.pdf

this “would be a statement that copyright owners should accept the widespread infringement of their rights without compensation”.¹⁸¹

- The Australian Screen Association (ASA) (formerly known as Australian Federation Against Copyright Theft) referencing time-shifting amendment stated, “[i]t is reasonably foreseeable that some sectors of the Australian industry would disappear altogether, or subsist exclusively on Government subsidy if available”;¹⁸² and
- The Australian Recording Industry Association asserted “that the record industry considers that there is no demonstrated need for format shifting and time shifting exceptions”.¹⁸³

As the Productivity Commission noted, ‘static’ copyright exceptions are not capable of adapting to fundamental changes in the way copyright material is created or shared without statutory amendment. The Productivity Commission also noted that previous amendments to the exceptions in the *Copyright Act* were “largely sought to codify existing practices ... or to remove unintended overreach from the copyright system”.

Equally, despite the fact that data mining has rapidly established itself as a crucial element in digital transformation, “there is no exception in the *Copyright Act* that covers data and text mining”, with the result that in Australia, when “data or text mining processes involve the copying, digitisation, or reformatting of copyright material without permission, it may give rise to copyright infringement”.¹⁸⁴ In contrast, in the U.S., no amendment of any consequence has been made since 1998; yet, due to fair use, in the last 18 years, courts have been able to keep pace with the progress of technology and innovation.

Intellectual property academic, Dr Rebecca Giblin, has compared the U.S. innovation-friendly regulatory environment to that in Australia, which she says is “a hostile regulatory environment for technology innovators and investors”.¹⁸⁵ Dr Giblin notes:

*...had VCRs been first made available in Australia, right holders may well have succeeded in suing them out of existence (incidentally eliminating the new markets and huge gains to content owners that grew from their creation).*¹⁸⁶

These issues are particularly relevant to social media. Box 5.1 provides a high level overview of the issues regarding existing Copyright Law in Australia with the rise of new devices. The absence of a general exception allowing fair non-commercial uses such as sharing a meme on Facebook or Pinterest enabling day-to-day consumer uses suggests the need to review the current fair dealing system.

¹⁸¹ APRA/AMCOS, Submission 45, Senate Legal and Constitutional Affairs Committee Inquiry into Copyright Amendment Bill 2006.

¹⁸² Australian Federation Against Copyright Theft, Submission 91, Attorney-General’s Department, Fair use and other copyright exceptions: Issues Paper (2005).

¹⁸³ Australian Recording Industry Association Ltd. (ARIA), Submission 38, Senate Legal and Constitutional Affairs Committee Inquiry into Copyright Amendment Bill 2006.

¹⁸⁴ Australian Law Reform Commission (2013) above n 2, p 262.

¹⁸⁵ R Giblin, Submission 251, ALRC Copyright and the Digital Economy review

¹⁸⁶ *Ibid.*

Box 5.1: Current copyright laws and digital devices

Deloitte's Mobile Consumer Survey revealed in 2017 that nearly 90 per cent of Australian adults now own a smartphone,¹⁸⁷ while the use of tablet computers is also growing quickly. Despite this, today's copyright laws significantly limit the way digital devices can be legally used. Some examples are illustrative:

- It is permissible to copy music from a CD to a tablet - but not to copy a film from a DVD to that same tablet;¹⁸⁸
- It is permissible to use a mobile app to record a TV show on a device stored in a home, but not if it is recorded and stored in the cloud (see Federal Court decision on the Optus TV Now case);
- It is permissible to back-up one's own emails and attachments, but there are no exceptions to save emails and attachments received from someone else;
- It is not permissible to copy a funny photo on Twitter and share it on a Facebook page as it is not covered by any exception;
- It is permissible to watch an online video, but not play it in a presentation to one's team at work as it is not covered by any exception;
- A comedian can remix content for parody or satire, but an artist can't remix the same content for purely artistic purposes.

Perhaps even more serious in their economic consequences than those largely unanticipated gaps in the statutory provisions are the overlaps, ambiguities and seeming contradictions that affect some of the exceptions that have been enacted, with the Law Council of Australia noting, in its submission to the ALRC, that the legal position in relation to caching in Australia is "confusing, overlapping, incoherent and in some cases redundant and that it is undesirable to have several overlapping, but distinct provisions aimed at the same basic phenomenon and offering only partial and uncertain protection".¹⁸⁹ Much the same could be said of the provisions dealing with interoperability, which—although crucially important from a competition policy perspective—have, in practice, proven to be a "very limited exception", as the Federal Court concluded in *CA Inc v ISI Pty Ltd* (2012) 201 FCR 23.

The overall result, the ALRC suggests, is a situation where the manifest distance between the law as it stands and everyday experience "diminishes respect for copyright and undermines the credibility of the Act".¹⁹⁰

5.2 Legal costs and predictability

One concern that has been raised concerning the introduction of fair use is its potential to either raise legal costs or increase the level of legal uncertainty for rights holders. Indeed the case by case nature of the way fair use is applied is considered by critics of fair use as a flaw on the basis that such a system may be 'unpredictable and indeterminate' in application. On this basis it has been argued that the flexibility of fair use generates significant transaction costs, in the form of litigation between parties in cases where it is not clear whether a particular use is fair or not. The costs of this litigation will be borne between the parties (in hiring lawyers and experts) and the justice system as a whole.

¹⁸⁷ Deloitte Australia (2017) *Mobile Consumer Survey*. Available at: <https://www2.deloitte.com/au/mobile-consumer-survey>

¹⁸⁸ *Copyright Act 1968 (Cth) s 110AA*.

¹⁸⁹ Australian Law Reform Commission (2013) above n 2, p 254.

¹⁹⁰ Australian Law Reform Commission (2013) above n 2, p 234, citing Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) p 6.

On the other hand, advocates of fair use note that its case by case, fact-sensitive, nature is a strength, conferring flexibility and adaptability on the copyright system.

This section first considers the existing evidence on the extent to which fair use is likely to increase litigation costs relative to fair dealing. It then critically examines the extent to which fair use is likely to result in a greater level of legal uncertainty for producers of new copyright material or investors in new technologies.

5.2.1 Assessing the impact of fair use and fair dealing on legal costs

There have been some previous attempts to estimate the potential costs of copyright litigation in Australia. Lateral Economics considered a previous report of the Standing Committee on Legal and Constitutional Affairs of the House of Representatives, which heard that the average cost of infringement proceedings in the 1990s was in excess of \$100,000.¹⁹¹ Adjusted for inflation, this provided a figure of about \$144,000 per case in 2012. The report estimated, based on the opinion of an intellectual property lawyer, that about a third of IP cases proceeding to trial in the Federal Court (or 70 cases per year) involved copyright in any given year. This created a total cost of copyright law proceedings of roughly \$10 million per year (not including the costs in cases that did not proceed to trial).

PwC, considering submissions by stakeholders, estimated that complex cases would cost \$1 million on average.¹⁹² PwC also relies on Lateral Economics' estimate that roughly 70 copyright cases proceed to trial in any given year. Because the United States had five times more cases from fair use than the United Kingdom had from fair dealing, PwC also assumed that the number of cases would increase to 350 per year (without adjusting for differences in population between the two jurisdictions – with the population in the U.S. being roughly five times that of the U.K.). This assumes that all copyright cases relate to fair use, that all will proceed to trial, and all will be complex cases reaching appellate courts (and the highest level of average costs per case).

As foreshadowed above, the actual experience in the U.S. is that fair use cases are relatively rare. During the seven year period between 2009 to 2016,¹⁹³ there have only been seven fair use trials from a total of 60 cases.¹⁹⁴ More than 76 percent of those cases were dealt with by summary judgment, meaning a decision was made without a trial; 80 percent of those decisions were upheld on appeal.¹⁹⁵

The Israeli experience similarly suggests that no substantive spike in litigation resulted from a shift to fair use: only 11 percent of copyright lawsuits related to online infringement filed in Israel during 2010-2013 considered fair use.¹⁹⁶

¹⁹¹ Lateral Economics (2012) *Excepting the future*. Online: <https://lateraleconomics.com.au/wp-content/uploads/2014/01/Excepting-the-Future-Report-to-ADA-Sept-20122.pdf>.

¹⁹² PwC (2016), above n 82.

¹⁹³ 1 January 2009 to 30 September 2016.

¹⁹⁴ Lex Machina, Copyright Litigation Report 2016: Figure 18, p.13.

¹⁹⁵ Thomson/Reuters, Westlaw legal database, Cases, U.S. Court of Appeals, 2009-2016. For more detail, see remark made by William Patry at the Australian Digital Alliance Forum 2017, 24 February 2017.

¹⁹⁶ Elkin-Koren, Niva. "The New Frontiers Of User Rights". *American University International Law Review* Vol 32 Issue 1 (2016).

At the same time, it is important to note that a prescriptive approach, such as that adopted in Australia, does not eliminate litigation—on the contrary, the exceptions and exemptions to the *Copyright Act* have been the subject of litigation, with weaknesses in the specification of those exceptions and exemptions making that litigation complex, costly and uncertain.

In this respect, fair dealing is still reliant on litigation as the impetus for change. The difference between the fair dealing and fair use regimes is less in their reliance on litigation than on the fact that litigation, under fair use, can respond directly to a new environment and technological change, whereas the eventual adjustment under fair dealing requires a subsequent legislative response. It is therefore misleading to portray the difference between fair use and fair dealing as being a contrast between an approach which involves extensive litigation and one in which litigation plays little role: the costs and errors of litigation are relevant to both.

Moreover, the fact that in Australia unsuccessful litigants face an order to pay the plaintiff's costs and court costs (the "English rule") means the scope for high levels of copyright litigation in Australia should not be exaggerated. However, even putting these insights from the economic analysis of law aside, the record suggests that, even in a country with perceived higher levels of litigation like the United States, fair use has not been a source of widespread, recurrent or costly litigation.

5.2.2 Fair use and legal predictability

In general, there is no reason to believe that fair use, as a legal principle, is especially uncertain in its application. On the contrary, the accumulation of precedents, stretching back, in the English common law, to 1721,¹⁹⁷ means that the fundamental elements of the principle are well-understood.

Evidencing that doctrinal stability, there have been no U.S. Supreme Court cases involving fair use since 1998, when the Supreme Court handed down its *Campbell* (2 Live Crew) opinion. That opinion, which endorsed Judge Leval's transformative use approach and its emphasis on a holistic approach to the fair use factors, set out clear principles defining the scope of the fair use defence. District courts have had little difficulty in applying it, as is apparent from the very low rate at which district court decisions have been overturned on appeal: subsequent to the 1998 *Digital Millennium Copyright Act* (the last meaningful amendment to the U.S. *Copyright Act*) there have only been 64 court of appeals fair use opinions, of which 50 affirmed the lower court, 13 reversed, and one was mixed (affirming some works, remanding on others) — an affirmance rate of 80 per cent (leaving aside the mixed opinion) which is high for any area of litigation.¹⁹⁸

Those facts are consistent with the ALRC's conclusions. Based on its review of the scholarly sources, it found that "fair use in the U.S. is not uncertain", with it being generally possible, as Professor Pamela Samuelson has concluded, "to predict whether a use is likely to be fair use by analysing previously decided cases in the same policy cluster".¹⁹⁹ As a result, parties determining their conduct "in the shadow of the law" can be relatively clear as to its substance and implications.

¹⁹⁷ Patry, William F. *Patry On Fair Use*. [Eagan, MN]: Thomson Reuters, 2015, pp 18-52.

¹⁹⁸ Thomson/Reuters, Westlaw legal database, Cases, U.S. Court of Appeals, 2009-2016.

¹⁹⁹ Australian Law Reform Commission (2013) above n 2, pp 113-114, citing Pamela Samuelson, *Unbundling Fair Uses* (2009) 77 *Fordham Law Review* 2531.

In practice, courts and litigators in Australia will be able to rely upon the established principles of fair use in the body of U.S. law, along with existing precedents surrounding the fair dealing exceptions. The presence of a substantial body of precedents in the U.S. will help reduce potential uncertainties associated with the transition to a fair use regime and also the potential legal complexity of any cases that do come before the court. Academics have also observed that the experience in the U.S. also suggests that the uncertainty critique is overstated and 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 (Sag 2012)".*²⁰⁰

In addition, a study conducted by Hinze et al in 2013 explained that in regards to uncertainty:

*"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."*²⁰¹

This point on uncertainty was also referred to in the 2016 EY report.²⁰² As the law in Australia becomes more settled the long run litigation costs under fair use are likely to fall. That makes it all the more important not to overstate the gains, if any, that the fair dealing provisions bring in terms of predictability (and hence reliance) compared to fair use. To begin with, any such gains could be bought at the cost of sub-optimal outcomes. Thus, as Professor Schauer has argued, "although the ability to predict and then rely on the decisions of others has undeniable value when viewed in isolation, decision-making environments can offer predictability only by diminishing their capacity to adapt to a changing future".²⁰³ When the decision-making context is stable, he suggests, principles-based adjudication (such as fair use) is likely to be no less predictable than its rules-based counterpart (in this case, fair dealing); it is only when the environment is changing rapidly, so that decisions made on the basis of the underlying principles could lead to outcomes that diverge from those of the rule that is supposed to embody those principles, that "rules (are) likely to be needed in order to ensure predictability, but those are the very cases in which the costs of ensuring

²⁰⁰ See e.g. (1) Sag, M. (2012). Predicting fair use. Loyola University Chicago, School of Law. (2) Hickey, K.J. (2014). Consent, user reliance, and fair use. Yale Journal of Law and Technology, 16(2): 4. (3) Netanel, N.W. (2011). Making sense of fair use. Lewis & Clark Law Review, 15; UCLA School of Law Research paper, 11-20. (4) Law and Economics Consulting. (2013). Agreed use and fair use: the economic effects of fair use and other copyright exceptions.

²⁰¹ Hinze, G. Jaszi, P. and Sag, M. (2013) The Fair Use Doctrine in the United States – A Response to the Kernochan Report.

²⁰² Ernst & Young (2016) above n 7.

²⁰³ Schauer, Frederick F. Playing By The Rules: A Philosophical Examination Of Rule-Based Decision-Making In Law And In Life. Oxford, England: Clarendon Press, 1991, p 140.

predictability will be greatest”.²⁰⁴ It follows that “the frequency of suboptimal decisions ... will be highest in those cases in which the predictability advantages of rule-based decision-making are likely to be largest”.²⁰⁵

Yet it is not even apparent that the current fair dealing provisions do yield advantages in terms of predictability. Rather, the ALRC suggests, the exceptions provided under the current law are highly uncertain, depriving market participants of the guidance required to take efficient investment decisions: as the ALRC says of Optus’ TV Now service, which was found not to fall within the time-shifting exception, “Optus would presumably not have invested ... if the scope of the current time shifting exception were clearer”.²⁰⁶

In short, whatever the uncertainties involved in fair use (and the discussion above suggests they have been greatly exaggerated), the current fair dealing provisions combine the disadvantages of statutory rigidity with those of unpredictability in application. The result is not only to harm consumers — who would “value the certainty of knowing that they can make certain unpaid uses of material without infringing copyright” — but also to stymie innovation, as “businesses that make transformative uses of copyright material ... need certainty, so that they have the confidence to invest in new business models and services”.²⁰⁷

5.2.3 Predictability and technological innovation

A further concern noted in relation to fair use is that initial uncertainty about how fair use will apply could adversely impact technological investment. This assumes that the flexibility of fair use creates uncertainty for innovators and adds risk to investment in technological development. By this logic, fair use creates greater difficulty for investors in estimating potential returns from innovation.

This experience again has not been borne out in the U.S., where many of the most innovative products and services were created in reliance on fair use, including the iPod and the iMac. The iPod was built on fair use: initially, the only way it could have and did work commercially is through allowing people to copy their existing personal copies of recordings onto their iPods. Had Apple built the iPod by only allowing people to use it with newly bought songs, it would have been unlikely to achieve the same level of sales. Fair use made it possible for the iPod and iTunes to exist. The iMac operated under the same principles of allowing personal copying as fair use, as demonstrated in the iconic Apple advertisement with the catch phrase “Rip.Mix.Burn” (which we have not reproduced because there is no relevant exception in the *Copyright Act* to permit it).

No litigation was brought against Apple over these uses.

Google also credits fair use for the basic functionality of search engines and many useful search features.

In assessing the extent to which legal uncertainty is created by fair use and how it affects decision to invest in research and innovation, Deloitte Access Economics reviewed the existing literature that analyses the judicial application of fair use. Two studies have empirically assessed the fair use

²⁰⁴ Ibid p 141.

²⁰⁵ Ibid.

²⁰⁶ Australian Law Reform Commission (2013) above n 2, p 113.

²⁰⁷ Ibid.

doctrine and the level of uncertainty it creates in guiding decision making.²⁰⁸ Both studies highlight that there are observable patterns in judicial analysis on fair use decisions that help guide decision making by investors. In any event, 80 per cent of appealed fair use decisions are affirmed by higher courts (see above), indicating the predictability of the doctrine.

5.3 Parallels to other areas of policy

A shift from an approach based on fair dealing to one of fair use entails a move from specifying *ex ante* the range of potentially exempt uses to specifying the principles that should be applied in determining whether a particular instance of use is or is not fair. While it would potentially expand the range of uses which could fall within the scope of the provision, it would also clarify the basis on which the assessment of permissibility was to be made. It would therefore be consistent with two important characteristics of good public policy: it would be explicitly *principles-based* and it would be *neutral* as between uses, technologies and sectors.

Such a change is consistent with the development of public policy in a broad range of areas. The ALRC rightly points to the prohibition on 'misleading or deceptive conduct' in s 18 of the Australian Consumer Law and the unfair contracts provisions of that Law, both contained in schedule 2 of *Competition and Consumer Act 2010 (Cth)* ["CCA"], as examples of a principles-based approach.²⁰⁹ It is, however, worth noting that the CCA itself, and most obviously its competition provisions, provide a broader example of the move from more narrowly framed exceptions to principles-based assessment.

As was noted by the late Professor Maureen Brunt, who played a crucial role in the evolution of competition law through her role as a member of the then Trade Practices Tribunal in Australia and as a lay member of the High Court in New Zealand, the Australian competition provisions, as originally enacted, were "lengthy and intricately structured", creating "a kind of lawyer's jigsaw puzzle".²¹⁰ The aim, no doubt, was to provide greater certainty through specificity than had characterised antitrust law in the United States;²¹¹ in practice, that resulted both in a substantial number of prohibitions that were *per se* in nature—that is, illegal on their face—and in considerable drafting complexity.

The prohibition on exclusive dealing, for example, has required an extremely dense five pages of statute; yet the recent Competition Policy Review finds that "despite its complexity, section 47 is not comprehensive, since it does not address every form of (non-price) vertical restriction".²¹² The combination of prescriptiveness, complexity and incompleteness also affects other aspects of the competition provisions, for instance in respect of collusion.

However, unlike the *Copyright Act*, the competition statute has at least had a mechanism providing a degree of flexibility through the scope for applicants to seek what amounts to an exemption from its prohibitions by applying for

²⁰⁸ Beebe, B. (2008). An empirical study of U.S. copyright fair use opinions, 1978-2005, 156 U.Pa.L.Rev.549, 594-621; Samuelson, P. (2009). Unbundling fair use, 77 Fordham L. Rev 2537, 2537.

²⁰⁹ Australian Law Reform Commission (2013) above n 2, p 99.

²¹⁰ Brunt, Maureen. *Economic Essays On Australian And New Zealand Competition Law*. The Hague: Kluwer Law International, 2003, p 328.

²¹¹ See, for example, Freyer, Tony Allan. *Antitrust And Global Capitalism, 1930-2004*. Cambridge: Cambridge University Press, 2006, p 327.

²¹² Harper, Professor Ian, Peter Anderson, Su McCluskey, and Michael O'Bryan QC. *Competition Policy Review*. Canberra: Commonwealth of Australia, 2015, p 375.

specific conduct to be authorised under a public interest test. The very broad interpretation given to the ‘benefit to the public’ that has to be made out to secure authorization—as “anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements the achievement of the economic goals of efficiency and progress” (*Re Queensland Co-operative Milling Association Ltd, Defiance Holdings Ltd* (1976) 25 FLR 169, 186)—has blunted the harm the law’s prescriptiveness would otherwise have caused.

As matters turned out, the competition provisions did not prove as uncertain as initially feared. A not insignificant factor, in that respect, was the emergence of what Professor Brunt referred to as a “unifying vision” shared by “the courts, [the Trade Practices] Tribunal, [the Trade Practices] Commission and practitioners”. While those actors were properly “wary of importing overseas ‘doctrines’ ... without regard to policy objectives, statutory terms, factual circumstances or characteristics of the economy,” the unified understanding of the law has been “guided, it is plain, by some of the fundamental discussions in US antitrust”.²¹³ Moreover, the accumulation of precedent—for instance, in terms of the meaning to be given to terms such as “substantial lessening of competition”—has ensured market participants can reasonably predict the manner in which the provisions will be implemented.

The result is a decided move away from the original legislation prescriptiveness towards an approach that is more firmly principles-based.

A similar move, away from a prescriptive approach to one that is principles-based, has been recommended by the Productivity Commission in its review of the compulsory licensing provisions set out in the Patents Act, 1990 (Cth), including at ss. 133–140. Thus, the Commission concludes that the current provision, which seeks to specify the circumstances under which a compulsory license can be granted, should be replaced by a test which assesses whether:

*“There is a substantial public interest in providing access to the applicant, having regard to: benefits to the community from meeting the relevant unmet demand; commercial costs and benefits to the patent holder and licensee from granting access to the patented invention; [and] other impacts on community wellbeing, including those resulting from greater competition and from the overall effect on innovation”.*²¹⁴

In arriving at that recommendation, the Productivity Commission considered the option of instead introducing specific exemptions or exclusions for conduct which would otherwise be infringement, for instance, so as to facilitate access to patented bio-medical innovations. However, it concluded that such “technology-specific” changes were inferior, in a public policy perspective, to adopting an economy-wide perspective (Productivity Commission, 2013, 196 and follows).

In short, a move from the current fair dealing regime to a fair use approach that is neutral as between sectors, technologies and uses, and which relies on principles rather than prescriptions would be entirely aligned with the thrust of change both in competition law and in the intellectual property laws. In all those areas, the benefits of reform include greater flexibility,

²¹³ Brunt, Maureen (2003) above n 210, 315.

²¹⁴ Productivity Commission (2016) above n 3, Recommendation 6.2, p 40.

enhanced openness to technological change and ultimately, a more competitive, creative and innovative society.

Conclusion

The growth of the digital technologies has brought in major opportunities for the Australian economy, through the ability to generate new ideas and innovations and to distribute them to ever wider audiences. We need a legal framework that unlocks free expression and innovation to enable these changes, which directly affect the way we live, work and play.

Fair use provides a more flexible framework that provides a principles-based test to see if a use is permitted or not. While fair dealing aims to promote creativity by specifying permissible uses in legislation, fair use sets a standard that can be applied to any potential use of copyright material. Major new uses of copyright material are occurring outside of any clear, supportive legal framework, including important growth areas such as text and data mining and cloud computing. Therefore, a move to fair use would cut through these problems, instead of shoehorning new uses into narrow legislative provisions, thereby fostering innovation.

Overall, this report reaches a similar conclusion to recent reviews of fair use by the ALRC, Productivity Commission and EY, namely a transition to fair use would have net benefits, enabling innovation, encouraging new forms of creative endeavour and providing a more flexible and responsive legal regime so Australia can make the most of opportunities provided by the digital age. Having considered the respective benefits and costs of fair use and the nature to which these may occur and the potential size of their impact on the economy, we consider a transition to fair use would increase the flexibility of Australia's copyright system. The theoretical model considered finds that the error costs associated with fair dealing cases are likely to be greater than error costs under fair use cases. This is particularly likely to be the result when technology is undergoing rapid change; courts are reasonably able to determine whether there will be a public benefit from such a change. The social cost of the failure to adjust is high, while that of occasionally making changes which should not have been made is not.

While there are potential initial costs in transitioning to a fair use regime, these are likely to be relatively small in practice based on the experience of a range of other countries in transitioning to fair use. Over time, precedent will help guide the way fair use is interpreted, with courts being able to draw on a considerable body of U.S. precedents facilitating that process. Meanwhile, legislative change has significantly lagged behind technological developments under fair dealing, which has the potential to stifle new uses directly. A significant degree of legal uncertainty can potentially be imposed even when these legislative changes do occur under the current fair dealing system. Users of copyright material are currently facing uncertainty over which uses are infringing copyright law, due to the prescriptive nature of the system.

Finally, a shift towards fair use would be consistent with the trajectory of other areas of policy development. In short, a move from the current fair dealing regime to a fair use approach that is neutral as between sectors, technologies and uses, and which relies on principles rather than prescriptive rules would be entirely aligned with the thrust of change in Australia's economic legislation. In all those areas, the benefits of reform include greater flexibility, enhanced openness to technological change and ultimately, a more competitive, creative and innovative society.

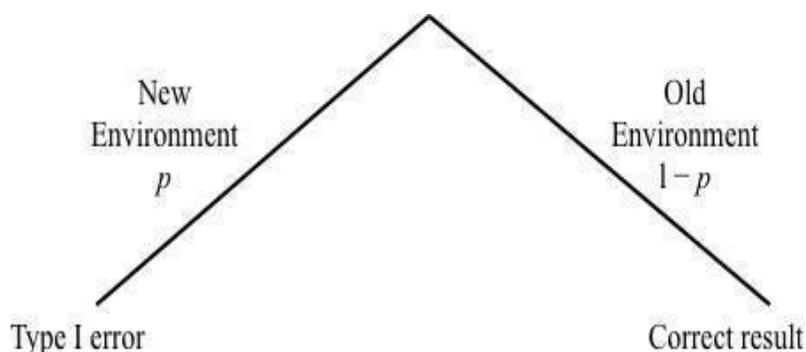
Appendix A: A model of error costs under fair use and fair dealing

A model (adapted from the discussion of judicial decision-making in Miceli, 2004, 272-273) is helpful in understanding the possible costs of the first kind of error—that is, of incorrectly determining the permissible range of uses—under fair dealing compared to fair use.

Thus, suppose that the existing range, R , was efficient in the past, but that there is some probability, p , that the environment has changed, making a new range, N , more efficient in the present and future. Under fair use, a court can determine—in the light of the fact situation of the case—that the specific use at issue is fair, despite uses of that broad type not having been dealt with previously. In making such a finding, it incurs some risk of error, which may be of two types: the old range may be retained when the new one has become efficient (in statistical terms, a type I error), and the new range may be selected when the old one is still efficient (a type II error). Under fair dealing, the range of permissible uses is fixed by statute and so cannot be modified in the course of infringement proceedings.

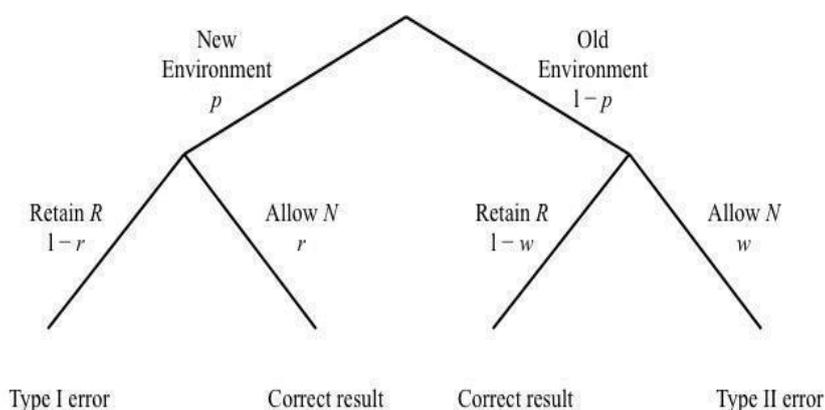
The possible outcomes under fair dealing are set out in Figure A.1: if the cost of a type I error is C_I , the expected error cost under fair dealing (ECP) is $p C_I$, as the range of permissible uses is fixed.

Figure A.1 Outcomes under Fair Dealing



The pattern of outcomes under fair use is necessarily more complex. Thus, let r be the conditional probability that the court will correctly identify a change in the environment, so that $1 - r$ is the probability that the old range will be incorrectly retained in this situation (a type I error). Similarly, let w be the probability that the court will alter the range when the environment has not in fact changed (a type II error), with $1 - w$ being the probability that the old range is instead correctly retained. There are consequently four possible outcomes, which are set out in figure A.2.

Figure A.2 Outcomes under Fair Use



If the cost of a type II error is C_{II} , the expected error cost of decision-making (ECD) under fair use will be $ECF = p(1-r)C_I + (1-p)wC_{II}$. Comparing and combining terms, fair dealing results in lower expected error costs if $ECF < ECF$ or if $r/w < ((1-p)/p)C_{II}/C_I$.

According to this condition, the desirability of a fair use approach depends on three ratios.

The first, r/w , reflects the reliability of a court's ability to correctly identify environmental change—the higher that ratio, the more socially valuable is the flexibility provided by fair use.

The second ratio, $((1-p)/p)$, reflects the *stability* of the environment. An decrease in this ratio (that is, an increase in p) increases the value of flexibility—as the environment is more likely to change, the expected cost of locking in the old range is higher.

Finally, flexibility is more valuable as the cost of type I errors increases relative to that of type II errors, as a fair use regime is vulnerable to type II errors while a fair dealing regime only incurs type I errors.

In summary the error costs under fair dealing, relative to fair use, are greater:

- the greater the rate at which changes occur which are relevant to modifying the scope of permitted uses;
- the greater the accuracy with which courts can distinguish between changes which do justify such modifications and those which do not; and
- the greater is the social cost of perpetuating the initial range of permitted uses when it should be changed, compared to the social cost of changing that range when it should not be.

To the extent that digital transformation has increased the probability of desirable change (p in the model) and the social costs of failing to change when change is needed (C_I in the model), this would suggest that digital transformation would increase the relative error costs under fair dealing.

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